Chapter 13 De Minimis Plans: Toward a Consensus on "Good Faith"

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NOTES

CHAPTER 13 DE MINIMIS PLANS: TOWARD A CONSENSUS ON "GOOD FAITH"

The Bankruptcy Reform Act of 1978 (Code)\(^1\) continues the approach of prior law (Act)\(^2\) in allowing consumer debtors\(^3\) the option of either liquidating their assets under Chapter 7\(^4\) or paying their creditors out of future income in accordance with court-approved payment plans under Chapter 13.\(^5\) However, in altering the mechanics of payment-plan relief, the drafters of the Code have brought about a fundamental restructuring of debtor-creditor relations. It is far from clear from the bare language of the new law just how far the debtor's obligation to repay his creditors now extends.

In contrast to the former Act, plan confirmation under the Code is not founded upon creditor acceptance.\(^6\) Instead the Chap-

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3. To be eligible for relief under Chapter 13 of the Code, the debtor must qualify as an "individual with regular income," as that term is defined in § 101(24), 11 U.S.C. § 101(24), who falls within specified debt ceilings. See § 109(e), 11 U.S.C. § 109(e). Under the former Act, only an individual who was a "wage earner," as that term is defined in Act § 606(8), 11 U.S.C. § 1006 (1976), was eligible for the payment-plan relief of Chapter XIII.
6. See § 1325, 11 U.S.C. § 1325. Under the former Act, a plan could not be confirmed unless it was accepted by a majority both in the number of unsecured creditors affected by the plan and in the amount of such unsecured claims. Furthermore, it
ter 13 debtor need only satisfy the confirmation standards set forth in section 1325 to receive judicial approval of his plan. By requiring the court to make an independent determination that the criteria of section 1325 have been met, the Code in effect ordains the bankruptcy judge the guardian of creditor interests. The theory underlying Chapter 13 is that the statutory confirmation standards alone provide sufficient protection of creditor interests, and there is consequently no need to have creditors vote on a proposed plan.

Creditor disenfranchisement under the Code has given rise to the recent phenomenon of the Chapter 13 "de minimis" plan, and has opened the floodgates to a new wave of cases centering on the parameters of the "good faith" requirement of section 1325(a)(3). The debtors in such cases often argue that as long as unsecured creditors receive at least as much as they would in a liquidation case, the plan satisfies the quantitative component of the Code's confirmation requirements and should therefore be confirmed as had to be approved by all secured creditors whose claims were "dealt with by the plan." Act § 652, 11 U.S.C. § 1052 (1976).

9. A "de minimis" plan, as the term is used in this Note, is a plan of debt arrangement which proposes to pay unsecured creditors a nominal percentage of their claims, if anything. It is imperative for one to recognize that under this usage of the term it is possible for a plan to be de minimis even though substantial payments are to be made to holders of priority or secured claims.
12. Section 1325(a)(4) of the Code provides that the court shall confirm the plan if inter alia the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date.
long as the other elements of section 1325 are met. Creditors, on
the other hand, invariably claim that Congress intended the good-
faith element of section 1325(a)(3) to serve as the measuring stick of
repayment adequacy. They argue that nominal payment plans are
inherently violative of the good-faith requirement since the quid
pro quo for the liberal rehabilitative provisions of Chapter 13 is
the implicit obligation to make meaningful repayment of outstand-
ing unsecured debts.

From a study of the early cases arising under the Code, it is
clear that the courts are wholly inconsistent in their application of
the good-faith requirement of section 1325. At one extreme, a
plan proposing no payment to any creditors has been confirmed. At
the other extreme, at least two courts have held that a mini-
umum of seventy percent repayment is always required for a plan
to be confirmed. Such divergence of opinion illustrates the dan-
ger of leaving undefined the umbrella concept of good faith—what
is otherwise healthy judicial discretion gives rise to unequal protec-

11 U.S.C. § 1325(a)(4) (emphasis added). This provision is the equivalent of the
"best interests of the creditors" test found in § 656 of the former Act, 11 U.S.C. §
1056(a)(2) (1976). The best-interests-of-the-creditors standard is a term of art which is
not to be read literally. It connotes nothing more than a requirement that unsecured
creditors receive their liquidation equivalent. See In re Hurd, 4 B.R. 551, 553, 2
C.B.C.2d 190, 193-94, 6 B.C.D. 412, 413-14 (W.D. Mich. 1980). This Note will use
interchangeably the phrases "best interests of the creditors" and "liquidation value"
as shorthand for the § 1325(a)(4) requirement.

Since secured creditors' entitlements are delineated in § 1325(a)(5), 11 U.S.C. §
1325(a)(5), their claims are only tangentially related to the quantitative good-faith is-

13. See text accompanying note 93 infra.

14. In other words, it is contended that good faith requires examination of the
sufficiency of the proposed payments and is not limited to the honesty of the
debtor's motives. See, e.g., cases cited in note 16 infra and accompanying text.

15. See text accompanying notes 46-71 infra.

16. Numerous courts have so held. E.g., In re Burrell, 6 B.R. 360, 2 C.B.C.2d
1019, 6 B.C.D. 900 (Dist. Ct., N.D. Cal. 1980); In re Marlow, 3 B.R. 305, 1 C.B.C.2d
705, 6 B.C.D. 77 (N.D. Ill. 1980); In re Howard, 3 B.R. 75, 1 C.B.C.2d 633, 5 B.C.D.
1375 (S.D. Cal. 1980); In re Campbell, 3 B.R. 57, 1 C.B.C.2d 653, 5 B.C.D. 1365
(S.D. Cal. 1980); In re Iacovoni, 2 B.R. 256, 1 C.B.C.2d 331, 5 B.C.D. 1270 (D. Utah
1980).

17. See text accompanying note 10 supra.

18. See In re Terry, 3 B.R. 63, 1 C.B.C.2d 525, 5 B.C.D. 1397 (W.D. Ark.),
rev'd, 630 F.2d 634 (8th Cir. 1980).

19. See In re Raburn, 4 B.R. 624, 6 B.C.D. 453 (M.D. Ga. 1980); In re Burrell, 2
B.R. 650, 1 C.B.C.2d 474, 5 B.C.D. 1321 (N.D. Cal.), rev'd, 6 B.R. 360, 2 C.B.C.2d
1019, 6 B.C.D. 900 (Dist. Ct., N.D. Cal. 1980).
tion of the laws when the courts proceed upon different first principles.20

In order to achieve some semblance of uniformity in commercial relations, the Constitution vests exclusive responsibility for the enactment of bankruptcy laws in the federal government.21 The existing disparate application of Chapter 13 confirmation standards frustrates that objective. Since most consumer liquidation cases would result in no distribution to unsecured creditors,22 it is particularly important to determine whether the good-faith requirement imports a quantitative element of its own into section 1325.23 In an attempt to abate some of the existing confusion, this Note will examine the underlying policies and objectives of Chapter 13 in order to put the role of the good-faith concept into its proper perspective. The thesis of this Note is that good faith is a quantitative standard which obligates the debtor to repay his unsecured creditors in accordance with his means. If the debtor has little or no surplus after taking account of his living costs and rehabilitative needs, a de minimis plan may well be appropriate. In order to distinguish between the uses and abuses of Chapter 13, it is necessary at the outset to give a general overview of the history and mechanics of the Chapter.

