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REAPPEARING DEBTOR RIGHTS IN CHAPTER 13 PROCEEDINGS?

*By Joseph A. Chrystler, C.P.A.**

This article is written in response, and partial rebuttal, to the article written by Attorney James C. Keller which appeared in the November, 1990 Newsletter. In that article I sense a frustration on the part of Mr. Keller as he does the best he knows how in representing individual debtors and channeling them into either Chapter 7 or Chapter 13, whichever he deems the most appropriate. As a standing Trustee I feel many similar frustrations, and numerous others which do not align with those of Mr. Keller. My responses to his comments will follow the order of his text, with supplemental comments and concerns to follow.

THE GOOD FAITH REQUIREMENT

Mr. Keller's firm had the lead case mentioned under the 'black Monday' comment, the Hurd case. The case was unusual to say the least, but in this writer's opinion did not sound the death knell to nominal percentage plans, and to intimate that any certain judge set the tone for this is unfair to all our bankruptcy judges. If each judge, and each trustee for that matter, did not look at the facts and circumstances surrounding each individual case, the system would fail. Time has proven that debtors do not conveniently fit into pigeon holes or categories. My fifteen-plus years as a trustee has taught me that categorization is inadvisable and, in fact, impossible using surface information in the sworn schedules. One dares not form first impressions based on numbers and words in schedules because they often are far from telling the whole story. That is one of the primary functions of the 341(a) hearing, to interpret the words and numbers and consider the human element after eliciting appropriate testimony. I am convinced there is nothing wrong with the 'general practice rule'

Mr. Chrystler is a Standing Chapter 13 Trustee in the Kalamazoo Division of the Western District of Michigan. He is a graduate of Western Michigan University with a degree in finance and accounting, and has taken graduate studies at Wayne State University. For the past 15+ years he has been a Bankruptcy Trustee: the first 7 years in the Chapter 7 area; the past 8+ years in Chapter 13. He has handled Chapter 12 cases since their inception in late 1986.

Mr. Keller alludes to, if used only as a benchmark, and as long as it can be deviated from as conditions would appear to warrant by case facts and circumstances. If all cases provided no dividend to unsecured creditors there would be many situations where the filing would be nothing more than a disguised Chapter 7, with Chapter 13 only motivated by some other consideration. The relationship of the unsecured creditor dividend to the level of attorney fees awarded is but another benchmark that the trustees must be aware of in their recommendation of plan confirmation to the Court, or the Court can, but rarely does, raise the issue sua sponte. A number of cases are filed to cure a mortgage arrearage and/or pay off a fully secured car on which payments have fallen behind prior to filing, with no unsecured creditors indicated. Is the attorney thus entitled to no fee in these cases? Certainly not.

DISPOSABLE INCOME RULE

Mr. Keller glosses over the one key word in 11 U.S.C. 1325(b)(2)(B), the word 'projected'. The comment regarding the lack of incentive on the part of debtors to improve their economic lot while in Chapter 13 should be, and hopefully is, unwarranted. Again, each case must rest on the individual facts and circumstances. If a debtor 'projects' his disposable income at a certain level and that level is only deviated from by normal pay increases, either the trustee or the unsecured creditor would be laughed out of court on a section 1329 motion to increase the plan payment. Prior to the 1984 Code revisions the trustee and the unsecured creditor had no tool with which to deal with the unusual situation of a debtor hitting the lottery or getting a substantial award in a lawsuit during the first three years of a confirmed plan. The other obvious situation where 1329 becomes a valuable tool for the unsecured creditor is where the debtor projected his future income based on the situation at the time of filing, with the only source of income at that time being welfare and/or unemployment compensation. If that debtor later finds employment and substantially improves his economic position in society, should not he be willing to share a measure of his success with the creditors who partially bankrolled him up to the date the case was filed? If he is already paying a 90% dividend from the original confirmed plan perhaps not, but if it is a nominal percentage plan the situation bears further analysis. What type of debts are being discharged? Is it $40,000 in cred. cards that could hav been better controlled by a debtor who suffered no significant income lapse prior to filing, or is it a medical catastrophe situation or a filing caused by an extended period of involuntary unemployment? While the trustee or the unsecured creditor should not discriminate among creditors by type, these are additional circumstances and factors the trustee must weigh in making a recommendation of confirmation initially or the trustee or an unsecured creditor in requesting a mid-stream payment increase under section 1329. There are precious few motions to modify ever brought before the court wherein a payment increase is sought by the trustee or an unsecured creditor, and this is as it should be. That vehicle should be available in the dramatic income betterment situation. The ratio likely runs 50-1, or better, of motions filed by debtors to reduce payments mid-stream, and this Trustee can never recall an instance where a debtor has motioned to voluntarily increase payments, unless to cover a post-petition debt or a mortgage payment increase. I have had two situations where debtors paid off their plans early after winning the Michigan Lottery, and both were done voluntarily, but

