

CHAPTERS 7 & 13 ISSUES

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Determining Which Chapter to File

[Barriers to Relief (BAPCPA)]

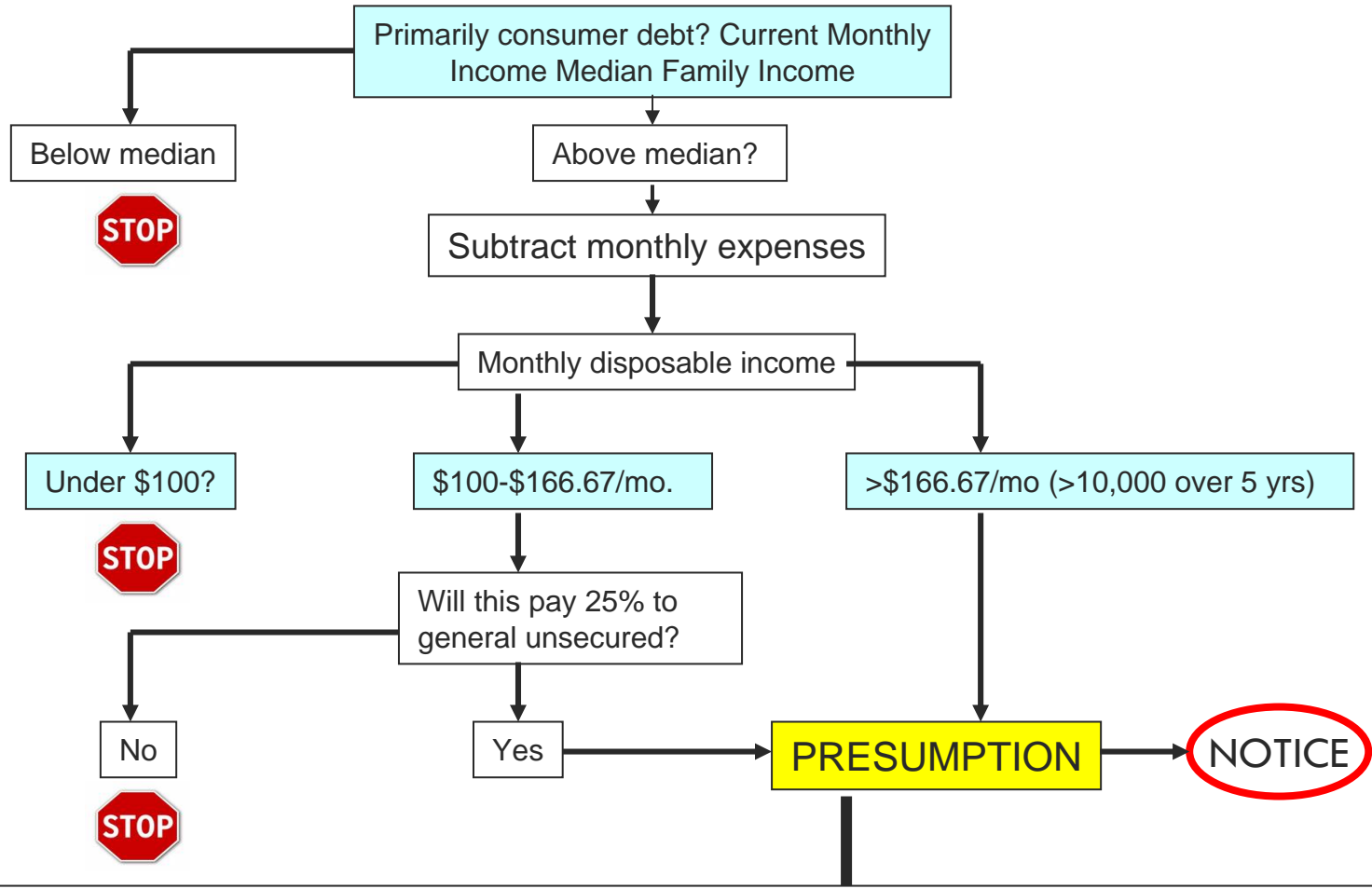
- Mandatory pre filing credit counseling for all individuals
- Means test for Chapter 7 abuse
- Notices concerning criminal penalties, valuation standards and DOJ audits
- Increased cost of attorneys fees, filing fees
- Financial education required for discharge

[Chapter 7 or Chapter 13?]

