# Not Dry or Smelly Potpourri
## Ethical and Other Considerations in Chapter 13
by Nisha Patel, Esq.

Chapter 13 cases include a variety of pitfalls for the practitioner, so this subsection attempts to highlight some areas of concern and/or consideration.

### Some Key Definitions

- 11 U.S.C. § 101(3): The term "assisted person" means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000.00.
- 11 U.S.C. § 101(4): The term "attorney" means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law.
- 11 U.S.C. § 101(12A): The term "debt relief agency" means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110…
- 11 U.S.C. § 101(14A): The term "domestic support obligation" ("DSO") means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is –
    - (A) owed to or recoverable by –
        - (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
        - (ii) a governmental unit;
    - (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
    - (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of –
        - (i) a separation agreement, divorce decree, or property settlement agreement;
        - (ii) an order of a court of record; or
        - (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

- 11 U.S.C. § 101(31): The term "insider" includes –
  (A) if the debtor is an individual –
    (i) relative of the debtor or of a general partner of the debtor;
    (ii) partnership in which the debtor is a general partner;
    (iii) general partner of the debtor; or
    (iv) corporation of which the debtor is a director, officer, or person in control…

As a debt relief agency, a bankruptcy attorney is obligated under to make timely disclosures of specific information to a potential debtor (an "Initial Consultation Package") within 3 business days after the first date in which the attorney offers to provide bankruptcy assistance services.[1]

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[1] 11 U.S.C. § 342(b) provides:

(b) Before the commencement of a case under this title by an individual whose debts are primarily consumer debts, the clerk shall give to such individual written notice containing –

(1) A brief description of –

(A) chapters 7, 11, 12, and 13 and the general purpose, benefits, and costs of proceeding under each of those chapters; and

(B) the types of services available from credit counseling agencies; and

(2) statements specifying that –

(A) a person who knowingly and fraudulently conceals assets or makes a false oath or statement under penalty of perjury in connection with a case under this title shall be subject to fine, imprisonment, or both; and

(B) all information supplied by a debtor in connection with a case under this title is subject to examination by the Attorney General.

11 U.S.C § 527(a) provides:

(a) A debt relief agency providing bankruptcy assistance to an assisted person shall provide –

(1) the written notice required under section 342(b)(1); and

(2) to the extent not covered in the written notice described in paragraph (1), and not later than 3 business days after the first date on which a debt relief agency first offers to provide any bankruptcy assistance services to an assisted person, a clear and conspicuous written notice advising assisted persons that –

(A) All information that the assisted person is required to provide with a petition and thereafter during a case under this title is required to be complete accurate, and truthful;

(B) all assets and all liabilities are required to completely and accurately disclosed in the documents filed to commence the case, and the replacement value of each asset as defined in section 506 must be stated in those documents where requested after reasonable inquiry to establish such value;

(C) current monthly income, the amounts specified in section 707(b)(2), and, in a case under chapter 13 of this title, disposable income (determined in accordance with section 707(b)(2)), are required to be stated after reasonable inquiry; and

11 U.S.C. § 528[2] further requires that the attorney must execute a written contract (an "Engagement Letter") with the debtor(s) within 5 business days, and, of course, prior to the date of filing of the petition (the "Petition Date"). 11 U.S.C. § 526(c)(1) renders void an Engagement Letter for failure to comply with 11 U.S.C. §§ 526, 527, and 528. Further, a debt relief agency that is determined to have violated §§ 526, 527, or 528, whether intentionally or negligently, is liable to an assisted person for fees paid to the debt relief agency, plus actual damages, and reasonable attorneys' fees and costs.[3]

Every attorney who assists a debtor in filing a petition is required to file, pursuant to Rule 2016 of the Federal Rules of Bankruptcy Procedure, a statement of compensation (the "2016 Disclosure") no later than 14 days of the Petition Date. Trustees often ask for copies of the Initial Consultation Package and the Engagement Letter to verify the amount of fees and costs paid to counsel, as it is not uncommon for the figures in an Engagement Letter, 2016 Disclosure, proposed chapter 13 plan, and/or the statement of financial affairs to differ. Inconsistency with respect to either fees or costs will likely draw an objection.

Failure to provide the requested documents will also likely draw an objection. Several years ago, Judge Adams, of the Bankruptcy Court for the Eastern District of Virginia, rejected debtor's counsel's argument that the chapter 13 trustee was not the proper recipient of such information, and held that Engagement Letters and related information must be turned over "in all cases filed under 7, 11, 12, 13 or 15 of Title 11."[4]

But in these days of FaceTime consultations and Zoom hearings, what happens if the debtor(s) and/or counsel inadvertently fail to execute an Engagement Letter prior to the Petition Date? Is counsel still entitled to compensation, whether in accordance with the "no-look" fee then in effect or pursuant to applications for compensation? At least

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> (D) information that an assisted person provides during their case may be audited pursuant to this title, and that failure to provide such information may result in dismissal of the case under this title or other sanction, including a criminal sanction.

[2] 11 U.S.C. § 528 provides:

> (a) A debt relief agency shall –
>
> (1) not later than 5 business days after the first date on which such agency provides any bankruptcy assistance services to an assisted person, but prior to such assisted person's petition under this title being filed, execute a written contract with such assisted person that explains clearly and conspicuously –
>
> (A) the services such agency will provide to such assisted person; and
>
> (B) the fees or charges for such services, and the terms of payment ...

[3] Robbins v. Jennings (In re Brown), 505 B.R. 716, 723 (Bankr. W.D. Va. 2014).

[4] In re Norman, No. 06-70859-A, 2006 Bankr. LEXIS 2925 at *21 (Bankr. E.D .Va. Oct. 24, 2006).

one bankruptcy court has held that a debt relief agency is not entitled to compensation and that estate funds cannot be used for such purpose.[5]

(Potentially) The Worst Person in the World!

Relatedly, a Colorado attorney ("Barclay") recently failed to execute an Engagement Letter with a married couple (the "Mennonas"), for whom Barclay filed a chapter 7 petition.[6] Barclay did not merely err in failing to execute the Engagement Letter, but rather, in what the Bankruptcy Court for the District of Colorado deemed an "appalling abuse of the bankruptcy system," also:

1. Forged the Mennonas' signatures on the petition, schedules, and statements;
2. Knowingly filed a false application for the Mennonas to pay their filing fee in installments;
3. Advised the Debtors to have their case dismissed because the appointed chapter 7 trustee was "greedy, corrupt, would make their life hell, and would make the Debtors sell their house;"
4. Advised the Mennonas not to pay the second filing fee installment because "we need the case to get dismissed, and not paying the court fee is the fastest way to get there," but did not advise them of the ramifications of not paying the installment(s);
5. Advised the Mennonas not to appear at the meeting required by 11 U.S.C. § 341 (the "341 Meeting");
6. Lied to the chapter 7 trustee at the 341 Meeting;
7. Advised the Mennonas not to attend the rescheduled 341 Meeting;
8. Failed to appear at the rescheduled 341 Meeting;
9. Filed one motion to dismiss the Mennonas' case on the basis that one of the Mennonas was "paid weekly, but omitted paystubs for April 9, and April 16, 2021," despite having the referenced pay stubs in his possession;
10. Filed a second motion to dismiss the Mennonas' case on the basis that one of the Mennonas "failed to submit pay advices received February 26, 2021, March 5, 2021, and March 19, 2021," despite knowing that the referenced Mennona was not in fact working on those dates;
11. Failed to advise the Mennonas of informal requests made by the chapter 7 trustee;
12. Failed to respond to the chapter 7 trustee;

[5] In re Perez, No. 15-06593, 2018 Bankr. LEXIS 2245 (Bankr. D.P.R. Jul. 31, 2018).

