Chapter 13 from the Trustee’s Perspective- The Plan

Is the Debtor Above median?

1. Yes,
   a. The plan must be 60 months.
   b. The plan must pay line 45 of official form 22C-2 to the unsecured.
      i. May be reduced for a *Lanning* change in circumstances.
      ii. You should include the projected Plan payment on line 36, because you include the projected Plan payment on line 36, the Trustee fee is already calculated into the line 45 and therefore the Trustee fee must be paid in addition to the amount on line 45.

2. No,
   a. The term of the plan should be 36 months.
      i. If less than 36 months, the Plan must pay 100% to the unsecured creditors.
      ii. The plan can be extended up to 60 months, but only for cause.

What must be included in the plan?

1. Priority claims under 507 must be paid in full through the plan
   a. Pursuant to 1322(a)(2) may be paid differently with the agreement of the parties.
   b. DSO claims must be paid in full through the Plan, unless the plan provides for all of the debtors projected disposable income to be paid over a 5-year period.
   c. You cannot pay interest on any non-dischargeable priority claims, unless you pay all of the unsecured claims in full 1322(b)(10).

2. Secured Claims: The plan must state at least one of the following:
   a. The Debtors will pay through the plan.
      i. Specify an interest rate based on *Till*
      ii. Do not include the regular monthly payment on Schedule J
   b. The Debtors will pay direct.
      i. (Any Arrearage must be objected to or paid through the Plan),
      ii. If the creditor has a claim that does not need to be paid back until during the course of the Plan, then the Plan should state it will be paid directly pursuant to the terms of the contract,
   c. The Debtors are surrendering the underlying property to the Secured creditors. (provide the Creditor time to file an unsecured claim)

3. Unsecured Creditors should be paid at least the greater of the following:
   a. The amount listed on line 45 of the official form 22C-2
   b. Liquidation analysis

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c. All Plans should be Pot Plans. The 7th Circuit has a general disfavor for percentage plans. The only percentage plan that should be used is 100%. The 7th Circuit indicated that plans which are proposed as Percentage Plans may run afoul of the good faith provisions. *In re Witkowski*, 16 F.3d 739, (7th Cir. 1994)

4. Trustee Fee:
   a. Calculate the Trustee Fee at 10%
   b. Total all amounts included in the Plan and multiply by 1.1111111111

5. Student Loans:
   a. Are general unsecured creditors
   b. Since the obligation is not dischargeable, interest will continue to accrue
   c. You are not allowed to unfairly discriminate in favor of a student loan and against the other general unsecured creditors.
   d. You cannot pay interest on any student loan claims, unless you pay all of the unsecured claims in full 1322(b)(10)

6. Additional language
   a. Tax language (all cases):
      “The Debtor(s) shall submit their Federal and State Tax Returns to the Trustee each year. The Debtor(s) shall turnover their Federal and State Tax refunds each year.”

   b. 100% language (in cases where the claims bar date has not passed):
      “The Plan shall pay 100 percent of the timely filed unsecured creditor’s claims. In the event that it pays less than 100 percent of the timely filed unsecured claims, after the expiration of the Claims Bar Date, the Debtor shall file a Motion to Modify the Plan.”

   c. Bonuses (in cases where the Debtor has received Bonus, except where Official form 22C-2 takes into account the bonuses received in the 6 months prior to filing and the bonus remains consistent over the life of the Plan):
      “Within 14 days of the receipt of any bonus, the Debtors shall turnover 100% of the bonus received by the Debtor during the pendency of the Debtor’s Plan. The additional amount shall be used to increase the pro rata payment to the unsecured creditors, up to 100%”

Can the vehicle payment be made directly by the Debtor?

The Debtor may make direct vehicle payments, if a payment, according to the original terms of the contract, would become due after the conclusion of the Plan. All other vehicles, that are owned and paid for by the Debtor(s), should be paid by the Trustee through the Plan.
What are the benefits of paying a Secured creditor through the Plan?

