

**The Honorable Tamara O. Mitchell
Consumer Judges Panel 2012**

*25TH Annual Seminar of the Alabama State Bar Bankruptcy and Commercial Law Section
June 8 - 9, 2012*

UNITED STATES BANKRUPTCY COURT		PROOF OF CLAIM
Name of Debtor:	Case Number:	
NOTE: Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.		
Name of Creditor (the person or other entity to whom the debtor owes money or property):		
Name and address where notices should be sent:		COURT USE ONLY
Telephone number: _____ email: _____		☐ Check this box if this claim amends a previously filed claim. Court Claim Number: _____ (If known) Filed on: _____
Name and address where payment should be sent (if different from above):		☐ Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.
Telephone number: _____ email: _____		
1. Amount of Claim as of Date Case Filed: \$ _____ If all or part of the claim is secured, complete item 4. If all or part of the claim is entitled to priority, complete item 5. ☐ Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.		
2. Basis for Claim: _____ (See instruction #2)		
3. Last four digits of any number by which creditor identifies debtor: _____	3a. Debtor may have scheduled account as: _____ (See instruction #3a)	3b. Uniform Claim Identifier (optional): _____ (See instruction #3b)
4. Secured Claim (See instruction #4) Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information.		
Nature of property or right of setoff: ☐ Real Estate ☐ Motor Vehicle ☐ Other Describe: _____ Value of Property: \$ _____ Annual Interest Rate _____ % ☐ Fixed or ☐ Variable (when case was filed)		Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any: \$ _____ Basis for perfection: _____ Amount of Secured Claim: \$ _____ Amount Unsecured: \$ _____
5. Amount of Claim Entitled to Priority under 11 U.S.C. § 507 (a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.		
☐ Domestic support obligations under 11 U.S.C. § 507 (a)(1)(A) or (a)(1)(B).	☐ Wages, salaries, or commissions (up to \$11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. § 507 (a)(4).	☐ Contributions to an employee benefit plan – 11 U.S.C. § 507 (a)(5).
☐ Up to \$2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. § 507 (a)(7).	☐ Taxes or penalties owed to governmental units – 11 U.S.C. § 507 (a)(8).	☐ Other – Specify applicable paragraph of 11 U.S.C. § 507 (a)(____).
Amount entitled to priority: \$ _____		
<i>*Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.</i>		
6. Credits. The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #6)		

7. Documents: Attached are **redacted** copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. If the claim is secured, box 4 has been completed, and **redacted** copies of documents providing evidence of perfection of a security interest are attached. (See instruction #7, and the definition of “**redacted**”.)

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

8. Signature: (See instruction #8)

Check the appropriate box.

- ☐ I am the creditor. ☐ I am the creditor’s authorized agent.
(Attach copy of power of attorney, if any.) ☐ I am the trustee, or the debtor,
or their authorized agent. ☐ I am a guarantor, surety, indorser, or other codebtor.
(See Bankruptcy Rule 3004.) (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: _____

Title: _____

Company: _____

Address and telephone number (if different from notice address above): _____

(Signature)

(Date)

Telephone number: _____ email: _____

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:

Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor’s full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

Creditor’s Name and Address:

Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:

State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:

State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:

State only the last four digits of the debtor’s account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:

Report a change in the creditor’s name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

3b. Uniform Claim Identifier:

If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

4. Secured Claim:

Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. § 507 (a).

If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:

An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:

Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

8. Date and Signature:

The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer’s address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, attach a complete copy of any power of attorney, and provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.

DEFINITIONS**Debtor**

A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

Creditor

A creditor is a person, corporation, or other entity to whom debtor owes a debt that was incurred before the date of the bankruptcy filing. See 11 U.S.C. §101 (10).

Claim

A claim is the creditor's right to receive payment for a debt owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Proof of Claim

A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

Secured Claim Under 11 U.S.C. § 506 (a)

A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien.

A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

Unsecured Claim

An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

Claim Entitled to Priority Under 11 U.S.C. § 507 (a)

Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

Redacted

A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor must show only the last four digits of any social-security, individual's tax-identification, or financial-account number, only the initials of a minor's name, and only the year of any person's date of birth. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information.

Evidence of Perfection

Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

INFORMATION**Acknowledgment of Filing of Claim**

To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system (www.pacer.psc.uscourts.gov) for a small fee to view your filed proof of claim.

Offers to Purchase a Claim

Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), and any applicable orders of the bankruptcy court.

2011 COMMITTEE NOTE

The form is amended in several respects. A new section—3b—is added to allow the reporting of a uniform claim identifier. This identifier, consisting of 24 characters, is used by some creditors to facilitate automated receipt, distribution, and posting of payments made by means of electronic funds transfers by chapter 13 trustees. Creditors are not required to use a uniform claim identifier.

Language is added to section 4 to clarify that the annual interest rate that must be reported for a secured claim is the rate applicable at the time the bankruptcy case was filed. Checkboxes for indicating whether the interest rate is fixed or variable are also added.

Section 7 of the form is revised to clarify that, consistent with Rule 3001(c), writings supporting a claim or evidencing perfection of a security interest must be attached to the proof of claim. If the documents are not available, the filer must provide an explanation for their absence. The instructions for this section of the form explain that summaries of supporting documents may be attached only in addition to the documents themselves.

Section 8—the date and signature box—is revised to include a declaration that is intended to impress upon the filer the duty of care that must be exercised in filing a proof of claim. The individual who completes the form must sign it. By doing so, he or she declares under penalty of perjury that the information provided “is true and correct to the best of my knowledge, information and reasonable belief.” That individual must also provide identifying information—name; title; company; and, if not already provided, mailing address, telephone number, and email address—and indicate by checking the appropriate box the basis on which he or she is filing the proof of claim (for example, as creditor or authorized agent for the creditor). Because a trustee or debtor that files a proof of claim under Rule 3004 will indicate that basis for filing here, the checkbox on the first page of the form for stating the filer’s status as a trustee or debtor is deleted. When a servicing agent files a proof of claim on behalf of a creditor, the individual completing the form must sign it and must provide his or her own name, as well as the name of the company that is the servicing agent.

Amendments are made to the instructions that reflect the changes made to the form, and stylistic and formatting changes are made to the form and instructions. Spaces are added for providing email addresses in addition to other contact information in order to facilitate communication with the claimant. The provision of this additional information does not affect any requirements for serving or providing official notice to the claimant.

2008 COMMITTEE NOTE

The form is amended at box seven on page one, and instructions two and seven on page two, to instruct the claimant that the information contained in or attached to a claim based on the delivery of health care goods or services should be limited so as to avoid embarrassment or the

unnecessary disclosure of confidential information. The claimant is informed that additional disclosure may be required if the trustee or another party in interest objects to the claim.

Page two of the form is also amended to revise slightly the definitions of "creditor" and "claim" to conform more closely to the definitions of those terms in the Code.

2005-2007 COMMITTEE NOTE¹

The form is amended to conform to changes in the priority afforded the claims of certain creditors in § 507(a) of the Code as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005).

In addition, the form and its instructions are amended in several respects based on the experiences of creditors and trustees in using it and on the technological changes that have occurred in the courts' processing of claims. A definition of the word "redacted" has been added in conformity with Rule 9037.

The creditor now has a space in which to provide a separate payment address if different from the creditor's address for receiving notices in the case. The checkboxes for indicating that the creditor's address provided on the proof of claim is a new address, and that the creditor never received any notices from the court in the case have been deleted. The computer systems now used by the courts make it unnecessary for a creditor to "flag" a new address or call attention to the fact that the creditor is making its first appearance in the case. In place of the deleted items is a new checkbox to be used when a debtor or a trustee files a proof of claim for a creditor; it will alert the clerk to send the notice required by Rule 3004. The box for indicating whether the claim replaces a previously filed claim also has been deleted as no longer necessary in light of the 2005 amendments to Rules 3004 and 3005. The creditor simply will amend the claim filed by the other party.

Requests for the creditor to state the date on which the debt was incurred and the date on which any court judgment concerning the debt was obtained have been deleted, based on reports from trustees that they rely on the documents supporting the claim for this information. The checkboxes for stating the basis for the creditor's claim have been replaced with a blank in which the creditor is to provide this information. Examples of the most common categories, based on the former checkboxes, can be found in the instructions on the form. The request to state the account number by which the creditor identifies the debtor has been moved to paragraph 3 of the form and has been revised to request only the last four digits of the number, in conformity with Rule 9037. In addition, a new paragraph 3a gives the creditor a place to notify the trustee and the court of any change in the creditor's name, or that the claim has been transferred, or to provide any other information to clarify a difference between the proof of claim and the creditor's claim as scheduled by the debtor.

¹The 2005-2007 Committee Note incorporates the Committee Note previously published in 2005.

The adjective "total" is deleted from the sections of the form where the creditor states the amount of the claim and the creditor now simply reports the amount of the claim. If the claim is a general unsecured claim, no further details are stated on the form, although a creditor still must attach a copy of any writing on which the claim is based, as required by Rule 3001(c), and must attach a statement itemizing any interest or other charges (in addition to the principal) that are included in the claim. If the claim or any part of it is secured or entitled to priority under § 507(a) of the Code, the creditor is directed to provide details in the appropriate sections of the form. The creditor now states the amount to be afforded priority only once, in the section of the form designated for describing the specific priority being asserted. The introductory language in the section where the creditor describes any priority to which it is entitled has been revised for clarity. The word "collateral" has been replaced with the less colloquial and more accurate phrase "lien on property" throughout the form.

Information about obtaining acknowledgment from the court of the filing of the proof of claim is revised and moved to a new section on the reverse side called "Information." This new section also alerts a creditor to the possibility that it may be approached about selling its claim, advises that the court has no role in any such solicitations, and states that a creditor is under no obligation to accept any offer to purchase its claim. A new instruction is added about signing a proof of claim. This instruction includes citations to Rules 9011 and 5005(a)(2) concerning signature requirements in an electronic filing environment.

Finally, all of the definitions and instructions on the reverse side of the form are amended generally to reflect the deletions, additions, and other changes made on page 1. These include a reminder to the creditor to keep the court informed of any changes in its address. The instructions now appear at the top of the page, and the text is revised both to reflect the substantive changes to the form and to improve the clarity and style of this explanatory material.

2005 COMMITTEE NOTE

The form is amended to conform to changes in the priority afforded the claims of certain creditors in § 507(a) of the Code as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005).

2003 COMMITTEE NOTE

The form is amended to require a wage, salary, or other compensation creditor to disclose only the last four digits of the creditor's social security number to afford greater privacy to the creditor. A trustee can request the full information necessary for tax withholding and reporting at the time the trustee makes a distribution to creditors.

1997 COMMITTEE NOTE

Numbered sections 4. and 5. of the form have been reformatted to eliminate redundant information and make it easier to complete the form correctly. A creditor will report the total amount of the claim first, and will report only that amount unless the claim is secured by collateral or entitled to a priority under § 507 of the Code.

Explanatory definitions and instructions for completing the form also have been added.

1995 COMMITTEE NOTE

The form is amended to add the seventh priority granted by the Bankruptcy Reform Act of 1994 to debts for alimony, maintenance, or support of a spouse, former spouse, or child of the debtor. The form also amends the Code reference to the priority afforded to tax debts and the dollar maximums for the priorities granted to wages and customer deposits in conformity with amendments made by the 1994 Act to section 507(a) of the Code. The 1994 Act also amended section 104 of the Code to provide for future adjustment of the dollar amounts specified in section 507(a) to be made by administrative action at three-year intervals to reflect changes in the consumer price index. The form is amended to include notice that these dollar amounts are subject to change without formal amendment to the official form.

1993 COMMITTEE NOTE

The form has been amended to accommodate inclusion of the priority afforded in § 507(a)(8) of the Code, which was added by Pub. L. No. 101-647, (Crime Control Act of 1990), and to avoid the necessity of further amendment to the form if other priorities are added to § 507(a) in the future. In addition, sections 4 and 5 of the form have been amended to clarify that only prepetition arrearages and charges are to be included in the amount of the claim.

1991 COMMITTEE NOTE

This form replaces former Official Forms No. 19, No. 20, and No. 21. The box format and simplified language are intended to facilitate completion of the form.