HISTORY AND POLICY OF CHAPTER 13

There are two overriding objectives of the American bankruptcy system.24 The first is to "relieve the honest debtor from the

20. It is one thing to permit the facts of the given case to dictate what percentage repayment is fair; it is something quite different for the courts to be applying inconsistent legal requirements. The legislative history of the Code nowhere discusses the good-faith standard and therefore offers little guidance.
23. If liquidation value stood alone as the sole quantitative standard, arrangements known as "zero plans," i.e., no payment to unsecured creditors, would abound. It is not difficult to see that such an interpretation would render Chapter 7 moot insofar as most consumer debtors are concerned: why would a debtor ever file in Chapter 7 if he could reap the more generous benefits attendant to Chapter 13 without incurring greater obligation? In fact, it has been suggested that attorneys in jurisdictions adhering to the view that liquidation value is the only quantitative standard of confirmation would be guilty of malpractice per se for filing a Chapter 7 petition on behalf of a consumer debtor who would qualify for Chapter 13 relief. See In re Hurd, 4 B.R. at 557-58, 2 C.B.C.2d at 199, 6 B.C.D. at 416.
24. See COMMISSION REPORT, supra note 8, at 71. A third principal objective identified by the Commission Report is "economical administration." See id. at 75.
weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.\textsuperscript{25} The second is to assure orderly and equitable administration of the debtor's estate so that the rights of creditors are fairly protected.\textsuperscript{26}

While liquidation of the debtor's assets is remedial insofar as it gives the debtor a discharge of many of his debts,\textsuperscript{27} it is no panacea for the debtor's financial problems, because it removes the assets which would otherwise serve as his economic building blocks.\textsuperscript{28} In order to afford the individual debtor more complete relief, the former Act permitted qualifying "wage earners"\textsuperscript{29} to opt instead for Chapter XIII status.\textsuperscript{30} Under this Chapter, the debtor was permitted to retain his assets if he proposed and gained creditor acceptance of a plan to make debt repayment out of his future earnings.\textsuperscript{31} Since confirmation in Chapter XIII required the plan to be in the "best interests of the creditors,"\textsuperscript{32} the creditors were assured of receiving at least as much as they would in liquidation. Thus, in theory Chapter XIII relief was preferable to liquidation from the standpoints of both the debtor and creditor.

\textit{Shortcomings of Chapter XIII}

For various reasons, Chapter XIII did not achieve its intended results. First, since secured creditors individually and unsecured

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Commission Report}, supra note 8, at 76-79.
\item liquidation under Chapter 7 gives the individual debtor who is not prevented by the objections to discharge set forth in § 727(a), 11 U.S.C. § 727(a), a discharge from all debts which arose prior to the date of the order for relief, save those which are nondischargeable under § 523(a), 11 U.S.C. § 523(a).
\item Liquidation causes all of the debtor's assets except those which are specifically exempted under § 522(d), 11 U.S.C. § 522(d), to be removed from his control and applied in repayment of the outstanding allowed claims.
\item A "wage earner" under the former Act was "an individual whose principal income is derived from wages, salary, or commissions." Act § 606(8), 11 U.S.C. § 1006(8) (1976). To qualify for relief under Chapter XIII, the wage earner had to be "insolvent or unable to pay his debts as they mature." Act § 623, 11 U.S.C. § 1023 (1976).
\item Under the former Chapter XIII, the debtor was required to attempt to effectuate a plan providing for payments solely out of his future earnings. Act § 623, 11 U.S.C. § 1023 (1976).
\item See id.; note 6 supra. In addition, the debtor had to meet the confirmation standards of Act § 656, 11 U.S.C. § 1056 (1976). As a practical matter, however, creditor approval was the real key to confirmation.
\item Act § 656(a)(2), 11 U.S.C. § 1056(a)(2) (1976); see note 12 supra.
\end{enumerate}
\end{footnotesize}
creditors collectively, possessed a veto power over the debtor’s plan, they were often in a position to force a full payment extension plan rather than accept a composition. This discouraged many debtors from filing under Chapter XIII. Of those debtors who did file under the Chapter, many, in agreeing to undertake full repayment within three years, exceeded their capabilities. As a result, wage-earner plans under the former Act had a high mortality rate.

A second reason for the limited use of the composition feature was the fact that the six-year bar to subsequent debt relief imposed by the Act applied to Chapter XIII composition plans. Many debtors simply did not want to “waste” the opportunity for future relief.

Third, if some unforeseen inability to make the required payments arose, the debtor would be ineligible for a “hardship” discharge unless the debtor had already complied with the terms of the plan for three years and the court determined that he should not be justly held accountable for his inability to complete the plan. Thus, rather than undertake substantial payment obligations and risk the loss of discharge in the process, many debtors opted instead for liquidation.

Fourth, many debtors in need of relief did not meet the narrow eligibility requirement of being “an individual whose principal income is derived from wages, salary, or commissions.” Excluded

33. See note 6 supra; cf. text accompanying notes 58-59 infra (creditors have no veto power under Code).
34. See COMMISSION REPORT, supra note 8, at 161. An extension plan is an arrangement under which the debtor proposes to pay his debts in full over an extended period of time. A composition plan is an arrangement under which the debtor proposes to pay his creditors a certain percentage on his debts, for which the debtor will receive a full discharge.
35. While the Act did not place a three-year time limit on wage-earner plans, three years became the normative duration because of the § 661 “hardship” discharge requirement that payments be made for at least three years. See id. at 160.
36. See id. at 12, 160.
37. Id.
39. See COMMISSION REPORT, supra note 8, at 160-61.
40. A “hardship” discharge is the release from obligation afforded a qualifying debtor who is unable to complete his plan.
41. Cf. text accompanying notes 67-68 infra (no time restrictions for “hardship” discharge under Code).
43. Act § 606(8), 11 U.S.C. § 1006(8) (1976); cf. text accompanying notes 55-56
by Chapter XIII were individuals whose principal income was derived from welfare or retirement benefits and individuals who were self-employed. 44

Finally, Chapter XIII relief was inflexible in that payments under the plan had to derive exclusively from future income. 45 In other words, the debtor was prohibited from using his assets to effect payments under the plan. By so constraining the debtor, the Act made it difficult for him to propose a plan that would be agreeable to his creditors.

The failings of the former Chapter XIII demonstrated the need for more meaningful relief for individual debtors. 46 In drafting the Code, the framers structured the new Chapter 13 with an eye toward expanded eligibility, 47 increased flexibility, 48 and more liberal discharge of indebtedness. 49 But while the means were altered, the ends of “fair treatment of all creditors and the rehabilitation of the debtor” remain unchanged. 50

THE NEW APPROACH

Proceeding upon the belief that repayment plans are generally more beneficial to all parties concerned than straight liquidation, 51 the drafters of the Code attempted to encourage greater use of plan-type relief. 52 First, Congress expanded eligibility under Chapter 13 to include not only wage earners, but any “individual with regular income” 53 who falls within specified debt ceilings. 54 In

infra (Code expanded eligibility). This problem was to some extent mitigated by the liberal construction placed on the eligibility requirements by the courts. COMMISSION REPORT, supra note 8, at 13.


46. See COMMISSION REPORT, supra note 8, at 12-14, 79-80.

47. See text accompanying notes 53-56 infra.

48. See text accompanying notes 63-66 infra.

49. See text accompanying notes 57, 61-62 infra. For a discussion of the fundamental changes effectuated by the Code in the area of discharge of indebtedness, see In re Bloom, 3 B.R. 467, 469-70, 1 C.B.C.2d 1098, 1100-01, 6 B.C.D. 141, 142-43 (C.D. Cal. 1980).

50. COMMISSION REPORT, supra note 8, at 75.


52. See id.

53. § 109(e), 11 U.S.C. § 109(e). For the Code’s definition of “individual with regular income,” see text accompanying note 76 infra.

54. Section 109(e) of the Code provides that
shifting the focus from the source and nature of the income to its stability and regularity,\textsuperscript{55} many individuals who had theretofore been denied the use of payment-plan relief, such as pensioners, welfare recipients, and individual proprietors, gained access.\textsuperscript{56} Moreover, the Code affirmatively encourages individuals to use the payment-plan mode of relief by allowing the Chapter 13 debtor to avoid most of the exceptions to discharge that are applicable to a straight liquidation case under Chapter 7.\textsuperscript{57}

Second, by abandoning the requirement of creditor approval of the debtor's plan,\textsuperscript{58} the Code removed the de facto bar to composition plans which existed under the former Act.\textsuperscript{59} In a further effort to remove the deterrents to the use of composition plans, the new law does not preclude subsequent Chapter 13 relief for a debtor who has had such a plan confirmed.\textsuperscript{60} With composition plans possible, debtors are obviously more amenable to Chapter 13 relief. At the same time, the mortality rate of Chapter 13 plans is likely to decline sharply since debtors will no longer be coerced into undertaking obligations in excess of their means.