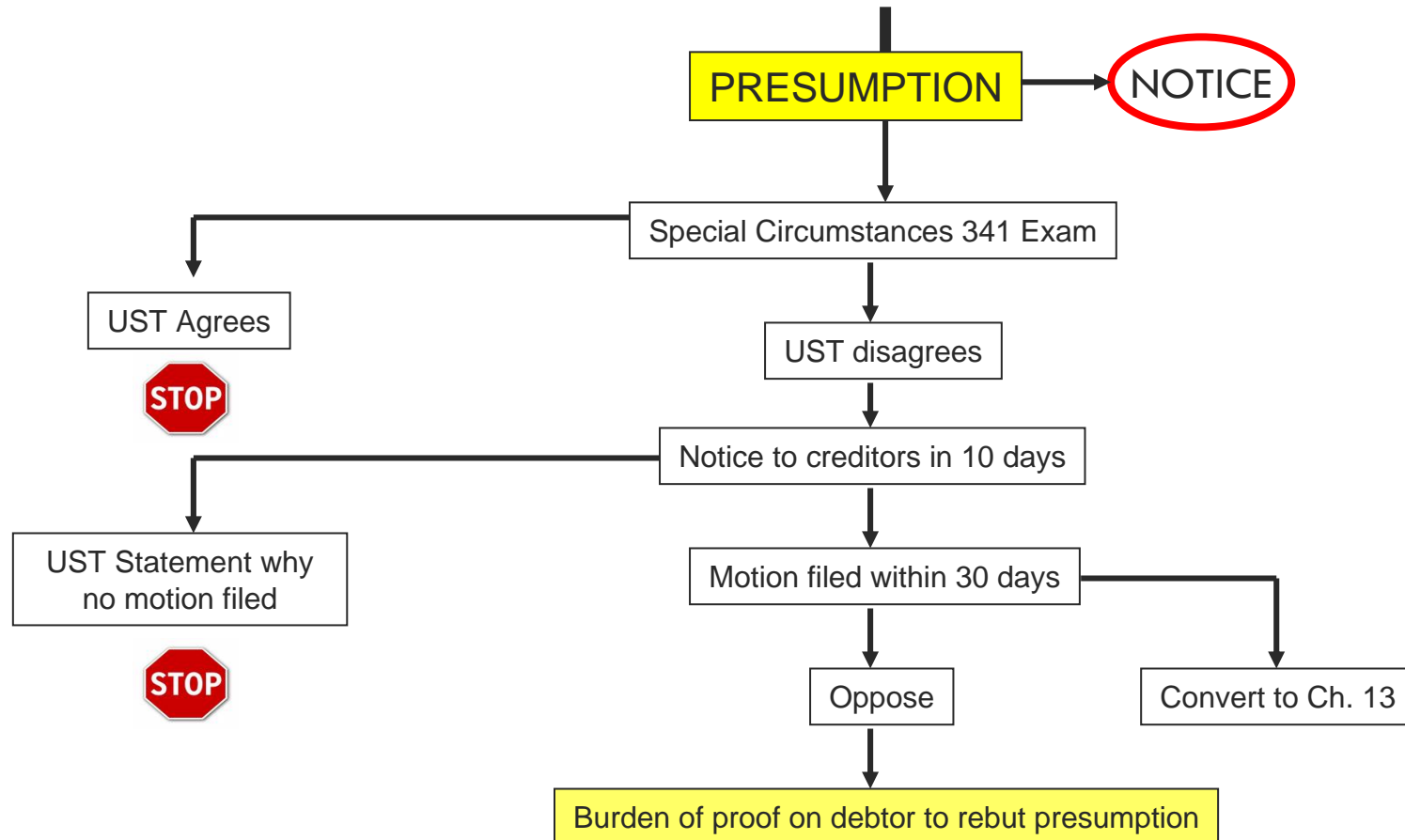
■ §101

- First, determine if debts are mostly consumer debts
- If Not, go directly to chapter 7
 - Do not have to pass the means test
 - The means test does not apply to those whose debt is *primarily* business debt or taxes, business or personal.
- If mostly consumer debts, go to Means Test

How the Means Test Works



[Means Test...]



Eligibility To File or Eligible For Discharge?

