

# **BAPCPA**

# **Changes to Chapter 13**

**A Fly Over At 20,000 Feet**

By: Rick A Yarnall  
Chapter 13 Bankruptcy Trustee  
Las Vegas, NV

# ***3 Routes to Chapter 13***

1. Chapter 7 – Means Test 707(b)-Above State Medium Income
  - Dismiss or Convert to a 13
2. Voluntary Conversion From Another Chapter to Chapter 13
  - Chapter 7 – Above or Below Means Test
  - Chapter 12 – No Means Test
3. Voluntary Chapter 13
  - No Means Test
  - Debtor's Attorney Not Required to Certify Accuracy of Petition & Schedules which is Required in Chapter 7's. See §707(b)(4)(C)&(D)

# *Methodology*

1. Review the BAPCPA Changes to Chapter 13
2. 18 Sections in Chapter 13.
  - 9 Sections have *no* changes
  - 4 Sections have *minor* changes
  - 5 Sections have *major* changes

# § 1301 – Stay of Action Against Co-Debtor

Comment: [§365\(p\)\(3\)](#)

Co-Debtor Stay  
Automatically  
Terminated if  
Chapter 13 Plan is  
Confirmed and a  
Lease of Personal  
Property is Not  
Assumed

NO  
CHANGE

# §1302 Trustee Duties

## 4 - *BAPCPA Changes to Remember*

### 1. §1302(b)(6)

Summarized:

If Debtor has a DSO the Trustee shall provide special notice to certain individuals and agencies

Comment 1:

What is a Domestic Support Obligation See §101(14A)  
The term “domestic support obligation”

# §1302

## Summarized:

A debt which accrues before, on, or after Debtor filed, in favor of a spouse, former spouse, child etc., in the nature of alimony, maintenance, or support by reason of a separation agreement, divorce decree, or property settlement, not assigned to a non government entity, unless voluntarily assigned for purpose of collecting the debt.

# §1302

## 2. §1302(d)(1)(A)(i)&(ii) and §1302(d)(1)(B)(i)&(ii)

### Summarized:

That at a time (not specified) during the course of the case, the Trustee shall notify:

- A. DSO claim holder of the right to use their State Child Support Enforcement Agency for assistance in collecting child support and give the claimant the agencies address and telephone number to contact §1302(d)(1)(A)(i)&(ii)
- B. The State Child Support Enforcement Agency of DSO's name, address, and telephone number.  
§1302(d)(1)(B)(i)&(ii)

# §1302

## Comments:

1. The details about the DSO claimant must come from the Debtor – Rules and Forms may specify the process.
2. Debtor may not know details – So how does the Debtor obtain it?
3. Debtor may be prohibited from obtaining this information if there was an abusive relationship.
4. What if the DSO claim holder doesn't want this information to become part of the Bankruptcy Court record?



# §1302

## 3. §1302(d)(1)(C)

### Summarized:

If the Debtor is granted a **Discharge** §1328 the Trustee shall provide written notice to the DSO claim holder and State Agency of the following:

1. Debtor was granted a discharge
2. Debtors last known address
3. Last recent known address of Debtor's employer
4. Name of each creditor with a claim that was not discharged under §523(a)(2) – (money/credit obtained by fraud) and §523(a)(4) – (fraud, embezzlement, or larceny)
5. The name of each creditor whose debt was reaffirmed under §524(c)

# §1302

## Comments:

1. What if DSO claimant moves from time to time?
2. Will this require Debtor to appear at a discharge hearing to provide under oath current address and employer information? Or, can Debtor certify this information for the court?
3. At discharge Debtor must certify DSO payments are current. §1328(a)

## §1302

### 4. §1302(d)(2)(A)&(B)

#### Summarized:

A DSO claimant and/or State Child Support Enforcement Agency may request of any creditor whose claim was not discharged or debt reaffirmed of the Debtor's last known address. If the creditor complies, it will not be liable for making such disclosure.