[6] Layng v. Barclay, No. 22-01139 (Bankr. D. Colo. Jan. 10, 2023).

13. Failed to inform the Mennonas of a motion to compel filed by the chapter 7 trustee, the order subsequently entered by the Bankruptcy Court, and the order to show cause when the Mennonas did not comply;
14. Advised the Mennonas as follows: "If either of you have COVID or some other highly infectious, nasty disease – or if you know someone who does – please make sure they lick the envelope [to the chapter 7 trustee's counsel"] and handle it as much as possible;"
15. Did not present evidence on the Mennonas' behalf at the hearing on the show cause, at which the Mennonas were sanctioned for contempt; and
16. Attempted to convince a creditor's attorney to request the Mennonas' tax returns and seek dismissal of the Mennonas' case.

Barclay, unsurprisingly, was subsequently suspended from practicing law for three years for violating several rules of professional conduct. But the Mennonas' case still offers several takeaways for chapter 13 practitioners. While it seems far-fetched that any of the bar in attendance at this seminar would intentionally forge a client's signature on a petition, schedule, statement, or other document, typing /s/ and a name takes only seconds. And while the debtor is likely in the office for an initial signing appointment, what happens when the attorney or his/her staff subsequently notices an error in the schedules, and prepares amended schedules? Some bankruptcy software programs automatically insert an electronic signature for the debtor. But even if the attorney' particular software or settings don't do so, is it enough for the debtor to "authorize" his/her electronic signature, or will a signature by DocuSign or similar software suffice, or must the attorney have in his/her hand a wet signature in order to file the amendment? Consider Local Rule 5005-4, which states that the electronic filing of a document through CM/ECF constitutes a representation to the Court that the filer is in possession of the paper original.

Similarly, affixing the electronic signature of another attorney or the trustee in a case can easily become problematic. Many attorneys and their support staff, in an attempt to save time, prepare and circulate orders on motions and include the electronic signatures of all parties at the circulation stage. Since Local Rule 9072-1 provides that an agreed order bearing typed signatures of other attorneys constitutes counsel's representation that the other attorneys have reviewed and consented (or objected) to the submitted order, it seems that the best practice would be to add the /s/ of the other attorney(s) and/or trustee only after obtaining the necessary authorizations.

Cooperation with the chapter 13 trustee is also a takeaway from the Mennona case, though it is of course for a debtor to cooperate when he/she knows of the trustee's requests! Most trustees send a letter to a debtor, in which the trustee outlines the debtor's responsibility to provide certain documents in advance of the 341 Meeting. A

copy of the letter routinely mailed out by Herb Beskin's office – now Angela Scolforo's office – is included with these materials, as is a copy of his questionnaire.

Most of the requested information – wage and/or income information, tax returns, personal and/or real property assessments, potentially a property deed – is necessary for counsel to prepare the petition, schedules, and statements; yet, trustees routinely do not timely receive the information that they need to conduct and conclude the 341 Meeting. Most trustees also request verification of current vehicle or other relevant insurance. While that information may not be necessary for the filing of the case, a best practice would likely be to obtain that information from the debtor at the outset of the engagement, so that the information is already in the file. There is no harm in sending additional information; in fact, the more information that counsel provides to the trustee, the easier it is for the trustee to see the whole picture. To paraphrase statements made by Judge Santoro of the Eastern District of Virginia during a debtor's motion in 2020: "The faster counsel coordinates an information exchange with the trustee, the easier it is for the trustee to say yes. That's the whole point. They're not asking for this information so they can say no. They're asking for this information so they can say yes."

## The Pre-Confirmation Affidavit

After a case has been filed, and the 341 Meeting has been held, the debtor is required to sign an affidavit requesting confirmation of the proposed chapter 13 plan (the "PCA"). In the PCA, a debtor certifies, under penalty of perjury, that he/she has:

1. Made all required direct post-petition payments to secured creditors, personal property lessors, and taxing authorities;
2. Filed all required federal, state, and local tax returns required during the four-year period prior to the Petition Date, and for which a return is due as of the date of the PCA; and
3. Either not been required to pay a DSO; or
4. Made all DSO payments.

Whether due to a misunderstanding or something more, a debtor often signs the pre-confirmation affidavit and obtain confirmation of proposed chapter 13 plan, only to receive a motion for relief from (an "MFR") a secured creditor. To the extent that the MFR references post-petition payments due prior to the filing of the PCA, what is the debtor's attorney's obligation with respect to the PCA? Should it be withdrawn? Since the chapter 13 trustee presumably relied upon the PCA to confirm the proposed plan, should the trustee move for reconsideration of the confirmation order? If so, what happens to disbursements made pursuant to the confirmation order? We know at least one of our panelists would argue that the "PCA Problem" could be avoided by proposing

a plan in which the payments to the secured creditor are made through case administration…

Domestic Support Obligations

Similarly, DSOs can cause issues for debtors in chapter 13, especially when the prepetition arrearage renders confirmation of a proposed plan difficult at best. But DSOs can also cause other problems, as is illustrated by the recent District Court decision affirming Judge Connelly.[7]

According to a property settlement agreement ("PSA") executed prior to the filing of the debtor's case, the debtor in Evans owed his ex-wife $212,500, which was to be repaid with a lump-sum of $135,000 by mid-September of 2020, followed by monthly installments of $1,000 for approximately 6.5 years. The debtor had paid approximately $99,000 of the debt in the three months prior to filing his chapter 13 case in February 2021.

Though the ex-wife, by counsel, objected to confirmation of the debtor's proposed plan, on the basis that the debtor failed to pay the ex-wife's claim in full as required by 11 U.S.C. § 1322(a)(2), the parties resolved the objection and the Court did not hear argument. In any event, the confirmation order subsequently entered by the Court in June 2021 bound the debtor and the ex-wife to the terms of the plan, which required the debtor to pay the monthly installments of $1,000 directly to the ex-wife during the plan term, and provided that any remaining balance would survive the chapter 13 discharge.

Approximately one week after the Bankruptcy Court's entry of the confirmation order[8], the ex-wife filed a petition for rule to show cause in state court for the debtor's failure to comply with the terms of the PSA. At the subsequent hearing on the show cause, the state court also heard the status of the ex-wife's prepetition motion for contempt, wherein the ex-wife sought to enforce a provision in the PSA that required the debtor to indemnify and hold the ex-wife harmless on a joint unsecured debt. The state court found the debtor in contempt and directed him to "use funds from his retirement accounts which he exempted from his bankruptcy estate… so that it is clear that the order does not violate the terms of 11 U.S.C. § 362." The state court also took the possibility of jail time for the debtor under advisement.

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[7] Evans v. Evans (In re Evans), No. 22-00026 (W.D. Va. Mar. 20, 2023).

[8] Careful reading of the confirmation order is also important. As of the date of writing of these materials, the form confirmation order in the Western District of Virginia requires the Bankruptcy Court's approval of any encumbrance, refinance, sale, or other conveyance of real property by a debtor. The form confirmation order in the Norfolk/Newport News Divisions of the Eastern District of Virginia requires Court approval for the sale, refinance, and/or transfer of both real and personal property.