\textsuperscript{59} See text accompanying notes 33-34 supra.
\textsuperscript{60} See § 1328, 11 U.S.C. § 1328. While use of the composition feature does not bar future relief in Chapter 13, it does bar discharge in Chapter 7 liquidation for the ensuing six years, unless payments made by the debtor under his plan were not less than "(A) 100 percent of the allowed unsecured claims in such case; or (B)(i) 70 percent of such claims; and (ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort." § 727(a)(9), 11 U.S.C. § 727(a)(9). Thus, it is clear that while Congress sought to promote the use of the composition feature in appropriate Chapter 13 cases, it did not want to remove all incentives for high payment plans. See text accompanying note 128 infra.
Third, the Code eliminated the former Act's provision that a court could not confirm the debtor's Chapter XIII plan unless it was satisfied that "the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of the bankrupt." The drafters reasoned that ineligibility for discharge in straight bankruptcy should have no bearing on eligibility for discharge in Chapter 13 since confirmation of a Chapter 13 plan requires a finding that it is proposed in good faith and is in the best interests of the creditors.

Fourth, to prevent frustration of Chapter 13 relief by unwilling secured creditors, the debtor is now permitted to "cram down" his secured debts under the provisions of section 1325(a)(5). That is,
if the secured creditor does not accept the plan, the debtor nevertheless has the option of either paying such creditor the value of the collateral and allowing her to retain her security interest or surrendering the collateral to the creditor.

Fifth, the Code permits the debtor to use his nonexempt assets, as well as his future income, to make payments under his plan. Thus, the debtor is given a greater degree of flexibility in allocating his resources in fulfillment of his obligations.

Finally, the Code does not make three years of compliance with the terms of the plan a prerequisite for "hardship" discharge as the former Act did. Rather, the new law permits the disabled debtor, upon meeting the requirements of section 1328(b), to bail out of his plan and receive a discharge of his indebtedness at any time after confirmation. From the foregoing, it is clear that Congress has provided great inducement for debtors to attempt repayment of debts in lieu of liquidation. Chapter 13 affords the debtor innumerable benefits, including: (1) retention of property; (2) more comprehensive discharge relief; (3) protection of credit standing; and (4) avoidance of the stigma attached to an individual adjudicated a bankrupt.

Consideration of how a given chapter of the Code affects a debtor is, at most, one-half of the problem. While Chapter 13 is a vehicle for debtor rehabilitation, it serves at the same time the

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64. A creditor under the Code is deemed to have a “secured” claim only to the extent of the value of the property securing the debt. The remainder, if any, is treated the same as any other unsecured claim. See § 506, 11 U.S.C. § 506.

65. See note 63 supra.


70. See text accompanying notes 98-109 infra.

71. See House Report, supra note 44, at 118, reprinted in [1978] U.S. CODE CONC. & AD. NEWS 5963, 6079. The benefits numbered “(3)” and “(4)” in the text theoretically evolve from the debtor’s self-imposed commitment to repay his creditors. Whether lending institutions will in practice view Chapter 13 debtors in a more favorable light than Chapter 7 debtors remains to be seen.
function of protecting the interests of creditors.\textsuperscript{72} Which of these competing internal goals of the bankruptcy system\textsuperscript{73} will outweigh the other in a given case must be determined by the facts of the particular situation. In the final analysis, the bankruptcy system sides with neither debtor nor creditor but strives to achieve fundamental fairness between them in light of their circumstances.\textsuperscript{74}

**Mechanics of Chapter 13**

Subject to specified debt ceilings, any individual debtor with "regular income" may file for relief under Chapter 13.\textsuperscript{75} The Code defines "individual with regular income" as any "individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stock broker or a commodity broker."\textsuperscript{76}

Once a petition is filed, an automatic stay comes into opera-

\textsuperscript{72} See *Commission Report*, supra note 8, at 62-79.

\textsuperscript{73} The Commission Report categorizes the various goals of the bankruptcy system as being either "external" or "internal." *Id.* at 68-83. The "external" goals are those which relate to the interaction between the bankruptcy process and the "open credit economy." Since private credit plays a major role in the economy of the country, the bankruptcy system must be attuned to the ramifications its policies may have on those who are not the principals in the bankruptcy process. *See id.* at 68-74. As an illustration, one need simply consider how in facilitating debtor rehabilitation the existing bankruptcy system guards against individuals becoming counter-productive to the overall economy.

The "internal" goals of the bankruptcy system are those which relate specifically to the bankruptcy process. *Id.* at 75. The two "internal" goals which are most central to the purposes of this Note are: (1) debtor rehabilitation, *id.* at 79-81; and (2) equitable disposition of creditors' claims, *id.* at 76-79.

\textsuperscript{74} See generally *id.* at 75-83.


\textsuperscript{76} § 101(24), 11 U.S.C. § 101(24). Stockbrokers and commodity brokers are categorically excluded from Chapter 13 relief because of the nature of their debts. Debtors who are either stockbrokers or commodity brokers invariably owe money on customer accounts. The Code, under §§ 741-766, 11 U.S.C. §§ 741-766, imposes "special protective rules" in Chapter 7 liquidation to protect the interests of these otherwise vulnerable customers. *House Report*, supra note 44, at 319, reprinted in [1978] U.S. Code Cong. & Ad. News 5963, 6276. However, since the more streamlined procedures of Chapter 13 do not afford similar protection, the drafters precluded access to the Chapter by the brokers. *See id.*
tion, which gives the debtor "breathing space" from collection or enforcement activities so that he may put his affairs in order and draft a payment plan. To prevent coercion of the debtor through the application of pressure on his relatives and friends, Chapter 13 also provides for a stay of action against co-debtors.

Section 1322(a) sets forth three mandatory provisions for any Chapter 13 plan. First, the plan must "provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan." Second, the plan must "provide for the full payment, in deferred cash payments of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim." Finally, if the plan classifies claims, it must "provide the same treatment for each claim within a particular class." In addition to these mandatory provisions, section 1322(b) lists the optional provisions a plan may contain.

The debtor's resource pool, known as his "estate," is broader in Chapter 13 than it is in Chapter 7, since it includes after-acquired property and income. Because the Chapter 13 estate is an "open" estate, its exact value cannot be ascertained at the fil-
ing date, but must be estimated by projection. Section 522(d) sets forth the property of the debtor that may be exempted from the estate.\textsuperscript{87} The debtor has the option of electing either these federal exemptions or the applicable state exemptions.\textsuperscript{88}

In order to avoid creating a system of institutionalized "wage slavery,"\textsuperscript{89} Chapter 13 imposes a normal maximum of three years' duration on plan payments.\textsuperscript{90} Plans of much longer duration would run the risk of putting the debtor on a financial treadmill and, in most cases, would frustrate the goal of debtor rehabilitation.\textsuperscript{91} Thus, in order to afford the debtor the opportunity to achieve renewed economic viability, the Code limits the period of time for which the debtor must work for the benefit of his creditors.

A proposed plan does not become effective unless and until it is confirmed by the court.\textsuperscript{92} If the court is satisfied that the statu-

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87. 11 U.S.C. § 522(d). The exemptions enable the debtor to insulate specified amounts of various types of property thought to be vital to the debtor's subsistence. As deserving as creditors are of collecting on their outstanding claims, the bankruptcy system is not so insensitive to the needs of the debtor as to leave him without the basic means of survival.