The form directs the claimant to attach documents to support the claim or, if voluminous, a summary of such documents. These include any security agreement (if not included in the writing on which the claim is founded), and evidence of perfection of any security interest. See Committee Note to Rule 3001(d) concerning satisfactory evidence of perfection. If the claim includes prepetition interest or other charges such as attorney fees, a statement giving a detailed breakdown of the elements of the claim is required.

Rule 2002(g) requires the clerk to update the mailing list in the case by substituting the address provided by a creditor on a proof of claim, if that address is different from the one supplied by the debtor. The form contains checkboxes to assist the clerk in performing this duty.

The form also alerts the trustee when the claim is an amendment to or replacement for an earlier claim.

Mortgage Proof of Claim Attachment

If you file a claim secured by a security interest in the debtor's principal residence, you must use this form as an attachment to your proof of claim. See Bankruptcy Rule 3001(c)(2).

Name of debtor: _____ Case number: _____

Name of creditor: _____ Last four digits of any number you use to identify the debtor's account: _____

Part 1: Statement of Principal and Interest Due as of the Petition Date

Itemize the principal and interest due on the claim as of the petition date (included in the Amount of Claim listed in Item 1 on your Proof of Claim form).

1. Principal due (1) \$ _____

2. Interest due

Interest rate	From mm/dd/yyyy	To mm/dd/yyyy	Amount
_____ %	_____	_____	\$ _____
_____ %	_____	_____	\$ _____
_____ %	_____	_____	+ \$ _____
Total interest due as of the petition date			\$ _____

Copy total here ► (2) + \$ _____

3. Total principal and interest due

(3) \$ _____

Part 2: Statement of Prepetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges due on the claim as of the petition date (included in the Amount of Claim listed in Item 1 on the Proof of Claim form).

Description	Dates incurred	Amount
1. Late charges	_____	(1) \$ _____
2. Non-sufficient funds (NSF) fees	_____	(2) \$ _____
3. Attorney's fees	_____	(3) \$ _____
4. Filing fees and court costs	_____	(4) \$ _____
5. Advertisement costs	_____	(5) \$ _____
6. Sheriff/auctioneer fees	_____	(6) \$ _____
7. Title costs	_____	(7) \$ _____
8. Recording fees	_____	(8) \$ _____
9. Appraisal/broker's price opinion fees	_____	(9) \$ _____
10. Property inspection fees	_____	(10) \$ _____
11. Tax advances (non-escrow)	_____	(11) \$ _____
12. Insurance advances (non-escrow)	_____	(12) \$ _____
13. Escrow shortage or deficiency (Do not include amounts that are part of any installment payment listed in Part 3.)	_____	(13) \$ _____
14. Property preservation expenses. Specify: _____	_____	(14) \$ _____
15. Other. Specify: _____	_____	(15) \$ _____
16. Other. Specify: _____	_____	(16) \$ _____
17. Other. Specify: _____	_____	(17) + \$ _____
18. Total prepetition fees, expenses, and charges. Add all of the amounts listed above.		(18) \$ _____

Part 3. Statement of Amount Necessary to Cure Default as of the Petition Date

Does the installment payment amount include an escrow deposit?

☐ No

☐ Yes Attach to the Proof of Claim form an escrow account statement prepared as of the petition date in a form consistent with applicable nonbankruptcy law.

1. Installment payments due	Date last payment received by creditor _____ mm/dd/yyyy	
	Number of installment payments due (1) _____	
2. Amount of installment payments due	_____ installments @ \$ _____	
	_____ installments @ \$ _____	
	_____ installments @ + \$ _____	
	Total installment payments due as of the petition date \$ _____	Copy total here ► (2) \$ _____
3. Calculation of cure amount	Add total prepetition fees, expenses, and charges	Copy total from Part 2 here ► + \$ _____
	Subtract total of unapplied funds (funds received but not credited to account)	- \$ _____
	Subtract amounts for which debtor is entitled to a refund	- \$ _____
	Total amount necessary to cure default as of the petition date	(3) \$ _____

Copy total onto Item 4 of Proof of Claim form

2011 COMMITTEE NOTE

This form is new. It must be completed and attached to a proof of claim secured by a security interest in a debtor's principal residence. The form, which implements Rule 3001(c)(2), requires an itemization of prepetition interest, fees, expenses, and charges included in the claim amount, as well as a statement of the amount necessary to cure any default as of the petition date. If the mortgage installment payments include an escrow deposit, an escrow account statement must also be attached to the proof of claim, as required by Rule 3001(c)(2)(C).

UNITED STATES BANKRUPTCY COURT

In re _____,
Debtor

Case No. _____

Chapter 13

Notice of Mortgage Payment Change

If you file a claim secured by a security interest in the debtor's principal residence provided for under the debtor's plan pursuant to § 1322(b)(5), you must use this form to give notice of any changes in the installment payment amount. File this form as a supplement to your proof of claim at least 21 days before the new payment amount is due. See Bankruptcy Rule 3002.1.

Name of creditor: _____

Court claim no. (if known): _____

Last four digits of any number
you use to identify the debtor's
account: _____

Date of payment change:

Must be at least 21 days after date of
this notice

mm/dd/yyyy

New total payment:

\$ _____

Principal, interest, and escrow, if any

Part 1: Escrow Account Payment Adjustment

Will there be a change in the debtor's escrow account payment?

☐ No

☐ Yes Attach a copy of the escrow account statement prepared in a form consistent with applicable nonbankruptcy law. Describe the basis for the change. If a statement is not attached, explain why: _____

Current escrow payment: \$ _____

New escrow payment: \$ _____

Part 2: Mortgage Payment Adjustment

Will the debtor's principal and interest payment change based on an adjustment to the interest rate in the debtor's variable-rate note?

☐ No

☐ Yes Attach a copy of the rate change notice prepared in a form consistent with applicable nonbankruptcy law. If a notice is not attached, explain why: _____

Current interest rate: _____%

New interest rate: _____%

Current principal and interest payment: \$ _____

New principal and interest payment: \$ _____

Part 3: Other Payment Change

Will there be a change in the debtor's mortgage payment for a reason not listed above?

☐ No

☐ Yes Attach a copy of any documents describing the basis for the change, such as a repayment plan or loan modification agreement. (Court approval may be required before the payment change can take effect.)

Reason for change: _____

Current mortgage payment: \$ _____

New mortgage payment: \$ _____

Part 4: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number if different from the notice address listed on the proof of claim to which this Supplement applies.

Check the appropriate box.

- ☐ I am the creditor. ☐ I am the creditor's authorized agent.
(Attach copy of power of attorney, if any.)

I declare under penalty of perjury that the information provided in this Notice is true and correct to the best of my knowledge, information, and reasonable belief.

X _____ Date _____
Signature mm/dd/yyyy

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

City State ZIP Code

Contact phone _____ Email _____

2011 COMMITTEE NOTE

This form is new and applies in chapter 13 cases. It implements Rule 3002.1, which requires the holder of a claim secured by a security interest in the debtor's principal residence—or the holder's agent—to provide notice at least 21 days prior to a change in the amount of the ongoing mortgage installment payments. The form requires the holder of the claim to indicate the basis for the changed payment amount and when it will take effect. The notice must be filed as a supplement to the claim holder's proof of claim, and it must be served on the debtor, debtor's counsel, and the trustee.

The individual completing the form must sign and date it. By doing so, he or she declares under penalty of perjury that the information provided is true and correct to the best of that individual's knowledge, information, and reasonable belief. The signature is also a certification that the standards of Rule 9011(b) are satisfied.

UNITED STATES BANKRUPTCY COURT

In re _____,
Debtor

Case No. _____

Chapter 13

Notice of Postpetition Mortgage Fees, Expenses, and Charges

If you hold a claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any postpetition fees, expenses, and charges that you assert are recoverable against the debtor or against the debtor's principal residence. File this form as a supplement to your proof of claim. See Bankruptcy Rule 3002.1.

Name of creditor: _____

Court claim no. (if known): _____

Last four digits of any number you use to
identify the debtor's account: _____

Does this notice supplement a prior notice of postpetition fees,
expenses, and charges?

☐

No

☐

Yes. Date of the last notice: _____

mm/dd/yyyy

Part 1: Itemize Postpetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges incurred on the debtor's mortgage account after the petition was filed. Do not include any escrow account disbursements or any amounts previously itemized in a notice filed in this case or ruled on by the bankruptcy court.

Description	Dates incurred	Amount
1. Late charges	_____	(1) \$ _____
2. Non-sufficient funds (NSF) fees	_____	(2) \$ _____
3. Attorney fees	_____	(3) \$ _____
4. Filing fees and court costs	_____	(4) \$ _____
5. Bankruptcy/Proof of claim fees	_____	(5) \$ _____
6. Appraisal/Broker's price opinion fees	_____	(6) \$ _____
7. Property inspection fees	_____	(7) \$ _____
8. Tax advances (non-escrow)	_____	(8) \$ _____
9. Insurance advances (non-escrow)	_____	(9) \$ _____
10. Property preservation expenses. Specify: _____	_____	(10) \$ _____
11. Other. Specify: _____	_____	(11) \$ _____
12. Other. Specify: _____	_____	(12) \$ _____
13. Other. Specify: _____	_____	(13) \$ _____
14. Other. Specify: _____	_____	(14) \$ _____

The debtor or trustee may challenge whether the fees, expenses, and charges you listed are required to be paid. See 11 U.S.C. § 1322(b)(5) and Bankruptcy Rule 3002.1.

Part 2: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number if different from the notice address listed on the proof of claim to which this Supplement applies.

Check the appropriate box.

- ☐ I am the creditor.
- ☐ I am the creditor's authorized agent. (Attach copy of power of attorney, if any.)

I declare under penalty of perjury that the information provided in this Notice is true and correct to the best of my knowledge, information, and reasonable belief.

X _____ Date _____
Signature mm/dd/yyyy

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street
City State ZIP Code

Contact phone _____ Email _____

2011 COMMITTEE NOTE

This form is new and applies in chapter 13 cases. It implements Rule 3002.1, which requires the holder of a claim secured by a security interest in the debtor's principal residence—or the holder's agent—to file a notice of all postpetition fees, expenses, and charges within 180 days after they are incurred. The notice must be filed as a supplement to the claim holder's proof of claim, and it must be served on the debtor, debtor's counsel, and the trustee.

The individual completing the form must sign and date it. By doing so, he or she declares under penalty of perjury that the information provided is true and correct to the best of that individual's knowledge, information, and reasonable belief. The signature is also a certification that the standards of Rule 9011(b) are satisfied.



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H

United States Court of Appeals,
First Circuit.
In re Wayne Eric PUFFER, Debtor.
L. Jed Berliner, Movant, Appellant,
v.
Denise M. Pappalardo, Trustee, Appellee.

No. 11–1831.
Heard Jan. 10, 2012.
Decided March 22, 2012.

Background: Following denial of confirmation of proposed “fee-only” Chapter 13 plan on grounds that it had not been filed in good faith, and conversion Chapter 7, debtor’s attorney filed fee application. The United States Bankruptcy Court, [Henry J. Boroff](#), J., disallowed attorney’s claim for fees and expenses, other than for reimbursement of debtor’s filing fee, and attorney appealed. The United States District Court for the District of Massachusetts, [Michael A. Ponsor](#), J., [453 B.R. 14](#), affirmed, and attorney again appealed.

Holding: In resolving a question of first impression, the Court of Appeals, [Selya](#), Circuit Judge, held that “fee-only” Chapter 13 plans are not per se filed in bad faith.

Reversed and remanded.

[Lipez](#), Circuit Judge, concurred in the judgment and filed opinion.

West Headnotes

[1] Bankruptcy 51 3779

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3779 k. Scope of review in general.
[Most Cited Cases](#)

Bankruptcy 51 3782

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3782 k. Conclusions of law; de novo review. [Most Cited Cases](#)

Bankruptcy 51 3784

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3784 k. Discretion. [Most Cited Cases](#)

Bankruptcy 51 3786

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3785 Findings of Fact
51k3786 k. Clear error. [Most Cited Cases](#)

Court of Appeals reviews a bankruptcy court’s order directly without reference to an intermediate affirmance by the district court; in performing such task, court assays the bankruptcy court’s conclusions of law de novo, its factual findings for clear error, and its quantification of fees for abuse of discretion.