SYNOPSIS	Can File?	Discharge Ch. 7?	Discharge Ch. 13?	Comments
Ch. 7, w /in 180 days and DISMISSED	NO	No – § 109 (g)	No – § 109 (g)	The dismissal has to be either: (1) willful failure to abide court orders; or (2) voluntarily dismissed after stay relief requested.
Ch. 7, w /in 180 days and DISCHARGED	YES	No. – § 727 (a)(8)	No - § 1328 (f)(1)	Gives the client time to gather retainer.
Ch. 7, 181 days to 2 years and DISCHARGED	YES	No – § 727 (a)(8)	No – § 1328 (f) (1)	Rule of thumb – if less than 2 years, bankruptcy is not for discharge, but may be sued for right to reinstate mortgage and obtain stay.
Ch. 7 or 11, w /in 2-4 years and DISCHARGED	YES	No – § 727 (a)(8) ³	No – § 1328(f)(1) ⁴	In Ch. 13, the two years is measured from filing date of old case to filing date of new case.
Ch. 7 or 11, w/in 4+ to 8 years and DISCHARGED	YES	No - § 727 (a)(8)	Yes - § 1328(f)(1)	In Ch. 13, filing to filing is measurement.

Table prepared by; Robert C. Meyer, Esq.

Eligibility To File or Eligible For Discharge?...

SYNOPSIS	Can File?	Discharge Ch. 7?	Discharge Ch. 13?	Comments
Ch.7 or 11, more than 8 years and DISCHARGED	YES	Yes - § 727 (a)(8)	Yes - § 1328(f)(1)	Commencement from old case to date of filing new case must be 8 years under § 727 (a)(8)
Ch.12 or 13, w/in 180 days and DISMISSED	NO	No - § 109(g)	No - § 109(g)	The dismissal has to be either: (1) willful failure to abide court orders; or (2) voluntary dismissed after stay relief requested.
Ch.12 or 13, 181 days to 2 years	YES	No - § 727 (a)(9) ¹	Yes - § 1328(f)(2)	Still can file – but NO discharge. Use to save the house or more importantly obtain a stay – but know the exceptions to the stay rule.
Ch.12 or 13, 2+ to 6 years	YES	No - § 727 (a)(9) ²	Yes - § 1328(f)(2)	Looks like 13 is the only Chapter to think about.
Ch. 12 or 13, 6-8 years	YES	Yes - § 727 (a)(9) ³	Yes - § 1328(f)(2)	Measurement is from date of commencement of old case to filing date of new case.

[Current Monthly Income]

- **Definition**

- Average of past six months of income from all sources §101(10A)

- **Excludes**

- Social Security
- Payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and
- Payments to victims of international terrorism

[Current Monthly Income ...]

- CMI x 12 compared to median household income for like families in state
 - U.S. Census Bureau 2006 Puerto Rico Community Survey
 - 1 earner family \$20,425
 - 2-person families \$16,643
 - 3-person families \$21,640
 - 4-person families \$25,404
 - 5-person families \$24,838
 - 6-person families \$21,024
 - 7-or-more-persons fam. \$23,145

[Allowable Deductions to CMI]

- IRS allowances for
 - Food
 - Clothing
 - Personal care
 - Housekeeping and
 - Transportation and/or vehicle operations
- Taxes
- Mandatory payroll deductions
- IRS housing allowance used for renters, by state and county

[Deductions to CMI...]

- IRS non mortgage allowance for utilities used for homeowners
- Other necessary expenses: health care, life insurance, child care
- Education of expenses of minor children

[Deductions to CMI-Chapter 13]

- “Hypothetical” chapter 13 expenses deductions
 - Secured debt payments due in 60 months
 - Arrears on secured debts
 - Priority claims
 - Chapter 13 trustee expenses
 - Attorneys fees for ch.13

[CMI, Median Income and Ch. 13]

- §1325(b)(2)
 - CMI excludes child support
- §1325(b)(4)
 - Debtors under median income - 3 year commitment period
 - Debtors over median income - 5 year commitment period

[Disposable Income in Ch. 13]

- § 707:
 - Disposal income calculation
 - Repayment of retirement loans expressly excluded from disposable income §1322(f)
 - Plan must pay to unsecured creditors the monthly disposable income x the number of months in the commitment period

[Debt Relief Agents (DRA)]