nly after I had been ade aware of the winnings and contacted the attorney regarding an early disposition of the plan. There is nothing wrong, if conditions warrant, with a motion by debtor to decrease payments. Debtors are not expected to live at or below the poverty level while paying their creditors, although a shocking percentage of them do out of necessity if they are trying to save their home and/or their 1981 Chevette automobile. Were the attempt to save a $30,000 conversion van and an 18' bass boat the merits change, as does the trustee's attitude, as well as that of the unsecured creditor concerning the decision to file a section 1329 motion.

GLENN AND *TERRELL* REVISITED

As to the issue of the reasonableness of the 'cure' term, again, each case must rest on the facts and circumstances. How many times have I, and will I continue to, use the "F" and "C" words in this text, simply because it is the major consideration to be weighed in every situation? I can recall one of the judges allowing a full sixty months to cure a mortgage arrearage, which was vigorously opposed by counsel for the mortgagee, in a fact situation where the debtors had a reasonable equity in the property but had suffered the loss of one spouse's income for health-related reasons, there were a number of children still at home, and the on-going payment plus the amortized arrearage payment was less than the debtors would have had to pay in an alternative rental situation.

Glenn and Terrell, in my understanding, only become operative if the creditor wants them to. Many Glenn and Terrell situations are worked out to continue the mortgage or contract in the plan, and the trustee, upon finding an applicable situation, certainly does not jump on the phone and call the lender and educate him as to the Glenn and Terrell decisions. In other instances, out of lack of knowledge of the existence of Glenn and Terrell, the creditor sits on its hands and does nothing, and the plan gets confirmed after the sheriff's sale or after the forfeiture has been completed. The thrust of Glenn and Terrell, however, can and often does have an impact on the negotiations regarding length of arrearage cure time if both sides are aware of the current decisions.

What about the other side of the bad case scenario, where the vendor is an elderly widow relying on the contract income just to survive, and doesn't have the funds to hire an attorney who knows about Terrell? All too often the widow is left out to dry through inaction, and the trustee dares not take sides and inform her.

TRUSTEE FEES AND EXPENSES

Trustees may be authorized to retain 10% of funds disbursed to creditors, but this 10% is a cap, and many trustees operate well below the cap, including all the trustees in the Western District of Michigan. If I may be allowed a self-serving statement, I know all four of us are well below the prevailing rate in other jurisdictions with similar, and even substantially greater, caseloads. Case law as to what must be included "in" the plan is becoming more and more uniform throughout the country. Mr. Keller's presumption that fees will reach 10% again in the future is hopefully erroneous, and this Trustee cannot foresee it happening, unless for one year in which we would be forced to purchase a new computer system, and even that scenario should produce a higher fee in only one year when payment on the system is made. The only other factor dictating our fee percentage is the amount of additional duties placed on us by the system, including the Court and the office of the United States Trustee. These administrative duties

have increased dramatically in the past five years or so with the addition of two more judges and the transfer of a substantial amount of mailings from the Clerk's office to the Trustee. The advent of the United States Trustee has increased the Standing Trustee's duties in that our reporting requirements are much greater now, but this is somewhat of a necessity as the United States Trustee fulfills his watchdog obligations over each Standing Trustee to help maintain the integrity of the system. A dramatic decline in caseload could also signal an increase in the fee percentage, but if recent history is any indicator, this is highly unlikely to happen, unless practitioners such as Mr. Keller become so disenamored with Chapter 13 that they seek their legal niche elsewhere. Only in Chapter 13 intense areas such as Tennessee, North Carolina, Georgia and limited other sections of the country are the fee percentages less. As an example, the seven Trustees in Tennessee (recently expanded from five) have in excess of 31,000 cases under administration, and the intensity of the caseload allows a lesser percentage fee to be charged. The two Trustees in Memphis and the two in Nashville likely account for about 70% of the cases in the whole state. They must necessarily have large staffs with several staff attorneys each, but the ability to spread the expenses over so many cases creates the situation of an actual percentage charge per case of less. It is just like manufacturing widgets. The first one you produce costs $50,000 in tooling and other costs. After the first one, the others are ten cents apiece if you produce enough.

