

## **CHAPTER 13 PLAN INFORMATION**

### **General Information**

In the upper right-hand corner of the plan is a box to be checked if the plan is an amended plan. There is also space provided to state what sections are being amended.

It is important to remember that an amended plan voids all prior plans. The most recently filed plan on the Court's docket will control. Some counsel have attempted to make corrections to their plan by filing an amended plan for the corrections, but then deleting or omitting other information from the original plan.

For example, counsel may be amending the plan for a change in interest rate but then have removed the treatment of another secured creditor. There is no such thing as a supplemental plan. When a plan is amended, the prior plans are void; and therefore, counsel need to restate the plan in its entirety.

Some counsel have advised that there may be issues with their software and that is an issue for counsel to explore with their software providers. There should be a way for counsel to save all plans in a case so that when it becomes necessary to make a change, counsel does not have to start over again in drafting the plan.

Pursuant to Akron Administrative Order No. 18-5, counsel are responsible for amending their plan if there is a change in the interest rate between the time of filing and the confirmation date.

Prior to confirmation, counsel are also responsible for amending the plan should counsel enter an agreed order with a creditor or have an order objecting to a claim sustained by the Court. Note: some counsel have added language in orders that the order amends the plan. This language does not relieve counsel of the responsibility to amend their plan so that at the time the plan is confirmed the plan is an accurate account of how parties are to be treated.

### **Part 1: Notices**

Section 1 of the plan includes 3 boxes to state whether an item is included or not included. The 3 items are valuations, avoiding judicial liens and non-standard provisions that counsel believes should be included in the chapter 13 plan.

These boxes inform parties in interest that their claims may be affected by the plan in sections 3.2 (valuations) 3.4 (lien avoidance), and 8 (non-standard provisions).

It is important to note that if counsel are including anything in the above sections in the plan that it is necessary to check the appropriate box(es) in Section 1. If counsel includes language in those sections, it will not be binding on the creditor unless the appropriate box is checked in Section 1.

## **Part 2: Plan Payments and Length of Plan**

**Section 2.1** of the plan provides an area for the plan to state the amount of the regular payments and the number of months for each payment.

Many counsel are arbitrarily putting 60 months in these boxes even if the Debtor is a below median Debtor and may be able to finish the plan in less than 60 months.

It is important to remember that if counsel is asserting that the plan is a 60-month plan (even if it is a below median Debtor) that it will be given the interpretation that the plan has to be 60 months. In stating 60 months in this section, counsel are putting parties in interest on notice for the length of the plan and the approximate dollar amount to be paid into the plan.

The applicable commitment period is temporal and is determined by the means test calculation. See Baud v. Carol, 634 F.3d 327 (6<sup>th</sup> Cir.)(2011).

The only 2 numbers that should be provided in this area are 36 or 60 months.

If the debtor is a below median debtor, the paragraph should only provide payments for 36 months. Please note that there is a footnote under this line item that states: *if fewer than 60 months of payments are specified, additional monthly payments will be made to the extent necessary to make the payments to creditors specified in this plan.* This means that below median Debtors can of course extend the plan to 60 months if necessary. However, if a below median Debtor, for example, can complete their plan in 47 months it would not be necessary to lock them into a 60 month plan right from the start.

For above median Debtors, the applicable commitment period would be 60 months and 60 months' worth of payments should be specified in Section 2.1.

This section corresponds with marking the last box in section 5.1 allowing the plan to be a base plan. See discussion on section 5 below.

A base plan allows the Chapter 13 Trustee to adjust the return to non-priority unsecured creditors after payment of all administrative, secured and priority claims. This helps counsel in reducing post confirmation modifications should secured and priority claims be filed in amounts greater than projected. For a base plan, the Trustee must know the number of months the plan is to run. If for instance, in a below median case, the plan takes 40 months to pay all administrative, secured and priority claims, then unsecured would receive zero as the Debtor would be past their 36 applicable commitment period. Unless counsel stated in section 2.1 the plan will last 60 months, in which case it is assumed the Debtors voluntarily are extending their plan past their required applicable commitment period.