90. See § 1322(c), 11 U.S.C. § 1322(c). However, where exigent circumstances exist, the court may approve a payment schedule of up to five years. See id.

91. See House Report, supra note 44, at 117, reprinted in [1978] U.S. Code Cong. & Ad. News 5963, 6078. Payment plans substantially in excess of three years' duration would hinder the "fresh start" policy of the Code. If the debtor is to be a contributing consumer in the "open credit economy," see note 73 supra, he must be able at some point to work for his own benefit. The Code draws the line of compromise at three years.

92. The standards of confirmation are set forth in § 1325(a):
The court shall confirm a plan if—
(1) the plan complies with the provisions of this chapter and with other applicable provisions of this title;
(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;
(3) the plan has been proposed in good faith and not by any means forbidden by law;
(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;
(5) with respect to each allowed secured claim provided for by the plan—
(A) the holder of such claim has accepted the plan;
tory criteria of section 1325 have been met, it must approve the tendered plan. The confirmation requirements most central to the present discussion are: (1) the plan must have been "proposed in good faith and not by any means forbidden by law;" unsecured creditors must receive not less than they would if the debtor's estate were liquidated under Chapter 7; and (3) it must appear that the debtor will be able to fulfill the terms of his plan.

Once the plan is confirmed, the debtor and each creditor are bound by its terms regardless of whether the plan provides for the claim of the creditor and whether the creditor has objected to the plan. If the debtor successfully completes all payments required under his plan, he is entitled, with certain limited exceptions, to a discharge of all debts provided for by the plan or otherwise disallowed. The broad scope of discharge is one of the most attractive features of Chapter 13 relief. In a Chapter 7 liquidation case, discharge may be denied in toto where the debtor is guilty of certain

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder; and

(6) the debtor will be able to make all payments under the plan and to comply with the plan.


93. Id. In light of the accommodating nature of the language employed in the § 1325(a) confirmation criteria, it is clear that while the Code directs the court to confirm a plan satisfying those criteria, the court has extremely broad discretion in determining whether the elements have in fact been met.


96. § 1325(a)(6), 11 U.S.C. § 1325(a)(6). This is, in effect, the equivalent of the "feasibility" requirement found under the former Act. See § 656(a)(2), 11 U.S.C. § 1056 (1976). The legislative history of § 1325(a)(6) states that [t]he court will necessarily be required to consider the debtor's ability to meet his primary obligation to support his dependents, because otherwise the plan is unlikely to succeed. Moreover, it may force the debtor or his dependents to become a public charge, to the detriment of the debtor, his dependents, his creditors, and the public. If the debtor is able to meet his obligations, both under the plan and to his dependents, the court confirms the plan.


wrongful conduct\textsuperscript{100} or where the debtor received a prior discharge within the six-year period preceding the filing of his petition.\textsuperscript{101} In Chapter 13, on the other hand, discharge is not subject to objection on grounds that the debtor has been dishonest\textsuperscript{102} or that he is a habitual applicant for relief.\textsuperscript{103} Moreover, many of the exceptions to discharge that are applicable in a liquidation case are made inapplicable in Chapter 13.\textsuperscript{104} The only types of debts which are nondischargeable in a Chapter 13 completed-plan case are alimony and support payments\textsuperscript{105} and certain long-term obligations.\textsuperscript{106}

If a debtor is unable to complete payments in accordance with his plan, he may apply for permission to modify his plan pursuant to section 1329.\textsuperscript{107} If the court deems a modification impracticable, the debtor may nevertheless be granted a "hardship" discharge under section 1328(b) if the criteria therein are satisfied.\textsuperscript{108} It must

\textsuperscript{100} See § 727(a)(2)-(7), 11 U.S.C. § 727(a)(2)-(7).
\textsuperscript{101} See § 727(a)(8)-(9), 11 U.S.C. § 727(a)(8)-(9); note 60 supra.
\textsuperscript{102} Proceeding upon the assumption that it is generally better for all parties concerned for the debtor to effect a payment plan than it is for him to liquidate his assets, the Code allows the wrongdoer to gain the benefits of Chapter 13. See note 62 supra. This is not to be confused, however, with wrongdoing which relates to the bankruptcy proceedings themselves. A debtor who acts dishonestly at any stage of the bankruptcy proceedings is liable to either lose his quest for confirmation on the ground of lack of good faith, see § 1325(a)(3), 11 U.S.C. § 1325(a)(3), or have his discharge revoked on the ground that it was obtained through fraud. See § 1328(e), 11 U.S.C. § 1328 (e). See also In re Bloom, 3 B.R. at 469-70, 1 C.B.C.2d at 1101, 6 B.C.D. at 143.
\textsuperscript{103} A debtor who fulfills the eligibility and confirmation criteria is not limited as to the number of successive discharges he may receive in Chapter 13. See In re Bloom, 3 B.R. at 469-70, 1 C.B.C.2d at 1101, 6 B.C.D. at 143.
\textsuperscript{104} Compare § 1328(a), 11 U.S.C. § 1328(a) with § 523(a), 11 U.S.C. § 523(a).
\textsuperscript{105} § 1328(a)(2), 11 U.S.C. § 1328(a)(2).
\textsuperscript{106} § 1328(a)(1), 11 U.S.C. § 1328(a)(1). The long-term obligations which are excepted from dischargeability are those "on which the last payment is due after the date on which the final payment under the plan is due." § 1322(b)(5), 11 U.S.C. § 1322(b)(5). A prime example is the home mortgage. A debtor who has a mortgage debt which survives the term of his plan will not be able to obtain a discharge of that indebtedness. Were it otherwise, it is not difficult to see that the great risk that would be forced upon lenders would cause a substantial contraction in the credit market.

It should be noted that while claims that have priority under § 507, with the exception of certain taxes, are technically dischargeable, they are not subject to composition in a completed plan case unless the holder of such claim so agrees, since all priority claims must be paid in full under a Chapter 13 plan. § 1322(a), 11 U.S.C. § 1322(a).
\textsuperscript{107} 11 U.S.C. § 1329.
\textsuperscript{108} Section 1328(b) provides:
At any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if—
be noted, however, that a "hardship" discharge is less comprehensive than a regular discharge, because all of the nondischargeable debts listed in section 523(a) apply in a hardship situation. Thus, it is in the debtor's interest to make certain that he will be able to fulfill the terms of the plan he proposes.

THE DE MINIMIS PLAN CONTROVERSY

It is clear that there are many benefits to be gained by filing a Chapter 13 petition. Not only does the debtor who successfully completes his plan get broader discharge than would be obtainable in Chapter 7, but he is able to remain in possession of his property. Since the vast majority of consumer cases are "no asset" cases, creditors often receive little, if anything, in liquidation. Thus, the debtor can normally meet the best-interests-of-the-creditors test of section 1325(a)(4) by proposing a plan offering unsecured creditors either nominal amounts or nothing at all. There is some disagreement among the courts as to whether a Chapter 13 plan which has as its goal the discharge of a debt nondischargeable in Chapter 7 can ever be deemed to satisfy the section 1325(a)(4) test. It has been held that a creditor whose otherwise nondischargeable debt is dischargeable in Chapter 13 is not receiving his liquidation equivalent, since he is losing his right to pursue the debtor for the balance of his claim. However, the vast majority of courts which have considered the matter have held that since section 1325(a)(4) speaks solely in terms of what would be "paid" on such claim in liquidation, the best-interests-of-the-

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(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
(2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and
(3) modification of the plan under section 1329 of this title is not practicable.