ATTORNEY FEES

I have some difficulty in not making mention to the Court at the time of confirmation of attorney fees being charged at $1,000 in a case with two unsecured creditors, a debtor who has worked at the same plant for 25 years, and a payroll order in place. This is what can be characterized as the classic "no brainer" case, but, in reality, we see extremely few of these. In my humble opinion, this case does not warrant a fee, at least initially, of more than $500 - $700 on the surface. However, I may not have knowledge of how many broken appointments were caused by the debtor, how many times he called the attorney unnecessarily, how many trips to the attorney's office because he forgot to bring along necessary documents, and the like, so once again, first impressions can be unhealthy. A simpl explanation at the 34 hearing, which the trustee can incorporate into his comments regarding confirmation, should take care of this. Every week I see a case or cases dismissed short of completion where the attorney for the debtor received little or nothing of the fees he or she was granted. This is an unfortunate hazard of the specialty. No one wants their efforts to go unrewarded. The attorney must obviously set his hourly rate at a level to compensate for the bad case situation, but cannot be allowed to overcharge in one case to compensate for loss of revenue in another, because we are likely dealing with a different set of creditors in each case, and one body of creditors should not suffer the attorney's loss in another, except to the extent the hourly rate of the attorney is affected.

The creditors, trustees and judges are realists. We all know that an attorney cannot handle a complicated business Chapter 13 for a total fee of $1,000. Therefore, at least the trustees and the judges welcome appropriate fee applications. We cannot maintain the integrity of a syste for long that must rely on an underpaid debto bar. Adequat compensation is a mus or there will be n incentive to practic

the bankruptcy arena or other than the few attorneys that perhaps should not be practicing in any arena. With one dramatic exception, we have not seen a myriad of fee applications filed, except in extremely difficult cases. By and large, the attorney lives (or dies) with the initial allowance, and hopes that he or she can even the odds by having certain cases that were deemed at the outset to be problem-laden turn out to be "no brainers".

I believe we trustees strive, wherever possible, to provide up-front payment of attorney fees, or at least a reasonable monthly amount commencing with confirmation. Certain cases with substantial secured creditor payment requirements negotiated and stipulated to will leave little or nothing for the attorney until down the plan road somewhere. This is unfortunate, and not always can the attorney predict this. If he can, then he has a management decision to make regarding taking the case at all. Too often the attorney calculates plan feasibility prior to filing and finds enough to pay his fees reasonably, only to find that the mortgage arrears is 17 months when the claim is filed rather than the four months the debtor admitted in the interview. In this situation it is difficult, if not impossible, to build in a comfort factor for payment of fees.

When the Code was originally enacted there was an immediate wail from creditors that it was so debtor oriented as to have eroded or completely destroyed creditor rights. Over time creditor bodies and special interest groups have been somewhat successful in restoring some lost rights. In the areas of debt dischargeability, the so-called "super discharge" afforded a Chapter 13 debtor is being severely assailed in the areas of health education loans, criminal restitution and alcohol or drug related wrongful death or personal injury situations, to name major areas where change has already been effected. Legislation in many other areas is proposed at present. This forms the major area of my concern over the future of Chapter 13. Congress seems to now be sending the message that involuntary servitude must be a way of life if one is guilty of accumulating debts in certain areas. This will likely prompt more Chapter 7 filings with the debtor bar taking its chances with dischargeability litigation. Even though it may sound self-serving since I make my living from Chapter 13, I feel that the recent decisions requiring a debtor to exert his best effort for a full five years where his sincerity in filing is questionable or his debt structure is subject to dischargeability attack in Chapter 7, really represents a best effort for about as long as should be effected. These are the cases we Trustees monitor more closely than we may some others, looking for the dramatic income increase that would warrant the filing of a motion for increased payment under section 1329.

It is obvious Mr. Keller's frustrations are, to him, real and not imaginary. However, after fifteen years in this business I am still naive enough to believe there are a substantial amount of potential debtors out there that want to pay their creditors, in full if humanly possible. I continue to be impressed with the number of full five-year plans that are filed that could be three-year plans with a much lesser dividend to unsecured creditors. If a proposed five-year plan contains some budget expense padding I merely reduce the amounts to a more reasonable (in my opinion) level (unless the padding is obviously blatant), recompute my concept of disposable income over a minimum three-year plan, and if the result for creditors is better

in the plan proposed I make no issue of the "reasonable" padding of expenses, generally speaking, although there are obvious exceptions to this as well. Remember, a debtor must only pay all of his disposable income if he proposes a plan with a minimum three-year duration, and only then if the trustee or an unsecured creditor objects. Enough substantial payment plans are still being funded by persons at or just above the poverty level so as to help keep my faith regarding the integrity of the system from this standpoint.