When the debtor brought a stay violation action in the Bankruptcy Court, the ex-wife argued that her filings fell within the exception set forth in 11 U.S.C. § 362(b)(2)(B) – the "collection" of a DSO "from property that is not property of the estate" – because "collection" included commencement of actions related to DSOs. The Bankruptcy Court disagreed, noting that the ex-wife's actions were aimed at the debtor personally, not just to property not of the estate, and held that the ex-wife had willfully violated the automatic stay, though not so egregiously as to justify punitive damages, and the District Court affirmed.

## Changes to Financial Condition

As discussed above, a debtor has a duty to cooperate[9] with the trustee appointed in their case, both in terms of disclosure and in terms of providing financials and other information. But in a recent case in the Eastern District of Virginia, a debtor was recently barred from refiling a case under any chapter of the Bankruptcy Code for one year after she failed to disclose information to the chapter 13 and chapter 7 trustee. The debtor filed her chapter 13 case in April 2018, and obtained confirmation of her chapter 13 plan in September 2018. Approximately two years into the debtor's case, a fire at the debtor's real property gave rise to an insurance claim, whereby the debtor received approximately $82,500 directly in July 2020. The debtor informed the chapter 13 trustee of the fire in August 2020, and provided information regarding a check of approximately $8,600 sent by the debtor's insurance company to pay off the balance of the mortgage on the real property, but did not disclose receipt of the $82,500.

After the chapter 13 trustee filed a motion to dismiss the debtor's case in October 2021, the debtor converted her case to a case under chapter 7 in December 2021, but again, did not disclose receipt of the insurance proceeds. In the motion to dismiss with prejudice subsequently filed by the United States Trustee (the "UST"), wherein the UST asserted the $82,500 was property of the estate, the UST argued that the debtor's failure to disclose the insurance proceeds, and dissipation of the majority of funds prior to converting her case, constituted bad faith. The Bankruptcy Court noted that the debtor's lack of candor could be neither overlooked nor condoned, and dismissed the debtor's case for cause, with a one-year bar from refiling.

As courts around the country are currently divided on whether post-petition appreciation in real property belongs to the debtor or to creditors, how should debtor's counsel advise a debtor about selling property that has appreciated in value?

[9] In re Ilyev, No. 17-12987 (Bankr. E.D. Va. Jul. 26, 2022).

OFFICE OF THE CHAPTER 13 BANKRUPTCY TRUSTEE
HERBERT L. BESKIN, TRUSTEE
123 EAST MAIN STREET, SUITE 310
P. O. BOX 2103
CHARLOTTESVILLE, VIRGINIA 22902

Angela M. Scolforo, Staff Attorney
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(Revised, 03/04/2010)

June 14, 2010

«both»
«dbtr_addr1»
«dbtr_addr2»
«dbtr_addr3»

**RE: Your Chapter 13 Bankruptcy Case, #«print_casenum»**

Dear Debtor(s):

Our office has received notice of the filing of your Chapter 13 case, and we look forward to working with you to ensure your success in Chapter 13. As your attorney has already explained to you, you have certain responsibilities as a Chapter 13 Debtor. We wanted to make sure you are aware of **those initial responsibilities:**

**1. Plan Payments:**

Your first proposed Plan payment is due **30 days from the date your case was filed.** If your payments are to be made by automatic wage deduction from your employer, **you are responsible for making all Plan payments until you see the payment being deducted from your paycheck.** Throughout the plan, review your paystubs to make sure the correct amount is being deducted each time. Make all checks payable to: **Herbert L. Beskin, Chapter 13 Trustee**.

Send all payments to: **Herbert L. Beskin, Chapter 13 Trustee, P.O. Box 1961, Memphis TN 38101-1961.** Make sure that on every check or money order you put **your full name and the full case number as shown at the top of this letter**, and that **the number version and the written version of the amount are exactly the same.** If you pay by personal check and one of your checks bounces, you will be required to make all future payments by money order or certified check. If you have any questions about the amount or frequency of your Plan payments, call your attorney or call our office.

**2. Documents:**

In preparation for the meeting of creditors, the Trustee is required to review certain kinds of documents from Debtors. **These documents must be sent to this office at least 10 days before the meeting of creditors. If you are represented by an attorney, do not send these documents to this office; instead, send the documents to your attorney, who will send them to this office.** The documents we need are:

**A. Trustee Questionnaire:** If you are represented by an attorney, your attorney will help you fill out in his/her office a three page Trustee Questionnaire which must be sent to the Trustee's office prior to the meeting of creditors. If you do **not** have an attorney, you will find the Questionnaire attached to this letter. You must fill it out and send it to the Trustee's office yourself at least ten days before the meeting of creditors. If the Questionnaire is not received by the Trustee in time to review it before the meeting of creditors, it may result in additional court appearances by you.

**B. A copy of your most recent two months of paystubs:** The pay stubs must be consecutive, with no gaps between them, and must include all paystubs received by you in the 60 days immediately prior to the date you filed this case. If you are a self-employed Debtor, we need operating statements (income and expenses) for the same two month period; your attorney will have a form that you can use. If you receive Social Security or retirement benefits, a copy of the check or statement will suffice.

**C. A copy of the current personal property tax and real estate tax assessments:** We need the tax bill or assessment for the **current year** from the county or city where the property is located for any ownership interest you have in any (1) land, house, time-share, or other real estate; and (2) cars, trucks, or other motor vehicles. If there has been a private **appraisal** of any such property done within the past 24 months, we will need a copy of that as well.

**D. A copy of your current car, truck, etc., insurance declaration page:** We need a statement from your insurance company which shows all of the following information: (1) the period of time to which the coverage applies; (2) which vehicles are covered; and (3) the total premium for the entire coverage period for all vehicles that are insured.

**E. A copy of your federal income tax return (with all attached schedules) for the most recent year you have filed.**

**3. Meeting of Creditors:**

You must attend your "meeting of creditors." The date, time, and place is set forth on the notice you have just received from the Bankruptcy Court. Yours is scheduled for **«latest_341_date», at «latest_341_time».** If you fail to attend, the Court may consider dismissing your case. If for any reason you will not be able to be present, contact your attorney immediately, or call our office if you have no attorney.

**4. Financial Management Course:**

Under new provisions of the Bankruptcy Code effective October 17, 2005, before you can be issued a discharge of your debts in Chapter 13 you must attend a class in personal financial management (also called "debtor education"). **The class must be completed before you make your last Chapter 13 plan payment**, but we strongly suggest that you complete the class sooner rather than later because it will include information designed to help you understand and successfully complete the Chapter 13 process. Here in the Western District of Virginia, there are many options available to you. The various providers offer several options to complete the course either in-person, online, or over the phone. The course length is typically 2- 3 hours, and with most providers there will be a fee charged (typically $25 – $30 for an individual; $50 - $60 for joint filers). You can find additional information on the Bankruptcy Court's website at http://www.vawb.uscourts.gov/ . Your attorney can also provide you with additional information about this required course.

If you have any questions about anything in this letter, please feel free to contact our office.