1. Payments are made monthly by the Trustee. You are able to track the amount paid by your Debtors to the Trustee and the amount paid from the Trustee to the secured creditor.
2. If the Debtor becomes delinquent the Trustee is involved in any Motion for Relief from Stay that gets filed. The Trustee may allow for more beneficial repayment terms that could include spreading the delinquency over the remainder of the Plan.
3. Till interest rate can be used.
   a. Calculated by adding 1 or 2 to the Prime rate. (prime is currently 3.75%)
   b. Cannot be used on a mortgage for the Debtors primary residence.
   c. Typically must pay the entire debt through the Plan.
   d. Currently if the Debtor is paying more than 14.75% interest the Till rate should save the Debtor money.
4. If the vehicle is paid outside of the plan, the Trustee will request that the Debtor increase their monthly payments after the vehicle loan has been completed, depending on the amount listed on line 23(c) of Schedule J.

When does the Trustee require an increase in plan payments?

1. An increase in the monthly plan payments will be required in the following situations:
   a. 401K loan is paid off prior to the completion of the plan,
   b. Vehicle loan (if being paid directly by the Debtors) is paid off prior to the completion of the plan, and
   c. Other direct payment concludes during the course of the Plan.

How can I tell if my plan is feasible?

1. Line 23(c) of Schedule J projects what the Debtor can afford on a monthly basis.
2. If line 23(c) of schedule J is less than the debtors monthly plan payment the plan is not feasible.
3. The debtors monthly plan payment should be the same amount as the net available on schedule J.
4. Schedule J and the official form 22C-2 are different calculations and the debtor may not be able to afford the payment required by the official form 22C-2, but that is the amount that must be paid to the unsecured creditors.

What is the liquidation analysis?

1. In a Chapter 13 case the unsecured creditors must receive at least what they would through a hypothetical chapter 7.
2. In order to determine the amount that must be paid to the unsecured creditors you must perform a liquidation analysis.
3. The test is as follows:
   Value of the Property
   – the cost of sale (there is no cost of sale for property that is already liquidated)
   – perfected security interests
   – claimed exemptions
   – Hypothetical chapter 7 Trustee fee.
   = the amount that must be paid to the unsecured creditors through the Plan.

When and how can my client make payments?

1. First payment must be made within 30 days of the date of filing. (If you don’t have a plan on the date of filing, the first payment should be the amount listed on line 23(c) of schedule J.

2. Four forms of payment are available
   a. Wage Order - payments are taken directly from the Debtors wages, based on an order from the Court.
   b. ACH – payments are taken directly from the Debtors bank account, can only be taken out on the 5 and/or the 17. Requires an agreement to be signed and sent to the Trustee.
   c. Direct – payments are mailed directly to a lockbox in Tennessee. Must be in the form of money order or cashier’s check.
   d. ePay – Debtor initiates a payment on the internet. Money is paid directly from the Debtors bank account. Debtor can schedule a few payments in advance. The bank charges a small fee, (less than the amount to get and mail a cashier’s check or money order

3. If the Debtor fails to make the first payment, the Trustee will file a wage order pursuant to 11 U.S.C §1325(c)

Other notes:

- Monthly plan payments must be at least $160.00 per month for 36 months to receive the full “no-look” attorney fee.
- When “Stripping” or avoiding a lien, the lien becomes an unsecured creditor.

Noteworthy opinions:

401(K) Loan Repayment

*In re Brann,* (Bankr. C.D.III. August 9, 2011, Judge Fines) - The Debtors took a deduction on both the B22C and Schedule I for the full amount of their two monthly 401(K) loan repayments. The Trustee objected to the Plan on the grounds that the Plan failed to provide the Debtors full disposable income after the 401(K) loans were repaid. The Court followed *In re Noll,* 2010 WL 5336916 (Bankr. E.D. Wis 2010) and *In re Seafort,* 437 B.R. 204 (B.A.P. 6th Cir. 2010) where
the Courts determined that “As soon as the loan is satisfied, the shield provided by 11 U.S.C. § 1322 is removed, and the funds which had been used to make the 401(K) loan payments must become available to the unsecured creditors.”