11 U.S.C. 1329(a) appears to be the only tool available to a creditor to right an obvious wrong, although the creditor could obtain indirect relief through dismissal of a case by the Court, either on its own motion or on the motion of the United States Trustee under 11 U.S.C. 707(b). However, as good as these two tools may appear in theory, implementation in practice has been extremely limited, either by the creditor under 1329, or the Court or United States Trustee under 707. In my naivete I like to think the reason is that the vast majority of the Chapter 13 plans are put forth by well-intentioned debtors working with a debtor bar that has an extremely high level of integrity. May Mr. Keller and those others who practice in our arena continue this trend they have established over many years of efforts and through times of sweeping changes.

RECENT BANKRUPTCY DECISIONS:

The following are summaries of recent court decisions that address important issues of bankruptcy law and procedure. These summaries were prepared by Patrick E. Mears with the assistance of Larry A. Ver Merris.

Grogan v. Garner, Case No. 89-1149 (U.S. S. Ct. Jan. 15, 1991). In a unanimous opinion, the United States Supreme Court, per Justice Stevens, held that creditors seeking determinations of nondischargeability under 11 U.S.C. § 523(a) must satisfy a "preponderance of the evidence" test. Justice Stevens rejected the debtor's argument that an action to determine the dischargeability of a debt based upon the debtor's fraud must be proven by "clear and convincing" evidence to effectuate the "fresh start" policy of the Bankruptcy Code.

Forbes v. Lucas (In re Lucas), Case No. 89-6487 (6th Cir. Jan. 14, 1991). In this Chapter 7 case, the individual debtor held an interest in an ERISA-qualified pension plan prior to the filing of her bankruptcy petition in the Bankruptcy Court for the Middle District of Tennessee. In her Schedule B-4, debtor listed a $2,000 exemption in a defined contribution plan maintained by her employer, Holiday Inn Corporation. This plan was alleged to be subject to ERISA and contains the anti-alienation clause required by 29 U.S.C. § 1056(d)(1). Upon investigation, the Chapter 7 trustee discovered that, after debtor commenced her bankruptcy case, debtor withdrew $7,591.21 from this plan.

Thereafter, the trustee commenced an adversary proceeding seeking a turnover of the portion of vested benefits disbursed to debtor after the petition was filed. The bankruptcy court, in a decision reported at 100 Bankr. 969, found that the debtor's pension benefits were property of the estate and that the trustee could recover these post-petition withdrawals. The bankruptcy court stated that the plan was not a spendthrift trust under Tennessee law and was therefore property of the estate under 11 U.S.C. § 541(a). The court then concluded

hat the plan benefits were not exempt under Tennessee law. This decision was affirmed by the federal district court without an opinion.

On appeal, the Sixth Circuit Court of Appeals reversed the decisions below in a decision authored by Judge Suhrheinrich. The Sixth Circuit found that ERISA qualifies as "applicable nonbankruptcy law" under 11 U.S.C. § 541(c)(2) and, therefore, the debtor's plan benefits did not constitute property of the estate. The Sixth Circuit, noting that there is a split in the courts on this issue, declared that the statutory phrase "applicable nonbankruptcy law" is not limited to state spendthrift trust law. Since the debtor's interest in this fund was exempt from the claims of her general creditors under ERISA, the plan was therefore not included in debtor's bankruptcy estate.

Leitch v. The Lievense Insurance Agency (In re Kent Holland Die Casting & Plating, Inc.), Case No. 90-1345 (6th Cir. Jan. 7, 1991). In this decision authored by Judge Peck, the Sixth Circuit reversed the decision of the United States District Court for the Western District of Michigan dismissing Aetna Casualty & Surety Company from this adversary proceeding. The district court's decision is discussed in the March, 1990 issue of this Newsletter. The Sixth Circuit first concluded that the holdings below that a purported amendment of a complaint adding Aetna as a party defendant was improper failed to relate back to the time of filing of the original complaint since it added a new party to the action. However, the Sixth Circuit concluded that, on the basis of the record before it, the courts below should have considered whether Aetna was equitably estopped from asserting the statute of limitations as an affirmative defense to the trustee's claims. The Sixth Circuit noted that Aetna was directly involved in the defense of the trustee's original claims against the insurance agency. The Sixth Circuit remanded this action to the bankruptcy court for further factual findings on this issue.