Sincerely yours,

Chapter 13 Trustee

c: «attorney»

*(Version #8, Revised, 01/07/18)*

**TRUSTEE QUESTIONNAIRE** **CASE NUMBER:** _____

***This completed form should be submitted to the Trustee at least 10 days before your Meeting of Creditors. For questions asking "yes" or "no," please circle the answer that applies to you.*** **IF YOU HAVE AN ATTORNEY, YOUR ATTORNEY SHOULD HELP YOU FILL THIS OUT, AND THEN THE ATTORNEY WILL SEND IT TO THE TRUSTEE.**

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1. ***Your name(s):*** _____ _____
2. ***Address(s):*** _____ _____
   _____ _____
3. ***Phone number:*** ( ) _____ - _____ ( ) _____- _____
   ***E-Mail Address:*** _____ _____
4. ***Marital Status: (circle one): (a) Married & Living Together (b) Separated (c) Divorced (d) Single (e) Widow(er)***
5. ***(a) Please check one: I/We will be paying my/our Chapter 13 Plan payment by:***
   _____ ***Automatic wage deduction from your employer***
   _____ ***TFS payment from your bank account***
   _____ ***Other means (specify):*** _____
   ***(b) If by automatic wage deduction, from whose employer will the wage deduction be taken? ___ Debtor #1 (name: _____) ____Debtor #2 (_____)***
6. ***(a) How many other people live with you?*** _____
   ***(b) Please explain the relationship to you of each person living with you:***
   _____ _____
   _____ _____
   _____ _____
   _____ _____

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7. ***YES NO (a) Do you have dependents (people that you are supporting) who are not living with you? If "yes," how many?*** _____
8. ***YES NO (a) Going back 2 years from the date you filed this case, did you at any time during that period live in a state other than Virginia ?***
   ***(b) If "yes," please list all states in which you lived during the period from 2 years to 2½ years before the date this case was filed:***

| ***State*** | ***Date moved there*** | ***Date left there*** |
|---|---|---|
| | | |
| | | |

9. ***YES NO (a) Have you ever filed any kind of bankruptcy case before?***
   ***(b) If "yes," please answer the following questions for every case:***

| ***Date filed*** | ***State*** | ***Chapter*** | ***If discharged, date*** | ***If dismissed, date*** |
|---|---|---|---|---|
| | | | | |
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***10. YES NO (a) Are you at present required to pay child support or spousal support, for either an ongoing obligation or an obligation that would have ended by now if you had made all your payments on time? (If this is a joint case, whose obligation is this: ___Debtor #1 (_____) ___Debtor #2 (_____)***

***(b) If "yes," the amount of my support payment is $ _____ per month. Of that amount, $_____ per month is to pay arrears of $_____.***

***(c) If "yes," the name of the person to whom I owe support is _____ _____, his/her full address is _____ _____,***

***and his/her phone number is ( ) _____ - _____.***

***YES NO (d) If "yes," were you behind in your support payments as of the date this case was filed? If you were behind, state the amount you were behind as of filing: $ _____.***

***11. YES NO (a) Are any of your debts are "non-dischargeable" in this bankruptcy case? (That means that if you don't pay the debt in full in this case, you will have to finish paying it off after your case is over; check with your attorney)***

***(b) If "yes," please list each non-dischargeable debt: _____ _____ _____***

***12. YES NO Do you expect your income to <u>increase</u> in the upcoming year? If "yes," explain: _____.***

***13. YES NO Do you expect your income to <u>decrease</u> in the upcoming year? If "yes," explain: _____.***

***14. YES NO (a) Have you failed to file federal or state income tax returns for <u>any</u> years?***

***(b) If "yes," list the years that were <u>not</u> filed: Federal: _____ _____; State: _____***

***(c) If "yes," why did you not file? _____***

***15. YES NO (a) Did you receive a federal or state income tax refund for the last year that you filed your personal income tax returns?***

***(b) If "yes": year: _____; fed. refund: $_____; state refund: $_____***

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***16. YES NO (a) Do you understand that while you are in Chapter 13 you cannot sell, transfer, refinance, or place a lien against any real estate (house or land) that you own without first obtaining an order of approval from the Court?***

***YES NO (b) Do you understand that while you are in Chapter 13 you cannot borrow money or incur new debt on credit in a cumulative amount totaling more than $15,000.00 of principal and interest without first obtaining an order of approval from the Court?***

***17. YES NO (a) Did your attorney, or someone from your attorney's office, assist you in filling out this questionnaire or review it with you? (If you have no attorney, write "N/A")***

***Signed: _____ Date: _____***

***Debtor #1***

# OFFICE OF THE CHAPTER 13 TRUSTEE
## CHRISTOPHER MICALE, TRUSTEE

JANE FAKE-CASE & JOHN FAKE-CASE
105 FRANKLIN RD, SW
SUITE 110
ROANOKE, VA 24011

Re: Case No. 99-99999-PBR

It is my pleasure to write to you as the Chapter 13 Trustee regarding your recently filed Chapter 13 case. In advance of your meeting of creditors, there are two critical items of information that I need to address.

First, your initial payment is due within thirty (30) days of the date your case was filed and the amount of the payment due can be found on the schedule proposed in Part 2 of your Chapter 13 Plan.

It is best to make your payment by automatic wage deduction through your employer, but if you cannot then you may pay by enrolling in the ePay system or by mailing your payment to the lockbox address. Information about the ePay system may be found at: https://www.ch13wdva.com/debtor-payments.html.

**No cash payments or payments by phone will be accepted.** Until wages are withheld by your employer (which should be reflected on your paystub), you should make your payments directly through the ePay system. If you can only send your payments by mail, the payments must be a personal check, certified check, cashier's check, or money order and must include both your name and case number, made payable to Christopher Micale, Chapter 13 Trustee, and mailed to the lockbox address:

Christopher Micale, Trustee
PO Box 750
Memphis, TN 38101-0750

Second, your meeting of creditors, is scheduled for **August 07, 2019** at **11:00 am**. Please refer to your Notice of Chapter 13 Bankruptcy Case for participation details or contact your attorney. Meetings are conducted :

**BY ZOOM**: Five minutes before the scheduled meeting time, go to **zoom.us/join**, enter **ZOOM ID**: 603 226 2142, and **PASSWORD**: 341meeting. Mute your mic until your case is called.

**BY PHONE:** Five minutes before the scheduled meeting time, call **1-301-715-8592**, enter **Meeting ID**: 603 226 2142, **No Participant ID**, and **PASSWORD**: 466 641 9174. Place your phone on mute until your case is called.

Please provide your attorney with these documents or meet with your attorney to complete them in advance of the meeting so they can be electronically sent to my office. All documents must be provided by **July 28, 2019.** The following list of documents can be found on our website at: www.ch13wdva.com. Select Services for Attorneys, Creditors, and Debtors, and then scroll down to the 3rd box on the left to find Forms. If you do not have an attorney, see the back of this page for document upload instructions, or alternatively, you may mail them to 15 Salem Ave., SE, Suite 300, Roanoke, VA 24011-1419.

1. Trustee Questionnaire
2. ePay Authorization Form (If paying by ePay)
3. A copy of your most current tax year Form 1040 U.S. Individual Tax Return with all schedules (or a tax transcript, which can be obtained from your local Internal Revenue Service office)
4. All pay stubs and proof of all income received within sixty (60) days prior to your case being filed.
5. You must provide your attorney with a photo ID and proof of your social security number. Examples may be found on the back of this page. Make sure your attorney sent these to the Trustee before your meeting of creditors.

Failure to provide these documents may result in delays in administering your case and may require additional court appearances.

Also remember, you must complete a debtor education course. For a list of approved debtor education agencies please visit the following link: http://www.justice.gov/ust. From the menu on the left, select *Credit Counseling & Debtor Education*, then *Approved Debtor Education Providers*, select *Show More* to choose the *state of Virginia*, and then the *Judicial District for Western District of Virginia*.

