30th Annual Northwest Bankruptcy Institute

Cosponsored by the Oregon State Bar Debtor-Creditor Section and the Washington State Bar Association Creditor Debtor Rights Section

Friday, April 7, 2017, 8:30 a.m.–5:35 p.m. Saturday, April 8, 2017, 9 a.m.–Noon

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Washington: 7.75 Law and Legal credits and 2 Ethics credits or 8.75 Law and Legal credits and 1 Ethics credit
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The Honorable Thomas M. Renn, Ex Officio Member
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Thank you to our reception sponsors

Seattle

Portland and Seattle

Portland
Save the Date!

31st Annual
Northwest Bankruptcy Institute

Friday, April 13, 2018
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Renaissance Seattle Hotel
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   — S. Ward Greene, *Williams Kastner Greene & Markley, Portland, Oregon*

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SCHEDULE

Friday, April 7, 2017

7:30  Registration and Continental Breakfast

8:30  Legal Ethics: Avoiding Missteps in Social Media
Professor Nancy Rapoport, William S. Boyd School of Law, University of Law Vegas, Las Vegas, NV

9:30  Evidence in Bankruptcy Court: You Make the Call
Professor Laurie Levenson, Loyola Law School, Los Angeles, CA
S. Ward Greene, Williams Kastner Greene & Markley, Portland, OR

11:00 Break

11:15 Breakout A: Connections and Conflicts: More Than State Ethics Rules?
Professor Nancy Rapoport, William S. Boyd School of Law, University of Law Vegas, Las Vegas, NV
Jonas Anderson, Office of the U.S. Trustee, Eugene, OR
Jay Kornfeld, Bush Kornfeld LLP, Seattle, WA

Breakout B: Means Testing
Jordan Hantman, Office of the Chapter 13 Trustee, Portland, OR
James Perkins, U.S. Trustee’s Office, Spokane, WA
Kevin O’Rourke, Southwell & O’Rourke PS, Spokane, WA

12:15 Lunch: Understanding Implicit Bias
Professor Erik Girvan, University of Oregon School of Law, Eugene, OR

1:45 Insurance in Bankruptcy: Asset, Liability, or Both?
The Honorable Elizabeth Perris (Ret.), Portland, OR
Albert Kennedy, Tonkon Torp LLP, Portland, OR
Patrick Maxcy, Dentons U.S. LLP, Chicago, IL

3:00 Break

3:15 Breakout C: Oregon and Washington Receivership Law Update
Deborah Crabbe, Foster Pepper PLLC, Seattle, WA
Teresa Pearson, Miller Nash Graham & Dunn LLP, Portland, OR

Breakout D: Big Changes to the Chapter 13 Plan and Rules: To Opt Out Is Not the Only Question
Moderator: The Honorable Fred Corbit, U.S. Bankruptcy Court, Eastern District of Washington, Spokane, WA
The Honorable Brian Lynch, U.S. Bankruptcy Court, Western District of Washington, Tacoma, WA
The Honorable Thomas Renn, U.S. Bankruptcy Court, District of Oregon, Eugene, OR
Andrea Breinholt, Naliko Markel Trustee, Eugene, OR
Michael Malaier, Office of the Chapter 13 Trustee, Tacoma, WA

4:15 Transition Break
4:20  Judges Panel—Practical Guidance from the Bench
Moderator: The Honorable Frank Kurtz, U.S. Bankruptcy Court, Eastern District of Washington, Yakima, WA
The Honorable Trish Brown, U.S. Bankruptcy Court, District of Oregon, Portland, OR
The Honorable Mary Jo Heston, U.S. Bankruptcy Court, Western District of Washington, Seattle, WA
The Honorable David Hercher, U.S. Bankruptcy Court, District of Oregon, Portland, OR

5:35  Adjourn to Hosted Reception

Saturday, April 8, 2017

8:15  Judges Breakfast and Late Registration

9:00  Day Care to Day Trader—Sole Proprietors and Closely Held Companies in Chapter 7 and 13 Cases
John Munding, Attorney at Law, Spokane, WA
Jason Wilson-Aguilar, Office of Chapter 13 Trustee, Seattle, WA

10:30  Break

10:45  U.S. Supreme Court Cases Every Bankruptcy Attorney Should Know
Eric Brunstad, Dechert LLP, Hartford, CT

Noon  Adjourn
FACULTY

Jonas Anderson, Office of the U.S. Trustee, Eugene, OR. Mr. Anderson has served as the Acting Assistant United States Trustee in Eugene since August 2016. He previously was a trial attorney in the Las Vegas office of the United States Trustee and before that clerked for the Honorable Deanell R. Tacha on the U.S. Court of Appeals for the Tenth Circuit. Mr. Anderson holds an LL.M. from Duke Law School.

Andrea Breinholt, Naliko Marke Trustee, Eugene, OR. Ms. Breinholt is a staff attorney for Naliko Markel, the Standing Chapter 13 Trustee in the District of Oregon, Eugene Division. Previously, she represented debtors in Chapter 7 and Chapter 13 bankruptcy. She is a member of Oregon’s Rules and Forms Committee and was one of the drafters of the significantly revised Oregon Chapter 13 Plan form in 2013.

The Honorable Trish Brown, U.S. Bankruptcy Court, District of Oregon, Portland, OR. Judge Brown is Chief Judge of the U.S. Bankruptcy Court for the District of Oregon. Prior to her appointment to the bench, she was in private practice focusing on bankruptcy and corporate reorganizations, loan workouts and foreclosures, real estate transactions, and mediating and arbitrating all aspects of debtor-creditor, real estate, and contract disputes. Judge Brown is a member of the Oregon State Bar Debtor-Creditor Section, chair of the National Conference of Bankruptcy Judges Finance Committee, and a member of the Commercial Law League. She is licensed in Oregon, Washington, and Virginia, and she is certified in business bankruptcies by the American Board of Certification.

Eric Brunstad, Dechert LLP, Hartford, CT. Mr. Brunstad has argued ten cases before the U.S. Supreme Court, including matters involving the First Amendment, bankruptcy, taxation, the Commerce Clause, statutory interpretation, jurisdiction, and arbitration. He has worked on more than 35 other matters in the Supreme Court and has argued and briefed numerous cases in most of the federal courts of appeals. In addition to his practice, he is an adjunct professor of law at NYU School of Law and a frequent visiting lecturer at Yale Law School, where he teaches courses on bankruptcy, secured transactions, commercial law, argument and reason, and federal courts. He has also taught at Harvard Law School. Mr. Brunstad is a member of the Connecticut and Hartford County bar associations, a member of the American Bar Association Business Law Section, and chair of the ABA Business Bankruptcy Committee. He is also a member of the American Bankruptcy Institute and the Judicial Conference Advisory Committee on the Federal Bankruptcy Rules. Mr. Brunstad is a contributing author for the Collier treatise on bankruptcy law. He is widely published, and his scholarly work has been cited or quoted by many courts, including the Supreme Court. He holds an LL.M. and J.S.D. from Yale Law School. Mr. Brunstad is admitted to practice in New York and Connecticut.

The Honorable Fred Corbit, U.S. Bankruptcy Court, Eastern District of Washington, Spokane, WA. Judge Corbit is Chief Judge of the U.S. Bankruptcy Court for the Eastern District of Washington. He was sworn in on September 19, 2013. Immediately prior to taking the bench, Judge Corbit practiced law at the Northwest Justice Project and before that was in private practice in Seattle representing many companies and individuals in connection with issues related to the acquisitions and sales of businesses, creditor/debtor matters, and business litigation. He has also served as an adjunct professor at Seattle University School of Law. Judge Corbit is a frequent lecturer on legal matters, and he has published numerous articles in legal journals.

Deborah Crabbe, Foster Pepper PLLC, Seattle, WA. Ms. Crabbe is a member of the firm’s Real Estate, Creditors’ Rights & Bankruptcy, and Financial Institutions practices. She focuses on representing creditors in all aspects of secured transactions, receiverships, bankruptcies, and workout proceedings. In particular, she has substantial experience representing lenders, leasing companies, trade creditors, trustees, and receivers. She is a Trustee of the American Bankruptcy Institute and a member of its Committee to the Commission Studying Changes to Chapter 11 and its Publications Committee. She is a member of the Washington State Bar Association Creditor Debtor Rights Section, the Oregon State Bar Debtor-Creditor Section, and the King County Bar Association. Ms. Crabbe is a regular author and lecturer on bankruptcy topics.
Professor Erik Girvan, University of Oregon School of Law, Eugene, OR. Professor Girvan is Assistant Professor and CRES Faculty Codirector at the University of Oregon School of Law, where his academic interests include civil litigation, conflict and dispute resolution, criminal law, appropriate dispute resolution, the Oregon Child Advocacy Project, and psychology. His research investigates how stereotypes, attitudes, and other biases might impact decisions in the legal system. He empirically tests practical ways to reduce or eliminate implicit biases by working with a diverse variety of legal and other professionals. Before joining Oregon Law’s faculty, he litigated over 100 complex commercial cases in various federal and state jurisdictions across the country. In addition to his J.D., he holds a Ph.D. in Psychology from the University of Minnesota.

S. Ward Greene, Williams Kastner Greene & Markley, Portland, OR. Mr. Greene has a varied transactional and litigation practice with a focus on commercial law, business reorganization, bankruptcy, collections, employment law, and real estate matters. He has represented a number of creditors’ committees and debtors in successful Chapter 11 cases, as well as corporate and banking clients in general business financing and corporate matters. He is a Fellow of the American College of Bankruptcy and a member of the Multnomah Bar Association, the American Bankruptcy Institute, and the Oregon State Bar Debtor-Creditor Section Newsletter Editorial Board. He is a past member of the Oregon State Bar Board of Governors and past president of the Multnomah Bar Association. He has presented at the biannual Oregon-Washington Uniform Commercial Code seminar, the Northwest Bankruptcy Institute, and numerous Multnomah Bar Association and Oregon State Bar seminars on the Uniform Commercial Code, collection law, bankruptcy, real estate financing, and lien law. Mr. Green is the 2015 recipient of the Oregon State Bar President’s Award for Sustainability.

Jordan Hantman, Office of the Chapter 13 Trustee, Portland, OR. Mr. Hantman is the Managing Attorney for Wayne Godare, Standing Chapter 13 Trustee for the District of Oregon in Portland. Prior to joining the trustee’s office, he represented both debtors and creditors in consumer bankruptcy cases in Oregon. He is an active member of the Oregon State Bar Debtor-Creditor Section Executive Committee and chairs the section’s Donation Requests Committee. He has frequently presented on Chapter 13 bankruptcy topics for the Oregon State Bar.

The Honorable David Hercher, U.S. Bankruptcy Court, District of Oregon, Portland, OR. Judge Hercher was appointed to the bench in January 2017 to fill the vacancy resulting from the retirement of Judge Randall L. Dunn. He previously was in private practice in Portland. He serves on the Oregon Law Commission Receivership Work Group and the Oregon State Bar Disciplinary Board and is past chair of the Oregon State Bar Debtor-Creditor Section Local Bankruptcy Rules Committee and Legislative Committee, and the Multnomah County Local Professional Responsibility Review Committee. Judge Hercher has been a volunteer speaker at high schools as part of the Credit Abuse Resistance Education (CARE) program, which educates high school students about the responsible use of credit. He is board certified in business bankruptcy law by the American Board of Certification.

The Honorable Mary Jo Heston, U.S. Bankruptcy Court, Western District of Washington, Seattle, WA. Prior to taking the bench, Judge Heston was in private practice focusing on both commercial litigation and transactional matters with an emphasis on business workouts and bankruptcy reorganizations and the acquisition of troubled businesses, and before that she served a five-year term as the United States Trustee for Region 18. She is a Fellow of the American College of Bankruptcy, a member of the Turnaround Management Association NW Chapter board, and judicial liaison for CENTS, the local pro bono bankruptcy organization. She has served on the boards of the American College of Bankruptcy Foundation, the American Bankruptcy Law Journal, the St. John’s/ABI Law Review, the American Bankruptcy Institute, INSOL International, and the Washington State Bar Association Debtor-Creditor Section. She has taught as an adjunct professor of bankruptcy and reorganization law at both Seattle University School of Law and the University of Washington Law School. Judge Heston is a frequent regional and national speaker and author on bankruptcy-related topics, including international insolvency issues. She is the 2003 recipient of the WSBA Debtor-Creditor Section Sydney C. Volinn Memorial Award of Merit.
Albert Kennedy, Tonkon Torp LLP, Portland, OR. Mr. Kennedy’s practice focuses on complex corporate reorganizations and restructuring. He has expertise in all areas of commercial, bankruptcy, and creditors’ rights law. He has represented creditors (including a variety of financial institutions) and debtors in bankruptcy proceedings, commercial litigation, and real estate foreclosures in both federal and state courts. He also has extensive experience in the negotiation and documentation of out-of-court workouts and commercial loan transactions. In recent years, Mr. Kennedy has been lead debtor or committee counsel attorney in some of the most significant commercial and business bankruptcy cases filed in Oregon and southwest Washington. He is a member of the Turnaround Management Association and the Multnomah Bar Association. Mr. Kennedy is a frequent speaker on bankruptcy and the author of numerous articles on bankruptcy-related topics. He is admitted to practice in Oregon and Washington.

Jay Kornfeld, Bush Kornfeld LLP, Seattle, WA. Mr. Kornfeld represents companies in commercial creditor and debtor matters, emphasizing out-of-court workouts, restructurings, and Chapter 11 reorganizations. Over the years, he has represented clients in diverse industries, including retail, agricultural, grocery, manufacturing, high-tech, telecom, wood products, biotech, commercial and residential real estate, and commercial fishing. He is a Fellow of the American College of Bankruptcy and a trustee of the King County Bar Association. He is a member and past chair of the King County Bar Association Creditor-Debtor Section and a member of the Federal Bar Association Creditor-Debtor Section, the American Bankruptcy Institute, and the Turnaround Management Association. Mr. Kornfeld is a regular presenter on his topics of expertise.

The Honorable Frank Kurtz, U.S. Bankruptcy Court, Eastern District of Washington, Yakima, WA. Judge Kurtz was appointed to the U. S. Bankruptcy Court for the Eastern District of Washington in 2005 and the Ninth Circuit Bankruptcy Appellant Panel in 2013. Previously, he was a judge on the Washington State Court of Appeals, and before that he was in private practice in the area of bankruptcy law. Judge Kurtz is past chair of the Washington State Bar Association Creditor-Debtor Rights Section, and he was a founding director and first cochair of the Eastern District of Washington Bankruptcy Bar Association. During his tenure as a Washington state court judge, Judge Kurtz was a member of the Court of Appeals Executive Committee and the Board for Judicial Administration and chaired the Washington State Judges Ethics Advisory Committee.