Textron Financial Corp. v. M. Logan Wysong Co., Case No. 1:90-CV-216 (W.D. Mich. December 20, 1990). This case concerned an action by a creditor to enforce certain written guaranties. The creditor, Textron Financial Corporation ("Textron"), and Peninsula Asphalt Company ("Peninsula") had entered into a lease agreement of an asphalt plant. The term of the lease was five years and contained an option to purchase the plant at the end of the lease term for its fair market value. Defendants guaranteed the obligations of Peninsula under the lease. Peninsula defaulted on the lease and filed a Chapter 11 petition, and Textron thereafter repossessed and sold the plant. Textron thereupon sought to recover its deficiency claim from the guarantors. The guarantors raised the affirmative defense that the lease agreement was intended to be a security agreement and that since Textron had failed to provide them with proper notice of sale, Textron could not recover its deficiency claim under Michigan law.

In his opinion, District Judge Benjamin F. Gibson noted that if that lease was in fact a security agreement and if Textron failed to provide proper notice of the sale, then Textron could not recover its deficiency from the guarantors. The court then held that the affirmative defense raised issues of material fact and, therefore, denied the motion for summary judgment.

Chevy Chase Federal Savings Bank v. Davis, 121 Bankr. 516 (Bankr. E.D. Mich. 1990). In this case, a bank commenced an adversary proceeding alleging that its claim against

the individual Chapter 7 debtors was nondischargeable. One of the debtors filed a motion to dismiss the complaint and one filed a motion for summary judgment. At the hearing on those motions, the bank orally moved to amend its complaint. That motion was denied, and the court granted the debtors' motions. The bank subsequently filed a motion to amend its complaint, which the bankruptcy court denied. The District Court, per Judge Hackett, affirmed the bankruptcy court's decision. Judge Hackett reasoned that the bank had acted too late to amend its complaint and had failed to defend properly against the debtors' motions.

In re Urbanco, Case No. 90-82065 (Bankr. W.D. Mich. January 2, 1991). In this Chapter 11 case, the debtor filed a motion to assume an unexpired lease of nonresidential real property within the 60-day period in 11 U.S.C. § 365(d)(4), and never filed a motion for additional time to assume or reject the lease. After this 60-day period expired, the lessor filed a motion to require the debtor to surrender the premises. At the hearing on both motions, the debtor asserted that an oral agreement to assume the lease, coupled with a letter to it from the lessor, constituted assumption required by 11 U.S.C. § 365. Bankruptcy Judge Jo Ann C. Stevenson disagreed, and granted the lessor's motion. The debtor appealed and filed a motion for stay pending appeal. Judge Stevenson considered the four factors a party must establish to obtain a stay pending appeal and denied the motion. These factors are:

1. A likelihood that the parties seeking the stay will prevail on the merits of the appeal;

2. The movant will suffer irreparable injury unless the stay is granted;

3. Other parties will suffer no substantial harm if the stay is granted;

4. The public interest will not be harmed if the stay is granted.

Judge Stevenson also held that a debtor must immediately surrender nonresidential real property upon rejection of a lease. If the debtor fails to do so, the lessor must enlist the aid of the state courts to evict the debtor. Pursuant to 11 U.S.C. § 362(d)(10), the automatic stay would not bar the lessor from commencing these proceedings. Finally, Judge Stevenson indicated that a bankruptcy cou could enforce surrender order throug civil contempt, conversion, or appointment of a trustee.

In re Bencker, Case No. 89-03577 (Bankr. W.D. Mich. December 20, 1990). In this case, the debtors' mobile home burned down prior to the date they commenced their Chapter 13 case. Debtors thereafter entered into a contract to purchase a new mobile home with the proceeds of insurance covering their prior home. Numerous parties, including the Internal Revenue Service which held tax liens in the destroyed mobile home, claimed those funds. Both District Judge Richard Enslen and Bankruptcy Judge Laurence Howard, in separate cases, held that the funds were the property of the estate and the IRS appealed both decisions. Judge Howard subsequently conducted a hearing regarding the debtors motion to distribute the insurance proceeds to the mobile home seller. The IRS argued that the court had no jurisdiction to distribute the proceeds pending the IRS' appeal of the decisions that the proceeds were property of the estate. Judge Howard held that he had jurisdiction to grant the debtors motion and distribute the proceeds indicating that the IRS would probably not win on appeal, and even i

ıe decisions were eversed, no harm would esult by the distribution of the proceeds to the mobile home seller. Judge Howard also held, following In re Terrell, 892 F.2d 464 (6th Cir. 1989), that the contract to purchase the mobile home was executory and could be assumed by the debtors.

EDITOR'S NOTEBOOK:

A meeting was held on January 18, 1991 at noon at the Peninsular Club.