Note: In Cleveland, the practice is for the number of months in 2.1 to be an estimate and not be binding. However, Cleveland also requires that counsel state a dollar amount or percentage to

unsecured in section 5.1 (the first two boxes), so it is clear how much unsecured creditors are to receive.

**Section 2.2** of the plan is where the Debtor(s) states how the plan payments will be made. Please note that Administrative Order 17-3 requires that all employed Debtor(s) make their chapter 13 payment by wage deduction.

The only parties allowed to make their payment other than by wage deduction are those that are retired or have self-employed income. All other exceptions must seek permission of the Court.

**Section 2.3** of the plan the Debtor(s) should check the third box which states that the Debtor(s) will treat income tax returns as follows. The correct language to use is simply

“The Debtor(s) will treat income tax refunds as follows: **Pursuant to the Order Confirming Plan**”.

The Order Confirming Plan in Akron provides that Debtor(s) may retain the first \$1,500 in annual tax refunds in addition to any child or earned income credits.

**Section 2.4** stipulates additional payments. Generally, this section should have the “None” box checked as it would be impossible for the Debtor(s) to know if they were going to get additional payments through the length of the plan.

One possible exception the Debtor(s) could put in this section is the following:

*The Debtor(s) acknowledges that the chapter 13 plan is not feasible with the above funding. However, the Debtor(s) proposes to sell real property located at 123 Main Street with the net proceeds paid into the plan. The Debtor(s) agrees that this property must be sold within 60 months (or a lesser time frame) and failure of the Debtor(s) to sell said property for any reason will result in dismissal of this case. If the Debtor(s) has not sold the property within 60 months from the date their first plan payment is due, the Trustee is authorized to file an order of dismissal.*

**Section 2.5** asks for the total of the estimated payments. Some counsel have completed this section and others have left it blank. It is worth noting that it is useful to complete this section in order to complete the feasibility worksheet at the end of the plan so that counsel will know whether or not their plan is feasible.

**Note:** Counsel may have to manually calculate this section as one of the variables is the number of months stated in section 2.1. So, if in a below median Debtor(s) case, 36 months shows the plan not feasible, counsel will need to manually add additional monthly payments until the worksheet shows that the plan is feasible.

### **Part 3: Treatment of Secured Claims**

**Section 3.1** is for the treatment of secured creditor(s) whose total claim generally will not be paid in full during the Chapter 13 plan. If the Debtor(s) is not current in payments to the creditor, the arrearage must be paid through the plan. If the creditor is the lender on the Debtor(s) residence, the plan must provide for both a curing of the arrearage and for conduit mortgage payments through the plan. If the Debtor(s) is current in their installment payments, they can opt to continue to make the monthly payment to the creditor outside the plan.

It is imperative that counsel check the box under the “current installment payment” column to indicate if the Debtor or Trustee will be processing the payment to the creditor.

Items to be placed in this section include:

1. The Debtor(s) mortgage lender for any arrearages and current installment payment. Please note that it is imperative that counsel state the address of the property which secured the lenders claim under the collateral heading. This allows the Trustee to know which property the Debtor(s) is seeking to bring payments current. Additionally, counsel may want to consider inserting zero for the interest rate on the arrearage. Generally, there is no interest on an arrearage portion of the claim because the interest is already included in the arrearage amount.
2. The Debtor(s) homeowner’s association. Many Debtor(s) are seeking to bring current their homeowners association dues but to also keep current in said payments during the course of the Chapter 13 plan. As with mortgages, it is necessary to state the address for which the homeowner’s association dues are being paid.
3. If the Debtor(s) is seeking to pay property taxes through the Chapter 13 plan, both to bring delinquent property taxes current to the county and to make ongoing property tax payments to the county through the Chapter 13 plan, it is necessary for the Debtor(s) to state the parcel number for which the conduit property tax claim should be paid.
4. Although it may not fit this particular section, the best place to put property taxes which have been sold to third party tax lien certificate buyers should be listed in this section. The parcel numbers should be listed in the collateral box.