Professor Laurie Levenson, Loyola Law School, Los Angeles, CA. Professor Levenson is the David W. Burcham Chair in Ethical Advocacy at Loyola Law School. She teaches evidence, ethics, criminal law, criminal procedure, white-collar crime, and trial advocacy. She is founder of Loyola’s Project for the Innocent. She previously served as an Assistant United States Attorney and clerked for the Honorable James Hunter III of the U.S. Court of Appeals for the Third Circuit. Judge Levenson has authored numerous books and articles on criminal law and ethics. She is a regular lecturer for the Federal Judicial Center and has served as a commentator for high-profile trials.

The Honorable Brian Lynch, U.S. Bankruptcy Court, Western District of Washington, Tacoma, WA. Judge Lynch is was appointed Chief Bankruptcy Judge for Western Washington in October 2014, and was sworn in as a bankruptcy judge for the Tacoma Division of the court in June 2010. Prior to his service as bankruptcy judge, he was the Chapter 13 trustee for the Portland Division of the District of Oregon bankruptcy court, and before that he practiced in the areas of bankruptcy law and creditors’ rights.

Michael Malaier, Office of the Chapter 13 Trustee, Tacoma, WA. Mr. Malaier is the Chapter 13 Standing Trustee for the Western District of Washington–Tacoma/Vancouver. He oversees 18 employees, conducts 341 meetings, reviews cases prior to and following confirmation, drafts motions and memoranda concerning all issues relevant to Chapter 13, and appears in court regularly. Prior to entering the field of bankruptcy law, Mr. Malaier maintained a criminal defense practice representing both privately retained and publicly assigned clients. He has a keen interest in maintaining Chapter 13 as a viable and robust program for assisting debtors in getting back on their feet.
Patrick Maxcy, Dentons U.S. LLP, Chicago, IL. Mr. Maxcy is a partner in the firm’s Restructuring, Insolvency and Bankruptcy practice. He has represented significant stakeholders in Chapter 11 cases, out-of-court restructurings, and cross-border insolvency proceedings. He has substantial experience representing insurers and other interested parties in mass tort bankruptcy cases, including Chapter 11 bankruptcy cases arising from alleged asbestos exposure, sexual abuse claims against religious organizations, and rail transport of hazardous cargo. Mr. Maxcy’s cross-border insolvency experience also includes enforcement of insurance rights in foreign and domestic jurisdictions.

John Munding, Attorney at Law, Spokane, WA. Mr. Munding’s practice primarily focuses on debtor representation, including matters such as complex civil litigation, Chapter 11 bankruptcies, Chapter 7 bankruptcies, nonbankruptcy workouts, and related appellate practice for national and local clients ranging from individuals to multi-national corporations. He also has considerable experience as a Chapter 7 trustee, Chapter 11 trustee, independent fiduciary, and state court receiver. Mr. Munding actively practices law in California, Idaho, and Washington.

Michael O’Brien, Michael D. O’Brien & Associates PC, Portland, OR. Mr. O’Brien’s practice focuses on insolvency relief for individual and small business owners through litigation defense, negotiated workouts, homeowner defense of foreclosure proceedings, and bankruptcy. His bankruptcy practice ranges from simple Chapter 7 cases through complex Chapter 13 and Chapter 11 repayment and reorganization proceedings. In 2007, Mr. O’Brien received his Board Certification as a Consumer Bankruptcy Specialist by the American Board of Certification.

Kevin O’Rourke, Southwell & O’Rourke PS, Spokane, WA. Mr. O’Rourke’s practice focuses on bankruptcy and reorganizations in Washington and Idaho. He serves on the U.S. Bankruptcy Court for the Eastern District of Washington Mediation Panel and serves by appointment on the Advisory Rules Committee. Mr. O’Rourke is a member of the Washington State Bar Association Creditor-Debtor Rights Section Executive Committee and past president of both the Bankruptcy Bar Association and the Federal Bar Association for the Eastern District of Washington. He teaches as an Adjunct Bankruptcy Law Professor at Gonzaga University School of Law and is a Chapter 7 Panel Trustee for the Eastern District of Washington.

Teresa Pearson, Miller Nash Graham & Dunn LLP, Portland, OR. Ms. Pearson’s practice focuses primarily on creditors’ rights, insolvency, and reorganization. She represents lenders, trade creditors, creditor committees, trustees, receivers, debtors, and other clients in all forums where debtor-creditor issues appear—out of court, bankruptcy court, state and federal trial court, and appellate court. In 2006, Ms. Pearson received national board certification in business bankruptcy law from the American Board of Certification. She is admitted to practice in Oregon and Washington and before the U.S. Supreme Court.

James Perkins, U.S. Trustee’s Office, Spokane, WA. Mr. Perkins is a trial attorney for the United States Trustee Program, the component of the U.S. Department of Justice responsible for overseeing the administration of bankruptcy cases and private bankruptcy trustees. Previously, he served as in-house counsel for a multinational technology firm in the Spokane area and was in private practice as a commercial litigator in Spokane.

The Honorable Elizabeth Perris (Ret.), Portland, OR. Judge Perris was an active United States Bankruptcy Judge for the District of Oregon for over 30 years until her retirement in January 2015. She is a Fellow of the American College of Bankruptcy. She has been an Adjunct Professor at Lewis & Clark College of Law and Willamette University School of Law, has served as a member of the Bankruptcy Appellate Panel for the Ninth Circuit, and has chaired the Bankruptcy Judges’ Education Committee. She was a member of the United States Judicial Conference Advisory Committee on Bankruptcy Rules and served as chair of its Forms Subcommittee and Forms Modernization Project, which oversaw modernizing national bankruptcy forms. Judge Perris was on the board of the Federal Judicial Center and helped educate new bankruptcy judges throughout the country. As a judge, she served as a judicial mediator in many bankruptcy matters, including the Chapter 9 cases filed by multiple cities, Detroit, Stockton, Mammoth Lakes, and Vallejo.
Professor Nancy Rapoport, *William S. Boyd School of Law, University of Law Vegas, Las Vegas, NV.* Professor Rapoport is Special Counsel to the President of the University of Nevada, Las Vegas, the Garman Turner Gordon Professor of Law at the William S. Boyd School of Law at UNLV, and an Affiliate Professor of Business Law and Ethics in the Lee Business School at UNLV. She has also taught and served as Associate Dean for Student Affairs at The Ohio State University College of Law, and subsequently she was Dean and Professor of Law at the University of Nebraska College of Law and then the University of Houston Law Center. Prior to her academic career, she was in private practice in San Francisco, focusing primarily on bankruptcy law, and she clerked for the Honorable Joseph T. Sneed III of the United States Court of Appeals for the Ninth Circuit.

The Honorable Thomas Renn, *U.S. Bankruptcy Court, District of Oregon, Eugene, OR.* Judge Renn was appointed to the bankruptcy bench in October 2011. Prior to that, he served as a Chapter 7 Panel Trustee for the District of Oregon. In addition to his regular duties, Judge Renn is a member of the Ninth Circuit Judicial Conference Executive Committee and the Ninth Circuit Bankruptcy Judges Education Committee. Judge Renn is past chair of the Oregon State Bar Debtor-Creditor Section. A frequent speaker and writer on bankruptcy law issues, Judge Renn has been an adjunct professor teaching bankruptcy law at both the University of Oregon and Lewis and Clark Law School.

Jason Wilson-Aguilar, *Office of Chapter 13 Trustee, Seattle, WA.* Mr. Wilson-Aguilar is a Senior Staff Attorney and Legal Department Manager for the Office of the Chapter 13 Trustee, where he leads and manages the trustee’s legal team, provides legal advice to the trustee on all issues related to the trustee’s statutory responsibilities, represents the trustee in bankruptcy cases, litigation, and appeals, provides legal advice and support to other departments of the Trustee’s Office, including the Auditing Department, Claims Department, and Case Management Department, and initiates and assists with document and system improvements. He has experience in real estate/mortgage loan originations/finance, default servicing, compliance, and bankruptcy with private firms, a financial institution, and a government-regulated entity. He has been actively involved in committees on the implementation of legal rules and forms with the United States Bankruptcy Court of the Western District of Washington. Mr. Wilson-Aguilar is a frequent speaker on mortgage lending/servicing and bankruptcy topics.
Chapter 1

Avoiding Social Media Missteps—Presentation Slides

Professor Nancy Rapoport
William S. Boyd School of Law
University of Law Vegas
Las Vegas, Nevada
Avoiding Social Media Missteps

Nancy B. Rapoport
Special Counsel to the President, UNLV
Garman Turner Gordon Professor of Law, William S. Boyd School of Law
Affiliate Professor of Business Law & Ethics, Lee Business School
http://www.law.unlv.edu/faculty_nancyRapoport.html
http://nancyrapoport.blogspot.com/

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From Pong to modern social media
Feel free to tweet during this session

• @NancyRapoport #whatisatweet
• @NancyRapoport #whyamihere
• @NancyRapoport Where are your movies?!?!!

Old media vs. new

• Can send copies to a few people with a little bit of effort.
• Friends of friends might have some difficulty accessing your personal info.

• Can send copies all over the world with just a few clicks.
• You’d be amazed at what friends of friends might be able to see.
The Internet IS that “permanent record” you heard about as a child:

*Brave New World Meets Stodgy Old World.*

Social network issues
Stupid social media tricks.

- Asking for a continuance to attend a funeral, then posting pictures of your week’s vacation on Facebook.
- Applying for admission to a state bar and posting pictures of your excessive drinking (or having friends tag you in their pictures).
- Tweeting about your client, your strategy, or the other side. (Ever heard of re-tweeting?)

Social media policies

- Decide:
  - Who’s covered? Professionals? All employees?
  - What’s covered? Just your business-y stuff? Any personal social media uses?
  - How to handle “endorsements.”
Blogging

Pros
• It’s actually pretty easy.
• Great way to get your name out.
• It’s pretty cheap, too.

Cons
• Some states consider blogging to be “advertising.”
• Dormant ones don’t do you much good.
• Be careful about who, if anyone, gets to “comment.”
• Anonymous commenters are often really, really annoying.
• Don’t forget to check your insurance.
“Friending”

- You can’t lie.
- You need to be clear about who you are when you send out a “friend” request.
The Good Wife (Season 3, Episode 11—What Went Wrong) (CBS 2011)

[SNIP]

The next slide proves that I’m an ethics geek.
The Office (Season 5) (NBC/Universal Home Entertainment 2008)

[SNIP]

Ethics rules that might apply.

- Potential clients: MRPC 1.18.
- Case law on how an attorney-client relationship is formed (“reasonable belief that relationship is formed”).
- Confidentiality: MRPC 1.6.
- Advertising: MRPC 7.1, 7.2, 7.4.
- UPL: MRPC 5.5.
- Dissing judges: MRPC 8.2.
Disclaimers to prevent creation of attorney-client relationship.

• Use simple language.
• Don’t make people scroll through tiny screens to read tiny disclaimer language written in legalese.

Legal Zoom’s home page:
Creation of the attorney-client relationship.

- It all boils down to whether the person formed a reasonable belief that you were her lawyer.
Confidentiality.

• Don’t post things about clients, and don’t let them post things about their cases.
  – No posting on Facebook.
  – No posting on Twitter.
  – No discussing your cases on your blogs.
• It’s not a great idea to use Twitter and Facebook for your client contacts.

Clients have been known to tweet questions:

Lana Mcclory
Yesterday at 7:47am · 📱
I have not had much success with this
What happens if you can’t get blood pressure meds after being diagnosed and denied disability?

Find a Lawyer - LegalMatch
WWW.LEGALMATCH.COM
Groupon

• Is the marketing organization sending out the coupon taking only a reasonable percentage for the advertising?
• Does the coupon contain any potentially misleading information?
• Does the purchaser of the coupon know where he stands (not quite a prospective client)?
• Is the lawyer competent in that area of law?
• Have there been so many coupons sold that there’s a diligence problem in handling all of the cases?

Unauthorized practice of law.

• It’s important to pay attention to whether you’re providing legal advice w/o affiliating with someone who’s admitted in that jurisdiction.
So if we know all of these things….

• Why do we still do stupid stuff?

My theory: sometimes it’s the person, and sometimes it’s the situation.

• Smart people do dumb things because of certain hard-wired cognitive errors.
• Mix of psychological and sociological errors.
  – Cognitive dissonance error.
  – Diffusion of responsibility error.
  – Social pressure error.
  – Anchoring error.
• You combine these four and you get “the person and the situation” examples.
Cognitive dissonance.

“I am a good person.”

“I am doing a bad thing.”

“There’s a good reason I’m doing this.”

My new favorite cognitive dissonance clip:

[SNIP]

From Concussion (Columbia Pictures 2015).
When it comes to cognitive dissonance, there are no lobsters, only frogs.

Other personal and group cognitive errors:

• Diffusion of responsibility (also called the “bystander effect”).
  – “Someone else will do it.”

From *Enron: The Smartest Guys in the Room* (Magnolia Home Pictures 2005).
Easy way to remember diffusion of responsibility:

THE NAIL THAT STICKS UP GETS HAMMERED DOWN.

Japanese Proverb

Anchoring in action:

• Focusing on one factor = anchoring error.

[SNIP]

https://www.youtube.com/watch?v=5odWkym0RMw.
Social pressure and changes in a group’s norms:

- Solomon Asch.
- The two most likely cognitive errors affecting most organizations?
  - Social pressure and diffusion of responsibility.

How cognitive errors can affect your behavior.

- Talking yourself into believing that something you did was OK, even when it wasn’t OK.
- Assuming that, if you discover a problem, everyone else knows it, too, so you don’t have to act on your discovery.
- Letting “everyone else does it” determine whether you do it, too.
- Focusing on one factor and ignoring all others.
Final words:

• It’s nice to be connected via social networks.
• Just be aware.
• For more:
Chapter 2

2017 Evidence Update

Professor Laurie Levenson
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Patty Pepper ("Debtor") started a business five years ago to import exotic spices from Asia. Initially, the business did well and her friends were interested in being investors. In particular, Sam Salt ("Creditor") alleges that he gave Pepper $100,000 as an "investment" in Debtor’s Business, "Put Spice in Your Life" (PSYL) Ventures, a closely-held corporation. Pepper was the president and primary stockholder of PSYL. Salt claims he met Pepper while looking at the shark tank at the local aquarium and they struck up a conversation. After several conversations, they drafted up a written contract that states that in exchange for $100,000, PSYL promised Salt 23% return on his investment, with payments beginning eight months after closing. Pepper ended up filing a chapter 7 petition just a few days before her first payment was due to Salt. She claims that PSYL ran into trouble when the spice market unexpectedly crashed. Salt alleges that Pepper used the money to redo her kitchen and take a six week trip through Asia.

Salt has filed an adversary complaint as an unsecured creditor, objecting to the dischargability of the debt pursuant to sections 523(a)(2)(A); 523(a)(2)(B) and 523(a)(4), and is objecting to Debtor’s discharge pursuant to sections 727(a)(4) and 727(a)(5). Salt claims that Pepper conspired with her friend, Rose Mary Dill, former treasurer of PSYL, to take investors money and never intended to invest them in the company. You are presiding over the adversary trial.