112. See authorities cited note 22 supra and accompanying text.
113. See note 12 supra.
creditors test requires only that the creditors receive the equivalent of the amount that would actually be distributed in liquidation.\textsuperscript{115}

Many courts have refused to confirm de minimis plans on the ground that the debtor is attempting to gain the advantages of Chapter 13 relief without undertaking the commensurate burden of providing for "meaningful" payments to the holders of unsecured claims.\textsuperscript{116} These courts view a de minimis plan as a subterfuge that masks what is in effect a liquidation case.\textsuperscript{117} The standards of confirmation set forth in section 1325 do not contain an express requirement that "meaningful" payments be proposed; the section only states that payments to unsecured creditors must not be less than they would receive in liquidation.\textsuperscript{118} Thus, the crux of the de minimis plan controversy is whether the good-faith requirement of section 1325(a)(3) imports a quantitative standard of its own into the confirmation scheme. If it does, one must then determine how much repayment must be proposed to satisfy good faith.

The Parameters of Good Faith

Many of the courts that have confirmed zero or de minimis plans have done so on the ground that the sole quantitative criterion for confirmation is the best-interests-of-the-creditors test.\textsuperscript{119} Conversely, many of the courts that have denied confirmation of


\textsuperscript{118} \S\ 1325(a)(4), 11 U.S.C. \S\ 1325(a)(4).

such plans have done so on the ground that "substantial" or "meaningful" payments were not being offered to the holders of unsecured claims.\textsuperscript{120} Both the former courts and the latter courts have in diverse ways misjudged the dimensions of the good-faith requirement. Properly construed, the good-faith concept obligates the debtor to pay his unsecured creditors only so much in excess of liquidation value as he can reasonably afford to pay after taking account of his rehabilitative needs.

In drafting Chapter 13, Congress recognized both the need of the debtor for relief and the right of the creditor to receive her fair share from the debtor.\textsuperscript{121} In liberalizing the rehabilitative provisions affecting individuals in order to make payment-plan relief more inviting to debtors, Congress was not unmindful of the interests of creditors.\textsuperscript{122} The line drawn by the Code as an absolute minimum of creditor entitlement is the liquidation value of the debtor's nonexempt assets.\textsuperscript{123} Congress has thus determined that in any case, no matter what the particular circumstances, if the creditor is not receiving the value that she would receive in a straight liquidation proceeding, she is not being treated fairly.\textsuperscript{124} If liquidation value were the sole criterion of fairness, debtors with no nonexempt assets would be in a position to propose plans offering no payment whatsoever.\textsuperscript{125} However, the pervasive theme running through the legislative history of Chapter 13 is that payments must be made out of future income.\textsuperscript{126} If a debtor were permitted

\textsuperscript{120} E.g., In re Hall, 4 B.R. 341, 2 C.B.C.2d 310, 6 B.C.D. 476 (E.D. Va. 1980); In re Marlow, 3 B.R. 305, 1 C.B.C.2d 705, 6 B.C.D. 77 (N.D. Ill. 1980); In re Iacovoni, 2 B.R. 256, 1 C.B.C.2d 331, 5 B.C.D. 1270 (D. Utah 1980).


125. It has been suggested in dictum that such a plan is really no "plan" at all, and therefore fails the requirement of § 1321 that the debtor must "file a plan." See In re Cook, 3 B.R. at 482, 1 C.B.C.2d at 783, 6 B.C.D. at 220. Even if this reasoning is technically correct in a "zero" plan context, its ramifications are insignificant. A debtor who proposes payment of a few pennies may circumvent the tenuous distinction drawn. The more meaningful line of inquiry is not whether a "plan" has been filed, but whether the plan tendered has been proposed in good faith.


http://scholarlycommons.law.hofstra.edu/hlr/vol9/iss2/11
to propose a no-payment plan, the "regular income" requirement for entry into Chapter 13 would lose its meaning.\footnote{Emrich: Chapter 13 De Minimis Plans: Toward a Consensus on "Good Faith" Published by Scholarly Commons at Hofstra Law, 1981} Indeed, it is difficult to see what logic there would be in denying a debtor with no income the opportunity to circumvent his debts if a debtor with regular income were free to do so.

The fact that a debtor with no assets must nevertheless propose payment under his plan demonstrates that liquidation value is not the safe harbor that many debtors claim it is. It is manifest from the Senate Report that liquidation value is not to be viewed in all cases as tantamount to fair treatment:

As in current law, 100 percent payment plans will be encouraged by the limitation on availability of a subsequent discharge in § 727(a)(8) \footnote{Emrich: Chapter 13 De Minimis Plans: Toward a Consensus on "Good Faith" Published by Scholarly Commons at Hofstra Law, 1981} It is also necessary to prevent chapter 13 plans from turning into mere offers of composition plans under which payments would equal only the non-exempt assets of the debtor.\footnote{Emrich: Chapter 13 De Minimis Plans: Toward a Consensus on "Good Faith" Published by Scholarly Commons at Hofstra Law, 1981} Since Congress designed Chapter 13 with the expectation that creditors' "losses will be significantly less than if their debtors opt for straight bankruptcy," it is obvious that liquidation value was not intended to serve as the sole quantitative standard for confirmation.\footnote{Emrich: Chapter 13 De Minimis Plans: Toward a Consensus on "Good Faith" Published by Scholarly Commons at Hofstra Law, 1981} Moreover, the Commission Report suggests that the term "good faith" was intended to encompass quantitative considerations: "The [Bankruptcy Reform] act should not require . . . application of the nonexempt assets to the immediate payment of debts . . . except insofar as such application may be deemed necessary . . . by the court to meet the statutory standards of the 'best interests of creditors' and 'good faith.'"\footnote{Emrich: Chapter 13 De Minimis Plans: Toward a Consensus on "Good Faith" Published by Scholarly Commons at Hofstra Law, 1981} Finally, in the recent House debates on the proposed amendments to the Code, Congressman Hyde stated:

Some of you, though, may be aware of problems which have developed with regard to the court's [sic] interpretation of the debtor's "good faith" in proposing his repayment plan. Since the act became effective a year ago, there have been several in-
stances in which bankruptcy judges have given their approval to plans which offered the bare minimum to creditors—that is, an amount equal to what they would have received under straight bankruptcy in chapter 7. That was clearly not our intent when we considered the Bankruptcy Reform Act of 1978.1

Evaluating the Sufficiency of Payments

Since it is established that payment in excess of liquidation value is to be expected of the debtor in appropriate circumstances, the next step is to determine just how much repayment should be required. Following the lead of In re Iacovoni,132 numerous bankruptcy courts have held that the good-faith standard requires all Chapter 13 debtors to undertake “meaningful” or “substantial” repayment to the holders of unsecured claims.133 The problem with this interpretation is that its overly broad reading of the good-faith standard is inconsistent with the rehabilitative spirit of Chapter 13.134 Moreover, in designating “meaningful” or “substantial” repayment to unsecured creditors as an absolute prerequisite for confirmation, Iacovoni and its progeny are in effect demeaning the statutorily imposed best-interests-of-the-creditors test.135

The “regular income” requirement of Chapter 13 dictates that the debtor must have income “sufficiently stable and regular to enable such individual to make payments under a plan . . . .”136 In order to qualify for entry into the Chapter, the individual must anticipate income over and above reasonable living expenses.137 On the surface, therefore, it would appear that any debtor who qualifies as having regular income ought to be able to make “significant” repayment to his unsecured creditors over the course of the three ensuing years.138 However, there are situations in which the

134. See text accompanying notes 163-168, 175-176 infra.
138. Good faith should normally be measured in terms of ability to pay over a period of three years, since the Code draws the line of normal maximum plan duration at three years. § 1322(c), 11 U.S.C. § 1322(c).
debtor has future income sufficient to make payments but may need to use the money to pay a secured creditor or the holders of priority claims in lieu of paying general unsecured creditors. Although it is clear from the express language of Chapter 13 that the debtor must have a sufficiently regular and stable income to make payments under a plan, neither the Code nor its legislative history suggests that unsecured creditors must in every case be the beneficiaries of those payments. By the terms of section 1325(a)(4), Congress has adopted liquidation value as the litmus-paper test of per se quantitative bad faith.