# §1302

## Comments:

1. Hasn't the Trustee already provided this information - §1302(d)(1)(c)?
2. Why would a creditor want to get involved?
3. Does this provision provide the necessary protection? – immunity?
4. Could the creditor be liable for other reasons?
5. If such a request is made, is the creditor obligated to disclose?

- §1303. Rights and powers of debtor
- §1304. Debtor engaged in business
- §1305. Filing and allowance of post petition claims
- §1306. Property of the estate Except for changes in §522 & §541

**NO CHANGE**

# § 1307 - Conversion or dismissal

## 2 BAPCA Changes to Remember

### 1. § 1307(c)(11)

#### Summary:

Court may dismiss or convert case if Debtor fails to pay any DSO after date of filing.

## § 1307

### 2. § 1307(e)

**Summary:** If Debtor fails to file Tax Returns Required by §1308, upon request of a party in interest and after notice and hearing, the court shall dismiss or convert the case.

## § 1307

### Comment 1:

## Other reasons to dismiss a case can be found in §521

- A. §521(e)(2)(B) – Court shall dismiss case unless it is beyond debtors control to provide Trustee with most recent Tax Return 7 days before first date set of §341. Compare and Reconcile the §1308(a) – 1 day requirement
- B. §521(e)(2)(C) – If creditor request a copy of a tax return and debtor fails to comply
- C. §521(i)(1) – If debtor fails to file all information required by §521(a)(1) within 45 days of filing the case. The case will automatically be dismissed on the 46th day.
- D. §521(i)(4) – Trustee can file motion to Dismiss if Debtor fails to provide all information required of §521(a)(1)
- E. §521(j) – After filing, if debtor fails to file Tax Returns after taxing authority requests Debtor to do so, the court may dismiss or convert the case.



## § 1307

Comment 2: Days Before meeting of creditors what tax returns must be filed?

1. Tax Returns: Sec §1308 – 1 Day before first date set of §341 - 4 years of tax returns including Return for most recent Tax year immediately preceding the petition date.

- Compare -

2. Debtor's duties: Sec §521(e)(2)(A)(i) – 7 Days before first date set of 341 the tax return for the most recent tax year immediately proceeding the petition date.

## § 1308 Filing of Pre-petition Tax Returns

### 3 BAPCPA Changes to Remember

#### 1. § 1308(a)

Summarized: Not later than 1 day before the §341 meeting of creditors first set, if Debtor's required to file any tax return Debtor shall file all Tax Returns for all tax periods in the prior 4 years proceeding the Date of Filing

# § 1308

## 2. § 1308(b)(1)

### Summarized:

If the 4 year period Tax Returns have not been filed by the first date set for §341 the Trustee may hold open the §341 for a reasonable period:

1. For Past due Returns up to 120 Days
2. For Returns not past due the later of:
  - a) 120 Days or
  - b) The date the Return is due under Automatic Exclusion

Comment : Under §1308(b)(1)(B)(ii) the §341 could be extended up to October 15<sup>th</sup> starting with the 2005 Return.

## § 1308

### 3. §1308(b)(2)

#### Summarized:

Debtor may obtain an extension of time to file Returns if application is made of the court, before the tolling of any time period and upon notice and hearing. Debtor has the burden to prove he could not get the tax return done timely and the court may grant an extension subject to:

- A. §1308(b)(2)(A) - 30 days on any tax returns; and
- B. §1308(b)(2)(B) – No extension after the 30 days previously given

# § 1321 Filing of Plan

NO CHANGE

## § 1322

# 4 BAPCPA Changes to Remember

### 1. § 1322(a)(4)

Summarized: Debtor's plan may propose to pay less than the full amount of the priority §507(a)(1)(B) claim (A DSO assigned to a governmental unit) only if the plan provides that all the debtor's projected disposable income for a 5 year period will be applied to payments under the plan

Comment 1: See § 1322(d)(1)&(2) if related to "Applicable Commitment Period" Debtor's CMI X12 is less than State medium income can Debtor still propose a 5 year plan to take advantage of this provision?