[2] Bankruptcy 51 3706(1)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3706 Good Faith in General
51k3706(1) k. In general. [Most Cited Cases](#)

Totality of the circumstances approach is proper in adjudicating whether Chapter 13 plan has been filed in good faith. [11 U.S.C.A. § 1325](#).

[3] Bankruptcy 51 3706(1.5)

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51 Bankruptcy

51XVIII Individual Debt Adjustment

51k3704 Plan

51k3706 Good Faith in General

51k3706(1.5) k. Factors considered in determining presence of good faith. Most Cited “Fee-only” Chapter 13 plans are not per se filed in bad faith; presence or absence of good faith should be ascertained case by case. 11 U.S.C.A. § 1325.

*79 L. Jed Berliner, with whom Meghan R. Bristol and Berliner Law Firm were on brief, for appellant.

David G. Baker on brief for National Association of Consumer Bankruptcy Attorneys, amicus curiae.

Lynne F. Riley, with whom Riley Law Group LLC was on brief, for appellee.

Before SELYA, Circuit Judge, SOUTER,^{FN*} Associate Justice, and LIPEZ, Circuit Judge.

^{FN*} Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

SELYA, Circuit Judge.

This bankruptcy case involves a dispute over attorneys' fees. Resolving this dispute requires us to address a question of first impression at the appellate level concerning the propriety of so-called “fee-only” plans in Chapter 13 bankruptcy cases. This is an issue that has divided the bankruptcy courts. Compare *In re Paley*, 390 B.R. 53, 59 (Bankr.N.D.N.Y.2008) (rejecting fee-only plan as contrary to spirit and purpose of Bankruptcy Code), and *In re Dicey*, 312 B.R. 456, 459–60 (Bankr.D.N.H.2004) (same), with *In re Elkins*, No. 09–09254–8, 2010 WL 1490585, at *3 (Bankr.E.D.N.C. Apr. 13, 2010) (stating that “[t]here are many permissible reasons to file [fee-only] chapter 13 cases”), and *In re Molina*,

420 B.R. 825, 829–33 (Bankr.D.N.M.2009) (upholding good faith of fee-only plan). The bankruptcy court in this instance concluded that such plans are per se proffered in bad faith and disallowed virtually all attorneys' fees. On an intermediate appeal, the district court upheld the bankruptcy court's ruling.

The matter has now been appealed to this court. We have had the benefit of *80 briefing (including the helpful submission of an amicus) and oral argument. After careful consideration, we hold that fee-only plans are not per se in bad faith. Consequently, we reverse the order appealed from and remand for further proceedings consistent with this opinion.

The background facts are easily stated. The debtor, Wayne Eric Puffer, had amassed unsecured liabilities totaling almost \$15,000. His anticipated disposable income amounted to approximately \$100 per month. He concluded that he could never satisfy his increasingly impatient creditors and decided to consider the advisability of bankruptcy protection. With this in mind, he visited the appellant, L. Jed Berliner, an attorney specializing in bankruptcy matters, in January of 2007.

After some discussion, the appellant presented the debtor with two options. First, he could file for straight bankruptcy under Chapter 7, which is the conventional course when an individual has debts that dwarf his income and assets. See 11 U.S.C. §§ 701 – 784. Chapter 7 proceedings are straightforward; they usually can be concluded within a matter of months. A successful Chapter 7 application discharges virtually all debts, including any unpaid legal fees. See *id.* § 727.

The second option that the appellant presented to the debtor was somewhat less conventional. He suggested that the debtor could file for Chapter 13 protection. See *id.* §§ 1301–1330. Chapter 13 proceedings must be kept open for a minimum of 36 months unless all affected debts are to be fully satisfied within a shorter period of time. See *id.* § 1325(b)(4). If successful, a Chapter 13 proceeding

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allows a debtor to discharge his debts over time, provided that he submits a plan, which must be approved by the bankruptcy court, for satisfying some of his creditors. *See id.* §§ 1321–1322, 1328.

The appellant stated in substance that he would not represent the debtor in a Chapter 7 proceeding unless and until the debtor paid him, up front, the whole of his anticipated legal fees (which he estimated to be around \$2,300). If, however, the debtor chose the Chapter 13 alternative, he would not have to pay all of his legal fees immediately but, rather, could pay them over time as part of the Chapter 13 plan. The appellant estimated that the fees associated with a Chapter 13 proceeding would total \$4,100.

At that moment, the debtor did not have sufficient funds on hand to pay the legal fees requested for a Chapter 7 filing. Faced with the appellant's unwillingness to handle a Chapter 7 matter, the debtor opted to seek Chapter 13 protection, engaged the appellant as his counsel for this purpose, and paid him \$500 on account.

The debtor, counseled by the appellant, prepared the necessary paperwork. As part of that paperwork, he submitted a Chapter 13 plan to the bankruptcy court. *See id.* §§ 1321–1322. The plan called for the debtor to pay into the bankruptcy estate \$100 per month for 36 months (a total of \$3,600). Of that amount, only about \$300 (or about 2% of the roughly \$15,000 owed by the debtor) would be available for distribution to general creditors.^{FN1} Conversely, the appellant would receive through the plan more than \$2,900 for legal services. The remainder of the bankruptcy estate (about \$400) would cover the fees of the standing trustee. *See id.* § 1326(b)(2). A Chapter 13 plan of this genre is colloquially known as a “fee-only” plan because it pays the debtor's lawyer and the trustee their professional fees but *81 leaves the general creditors holding an empty (or nearly empty) bag.

^{FN1}. The record does not contain a reliable

estimate of what the creditors would have received if a Chapter 7 proceeding had been initiated at this point.

The bankruptcy court rejected the proposed Chapter 13 plan on the grounds that neither the debtor's Chapter 13 petition nor the plan itself was submitted in good faith. *See id.* § 1325(a)(3), (7).^{FN2} In reaching this conclusion, the court cited *In re Buck*, 432 B.R. 13, 21–22 (Bankr.D.Mass.2010), which held that fee-only Chapter 13 plans are per se submitted in bad faith.

^{FN2}. Although the courts below found both the petition and the plan to have been filed in bad faith, for simplicity's sake we henceforth refer only to the plan. Our holding is, of course, equally applicable to the filing of the petition.

After rejecting the Chapter 13 plan, the bankruptcy court gave the debtor three options: he could (i) amend his Chapter 13 plan; (ii) convert his bankruptcy case to Chapter 7; or (iii) dismiss the case entirely. The debtor elected the second option and converted his case to Chapter 7. He ultimately received a discharge under that chapter.

Meanwhile, the appellant moved the bankruptcy court to award him \$2,872 in fees and expenses arising from his representation of the debtor in the Chapter 13 proceedings. *See* 11 U.S.C. § 330(a)(4)(B). The appellant anticipated that this emolument would be paid out of the Chapter 13 estate, which the debtor had endowed monthly from the filing of the Chapter 13 plan until the date of the conversion to Chapter 7. The bankruptcy court awarded the appellant only \$299 (the amount that it cost to file the debtor's converted Chapter 7 petition). Because the appellant had already collected a \$500 retainer in advance of the filing of the Chapter 13 petition, this order effectively required him to disgorge more than \$200. The court grounded its order on the proposition that an attorney is not entitled to professional fees for time spent preparing a Chapter 13 plan that he knows or has reason to

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know is submitted in bad faith. See *In re Buck*, 432 B.R. at 22–24.

The appellant sought review of the fee order in the district court. See 28 U.S.C. § 158(a). The trustee opposed the appeal, and the district court affirmed the disputed order. This timely second-level appeal followed.

[1] We review a bankruptcy court's order directly without reference to an intermediate affirmation by the district court. See *City Sanitation, LLC v. Allied Waste Servs. of Mass., LLC (In re Am. Cartage, Inc.)*, 656 F.3d 82, 87 (1st Cir.2011). In performing this task, we assay the bankruptcy court's conclusions of law de novo, *Donarumo v. Furlong (In re Furlong)*, 660 F.3d 81, 86 (1st Cir.2011), its factual findings for clear error, *id.*, and its quantification of fees for abuse of discretion, *Prebor v. Collins (In re: I Don't Trust)*, 143 F.3d 1, 3 (1st Cir.1998) (per curiam).

This is a rifle-shot appeal. It raises only a single issue: the propriety vel non of the bankruptcy court's award of fees to the appellant. But the bankruptcy court hinged that award on its preudial ruling that fee-only Chapter 13 plans are per se in bad faith. Consequently, we must start by considering whether the bankruptcy court erred as a matter of law when it adopted that per se rule.

The requirement that Chapter 13 plans be filed in good faith springs directly from the Bankruptcy Code. See 11 U.S.C. § 1325(a)(3). The term “good faith” is not specially defined, and the legislative history provides little insight into its meaning. See *In re Schaitz*, 913 F.2d 452, 453 (7th Cir.1990); *Handeen v. LeMaire (In re LeMaire)*, 898 F.2d 1346, 1348 (8th Cir.1990) (en banc). By like token, this court has *82 had no occasion to demarcate the contours of section 1325's good faith element. We have, however, explicated “good faith” in the related context of a debtor who attempts, pursuant to 11 U.S.C. § 706(a), to convert a Chapter 7 proceeding to Chapter 13. See *Marrama v. Citizens Bank of Mass. (In re Marrama)*, 430 F.3d

474, 482 (1st Cir.2005), *aff'd*, *Marrama v. Citizens Bank of Mass. (Marrama II)*, 549 U.S. 365, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007).

In *Marrama I*, we measured good faith by applying a totality of the circumstances test. *Id.* This test considered, among other things, the veracity of the debtor's representations to the court and an assessment of whether the debtor was abusing the bankruptcy process. See *id.*; cf. *Barbosa v. Solomon*, 235 F.3d 31, 40 n. 13 (1st Cir.2000) (holding that under 11 U.S.C. § 1329, “lack of good faith can be shown by manipulation of code provisions” (internal quotation marks omitted)).

[2] We believe that the totality of the circumstances approach to adjudicating good faith should apply equally to inquiries under section 1325. This belief is fortified by the fact that other courts interpreting section 1325's “good faith” element have performed a comparably holistic balancing of relevant factors. See, e.g., *Robinson v. Tenantry (In re Robinson)*, 987 F.2d 665, 668 & n. 7 (10th Cir.1993) (per curiam); *In re LeMaire*, 898 F.2d at 1348–49; *Ohio Student Loan Comm'n v. Doersam (In re Doersam)*, 849 F.2d 237, 239 (6th Cir.1988); *Sullivan v. Solimini (In re Sullivan)*, 326 B.R. 204, 211–12 (B.A.P. 1st Cir.2005).

[3] The totality of the circumstances test cannot be reduced to a mechanical checklist, and we do not endeavor here to canvass the field and catalogue the factors that must be weighed when determining whether a debtor has submitted a Chapter 13 plan in good faith. Cf. *Marrama II*, 549 U.S. at 375 n. 11, 127 S.Ct. 1105 (declining to articulate the precise contours of “good faith” in an analogous context). But we, like other courts, are reluctant to read per se limitations into section 1325's good faith calculus. See *Johnson v. Vanguard Holding Corp. (In re Johnson)*, 708 F.2d 865, 868 (2d Cir.1983) (per curiam) (collecting cases). After all, Congress has legislated nine requirements that must be met before a Chapter 13 plan can be confirmed, see 11 U.S.C. § 1325(a)(1)–(9), and we do not think that it is our province to insist upon a tenth.