The employment of a requirement of some unstated absolute minimum payment to unsecured creditors is in clear violation not only of the best-interests-of-the-creditors test, but also of the legislative direction that each case be decided upon its own facts. It seems unlikely that Congress, in extending eligibility for Chapter 13 relief to welfare recipients, could have intended to

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139. The Code expressly permits the debtor to retain property used to secure a debt by agreeing to pay the value of the property to the holder of the secured claim. See § 1325(a)(5)(B), 11 U.S.C. § 1325(a)(5)(B); text accompanying note 174 infra.


Although the House Report states that the Code "requires only that creditors receive under the plan more than they would if the debtor went into straight bankruptcy," HOUSE REPORT, supra note 44, at 123-24, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5963, 6094-85 (emphasis added), it clearly provides an inaccurate description of the law as enacted. See In re Cloutier, 3 B.R. at 585, 1 C.B.C.2d at 910, 6 B.C.D. at 196-97. Section 1325(a)(4) only requires that the value of the property distributed under the plan be "not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7." 11 U.S.C. § 1325(a)(4) (emphasis added).


145. See text accompanying note 144 supra.


simultaneously inject into the Chapter a requirement that in every case "meaningful" or "substantial" repayments be made to holders of unsecured claims. If Congress had desired to provide for a fixed percentage minimum-payment requirement, it could have easily done so. Rather, it chose to forego imposition of a stated minimum in favor of the undefined and more fluid concept of good faith.

The proper place for any preconceived minimum-payment requirement is at the Chapter 13 doorstep. If a debtor who lacks the ability to make significant payment under a plan is to be denied Chapter 13 relief, it must be because he does not qualify as a debtor under the Chapter, and not because a de minimis plan demonstrates inherent bad faith. However, once he qualifies as a debtor with income sufficiently regular and stable to be able to propose a plan offering significant aggregate repayment—which includes full payment of priority claims, payment to secured creditors to the extent of the value of the collateral, and payments to unsecured creditors which are in no event below liquidation value—the individual has demonstrated the requisite ability to meet the abstract quantitative standards which apply in all cases. At that juncture, the debtor's proposed payments must be weighed solely in relation to his financial ability. That is, once he steps inside the Chapter 13 door, the debtor is entitled to have good faith measured in terms of what he can afford to pay in light of his anticipated living expenses and rehabilitation costs.

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148. Since welfare recipients normally have relatively low future income expectations, sums available for payment to unsecured creditors will not be "substantial" on an abstract scale.


151. The requirement of making significant total payments is a logical consequence of the "regular income" requirement. See text accompanying notes 125-127 supra.


156. See HOUSE REPORT, supra note 149, at 24-26.

157. See note 96 supra.

158. The overriding purpose of Chapter 13 is to "provide the debtor with a
appropriate line of inquiry becomes not whether the payments to unsecured creditors are in some sense "meaningful," but whether the debtor has made a reasonable effort to pay in accordance with his means. Indeed, giving one's best effort negates, by definition, any allegation of quantitative bad faith.

When courts begin holding, as several have in effect already done, that good faith requires something greater than best effort, it is manifest that the term can no longer stand up under its own weight. Since Congress has not yet seen fit to exact the best effort of the debtor, it follows a fortiori that it did not intend to impose a payment standard in excess of the means of certain debtors who otherwise qualify for Chapter 13 relief. What constitutes fresh start? See House Report, supra note 44, at 118, reprinted in [1978] U.S. Code Cong. & Ad. News 5663, 6075. The "fresh start" contemplated by Chapter 13 would appear to be broader than under Chapter 7, since it does not limit retention of assets to property deemed exempt under § 522(d). In appropriate cases, the Chapter 13 debtor is permitted to invest in his own future by retaining property securing his debt and paying off the secured creditor under his plan, to the detriment of the general unsecured creditors. See § 1325(a)(5)(B), 11 U.S.C. § 1325(a)(5)(B). In enabling the debtor to apply part of his nonexempt estate to redeem collateral with which to further his rehabilitation, see text accompanying notes 163-176 infra, Chapter 13 assists the debtor in achieving renewed financial viability.


160. E.g., In re Murallo, 4 B.R. 668, 6 B.C.D. 478 (D. Conn. 1980); In re Hall, 4 B.R. 341, 2 C.B.C.2d 310, 6 B.C.D. 476 (E.D. Va. 1980); In re Beaver, 2 B.R. 337, 1 C.B.C.2d 609, 5 B.C.D. 1285 (S.D. Cal. 1980). The courts that have held the debtor's best effort to be insufficient to satisfy the "meaningful" payment standard have in effect determined what is meaningful from the standpoint of the creditors rather than from that of the debtor. However, even the Iacovoni court noted the importance of the debtor's relative effort in determining whether the good-faith criterion has been met: "The intent [of the legislature] seems clear that for confirmation to be granted, the plan must propose a legitimate or substantial repayment of unsecured claims depending, of course, on the individual's particular situation." 2 B.R. at 267, 1 C.B.C.2d at 347, 5 B.C.D. at 1277.

161. The courts are in agreement that the law as it now stands does not require the debtor's "best effort." See, e.g., In re Burrell, 6 B.R. 360, 366, 2 C.B.C.2d 1019, 1026, 6 B.C.D. 900, 904 (Dist. Ct., N.D. Cal. 1980); In re Schongalla, 4 B.R. 360, 363, 2 C.B.C.2d 286, 289, 6 B.C.D. 408, 410 (D. Md. 1980); In re Iacovoni, 2 B.R. at 267, 1 C.B.C. 2d at 346-47, 5 B.C.D. at 1276. The Senate version of the so-called "Technical Amendments Bill" would amend current law to require the "best effort" of the debtor. S. 658, 96th Cong., 1st Sess. § 188, 125 Cong. Rec. S 12,185 (1979); see S. Rep. No. 96-305, 96th Cong., 1st Sess. 14 (1979) [hereinafter cited as Senate Report]. However, the House has rejected the Senate version in favor of a "good faith effort" test. See S. 658, 96th Cong., 2d Sess. § 128(b), 126 Cong. Rec. H 9,299 (daily ed. Sept. 22, 1980); House Report, supra note 149, at 24-26. As of this writing, there is an impasse between the two branches of the legislature on this issue.
good faith for one debtor may not constitute good faith for another debtor, but it is clear in any event that financial ability is the cornerstone of a quantitative good-faith standard.\textsuperscript{162}

**The Redemption Motive**

Where a debtor is obligated on a secured debt, the Code gives him the option of either surrendering the collateral to the secured creditor or redeeming the property securing the debt by paying the value of the secured claim under the plan.\textsuperscript{163} The situation may arise in which the debtor seeks to save his house from foreclosure and therefore desires to pay his secured creditor out of his future income. Obviously, this would reduce the amount available for payment to unsecured creditors. But can it be said that the debtor who makes little or no payment to his unsecured creditors in order to preserve his house acts in bad faith?\textsuperscript{164}

The good-faith requirement may in appropriate circumstances compel the surrender of nonexempt assets in payment of one’s debts;\textsuperscript{165} however, it must be borne in mind that the foremost distinction between a Chapter 7 liquidation case and a Chapter 13 case is the retention of assets.\textsuperscript{166} The object of Chapter 13 is not to extract the lifeblood from the debtor; it is to rehabilitate him.\textsuperscript{167} In

\textsuperscript{162} As stated by Congressman Don Edwards during the House debates, “if the debtor makes an effort to repay his creditors, the creditors should not be able to say that the plan does not propose to pay enough . . . .” 123 CONG. REC. H 11,699 (1977); see In re Iacovoni, 2 B.R. at 287 n.4, 1 C.B.C.2d at 347 n.4, 5 B.C.D. at 1277 n.4; text accompanying notes 201-208 infra.

\textsuperscript{163} See note 139 supra; text accompanying note 174 infra.