The trustee has not yet taken any action against Pepper.
QUESTION #1

[Expert Witness]

As his first witness, Creditor calls Dr. Laurie Flevinson, a professor at a local community college who moonlights as an accounting expert. Flevinson is a licensed CPA, but prefers to teach basic accounting at the college. She, herself, has tried her hand at several import/export business but, like Pepper, had little success. In an interview to the local newspaper, she was quoted as saying, “It is hard these days to be a successful entrepreneur if you are honest. Many more businesses fail than succeed. In my experience, precious little of the investors’ funds end up where they are supposed to be.”

To prepare for her expert testimony, Flevinson has reviewed all of PSYL’s corporate records, including its by-laws and articles of incorporation. She has also reviewed the corporate laws of the state in which PSYL was incorporated, as well as its offering memoranda to prospective lenders. Finally, she has reviewed the loan documents executed by Debtor with each lender and the deposition transcript and Section 341 meeting tape.

Flevinson has issued a brief report that contains her expert opinions. According to that report, Plaintiff expects Flevinson to testify to the following:

1. PSYL’s business had all of the indicia of a fraudulent endeavor. Two insiders ran the business, neither had invested more than a token amount of their own funds, their predictions as to expected sales were 200% higher than others in the spice business, and a promise of a 23% return was a laughable estimate.

2. Pepper breached her fiduciary duty to the company by spending so much money on her Asia trip and that no funds should have been used on her kitchen even if the company used her kitchen to test the new spices they obtained.

3. Based upon a damage theory she developed when earning her Ph.D., Flevinson projected the likely profits of PSYL over ten years.

**Responder Questions**

1. Should Flevinson be allowed to testify as an expert?

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2. If allowed to testify as an expert, should the court allow Flevinson to testify that PSYL had all of the indicia of a fraudulent endeavor?

   1 = Yes
   2 = No

3. Should the court allow Flevinson to testify to the projected profits of PSYL?

   1 = Yes
   2 = No

4. Is a written copy of Flevinson’s expert report admissible?

   1 = Yes
   2 = No

5. Are the business documents referred to in PSYL’s files also admissible?

   1 = Yes
   2 = No

6. Is the newspaper article with Flevinson’s quote admissible?

   1 = Yes
   2 = No

Legal Authorities

Fed. R. Evid. 701 [Lay Testimony]
Fed. R. Evid. 702 [Expert Testimony]
Fed. R. Evid. 704 [Opinion on Ultimate Issue]
Fed. R. Evid. 802 [Inadmissible Hearsay]
Fed. R. Evid. 803(6) [Business records]
Marx & Co., Inc. v. Diner’s Club Inc., 550 F.2d 505 511 (2d Cir. 1977) (cautioning against experts making legal conclusions).
QUESTION #2
[Authentication]

During the hearing, Creditor (Salt) offers a copy of an email, Exhibit E:

It reads as follows:

To:  Sam.salt@aol.com  
From: Peter.Paprika@yahoo.com  

June 3, 2015  6:45 a.m.

Dear Sam: Sorry to hear your investment went bust. I am forwarding you an email that Pat recently sent to me. Not sure if it will help you get your money back, but I thought you would want to know about it.

Peter

To:  Peter.Paprika@yahoo.com  
From: Pat.Pepper@PSYL.org  

April 8, 2015  8:12 p.m.

I wished I had taken my lawyer’s advice and never started this company. Thankfully, we had the good sense to put some of the money aside in another account so that we have something to eat if this all goes bust.

Pat

-------------------------------------------------------------------------

Responder Question

1. Should the email be admitted?

1 = Yes
2 = No
Legal Authorities

Fed. R. Evid. 901(a), (b)(1),(4) [Authenticity of emails]
Fed. R. Evid. 902 (7&11) [Authenticity of emails]
QUESTION #3

[Dill’s Dilemma]

Creditor has not been able to locate Ms. Rose Mary Dill. However, Creditor offers a phone message left on his voice mail from a person he believes to be Dill’s daughter. The female voice states, “You’ve really blown things out of context. You’ve got so much money. A hundred grand is a drop in the bucket for you. My mom may have been greedy, but she will never be as greedy as you. Moreover, she just did what I told her to do. We are off to Phuket. Good luck trying to find us here.”

Responder Question

1. Should the court admit the voice mail?

1 = Yes
2 = No

Legal Authorities

Fed. R. Evid. 801 [Hearsay]
Fed. R. Evid. 804(a), (b)(3) [Hearsay; Unavailable Declarant; Statement Against Interest]
Fed. R. Evid. 901(a), (b)(5) [Authentication]
QUESTION #4

[Court Records]

Creditor also asks the court to admit the docket sheets from two fraud lawsuits pending against Pepper in local Superior Court cases. The docket sheets are on the web site for the Superior Court. Anyone can go to the court web site to look at them. Debtor objects.

Responder Question

1. Should the court take judicial notice of the docketed fraud suits?

1 = Yes
2 = No

Legal Authorities

Fed. R. Evid. 201  [Judicial Notice]
Fed. R. Evid. 404(b) [Other Crimes, Wrongs, or Acts]
QUESTION #5

[Summaries]

Debtor, Patty Pepper, will be called to testify in her own defense. She plans to testify as to the details of her business plan when she began PSYL. She has a huge box filled with documents and notes regarding spice inventory and sales by ten global competitors. These documents include corporate earnings reports filed by competitors, invoices from her first two months of sales and published reports on the global spice market. She claims to have read through the information and compiled a chart that shows why she expected an annual 23% rate of return when she began the business. She prepared the chart just for the hearing. Although Creditor has been given a copy of all of the underlying documents in one form another, he objects to the chart.

Responder Question

1. Should the court admit the chart?

   1  =  Yes
   2  =  No

Legal Authorities

Fed. R. Evid. 1006  [Summaries]
HYPOTHETICAL “B”

“LIEN STRIPPING AND MORE”

Mindy and Marty McMansion bought their lovely home in 2003, during the real estate boom. Mindy was a real estate broker for well-to-do clients. Marty was manager of a hedge fund. The couple had a significant income, life was good, and the home they were able to buy would be considered a luxury home for their area of the country. The purchase price for the home was $325,000, and they put down a down payment of 5%—$17,000. The Ninth Sixth Bank financed the purchase, and issued both the note (for $308,000 at an interest rate of 6.5% on a fixed-rate, 30-year mortgage) and the mortgage.

Between 2003 and 2008, Mindy and Marty lived the lifestyle their income afforded them—nice cars, private schools for their kids (Mitch, Maureen, and Murphy), toys (the house is on a lake, and they bought Jet Skis, boats, a hot tub, etc.), several lovely vacations (the Maldives, anyone?). They'd also taken out a second mortgage on the house in 2006, so that they could improve the kitchen (Viking stove, heated floor, overhead range on the island that seated five, etc.) and build a pier/boathouse/outdoor living room outside. Wills Furgo Bank issued the second mortgage--the loan was for $85,000, at an interest rate of 6.7%. About five minutes after Wills Furgo issued the note and mortgage, it did what any self-respecting mortgage lender in the early years of the 21st Century would do, and it sold off the note and mortgage. In the subsequent six years, the note was sold some five times, each time to a pooled trust of some kind or another.

In late 2008 and early 2009, the bottom fell out. Mindy's business dried up in the mortgage crisis. The hedge fund died in the midst of the Bear Sterns/Goldman Sachs/Lehman Brothers catastrophes. The couple tried to hold out, unloading stocks, selling off jewelry and some of the other assets, borrowing, cutting down on discretionary spending. Both found other jobs, but neither could find employment paying anywhere near what they'd earned at the time they purchased the house. Eventually, in 2013, the couple was forced to file for Chapter 13 bankruptcy.

In the Chapter 13, the McMansions have filed an adversary proceeding, seeking to strip the second mortgage. The current holder (maybe) of the first mortgage filed a proof of claim, alleging that it was owed $250,000. The current holder (maybe) of the second mortgage, ABC LTV as Trustee for XYZ Trust #5000-100 ("ABC"), filed a proof of claim alleging a debt of $103,000. In their adversary complaint, the debtors make two arguments. First, they argue that the house is worth only $200,000. Second, they argue that they have no idea who "ABC LTV as Trustee for XYZ Trust #5000-100" is, and that that entity has no standing to file a proof of claim in the Chapter 13.

ABC files an answer to the complaint. It responds that it does have standing to file a proof of claim (and to defend against the suit). It claims that it has the note issued by Wills Furgo, and that it has an endorsement (in blank). Thus, it claims that it is both the holder of the note itself, and that the endorsement also gives it standing. Second, it...
argues that the debtors' have deliberately undervalued the home, that it has retained a good deal of its value, and that the real value is closer to $300,000, securing at least a portion of their claim.

--------------------------------------------------------------------------------------------------

QUESTION #1

If ABC offers a copy of the note does its admission violate the Best Evidence Rule?

1 = Yes
2 = No

Legal Authorities
Fed. R. Evid. 1002 [Requirement of Original]
Fed. R. Evid. 1003 [Admissibility of Duplicates]

--------------------------------------------------------------------------------------------------

QUESTION # 2

Is the proffered note admissible without any further authentication?

1 = Yes
2 = No

Legal Authorities
Fed. R. Evid. 901 [Authentication]
Fed. R. Evid. 902 [Self-Authentication]

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QUESTION #3

If a bank employee with no knowledge of the transactions identifies the records as business records, is there sufficient grounds to admit the records?

1 = Yes
2 = No

Legal Authorities
Fed. R. Evid. 803(6) [Business Records]
QUESTION #4

If the bank and debtor show up with different copies of what they claim to be the note, would you admit:

1 = Both
2 = Only one
3 = None

Legal Authorities

Fed. R. Evid. 901 [Authentication]

QUESTION #5

Given that the note is a statement prepared outside of court, is it hearsay?

1 = Inadmissible hearsay
2 = Admissible as a verbal statement
3 = Fed. R. Evid. 803(6) [Business Records]
4 = Fed. R. Evid. 803(14) [Property Records]

Legal Authorities

Fed. R. Evid. 803(6) [Business Records]
Fed. R. Evid. 803(14) [Property Records]
QUESTION #6

[“So you want to know the value …”]

The parties continue to debate the value of the house. They offer a variety of evidence to support their valuations, including: (1) A broker’s opinion as to the value of the house; (2) An appraisal in the bank’s files; (3) An offer in a letter from a neighbor that states, “I know you’re in trouble. Always loved your house. Would you sell it for $200,000?;” (4) the expert testimony of the pooled trust’s lender as to the value of the house; (5) the debtor’s opinion that they’ve investigated what they have seen their neighbors’ houses selling for and that they believe that the value of the house is only $200,000; (6) the County Assessor’s appraisal of the value of the house; and (7) a Zillow report of the “Zestimate” value of the house.

Responder Questions

5A. Should the court allow a broker to testify as to her opinion of the value of the house?

1 = Yes
2 = No

5B. Should the court admit the bank’s appraisal as a business record to prove value if the house assuming that it was established to be part of the bank’s loan files?

1 = Yes
2 = No

5C. Should the court admit the letter offer from the neighbor admissible?

1 = Yes
2 = No

5D. Should the court allow the pooled trust’s lender to give an expert opinion as to the value of the house based upon his twenty years of work as a lender and his evaluation of the files in this case?

1 = Yes
2 = No
5E. Should the court allow the debtor to give lay opinion as to the value of the house?

1 = Yes
2 = No

5F. Should the court admit the County’s real estate tax appraiser’s report?

1 = Yes
2 = No

5G. Should the court admit the Zillow.com report of the value of the house?

Legal Authorities

Fed. R. Evid. 801 [Hearsay]
Fed. R. Evid. 803(6) [Business Records]
Fed. R. Evid. 803(8) [Public Records]
Fed. R. Evid. 701 [Lay Opinion]
Fed. R. Evid. 702 [Expert Opinion]

In re Missouri Flats Associates, 86 B.R. 634 (Bankr. E.D. Cal. 1988) (Appraisals are inadmissible if not verified by declarations under penalty of perjury)
Advisory Note to FRE 701 (lay testimony of owners as to value)
QUESTION #7

[Judicial Notice]

The parties ask the court to take judicial notice of: (1) the value for the home that the debtor put in his schedules, and (2) a CNN report about the decline of home values in the debtor’s neighborhood.

Responder Question

Should the court take judicial notice of?

1 = Both (1) and (2)
2 = Only the value in the schedule
3 = Only the CNN report
4 = Neither (1) or (2)

Legal Authorities

Fed. R. Evid. 201 [Judicial Notice]
HYPOTHETICAL “C”

[WFBT v. “Digger” McMillan]

Debtor Doug “Digger” McMillan filed for Chapter 13 relief in January 2015. He lists among his assets a 2012 GMC Sierra 2500HD, with four-wheel drive and the work truck package (a ¾ ton pickup truck). On the schedules, Digger values the truck at $19,500. Lender “We Finance Big Trucks!” (WFBT) has filed a proof of claim, indicating that Digger owes $30,104.73. When Digger files his Chapter 13 plan, he proposes to pay WFBT through the plan, and proposes to pay a total of $19,000 at the Till rate of interest. WFBT objects to confirmation, indicating that the value of the truck should be closer to $30,000. The lender cites the NADA clean retail value of $30,275. The parties ask the court to schedule a hearing on the value of the vehicle.

At the hearing Digger testifies as follows:

**Debtor Counsel:** What do you do Mr. McMillan?

**Digger:** I own my own excavation company.

**Debtor Counsel:** Do you own a 2012 GMC Sierra 2500 pick-up truck?

**Digger:** Yes, but it is in terrible condition. I use the truck all the time for my business. I need it because it has four-wheel drive. It has really been through the war. I have used it every day for almost three years.

**Debtor Counsel:** Could you describe the condition of the truck?

**Digger:** Pretty beat up. One of my young guys, Mikey, is not that bright. He backed the truck into a ditch and really busted up the rear suspension.

**Debtor Counsel:** Anything else?

**Digger:** Well, you wouldn’t want to sit in it. There are chewing tobacco stains on the seats and a huge scrape along the side. Mikey’s friend, Billy, put a gash in it when he was using the bulldozer. The kid really has to learn to use that thing better.

**Debtor Counsel:** Anything else?

**Digger:** Well, there is this weird “unh-unh-unh” noise the truck makes when it goes into reverse. It makes the same weird noise when I try to drive more than 15 miles per hour.
Debtor Counsel: Do you know what your truck is worth now?

Creditor: I object!!

QUESTION #1

Should the court sustain or overrule the objection?