**Windfalls received during the Plan**

*In re Baker*, (Bankr. C.D.Ill. November 28, 2012, Judge Fines) – The Debtor received a one-time bonus during the 2011 tax year. The Trustee filed a Motion to Dismiss for failing to report the bonus to the Trustee in a timely fashion. The Court reviewed §1306(a)(1) and (2) to determine that the one-time bonus is an asset of the estate and that the bonus represented an unforeseeable change to the Debtors circumstances. The Trustee’s Motion to Dismiss was denied and the Debtor was order to file a Motion to Modify to provide for the payment of the value of his 2011 bonus to the unsecured creditors.

**Old Car Deduction**

*In re VanDyke*, 450 B.R. 836 (Bankr. C.D. Ill. May 12, 2011, Judge Perkins) – An above median Debtor filed a chapter 13 case and claimed a deduction on line 27 of the B22C in the amount of $200.00 for a vehicle that was more than 6 years old and/or had more than 75,000 miles. The Court looked to *Ransom v. FIA Card Services, N.A.*, and noted “that a debtor who does not make loan or lease payments may not take the ownership deduction, as it is not ‘applicable to the Debtor’ because of that type of expense will not be incurred during the term of the plan.” *VanDyke* at 840. The Court rejects the use of the IRS Guidelines to establish a basis for the additional operating expense. “any deviation from the overarching policy that Chapter 13 debtors are to repay creditors the maximum they can afford should be based upon some explicit congressional direction” *Id* at 842. “After Ransom such an expense cannot be ‘applicable’ if it is not incurred.” *Id* at 844.

**Inheritances**

*In re Melvin*, (Bankr. C.D.Ill. April 6, 2011, Judge Fines) – The Debtors had an interest in an Estate. The Trustee objected to the Plan and sought the turnover of the value of the inheritance minus the exemption received in the inheritance. The court reviewed §1325(a)(4) and determined that the inheritance was in fact income that must be paid into the Debtors’ Plan.

*In re Johnson*, (Bankr. C.D.Ill. May 16, 2011, Judge Fines) – the Debtor provided for the turnover of the proceeds, that they were to receive from an Estate. After the Plan was confirmed, the Debtors disclaimed their interest in the Estate and sought the reconsideration of the confirmation of the Plan. The Court looked to §541to determine that “every conceivable interest of the Debtor, future, nonpossessory, contingent, speculative and derivative, is within the reach of the §541.” The Court found that the disclaimer was void as it violated the clear terms of the confirmed Plan.
**Student Loans – unfair discrimination.**

*In re Perrine*, 2001 WL 34076434 (Bankr. C.D.Ill, July 13, 2001, Judge Perkins) – Debtor proposed to pay $50.00 to the U.S. Department of Education outside of the Plan. After reviewing the Debtor’s Plan, the court determined that the Debtor would be paying 4% to unsecured creditors through the Plan and would be paying 60% to his student loans. “A government made or insured student loan, although nondischargeable, are not accorded priority status under 11 U.S.C. § 507. They are properly classified as general unsecured claims. As such, their disparate treatment is presumptively unfair and the debtor has the burden of proving otherwise.” *Id* at 5. If you were to combine the direct payment with the payment made through the Plan, the unsecured creditors would receive 13% of their claims. The disproportionate treatment within the same class required confirmation of the Plan to be denied.

**Motion for Relief, requires an Order that Modifies the secured creditors claim in order to discharge debt being paid directly by the Debtor.**

*In re Bryant*, (Bankr.C.D.Ill. March 10, 2010, Judge Fines) – The Confirmed Plan provided for the payment of the arrearage claim for the vehicle through the Plan, and the payment of the ongoing secured claim by direct payments. The Debtor failed to maintain the direct payments and a Motion for Relief From Stay was granted. After the Motion for relief was granted the Debtor did not modify her plan or file an objection to the secured creditors claim. The Court reviewed §§1322, 1327, 1328, and 1329. The Court held that once the Plan was confirmed, the Debtor and the Creditors were bound to the terms of the Plan and the Debtor was obligated to pay the remaining payments to the secured creditor as they became due. The Debtor and the Creditor are able to change the Plan if there is a change in circumstances, through §1329. The Debtors treatment of the Creditors secured claim under §1325 and her failure to effect any change prior to her discharge meant that her debt to the secured creditor was excepted from discharge.