1. Brett Rodgers gave a brief Treasurer's Report on behalf of the Federal Bar Association showing the various monies on hand in the general, seminar, portrait and trial skills accounts.

2. James A. Engbers and Mark VanAllsburg reported on the status of furnishing the Attorney Lounge on the 7th floor of the Federal Building. A total of $6,500.00 has been budgeted to complete the renovation and furnishing of this lounge area with monies coming, hopefully, from the bankruptcy bar, which would principally be utilizing the same. In that regard, you may shortly be receiving a letter from Mr. Engbers concerning a possible monetary contribution, although you should feel free to contact him should you desire to pledge some money toward this worthy cause. It is expected that all identifiable property purchased will remain property of the contributor for depreciation and other purposes.

3. Discussion was had regarding the agenda, speakers, topics and other matters associated with the August, 1991 Shanty Creek Seminar. Patrick E. Mears is in charge of putting this seminar together and may be contacting some of you concerning the possibility of speaking in a certain subject area at that time.

4. Thomas P. Sarb has agreed to assume editorial duties beginning with the August, 1991 Newsletter. Thanks to Tom for agreeing to take over the Editor's responsibilities; I am sure he will do a great job.

5. The next Steering Committee meeting was scheduled for noon at the Peninsular Club on Friday, February 15, 1991. It was also agreed that in the future we would try to schedule all Steering Committee meetings on the third Friday of each month in the Gold Room on the 4th floor of the Peninsular Club, with the exception of August and December, when no monthly meeting will be held unless the Committee deems the same to be necessary.

Larry A. Ver Merris

The following is a portion of an open letter from Joseph A. Chrystler to various attorneys concerning student loan discharge problems in Chapter 13 cases given the new Code amendments which were effective November 5, 1990:

* * * * * * * * * * *

How will we deal with . . . student loans now that they are not dischargeable? Let me count the ways. First of all, they may be dischargeable if either of the two conditions is present that are expounded in 11 U.S.C. 523(a)(8), the debt that became due more than seven years (changed from five years under the law prior to 11-5-90) before the bankruptcy petition date, or the hardship exception. Hardship may be more difficult to establish in a Chapter 13 setting, however, since continued hardship may have to be proven for the minimum three year life of a plan, on up to the maximum life of five years.

Next, a myriad of questions has already crossed my mind, and this list is certainly far from all inclusive. No doubt you have pondered other questions and/or observations I have not even considered as of yet, and if so, I wish you would share them with me.

Which student loans are non-dischargeable? The Public Law states quite simply 'student loans,' without further expansion.

What is a student loan? Is a debt to Grand Rapids Junior College for a NSF check arising from the purchase of textbooks at the bookstore a student loan? What started out as a cash transaction turned into a credit situation between a college and a student! The possibilities here are as endless as your imagination.

How will the non-dischargeable student loans have to be dealt with in a Chapter 13 plan? The varieties and repayment terms are many and varied. The cramdown provisions appear to be operable, but how may this be exercised to any debtor benefit since the totality of the loan, and its accompanying interest charges, likely, will not go away?

Does the student loan creditor have to file a claim?

Does the student loan creditor have to file a complaint to determine non-dischargeability?

Does the debtor have to file a complaint to determine dischargeability?

What if the student loan debt, by its own terms, extends beyond the life of the Chapter 13 plan?

Does interest have to be paid on the student loan, or is only the principal amount of the loan non-dischargeable? If interest is not requested by the creditor and not volunteered in the plan by the debtor is the accrued interest discharged?

If a student loan creditor files a deficient claim (fails to attach necessary documents, etc.) and the debtor or the Trustee sustains an unopposed objection to it, what will be the treatment in the plan and will the debt survive the plan if it is not paid therein?

Why did Congress intentionally create a sunset provision on October 1, 1996 for the student loan provision? The pre-bankruptcy posturing starting about mid-1996 is mind-boggling.

Is the door now open wide for the so-called Chapter 20; the Chapter 7 to blow away dischargeable unsecured debt, closely followed by the Chapter 13 to manage the secured, priority and student loan debt? If so, how will the Courts tackle the thorny question of good faith in the Chapter 13 filing in this potential piggyback situation?

One of my colleague Trustees (from another state) has given me his initial reaction (although he has two staff attorneys researching the issue) that the student loan will have to be treated much the same as a child support debt. It may be decelerated, but will have to be paid in full within the life of the plan unless the document itself calls for payment extension beyond the plan life or unless the creditor consents to other treatment. My initial reaction is somewhat different, and for what very little use it may prove to be, I will briefly expound on it.