1 = Sustain
2 = Overrule

Legal Authorities

Fed. R. Evid. 701 [Lay Opinion].
Advisory Note to FRE 701 (lay testimony of owners as to value)

Debtor Counsel: Digger, have you ever tried to find out how much your truck is worth now?

Digger: Well, my friend showed me the latest “Kelly Blue Book” values. I think they are kind of bogus when they come to my truck because it is so banged up. Even so, they definitely show my truck isn’t worth more than $20 grand max.

Debtor Counsel: Your honor, we offer Exhibit A: A copy of the Kelly Blue Book listing.

Creditor: We object!! Moreover, if they get their listing, we want to introduce the NADA values.

QUESTION #2

Should the court sustain or overrule the objection?

1 = Sustain
2 = Overrule

Legal Authorities

Fed. R. Evid. 801: [Hearsay]
Fed. R. Evid. 803(17): [Market reports, commercial publications]
Court: Anything further, counsel?

Debtor Counsel: Judge, we would like you to take judicial notice of how much it would cost Digger to buy a new 4-wheel-drive heavy work truck.

Creditor: We object!

Debtor Counsel: Well, at least take judicial notice that Digger can’t exactly run his business using a little Ford Focus.

Creditor: We still object!

QUESTION #3

Should the court sustain or overrule the objection?

1 = Sustain
2 = Overrule

Legal Authorities

Fed. R. Evid. 201 [Judicial Notice]
Chapter 3

Connections and Conflicts—Presentation Slides

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Connections and Conflicts

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* The views expressed herein do not necessarily represent the views of the United States Department of Justice or the United States Trustee Program.

Connections in Context

• Statutory excerpts:

➢ 11 U.S.C. § 327(a):

Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee’s duties under this title.
What IS a connection?

• Statutory excerpts (cont’d):

➤ **Fed R. Bankr. P. 2014(a):**

“The [employment] application shall state . . . to the best of the applicant’s knowledge, all of the person’s connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.”

What IS a connection?

• Statutory excerpts (cont’d):

➤ **Fed R. Bankr. P. 2014(a):**

“The [employment] application shall be accompanied by a verified statement of the person to be employed setting forth the person’s connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.”
What IS a connection?

- Statutory excerpts (cont’d):

  - **Fed R. Bankr. P. 9011(e):**
    “Whenever verification is required by these rules, an unsworn declaration as provided in 28 U.S.C. § 1746 satisfies the requirement of verification.”

  - **28 U.S.C. § 1746:**
    An unsworn declaration executed in the United States must be “in substantially the following form:”
    “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.
    Executed on (date). (Signature).”

What is a conflict (state ethics rules)?

- Typically, conflicts w/current clients involve two components:
  - Will the lawyer be at risk for pulling punches in favor of one client or the lawyer’s own interests?
  - Will the lawyer be at risk of using one client’s confidential information against that client in representing the other client?
  - Some types of conflicts are “consentable”; others aren’t.
- For former clients (and there’s a procedure to establish “former”), it’s about protecting client confidences.
Difference between connections and conflicts

• “Connections” are broader than conflicts.
• Overarching rule: the Court gets to decide if a connection is a problem, not the professional disclosing the connection.
• Disclose, disclose, disclose.
• And disclose formally; an informal disclosure may leave you exposed later in the case

Difference between connections and conflicts


• The “failure to disclose fully relevant information, such as potential, likely or actual conflicts of interest, may result in a denial of fees.” (citing Nebben & Starrett, Inc. v. Chartwell Fin. Corp. (In re Park-Helena Corp.), 63 F.3d 877, 882 (9th Cir. 1995)).
Difference between connections and conflicts

- *First Interstate Bank, N.A. v. CIC Inv. Corp. (In re CIC Inv. Corp.)*, 192 B.R. 549, 553 (B.A.P. 9th Cir. 1996)
  - “[W]here a professional’s employment was approved by the bankruptcy court after full disclosure of all potential conflicts, we hold that subsequent denial of compensation for the professional’s failure to be disinterested is within the court’s discretion.”

- *Neben & Starrett v. Chartwell Fin. Corp. (In re Park-Helena Corp.)*, 63 F.3d 877, 882 (9th Cir. 1995)
  - “[E]ven if [Party A’s] acceptance of a check from [Party B] did not create any actual conflict of interest, [the] failure to describe the circumstances of the payment violated Rule 2014’s disclosure requirements.”
Difference between connections and conflicts

- Neben & Starrett v. Chartwell Fin. Corp. (In re Park-Helena Corp.), 63 F.3d 877 (9th Cir. 1995)
  - Rule 2014 “assists the court in ensuring that the attorney has no conflicts of interest and is disinterested, as required by 11 U.S.C. § 327(a).” 63 F.3d at 881.
  - “All facts that may be pertinent to a court's determination of whether an attorney is disinterested or holds an adverse interest to the estate must be disclosed.” 63 F.3d at 882 (citation omitted; emphasis in original).
  - “The duty of professionals is to disclose all connections with the debtor, debtor-in-possession, insiders, creditors, and parties in interest. They cannot pick and choose which connections are irrelevant or trivial. No matter how old the connection, no matter how trivial it appears, the professional seeking employment must disclose it.” 63 F.3d at 882 (citation omitted).
  - “Appearances count. Even conflicts more theoretical than real will be scrutinized.” 63 F.3d at 882 (citation omitted).
  - “Even a negligent or inadvertent failure to disclose fully relevant information may result in a denial of all requested fees.” 63 F.3d at 882.
  - “The disclosure rules are applied literally, even if the results are sometimes harsh.” 63 F.3d at 881.

  - “The scope of disclosure is much broader than the question of disqualification. See In re Olson Indus., Inc., No. 94-1040, 1997 WL 834486, at *11 (Bankr. D. Del. Nov. 13, 1997)(court may find a disclosure violation even if the undisclosed connection does not amount to a conflict). The applicant and the professional must disclose all connections and not merely those that rise to the level of conflicts.”
  - “The professional must disclose all facts that bear on its disinterestedness, and cannot usurp the court’s function by choosing, ipse dixit, which connections impact disinterestedness and which do not. . . . The existence of an arguable conflict must be disclosed if only to be explained away.”
Here’s a way to think about the difference:

Duty to update connections disclosure:

  - “Rule 2014 has been interpreted to impose an ongoing duty to update information as circumstances change.” (citations omitted).
  - “Case law has uniformly held that under Rule 2014(a), (1) full disclosure is a continuing responsibility, and (2) an attorney is under a duty to promptly notify the court if any potential for conflict arises.” (citations and alterations omitted).
In re Berjac of Oregon*

- Law firm (“Firm”) switches to new bank (“Bank”), which provides Firm with various accounts and services.
- Several months later, Firm is appointed to represent Trustee.
- Bank later becomes potential litigation target of estate. Then Bank becomes definitive litigation target.
- Meanwhile, Firm deliberates about whether relationship with Bank rises to the level of a conflict of interest.
- Firm eventually identifies Bank as definitive litigation target and later withdraws its representation of Trustee.

* The position of the United States Trustee Program is made clear on documents it has filed in this case, which are available on the court’s public docket.

In re Jore Corp. (appeal to Dist. Ct.):

- Law firm disclosed relationship w/bank but did not disclose the nature of the limited consent waivers.
  - Law firm had agreed not to represent the debtor in actions against the bank.
  - When an issue arose against the bank, the debtor had to engage other counsel to prosecute the claim.
- Law firm had also failed to disclose limited waiver by another client.
The Good Samaritan Financial Advisor

• Complex commercial real estate development that required capital.
• Financial Advisor located source of financing to complete development via debt/equity structure.
• Source required Financial Advisor to commit small minority equity capital into deal.
• Financial Advisor agreed, with secured lender knowledge, and Creditor Committee sign off, and disclosed in open court under oath and in Disclosure Statement/Plan.
• Secured lender later objected to Financial Advisor fees and Court denied fees based on the conflict, even though openly disclosed.

If “disclose, disclose, disclose” is the rule....

• Why don’t more professionals err on the side of over-disclosure?
  – Most of the time, it’s not because the professional intends to lie to the court.
    • Cognitive errors.
    • Pressures for financial productivity (getting and keeping certain engagements).
    • Some professionals overthink the issue. Better to be expansive in approach.
Some basic cognitive errors and biases:

- Cognitive dissonance.
- Diffusion of responsibility.
- Anchoring.
- Social pressure.
- Cognitive errors + the exhaustion of a full-time practice = smart people doing dumb things.
- Projecting negative consequences of disclosure, i.e. disqualification and disgorgement

Over-disclosure has its own problems:

- “Needle in a haystack” issue.
The sad story of John Gellene.

Warning signs:

• Not admitted to NY bar for many years, but signing pleadings as if he were.
• Crazy-hour years.
• Late timesheets.
To sum up:

- It is always better to disclose and let the court decide if the connection is problematic.
# Chapter 4

## Means Testing

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1. Primarily Consumer Debt
   a. *In re Kelly*, 841 F.2d 908 (9th Cir. 1988). Pre-BAPCPA case laying the ground rules for determining whether a debt is consumer or non-consumer. That determination is made based on the purpose for which the debt was incurred. If it was incurred for a personal, family or household purpose, then it is a consumer debt. Debts incurred to purchase a home, improve a home, or on credit cards used for household expenses are all consumer debts.

   Whether the debt is secured or unsecured is irrelevant to the determination, except to the extent it bears on the purpose for which the debt was incurred. A debtor has primarily consumer debt when more than half of the dollar amount owed is consumer debt. (Chapter 7)

   b. *In re Cherrett*, 523 BR 660 (9th Cir. BAP 2014). When a debt is incurred for more than one purpose, the primary purpose for incurring the debt will control.

   The Bankruptcy Court did not err in concluding that a second mortgage loan provided to the Debtors by the husband’s employer as part of his total compensation package to enable the Debtors to purchase a house was primarily non-consumer based on the husband’s testimony that he considered the loan part of his employment relationship and that he expected to make a profit on the eventual re-sale of the house as he had on similar arrangements with prior employers. (Chapter 7)
B. INCOME ISSUES

1. Business Expenses
   a. In re Wiegand, 368 BR 238 (BAP 9th Cir. 2008). Chapter 13 debtor engaged in business may not follow Form 22C and deduct ordinary and necessary business expenses from gross receipts when calculating his current monthly income, rather they are to be subtracted from current monthly income to arrive at disposable income. (Chapter 13)

2. Other Income
   a. Blausey v. US Trustee, 552 F.3rd 1124 (9th Cir. 2009). The Debtors did not include the $4,000 per month payments Mrs. Blausey received from her private disability insurance policy when they computed their current monthly income on the means test. Had they included these payments, their income would have been above median. The Debtors argued that these payments should not be considered income because they aren’t considered income for tax purposes. The Court held that private disability income payments are income that must be included on the means test. The Court noted that the statute [§101(10A)] expressly indicates that whether income is taxable is irrelevant. (Chapter 7)
   b. In re Aslakson, No. 12-62182-tmr13, 2013 WL 1304494 (Bankr. D. Or. Mar. 28, 2013). Medical, dental and vacation benefits paid by debtor's wholly owned Subchapter S corporation are included in current monthly income by §101(10A). These types of benefits directly received by the sole shareholder (and his children) of a Subchapter S corporation, are to be included in current monthly income and annualized. (Chapter 13)
   c. In re Mullen, 369 B.R. 25, 35 (Bankr. D. Or. May 14, 2007). Federal, state and local taxes under 11 U.S.C. § 70[7](b)(2)(A)(ii) references a deduction for the federal, state and local taxes actually paid. Taxes actually paid are not equivalent to what is withheld from a debtor's paycheck for taxes. Tax refunds represent amounts over-withheld and thus, constitute additional income. Debtors' argument that the taxes are already captured in the disposable income calculations is misplaced. (Chapter 13)

3. Social Security Exclusion
   a. Adinolfi v. Meyer (In re Adinolfi), 543 B.R. 612 (9th Cir. BAP 2016). Adoption assistance payments paid by county government, but subject to the federal program requirements and standards of 42 U.S.C. §§ 670-679c and federal oversight, were "benefits received under the Social Security Act" and were therefore excluded from current monthly income under section 101(10A)(B). (Chapter 13)
b. *In re Scholz, 699 BR 887 (9th Cir. BAP 2011)*. Railroad retirement income is included when calculating CMI as it is not derived from the Social Security Administration so does not fall within that exclusion. However, it cannot be considered in calculating projected disposable income because of the overriding anti-anticipation clause in the RRA statute. The anti-anticipation holding of the BAP was reversed by the 9th Circuit on appeal. *In re Scholz, 699 F.3d 1167 (9th Cir. 2012)*. The 9th Circuit did not rule on the Social Security exclusion issue as all parties agreed that the BAP’s ruling on this issue was correct. *Id. at 1170.* (Chapter 13)

4. Household Size

a. *In re Ford, 509 B.R. 695 (Bankr. D. Idaho 2014)*. In deciding whether to confirm a plan, the court followed its earlier precedent in using the “economic unit” approach to household size, but found that the household did not include an informal “stepson” (the son of the debtor’s ex-wife) for whom the debtor had no legal obligation. (Chapter 13)

b. *In re de Bruyn Kops, No. 11-41153, 2012 WL 438623 (Bankr. D. Idaho Feb. 9, 2012)*. A debtor’s ex-wife/creditor claimed that their children should not be counted as his full dependents because they only lived part-time with their father. The court found that the children should be counted in full. The court rejected a “heads on beds” or “IRS dependency” test, instead adopting a modified “economic unit” test which it said should be limited to dependents that are financially dependent upon and resident, even on a part-time basis, with the debtor. (Chapter 13)

c. *In re Fleishman, 372 B.R. 64 (Bankr. D. Or. July 9, 2007)*. Applicable commitment period is determined as of effective date of plan. Unborn child on effective date of plan is not counted toward household size. (Chapter 13)

5. Timing of Income

a. *In re Arnoux, 442 B.R. 769 (Bankr. E.D. Wash. 2010)*. UST moved to dismiss debtor’s case as presumptively abusive under section 707(b)(2). Among the issues addressed by the bankruptcy court was whether a pay period that fell outside the six-month period but which included wages derived from that period should be included in the CMI calculation. The bankruptcy court found that the definition of “current monthly income” requires that income be both “received” and “derived” during the statutory six-month period. In this case, any income that debtor “derived” from her work during the six months preceding the petition date, but not “received” during that same period, was not “current monthly income.” (Chapter 7)
6. Disposable Income/Good Faith

a. *In re Welsh*, 711 F.2d 1120 (9th Cir. 2013). Chapter 13 Trustee sought to dismiss based on bad faith because Debtors (a) did not include their Social Security income and (b) included secured payments on luxury items when calculating their disposable income. The Ninth Circuit held that because §1325(b) now defines disposable income using the means test, and because Social Security income is excluded and all secured payments are included under the means test, it couldn’t be bad faith to follow the statutory definition of disposable income. (Chapter 13)

b. *In re Broadbent*, 531 B.R. 840 (Bankr. D. Idaho 2015). The chapter 13 trustee argued that the debtor had proposed his plan in bad faith because he did not include the income of his live-in girlfriend. The court disagreed, finding that a live-in “significant other” should not be treated like a non-filing spouse and that the trustee had made no showing that the girlfriend had any legal obligation to contribute to household expenses. (Chapter 13)
C. EXPENSE ISSUES