- Those counseling “Assisted Persons” (§ 101(3)) are Debt Relief Agents (§ 526)
- DRA’s must provide specified notices and “execute” a contract with an “Assisted Person” within 5 business days of providing assistance
- DRA prohibited from providing certain advice
- DRA must include identification as DRA in ads

Benefits and Disadvantages of Chapters 7 & 13

Benefits	Ch. 7	Ch. 13
Credit Report may show debts repaid?	No	Yes
Avoids foreclosure because of past due mortgage payments?	No	Yes
Avoids repossession because of past due auto payments?	No	Yes
Keep non-exempt property	No	Yes
Restructure past due IRS taxes	No	Yes
“Cram down” amount owed to collateral value?	No	Yes
Disadvantages		
Future payments required?	No	Yes
Proof of income necessary?	No	Yes
Monthly trustee fee?	No	Yes
Court supervision of monthly living allowance?	No	Yes



Filing in Bankruptcy Court

[The Filing Process]

- Determine which chapter of the bankruptcy code the debtor can use
- Steps after determining the proper Chapter filing
 - Mandatory credit counseling
 - File petition, schedules, & statement of financial affairs with the court
 - Mandatory meeting with the trustee

[The Filing Process...]

- Time for objections by creditors and trustee
- Financial management course
- Discharge

[Filing Process...]

- Chapter 13 Cases -- Additional Requirements
 - File a "Plan" of repayment
 - Plan confirmation hearing
 - The debtor's plan payments
 - Debtor's discharge.

Debtor's Duties

Section of Code – 521(a)(1)	Translated into English
(B)(i) a schedule of assets and liabilities	Schedules A-H
(B)(ii) a schedule of current income and current expenditures	Schedules I & J
(B)(iii) a statement of the debtor's financial affairs and , if section 342 (b) [1 1 USCS § 342(b)] applies, a certificate	Statement of Financial Affairs
(B)(iv) copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor	New Form which attaches copies of Pay stubs
(B)(v) a statement of the amount of monthly net income, itemized to show how the amount is calculated	
(B)(vi) a statement disclosing any reasonably anticipated increase in income or expenditure over the 12-month period following the date of the filing of the petition	Schedule I bottom portion

Table prepared by; Robert C. Meyer, Esq.

[Debtor's Duties...]

Section of the Code – 521(a)(2)	Translated in English
(2)(A) within thirty (30) days after the date of the filing of a petition under Ch. 7 of this title [11 USCS § 701 et seq.] or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court decides.	Statement of Intention A Form
(B) within thirty (30) days after the first date set for the meeting of creditors under section 341(a) [11 USCS § 341(a)], or within such additional time as the court, for cause, within such 30-day period fixes	Reaffirm or Redeem or Surrender

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Deadlines for Chapter 13 Filing

DATE	ITEM REQUIRED
Filing	Bare Bones Petition, Matrix, Filing fee, and initial financial counseling completion form
5 days	Wage deduction order
15 days	All schedules, B22 forms, statement of payment advices. If business, fill out trustee's business forms
20 days	Tax documents to trustee and creditors; pay stubs, bank statements to trustee
23 days	Schedules to any creditor that requested the same
29 days	Tax documents to Creditor that requested the same. If creditor – deadline to file objection to confirmation
30 days	First Payment on the Plan
30 days	341 meeting

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[Deadlines...]

DATE	ITEM REQUIRED
50 days	File fee application
50-53 days	LF – 67 ready for confirmation – earlier is better
59 days	Call trustee about confirmation
60 days	Confirmation
30-60 days	Complete financial counseling [GOOD IDEA TO DO JUST BEFORE 341 meeting]
90 days	Deadline to object to Discharge
120 days	Deadline to file proof of claim (if applicable)
Annually	Tax returns to trustee if required

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Dismissal and Conversion Issues

[Conversion vs. Dismissal]

- §349 (b)
- Both can be of significant consequence to a debtor and the creditor of the estate
 - Conversion to Ch. 7
 - The case continues and the debtor can **probably** look forward to a discharge
 - Dismissal of case
 - The parties will be restored to the positions they held prior to the bankruptcy filing
 - Debtor is **not** discharged

[Dismissal or Conversion]

- Motion may be filed by any party in interest
- Only against debtors whose debt is primarily consumer debt
- Abuse is presumed under the “means test formula”
 - National Standards are less than actual expenses