Comment 2: Is this a meaningless gesture because if Debtor's CMI is below the State Medium Income, How will Debtor pay?

# § 1322.

## 2. § 1322(b)(10)

Summarized: Debtor's plan may provide to pay interest on nondischargeable unsecured debt only if all other unsecured creditors are paid in full.

Comments: Non dischargeable debts such as:

- a. Certain Taxes – §507(a)(8)(C) & §523(a)(1)(B)
- b. Fraudulent tax returns – §523(a)(1)(c)
- c. Money/property obtained by tax fraud §523(a)(7)
- d. Fraud, embezzlement, larceny – §523(a)(4)
- e. Domestic Support Obligation §523(a)(5)
- f. Death/injury from motor vehicle, vessel, or aircraft while intoxicated. §523(a)(9)

## § 1322

### 3. § 1322(d)(1)

#### Summarized:

- A. This is the Debtor's Plan's "Applicable Commitment Period." A new term set out in §1325(b)(1)(B)(A) which means that if: Debtors and spouse combined current monthly income (CMI) X12 is greater than the State medium income for corresponding number in household. Debtors plan may not provide for payments longer than 5 years.



## § 1322.

### 3. *cont.* §1322(d)(2)

- B. If Debtor and spouse combined CMI X12 is  $\leq$  than State Medium income Debtor's plan may not propose a period longer than 3 years unless the court approves otherwise.

# § 1322

## 4. § 1322(f)

*“A plan may not materially alter the terms of a loan described in section 362(b)(19) and any amounts required to repay such loan shall not constitute “disposable income” under section 1325.”*

Summarized: Debtor’s plan may not alter the repayment of retirement loans and contributions: The amount paid shall not be considered as disposable income (§ 1325).

Comment : Can the Debtor slightly alter but not materially alter the repayment terms?

§ 1323 Modification of Plan Before  
Confirmation.

NO CHANGE

# § 1324 Confirmation Hearing

## 1 BAPCPA Change to Remember

### 1. § 1324(b)

#### Summarized:

The hearing on confirmation of Debtor Chapter 13 plan shall be heard not earlier than 20 days and no more than 45 days after the date of the meeting of creditors (341) unless the court determines it shall be held earlier and no objections

# § 1324

## Comment 1:

§1324(b) may not require confirmation within 20 days and no later than 45 days of the initial 341. See §1324(b) “after the date of the meeting of creditor” language. Compare §1308 language which says “meeting of creditor is **“first scheduled to be held under section 341(a),”**” Implies that meeting of creditors must be concluded and that confirmation must occur no earlier than 20 days and no more than 45 days after this event. Does this require a separate notice?

## Comment 2:

Business cases requiring a business review would reasonably delay confirmation

## Comment 3:

Under what circumstance should the confirmation be held earlier than 20/45 day rule?

# § 1325 Confirmation of Plan

## 7 BAPCPA Changes to Remember

### 1. §1325(a)(5)(B)

Summarized:

- A. The lien is retained until fully satisfied based on applicable nonbankruptcy law or Debtor is discharged under §1328 which ever is earlier
- B. If the case is dismissed or converted before completion of the plan the creditor retains the lien based on non-bankruptcy law.

## § 1325

### 2. §1325(a)(5)(B)(ii)

Summarized:

- A. If there are periodic payments the payments shall be in equal monthly amounts
- B. If the creditor is secured by “personal property” the equal monthly payments shall not be in an amount less than sufficient to provide the creditor with adequate protection during the period of the plan

Comment 1: If the payments must be equal is debtor prohibited from making step payments and increase the monthly payments.

## § 1325

### 3. §1325(a)(7) –

Summarized:

- A finding that the Debtor filed the petition in good faith

Comments:

1. How does the court make a finding that the Debtors action in filing the petition was done in good faith?
2. Conduct a hearing?
3. Compare: §1325(a)(3) – the plan was proposed in good faith. Is this a:

Double “Good Faith” Standard



# § 1325

## 4. §1325(a)(8)

### Summarized:

- The Court must find that the Debtor has paid all required DSO after filing the petition up to the time of confirmation.