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In all events, good faith is a concept, not a construct. Importantly, it is a concept that derives from equity. See *Fields Station LLC v. Capitol Food Corp. of Fields Corner (In re Capitol Food Corp. of Fields Corner)*, 490 F.3d 21, 24 n. 1 (1st Cir.2007); *Rivera-Lopez v. Mun'y of Dorado*, 979 F.2d 885, 887 (1st Cir.1992). This matters because equitable concepts are peculiarly insusceptible to per se rules. See *Johnson v. Spencer Press of Me., Inc.*, 364 F.3d 368, 383 (1st Cir.2004); see also *Rosario-Torres v. Hernandez-Colon*, 889 F.2d 314, 321 (1st Cir.1989) (en banc) (stating that “the hallmark of equity is the ability to assess all relevant facts and circumstances and tailor appropriate relief on a case by case basis”).

Against this backdrop, we reject the bankruptcy court's holding that fee-only Chapter 13 plans are per se in bad faith. This is not to say, however, that we disregard the bankruptcy court's concerns. The fundamental purpose undergirding Chapter 13 is to allow a debtor to pay his creditors over time, *Thompson v. Gen. Motors Acceptance Corp.*, 566 F.3d 699, 706–07 (7th Cir.2009); *Metro Emps. Credit Union v. Okoreeh-Baah (In re Okoreeh-Baah)*, 836 F.2d 1030, 1033 (6th Cir.1988), and fee-only plans, by definition, leave the *83 vast majority of debts unsatisfied. Moreover, fee-only arrangements may be vulnerable to abuse by attorneys seeking to advance their own interests without due regard for the interests of debtors; and such plans, by their very nature, create that appearance.

Notwithstanding these shortcomings, endorsing a blanket rule that fee-only Chapter 13 plans are per se submitted in bad faith would be to throw out the baby with the bathwater. While fee-only plans should not be used as a matter of course, there may be special circumstances, albeit relatively rare, in which this type of odd arrangement is justified. Given this possibility, prudence dictates that we hew to the overarching principle that the presence or absence of good faith should be ascertained case by case. See, e.g., *Marrama I*, 430 F.3d at 482.

Let us be perfectly clear. This opinion should by no means be read as a paean to fee-only Chapter 13 plans. The dangers of such plans are manifest, and a debtor who submits such a plan carries a heavy burden of demonstrating special circumstances that justify its submission. Cf. *Hardin v. Caldwell (In re Caldwell)*, 895 F.2d 1123, 1126 (6th Cir.1990) (explaining that “[t]he party who seeks a discharge under Chapter 13 bears the burden of proving good faith”).

On the record before us, we cannot tell whether or not special circumstances sufficient to justify a fee-only Chapter 13 plan existed here. The appellant argues that such circumstances did exist, but we are chary about his explanation. The appellant suggests that the debtor filed a fee-only Chapter 13 plan because that was the only means of securing the appellant's representation. There is no showing, however, that the debtor had a pressing need for the appellant's services, that he could not secure adequate representation that he could afford without resorting to a fee-only plan, or that it was infeasible to proceed pro se.^{FN3} Furthermore, the debtor himself asserted that he could have retained the appellant for representation in Chapter 7—a course usually more in line with the interests of the debtor, the creditors, and the bankruptcy court—if he had waited three months longer; and the record contains no compelling reason why a three-month wait would have been intolerable.

FN3. We do not mean to imply that any of these factors are necessary to a finding of special circumstances. Rather, we enumerate them to illustrate why we are unready to accept the conclusory claim of special circumstances advanced by the appellant here.

This tees up the issue on appeal: the propriety of the bankruptcy court's fee award. While bankruptcy courts have broad discretion in fashioning fee awards, *In re: I Don't Trust*, 143 F.3d at 3, an award based on an error of law is invariably an abuse of that discretion, see *Goya Foods, Inc. v. Wal-*

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lack Mgmt. Co., 290 F.3d 63, 75 (1st Cir.2002).

In the case at hand, the bankruptcy court did not consider the totality of the circumstances when measuring whether the debtor's Chapter 13 plan was presented in good faith. Instead, it mistakenly concluded that fee-only Chapter 13 plans are per se filed in bad faith and fashioned the fee award on that premise. Thus, the fee award rested on a legal error and must be vacated. See, e.g., *Aronov v. Napolitano*, 562 F.3d 84, 88 (1st Cir.2009) (en banc); *Correa v. Cruisers, a Div. of KCS Int'l, Inc.*, 298 F.3d 13, 30–34 (1st Cir.2002).

What remains to be done is for the bankruptcy court to reconsider, under the proper legal regime, the question of the appellant's entitlement to fees and to issue a new order in that regard. We take no *84 view as to the amount of fees, if any, that should be awarded.

We reverse the order appealed from and remand to the district court with instructions to vacate the bankruptcy court's fee order and remand to that court for further proceedings consistent with this opinion. All parties shall bear their own costs.

LIPEZ, Circuit Judge, concurring in the judgment.

I.

The issue of fee-only Chapter 13 petitions has emerged in recent years largely as a result of two events. The first was the Supreme Court's decision in *Lamie v. U.S. Tr.*, 540 U.S. 526, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004), which held that attorney's fees are not payable from estate funds in a Chapter 7 proceeding except in limited circumstances. *Id.* at 538–39, 124 S.Ct. 1023 (construing 11 U.S.C. § 330(a)(1)). Attorneys who advise debtors on Chapter 7 filings thus may be unable to collect their fees once the plans are in place, prompting them to request payment in full up front. The second event was enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), see 11 U.S.C. §§ 101 – 1532, which tightened the eligibility requirements for

Chapter 7 bankruptcy and made the process more complicated—increasing the need for legal advice and, in turn, the cost of filing for bankruptcy. See *In re Beck*, 2007 Bankr. LEXIS 517, at *7 (D.Kan. Feb. 21, 2007) (referring to the “significantly increased burdens” placed on debtors' attorneys after BAPCPA); Angela Litwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 Wm. & Mary L.Rev.1933, 1935–37 (2011) (hereinafter *The Affordability Paradox*) (noting that the BAPCPA “made consumer bankruptcy more expensive for all debtors” and that “one of BAPCPA's major effects was a rise in the cost of representation”).^{FN4}

FN4. In *The Affordability Paradox*, Professor Litwin stated that “the heart” of BAPCPA was “the means test that bars relatively well-off debtors from Chapter 7.” She went on to note, however, that

BAPCPA also subjected all filers to increased paperwork, stricter deadlines, new prerequisites such as credit counseling, and mandatory dismissals for myriad procedural mistakes. These new technical requirements caused many commentators to worry that the statute's real effect would be to increase costs and reduce the bankruptcy access of all debtors, especially the worst off.

52 Wm. & Mary L.Rev. at 1936 (footnotes omitted).

As I understand it, the fee-only Chapter 13 petition can be a creative solution for the “*Lamie* problem.” See, e.g., *In re Buck*, 432 B.R. 13, 22 n. 15 (Bankr.D.Mass.2010) (noting that *Lamie* “exacerbated the problem” of debtors' inability to afford attorney's fees); *In re Johnson*, 397 B.R. 486, 489–90 (Bankr.E.D.Cal.2008) (noting “the problem of the puzzle lying in the wake of the *Lamie* holding”). As a high priority expense under Chapter 13, attorney's fees may properly be scheduled for pay-

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ment in a Chapter 13 plan ahead of other types of debts. See generally Michelle Arnopol Cecil, *A Re-appraisal of Attorneys' Fees in Bankruptcy*, 98 Ky. L.J. 67, 73–74, 84 (2009) (citing *Lamie*, 540 U.S. at 537, 124 S.Ct. 1023); 11 U.S.C. § 330(a)(4)(B). At least some debtors who cannot afford an attorney-assisted Chapter 7 filing—because the attorney, understandably, would expect to be paid up front—can afford to pay for an attorney to assist with a Chapter 13 filing because the fee will be paid in post-petition installments. See *Buck*, 432 B.R. at 22 n. 15 *85 (recognizing that “some debtors are simply not able to afford the attorneys fees associated with filing a Chapter 7 case”). That approach results, of course, in the situation we face in this case: the debtor is in such bad shape that he is eligible to file for an immediate discharge of his debts under Chapter 7, but he files under Chapter 13 with his attorney's fees as the only (or dominant) debt scheduled to be paid over the course of the Chapter 13 plan (which typically runs three to five years).

Like my colleagues, I think that the totality of the circumstances test is the appropriate method to evaluate whether a particular fee-only Chapter 13 plan meets the good-faith requirements of the Bankruptcy Code. At this juncture, however, I would leave application of the test entirely to bankruptcy judges instead of prescribing a rule requiring “special circumstances” limited to “relatively rare” instances. As the majority notes, the bankruptcy courts have expressed mixed views on fee-only plans as their experience accumulates in the wake of *Lamie* and BAPCPA's enactment. We should allow that process to continue so that we have an adequate basis for deciding whether there is a need to construct an appellate rule disfavoring such plans in every case. Presently, I do not think we have that basis.

II.

We have observed that the Bankruptcy Code's purposes are two-fold: to give the deserving debtor a fresh start and to maximize the payment to creditors. See *In re Cunningham*, 513 F.3d 318, 324 (1st

Cir.2008) (“The Supreme Court has stated that ‘a central purpose of the Bankruptcy Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy “a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.” ’ ” (quoting *Grogan v. Garner*, 498 U.S. 279, 286, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991))); *In re Marrama*, 430 F.3d 474, 477 (1st Cir.2005) (noting “the principle that all the debtor's assets are to be gathered and deployed in a bona fide effort to satisfy valid claims”); *In re Sullivan*, 326 B.R. 204, 211–12 (1st Cir.BAP 2005) (stating that a primary objective of bankruptcy is “to relieve the honest but unfortunate debtor from the weight of oppressive indebtedness, allowing the debtor to start afresh”). A fee-only Chapter 13 plan may accomplish little toward the goal of satisfying creditors, but such a plan may nonetheless be essential to free “the honest but unfortunate debtor” from intolerable circumstances.

Bankruptcy judges evaluating a particular fee-only plan may properly take into account whether the plan “is consistent with the spirit and purpose of [Chapter 13]—rehabilitation through debt repayment,” *In re Molina*, 420 B.R. 825, 831 (Bankr.D.N.M.2009) (quoting *In re Paley*, 390 B.R. 53, 58 (Bankr.N.D.N.Y.2008))—but I fear that circumscribing the totality of the circumstances assessment with the requirement of special circumstances will in practical effect impose on debtors the more daunting task of disproving bad faith rather than proving good faith. I am therefore reluctant to confine what should be, in the majority's apt words, a “holistic balancing of relevant factors.”

I must emphasize that I agree with my colleagues' view that a Chapter 13 plan calling for payment of the debtor's attorney's fee, but none (or virtually none) of the outstanding debts that triggered the need for bankruptcy, warrants close examination. The typical attorney's fee for a

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Chapter 13 case is higher than the fee for a typical Chapter 7 case, see, e.g., *86 *In re Elkins*, 2010 WL 1490585, at *2, 2010 Bankr. LEXIS 1085, at **4–5 (Bankr.E.D.N.C. April 13, 2010), and there undoubtedly are costs imposed on the bankruptcy system as a whole when a debtor eligible for Chapter 7 relief prolongs the bankruptcy process by filing a Chapter 13 plan for the sole purpose of paying attorney's fees. Moreover, as the majority observes, the fee-only structure may leave unknowledgeable debtors vulnerable to attorneys seeking to maximize their compensation. See Kerry Haydel Ducey, Note, *Bankruptcy, Just for the Rich? An Analysis of Popular Fee Arrangements for Pre-Petition Legal Fees and a Call to Amend*, 54 Vand. L.Rev. 1665, 1703 (2001) (hereinafter *Just for the Rich?*) (noting that, “[i]n some cases, self interest ... compels the attorney to advise debtors to file Chapter 13 or other high percentage payment plans when Chapter 7 would actually better serve the debtor” (footnote omitted)).