Please review **Introduction to Chapter 13** available at https://ch13wdva.com/Introduction_to_Chapter_13.pdf

IF YOU ARE REPRESENTED BY AN ATTORNEY, THE TRUSTEE'S OFFICE WILL RETURN YOUR PHONE CALLS AND MESSAGES BUT WILL NEVER INITIATE A PHONE CALL TO YOU. THE TRUSTEE'S OFFICE ONLY ACCEPTS PLAN PAYMENTS BY WAGE DEDUCTION, EPAY, OR MAILED TO THE LOCKBOX IN MEMPHIS. IF ANY PERSON REQUESTS A PAYMENT BY ANOTHER METHOD, YOU SHOULD VERIFY THE REQUEST WITH YOUR ATTORNEY.

I look forward to working with you in the weeks and months ahead to achieve success in your Chapter 13 case.

Very Truly Yours,
Christopher Micale, Chapter 13 Trustee

NOTICE TO COUNSEL AND DEBTORS

Before the Trustee can conduct your meeting of creditors to be held on **August 07, 2019**, **your attorney** must provide the Trustee with your photo ID and proof of your social security number. If you do not have an attorney, visit Bankruptcy Documents at: https://www.bkdocs.us/account-register.html to register for an account to upload documents. Instructions for registration and for uploading documents can be found at: https://www.ch13wdva.com under the Bankruptcy Documents section. If these items are not provided at least two business days before **August 07, 2019**, you may be required to appear at multiple meetings. Examples of acceptable documents follow below.

Acceptable Photo ID Cards

Driver's license
State issued picture ID
Military ID
Government ID
Student ID
US passport
Resident alien card

Acceptable Proof of Social Security Number

Social Security card
Medical insurance card with complete Social Security number
Pay stub with complete Social Security number
W-2 Form with complete Social Security number
IRS Form 1099 with complete Social Security number
Social Security Administration report or letter with complete Social Security number

Helpful Links

Our website: www.ch13wdva.com <http://www.ch13wdva.com>
Trustee Questionnaire: <https://ch13wdva.com/files/Trustee_Questionnaire_Fillable_2.pdf>
EPay Authorization: <https://ch13wdva.com/files/ePay_Authorization_Form_Fillable.pdf>
Authorization to Release: <https://ch13wdva.com/files/Autorization_to_Release_Information_Fillable.pdf>
Debtor Education: <http://www.justice.gov/ust>
Introduction to Chapter 13: <http://ch13wdva.com/Introduction_to_Chapter_13.pdf>
Epay System: <http://ch13wdva.com/debtor-payments.html>
NDC: www.ndc.org <http://www.ndc.org>

For general questions please email us at help@ch13wdva.com and receive a response within one business day.

# To Con***fi***rm or to Approve—***that is the question***:

Approval of CARES Act Plan extended beyond 60 month

by Christopher Micale, Chapter 13 Trustee

I. What had happened was…

It's 9:00 a.m. on March 29, 2022, and you stop at your favorite coffee shop to grab a coffee and a cruller. It's going to be a great day because vacation is coming up and who doesn't love a little caffeine and sugar to get the day going before vacation. But then the other show drops—Jon and Jane Debtor send you an email and you foolishly look at it on your phone while you're waiting for the much needed coffee and cruller.

Last year Jon and Jane took advantage of 11 U.S.C. § 1322(d) and their 60 month Plan was extended to a full 84 month term. Jon had been working as a restaurant manager at a very exclusive local restaurant in town, but, because of the pandemic, the restaurant closed and now the best thing he can find is managing the local KFC. As a result of this new employment, he lost forty percent of his income. Jane had been working as a receptionist but lost her job as she is suffering from long-COVID and her prognosis is incredibly uncertain given the lack of knowledge the medical community has about this novel virus. Overall the household income decreased by over sixty percent. Jon and Jane need relief under Chapter 13 to repay mortgage arrears, tax claims and their vehicle loans.

Jon and Jane now need help because Jane just underwent some medical testing not covered by insurance and they need to suspend two Plan payments to cover the medical costs. To still make the Plan work they agree to surrender one of the vehicles as Jane's mother will lend her a car when she needs to get to medical appointments. With only one car payment in the Plan, you think the Plan will still work mathematically if they suspend two Plan payments and then resume a lower Plan payment over the remaining term of the Plan which will still be only a total term of 84 months.

You grab the coffee after being berated by the barista for reading your phone, not paying attention and he had to scream at you ten times to get your attention to keep the line moving. And because you weren't paying attention you forgot to ask for the cruller. Since work is pretty slow you draft the Plan that day, get it filed, and the Trustee files the standard response about being current, blah, blah, blah. The hearing is set the day you are leaving for vacation and for some reason the order approving the Plan is not entered before the hearing. The Trustee assures you it was submitted to the court and does not know why it was not entered yet. Without the order being entered, you both attend the hearing. The judge announces, sua sponte, the Plan cannot be confirmed because 11 U.S.C. § 1322(d) no longer exists, a Plan term can no longer be 84 months. The judge then asks you for authority as to why the modification should be granted.

II. Scope of issue

a. The topic is meant to explore whether a modification of a Plan term, previously approved to be 84 months, can again be modified after March 27, 2022. The post-March

27, 2022, modification is not intended to change the Plan's term, merely adjust some other provision.

b. The topic is not meant to explore:
    i. Whether Jon and Jane qualify for relief under 11 U.S.C. § 1322(d). Given the last Plan's approval, Jon and Jane met the eight elements to extend the Plan's term to eighty-four months. In re Mercer, 640 B.R. 577, 578-579 (Bankr. D. Colo. 2022).
    ii. Whether a modification filed before March 27, 2022, but not yet approved could be approved. In re Mercer, 640 B.R. 577 (Bankr. D. Colo. 2022) (holding modifications filed before March 27, 2022, and first seeking terms beyond sixty months, could not be approved).
    iii. Whether judges ruin vacations.

c. Data to quantify scope
    i. In the Roanoke, Danville, Abingdon and Big Stone Gap divisions, the first petition date in a case with a CARES Act Plan was in January 2015. The total number of cases filed since January 2015 and otherwise eligible for a CARES Act modification is 4,140.
    ii. Of the 4,140 cases only 223 sought a CARES Act modification or about 5.3% of the total cases filed.
    iii. Of the 223 CARES Act modifications, 128 are still open and pending cases and 95 cases closed. Of the closed cases, 55 closed as completed, 11 closed as converted and 29 were dismissed. Note: because not all CARES Act modification cases are complete, we cannot accurately measure "success" of cases with a CARES Act modification.

III. Denying approval of the modified Plan

a. Orders denying approval of the modified Plan seem to be in the majority, however, there are so few cases that a clear majority or minority is both difficult to quantify or to explain the legal reasoning for each position. Of the cases from our region, Judge Gunn denied approval of a modified Plan after March 27, 2022, but the order simply denies the modification for the reasons stated on the record. In re Rachal, Case No. 19-00197-ELG (Bankr. D.D.C April 11, 2022). My understanding is this case had complex facts with more issues than just approving an 84 month Plan after March 27, 2022, as the modified Plan sought to add additional post-petition tax liability. Was there a lack of good faith component really at issue if the Debtor attempted to reduce the pool to pre-petition unsecured creditors to fund the post-petition tax liability?