[Abusive Filing of Bankruptcy]

- §707 (b) - Abuse is presumed if:
 - i) The debtor's aggregate CMI over 5 yrs., minus certain statutorily allowed expenses, is more than (i) \$10,000, or
 - (ii) 25% of the debtor's non priority unsecured debt, as long as that amount is at least \$6,000

[Abusive Filing of Bankruptcy]

- Presumption of abuse arises if debtor can fund a Chapter 13 at statutory minimum
- Those with current monthly income (CMI) below state median protected from presumption of abuse

[Case Conversion]

- §1307(a) – Voluntary conversion to Ch. 7
 - Must qualify - absolute right - no restrictions

- §1307(b) – Voluntary dismissal by debtor
 - absolute right – no restrictions

- §1307(c) – Involuntary conversion to Ch. 7 or dismissal for cause
 - Court's discretion

- Court **may not** convert from Ch. 7 to Ch. 13 without the consent or request of the debtor
 - Debtors must qualify (e.g. must have disposable income)

Causes for Dismissal or Conversion – Ch. 13 Case

- Defined by §1307(c)
 - Debtor's unreasonable delay prejudicial to creditors
 - Nonpayment of fees and costs
 - Failure to file the plan in a timely manner
 - Failure to begin making timely payments within 30 days of the filing

[Causes...]

- Denial of confirmation of plan or modified post-confirmation plan
- Material default on the terms of a confirmed plan
 - Failure to maintain payments under the plan
- Revocation of plan; denial of modification
- Termination of plan without completion of payments

[Causes...]

- Failure to comply with §521(1)
 - List of Creditors
 - Schedules
- Failure to comply with §521(2)
 - Statement of Intention to retain or surrender assets that secure consumer debts
 - Statement of Intention for exempt or redeemed property (when applicable)
 - Statement to reaffirm the debt secured by the property
- Failure to pay a domestic support obligation
- Failure to file tax returns

[Other Causes]

- Additional causes that may trigger conversion or dismissal under §1307.3.5:
 - Bad faith
 - Ineligibility for Chapter 13
 - Aggregating causes
 - When a single factor does not provide sufficient cause, totality of causes may justify relief



Dischargeability of Debt

[Dischargeable or Not in Ch. 7?]


Dischargeable	Possibly Dischargeable	Not Dischargeable
Personal loans	Property settlements or division of debts in divorce	Recent taxes
Credit cards	Willful and malicious injuries to others	Trust fund taxes
Repossession deficiencies	Embezzlement	Child or family support
Auto accident claims	Debts incurred by fraud or dishonesty	Criminal fine or restitution
Judgments	Debts arising from breach of fiduciary duty	Auto accident claims involving intoxication
Business debts	In order for these debts NOT to be discharged, creditors must ask the court to make a determination about them. Without a request from the creditor and a granting of that request by the court, these types of debts will be discharged.	Debts not scheduled
Leases		Penalties payable to the government other than tax penalties
Guaranties		Student loans
Negligence claims		Debts listed in prior bankruptcy where debtor was denied a discharge

[Dischargeable Debts in Ch. 13]

- A Chapter 13 discharge affects **only** those debts provided for by the plan
- Granted upon completion of plan
- Any debts not provided for in the plan **will remain**
 - Debtor will have to pay them in full, even after discharge.

Exceptions to Discharge of Debts in Ch. 13

- Additional exceptions to discharge of debts
 - Claims for spousal and child support
 - Educational loans
 - Drunk driving liabilities
 - Criminal fines and restitution obligations
 - Certain long-term obligations, such as home mortgages, that extend beyond the term of the plan



Requirements of a Chapter 13 Plan

Ch. 13 Mandatory Plan Requirements

- §1322
 - Submission of future earnings or future income to the trustee
 - Provide disposable income
 - Payment of liquidation value

[Mandatory Plan Requirements...]

- Full payment of priority claims, unless the holder of the claim agrees to different treatment
 - Adequate protection
 - Modify the rights of secured claim holders other than those secured only by real property that is debtor's principal residence

[Ch. 13 Permissive Provisions]

- Plan no longer than 3 years unless the court approves a longer period
 - **Maximum 5 years**
- Classification of claims
 - Same treatment for each claim within a class
 - Absolute Priority Rule

[Ch. 13 Permissive Provisions...]