1. Vehicle Operating Expense
   a. In re Luedtke, 508 BR 408 (9th Cir. BAP 2014). The Debtor claimed the additional $200 "older vehicle operating expense" permitted by the IRS when applying IRS National and Local Standards in IRS compromise negotiations. The BAP held that because that "older vehicle operating expense" is not a part of the IRS National and Local Standards that it was not incorporated into the means test by Congress and is not available as an expense on the means test form. (Chapter 13)

2. Vehicle Ownership Expense
   a. In re Ransom, 577 F.3d 1026 (9th Cir. 2009) affirmed Ransom v. FIA Card Services, N.A., 562 U.S. 61 (2011). The above median Debtor claimed the IRS Local Standard amount as a monthly vehicle ownership expense, even though he owned his car free and clear. The Ninth Circuit held that a debtor may not deduct an ownership payment on the means test if the debtor does not have an ownership payment. (Chapter 13)
   b. In re Drury, 2016 Westlaw 4437555 (9th Cir. BAP 2016)(unpublished). The Debtor claimed the IRS Standard vehicle ownership expense for a vehicle that her sister had purchased and that she was using and making the payments on. The BAP held that, even though she did not own the car and was not personally liable on the loan, this was an allowable expense for means test purposes. (Chapter 7)
   c. In re Christianson, No. 15-60288, 2015 WL 4761265 (Bankr. D. Or. Aug. 12, 2015). The chapter 13 trustee argued that under Lanning and Ransom, the above-median debtors could not take the full vehicle ownership expense under the IRS’s National and Local Standards because their actual car payment was less. The court rejected this on the basis that the plain language of section 707(b)(2)(A)(ii)(I) mandated use of the National and Local Standards.
      The court held that Lanning was limited to calculating “projected” disposable income and only involves changes in the debtor’s income or expenses occurring after the period for calculating disposable income. In accordance with Ransom, however, the court found that the debtor’s plan would need to be amended to take account of the fact that the debtor’s vehicle loan would be paid off before the completion of the plan. (Chapter 13)
   d. In re Cummings, 06-33029, 2007 WL 6362250 (Bank. D. Or. 2007). Where an expense provided for under the National or Local Standards is “applicable” to a debtor, that is, the debtor has an expense of that nature, the debtor is entitled to deduct the full amount of the National and Local Standards for purposes of determining disposable income, regardless of the amount of the debtor’s actual expense for that item. (Chapter 13)
3. Secured Debt Payments, 401k Loan

   a. In re Egeberg, 574 F.3d 1045 (9th Cir. 2009). The above median Debtor claimed his monthly 401k loan repayments as a secured debt payment on then Line 42 of the means test. The Ninth Circuit held that a 401K loan is not a debt and thus not a “secured debt” payment which may be deducted on the means test. The Court also held that (a) these payments were not an “other necessary expense” so they could not be deducted as an involuntary employment expense on then Line 26 and (b) the existence of 401K loan payments is not by itself a special circumstance which permits a debtor to stay in Chapter 7 even though the presumption of abuse arises.

     Also of interest is the Court’s implication that when a finding of abuse is sought under the provisions of both §707(b)(2) (means test) and (b)(3) (totality of circumstances or bad faith), a court should normally first consider the case under (b)(2) and only reach the (b)(3) issues if there is no finding of abuse using the means test. (Chapter 7)

   b. In re Hartley, No. 13-61182, 2014 WL 1329407 (Bankr. D. Or. Mar. 28, 2014). Granting dismissal under the means test, the court held that the above-median chapter 7 debtors could not deduct 401(k) loan repayments as such a loan was not a “debt” under the Bankruptcy Code but was merely borrowed from the vested funds of one of the debtors. The court suggested that it might have reached a different decision if the loan were not drawn from the 401(k) funds themselves, but had been a separate loan secured by the 401(k). (Chapter 7)

4. Secured Debt Payments, Surrender

   a. In re Smith, 418 BR 359 (9th Cir. BAP 2009). The Debtors had above median income so were required to complete the expense portion of the means test form to determine their disposable income. They claimed as an expense on Line 42 their monthly payments on two homes and a car which they intended to surrender. The BAP held that because the Debtors had determined that these payments were not reasonably necessary for their support, they could not be deducted even though the Debtors were contractually obligated to make the payments. (Chapter 13)

   b. Accord In re Martinez, 418 BR 347 (9th Cir. BAP 2009). Chapter 13 debtors may not deduct contract payments on secured debts which had been “stripped” from the collateral, rendering them completely unsecured. (Chapter 13)

   c. Contra In re Stewart, 410 BR 912 (Bkrtcy. D. Or. 2009). (Chapter 7)
6. Projected Disposable Income

a. *Hamilton v. Lanning*, 560 U.S. 505, 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010). As the result of a one-time buyout payment from her former employer received by the Chapter 13 Debtor during the 6 month pre-petition period, her means test form showed she was an above median debtor with disposable income of over $1100 per month. Based on her current income from her new job, the Debtor’s Schedules I/J showed she had below median income and disposable income of about $150 per month. Over the objection of the Chapter 13 Trustee, the Debtor proposed and confirmed a Chapter 13 plan with payments of $144 per month for 36 months. The Chapter 13 Trustee argued that BAPCPA mandates the use of disposable income as reflected on the means test form in determining the plan payment.

The United States Supreme Court affirmed (8-1), holding that “projected disposable income” is different than the statutorily defined “disposable income” and that a bankruptcy court may modify “disposable income” to account for changes in the debtor’s income or expenses that are known or virtually certain at the time of confirmation. In doing so the Court expressly rejected the “mechanical approach” which had been adopted by some courts, including *In re Kagenveama*, 541 F.3d 868 (9th Cir. 2008). The Court did not expressly address the issue of whether the debtor would be treated as above median or below median for purposes of determining the length of the plan.

b. *Kagenveama v. Maney*, 541 F. 3d 868 (9th Cir. 2008) overruled on this issue by *Hamilton v. Lanning*, above. (Chapter 13)

c. *In re Flores*, 735 F.3d 855 (9th Cir. 2013). A Bankruptcy Court may confirm a Chapter 13 plan under 11 U.S.C. § 1325(b)(1)(B) only if the plan’s duration is at least as long as the applicable commitment period provided by §1325(b)(4), even if the debtor has no projected income, overruling *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868 (9th Cir. 2008). Thus, above-median Debtors with no projected disposable income must propose five year plans. (Chapter 13)

d. *In re Parks*, 475 BR 703 (9th Cir. BAP 2012). Chapter 13 debtor may not exclude voluntary 401k contributions from income when calculating disposable income on the means test form. The Debtor had argued that the “hanging paragraph” at the end of §541(b)(7)(A)(i) rendered those contributions not property of the estate and thus not includible in income. The BAP held that the exclusion was only of pre-petition contributions and that the post-petition contributions are property of the estate. (Chapter 13)

e. *In re Mattson*, 468 B.R. 361 (9th Cir. BAP 2012). Above-median-income Debtors whose income had significantly increased after confirmation, moved to modify their chapter 13 plan to increase their payments to unsecured creditors, while at the same time reducing the length of their plan from 60 to 36 months. The BAP emphasized that the continued absence from
§1329(b)(1) of any reference to §1325(b) is conclusive as to whether a debtor may modify his or her plan to reduce the term below the applicable commitment period required for under the original plan. Congress is presumed to act intentionally and purposefully when it includes language in one section of the Bankruptcy Code, but omits it in another section. Congress, aware of the function of the means test in chapter 13 relating to confirmation of original plans, did not amend §1329(b)(1) to incorporate §1325(b). Therefore, the plain language of §1329(a)(2), which authorizes modifications to extend or reduce the time for payments under the plan, continues to control. However, appropriateness of a particular modification is subject to the court’s discretion, as limited by §1329.

In determining the appropriateness, the court must conduct a good faith analysis, made on a case-by-case basis, after considering the totality of the circumstances. The burden of establishing that a plan is submitted in good faith is on the debtor. The generalized test for good faith includes consideration of the substantiality of proposed plan payments, whether the debtor misrepresented facts in the plan, whether the debtor unfairly manipulated the Bankruptcy Code, and whether the plan is proposed in an equitable manner. A substantial and unanticipated change test and that the change in plan correlate to the change in circumstances may simply be another factor that may be considered under the totality of circumstances approach to a good faith analysis in this Circuit.

The Debtors failed to meet their burden of proving that a shortened term of their plan was made in good faith. Debtor’s contribution of a portion of their increased income to their plan for a three year period rather than a five year period does not amount to per se good faith. The Debtors could not point to any facts in the record which showed they would be unable to continue their increased payments beyond the 36 month period that they proposed. As a consequence, in light of the Debtors’ increased income, allowing them to shorten the term for their plan would be an inequitable result. (Chapter 13)

f. **In re Vue, No. 15-41405 (Bankr. W.D. Washington June 16, 2015) 2015 WL 6684227.** Voluntary contributions to an employee retirement plan may be excluded from the computation of current monthly income (to the extent that the contributions were being made pre-petition during the 6-month look back period) and, therefore, not deducted from disposable income in the means test. (Chapter 13)

g. **In re Braswell, No. 13-60564-fra13, 2013 WL 3270752 (Bankr. D. Or. June 27, 2013).** When plan pays unsecured creditors in full under §1325(b)(1)(A) with less than all of a debtor’s projected disposable income, plan must pay interest at Till rate to unsecured creditors. §1325(b)(1) allows debtor to choose subsection (B) and devote all of his projected disposable income to the plan or, if the debtor wishes to devote less of his income to the plan, he may choose subsection (A). The price for doing so, however, is that unsecured claims must be paid in full with interest. With respect to subsection (A), “the value of property to be distributed under the plan” must
be measured as of the date of confirmation, and must be “not less than the amount of such claim.” This interpretation would require the payment of interest, because a future income stream must be discounted to present value. (Chapter 13)

7. Use of IRS Standards is Constitutional
   a. In re Wedblad, No. 10-65055, 2012 WL 245967 (Bankr. D. Ore. Jan. 25, 2012). 11 U.S.C. § 707(b)(2)’s incorporation of the IRS’s National and Local Standards for means testing purposes was not an unconstitutional delegation of authority; rejecting debtors’ claim that the Standards were not developed in accordance with the requirements of the Administrative Procedures Act and thus were not "in effect" in the debtors' case. The court found that the statute does not delegate authority to the IRS to develop standards; instead, it merely incorporates whatever standards are already in effect at the time of filing. The standards themselves are interpretive rules, not legislative rules, and therefore are not subject to the APA’s notice and comment requirements. (Chapter 7)

D. SPECIAL CIRCUMSTANCES

1. Seriousness of Change in Circumstances
   a. *In re Hartley, No. 13-61182, 2014 WL 1329407 (Bankr. D. Or. Mar. 28, 2014).* Granting dismissal under the means test, the court held that debtors had failed to show that allegedly necessary bathroom repairs constituted a “special circumstance,” and indicated that any such circumstance would have to rise to the level of a serious medical condition or a call to active duty. (Chapter 7)
E. RELATED ISSUES

1. Forced Conversion to Chapter 11
   a. In re Parvin, 549 BR 268 (Dist.Ct. W.D. Wa. 2016) affirming 538 BR 96 (Bktcy.Ct. W.D. Wa. 2015). §706(b) permits a Bankruptcy Court to convert a Chapter 7 case to Chapter 11 over the objection of the debtor when it is in the interests of the parties and would further the goals of the Bankruptcy Code. (Chapter 7)
   b. In re Decker, 548 BR 813 (Dist.Ct. Alaska 2015) affirming 535 BR 828 (Bktcy.Ct. Alaska 2015). District Court affirmed Bankruptcy Court decision to mandate conversion to Chapter 11 pursuant to §706(b) based primarily on Debtor’s substantial disposable income. The Debtors had primarily consumer debt so were exempt from a motion to dismiss for abuse. The District Court held that (a) statutory language does not require consent, (b) fact that §707(b) requires consent does not override statutory language of §706(b), and (c) Bankruptcy Court properly considered all of the necessary factors before deciding to order conversion. (Chapter 7)

2. Timing of Filing
   a. In re Hageney, 422 BR 254 (Bkrtcy. ED Wash. 2009). The Debtor husband took a new job with substantially higher pay about 4 months before the case was filed. The Debtors filed their case on the 28th of the month, which meant they were only required to include 3 months of the higher pay in their means test income. Had they filed 3 days later they would have been required to include 4 months of the higher pay and would have been above median debtors. The Court held that the Debtors’ timing of their filing to prevent them from being above median was not by itself bad faith under 707(b)(3). However, the Court dismissed the case for bad faith based on the Debtors’ purchase of a luxury motorcycle 10 weeks prior to filing and on the totality of the Debtors’ financial circumstances. (Chapter 7)
“HOT” ISSUES IN CHAPTER 13, SELECT CASES

1. Local Standard: Housing and Utilities

_In re Currie_, No. 14-71331, 2015 WL 5474475 (Bankr. C.D. Ill. Sept. 17, 2015). The division of Local Standards: Housing and Utilities into mortgage and nonmortgage components was the work of the EOUST and the Rules Committee, not the IRS. A debtor with taxes and insurance but no mortgage debt is allowed the entire undivided Local Standards: Housing and Utilities amount stated by IRS.

2. Student Loan as Special Circumstance?

_In re Brown_, 500 B.R. 255 (Bankr. S.D. Ga. Sept. 6, 2013). $100,000 student loan debt was not a special circumstance for § 707(b)(2)(B) purposes.

Courts are split on whether student loan payments constitute special circumstances. The first line of cases apply a narrow interpretation of the statutory language and hold that student loans do not qualify as a special circumstance as they are not unforeseeable, unavoidable, or beyond a debtor's control. See _In re Lightsey_, 374 B.R. at 381; _In re Maura_, 491 B.R. 493, 511 (Bankr.E.D.Mich.2013); _In re Carrillo_, 421 B.R. 540, 544-45 (Bankr. D.Ariz. 2009). A second approach holds that student loans qualify as special circumstances because public policy encourages pursuit of higher education and student loans are non-dischargeable so a debtor has no realistic option other than to pay the student loans during the bankruptcy. See _In re Knight_, 370 B.R. 429 (Bankr. N.D.Ga.2007). A third approach is to examine the motivation and reasons the debtor acquired the student loan. See _In re Pageau_, 383 B.R. 221 (Bankr.D.N.H.2008) (pursuit of higher education solely for career advancement or increased salary is not special circumstance as the student loan must be necessitated by permanent injury, disability, or an employer closing or layoffs); see also _In re Cribbs_, 387 B.R. 324, 329 (Bankr.S.D.Ga.2008) (finding that special circumstances must be similar to the examples set out in the statute, which courts have characterized as being unanticipated, unavoidable and beyond Debtor's control but finding special circumstances under the facts of the case).