b. The best example of a case denying approval of a post-March 27, 2022, modified Plan is In re Nelson, 19-24458-beh (Bankr. E.D. Wis. Oct. 11, 2022).
    i. Facts
    The decision consolidated two different cases. In Mr. Nelson's case, the debtor achieved confirmation of an initial Plan and, post-confirmation, modified the Plan to take advantage of 11 U.S.C. § 1329(d) when it was in effect and extended the Plan to an 84 month Plan. Id. at *1. There was a subsequent default on Plan payments and the resolution required the debtor to file a further modified Plan to increase the Plan payments to resolve the delinquency but the modified Plan

would still be an 84 month term. Id at *1-*2. In Mr. Ramos' case, he defaulted on post-petition ongoing mortgage payments and resolution of the first mortgage default resulted in an approved modification extending the Plan term to a total term of 76 months. This modification occurred prior to March 27, 2022. After March 27, 2022, there was an additional ongoing mortgage payment default and the resolution included a modified Plan increasing the Plan payment to provide for the additional ongoing mortgage payment default. Id. at *2-*3. (Clearly Mr. Ramos would have been best served to have paid the ongoing mortgage payment through case administration from the beginning, but I digress.)

ii. Nelson court's reasoning
    1. The Nelson court first declares the post-March 27, 2022, statute is not ambiguous as only 11 U.S.C. § 1329(c) survives and this provision specifically prohibits a Plan term beyond 60 months. In re Nelson, 19-24458-beh at *8. Nelson declares that ambiguity generally results from two contradicting statutes and, when there is ambiguity between the two, courts may look to prior statutes to resolve the ambiguity. Id. at *8-*9. However, since 11 U.S.C. § 1329(d) no longer exists, there is no ambiguity for the Nelson court and therefore no need to look at legislative history. Id.
    2. Even if there were ambiguity, the Nelson court seemed to find legislative support that a CARES Act Plan simply cannot be modified after March 27, 2022. Id. at *9-*10. The legislative history contains statements the act extending 11 U.S.C. § 1329(d) was temporary and that once the vaccine became available the emergency could be put behind everyone. Id. at *10-*11.
    3. The Nelson court also reiterated the caution against justifying a solution which is "judicial curing of a seeming congressional inadvertence." Id. at *12.
    4. In short, it seems the Nelson court's reading is that because 11 U.S.C. § 1329(d) no longer exists, it is impossible to further modify a CARES Act Plan.

IV. Approving a CARES Act modified Plan

a. In re Mercer 640 B.R. 577 (Bankr. D. Colo. 2022) appears to be the case holding a CARES Act Plan may be modified post-March 27, 2022. However, this case primarily addressed the question of whether a modified Plan filed prior to March 27, 2022, all of which exceeded a 60 month term, could be approved after March 27, 2022. Id. at 578. The Mercer court held that modified Plans not approved prior to March 27, 2022, and exceeded 60 months could not be approved. Id. at 581. Of this group of cases, however, there were two that had already had a modified Plan prior to March 27, 2022, approved and the court allowed these two cases to be further modified because the proposed modification did not change the Plan's previously approved term under the CARES Act. Id. The conundrum is that the Mercer court did not provide any reasoning apart from

saying the two modified Plans with already approved 84 month terms would again be approved.

Another case approving a modification post-March 27, 2022, is In re McLaughlin, Case No. 18-60391-BPH (Bankr. D. Mont. Aug. 20, 2022). McLaughlin highlights the language of 11 U.S.C. § 1329 is different from the confirmation process. Id. at *2. It ultimately approved a post-March 27, 2022, modification because the modification did not seek to change the already approved 84 month term. Id. So can an argument be made to further support the Mercer/McLaughlin courts?

b. In a vacuum, Nelson, makes sense. If a statute provided for X, and then the statute is repealed, how can X be approved after the statute's repeal? The reason is that while the repeal of 11 U.S.C. § 1322(d) may not be ambiguous,

> [s]tatutory construction…is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme-because the same terminology is used elsewhere in a context that makes its meaning clear, see, e.g., Sorenson v. Secretary of Treasury, 475 U.S. 851, 860 (1986), or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law, see, e.g., Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987); Weinberger v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-632 (1973); Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307-308 (1961).
> United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988).

Whether a statute is plain or ambiguous must be determined by reference to the specific language, the context in which the language is used and the broader context of the statute as a whole. In re Wise, 346 F.3d 1239, 1241 (10th Cir. 2003) (*citing* Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997). Furthermore, "[u]nder familiar rules of statutory interpretation…when Congress uses different words, it means different things." In re Rosa, 495 B.R. 522, 524 (Bankr. D. Haw. 2013).

c. Using these principles, 11 U.S.C. § 1329 cannot be read in a vacuum. Approving a modified Plan must be read in conjunction with all of Chapter 13. Within Chapter 13 there are two different events, identified by two different phrases: confirmation and approval of a modified Plan. Confirmation of a Chapter 13 Plan is a significant event. So much so that the concept spans five different sections. 11 U.S.C. §§ 1323, 1324, 1325, 1327 and 1329. Of these, the most important may be 11 U.S.C. § 1327 which provides that confirmation of the Plan is a new contract and binds all parties to its terms. Bullard v. Blue Hills Bank, 575 U.S. 496, 502 (2015). Inherent in this concept is also the idea that relitigation of issues actually litigated and necessarily determined by the confirmation order do not get relitigated. Id. Even if a confirmation order contains a legal error, the parties are bound by the error. Id. (*citing United Student Aid Funds, Inc.* v. Espinosa, 559

U.S. 260, 275 (2010). This event must be separate and apart from "modification of a plan" as Congress specifically chose a different phrase and did not say confirmation of a modified Plan. The whole of 11 U.S.C. § 1329 does not discuss a confirmation event but rather enumerates how, why and what standards to apply to a modification after confirmation. There is a strong line of cases which declare there is only one confirmation event ever in the life of a Chapter 13 case. In re Davis, 439 B.R. 863 (Bankr. N.D. Ill. 2010), In re Vela, 526 B.R. 230 (Bankr. W.D. Mich. 2015). The confirmation event is so significant that the Supreme Court admonished the bankruptcy community that the confirmation event is conducted to ensure a Chapter 13 Plan complies with all provisions of 11 U.S.C. §§ 1322 and 1325. United Student Aid Funds, Inc. v. Espinosa, 559 U.S. at 277-278.

But 11 U.S.C. § 1329 must be a different animal because a modified Plan after confirmation not only has its own Code section but the language used all throughout the section purposefully uses different language than confirming a Plan. Additionally, Congress chose not to make all sections related to initial confirmation applicable to a post-confirmation modified Plan. Following rules of statutory construction, these two events must mean something different.

The Nelson court erroneously labeled the modified plans as a confirmation event. Furthermore, the Nelson court applied all provisions of 11 U.S.C § 1329 to all provisions of the modified Plan. Was this correct? Again, parsing out § 1329, it's only the proposed modifications that are reviewed to meet other provisions of 11 U.S.C. § 1322, 1323 and 1325. 11 U.S.C. § 1329(b)(1). Maybe this is what the Mercer court meant, because the Plans had already been approved for a period exceeding 60 months, and the subsequent modification did not seek to change the Plan term, there is no need to evaluate any modifications not addressed in the modified Plan at hand. The McLaughlin court explicitly concludes there is no other way to view a post-confirmation modification than to look at the specific provisions modified and not the entire restated Plan. McLaughlin, Case No. 18-60391 at *2. This is in stark contrast to the confirmation event which requires the entirety of the Plan to comply with the Code. 11 U.S.C. § 1325(a)(1).