**Above Median Debtor – Applicable Commitment Period**

*In re Martin*, (Bankr. C.D. Ill. January 24, 2012, Judge Perkins) – An above Median debtor filed a Plan proposing a $150.00 per month payment for 3 years. Line 59 of the B22C was negative and line 19(c) of Schedule J was $150.01. The Debtor had a projected decrease in her income due to the loss of her maintenance payments from her ex-husband. Creditor (ex-husband seeking a refund of an overpayment on the maintenance award) objected to confirmation on the basis that the Debtor must propose a 60 month Plan. The Court indicated that a debtor’s “best efforts” are expected for the duration of the Plan and that if a debtor wished to pay their creditors as little as possible, or who wish to avoid working for the benefit of their creditors should not file chapter 13 and instead seek relief under chapter 7. Following the opinions in *Baud, Tennyson, Fredrickson*, and *Kagenveama*, the Court held that the “applicable commitment period” establishes a temporal or durational Standard and further followed *Baud* and *Tennyson* to hold that a 60 month plan is required even with a negative or zero projected
disposable income. The Court indicated that a loss of income under *Lanning* is properly taken into account to determine projected disposable income, but should be ignored in the determination of applicable commitment period.

An above median Debtor filed a Plan proposing 36 monthly payments of $150.00. Line 59 of the Debtors B22C was negative $113.65 and line 19(c) of schedule J was $85.29. Trustee objected to confirmation of the Plan on the grounds that an above median Debtor must propose a 60 month plan. Judge Fines reviewed his previous decision in *In re Andres*, (Bankr. C.D.Ill, August 2, 2011, Judge Fines), Judge Gorman’s opinion in *In re Burrell*, 2009 WL 1851104 (Bankr.C.D.Ill. 2009), and Judge Perkins’ opinion in *In re Martin*, (Bankr. C.D. Ill. January 24, 2012, Judge Perkins) and held that an above median Debtor is required to propose a 60 month Plan.

**Stripping of Second Mortgage**

*In re King*, 290 B.R. 641, (Bankr. C.D.Ill. March 5, 2003, Judge Perkins) – Debtors sought to strip-off the second mortgage. The Court found that strip-off of the wholly unsecured mortgage is permitted in a chapter 13. Contested matters are properly resolved through the Confirmation process. The Court found that the strip off determination is one of valuation and not one validity priority or extent of a lien. In order to accomplish the strip-off through the confirmation process, the plan must include specific terms. The basis must be a lack of collateral value, the plan must sufficiently put the creditor on notice that its lien will be lost. A provision that was found to be sufficient named the creditor, identify the mortgaged real estate, expressly proposed to void the creditors mortgage and treat the claim as unsecured, and stated the basis was a lack of equity in the property’s value that exceeded the first mortgage. Lastly, the Court stated the avoidance of the lien is contingent upon discharge.

**Duty to Investigate**

After granting the Chapter 7 Trustee’s objection to discharge, Judge Gorman entered an order to show cause for Debtor’s counsel to explain the failure to disclose the Debtor’s structured settlement payments in her Chapter 7 petition. Debtor’s counsel stated the Debtor’s petition was inadequately filled out because she did not provide enough information or ask to speak to an attorney. The Debtor’s client intake sheet and testimony by a staff member from Debtor’s Attorney, however, showed that the Debtor had provided everything that she was asked for by the firm and had disclosed the asset. The firm’s staff simply failed to include the payments in the petition. Debtor’s counsel indicated that he reviews the petitions before signing them but does not look at the client intake sheet. Judge Gorman suspended Debtor’s counsel’s central district ECF privileges for 6 months, finding that the duty of reasonable investigation requires an attorney to ask for more than the firm requested and do more than rely on paralegals to accurately fill out the Debtor’s petition.