I find no reference in the new law to any change in 11 U.S.C. 507, which sets the priority of claims and expenses. Therefore, at first blush it would appear the student loan is accorded no greater priority than it had before the November 5, 1990 law change. I am aware that certain plans have been confirmed where there existed a substantial child support obligation (arrearage, not ongoing) that would not be paid in full over the life of the plan. Therefore, it would appear that this same treatment, if necessary, could be accorded student loans. If a plan attempts to accord some priority status to a general unsecured student loan (what other kind are there?), to have it paid sooner than, or a greater percentage than, other general unsecured creditors in the same class, it may be an issue for judicial determination, which will likely be brought to the attention of the Court by the Trustee in fulfilling his duties, as to whether or not the treatment so proposed is in violation of 11 U.S.C. 1322(b)(1).

In closing, I hope someone will take the initiative immediately to establish the ground rules and framework we must all work within regarding these student loans. I further hope all four of our Judges can find a common manner of determining the treatment accorded student loans in our plans as they are presented for confirmation.

Joseph A. Chrystler
Standing Chapter 13 Trustee,
Western District of Michigan
- Kalamazoo Division

LOCAL BANKRUPTCY STATISTICS

The following is a summary of the number of bankruptcy cases commenced in the United States Bankruptcy Court for the Western District of Michigan during the period from January 1, 1990 through December 31, 1990. These filings are compared to those made during the past three years.

	1990	1989	1988	1987
Chapter 7	3,999	3,289	2,762	2,415
Chapter 11	154	98	84	91
Chapter 12	18	17	33	85
Chapter 13	1,717	1,420	1,215	1,269
Totals	5,888	4,824	4,094	3,860

FROM THE BANKRUPTCY COURT:

TO: **Persons on the Slip Opinion Mailing List of the United States Bankruptcy Court for the Western District of Michigan**

SUBJECT: **RECEIPT OF COPIES OF FUTURE SLIP OPINIONS FOR THE YEAR FEBRUARY 1, 1991 THROUGH FEBRUARY 1, 1992**

PLEASE TAKE NOTICE:

If you wish to remain on the Bankruptcy Court Slip Opinion Mailing Matrix for the year February, 1991 through February, 1992, a charge of $30.00 will be assessed. This charge will defer the costs of copying and mailing slip opinions. If an attorney or other individual desires to remain on the opinion mailing list, please complete the attached form and enclose a check in the amount of $30.00 made payable to:

Clerk, U.S. Bankruptcy Court
ATTN: Mark Van Allsburg
P.O. Box 3310
Grand Rapids, MI 49501

Anyone who has not remitted $30.00 by March 1, 1991 will be deleted from the mailing list. Of course, if a person does not wish to receive copies of all slip opinions of cases decided by the Court, a given opinion may be requested from the Court at the regular charge of $.50 per page.

If you have any questions regarding the above, please feel free to telephone me at (616) 456-2693.

Mark Van Allsburg, Clerk
U.S. Bankruptcy Court

SLIP OPINION REQUEST FORM

Please send me copies of all slip opinions rendered by the United States Bankruptcy Court for the Western District of Michigan during the 1991 calendar year. My name, mailing address, and business telephone number are **printed or typed** below as follows:

NAME _____

ADDRESS _____

_____

_____

TELEPHONE (_____) _____

I have enclosed a check in the amount of $30.00 made payable to the Clerk, United States Bankruptcy Court, to defer the costs of copying and mailing the opinions from February 1, 1991 to February 1, 1992.

Dated: _____ _____
Signature

FROM THE LOCAL FBA:

Dear Friends of Judge Hillman,

The Western Michigan Chapter of the Federal Bar Association is pleased to invite you and your colleagues to a luncheon honoring Chief Judge Douglas W. Hillman, who is taking senior status. The luncheon will be held in Grand Rapids on Friday, February 8, 1991, at the Ambassador Ballroom, Amway Grand Plaza Hotel, from 12 noon to 2:00 p.m. John W. Reed, Dean of Wayne State University Law School, will be the featured speaker.

Judge Hillman has enriched our community and the legal profession throughout his distinguished career, and his elevation to senior status is another important milestone. The luncheon will give us all the opportunity to reflect on Judge Hillman's past accomplishments and to celebrate achievements to come.

Many of Judge Hillman's friends and colleagues will want to attend this luncheon, so reservations will be accepted on a first-come, first-served basis. Enclosed is a reservation form to be filled out and returned with a check payable to Western Michigan Chapter, Federal Bar Association, for $22 per person. Please send the form to Ms. Deidre Toeller-Novak, Federal Bar Association, Suite 400, 200 Monroe Avenue, N.W., Grand Rapids, Michigan 49503. All reservations must be in no later than February 1, 1991 and are subject to a limited seating capacity.