But then 11 U.S.C. § 1329(c) references a "plan modified under this section may not provide for payments" longer than sixty months and this may suggest the entirety of the Plan. However, the phrase, "plan modified" is unusual. Why not just say a modi*fi*ed plan under this section? Attributive adjectives (adjectives before nouns) are the general rule so if Congress meant to say it was the entirety of the plan, it should have used "modified plan." While it does appear there are some exceptions to this general grammatical rule, called postpositive adjectives, the phrase plan modified does not appear to fall into these exceptions. Thus, it appears plan may be the adjective and modified the subject which means that it's the modification that needs to be no more than 60 months. So if the modification does not seek to change the Plan term, 11 U.S.C. § 1329(c) does not need to be considered. It thus follows that a plan appropriately modified to an 84 month term prior to March 27, 2022, can then again be modified after March 27, 2022, so long as the modification does not adjust the Plan term. If after March 27, 2022, a

debtor seeks to modify an 84 month term, the debtor may need to reduce the Plan term to a maximum of 60 months. I will admit that I am not an English expert, so let's assume I am incorrect about adjectives. 11 U.S.C. § 1329(c) cannot be read in a vacuum. Taken with the whole of the section, since 11 § 1329 largely seems to discuss a modification and not the whole Plan, if the modification does not attempt to modify the Plan term, 11 U.S.C. § 1329(c) does not need to be considered.

One may criticize this as the Nelson court criticized parties seeking a result rather than sticking to the plain language of the Code. But debtors are not seeking a result, they are simply reading Chapter 13 as a whole and applying all principles woven into it. Another supporting principle for this proposition is res judicata. The Fourth Circuit made clear that this principle is alive and well in the bankruptcy context and, specifically, in the Plan confirmation process. In re Varat Enterprises, Inc., 81 F.3d 1310, 1315 (4th Cir. 1996). Varat provides a good primer on this ancient concept.

> Generally, claim preclusion occurs when three conditions are satisfied: 1) the prior judgment was final and on the merits, and rendered by a court of competent jurisdiction in accordance with the requirements of due process; 2) the parties are identical, or in privity, in the two actions; and, 3) the claims in the second matter are based upon the same cause of action involved in the earlier proceeding. Kenny v. Quigg, 820 F.2d 665, 669 (4th Cir. 1987); see also Justice Oaks, 898 F.2d at 1550 (listing same criteria as four elements).
> Id.

When all elements are met, one cannot relitigate the issue post-confirmation through any other pleading. Id. at 1317.

Debtors routinely propose post-confirmation modified Plans, but the forms used for this require what is effectively a restatement of the entire confirmed Plan together with the specific modifications. If the confirmed Plan provides for elements A, B, C and D, and the Debtor only wants to modify element D, where does 11 U.S.C. § 1329 authorize relitigation of elements A, B and C? Doesn't Varart provide support that 11 U.S.C. § 1327 and the principles of res judicata bar any party from relitigating the propriety of elements A, B and C? If people were allowed to attack an element again, where is the ultimate finality of the confirmation the Supreme Court routinely enforces?

V. Testing the Mercer court's proposition versus the Nelson court
   a. If Mercer is correct, its holding and the proposed supporting logic must hold true in other circumstances.
      i. Let's assume the confirmed Plan provides for the cramdown of a car. At the confirmation hearing, held in January 2020, the confirmed Plan provides the car's value is $10,000. Let's fast forward to January 2022 when the auto industry's chip shortage decimated car dealers' inventory levels and everyone was buying a used car. Demand results in used cars actually appreciating. In January 2022 the same

debtor proposes a modified Plan to suspend Plan payments for two months because of a job loss and then will resume Plan payments. In January 2022 the used car is now worth $13,000. Following Nelson, why wouldn't the court force the car to be revalued? Nelson suggests even post-confirmation modified Plans have multiple confirmation dates. So why wouldn't 11 U.S.C. § 1325(a)(5) be re-triggered and force car valuation to be re-examined? Following Mercer, while these facts may be true, the post-confirmation modification does nothing to alter treatment of the car creditor and thus 11 U.S.C. § 1327 still binds everyone to the originally confirmed Plan terms and the value remains at $10,000. Remember, the reverse would be true. If the car depreciated on a normal schedule, why couldn't the debtor seek to reduce the value in a post-confirmation modification?

ii. Let's assume the confirmed Plan provides that allowed unsecured creditors must receive $10,000 because of the non-exempt value in the real estate. 11 U.S.C. § 1325(a)(4). The Plan is confirmed in January 2020. Fast forward to January 2022 and the Debtor again files a post-confirmation modification to suspend Plan payments due to a job loss and will then resume Plan payments in a sufficient amount to pay unsecured creditors $10,000. However, the real estate market radically changed in two years and if the home were liquidated in January 2022, unsecured creditors would likely receive $70,000. Again, why doesn't the Nelson court require re-analysis of the real estate's liquidation value and force the Debtor to pay more? Following Mercer, while all the facts may be true, the post-confirmation does nothing to alter treatment of the unsecured creditors and thus 11 U.S.C. § 1327 still binds everyone to the originally confirmed Plan terms. Also of important note here, the post-confirmation modified Plan is consistent in that the Debtor will retain the home.

iii. Let's assume the confirmed Plan provides allowed unsecured creditors must receive $10,000 because the non-exempt value in the real estate. 11 U.S.C. § 1325(a)(4). The Plan is confirmed in January 2020. Fast forward to January 2022 and the Debtor files a motion to approve the sale of the real estate. However, the real estate market radically changed in two years and analysis reveals the non-exempt equity is $70,000 if the property were liquidated in January 2022. I propose the motion to sell is a veiled Plan modification. The confirmed Plan provided the Debtor will retain the property and pay the non-exempt value as of the Plan's effective date. The motion to sell necessarily modifies the Plan because the Debtor will divest his interest. These were not the binding terms of the Plan. Following the logic of both Nelson and Mercer it seems that the modified term, the Debtor divesting their interest in the real estate, must be reviewed under 11 U.S.C. § 1325(a)(4). This also assumes one accepts that 11 U.S.C. § 1306(a)(1) brings in the post-petition acquired equity, however, this sub-issue could be a CLE topic in and of itself. Admittedly, this now calls into question how the Plan's effective date plays into this analysis but even if this results in a court requiring only $10,000 to be paid to allowed unsecured creditors, has the Debtor complied with 11 U.S.C. § 1325(a)(3)? Is it good faith for a Debtor to use the automatic

stay's shield to prevent creditors from action and then sell the property taking all of the appreciated equity?

## VI. Conclusion

If a post-confirmation modified Plan's term is not altered from the confirmation order, 11 U.S.C. § 1329 is best read as prohibiting review of the Plan's temporal term and allowing modification.

# Homestead Deed Post-2020: Lingering questions and Differing Perspectives

by: Shannon Morgan, Esq.

**§ 34-4. Exemption created** Every householder shall be entitled, in addition to the property or estate exempt under §§ 23.1- 707, 34-26, 34-27, 34-29, and 64.2-311, to hold exempt from creditor process arising out of a debt, real and personal property, or either, to be selected by the householder, including money and debts due the householder not exceeding $5,000 in value or, if the householder is 65 years of age or older, not exceeding $10,000 in value, and, in addition, real or personal property used as the principal residence of the householder or the householder's dependents not exceeding $25,000 in value. In addition, upon a showing that a householder supports dependents, the householder shall be entitled to hold exempt from creditor process real and personal property, or either, selected by the householder, including money or monetary obligations or liabilities due the householder, not exceeding $500 in value for each dependent. For the purposes of this section, "dependent" means an individual who derives support primarily from the householder and who does not have assets sufficient to support himself, but in no case shall an individual be the dependent of more than one householder.