Nonetheless, we must keep in mind that a struggling debtor who lacks the resources to pay a Chapter 7 attorney's fee up front has limited options. Although he theoretically could proceed pro se, I doubt that bankrupt individuals will ordinarily be able to navigate the complexities of the bankruptcy process on their own. See, e.g., *In re Beck*, 2007 Bankr. LEXIS 517, at *19–20 (stressing the importance of counsel for debtors and noting that the court “routinely” saw debtors giving away rights or property they would be entitled to retain). Indeed, an empirical study indicating that the percentage of pro se debtors has increased in the aftermath of BAPCPA shows that such cases are not succeeding. See *The Affordability Paradox*, 52 Wm. & Mary L.Rev. at 1938 (“[T]he high pro se failure rate since 2005 suggests that it is reasonable to equate the inability to afford a lawyer with having less than full access to the bankruptcy system.”); see also *Just for the Rich?*, 54 Vand. L.Rev. at 1667 (“Legal counsel is indispensable if a debtor is to effectively file for bankruptcy. The bankruptcy laws are complex, and legal counsel is often crucial

in helping the debtor make an informed decision based on his unique circumstances and the available alternatives.” (citing William C. Hillman, *Personal Bankruptcy: What Every Debtor and Creditor Needs to Know* 20 (1993) (“Many mistakes people make by trying to do it on their own often cannot be corrected later. Even the simplest choices involve uncertainties and risks if you are not thoroughly familiar with the law.”))). Moreover, lawyers play an important role in the bankruptcy system beyond their direct assistance to clients. See *In re Beck*, 2007 Bankr. LEXIS 517, at *9–10 (noting that pro se debtors increase the administrative costs for the court); *The Affordability Paradox*, 52 Wm. & Mary L.Rev. at 2010 (“At the most basic level, lawyers help the system run smoothly.”).

A debtor could attempt to find cheaper, or free, legal services, but I have no reason to think that counsel fees vary widely or that competent bankruptcy legal advice is readily available for free. See *In re Beck*, 2007 Bankr. LEXIS 517, at *21–22 (noting the absence of evidence that “there are sufficient attorneys available to file Chapter 7 cases pro bono, or for a reduced rate”); *In re Nieves*, 246 B.R. 866, 873 (Bankr.E.D.Wis.2000) (“This court fully recognizes that ... debtors who cannot afford to pay attorney's fees before filing for bankruptcy may have difficulty in obtaining legal counsel.”). We should have a better understanding of critical facts like these before we fashion a rule that may, in practical effect, make fee-only Chapter 13 plans unavailable.

The majority notes that the debtor in this case stated that he could have saved enough money in three months to pay *87 Chapter 7 fees, and they suggest that he should simply have waited to file for relief. The debtor's assertion of future ability to pay is certainly a factor to consider. For some debtors, however, the press of creditors, and the resulting stress, would likely make waiting intolerable. See, e.g., *In re Molina*, 420 B.R. at 829 (noting the debtor's “sincer[ity] in seeking chapter 13 relief since stopping the garnishment and preserving her

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home and income for herself and her grandson are critical for her”). In *Hamilton v. Lanning*, — U.S. —, 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010), the Supreme Court quoted a Chapter 13 treatise in noting the urgency of some bankruptcy filings:

“Potential Chapter 13 debtors typically find a lawyer’s office when they are one step from financial Armageddon: There is a foreclosure sale of the debtor’s home the next day; the debtor’s only car was mysteriously repossessed in the dark of last night; a garnishment has reduced the debtor’s take home pay below the ordinary requirements of food and rent. Instantaneous relief is expected, if not necessary.”

Id. at 2476 (quoting K. Lundin & W. Brown, *Chapter 13 Bankruptcy* § 3.1[2] (4th ed.2009)); see also *The Affordability Paradox*, 52 Wm. & Mary L.Rev. at 1938 (“Every month a debtor spends saving up for an increasingly expensive bankruptcy lawyer is a month in which she has lost substantive bankruptcy rights for procedural reasons.”).

It may turn out that balanced assessments will, in fact, result in designating a relatively small number of fee-only plans as filed in good faith. Such plans may be flawed by circumstances beyond the fact that they propose payment of only attorney’s fees, or fees and a minimal amount of secured debt. In *In re Buck*, for example, the bankruptcy court expressed concern about the unrealistic budgets underlying the plans. 432 B.R. at 21. Similarly, in *In re Paley*, 390 B.R. 53 (Bankr.N.D.N.Y.2008), the two debtors proposed plans of limited duration despite the longer commitment expected under Chapter 13. *Id.* at 59 (“A plan whose duration is tied only to payment of attorney’s fees simply is an abuse of the provisions, purpose, and spirit of the Bankruptcy Code.”); see also *In re Arlen*, 461 B.R. 550, 555–56 (Bankr.W.D.Mo.2011) (noting that the court’s finding that the proposed plans were not in good faith was linked “to the failure of the Debtors’ plans to comply with the applicable commitment period”); *In re Lavilla*, 425 B.R. 572, 578 (Bankr.E.D.Cal.2010) (noting that the *Paley* court

“had little difficulty finding that the debtors, who had *the ability but not the intent* to fund a meaningful chapter 13 plan, were not acting in good faith” because “[t]he brevity of their plans indicated that they were merely disguised chapter 7’s”). Yet the National Association of Consumer Bankruptcy Attorneys, as amicus, asserts that its members “have routinely had fee-only plans confirmed,” indicating that many such plans would satisfy the good-faith requirement if not rejected solely based on their fee-only characteristic.

In sum, in declining to fully join my colleagues’ approach, I do not question the need for caution in evaluating fee-only Chapter 13 plans. My concern is that a circumscribed totality of the circumstances analysis will unnecessarily, and perhaps unfairly, tilt the analysis against well meaning debtors. The experience thus far suggests that bankruptcy courts are able to draw distinctions between fee-only plans that comply with the Bankruptcy Code, including the good-faith requirement, and those that do not. Hence, unless further experience shows otherwise, I think we can be confident that the goals of Chapter 13 will be amply protected when the totality*88 of the circumstances test is thoughtfully applied, without threshold limitation, by bankruptcy judges.

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Only the Westlaw citation is currently available.

United States Bankruptcy Court,
N.D. Alabama,
Eastern Division.
In re Steven JACKSON, XXX-XXX-XXXX,
Debtor.
In re Lerin Brown, XXX-XXX-XXXX, Debtor.

Nos. 11-42528-JJR-13, 11-42825-JJR-13.
March 16, 2012.

Bethany Cobb Courville, Bethany Cobb Courville,
LLC, Northport, AL, [Leroy Alan Cobb](#), Cobb Law
Firm, LLC, Anniston, AL, for Debtor.

OPINION AND ORDER

[JAMES J. ROBINSON](#), Bankruptcy Judge.

*1 In their respective chapter 13 cases, Steven Jackson (“Jackson”) and Lerin Brown (“Brown”) and together with Jackson, the “Debtors”), each proposed plans ^{FN1} that are now before the Court for confirmation. Plan confirmation in most chapter 13 cases is a simple and uncontroversial affair. However, these cases typify a particular subset of chapter 13 cases that have been filed with disturbing frequency in the Eastern Division of this District. These cases contort the intent of chapter 13 and are nothing more than chapter 7’s on the installment plan and benefit no one with the exception of debtors’ counsel.

^{FN1}. Jackson Doc. 30; Brown Doc. 5.

To begin with, it is critical to observe that according to the Debtors’ Statements of Current Monthly Income (“CMI Statements”), no presumption of abuse would arise under [§ 707\(b\)\(2\) of the Bankruptcy Code](#) ^{FN2} if the Debtors had sought relief under chapter 7. ^{FN3} And equally critical, an examination of the Debtors’ schedules, statement of financial affairs, and proposed plans leads to the inescapable conclusion that the Debtors are quintes-

sential candidates for chapter 7 relief. So one must inquire, why did the Debtors seek relief under chapter 13 that postpones discharge pending completion of at least a 3-year plan, when they easily qualified for chapter 7 relief that will provide them with prompt discharges and no long-term commitments? The answer is an easy one: The Debtors have filed for relief under chapter 13 and not chapter 7 because of their inability or unwillingness to prepay their attorney fees in one lump sum before their petitions for relief were filed. ^{FN4}

^{FN2}. 11 U.S.C. § 101, *et seq.*, and herein referred to as the “Bankruptcy Code” or “Code.” Unless the context indicates otherwise, the symbol “ § ” is a reference to a section, subsection, paragraph, clause or other subdivision of the Code.

^{FN3}. [§ 707\(b\)\(2\)](#) was added to the Code with the adoption of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), and underscored Congress’s intent that debtors whose net income exceeds a calculated threshold should pay all or a portion of their debts through chapter 13, unless they are able to overcome a presumption that granting a discharge under chapter 7 would be an abuse. However, nothing was changed in the Code limiting access to chapter 7 for otherwise qualified debtors whose net income is below the [§ 707\(b\)\(2\)](#) threshold. See, *Morris v. Quigley* (*In re Quigley*), — F.3d —, 2012 WL 718894 *2 (4th Cir.2012) (“Attempting to address some perceived abuses in the bankruptcy system, as part of [BAPCPA], Congress revised the Bankruptcy Code by requiring debtors with above-median income ... to file ... under Chapter 13’s reorganization provisions rather than the liquidation provisions of Chapter 7”).

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FN4. In the Northern District of Alabama, attorney fees for chapter 7 cases are typically prepaid before the case is filed, and are usually in an amount significantly less than fees charged for chapter 13 cases. On the other hand, chapter 13 attorney fees are usually paid in installments through a confirmed plan and are often at least double the customary fee charged for a chapter 7 case.

Jackson's counsel initially sought a fee of \$2,500 (Doc. 15), but sensing the Court's aversion to attorney-fee-driven chapter 13 cases, dropped the proposed fee to \$1,500 (Doc. 30). Although a generous reduction, it was beside the point and further demonstrated that even with the reduction, Jackson refused or was unable to pay the fee at commencement of his case and seek the more fitting relief under chapter 7. For these and similar chapter 13 cases that should have been filed under chapter 7, and assuming a legitimate inability to prepay fees, the Court would encourage counsel to consider pro bono representation or referral to legal aid.

Jackson's Plan

Over a term of three years, Jackson's plan proposed to pay his attorney fees, filing fees, the trustee's commission, and approximately 18% of scheduled claims of unsecured creditors, assuming those creditors filed proofs of claim. **FN5** There were no priority or secured claims to be paid, and according to his schedules, all of Jackson's assets are protected by his allowed exemptions. The largest debt listed on Jackson's schedules was for a student loan owing to the "Department of Education/Sallie Mae," which would be nondischargeable under § 523(a)(8). **FN6**

FN5. Jackson's Schedule F listed 21 unsecured creditors, whose claims total \$14,902. Five of those creditors are listed

as "notice only" without any amounts shown as owing for their claims. As expected, few creditors bothered to file claims. Before the claims bar date, only three creditors filed claims in amounts, respectively, of \$1,073.47, \$200.00, and \$451.83. One scheduled creditor filed a tardy claim after the expiration of the bar date. As further discussed *infra*, it is both conspicuous and troubling that none of the creditors filing timely claims were listed in Jackson's schedules. Regardless, if the plan is confirmed, counsel's administrative claim for her fees will be the largest allowed claim in the case.

FN6. The claim of the Department of Education/Sallie Mae was scheduled for \$4,001.00, and mislabeled as a "credit card debt." Sallie Mae did not file a claim and neither did Jackson on its behalf. Education loans may be discharged only if a debtor can show excepting them from discharge will impose an undue burden on the debtor and his dependents. § 523(a)(8). A review of Jackson's schedules in this case, especially Schedules I and J, disclosed that there is virtually no possibility that such an undue burden exists.

Jackson did not appear at the hearing on plan confirmation, but he was represented by counsel. At the hearing the Court confronted counsel with the accusation that an objective analysis of the schedules, statement of financial affairs, CMI Statement, and proposed plan demonstrated that the primary motivation behind the case being filed under chapter 13, and not chapter 7, was to finance payment of attorney fees over time through plan payments. Although counsel never explicitly conceded, she offered no proof to the contrary and did not ask for the hearing to be continued, which is routinely allowed, to give her client an opportunity to rebut the accuracy of what the Court had gleaned from the schedules, plan and related bankruptcy docu-

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ments. Thus, based on the only evidence available, the Court must presume that its conclusion regarding why Jackson, with counsel's assistance and advice, filed for bankruptcy relief under chapter 13 was accurate: He was either unable or unwilling, or perhaps both, to pay attorney fees, other than through chapter 13 plan installments.^{FN7}

FN7. The Court's comments should not be interpreted as criticizing counsel for her failure to ask for a continuance. The purpose behind Jackson's and his counsel's choice between chapters 7 and 13 was obvious, and a delay to further verify the obvious would have been a waste of time.