### Comments:

1. Does the Debtor certify to the court, or appear at the confirmation hearing?
2. The check is in the mail.
3. Roadblock to Confirmation – the unhappy spouse.

## § 1325

### 5. §1325(a)(9)

#### Summarized:

Court must find that Debtor has filed all applicable Federal, State, and Local Tax Returns required by § 1308

#### Comments:

1. Possible delayed confirmation, up to 10 months, while waiting for the most recent Tax Returns required to be filed.
2. Or, do we skip the requirement for the most recent return not really due until the filing deadline as late as (October 15<sup>th</sup>).

## § 1325

### 6. §1325(a)(9) Hanging Paragraph Related to Anti- Cram-Down

#### 2 Components to §1325(a)(9) Referring to §506

##### A. Autos

- i. §506 does not apply if creditor has a **PMSI claim** securing the debt; and
- ii. Debt incurred within 910-day, “ ” proceeding the date before the date of filing the petition; and
- iii. Collateral for debt is a motor vehicle; and
  - See Definition (30102 of title 49)
- iv. Acquired for personal use of the debtor

## § 1325

### Comments on: 910 Autos

1. If Auto (new or used) was purchased within 910 days prior to filing, there is no cram down. §506 does not apply. Then no under-secured claim.
2. What if auto was for business use – will cram down apply?
3. What if auto was purchased for someone other than the Debtor, does cram down apply? Ex. Auto purchased for exclusive use of child
4. Can the Debtor take a 910 Auto that will pay off regularly in 36 months and stretch it out to 60?
5. Can the Debtor modify the interest rate on a 910 Auto under Till v. SCS Credit Corp 124 S.Ct.1951(2004)

# § 1325

## B. Other Personal Property

- i. Acquired for personal use
- ii. If collateral for debt is “any other thing of value,” and
  - Ex. Washer, Dryer, TV, etc...
- iii. If debt was incurred within a 1 year period proceeding the filing
- iv. Than §506 does not apply to this claim

Comment 1: There is no prohibition to cram down business personal property.

## § 1325

7a. What if the Trustee or the holder of an allowed unsecured claim objects to confirmation pursuant to §1325(b)(1)?

Summarized:

§1325(b)(1) is triggered only if the Trustee or a holder of an allowed unsecured claim objects. If an objection is made, all of Debtors disposable income to be received in the “**Applicable Commitment Period**” due under the plan will be applied to **unsecured creditors** over the life of the plan

# § 1325

## Comment 1:

If the Trustee or holder of an allowed unsecured claim objects under §1325(b)(1) the court can not confirm the plan until all conditions of §1325(b)(1) have been met.

## Comment 2:

What if the Trustee and/or unsecured creditor does not object? – Then §1325(b)(1) is not triggered and court can confirm. Skip all the elements of §1325(b)(1)

# § 1325

## Comment 3:

If an objection is made under this provision – the plan must provide for all of debtors **Projected Disposable Income** to be received in the **Applicable Commitment Period** beginning with the first payment due that will be applied to **Unsecured Creditors**.



## § 1325

7b. What does the term “Disposable Income” mean? 1325(b)(2)

1. CMI (See Definition in §101(10A)) **less:**
  - a. Child support, foster care, or disability payment for dependent child that are reasonably necessary.
  - b. Less Reasonably Necessary Expenses for:
    1. Support for dependents or
    2. DSO due after filing
  - c. Less Reasonably Necessary Expenses for:
    1. Charitable Contributions not to exceed 15% of [**Gross Income**]
    2. If Debtors in Business than for expenditures necessary to continue, preserve, and operate the business.

## § 1325

Comment 1: See §7047(b)(2)(A)&(B) and forms – IRS National Standards & Loan Standards.

Comment 2: If Debtor is over State medium income. Debtor may retain all collateral and make payments: There does not seem to be any penalty or limitations on living expenses and payments.