The Court found the approach set forth in _Pageau_ and _Cribbs_ complies with the statutory language of 11 U.S.C. § 707(b). While Congress did not define special circumstance it gave illustrative examples, such as a serious medical condition; or a call or order to active duty in the Armed Forces, which are circumstances beyond a debtor's control or at least extraordinary or exceptional for which there is no reasonable alternative. Under the facts of this case, the student loans do not qualify as a special circumstance warranting a deduction on her means test. There is nothing unique or special about Debtor's student loans. She obtained her loans to better herself and to obtain promotions, but that does not make the loans special or unique. She was never layed off from work or forced to get an education in order to
maintain her job. The fact that a bachelor's degree may have later become a requirement does not make her loan a special circumstance.

3. **Debtor Attorney Fees**

   *In re Hemker*, No. 15-90023, 2015 WL 5262080 (Bankr. C.D. Ill. Sept. 8, 2015). Debtors with current monthly income greater than applicable median family income can pay unsecured, priority attorney fees from disposable income with balance payable to general unsecured creditors. Debtors are entitled to deduct their attorney fees before calculating the amount that should be paid to nonpriority unsecured creditors.

4. **Projected Disposable Income**

   *In re Montano*, 544 B.R. 911, 913 (Bankr. S.D. Fla. Jan. 20, 2016). Debtor with negative projected disposable income need not increase plan payments in the 10th month after confirmation when the car note will pay off because the increase in projected income would still leave the debtor with negative projected disposable income. Form B22C showed debtor's disposable income was negative $526.73. Schedule J showed $429.52-per-month car payment that would end when the car was paid off in month 10 after confirmation. Creditor argued that payments to trustee should increase after the car loan was paid off. Even if the Court found that *Lanning* required a change in the allowable automobile expense starting in month 11 of the Plan, this change would still leave the Debtor with negative disposable income.

5. **Child Support**

   *Clark v. Brooks*, 784 F.3d 380, 383-88 (7th Cir. Apr. 23, 2015). Child support is excluded from projected disposable income except in rare case when amount demonstrates abuse of bankruptcy. Debtor was a single mother with two minor children. Monthly income included $400 in child support. Debtor deducted $400 per month from current monthly income at line 54 of Official Form B22C. Trustee objected, arguing that exclusion of child support was double accounting because expenses for raising children were factored into other standardized deductions.

   Child support payments are considered a part of current monthly income and include any amount paid by third parties on a regular basis for the household expenses of the debtor or the debtor's dependents. Pursuant to § 1325(b)(2), the debtor may next exclude child support payments to the extent reasonably necessary to be expended for such child. The subsection is structured to first allow an above-median debtor to calculate her income (excluding reasonably necessary child support), and second, to deduct from that figure standardized living expenses, as defined in § 707(b)(2)(A) and (B). The trustee's proposal would burden bankruptcy courts by mandating fact-intensive examinations of all child support expenses. Congress amended the Bankruptcy Code in 2005 precisely in order to avoid such complex calculations. The 2005 amendments also display a special solicitude for children entitled to support payments from a noncustodial parent. While there may be a
theoretical risk of a double deduction, such duplication is unlikely in practice. Bankruptcy courts retain the discretion to engage in an independent reasonable necessity inquiry and scrutinize child support payments to determine whether, in extreme cases, those payments are so excessive in comparison to acceptable expenditures that they cannot be deemed reasonably necessary. Such extreme cases, however, are likely to be rare.

The condition that the income exclusions are subject to a standard of reasonable necessity is best interpreted as a hedge against the risk of abuse. There may be some few cases where the custodial parent is so well off that child support payments amount to unneeded surplus funds. In that event, the reasonable necessity standard provides a basis for including the payments in the debtor's income. That occurrence is likely to be rare.
Chapter 4—Means Testing

Official Form 122A–1

Chapter 7 Statement of Your Current Monthly Income

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known). If you believe that you are exempted from a presumption of abuse because you do not have primarily consumer debts or because of qualifying military service, complete and file Statement of Exemption from Presumption of Abuse Under § 707(b)(2) (Official Form 122A-1Supp) with this form.

Part 1: Calculate Your Current Monthly Income

1. What is your marital and filing status? Check one only.
   - Not married. Fill out Column A, lines 2-11.
   - Married and your spouse is filing with you. Fill out both Columns A and B, lines 2-11.
   - Married and your spouse is NOT filing with you. You and your spouse are:
     - Living in the same household and are not legally separated. Fill out both Columns A and B, lines 2-11.
     - Living separately or are legally separated. Fill out Column A, lines 2-11; do not fill out Column B. By checking this box, you declare under penalty of perjury that you and your spouse are legally separated under nonbankruptcy law that applies or that you and your spouse are living apart for reasons that do not include evading the Means Test requirements. 11 U.S.C. § 707(b)(7)(B).

2. Your gross wages, salary, tips, bonuses, overtime, and commissions (before all payroll deductions).
   - $_________ $_________

3. Alimony and maintenance payments. Do not include payments from a spouse if Column B is filled in.
   - $_________ $_________

4. All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support. Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.
   - $_________ $_________

5. Net income from operating a business, profession, or farm
   - Debtor 1 Debtor 2
     Gross receipts (before all deductions) $______ $______
     Ordinary and necessary operating expenses − $______ − $______
     Net monthly income from a business, profession, or farm $______ $______
     Copy here ➔ $______ $______

6. Net income from rental and other real property
   - Debtor 1 Debtor 2
     Gross receipts (before all deductions) $______ $______
     Ordinary and necessary operating expenses − $______ − $______
     Net monthly income from rental or other real property $______ $______
     Copy here ➔ $______ $______

7. Interest, dividends, and royalties
   - $______ $______

Check one box only as directed in this form and in Form 122A-1Supp:

- 1. There is no presumption of abuse.
- 2. The calculation to determine if a presumption of abuse applies will be made under Chapter 7 Means Test Calculation (Official Form 122A–2).
- 3. The Means Test does not apply now because of qualified military service but it could apply later.

Check if this is an amended filing
Chapter 4—Means Testing

Debtor 1 _______________________________________________________ Case number (if known)_____________________________________

First Name Middle Name Last Name

Page 2

Column A
Column B
Debtor 1 Debtor 2 or non-filing spouse

8. Unemployment compensation

Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ................. $ __________

For you: ............................................................... $ __________

For your spouse: ................................................. $ __________

9. Pension or retirement income. Do not include any amount received that was a benefit under the Social Security Act.

$ __________ $ __________

10. Income from all other sources not listed above. Specify the source and amount.

Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total below.

$ __________ $ __________

$ __________ $ __________

Total amounts from separate pages, if any. + $ __________ + $ __________

11. Calculate your total current monthly income. Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.

$ __________ + $ __________ = $ __________

Part 2: Determine Whether the Means Test Applies to You

12. Calculate your current monthly income for the year. Follow these steps:

12a. Copy your total current monthly income from line 11. Copy line 11 here $ __________

Multiply by 12 (the number of months in a year).

12b. The result is your annual income for this part of the form. 12b. $ __________

13. Calculate the median family income that applies to you. Follow these steps:

Fill in the state in which you live. 

Fill in the number of people in your household.

Fill in the median family income for your state and size of household. ................................................................. 13. $ __________

To find a list of applicable median income amounts, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk’s office.

14. How do the lines compare?

14a. ☐ Line 12b is less than or equal to line 13. On the top of page 1, check box 1, There is no presumption of abuse. Go to Part 3.

14b. ☐ Line 12b is more than line 13. On the top of page 1, check box 2, The presumption of abuse is determined by Form 122A-2. Go to Part 3 and fill out Form 122A–2.

Part 3: Sign Below

By signing here, I declare under penalty of perjury that the information on this statement and in any attachments is true and correct.

Signature of Debtor 1

Signature of Debtor 2

Date MM / DD / YYYY

Date MM / DD / YYYY

If you checked line 14a, do NOT fill out or file Form 122A–2.

If you checked line 14b, fill out Form 122A–2 and file it with this form.
Chapter 4—Means Testing

Official Form 122A—1Supp

Statement of Exemption from Presumption of Abuse Under § 707(b)(2)

File this supplement together with Chapter 7 Statement of Your Current Monthly Income (Official Form 122A-1), if you believe that you are exempted from a presumption of abuse. Be as complete and accurate as possible. If two married people are filing together, and any of the exclusions in this statement applies to only one of you, the other person should complete a separate Form 122A-1 if you believe that this is required by 11 U.S.C. § 707(b)(2)(C).

Part 1: Identify the Kind of Debts You Have

1. Are your debts primarily consumer debts? Consumer debts are defined in 11 U.S.C. § 101(8) as “incurred by an individual primarily for a personal, family, or household purpose.” Make sure that your answer is consistent with the answer you gave at line 16 of the Voluntary Petition for Individuals Filing for Bankruptcy (Official Form 101).

   ❑ No. Go to Form 122A-1; on the top of page 1 of that form, check box 1, There is no presumption of abuse, and sign Part 3. Then submit this supplement with the signed Form 122A-1.

   ❑ Yes. Go to Part 2.

Part 2: Determine Whether Military Service Provisions Apply to You

2. Are you a disabled veteran (as defined in 38 U.S.C. § 3741(1))?  

   ❑ No. Go to line 3.

   ❑ Yes. Did you incur debts mostly while you were on active duty or while you were performing a homeland defense activity? 10 U.S.C. § 101(d)(1); 32 U.S.C. § 901(1).

      ❑ No. Go to line 3.

      ❑ Yes. Go to Form 122A-1; on the top of page 1 of that form, check box 1, There is no presumption of abuse, and sign Part 3. Then submit this supplement with the signed Form 122A-1.

3. Are you or have you been a Reservist or member of the National Guard?

   ❑ No. Complete Form 122A-1. Do not submit this supplement.


      ❑ No. Complete Form 122A-1. Do not submit this supplement.

      ❑ Yes. Check any one of the following categories that applies:

         ❑ I was called to active duty after September 11, 2001, for at least 90 days and remain on active duty.

         ❑ I was called to active duty after September 11, 2001, for at least 90 days and was released from active duty on ________________, which is fewer than 540 days before I file this bankruptcy case.

         ❑ I am performing a homeland defense activity for at least 90 days.

         ❑ I performed a homeland defense activity for at least 90 days, ending on ________________, which is fewer than 540 days before I file this bankruptcy case.

If you checked one of the categories to the left, go to Form 122A-1. On the top of page 1 of Form 122A-1, check box 3, The Means Test does not apply now, and sign Part 3. Then submit this supplement with the signed Form 122A-1. You are not required to fill out the rest of Official Form 122A-1 during the exclusion period. The exclusion period means the time you are on active duty or are performing a homeland defense activity, and for 540 days afterward. 11 U.S.C. § 707(b)(2)(D)(i).

If your exclusion period ends before your case is closed, you may have to file an amended form later.

Debtor 1 __________________________________________________________________
First Name Middle Name Last Name
Debtor 2 ________________________________________________________________
(Spouse, if filing) First Name Middle Name Last Name
United States Bankruptcy Court for the: __________ District of __________
Case number ___________________________________________
(If known)

Check if this is an amended filing
Official Form 122A–2

Chapter 7 Means Test Calculation

To fill out this form, you will need your completed copy of Chapter 7 Statement of Your Current Monthly Income (Official Form 122A-1).

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Determine Your Adjusted Income

1. Copy your total current monthly income. Copy line 11 from Official Form 122A-1 here...

2. Did you fill out Column B in Part 1 of Form 122A–1?
   - No. Fill in $0 for the total on line 3.
   - Yes. Is your spouse filing with you?
     - No. Go to line 3.
     - Yes. Fill in $0 for the total on line 3.

3. Adjust your current monthly income by subtracting any part of your spouse’s income not used to pay for the household expenses of you or your dependents. Follow these steps:

   On line 11, Column B of Form 122A–1, was any amount of the income you reported for your spouse NOT regularly used for the household expenses of you or your dependents?
   - No. Fill in 0 for the total on line 3.
   - Yes. Fill in the information below:

<table>
<thead>
<tr>
<th>State each purpose for which the income was used</th>
<th>Fill in the amount you are subtracting from your spouse’s income</th>
</tr>
</thead>
<tbody>
<tr>
<td>$_______________________________________________</td>
<td>$__________________________________________________________</td>
</tr>
<tr>
<td>$_______________________________________________</td>
<td>$__________________________________________________________</td>
</tr>
<tr>
<td>+ $_____________________________________________</td>
<td>$__________________________________________________________</td>
</tr>
<tr>
<td>Total. ......................................................................</td>
<td>..................................................................................</td>
</tr>
</tbody>
</table>

4. Adjust your current monthly income. Subtract the total on line 3 from line 1.

   $_________
Part 2: Calculate Your Deductions from Your Income

The Internal Revenue Service (IRS) issues National and Local Standards for certain expense amounts. Use these amounts to answer the questions in lines 6-15. To find the IRS standards, go online using the link specified in the separate instructions for this form. This information may also be available at the bankruptcy clerk’s office.

Deduct the expense amounts set out in lines 6-15 regardless of your actual expense. In later parts of the form, you will use some of your actual expenses if they are higher than the standards. Do not deduct any amounts that you subtracted from your spouse’s income in line 3 and do not deduct any operating expenses that you subtracted from income in lines 5 and 6 of Form 122A–1.

If your expenses differ from month to month, enter the average expense.

Whenever this part of the form refers to you, it means both you and your spouse if Column B of Form 122A–1 is filled in.

5. The number of people used in determining your deductions from income
   Fill in the number of people who could be claimed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support. This number may be different from the number of people in your household.

   National Standards You must use the IRS National Standards to answer the questions in lines 6-7.

6. Food, clothing, and other items: Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for food, clothing, and other items. $______

7. Out-of-pocket health care allowance: Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for out-of-pocket health care. The number of people is split into two categories—people who are under 65 and people who are 65 or older—because older people have a higher IRS allowance for health care costs. If your actual expenses are higher than this IRS amount, you may deduct the additional amount on line 22.

   People who are under 65 years of age

   7a. Out-of-pocket health care allowance per person $__________
   7b. Number of people who are under 65 X _____
   7c. Subtotal. Multiply line 7a by line 7b. $__________ Copy here $__________

   People who are 65 years of age or older

   7d. Out-of-pocket health care allowance per person $__________
   7e. Number of people who are 65 or older X _____
   7f. Subtotal. Multiply line 7d by line 7e. $__________ Copy here + $__________

   7g. Total. Add lines 7c and 7f. $__________ Copy total here $______
Based on information from the IRS, the U.S. Trustee Program has divided the IRS Local Standard for housing for bankruptcy purposes into two parts:

- Housing and utilities – Insurance and operating expenses
- Housing and utilities – Mortgage or rent expenses

To answer the questions in lines 8-9, use the U.S. Trustee Program chart.