Please join the Federal Bar Association in honoring Judge Hillman on this very special occasion.

Sincerely,

William W. Jack, Jr.
President
Western Michigan Chapter
Federal Bar Association

SUMMARY OF MAJOR BANKRUPTCY RELATED CHANGES
TITLE 11, UNITED STATES CODE

Section Change	Result	Pub. Law	Effective Date
305 (c)	Appeals for Absention Determinations	Federal Courts Study Committee Implementation Act of 1990	December 1, 1990
523 (a)(11)	Adds 11—Fraud, Defalcation Nondischargeable	Comprehensive Thrift and Bank Fraud Prosectuion and Taxpayer Recovery Act of 1990	November 29, 1990
523 (a)(12)	Adds 12—Malicious, Reckless Failure to Maintain Capital Nondischargeable	Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990	November 29, 1990
523 (a)(e)	Institution—Affiliated Party in Fiduciary Capacity for 523 (a)(4) or (11) Purpose	Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990	November 29, 1990
523 (a)(c)	(c)(1) Shall Not Apply to Federal Depository Institutions	Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990	November 29, 1990
522 (c)	Adds (3)—Fraud, Defalcation & Willful, Malicious Injury Debts are Exceptions to Exemption Categories	Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990	November 29, 1990
365	Adds (o) Commitments to Financial Regulatory Institutions Must Be Accepted by Trustee & Given Priority	Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990	November 29, 1990
507 (a)	Adds (8)—New Priority —Ranked 8th—Failure to Maintain Capital at Financial Institution	Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990	November 29, 1990
101	Definitional Changes	Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990	November 29, 1990
523 (a)(9)	Drunk Driving	Criminal Victims Protection Act of 1990 (Part of Crime Bill)	November 29, 1990
1328 (a)(2)	Drunk Driving	Criminal Victims Protection Act of 1990 (Part of Crime Bill)	November 29, 1990
1328 (a)	Restitution— Nondischargeable	Criminal Victims Protection Act of 1990 (Part of Crime Bill)	November 29, 1990
523 (a)(8)	Broadens Student Loan Language & Time Limits	Criminal Victims Protection Act of 1990 (Part of Crime Bill)	180 Days After Enactment

TITLE 11, UNITED STATES CODE

Section Change	Result	Pub. Law	Effective Date
362 (b)	Accreditation & Licensing of Educational Institutions	Student Loan Default Prevention Act of 1990	*November 5, 1990
541 (b)	Adds (3) Excludes Debtor from Participating in Higher Education Act Programs	Student Loan Default Prevention Act of 1990	*November 5, 1990
1328 (a)(2)	Students loans not Dischargeable	Student Loan Default Prevention Act of 1990	*November 5, 1990
523 (a)(9)	Drunk Driving	Criminal Victims Protection Act of 1990	November 15, 1990
1328 (a)	Restitution— Nondischargeable	Criminal Victims Protection Act of 1990	November 15, 1990

*Sunset provision 10-1-96

TITLE 12, UNITED STATES CODE

Section Change	Result	Pub. Law	Effective Date
1821 (d)	Adds (17) Superior Rights of Recovery for Resolution Trust Corporation	Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990	November 29, 1990
1787 (b)	Adds 16 (D) Superior Rights of Recovery for National Credit Union Board	Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990	November 29, 1990

TITLE 28, UNITED STATES CODE

Section Change	Result	Pub. Law	Effective Date
152 (a)	Extension of Term	Federal Courts Study Committee Implementation Act of 1990	December 1, 1990
158 (b)	Authorize Joint BAPS	Federal Courts Study Committee Implementation Act of 1990	December 1, 1990
1334 (c)(2)	Appeals for Abstention Determinations	Federal Courts Study Committee Implementation Act of 1990	December 1, 1990
1452 (b)	Appeals for Remand Determinations	Federal Courts Study Committee Implementation Act of 1990	December 1, 1990
586 (e) (1) (A)	Standing Trustees Pay	Federal Employees Pay Comparability Act of 1990	To be Determined by the President

TITLE 37, UNITED STATES CODE

Section Change	Result	Pub. Law	Effective Date
Chapter 5	New §37 Military Service Agreements Not Not Dischargeable	National Defense Authorization Act of 1991	November 5, 1990
Chapter 5	New §301d Sign-Up Bonus Obligation to Remain in Military Nondischargeable	National Defense Authorization Act of 1991	November 5, 1990