Comment 3: Forms & Debtor Living Expenses to favor Debtor with Real Estate Mortgage payments for Secured collateral Auto, Cycles, Boats, Etc.. In this event no money for unsecureds.

## § 1325

7c. §1325(b)(3) - How are amounts reasonably necessary to be spent under paragraph §1325(b)(2) determined?

Summarized:

1. If debtors CMI X12 is greater than States medium income for # in household
  - Than reasonably necessary expenses are determined by §707(b)(2)(A)&(B)
  - But is there any real penalty?
2. If Debtors CMI X12 is less than States medium income for # in household than §707(b)(2)(A)&(B) doesn't apply – “it's whatever”

Comment: The legal battle will center on how to determine the # of persons residing in the household. IRS Dependent definition or Census Bureau definition of # in household.

## § 1325

7d. §1325(b)(4) What is the Applicable Commitment Period?

### Summarized

1. 3 years or
2. 5 Years if CMI X12 is greater than medium income applicable for state and # in household
3. Maybe less than 3 years or 5 years only if plan provides for 100% payment to unsecured over a shorter period [§1325(b)(4)(B)]

§ 1325

## Bottom Line

Means

Not Much Left

# Rules Committee Just Released Draft of Forms

## Forms

Form 1 – Chapter 13 Statement of Current Monthly Income and Disposable Income Calculation

Form 2 – Chapter 13 Statement of Current Monthly Income and Disposable Income Calculation and **IRS Extra**

Forms can be found at:

<http://www.uscourts.gov/rules/CPA2005.html>

# § 1326 – Payments

## 4 BAPCPA Changes to Remember

### 1. §1326(a)(1)

Summarized:

Unless court orders otherwise, **Debtor** shall make first payment within 30 days of filing petition or filing of plan whichever is shorter.

Comment

1. Why would the court order otherwise?

➤ See §1326(a)(1)(A),(B) &(C)

## § 1326

### 2. §1326(a)(1)(A)(B)&(C)

#### Summarized:

1. Plan Payments to the Trustee
2. Payments on lease of personal property Debtor shall make direct to the creditor.
3. If the plan proposes to pay a secured claim through the Trustee, the Debtor shall make the payments directly until the plan is confirmed.
4. Debtor shall deduct payments from plan payment and provide Trustee with evidence of all payments up to time of confirmation

#### Comments:

1. Accounting and Proof of Claim issues
2. Will the Court enter a general order directing that all payments be made through the Trustee and direct the Trustee to make interim payments to the creditors?



## § 1326

### 3. §1326(a)(4)

Summarized:

Debtor shall provide evidence of insurance on the value of lease or secured personal property being released to the creditor with in 60 days of filing Chapter 13 and continue to provide the required insurance coverage as long as the debtor remains in possession

## § 1326

### 4. § 1326(b)(3)

#### Summarized:

If a Chapter 7 Trustee in this case or a prior case was allowed compensation due to conversion or dismissal in this or a prior case, and remains unpaid, the unpaid compensation shall be paid monthly, the greater of \$25 or the amount of the (*unsecured priority claim X 5% ÷ number of months in plan*).

#### Comments:

1. At \$25/mo X 36mos = \$900
2. If Unsecured Priority claims total \$50,000 ( $\$50,000 \times 5\% \div 36 \text{ months} = \$69.44 \text{ a month}$ ). Total \$2500 over the plan course.
3. Must be paid in equal monthly payments.
4. See §1326(d) Chapter 7 Trustee shall receive this compensation even if the obligation was discharged in a prior case.

§ 1327. Effect of confirmation

NO CHANGE

# § 1328. Discharge

## 5 BAPCPA changes to remember

### 1. § 1328(a)

Summarized:

Debtor must certify that all past (to the extent of the plan) and post filing DSO have been paid.