To find the chart, go online using the link specified in the separate instructions for this form. This chart may also be available at the bankruptcy clerk’s office.

8. Housing and utilities – Insurance and operating expenses: Using the number of people you entered in line 5, fill in the dollar amount listed for your county for insurance and operating expenses. .......................................................... $__________

9. Housing and utilities – Mortgage or rent expenses:
   9a. Using the number of people you entered in line 5, fill in the dollar amount listed for your county for mortgage or rent expenses. .......................................................... $__________
   9b. Total average monthly payment for all mortgages and other debts secured by your home.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

<table>
<thead>
<tr>
<th>Name of the creditor</th>
<th>Average monthly payment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$__________</td>
</tr>
<tr>
<td></td>
<td>$__________</td>
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<td>$__________</td>
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<tr>
<td></td>
<td>$__________</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Total average monthly payment $__________

9c. Net mortgage or rent expense.

Subtract line 9b (total average monthly payment) from line 9a (mortgage or rent expense). If this amount is less than $0, enter $0. .......................................................... $__________

10. If you claim that the U.S. Trustee Program’s division of the IRS Local Standard for housing is incorrect and affects the calculation of your monthly expenses, fill in any additional amount you claim. $__________

   Explain why:
   ______________________________________________________________________
   ______________________________________________________________________

11. Local transportation expenses: Check the number of vehicles for which you claim an ownership or operating expense.

   - 0. Go to line 14.
   - 1. Go to line 12.
   - 2 or more. Go to line 12.

12. Vehicle operation expense: Using the IRS Local Standards and the number of vehicles for which you claim the operating expenses, fill in the Operating Costs that apply for your Census region or metropolitan statistical area. $__________
13. **Vehicle ownership or lease expense:** Using the IRS Local Standards, calculate the net ownership or lease expense for each vehicle below. You may not claim the expense if you do not make any loan or lease payments on the vehicle. In addition, you may not claim the expense for more than two vehicles.

   **Vehicle 1**  
   Describe Vehicle 1: ________________________________________________________________
   ________________________________________________________________
   
   13a. Ownership or leasing costs using IRS Local Standard:  ................................................... $___________
   13b. Average monthly payment for all debts secured by Vehicle 1.  
   Do not include costs for leased vehicles.
   To calculate the average monthly payment here and on line 13e, add all amounts that are contractually due to each secured creditor in the 60 months after you filed for bankruptcy. Then divide by 60.

<table>
<thead>
<tr>
<th>Name of each creditor for Vehicle 1</th>
<th>Average monthly payment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$____________</td>
</tr>
<tr>
<td></td>
<td>$____________</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Total average monthly payment</td>
<td>$____________ - $________</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>
   13c. Net Vehicle 1 ownership or lease expense  
   Subtract line 13b from line 13a. If this amount is less than $0, enter $0.  ..................................... $____________

   **Vehicle 2**  
   Describe Vehicle 2: ________________________________________________________________
   ________________________________________________________________
   
   13d. Ownership or leasing costs using IRS Local Standard:  ................................................. $___________
   13e. Average monthly payment for all debts secured by Vehicle 2.  
   Do not include costs for leased vehicles.

<table>
<thead>
<tr>
<th>Name of each creditor for Vehicle 2</th>
<th>Average monthly payment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$____________</td>
</tr>
<tr>
<td></td>
<td>$____________</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Total average monthly payment</td>
<td>$____________ - $________</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>
   13f. Net Vehicle 2 ownership or lease expense  
   Subtract line 13e from 13d. If this amount is less than $0, enter $0.  ..................................... $____________

14. **Public transportation expense:** If you claimed 0 vehicles in line 11, using the IRS Local Standards, fill in the Public Transportation expense allowance regardless of whether you use public transportation.  
   $________

15. **Additional public transportation expense:** If you claimed 1 or more vehicles in line 11 and if you claim that you may also deduct a public transportation expense, you may fill in what you believe is the appropriate expense, but you may not claim more than the IRS Local Standard for Public Transportation.  
   $_______
Chapter 4—Means Testing

Debtor 1 _______________________________________________________ Case number (if known) _________________________________________

**Other Necessary Expenses**  
In addition to the expense deductions listed above, you are allowed your monthly expenses for the following IRS categories.

16. **Taxes:** The total monthly amount that you will actually owe for federal, state and local taxes, such as income taxes, self-employment taxes, Social Security taxes, and Medicare taxes. You may include the monthly amount withheld from your pay for these taxes. However, if you expect to receive a tax refund, you must divide the expected refund by 12 and subtract that number from the total monthly amount that is withheld to pay for taxes. Do not include real estate, sales, or use taxes.

\[ \text{Amount} \]

17. **Involuntary deductions:** The total monthly payroll deductions that your job requires, such as retirement contributions, union dues, and uniform costs. Do not include amounts that are not required by your job, such as voluntary 401(k) contributions or payroll savings.

\[ \text{Amount} \]

18. **Life insurance:** The total monthly premiums that you pay for your own term life insurance. If two married people are filing together, include payments that you make for your spouse’s term life insurance. Do not include premiums for life insurance on your dependents, for a non-filing spouse’s life insurance, or for any form of life insurance other than term.

\[ \text{Amount} \]

19. **Court-ordered payments:** The total monthly amount that you pay as required by the order of a court or administrative agency, such as spousal or child support payments. Do not include payments on past due obligations for spousal or child support. You will list these obligations in line 35.

\[ \text{Amount} \]

20. **Education:** The total monthly amount that you pay for education that is either required:
   - as a condition for your job, or
   - for your physically or mentally challenged dependent child if no public education is available for similar services.

\[ \text{Amount} \]

21. **Childcare:** The total monthly amount that you pay for childcare, such as babysitting, daycare, nursery, and preschool. Do not include payments for any elementary or secondary school education.

\[ \text{Amount} \]

22. **Additional health care expenses, excluding insurance costs:** The monthly amount that you pay for health care that is required for the health and welfare of you or your dependents and that is not reimbursed by insurance or paid by a health savings account. Include only the amount that is more than the total entered in line 7. Payments for health insurance or health savings accounts should be listed only in line 25.

\[ \text{Amount} \]

23. **Optional telephones and telephone services:** The total monthly amount that you pay for telecommunication services for you and your dependents, such as pagers, call waiting, caller identification, special long distance, or business cell phone service, to the extent necessary for your health and welfare or that of your dependents or for the production of income, if it is not reimbursed by your employer. Do not include payments for basic home telephone, internet and cell phone service. Do not include self-employment expenses, such as those reported on line 5 of Official Form 122A-1, or any amount you previously deducted.

\[ \text{Amount} \]

24. **Add all of the expenses allowed under the IRS expense allowances.**

Add lines 6 through 23.

\[ \text{Total} \]
### Chapter 4—Means Testing

#### Debtor 1 _______________________________________________________ Case number (if known)_____________________________________

**First Name** Middle Name **Last Name**

---

**Chapter 7 Means Test Calculation**

**Additional Expense Deductions**

These are additional deductions allowed by the Means Test.

*Note: Do not include any expense allowances listed in lines 6-24.*

<table>
<thead>
<tr>
<th>Item</th>
<th>Amount</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>25. <strong>Health insurance, disability insurance, and health savings account expenses.</strong> The monthly expenses for health insurance, disability insurance, and health savings accounts that are reasonably necessary for yourself, your spouse, or your dependents.</td>
<td>$_______</td>
<td></td>
</tr>
<tr>
<td>Health insurance</td>
<td>$_______</td>
<td></td>
</tr>
<tr>
<td>Disability insurance</td>
<td>$_______</td>
<td></td>
</tr>
<tr>
<td>Health savings account</td>
<td>$_______</td>
<td></td>
</tr>
</tbody>
</table>
| Total                                                                 | $_______ | Copy total here

Do you actually spend this total amount?

- [ ] No. How much do you actually spend? $_______
- [ ] Yes

<table>
<thead>
<tr>
<th>Item</th>
<th>Amount</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>26. <strong>Continuing contributions to the care of household or family members.</strong> The actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. These expenses may include contributions to an account of a qualified ABLE program. 26 U.S.C. § 529A(b).</td>
<td>$_______</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Item</th>
<th>Amount</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>27. <strong>Protection against family violence.</strong> The reasonably necessary monthly expenses that you incur to maintain the safety of you and your family under the Family Violence Prevention and Services Act or other federal laws that apply. By law, the court must keep the nature of these expenses confidential.</td>
<td>$_______</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Item</th>
<th>Amount</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>28. <strong>Additional home energy costs.</strong> Your home energy costs are included in your insurance and operating expenses on line 8. If you believe that you have home energy costs that are more than the home energy costs included in expenses on line 8, then fill in the excess amount of home energy costs. You must give your case trustee documentation of your actual expenses, and you must show that the additional amount claimed is reasonable and necessary.</td>
<td>$_______</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Item</th>
<th>Amount</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>29. <strong>Education expenses for dependent children who are younger than 18.</strong> The monthly expenses (not more than $160.42* per child) that you pay for your dependent children who are younger than 18 years old to attend a private or public elementary or secondary school. You must give your case trustee documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in lines 6-23. * Subject to adjustment on 4/01/19, and every 3 years after that for cases begun on or after the date of adjustment.</td>
<td>$_______</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Item</th>
<th>Amount</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>30. <strong>Additional food and clothing expense.</strong> The monthly amount by which your actual food and clothing expenses are higher than the combined food and clothing allowances in the IRS National Standards. That amount cannot be more than 5% of the food and clothing allowances in the IRS National Standards. To find a chart showing the maximum additional allowance, go online using the link specified in the separate instructions for this form. This chart may also be available at the bankruptcy clerk’s office. You must show that the additional amount claimed is reasonable and necessary.</td>
<td>$_______</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Item</th>
<th>Amount</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>31. <strong>Continuing charitable contributions.</strong> The amount that you will continue to contribute in the form of cash or financial instruments to a religious or charitable organization. 26 U.S.C. § 170(c)(1)-(2).</td>
<td>$_______</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Item</th>
<th>Amount</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>32. <strong>Add all of the additional expense deductions.</strong> Add lines 25 through 31.</td>
<td>$_______</td>
<td></td>
</tr>
</tbody>
</table>

---

Official Form 122A–2  
**Chapter 7 Means Test Calculation**  
page 6
### Deductions for Debt Payment

33. For debts that are secured by an interest in property that you own, including home mortgages, vehicle loans, and other secured debt, fill in lines 33a through 33e.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

- **Mortgages on your home:**
  - 33a. Copy line 9b here. 
  - Average monthly payment $\ldots$ 

- **Loans on your first two vehicles:**
  - 33b. Copy line 13b here.
  - Average monthly payment $\ldots$

- **List other secured debts:**
  - 33c. Copy line 13e here.
  - Average monthly payment $\ldots$

  - 33d. List other secured debts:
    - Name of each creditor for other secured debt
    - Identify property that secures the debt
    - Does payment include taxes or insurance?
      - No
      - Yes
    - Average monthly payment $\ldots$

33e. Total average monthly payment. Add lines 33a through 33d. $\ldots$

34. Are any debts that you listed in line 33 secured by your primary residence, a vehicle, or other property necessary for your support or the support of your dependents?

- No. Go to line 35.
- Yes. State any amount that you must pay to a creditor, in addition to the payments listed in line 33, to keep possession of your property (called the cure amount). Next, divide by 60 and fill in the information below.

<table>
<thead>
<tr>
<th>Name of the creditor</th>
<th>Identify property that secures the debt</th>
<th>Total cure amount</th>
<th>Monthly cure amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>$\ldots$</td>
<td>$\ldots$</td>
<td>$\ldots$ + 60 =</td>
<td>$\ldots$</td>
</tr>
<tr>
<td>$\ldots$</td>
<td>$\ldots$</td>
<td>$\ldots$ + 60 =</td>
<td>$\ldots$</td>
</tr>
<tr>
<td>$\ldots$</td>
<td>$\ldots$</td>
<td>$\ldots$ + 60 =</td>
<td>$\ldots$ + $\ldots$</td>
</tr>
</tbody>
</table>

35. Do you owe any priority claims such as a priority tax, child support, or alimony—that are past due as of the filing date of your bankruptcy case? 11 U.S.C. § 507.

- No. Go to line 36.
- Yes. Fill in the total amount of all of these priority claims. Do not include current or ongoing priority claims, such as those you listed in line 19.

Total amount of all past-due priority claims $\ldots$ + 60 = $\ldots$

For more information, go online using the link for Bankruptcy Basics specified in the separate instructions for this form. Bankruptcy Basics may also be available at the bankruptcy clerk’s office.

- No. Go to line 37.
- Yes. Fill in the following information.

Projected monthly plan payment if you were filing under Chapter 13

| $__________ |

Current multiplier for your district as stated on the list issued by the Administrative Office of the United States Courts (for districts in Alabama and North Carolina) or by the Executive Office for United States Trustees (for all other districts).

| X ______ |

To find a list of district multipliers that includes your district, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk’s office.

Average monthly administrative expense if you were filing under Chapter 13

| $__________ | Copy total here |

37. **Add all of the deductions for debt payment.**

Add lines 33e through 36.

| $__________ |

**Total Deductions from Income**

38. **Add all of the allowed deductions.**

- Copy line 24, All of the expenses allowed under IRS expense allowances
  | $__________ |

- Copy line 32, All of the additional expense deductions
  | $__________ |

- Copy line 37, All of the deductions for debt payment
  | $__________ |

Total deductions

| $__________ | Copy total here |

Part 3: **Determine Whether There Is a Presumption of Abuse**

39. **Calculate monthly disposable income for 60 months**

39a. Copy line 4, adjusted current monthly income

| $__________ |

39b. Copy line 38, Total deductions

| $__________ |


Subtract line 39b from line 39a.

| $__________ | Copy here |

For the next 60 months (5 years)

| $__________ | Copy here |

39d. **Total.** Multiply line 39c by 60.

| $__________ | Copy here |

40. **Find out whether there is a presumption of abuse.** Check the box that applies:

- The line 39d is less than $7,700*. On the top of page 1 of this form, check box 1, There is no presumption of abuse. Go to Part 5.

- The line 39d is more than $12,850*. On the top of page 1 of this form, check box 2, There is a presumption of abuse. You may fill out Part 4 if you claim special circumstances. Then go to Part 5.

- The line 39d is at least $7,700*, but not more than $12,850*. Go to line 41.