Pursuant to Administrative Order 18-5, other than the interest rate on the Debtor(s) residence, section 3.1 of the plan will control as to interest rates. Therefore, if the creditor files a claim for an interest rate lower than stated in the Debtor(s) plan, counsel may wish to consider to amend their plan to the interest rate requested by the creditor. If the interest rate in the plan is higher than that requested by the creditor, the higher interest will be paid.

**Section 3.2** is for when the Debtor(s) is seeking to have the Court value collateral to the fair market value of said collateral which the Debtor(s) is asserting in less than the claim amount held by the creditor.

Please note it is imperative that if counsel are serving an FDIC lender, that the certificate of service for the plan reflect that the Debtor(s) served the FDIC lender by certified mail on an officer or director as required by Bankruptcy Procedural Rule 7004.

Absent an objection by a creditor, the Debtor(s) plan will control as to valuation and interest rate.

Generally, this section is for automobiles which the Debtor(s) has purchased more than 910 days before the petition filing. Furniture, jewelry or other personal property may also be listed under this section.

This section may also be used when stripping a second or other junior mortgage to unsecured status. Please note that pursuant to Bankruptcy Rule 5009, counsel may be required to get an order that directs the county officials to release said lien upon conclusion of the plan. The Chapter 13 form plan provides for the valuation but it provides no direction on how the lien which has been discharged through the bankruptcy process is to be removed by the appropriate county official.

Counsel should also review the creditor's claim prior to confirmation. If the creditor asked for less value than stated in the plan, the creditor will be paid according to the higher amounts listed in the plan unless counsel amends the plan. Pursuant to Administrative Order 18-5, the interest rate in section 3.2 of the plan will control (absent a creditor objection) even if the creditor asked for less interest.

**Section 3.3** of the plan is for collateral which cannot be crammed down such as vehicles purchased within 910 days of the petition filing date or other personal property which the Debtor(s) are not able to cram down the principal owned.

It is possible for counsel to still cram down the interest rate on said collateral even if the principal cannot be crammed down. If the Debtor(s) is seeking to cram down the interest rate and the creditor is a FDIC lender, counsel will need to serve the FDIC lender by certified mail to the attention of officer or director as required by Bankruptcy Procedural Rule 7004.

Pursuant to Administrative Order 18-5, the plan will control as to interest rate. Therefore, if the plan has a higher interest rate than requested in the creditor's claim, the creditor will receive the higher interest rate unless the plan is amended to match the rate of interest requested by the creditor.

**Section 3.4** provides a calculation when a judgement lien impairs the Debtor(s) exemption pursuant to 11 USC § 522(f).

Please note that counsel may still have to return to the Court pursuant to Bankruptcy Rule 5009 to obtain an order removing said lien from the Debtor(s) property so said order can be properly served and filed on the appropriate county official at the conclusion of the chapter 13 plan.

**Section 3.5** is for the surrender of collateral. In this section the Debtor(s) should assert whatever collateral (auto, real estate) that the Debtor(s) is surrendering in the Chapter 13 plan. This section requires the Debtor(s) to state the name of the creditor. Under the collateral section the Debtor(s) should state the type of collateral.

If the Debtor(s) is a co-signer on a loan and the co-signer is seeking to retain the collateral, counsel may wish to put, after listing the collateral, a note that says the loan will be paid outside the plan by the co-signer.

The Debtor(s) should also list this creditor and the related collateral on Petition Schedule F. This will have the affect of once the Debtor(s) earns a discharge, the Debtor(s) would no longer be liable as a co-signer on the loan should the co-signer default in the future. By making the appropriate notations, the lender would be made aware if the co-signer intends to continue to make the necessary installment payments outside of the Chapter 13 plan.

#### **Part 4 Treatment of Fees and Priority Claims**

Generally, Section 4 is self-explanatory but the following tips may be useful:

**Section 4.2** Trustee fees, counsel should consider using ten percent. Ten percent is the maximum administrative percentage fee a Chapter 13 trustee can charge pursuant to 28 USC § 586. Chapter 13 administration fees are seldom at ten percent. However, by calculating the maximum ten percent, the plan can provide a cushion should secured and priority claims come in higher than anticipated. The additional cushion may help keep the plan feasible without the need to amend prior to confirmation.