Brown's Plan

*2 Brown's plan was very similar to that proposed by Jackson. Over a term of three years, the plan proposed to pay attorney fees, filing fees, the trustee's commission, and approximately 16% of scheduled claims of unsecured creditors.^{FN8} There were no priority or secured claims to be paid, and according to his schedules, all of Brown's assets are protected by his allowed exemptions. Brown's plan proposed to pay all administrative expenses, including attorney fees, in full before any distribution to creditors.^{FN9} Accordingly, before the first dollar is paid to creditors, payments during the first 16 months of Brown's 36-month plan will be exclusively devoted to paying attorney fees, filing fees and trustee's commission.

FN8. The claims bar date in Brown's case has expired, and three creditors filed claims, in the respective amounts of \$501.50, 489.46 and \$364.12. Brown's plan proposed to pay attorney fees of \$2,000; thus counsel's administrative claim for her fees, as in Jackson's case, will be the largest allowed claim in the case.

As mentioned, these two cases are very similar; neither is complex and each should have consumed approximately the same amount of counsel's time and

required the same amount of professional skill and knowledge. The same law firm represented both Debtors. Nonetheless, as mentioned in note 4, *supra*, the initial attorney fee proposed in Jackson's case was \$2,500, which was later reduced to \$1,500; however, the fee proposed in Brown's case has always been \$2,000.

FN9. As discussed in note 13, *infra*, such a provision was initially proposed in Jackson's plan but later dropped.

At the hearing, Brown's counsel candidly admitted the only reason Brown filed for relief under chapter 13 was to finance his attorney fees because he could not come up with the funds needed to prepay fees for a chapter 7 case. Brown was present at the hearing and confirmed counsel's admission as to why chapter 13 was chosen over chapter 7.^{FN10}

FN10. Yet another benefit to filing chapter 7 is that both Brown and Jackson appear to qualify for an *in forma pauperis* waiver of the chapter 7 filing fee under the current guidelines. No such waiver is available for chapter 13.

Good Faith—Duty of Bankruptcy Court

A chapter 13 plan may be confirmed only if a bankruptcy court finds the petition was filed, and the plan was proposed, in good faith. §§ 1325(a)(3), (7). And even in the absence of objections by creditors or a trustee, a bankruptcy court has an independent duty to determine that all prerequisites for plan confirmation have been satisfied.^{FN11} A chapter 13 debtor has the burden of proof to establish each element required for confirmation, including establishing both that the case was filed and that the plan was proposed in good faith.^{FN12}

FN11. *United Student Aid Funds, Inc. v. Espinosa*, 130 S.Ct. 1367, 1381 n. 14 (2010) (bankruptcy courts required to address defects in proposed plans even if no

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creditor raises the issue); *Alabama Dept. Of Economic & Community Affairs v. Ball Healthcare-Dallas, LLC* (*In re Lett*), 632 F.3d 1216, 1228–30 (11th Cir.2011) (bankruptcy courts have independent obligation to determine if absolute priority rule was violated); *Universal American Mortgage Co. v. Bateman* (*In re Bateman*), 331 F.3d 821, 828 n. 6 (11th Cir.2003) (bankruptcy courts have independent obligation to ensure compliance with the Code).

FN12. See e.g., *In re Lavilla*, 425 B.R. 572 (Bankr.E.D.Cal.2010) (discussing the distinction between a finding of “bad faith” and a finding of “not in good faith”, and also discussing the burden of proof for confirmation).

As with all prerequisites for chapter 13 plan confirmation, the Eleventh Circuit has directed bankruptcy courts to take an active role in assessing good faith:

We hold that with Section 1325(a)(3) Congress intended to provide bankruptcy courts with a discretionary means to preserve the bankruptcy process for its intended purpose. Accordingly, whenever a Chapter 13 petition appears to be tainted with a questionable purpose, it is incumbent upon the bankruptcy courts to examine and question the debtor's motives.... We simply require that the bankruptcy courts preserve the integrity of the bankruptcy process by refusing to condone its abuse.

Shell Oil v. Waldron (*In re Waldron*), 785 F.2d 936, 941 (11th Cir.1986). See also *Jim Walter Homes v. Saylor* (*In re Saylor*), 869 F.2d 1434, 1438 (11th Cir.1989) (bankruptcy court is in the best position to evaluate good faith and weigh *Kitchens* factors, *infra*, as it sits as finder of fact and can best assess debtor's credibility). And the Eleventh Circuit is not the only circuit that recognizes the importance of bankruptcy court scrutiny of

chapter 13 plans to determine if good faith standards are satisfied and to require that confirmation of abusive plans be denied:

The good faith requirement demands a separate, independent determination. As indicated, in determining whether a debtor's plan meets the section 1325(a)(3) confirmation requirement of good faith, we believe the proper inquiry should follow the analysis adopted by the Fourth Circuit: whether the plan constitutes an abuse of the provisions, purpose or spirit of Chapter 13. The bankruptcy court must utilize its fact-finding expertise and judge each case on its own facts after considering all the circumstances of the case. *If, after weighing all the facts and circumstances, the plan is determined to constitute an abuse of the provisions, purpose or spirit of Chapter 13, confirmation must be denied.*

*3 *United States v. Estus* (*In re Eutus*), 695 F.2d 311, 316 (8th Cir.1982) (emphasis added); See also *In re LeMaire*, 898 F.2d 1346, 1351 (8th Cir.1990) (holding, after addition of disposable income test, that the totality of the circumstances must still be examined in assessing good faith to determine if the plan “constitutes an abuse of the provisions, purpose, or spirit of Chapter 13”, with particular emphasis given to the debtor's motivation and sincerity in seeking chapter 13 relief (quoting *Eustus*, 695 F.2d at 316)).

Purpose of Chapter 13

It is important to recognize, in the simplest terms, the function chapter 13 serves in the context of debt relief for individuals, especially as compared with chapter 7. According to the Eleventh Circuit:

“Chapter 13 is designed to facilitate adjustments of the debts of individuals with regular income through extension and composition plans funded out of future income, under the protection of the court.” 5 *Collier on Bankruptcy* ¶ 1300.02 (15th Ed.1982). A chapter 13 plan allows a debtor to preserve his existing assets, while creditors benefit from ratable recovery out of the debtor's future

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income, which is unavailable in a chapter 7 liquidation.

Kitchens v. Georgia Railroad Bank & Trust Co. (In re Kitchens), 702 F.2d 885, 887 (11th Cir.1983). Similarly, Congress expressed its views of why an individual would seek relief under chapter 13 as opposed to chapter 7:

The purpose of chapter 13 is to enable an individual, under court supervision and protection, to develop and perform under a plan for the repayment of his debts over an extended period. In some cases, the plan will call for full repayment. In others, it may offer creditors a percentage of their claims in full settlement.... The benefit to the debtor of developing a plan of repayment under chapter 13, rather than opting for liquidation under chapter 7, is that it permits the debtor to protect his assets. In a liquidation case, the debtor must surrender his nonexempt assets for liquidation and sale by the trustee. Under chapter 13, the debtor may retain his property by agreeing to repay his creditors.

H.R.Rep. No. 95-595, at 1 (1977), U.S.Code Cong. & Admin. News 1978, p. 5863; see also *In re Levine*, 10 B.R. 168, 169 (Bankr.D. Mass 1981) (denying confirmation of plan offering 10% dividend to unsecured creditors and holding that “Chapter 13 was intended by Congress to provide certain benefits to debtors which are unavailable under either Chapter 11 or Chapter 7”). Thus, the precept for chapter 13 relief is adjustment of an individual's debts by way of developing a plan for their repayment, while preserving assets that otherwise might be liquidated under chapter 7. In the Debtors' cases, there is no meaningful adjustment of their debts and none of their assets are being protected—they are all exempt. It is axiomatic that a chapter 13 case filed for the wrong purpose is not filed in good faith.

Analysis of Debtors' Plans Vis-a-Vis Attorney Fees

*4 As a point of beginning to determine whether the Debtors' plans should be confirmed, including a finding that they do not constitute an abuse of

the provisions, purpose or spirit of chapter 13, the Court will first express its unequivocal agreement with the established and broadly accepted view of other courts who have found chapter 13 was designed by Congress for the “Adjustment of Debts of Individuals With Regular Income”—the official title given to chapter 13 in the Bankruptcy Code—and it was not intended as a payment collection and enhancement device for attorneys. *In re Buck*, 432 B.R. 13 (Bankr.D.Mass.2010) (condemning the use of chapter 13 as an attorney fee collection service in cases where debtors were excellent candidates for chapter 7 relief, and when chapter 7 would be in their best interest, although they were unable to prepay chapter 7 attorney fees up front); *In re Puffer*, 453 B.R. 14, 19-20 (D.Mass.2011) (discussing *In re Buck*, which collects cases on the subject, and emphasizing that the majority of courts to consider the issue find chapter 13 cases filed in lieu of otherwise-available chapter 7 relief to finance attorney fees, which the debtor cannot afford to prepay, are not filed in good faith under §§ 1325(a)(3), (7)). As discussed by the district court in *Puffer*, such a tactic is not redeemed by the fact that through chapter 13, the debtor may be provided legal services that might ultimately result in a discharge where such a “stratagem of invoking chapter 13 [serves to] delay by years such discharge, much to [debtor's] detriment.” *Id.* at 19 (emphasis in original).

The majority of reported cases hold that “Chapter 13 plans in which all or virtually all of the funds to be distributed are paid only to [d]ebtors' counsel unquestionably fail to meet any fair interpretation of the term ‘good faith’ in §§ 1325(a)(3) and (7), respectively.” *In re Buck*, 432 B.R. at 22. The court in *Buck* summarized the reported case law on this issue:

The overwhelming majority of courts that have addressed this question agree that Attorney Fee—Only Chapter 13 Plans fail to meet the good faith requirement of § 1325(a)(3). However, the plans in some of those cases also failed to

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meet good faith requirements on additional grounds. See *In re Sanchez*, No. 13–09–10955 MA, 2009 WL 2913224, at *1, *3 (Bankr.D.N.M. May 19, 2009) (finding a lack of good faith with a plan that pays only attorneys' fees in a case where debtors have a history of incurring "debts they are unable to repay and then seek[ing] bankruptcy protection every few years in order to alleviate their debt burden"); *In re Lehnert*, No. 07–55988, 2009 WL 1163401, at *4 (Bankr.E.D.Mich.Jan.14, 2009) (sustaining an objection to an Attorney Fee—Only Plan as not filed in good faith because the debtors were able to afford some dividend to creditors); *In re Montry*, 393 B.R. 695, 696–97 (Bankr.W.D.Mo.2008) (stating "[c]onfirming a Chapter 13 plan in a case where the only benefit to a debtor—beyond the relief available in Chapter 7—is the ability to pay the bankruptcy attorney fees over time would ... unnecessarily raise the cost of filing a bankruptcy petition for debtors who do not need or are ill suited for Chapter 13; and subvert the Supreme Court's holding in *Lamie v. U.S. Trustee* prohibiting the payment of post-petition attorney's fees from a debtor's Chapter 7 bankruptcy estate.") (footnotes omitted); *In re Paley*, 390 B.R. 53, 59–60 (Bankr.N.D.N.Y.2008) (stating "[t]he Debtors are not adjusting anything, much less debt; they are canceling and eliminating the claims of creditors while simply paying their attorneys. Under the theories advanced by the Debtors, carried to an absurd extreme, if they had paid their respective attorneys in full up front, they would have proposed a plan of \$0 for zero months and demanded a Chapter 13 discharge.... These cases, basically Chapter 7 cases hidden within Chapter 13 petitions, blur the distinction between the chapters into a meaningless haze."); *In re Dicey*, 312 B.R. 456, 459–60 (Bankr.D.N.H.2004) (stating "[n]ot only is the Plan a thinly disguised liquidation, but it is in essence only a payment plan for the Debtors' bankruptcy attorney's fees. Congress did not create Chapter 13 as a vehicle solely for the payment of attorney's fees."). But see *In re Molina*,

420 B.R. 825, 830–33 (Bankr.D.N.M.2009) (holding that a debtor who is in "economic straits;" "literally doing all that the statute requires of her;" ineligible to file for Chapter 7; and compliant with "the letter, and the spirit, of the chapter 13 law as Congress has written it" may file an Attorney Fee—Only Chapter 13 Plan).