- Curing default, including curing default and maintaining payments on long-term debt
- Assume or reject executory contracts or unexpired leases

[Ch. 13 Plan – Proof of Claim]

- A creditor must file a proof of claim with the court
 - Sets forth the amount owed by debtor at the moment of filing.
 - Without it, payment cannot be received in a bankruptcy case.
 - Amendments must be made prior to payment or confirmation of the plan.

[Proof of Claim...]

- The proof of claim:
 - Must be filed within 90 days after the first meeting with the creditors
 - Must be accompanied by evidence of the debt or security interest
 - Is allowed unless it is objected

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How to Compute a Chapter 13 Plan

[Computing a Chapter 13 Plan]

- Main factors
 - Liquidation value of the estate
 - Analysis for determining net asset value
 - Disposable income
 - Length of time using best effort
 - Payments received by the creditors must exceed what they would receive if the debtor filed a Chapter 7 plan.

[Liquidation Value of the Estate]

- Definition:
 - Current market value of the estates assets after allowance of secured debts.
- Purpose:
 - To determine the value that must be distributed under the plan.
- Formula:
 - **Assets** – **Liens and Exemptions** – **Costs** = **Liquidation Value**

[Disposable Income]

- Definition
 - Funds debtor has available that are not required for living expenses.
- Debtor must have a steady income

[Pointers for Computing a Plan]

- Unsecured creditors get paid **from the beginning** - §1325(b)(1)(B)
- Secured creditors must be cured in **equal monthly payments**, or surrender the collateral or adequate protection - §1325(a)
- Without motion, plan **cannot** exceed **3 years** for those **below** Family Median Income - §1322(d)(2)
 - 5 years if approved by the court for cause
 - If the debtor's CMI exceeds Median Family Income, a 60-month plan would probably work best

[Pointers...]

- The amount paid to creditors **must** exceed the liquidation amount - §1325(a)(4)
- The amount paid to unsecured creditors **must** exceed **CMI** (months required by plan) – 1325(b)(1)
 - e.g. – If CMI is \$250 and the plan time is 60 months, amount paid to unsecured creditors = \$15,000
- Good faith – §1325(a)(3) & 1325(a)(7)
- Keep up to date with court obligations - §1325(a)(8)
- File tax returns - §1325(a)(9)



Post-Confirmation Default

[Post-Confirmation Default]

- §1307(c)(6)
 - Material Default – cause for conversion of dismissal
 - Failure to comply with payments to trustee
 - Failure to comply with domestic support obligations
 - Failure to comply with payments related to secured debts, as proposed in plan
 - Failure to file tax returns
 - Bad faith ruling

[Default...]

- Procedure
 - Trustee files *Notice of Delinquency*
 - The Debtor cures default or moves for some kind of relief
 - In debtor does not cure default, the case will be dismissed without a hearing
 - Motion to Vacate Dismissal pursuant to Local Rule 9013-1(E)(3)(A)

[How to Cure Default]

- §1329 – Modification of Plan after Confirmation
 - Plan may be modified if debtor circumstances change and there is a decrease in income
 - Modification of Plan cannot extend plan over 60 months
 - Modified Plan must comply with confirmation requirements
 - New proof of claim is required if related to cure post confirmation payments to creditors

Revocation of an Order of Confirmation

- §1330(b)
 - If the court revokes an order of confirmation
 - Court shall dispose of this title, unless, within the time fixed by the court, the debtor proposes and the court confirms a modification of the plan under §1329



Post-Petition Debt

[Post Petition Debts]

- Definition
 - Any debt incurred after the filing of the bankruptcy.
- Post petition charges are not under the jurisdiction of the bankruptcy
 - Therefore, are **not** dischargeable
- The post petition dollar amount can be collected without violation of the automatic stay.

[Post Petition Claim]

- A post petition claim may not be paid and discharged in a chapter 13 case unless **all** of the following is true:
 - The plan provides for post petition claims
 - The claim is a tax claim (§1305), or a claim for a consumer debt necessary for the performance of debtor under the plan and meets §1305(c) requirements
 - The entity holding the claim files a proof of claim

- §368(d) If the debtor converts and had engaged in debt between the filing date and the conversion date, the debt is treated as though it was prepetition

THANK YOU

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