\textsuperscript{164} Several courts have confirmed de minimis plans under which payments went to creditors who held security interests in property that was essential to the debtor’s rehabilitation. E.g., In re Zellmer, 6 B.R. 497, 3 C.B.C.2d 42 (N.D. Ill. 1980) (truck used for livelihood); In re Johnson, 6 B.R. 34, 2 C.B.C.2d 552, 6 B.C.D. 579 (N.D. Ill. 1980) (house); In re Roy, 5 B.R. 611, 2 C.B.C.2d 985 (M.D. Ala. 1980) (vehicle used for transportation to work); In re Bellgraph, 4 B.R. 421, 2 C.B.C.2d 1057, 6 B.C.D. 480 (W.D.N.Y. 1980) (house); In re Sadler, 3 B.R. 536, 1 C.B.C.2d 935 (E.D. Ark. 1980) (car). But see In re Heard, 6 B.R. 876, 3 C.B.C.2d 170, 6 B.C.D. 1272 (W.D. Ky. 1980) (denying confirmation of 1% plan where motive was to retain car).

\textsuperscript{165} See In re Patterson, 4 B.R. 239, 2 C.B.C.2d 149 (C.D. Cal. 1980); text accompanying note 130 supra.


\textsuperscript{167} See note 158 supra; text accompanying notes 198-200 infra. The Commission Report, in rejecting a “liquidation plus” approach for the new Chapter 13, states:

A requirement that all of the debtor's nonexempt property be applied immediately to the payment of his debts would subject the petitioner with regular
order to facilitate his revitalization, the Code generally permits the
Chapter 13 debtor to retain his assets. However, since the re-
tention of assets is tied to the good-faith requirement, it would
seemingly be proper for the court to scrutinize the underlying
motive for redemption of assets that are subject to a security in-
terest in those cases in which the debtor's good faith is ques-
tioned.

While it may not constitute bad faith to pay a secured creditor
at the expense of unsecured creditors in order to save one's house
from foreclosure, it is doubtful that the same can be said of saving
a yacht or other such luxury item. It would appear from recent
decisions that the debtor should be permitted to make the trade-off
where items tending to further the policy of rehabilitation are con-
cerned and the unsecured creditors are receiving at least the
value they would receive in liquidation, but he should be denied
this privilege where he seeks to use funds which would otherwise
go to his unsecured creditors in order to live in luxury. In the

income seeking relief... to the obligations and burdens imposed on a bank-
rupt under the liquidation chapter along with the obligation assumed to pay
debts out of future income.

See House Report, supra note 8, at 164.

See text accompanying notes 130, 165 supra.

Compare In re Zellmer, 6 B.R. 497, 3 C.B.C.2d 42 (N.D. Ill. 1980) and In
re Johnson, 6 B.R. 34, 2 C.B.C.2d 552, 6 B.C.D. 579 (N.D. Ill. 1980) and In re
Bellgraph, 4 B.R. 421, 2 C.B.C.2d 1057, 6 B.C.D. 480 (W.D.N.Y. 1980) with In re
Patterson, 4 B.R. 239, 2 C.B.C.2d 149 (C.D. Cal. 1980). Retention of vital assets is
consistent with the Code's policy that "the primary duty of the debtor [is] to provide
in the future for the reasonable support and maintenance of the debtor and any de-

A "rehabilitative asset," as that term is used in this Note, is one which as-
sists the debtor in surviving his financial crisis or in generating future income. For
example, the revitalization policy of Chapter 13 would justify retaining the tools of
one's trade. See In re Zellmer, 6 B.R. 497, 3 C.B.C.2d 42 (N.D. Ill. 1980). While such
individual is paying off a creditor who holds security interests in rehabilitative prop-
erty at the expense of his unsecured creditors, the unsecured creditors are at least
receiving the value that they would be entitled to in liquidation, which is what Con-
gress has set as the statutory minimum of fairness.

Compare In re Zellmer, 6 B.R. 497, 3 C.B.C.2d 42 (N.D. Ill. 1980) (truck
used for livelihood) and In re Johnson, 6 B.R. 34, 2 C.B.C.2d 552, 6 B.C.D. 579

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formative stages of the Code, the Commission Report recommended that debtors be given the option of "cramming down" secured creditors in order to enable the debtors to retain assets which serve important functions:

In recognition of the fact that exemptions alone will not insure that the debtor will be able to retain the basic means of survival, the Commission recommends that a consumer debtor be allowed to redeem collateral securing a dischargeable consumer debt by paying the lesser of the claim or the appraised value. 174

In any given case, what needs to be defined is the point at which the debtor would transcend the limited aim of rehabilitation and begin to affirmatively profit from the enabling legislation.

Where a debtor's anticipated income is modest and he has few nonexempt assets, all of which are of a substantially rehabilitative nature, the quantitative good-faith requirement should approximate the best-interest-of-the-creditors test. That is, where the debtor's limited ability forces him to a choice between earmarking his available funds for payment to holders of claims secured by rehabilitative property or to holders of unsecured claims, the flexible good-faith standard should bend in favor of debtor rehabilitation. 175 Where a debtor's intentions are laudable, and his proposed payments satisfy the best-interests-of-the-creditors test and are substantially in proportion to his means, it cannot be said that the creditors are being treated unfairly. 176

The De Minimis Plan Anomaly

A number of courts have denied confirmation of de minimis plans on the ground that confirmation would result in the anomalous situation in which debtors who propose and carry out nominal payment plans would be eligible for the generous Chapter 13-type

174. COMMISSION REPORT, supra note 8, at 169 (emphasis added).
175. See In re Zellmer, 6 B.R. at 500-01, 3 C.B.C.2d at 47 (N.D. Ill. 1980); In re Roy, 5 B.R. at 613, 2 C.B.C.2d at 987.
discharge, while debtors who attempt substantial payment and are able to pay most but not all that the plan calls for are in effect relegated to the narrower "hardship" discharge. Congress, it is reasoned, could not have intentionally created such a disparity in treatment; therefore, the drafters must not have contemplated the confirmation of de minimis plans.

The apparent anomaly of this situation is not, however, sufficient cause to categorically proscribe low payment plans. In the first place, the scope of the anomaly should in practice prove to be minimal. The debtor who is unable for some unforeseen reason to meet the terms of his payment plan may apply for modification of his plan pursuant to section 1329. By completing his plan as modified, the debtor would be eligible for the broad discharge afforded the Chapter 13 debtor who completes his original plan. Thus, it is only where modification of the debtor's plan is impracticable that the anomaly survives.

More importantly, the disparity in treatment can be explained on grounds other than Congressional noncontemplation of de minimis plans. It is the so-called "hardship" discharge itself which in the final analysis is the aberration which gives rise to the existing anomaly. The ambivalent nature of the relief which flows from the hardship discharge is undoubtedly a reflection of the need to deter plan-breaking. The drafters may well have feared that by putting the hardship discharge on a par with ordinary discharge they would be giving debtors incentive to cease making payments altogether. Thus, they offered less comprehensive discharge relief to debtors who terminate payments in midstream.

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178. See In re Seman, 4 B.R. at 570, 2 C.B.C.2d at 396, 6 B.C.D. at 626-27; In re Campbell, 3 B.R. at 59, 1 C.B.C.2d at 655-56, 5 B.C.D. at 1366; In re Iacovoni, 2 B.R. at 262-63, 1 C.B.C.2d at 341, 5 B.C.D. at 1273.


180. See § 1329(b)(2), 11 U.S.C. § 1329(b)(2) (providing that plan as modified becomes plan, if approved after notice and hearing).


182. § 1328(b), 11 U.S.C. § 1328(b).