*5 *Id.* at 22, n. 14.

This Court further agrees with the finding in *Buck* that the term "fee only case" should also include cases that provided some small distribution to unsecured creditors, where the "main purpose" for choosing chapter 13 as opposed to chapter 7 was to finance attorney fees. *Id.* at 18, n. 7. ^{FN13}

^{FN13}. In an attempt to divert attention away from plans whose primary purpose is to pay attorney fees, rather than adjust debts and preserve a debtor's property, a small dividend is often proposed to unsecured creditors. What is telling are provisions in such plans that delay the commencement of payments to unsecured creditors until after attorney fees are fully paid. Such a provision has always been present in the Brown case. The original plan proposed in the Jackson case called for attorney fees to be fully paid before any payment to creditors; however, that proposal was later abandoned and is absent from the plan now under consideration. But such a simple change does not cure the problem or hide the fact that the Debtor's financial woes are best addressed through chapter 7 and his plan "constitute[s] an abuse of the provisions, purpose [and] spirit of Chapter 13." *Estus*, 695 F.2d at 316.

In its analysis of a plan similar to those proposed by the Debtors in the instant cases, the District Court for the District of Massachusetts affirmed a bankruptcy court's decision that found good faith was lacking in an attorney-fee-centric

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chapter 13 case although the plan proposed a small dividend to creditors. The district court further found that the overwhelming majority of reported cases addressing such cases held they were an abuse of chapter 13:

Appellant contends that the bankruptcy court erred when it followed the majority of courts nationwide in finding that attorney fee-only Chapter 13 plans lack the good faith required by § 1325(a)(3). Upon *de novo* review of the bankruptcy court's rulings of law, this court is unpersuaded by Appellant's arguments both as they pertain to Debtor's case specifically, and to the landscape of bankruptcy law generally. See *In re LaRoche*, 969 F.2d 1299, 1301 (1st Cir.1992). While sympathetic to Appellant's quandary—how to provide necessary representation to clients who are unable to pay for his services—the court can ignore neither the sound rulings from bankruptcy courts nationwide nor the facts of Debtor's case here.

The discussion must begin with the observation that Appellant could identify only one bankruptcy court that has upheld attorney fee-only Chapter 13 plans. See *In re Elkins*, No. 09–09254–8–JRL, 2010 WL 1490585, at *2, 2010 Bankr.LEXIS 1085, at *4 (Bankr.E.D.N.C. Apr. 13, 2010) (noting a “tidal wave” of attorney fee-only cases). But see *In re Arlen*, No. 10–21980–DRD–13, 2011 WL 1667473, at *3, 2011 Bankr.LEXIS 1638, at *10 (Bankr.W.D.Mo., May 3, 2011) (“These cases are little more than disguised Chapter 7 proceedings. Utilizing Chapter 13 in this fashion blurs the distinctions between the two chapters and the various differences in their scope and purpose as reflected by the different applicable statutory provisions.”); *In re Paley*, 390 B.R. 53, 59 (Bankr.N.D.N.Y.2008) (“A plan whose duration is tied only to payment of attorney's fees simply is an abuse of the provisions, purpose, and spirit of the Bankruptcy Code.”); *In re Dicey*, 312 B.R. 456, 460 (Bankr.D.N.H.2004) (“Congress did

not create Chapter 13 as a vehicle solely for the payment of attorney's fees.”); *In re Levine*, 10 B.R. 168, 169 (Bankr.D.Mass.1981) (observing that the “majority of bankruptcy cases that have quantifiedly interpreted the ‘good faith’ requirement of § 1325(a)(3) have concluded that there must be a meaningful or substantial payment under the plan” and listing cases).

In re Puffer, 453 B.R. 14, 19–20 (D.Mass.2011) (emphasis added).

*6 To the uninitiated it might appear that at least the Debtors in these cases may eventually receive a discharge of their debts if they complete their plans, although it will take years in chapter 13 rather than a few months through chapter 7. Such a naïve position ignores the abysmal failure rate of chapter 13 cases. In the Eastern Division of this District (and probably District- and nation-wide), approximately 65% of all chapter 13 cases fail before debtors complete their plans and become eligible for a discharge. And for these two cases in particular, the Debtors have little incentive to stay the course for three years. They are not saving their homes by paying mortgage arrears or protecting non-exempt equity or assets; neither are they avoiding repossession of vehicles, nor holding at bay tax or domestic support creditors. If either of the Debtors defaults, his case will be dismissed, and he may simply file another chapter 13 petition and start over again—including another round of plan installments to pay attorney fees. The Court has seen this scenario repeated *ad nauseum*; it captures debtors who are promised a quick fix, but never achieve a discharge; their serial chapter 13 filings benefiting no one except their attorneys, who may receive payments over the course of these unsuccessful cases in what may be tantamount to an annuity. ^{FN14} Another alternative for the Debtors might be to convert their cases to chapter 7 after they have accumulated sufficient funds to pay attorney fees or have paid them through early plan payments as proposed by Brown's plan and originally proposed in Jackson's; however, there is no good faith to be

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found in a temporary chapter 13 case filed to accommodate payment of attorney fees as a prelude to a conversion to chapter 7.

FN14. The court in *In re Buck*, spoke bluntly about the dubious role of debtor's counsel in that case:

But while this Court does not minimize the struggle of many Chapter 7 debtors to retain counsel, the Attorney Fee-Only Chapter 13 Plan here doubled the Debtors' attorneys' fees while increasing the risk they would fail to receive a discharge at all. In this way, [debtor's attorney] has not used Chapter 13 as a payment device; rather, he has used Chapter 13 as a payment collection and enhancement device. At some point, one has to wonder whether the line between client assistance and client exploitation has been blurred and whether [debtor's attorney]'s form Retainer Agreement in these and other respects could be more properly characterized as adhesion contracts.

432 B.R. at 22, n. 15.

And the chapter 13 trustee in *Buck* was similarly critical:

First, [the Chapter 13 Trustee] argues that such plans are merely thinly veiled Chapter 7 cases, thereby contravening the fundamental purpose of Chapter 13—to permit a debtor to repay his or her debts over an extended period of time through future income. Second, the Chapter 13 trustee highlights the retainer agreements docketed in these cases. She argues that these agreements place debtors into involuntary servitude—forced to pay off their attorneys' fees and denied a discharge in the meantime. Finally, the Chapter 13 trustee argues that Attorney Fee-Only Chapter 13 Plans fail to meet

the good faith requirements of § 1325(a).

Id. at 19.

As previously discussed, for these Debtors, and many like them, the benefits of chapter 7 relief are palpable, and under their circumstances, far outweigh those available through chapter 13. So why did the Debtors not pay their attorneys to file a chapter 7 case? There are three possibilities, and all are troubling. The first possibility is they were not informed they qualified for chapter 7 relief, and made aware of the differences between the two chapters. The second and third possibilities are they either lack the financial wherewithal, or lack the discipline to accumulate the funds necessary to pay the chapter 7 attorney fees—fees that are usually substantially less than those customarily charged for chapter 13.^{FN15} If counsel adequately explained the differences between the two chapters, and the Court will assume as much, they and the Debtors must have reached the inescapable conclusion that chapter 7 provided the better relief given the Debtors' circumstances, except for no accommodation allowing payment of attorney fees over time. Thus, the Court infers the Debtors lack either the financial means or the discipline, or perhaps lack both, needed to come up with the fees. Regardless of whether it is the lack of means or discipline, both are harbingers for imminent default and dismissal. How can these Debtors be expected to budget their money and exercise the self-control needed to stay the course for the three years required to satisfy a chapter 13 commitment, when they cannot make a one-time payment to their attorneys for the chapter 7 relief they so desperately need? The simple answer is that in chapter 13, they are being set up for failure and exposed to the risk of being caught up in the chapter 13 revolving door.

^{FN16}

FN15. Attorneys in this Division often charge \$1,000 or less to file a simple chapter 7 case.

FN16. Chapter 13 has allowed untold num-

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bers of financially distressed individuals to avoid foreclosure of homes and repossession of vehicles needed to get to work, and to protect nonexempt assets from judgment creditors; but there is a dark side to chapter 13. For too many debtors chapter 13 becomes a relief valve that can be turned on and off as needed when creditors become too aggressive. Instead of paying out a plan and obtaining a discharge, debtors often incur additional debts while their cases are pending. Their cases are dismissed, followed by another chapter 13 petition for relief. The much-acclaimed financial fresh start is never achieved and frankly is not on their agenda. This judge has seen debtors who have filed numerous chapter 13 cases that span decades. For serial debtors, chapter 13 encourages irresponsible credit decisions and a tumultuous financial lifestyle, and often becomes a government-sponsored program on which they rely as a means of quasi-support—a means by which they can repeatedly incur debt without repayment.

*7 In *In re Nelson*, 2009 WL 2241567 (Bankr.M.D.Ala.2009), the debtor's plan dealt with two secured creditors (a long-term mortgage creditor to be paid directly with no prepetition arrears and a furniture creditor owed \$262 to be paid through the plan), only one of which would be discharged in the case. *Id.* at *1. The debtor had below-median income and pursuant to § 1322(d) his applicable commitment period was 36 months but he proposed a 40-month plan that would repay approximately 4.65% of unsecured claims (a pro rata share of \$1,000). *Id.* The attorney fee in the case was, for that District, the “no-look” fee of \$2,500. *Id.* Judge Williams pointed out that once the attorney fee and small secured claim were paid, the debtor would have a strong incentive to convert to chapter 7, because conversion would allow an immediate discharge without further payments to unsecured creditors. *Id.* at *2. Such a conversion (as

well as a dismissal prior to completion) would place a burden on the chapter 13 trustee, as plans that are completed subsidize plans that are dismissed or converted, with much of the trustee's costs of administration incurred early in a case. *Id.*

In most chapter 13 cases, paying attorney fees through a plan is not only permitted, it is the norm. However, when payment of such fees becomes the overriding purpose for filing a chapter 13 case, especially when relief under chapter 7 would be the logical choice if it were not for the attorney-fee hurdle, then such a case and its accompanying plan abuse the provisions, purpose and spirit of chapter 13.

Eleventh Circuit's Kitchens Factors

Putting payment of attorney fees aside, the Debtors' cases and plans raise additional good faith issues. To begin with, in determining whether a chapter 13 case was filed and its plan proposed in good faith, a bankruptcy court within the Eleventh Circuit should take into account the good-faith factors prescribed in *Kitchens*, *supra*. The circuit court stated that good faith could not be simply measured by doing the arithmetic to confirm compliance with the “best interest test” under § 1325(a)(4). *Kitchens*, 702 F.2d at 888. Rather, a bankruptcy court must consider, but is not limited to, the following factors to determine good faith:

- (1) the amount of the debtor's income from all sources; (2) the living expenses of the debtor and his dependents; (3) the amount of attorney's fees; (4) the probable or expected duration of the debtor's Chapter 13 plan; (5) the motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13; (6) the debtor's degree of effort; (7) the debtor's ability to earn and likelihood of fluctuation in his earnings; (8) special circumstances such as inordinate medical expense; (9) the frequency with which the debtor has sought relief under [the Bankruptcy Code]; (10) the circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealing with his

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creditors; [and] (11) the burden which the plan's administration would place on the trustee.

*8 *Id.* at 888–89.