Comments:

1. As soon as practicable and after all payments made under the plan
2. How will the Debtor certify?
3. Who will verify?

# § 1328

## 2. 1328(f)

Summarized:

No Discharge if:

1. Debtor was discharged (to filing date) in a 7, 11, or 12 and files within next 4 years
2. Debt was discharged (to filing date) in a 13 and files within 2 years

Note: THIS IS A MATTER OF DISPUTE IS IT 2 YEAR  
FILING TO FILING OR DISCHARGE TO FILING?

Comments:

1. Debtor can still file a new 13 within 2 years. But won't receive a discharge.
2. How does this work? - Must one file a complaint alleging that Debtor is not eligible for a discharge or is it a plan provision?

# § 1328

## 3. §1328(g)

Summarized:

Debtor cannot obtain a discharge until completion of an instructional course on personal financial management.

Comments:

1. Debtor can start course any time after filing
2. If a for profit agency provides the approved course does that make it a DRA (Debt Relief Agent)?

# § 1328

## 4. § 1328(h)

### Summarized:

If Debtor has been charged with or convicted of a felony or violation of securities law the court may not grant a discharge unless within 10 days of discharge, conducts a hearing and finds no reasonable cause to believe that there have been such violation

### Comment:

- What happens if it does make such a finding?
  - §522(q)(1)(A)&(B)

# § 1328

## 5. New Exclusions from Chapter 13 Discharge

- A. 507(a)(8)(C) – Taxes required to be collected or withheld and which Debtors liable.
- B. 523(a)(1)(B) – On late or un-filed taxes based on late or un-filed tax returns
- C. 523(a)(1)(C) – Taxes based on fraudulent return
- D. 523(a)(2) – Extensions of credit based on false pretenses, false representation, material false writing related to debtor's financial condition. Presumption of non discharge in \$500 luxury goods with in 90 days of petition or \$750 cash advance with in 70 days of petition.
- E. 523(a)(3) – Creditor not scheduled such that creditor could not file a timely claim or object to Discharge.



# § 1328

## New Exclusions from Chapter 13 Discharge *Cont...*

- F. 523(a)(4) – Fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.
- G. 523(a)(5) – DSO
- H. 523(a)(8) – Educational Loans
- I. 523(a)(9) – Death or personal injury caused by operation of a motor vehicle, **vessel, or aircraft** if such operation was unlawful because Debtor was intoxicated from using alcohol, drugs, or another substance
- J. 1325(a)(4) – Restitution or damages awarded in a civil action against the debtor as a result of willful or malicious injury that Debtor caused personal injury or death of an individual.

# § 1328

## Comments:

1. Super discharge gone
2. Some Fees/Taxes can be discharged
3. Permits discharge of 523(a)(15) property settlement

## § 1329 Modification of Plan after Confirmation 2 BAPCPA Changes to Remember

### 1. §1329(a)(4)

#### Summarized:

Debtor may modify plan to reduce payments to purchase health insurance for Debtor and Dependents

#### Comments:

- Some limitation on costs
- Feasibility of plan may determine whether Debtor exercises this provision
- Cost not calculated as part of DI in §1325(b)

# § 1329

## 2. §1329(c)

Summarized:

Clarifies that if a modification of the plan is made under §1325(b)(1)(B), the Applicable Commitment Period starting with the first payment due under plan does not change.

Comments:

1. Does this resolve the issue whether §1329(a) incorporates 1329(b)?
2. Does this clarify that plans are time sensitive and not \$ sensitive?
3. See In Re Sunahara, 326B.R.768(9<sup>TH</sup> CIR.BAP2005)

**§ 1330 Revocation of an Order of  
Confirmation**

**NO CHANGE**

# Conclusions

1. File all Tax Returns before filing Petition – if applicable
2. Pre-calculate CMI Above/Below State Medium Income will make a difference
3. File Debtors Petition timely – consider homestead issues
4. File complete & accurate Petition Schedules & Plan
5. File a good plan so Trustee doesn't object triggering §1325(b)(1).
6. Consider Chapter 13 – No Means Test and Debtors attorney not required to certify accuracy of Debtors Petition and Schedules

The End