**Section 4.3** is the balance of attorney fees that counsel is seeking to be paid through the Chapter 13 plan. This amount must match counsel's Disclosure of Compensation.

**Section 4.4** is for priority claims which generally will be the total of child support arrearages and applicable taxes (federal, state and local).

**Section 4.5** is for domestic support obligations which is owned by a governmental entity. This does not mean serviced by the governmental entity but it means owned by the governmental entity. This claim can be discharged if the Debtor(s) does a 60-month plan. However, it is extremely rare for governmental entity to take legal possession of a domestic support obligation claim.

## **Part 5: Treatment of Non-Priority Unsecured Claims**

Under Section 5.1 it is in the best interest of all parties if the Debtor(s) simply checks the third box which states *the funds remaining after disbursements have been made to all other creditors provided for in this plan.*

This essentially makes the plan a base plan and does not lock the plan into a certain percentage. All other claims such as attorney fees, secured creditors and priority creditors would have to be paid before unsecured creditors would receive a return. Once the plan is confirmed, this helps reduce the need for post-confirmation modification as the unsecured percentage can increase or decrease daily based on pre-petition claims and the amount of funding provided by the Debtor(s).

Please note that there is one last box for the few cases in which there is equity. If the Debtor(s) has equity in an automobile of \$3,500 (for example), that should be stated on this line and the \$3,500 becomes the minimum amount that unsecured creditors must receive in the chapter 13 plan pursuant to 11 USC Section 1325(a)(4).

**Section 5.2** is for maintenance of payments and cure of any default on nonpriority unsecured claims

The Debtor(s) will need to state the legal basis on why the Debtor(s) should be allowed to continue maintenance payments on an unsecured claim. Please be advised that simply because a claim is non-dischargeable does not mean that the Debtor(s) can make payments on this claim to the detriment of other unsecured creditors.

**Section 5.3** of the plan would be for a consumer debt if the Debtor(s) was a co-signer with a third party and the Debtor(s) is seeking to pay this unsecured claim.

## **Part 6: Executory Contracts and Unexpired Leases**

**Section 6.1** is for the Debtor(s) to assert leases which the Debtor(s) is assuming which can include automobiles and real property. The leases must also be disclosed on petition schedule G.

## **Part 7: Vesting of Property of the Estate**

Pursuant to the Order Confirming Plan, property will vest in the Debtor(s) upon confirmation.

## **Part 8: Nonstandard Plan Provisions**

Counsel may want to consider the following nonstandard provisions:

- A. Government entities may file post-petition claims pursuant to 11 USC § 1305.

The above language allows taxing authorities to file, if necessary, post-petition tax claims. In the past, the IRS has moved to dismiss cases for nonpayment of post-

petition taxes as it was the position of the IRS that they could not file a claim unless the plan so provided.

Please note that if the Debtor(s) is not paying post-petition taxes which were provided for in the Debtor(s) monthly budget, the Trustee will not oppose to allow the post-petition taxes be added to the plan but the Trustee will seek to raise the Debtor(s) payments as the Debtor(s) should not be permitted to take funds from the unsecured class when a Debtor(s) already retained funds in their monthly budget to pay for these post-petition claims.

- B. Since many of the plan provisions are binding on the parties, if the Debtor(s) has asserted that the Debtor(s) will pay per the claim in any section of the plan, the Debtor(s) may want to consider the following:

The Debtor(s) reserves the right to object to any claim the Debtor(s) believes is inaccurate.

This may help the Debtor(s) preserve the right to object to claims if the Debtor(s) believe the claim is inaccurate or contains inappropriate charges.

- C. If the Debtor(s) is not seeking to value collateral or avoid liens through the plan but wishes to do so by motion, the Debtor(s) should expressly state that the Debtor(s) will seek to value certain collateral or avoid certain liens by motion in paragraph 8 to put the creditor(s) on appropriate notice.