**§ 34-6. How exemption of real estate secured; form to claim exemption of real property** In order to secure the benefit of the exemptions of real estate under §§ 34-4 and 34-4.1, the householder, by a writing signed by him and duly admitted to record, to be recorded as deeds are recorded, in the county or city wherein such real estate or any part thereof is located or, if such property is located outside of the Commonwealth, in the county or city in the Commonwealth where the householder resides, shall declare his intention to claim such benefit and select and set apart the real estate to be held by the householder as exempt, and describe the same with reasonable certainty, affixing to the description his cash valuation of the estate so selected and set apart. **However, if such real estate is claimed exempt in a case filed under Title 11 of the United States Code, the official Schedule of Property Claimed as Exempt filed in the United States Bankruptcy Court claiming such exemptions shall be sufficient to set apart such property as exempt.** Equitable as well as legal estates may be so selected and set apart. The following form, or one which is substantially similar, shall be used and shall be sufficient for the writing required by this section: . . . (Emphasis added)

**§ 34-14. How set apart in personal estate; form to claim exemption of personal property** Such personal estate selected by the householder under § 34-4, 34-4.1, or 34-13 shall be set apart in a writing signed by him. He shall, in the writing, designate and describe with reasonable certainty the personal estate so selected and set apart and each parcel or article, affixing to each his cash valuation thereof. Such writing shall be admitted to record, to be recorded as deeds are recorded in the county or city wherein such householder resides. **However, if such personal estate is claimed exempt in a case filed under Title 11 of the United States Code, the official Schedule of Property Claimed as Exempt filed in the United States Bankruptcy Court claiming such exemptions shall be sufficient to set apart such property as exempt.** The

following form, or one which is substantially similar, shall be used and shall be sufficient, when duly admitted to record in the county or city in which the householder resides, to exempt such described personal property from creditor process: . . . (Emphasis added)

**§ 34-21. When householder's right to exemption is exhausted** When an amount of property, whether real or personal, or both, has been set apart to be held by a householder as exempt under § 34-4, 34-4.1, or 34-13, such amount shall for a period of eight years from such setting apart be applied against the maximum amount to which the householder is entitled to set apart as exempt under § 34-4, 34-4.1, or 34-13.

# I. 2020 Virginia Law Updates

A. 2020 Legislative Session: House Bill 790 was signed into law on March 12, 2020 and became effective on July 1, 2020. It amended the following sections of the Virginia Code: 34-4; 34-6; 34-14; 34-17; and 34-21.

1. Sec. 34-4 Homestead exemption.

   *a) Arguably, one of the biggest changes in the practice of bankruptcy in many years. It opens the door for more debtors to file Chapter 7 in Virginia where there is some equity in their home and they cannot utilize another exemption to protect that equity.*

   *b) The amendment carved out a new exemption for real or personal property that the debtor or his dependent uses as a principal residence up to $25,000 in value, per individual debtor.*

2. Sec34-6 How exemption of real estate secured

   *a) Notably, it provides that the Schedule C filed with the United States Bankruptcy Court in a bankruptcy proceeding is a sufficient writing to claim the homestead exemption in real property.*

   *b) Any debtor seeking to protect real and/or personal property from creditor process outside of the Bankruptcy Court must still record a homestead deed in the land records of the county where the property is located.*

3. Sec.34-14 How set apart in personal estate

   *a) The official form Schedule C filed with the United States Bankruptcy Court in a bankruptcy proceeding is a sufficient writing to claim the homestead exemption in personal property.*

   *b) Again, for a debtor who has not filed a bankruptcy proceeding under Title 11 of the United States Code, the homestead exemption must be recorded in the land records to be operable to stop creditor process.*

4. Sec. 34-17 When exemption may be set apart; garnished wages

   *a) This amendment removed the requirement that a homestead deed for a debtor in a bankruptcy proceeding be recorded within 5 days after the meeting of creditors.*

   *b) Instead, the law now requires that the exempted property must be set apart under 34-6 or 34-14 any time before it is subject to sale under creditor process or by a trustee in bankruptcy or before it is turned over to the creditor, if such creditor process does not require sale of the property (i.e. wage garnishment).*

5. Sec. 34-21When householder's right to exemption is exhausted

   *a) A debtor's ability to use the homestead exemptions in real and personal property to set the assets apart from creditor process resets every 8 years*

# II. Homestead Deeds generally

A. Prior to 2020, homestead deeds were tracked from the initial filing through the current case and each ate away at a piece of the whole exemption under 34-4.

B. Starting in 2020, the lookback period was limited to 8 years prior to the filing of the current claim of exemption under 34-4.

1. However, the assertion of the exemption was no longer tied solely to the recording in the land records of the jurisdiction where the debtor resided.

2. Now, counsel needed to look not only to any recorded homestead deeds in the land records but also to Schedule C of any filing under the Bankruptcy Code.

3. Any Schedule C filed in a bankruptcy case within the eight years prior to the current claimed exemptions chipped away at the exemption and reduced the amount available to the debtor.

4. As a subsequent Chapter 7 filing would necessarily be 8 years or more after a prior Chapter 7 case, this made a green light for the exemption to reset by the time a Chapter 7 debtor would be eligible to file again.

5. The true issue was in the Chapter 13 that followed a Chapter 7 or another Chapter 13 (or a series of Chapter 13s) within the eight years after the initial Chapter 7 was filed.

6. The apparent solution for subsequent filings within the eight year period was to amend Schedule C of the prior filing under Chapter 13 to $0.00 under 34-4. Ideally, that amendment would be made immediately prior to dismissal of the earlier case to prevent exhaustion or depletion of the exemption and leave it available for the later case(s).

7. As counsel for debtors in any type of bankruptcy case, there should always be the feeling that you are building on any prior cases. That is truer than ever with the 2020 revisions to the exemption scheme and the potential that a prior case may have exhausted the exemptions available to your client in the imminent filing under Chapter 13.

# III. Real World Example

A. Attorney D filed a Chapter 13 Bankruptcy for Debtor E on March 1, 2023. Debtor E had a prior filing in August of 2020 that was dismissed in February of 2021. In the 2020 case, Debtor E had exempted $20,000 of her real estate and $4,500 in personal property on Schedule C. The case dismissed in December 2022 due to a default in plan payments and upon the Trustee's motion. Attorney D could offer no defense to the Trustees motion because Debtor E was unresponsive and further could not amend Schedule C to reduce the exemption under 34-4 down to $0.00. In the month leading up to filing of the 2023 case, Attorney D filed an amended Schedule C in the closed 2020 case reducing the exemptions asserted on Schedule C under 34-4 down to $0.00. The question becomes was that after the fact amendment to the 2020 case Schedule C sufficient to preserve the entirety of the 34-4 homestead exemptions for the 2023 filing?

1. Differing Perspectives

   *a) Trustee A takes the position that the exemption was partially exhausted in the 2020 case and that Debtor E was limited to the remainder of 34-4 available to her in the 2023 case without consideration of the post-closing amendment to the 2020 case's Schedule C as the 2020 case was closed and had not been reopened.*

   *b) Trustee B, on the other hand, chooses not to oppose the claimed full exemption of Debtor E in the 2023 case because exemption statutes are to be interpreted liberally in favor of debtors, Debtor E obtained no benefit from the claimed exemption in the 2020 case, there was no detriment to creditors as the 2020 case was dismissed, and no interest of justice would be served by holding the initial claim of exemption in the 2020 case against Debtor E.*

2. Judicial Opinions

   *a) To date, there are no published opinions on the post-2020 amendments to the homestead exemption under 34-4 so stay tuned.*