183. The "hardship" discharge is ambivalent in that it affords a debtor who is unable to meet the terms of his plan a discharge of many of his obligations, but despite the debtor's financially troubled position, denies him a parity of discharge relief with those debtors who are able to complete their plans.
The Discharge Motive

Many of the courts which have refused to confirm zero or de minimis plans have based their refusal on the fact that the debtor would be receiving the broad discharge of Chapter 13 without incurring the reciprocal burdens contemplated by the Chapter. Such reasoning is suspect on both practical and theoretical grounds. First, not all Chapter 13 debtors are in a position to benefit from the broader Chapter 13 discharge. If the debtor has no debts which would be excepted from dischargeability in Chapter 7 but which are dischargeable in Chapter 13, he will be obligated to repay his creditors no less under Chapter 13 than under Chapter 7. Thus, the filing of a de minimis plan in Chapter 13 does not by itself establish a motive of debt avoidance and cannot be said to constitute bad faith per se. Moreover, if in every case confirmation depended upon absolving the debtor of a debt-avoidance motive, resolution of the dischargeability issue would have to precede confirmation. In some cases, therefore, full-scale dischargeability hearings would have to be held at the preliminary stages of the relief proceedings. It is not difficult to see that this would substantially interfere with judicial economy.

Even if a debtor admits filing a Chapter 13 de minimis plan in order to take advantage of the expanded discharge, he may nevertheless be deserving of confirmation. True, the debtor may be benefiting at the expense of his general unsecured creditors. However, he is only taking what the law gives him in exchange for meeting the Chapter 13 asking price. The broad discharge of Chapter 13 is in effect earned by the debtor, not because he pays his creditors X dollars more than they would receive in liquidation, but rather because as a Chapter 13 debtor, he must put his future financial ability on the table and attempt to effect a reasonable and

185. See In re Marlow, 3 B.R. at 307, 1 C.B.C.2d at 707, 6 B.C.D. at 78.
complete mobilization of that ability.187 The debtor's just deserts ought not be rescinded simply because his financial ability is insufficient to offer "substantial" sums to his unsecured creditors after taking account of priority and secured claims.188

In keeping with its commitment to facilitating debtor rehabilitation, the drafters demonstrated a strong preference for resort to payment-plan relief in lieu of liquidation wherever possible.189 In light of this preference, Chapter 13 eligibility standards should be liberally interpreted. Unlike the former Act,190 the Code nowhere manifests exclusivity as to chapter eligibility. The law as written does not require that the debtor be restricted to liquidation simply because the end result of filing a de minimis plan in Chapter 13 would not be more favorable to general unsecured creditors. Nor does the Code demonstrate an intent that good faith be measured inversely against the benefits a particular debtor will derive from Chapter 13.191 As long as the debtor satisfies the "regular income" requirement192 and proposes to pay his creditors in accordance with his ability, but in no event less to his unsecured creditors than the value they would receive in liquidation,193 he should be free to avail himself of the relief offered by Chapter 13.194

**Present State of the Law**

As the situation now stands, many debtors are seeking relief in Chapter 13 not so much for the legitimate purpose of good-faith rehabilitation, but rather for the less-than-honest use of the Chapter as a haven from which to escape affordable outstanding debts.

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191. While it has been suggested that the Chapter 13 good-faith standard exacts payment on a "sliding scale" based on how much broader the debtor's discharge is in Chapter 13 than it would be in Chapter 7, see In re Cook, 3 B.R. 481, 1 C.B.C.2d 780, 6 B.C.D. 219 (S.D. W. Va. 1980), this view of good faith is nowhere supported by the Code or its legislative history. See In re Thorson, 3 C.B.C.2d at 70, 6 B.C.D. at 1269-70.
194. See In re Thorson, 3 C.B.C.2d at 70, 6 B.C.D. at 1269-70. See also House Report, supra note 149, at 25.
Such debtors are in clear violation of the purpose and spirit of Chapter 13, and their plans should not be confirmed. It is readily deduced from the regular-income requirement that total payments under the plan must not be insignificant.\textsuperscript{195} Exactly how much is to be distributed and how that total is to be allocated must depend upon the facts of the given case.\textsuperscript{196}

The question of "how much is enough?" is not easily answered. At one extreme, the debtor, at the absolute minimum, must propose to pay creditors the value they would receive in liquidation.\textsuperscript{197} At the other extreme, it is clear that the Code does not presently contemplate a requirement of best effort.\textsuperscript{198} The probable reason for this is the apprehension that if best effort were required, enough resources would be drained from the debtor to frustrate the underlying Chapter 13 goal of rehabilitation.\textsuperscript{199} Thus, a best-effort requirement was intentionally omitted from the House version of the so-called Technical Amendments Bill.\textsuperscript{200} If enacted in the form passed by the House, the new section 1325(a)(3) would permit confirmation of a plan if "the plan has been proposed in good faith and not by any means forbidden by law, and represents the debtor's good faith effort."\textsuperscript{201} The phrase "good faith effort" leaves little doubt that something in excess of the absolute minimum (i.e., liquidation value) would be required where it is in the debtor's power to offer more.\textsuperscript{202} This would appear to put an end

\textsuperscript{198} See text accompanying note 161 supra. Section 727(a)(9)(B) attaches a prerequisite of "best effort" in past performance as a Chapter 13 debtor for the debtor who received a discharge to be eligible for subsequent Chapter 7 discharge within a six-year period. See 11 U.S.C. § 727(a)(9)(B). However, the "best effort" criterion is noticeably absent from the language of the Chapter 13 discharge provisions. See § 1328, 11 U.S.C. § 1328.
\textsuperscript{199} See note 171 supra.
\textsuperscript{202} The House Report accompanying the Bill states that [t]he purpose of the "good-faith effort" test of subsection 1325(a)(3) is to prevent the use of chapter 13 composition plans by debtors having a demonstrated ability, but not the willingness, to make whatever payments their particular circumstances reasonably permit over and above their primary obligations to support themselves and their dependents during the extension period. Under these criteria, the circumstances of a given case may require

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to the line of cases using liquidation value as the sole quantitative requirement for confirmation.203 Furthermore, it is significant that the good-faith-effort requirement focuses attention on the debtor's ability to pay, rather than on how much money unsecured creditors are entitled to receive.204

One may argue that the distinction drawn in the House Report on the Technical Amendments Bill between the existing good-faith test and the proposed supplementary good-faith-effort test demonstrates that the law in its present form is unconcerned with the degree of the debtor's effort in relation to his ability.205 It is submitted, however, that those courts which have viewed the debtor's relative effort as an implicit component of the traditional good-faith standard206 have acted prudently in light of the purposes and spirit of Chapter 13. It was the intention of Congress from the outset to use the debtor's ability as the gauge with which to measure the adequacy of his proposed payments.207 Thus, while the proposed good-faith-effort test would certainly provide the legislative guidance needed to create order out of the existing confusion, it would merely clarify the law as it now stands rather than effect substantive change.

CONCLUSION

When good faith is measured in terms of ability and effort, it is clear that payment plans offering unsecured creditors nominal amounts may in appropriate circumstances be confirmed. That de minimis plans have their place in Chapter 13 is made explicit by the House Report on the Technical Amendments Bill: "[T]he circumstances of a given case may require that the court confirm a chapter 13 plan which proposes no dividend whatever to holders of allowed unsecured claims or that the court deny confirmation of a plan proposing a 95% dividend to the holders of such claims."

HOUSE REPORT, supra note 149, at 25-26.


204. See HOUSE REPORT, supra note 149, at 24-26.

205. Id.


207. See Statement of Congressman Edwards, supra note 162; text accompanying note 131 supra.
chapter 13 plan which proposes no dividend whatever to holders of allowed unsecured claims . . .” 208 The extent to which a debtor must offer his creditors more than they would receive in liquidation must in the final analysis depend upon his ability to effect such payment. In order to have his plan confirmed, the debtor should be required to mobilize his resources effectively enough so that it may be said that he dealt with his creditors in a manner which was fundamentally fair in light of the rehabilitative purposes of Chapter 13.

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