As mentioned, the above good-faith factors are not exhaustive, and among others the *Kitchens* court suggested for consideration are the substantiality of repayment to the unsecured creditors, whether debts would be nondischargeable under chapter 7, and inaccuracies in a debtor's schedules. *Id.* at 889. (See also *In re Nelson*, *supra*, citing *Kitchens*, 702 F.2d at 889). Of utmost concern, as discussed at length above, were the Debtors' motivations and sincerity that were tainted because they sought relief under chapter 13, not to adjust debts and preserve assets, but to accommodate payment of attorney fees. In addition, this Court cannot ignore two other *Kitchens* factors: the burden which administration of the Debtors' plans will place on the trustee, and as a segue to discuss exceptional circumstances recognized by *Kitchens*, the substantiality of the proposed repayment to unsecured creditors.

It is inconceivable that the trustee's commission in these cases will pay more than a fraction of her expenses and overhead related to servicing the Debtors' plans and paying minuscule distributions to creditors. At first glance, it may appear the Debtors should be permitted to proceed under chapter 13 because their plans at least propose to pay small, albeit tenuous distributions to unsecured creditors—something being better than nothing.^{FN17} However, as mentioned above in notes 5 and 8, the realities are that few creditors bothered to file claims perhaps because the likelihood of any meaningful payments was not feasible under the Debtors' budgets,^{FN18} and distributions from the trustee will be of little consequence. Creditors' expenses and those that will be incurred by the trustee, will, in most instances, exceed the recovery and commission. And let us not forget that the primary job of the trustee in these two cases will be to collect and distribute plan payments to pay attorney fees.

FN17. If a debtor should feel a moral obligation or otherwise wish to pay his creditors after receiving a chapter 7 discharge, § 524(f) expressly allows him to do just that.

FN18. See Debtors' Schedules I and J.

The bankruptcy court in *In re Nelson*, *supra*, found that even if a plan that was similar to those proposed by the Debtors in these cases were completed, it would be burdensome to unsecured creditors who would receive monthly checks in minimal amounts for the duration of the case. *Id.* Against that background, the court found the case was not proposed in good faith “because it is chiefly a means of financing the debtor's attorney fee without offering either the debtor or his creditors any meaningful benefit over what they would receive in a hypothetical chapter 7 case,” *id.*, and sustained the trustee's objection to confirmation.^{FN19} See also *In re Buck*, 432 B.R. 13, 17 (Bankr.D.Mass.2010) (court sustained trustee's objection on grounds “that from ‘an economic and legal standpoint, it does not appear to be in the Debtors' best interest to be in Chapter 13’ ”).

FN19. The Court is mindful that the real cost of administering chapter 7 cases disguised as chapter 13's is born by legitimate chapter 13 debtors, whose trustee's commissions are being used to subsidize the abuse by debtors such as the Debtors in these cases. Even when a trustee's operations are indisputably efficient, such as those in this Division, the Court cannot condone such cost-shifting, regardless of the temptation to give a desperate debtor relief under chapter 13.

In its *Kitchens* decision, the Eleventh Circuit mentioned substantiality of the repayment of unsecured creditors as a factor that may be considered when good faith is an issue in a chapter 13 case, but it specifically noted “that other factors or exceptional circumstances may support a finding of good

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faith, even though a debtor has proposed no or only nominal repayment to unsecured creditors.” 702 F.2d at 889 (citing *In re Eutus*, 695 F.2d at 317). As an illustration, the court approved of the exceptional circumstances found in *Matter of Bellgraph*, 4 B.R. 421 (Bankr.W.D.N.Y.1980). In *Bellgraph*, the chapter 13 debtor was a totally disabled 56-year-old mother of seven, whose plan proposed to pay off taxes and secured creditors, or allow them to maintain their security, thus allowing her family to save their home. Filing chapter 13 to cure defaults in home mortgages—sanctioned by § 1322(b)(5)—is a widespread utilization of chapter 13, even in cases where nominal or no payments are proposed for unsecured creditors. Recall, however, that the Debtors in these cases have no home mortgages or other secured debts, they have no priority tax or domestic support obligations, and neither has non-exempt assets to protect. It would be dubious at best to argue that the inability or unwillingness to pay attorney fees on a pre-petition basis is an exceptional circumstance that would be sanctioned by the Eleventh Circuit as a legitimate purpose for seeking chapter 13 relief when a debtor is otherwise ill-suited for chapter 13, and all legitimate considerations point to chapter 7 as the only sensible choice.

*9 Two other *Kitchens* factors should also be discussed with regard to Jackson's case and plan. Recall that Jackson's largest scheduled creditor is the Department of Education/Sallie Mae, to whom Jackson is indebted for a substantial education loan. Because of the exception from discharge of education loans under § 523(a)(8), even if Jackson were to successfully complete his plan, his education loan will not be discharged. Sallie Mae did not file a claim, timely or otherwise, and Jackson did not file a claim on its behalf as permitted by Code § 501(b) and Rule 3004 of the Federal Rules of Bankruptcy Procedure. Thus, during the plan's three year term, all Jackson will have accomplished with respect to Sallie Mae's claim is to postpone the imminent day of reckoning for payment of that debt, not to mention the accrual of additional interest, ex-

penses and penalties. A chapter 7 case would quickly conclude with a discharge of all debts other than the education loan, and free up Jackson's finances so he could devote post-discharge income to pay Sallie Mae. Without question, both Jackson and his § 523(a)(8) creditor—Sallie Mae—would be better served through chapter 7. To conclude otherwise is not only myopic, it further demonstrates that the payment of attorney fees in this case has been elevated above Jackson's best interest.

Finally, it has become evident that Jackson's schedules are not accurate. As mentioned in note 5, *supra*, only one creditor listed in his schedules filed a proof of claim, and that was filed after the bar date. Jackson filed no claims on the behalf of any creditor, most notably Sallie Mae. However, three creditors did file timely claims; creditors who cannot be found on the schedules. Jackson has not objected to the claims filed by these unscheduled creditors, and absent objections their claims are deemed allowed. § 502(a). One has to wonder how many additional creditors were omitted from the schedules but failed to receive notice through other means. Omitting creditors from schedules usually means they are not notified of the case and lose their opportunity to file claims and participate in the plan. Of importance from a debtor's perspective, is the risk that claims of omitted creditors who do not otherwise get timely notice will not be discharged even if a debtor were to complete his plan. § 1328(a) (only debts “provided for by the plan” are discharged). Could it be that for Jackson, accurately listing creditors and anticipating a discharge were not major concerns when schedules were being prepared? Perhaps the concern was more focused on how to get his lawyer paid. Regardless, the schedules are inaccurate, at least with respect to the three unscheduled creditors who filed timely claims. ^{FN20}

FN20. No amended schedules were filed. A \$30.00 fee is charged to amend schedules and add omitted creditors. Bankruptcy Court Miscellaneous Fee Schedule (4), is-

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sued in accordance with 28 U.S.C. § 1930(b).

While omitting three creditors (and possibly more) from schedules is a serious deficiency, absent the other problems with confirmation that were discussed herein, or unless the omissions were shown to be intentional, they probably would not be grounds to deny plan confirmation. As mentioned in note 6, *supra*, the educational loan owing to Sallie Mae was mislabeled in the schedules as a “credit card debt.” The omitted creditors and mislabeling of Sallie Mae’s debt leaves the Court with the impression that little care was given to the preparation of Jackson’s schedules.

Conclusion

In these cases, the Debtors’ best interests are served by seeking relief in chapter 7, not chapter 13, and the Court finds that they would have done just that if payment of attorney fees were not an obstacle. A chapter 7 case will enable the Debtors to receive discharges in short order; they will be protected in the meantime by the automatic stay; they will not be burdened with plan payments for three years, which for these Debtors may be insurmountable tasks; and perhaps most significantly, they will not run the high risk of default and dismissal of their cases followed by repeat performances. These Debtors, and others whose circumstances beg for chapter 7 relief, but nonetheless are motivated by an opportunity to pay their attorney fees on the installment plan, cannot simply disguise their opaque chapter 7 cases by cloaking them in illusory chapter 13 petitions. If allowed, these misguided debtors impermissibly burden chapter 13 trustees and bankruptcy courts with the administration of their cases which are subsidized by debtors in “legitimate” chapter 13 cases. And more times than not, they are wasting their own time and money for a short-lived financial respite rather than receiving a discharge and the financial fresh start

they need and for which they are qualified.

***10** There is simply no meaningful or legitimate debt adjustment purpose to be found in the Debtors’ cases or plans. Rather, the thinly veiled purpose for both was to pay attorney fees on the installment plan, not to protect encumbered property from secured creditors or non-exempt assets from liquidation by a trustee. Perhaps most glaring is that even if their proposed chapter 13 plans are ultimately paid, everything that might be accomplished over the next three years can be achieved more quickly and cheaply, and with greater certainty—especially a discharge—under chapter 7. Hence, the provisions, purpose and spirit of chapter 13 are being abused, and the Court finds that the Debtors’ cases were not filed, and their plans were not proposed, in good faith as required by §§ 1325(a)(3) and (7).^{FN21}

FN21. Years ago when the stigma of bankruptcy was much greater, cases like these were a rare phenomenon, but with the proliferation of liberal credit card offerings, check-advance and payday lenders, and rent-to-own vendors, the filing of fee-driven cases has evolved into a virtual institution, at least in the Eastern Division of this District. All participants, except the debtors, reap some benefit. The benefit to attorneys—payment of their fees in each successive case—has been discussed at length in this opinion. Creditors benefit when their claims are rarely discharged because most of these cases are dismissed before the plan is fully paid, and in the meantime miniscule dividends might be paid. Creditors can collect their claims after cases are dismissed and before serial debtors file another petition. The check-advance and pay-day lenders, and rent-to-own vendors—creditors-of-last-resort—often extend additional credit with exorbitant interest and fees to debtors who are in active

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chapter 13 cases. Once the debt-load from the additional credit, when added to the chapter 13 payments, becomes too great, the case is dismissed after a lengthy dismissal process, and the cycle starts over. The courts, including this one, and trustees are not immune from criticism. Reporting a high number of active chapter 13 cases may allow them to glow in statistical glory, which to the uninformed leaves the impression of hard work for a worthy cause. But what are we really accomplishing by allowing such a misguided utilization of chapter 13? Remember these are debtors whose incomes are below the median even for Alabama—a state near the bottom of the national average—and are not those targeted by Congress when it adopted BAPCPA. As the trustee in *Buck* so bluntly and aptly said: “these agreements placed debtors into involuntary servitude—forced to pay off their attorneys fees and denied a discharge in the meantime.” 432 B.R. at 19.

An interesting, albeit disturbing article recently appeared on the front page of the *New York Times*, in which deficiencies in the chapter 13 system were discussed, primarily from a racial disparity viewpoint. Nonetheless, several observations transcend race:

The vast majority of debtors file under Chapter 7 ..., which typically allows them to erase most debts in a matter of months. It tends to have a higher success rate and is less expensive than the alternative, Chapter 13, which requires debtors to dedicate their disposable income to paying back their debts for several years.

....

If a debtor chooses an inappropriate chapter, there can be serious implica-

tions. Chapter 13 plans, for instance, are more likely to fail than a Chapter 7. Nearly two of every three Chapter 13 plans are not completed, which means the filers' remaining debts are not discharged, leaving them right where they started. One bankruptcy judge, who sees filers once they can no longer make the required payments in the plans, said the debtors usually do not have enough income to stick with the budget.

....

Even though the attorneys' fees for the more labor-intensive Chapter 13 are more than double the charge for Chapter 7, some truly distressed debtors will pursue a Chapter 13 anyway, several bankruptcy experts said. That is because they can pay the fee over time, unlike in a Chapter 7, which typically requires a payment before the case is filed....

....

... “We should focus not on picking apart the conclusions,” Mr. [Henry E.] Hildebrand [III] said, “but use this study as an indication that we should be attempting to fix what has become a complex, expensive, unproductive system.”

Bernard, *Blacks Face Bias in Bankruptcy, Study Suggests*, N.Y. Times, January 20, 2012, at 1, col. 1.

Order

Accordingly, it is hereby ORDERED that confirmation of the Debtors' respective plans (Jackson Doc. 30; Brown Doc. 5) is DENIED, and each of the Debtors shall have 14 days to convert his case to a case under chapter 7. If either case is not timely converted it will be dismissed.

So Ordered.

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