  * Subject to adjustment on 4/01/19, and every 3 years after that for cases filed on or after the date of adjustment.
41. **Fill in the amount of your total nonpriority unsecured debt.** If you filled out *A Summary of Your Assets and Liabilities and Certain Statistical Information Schedules* (Official Form 106Sum), you may refer to line 3b on that form.

\[ \text{Total nonpriority unsecured debt} \times 0.25 \]


Multiply line 41a by 0.25.  

42. **Determine whether the income you have left over after subtracting all allowed deductions is enough to pay 25% of your unsecured, nonpriority debt.**

Check the box that applies:

- **Line 39d is less than line 41b.** On the top of page 1 of this form, check box 1, *There is no presumption of abuse.* Go to Part 5.

- **Line 39d is equal to or more than line 41b.** On the top of page 1 of this form, check box 2, *There is a presumption of abuse.* You may fill out Part 4 if you claim special circumstances. Then go to Part 5.

**Part 4: Give Details About Special Circumstances**

43. Do you have any special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative? 11 U.S.C. § 707(b)(2)(B).

- **No.** Go to Part 5.

- **Yes.** Fill in the following information. All figures should reflect your average monthly expense or income adjustment for each item. You may include expenses you listed in line 25.

You must give a detailed explanation of the special circumstances that make the expenses or income adjustments necessary and reasonable. You must also give your case trustee documentation of your actual expenses or income adjustments.

<table>
<thead>
<tr>
<th>Give a detailed explanation of the special circumstances</th>
<th>Average monthly expense or income adjustment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$__________________</td>
</tr>
<tr>
<td></td>
<td>$__________________</td>
</tr>
<tr>
<td></td>
<td>$__________________</td>
</tr>
<tr>
<td></td>
<td>$__________________</td>
</tr>
</tbody>
</table>

**Part 5: Sign Below**

By signing here, I declare under penalty of perjury that the information on this statement and in any attachments is true and correct.

[Signature]

Signature of Debtor 1

Date MM/DD/YYYY

[Signature]

Signature of Debtor 2

Date MM/DD/YYYY

Official Form 122A–2  Chapter 7 Means Test Calculation  page 9
# Chapter 4—Means Testing

In re ______________________________  
Debtor(s)  
Case Number: __________________  
(If known)

According to the information required to be entered on this statement (check one box as directed in Part I, III, or VI of this statement):

- The presumption arises.
- The presumption does not arise.
- The presumption is temporarily inapplicable.

## CHAPTER 7 STATEMENT OF CURRENT MONTHLY INCOME AND MEANS-TEST CALCULATION

In addition to Schedules I and J, this statement must be completed by every individual chapter 7 debtor. If none of the exclusions in Part I applies, joint debtors may complete one statement only. If any of the exclusions in Part I applies, joint debtors should complete separate statements if they believe this is required by § 707(b)(2)(C).

### Part I. MILITARY AND NON-CONSUMER DEBTORS

#### 1A Disabled Veterans. If you are a disabled veteran described in the Declaration in this Part IA, (1) check the box at the beginning of the Declaration, (2) check the box for “The presumption does not arise” at the top of this statement, and (3) complete the verification in Part VIII. Do not complete any of the remaining parts of this statement.

**Declaration of Disabled Veteran.** By checking this box, I declare under penalty of perjury that I am a disabled veteran (as defined in 38 U.S.C. § 3741(1)) whose indebtedness occurred primarily during a period in which I was on active duty (as defined in 10 U.S.C. § 101(d)(1)) or while I was performing a homeland defense activity (as defined in 32 U.S.C. §901(1)).

#### 1B Non-consumer Debtors. If your debts are not primarily consumer debts, check the box below and complete the verification in Part VIII. Do not complete any of the remaining parts of this statement.

**Declaration of non-consumer debts.** By checking this box, I declare that my debts are not primarily consumer debts.

#### 1C Reservists and National Guard Members; active duty or homeland defense activity. Members of a reserve component of the Armed Forces and members of the National Guard who were called to active duty (as defined in 10 U.S.C. § 101(d)(1)) after September 11, 2001, for a period of at least 90 days, or who have performed homeland defense activity (as defined in 32 U.S.C. § 901(1)) for a period of at least 90 days, are excluded from all forms of means testing during the time of active duty or homeland defense activity and for 540 days thereafter (the “exclusion period”). If you qualify for this temporary exclusion, (1) check the appropriate boxes and complete any required information in the Declaration of Reservists and National Guard Members below, (2) check the box for “The presumption is temporarily inapplicable” at the top of this statement, and (3) complete the verification in Part VIII. During your exclusion period you are not required to complete the balance of this form, but you must complete the form no later than 14 days after the date on which your exclusion period ends, unless the time for filing a motion raising the means test presumption expires in your case before your exclusion period ends.

**Declaration of Reservists and National Guard Members.** By checking this box and making the appropriate entries below, I declare that I am eligible for a temporary exclusion from means testing because, as a member of a reserve component of the Armed Forces or the National Guard

- a. [ ] I was called to active duty after September 11, 2001, for a period of at least 90 days and
  - [ ] I remain on active duty /or/
  - [ ] I was released from active duty on ____________, which is less than 540 days before this bankruptcy case was filed;
  
  OR

- b. [ ] I am performing homeland defense activity for a period of at least 90 days /or/
  - [ ] I performed homeland defense activity for a period of at least 90 days, terminating on ____________, which is less than 540 days before this bankruptcy case was filed.
## Part II. CALCULATION OF MONTHLY INCOME FOR § 707(b)(7) EXCLUSION

<table>
<thead>
<tr>
<th>Marital/filing status</th>
<th>Column A</th>
<th>Column B</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unmarried</td>
<td>Debtor’s Income</td>
<td>Spouse’s Income</td>
</tr>
<tr>
<td>Married, not filing jointly</td>
<td>Debtor’s Income</td>
<td>Spouse’s Income</td>
</tr>
<tr>
<td>Married, filing jointly</td>
<td>Debtor’s Income</td>
<td>Spouse’s Income</td>
</tr>
</tbody>
</table>

All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.

### 3 Gross wages, salary, tips, bonuses, overtime, commissions.

#### Income from the operation of a business, profession or farm.

<table>
<thead>
<tr>
<th>Gross receipts</th>
<th>Ordinary and necessary business expenses</th>
<th>Business income</th>
</tr>
</thead>
<tbody>
<tr>
<td>$</td>
<td>$</td>
<td>Subtract Line b from Line a</td>
</tr>
</tbody>
</table>

Do not include any part of the business expenses entered on Line b as a deduction in Part V.

### 5 Rent and other real property income.

<table>
<thead>
<tr>
<th>Gross receipts</th>
<th>Ordinary and necessary operating expenses</th>
<th>Rent and other real property income</th>
</tr>
</thead>
<tbody>
<tr>
<td>$</td>
<td>$</td>
<td>Subtract Line b from Line a</td>
</tr>
</tbody>
</table>

Do not include any part of the operating expenses entered on Line b as a deduction in Part V.

### 8 Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor’s dependents, including child support paid for that purpose.

<table>
<thead>
<tr>
<th>Gross receipts</th>
<th>$</th>
</tr>
</thead>
</table>

Do not include alimony or separate maintenance payments or amounts paid by your spouse if Column B is completed. Each regular payment should be reported in only one column; if a payment is listed in Column A, do not report that payment in Column B.

### 9 Unemployment compensation.

Enter the amount in the appropriate column(s) of Line 9. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below:

Unemployment compensation claimed to be a benefit under the Social Security Act

<table>
<thead>
<tr>
<th>Debtor</th>
<th>Spouse</th>
<th>$</th>
</tr>
</thead>
</table>

Debtor $_______ Spouse $_______
### Chapter 4—Means Testing

**Income from all other sources.** Specify source and amount. If necessary, list additional sources on a separate page. *Do not include alimony or separate maintenance payments paid by your spouse if Column B is completed, but include all other payments of alimony or separate maintenance.* Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism.

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>$</td>
</tr>
<tr>
<td>b.</td>
<td>$</td>
</tr>
</tbody>
</table>

Total and enter on Line 10

**Subtotal of Current Monthly Income for § 707(b)(7).** Add Lines 3 thru 10 in Column A, and, if Column B is completed, add Lines 3 through 10 in Column B. Enter the total(s).

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
</table>

**Total Current Monthly Income for § 707(b)(7).** If Column B has been completed, add Line 11, Column A to Line 11, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 11, Column A.

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
</table>

### Part III. APPLICATION OF § 707(b)(7) EXCLUSION

**Annualized Current Monthly Income for § 707(b)(7).** Multiply the amount from Line 12 by the number 12 and enter the result.

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
</table>

**Applicable median family income.** Enter the median family income for the applicable state and household size. (This information is available by family size at [www.usdoj.gov/ust/](http://www.usdoj.gov/ust/) or from the clerk of the bankruptcy court.)

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Enter debtor’s state of residence: _______________</td>
<td>b. Enter debtor’s household size: __________</td>
</tr>
</tbody>
</table>

**Application of Section 707(b)(7).** Check the applicable box and proceed as directed.

- **☐ The amount on Line 13 is less than or equal to the amount on Line 14.** Check the box for “The presumption does not arise” at the top of page 1 of this statement, and complete Part VIII; do not complete Parts IV, V, VI or VII.
- **☐ The amount on Line 13 is more than the amount on Line 14.** Complete the remaining parts of this statement.

### Complete Parts IV, V, VI, and VII of this statement only if required. (See Line 15.)

### Part IV. CALCULATION OF CURRENT MONTHLY INCOME FOR § 707(b)(2)

**Marital adjustment.** If you checked the box at Line 2.c, enter on Line 17 the total of any income listed in Line 11, Column B that was NOT paid on a regular basis for the household expenses of the debtor or the debtor’s dependents. Specify in the lines below the basis for excluding the Column B income (such as payment of the spouse’s tax liability or the spouse’s support of persons other than the debtor or the debtor’s dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If you did not check box at Line 2.c, enter zero.

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>$</td>
</tr>
<tr>
<td>b.</td>
<td>$</td>
</tr>
<tr>
<td>c.</td>
<td>$</td>
</tr>
</tbody>
</table>

Total and enter on Line 17.

**Current monthly income for § 707(b)(2).** Subtract Line 17 from Line 16 and enter the result.

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
</table>
### Part V. CALCULATION OF DEDUCTIONS FROM INCOME

#### Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
<th>Formula</th>
</tr>
</thead>
<tbody>
<tr>
<td>19A</td>
<td>National Standards: food, clothing and other items. Enter in Line 19A the “Total” amount from IRS National Standards for Food, Clothing and Other Items for the applicable number of persons. (This information is available at <a href="http://www.usdoj.gov/ust">www.usdoj.gov/ust</a> or from the clerk of the bankruptcy court.) The applicable number of persons is the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.</td>
<td>$</td>
</tr>
<tr>
<td>19B</td>
<td>National Standards: health care. Enter in Line a1 below the amount from IRS National Standards for Out-of-Pocket Health Care for persons under 65 years of age, and in Line a2 the IRS National Standards for Out-of-Pocket Health Care for persons 65 years of age or older. (This information is available at <a href="http://www.usdoj.gov/ust">www.usdoj.gov/ust</a> or from the clerk of the bankruptcy court.) Enter in Line b1 the applicable number of persons who are under 65 years of age, and enter in Line b2 the applicable number of persons who are 65 years of age or older. (The applicable number of persons in each age category is the number in that category that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.) Multiply Line a1 by Line b1 to obtain a total amount for persons under 65, and enter the result in Line c1. Multiply Line a2 by Line b2 to obtain a total amount for persons 65 and older, and enter the result in Line c2. Add Lines c1 and c2 to obtain a total health care amount, and enter the result in Line 19B.</td>
<td>$</td>
</tr>
<tr>
<td>20A</td>
<td>Local Standards: housing and utilities; non-mortgage expenses. Enter the amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and family size. (This information is available at <a href="http://www.usdoj.gov/ust">www.usdoj.gov/ust</a> or from the clerk of the bankruptcy court). The applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.</td>
<td>$</td>
</tr>
<tr>
<td>20B</td>
<td>Local Standards: housing and utilities; mortgage/rent expense. Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county and family size (this information is available at <a href="http://www.usdoj.gov/ust">www.usdoj.gov/ust</a> or from the clerk of the bankruptcy court) (the applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 42; subtract Line b from Line a and enter the result in Line 20B. <strong>Do not enter an amount less than zero.</strong></td>
<td>$</td>
</tr>
<tr>
<td>21</td>
<td>Local Standards: housing and utilities; adjustment. If you contend that the process set out in Lines 20A and 20B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention in the space below:</td>
<td>$</td>
</tr>
</tbody>
</table>
### Local Standards: transportation; vehicle operation/public transportation expense

You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation. Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 8.

- 0
- 1
- 2 or more.

If you checked 0, enter on Line 22A the “Public Transportation” amount from IRS Local Standards: Transportation. If you checked 1 or 2 or more, enter on Line 22A the “Operating Costs” amount from IRS Local Standards: Transportation for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (These amounts are available at [www.usdoj.gov/ust](http://www.usdoj.gov/ust) or from the clerk of the bankruptcy court.)

### Local Standards: transportation; additional public transportation expense

If you pay the operating expenses for a vehicle and also use public transportation, and you contend that you are entitled to an additional deduction for your public transportation expenses, enter on Line 22B the “Public Transportation” amount from IRS Local Standards: Transportation. (This amount is available at [www.usdoj.gov/ust](http://www.usdoj.gov/ust) or from the clerk of the bankruptcy court.)

### Local Standards: transportation ownership/lease expense; Vehicle 1

Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.)

- 1
- 2 or more.

Enter, in Line a below, the “Ownership Costs” for “One Car” from the IRS Local Standards: Transportation (available at [www.usdoj.gov/ust](http://www.usdoj.gov/ust) or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 42; subtract Line b from Line a and enter the result in Line 23. **Do not enter an amount less than zero.**

<table>
<thead>
<tr>
<th></th>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>IRS Transportation Standards, Ownership Costs</td>
<td></td>
</tr>
<tr>
<td>b.</td>
<td>Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 42</td>
<td></td>
</tr>
<tr>
<td>c.</td>
<td>Net ownership/lease expense for Vehicle 1</td>
<td></td>
</tr>
</tbody>
</table>

### Local Standards: transportation ownership/lease expense; Vehicle 2

Complete this Line only if you checked the “2 or more” Box in Line 23.

Enter, in Line a below, the “Ownership Costs” for “One Car” from the IRS Local Standards: Transportation (available at [www.usdoj.gov/ust](http://www.usdoj.gov/ust) or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 42; subtract Line b from Line a and enter the result in Line 24. **Do not enter an amount less than zero.**

<table>
<thead>
<tr>
<th></th>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>IRS Transportation Standards, Ownership Costs</td>
<td></td>
</tr>
<tr>
<td>b.</td>
<td>Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 42</td>
<td></td>
</tr>
<tr>
<td>c.</td>
<td>Net ownership/lease expense for Vehicle 2</td>
<td></td>
</tr>
</tbody>
</table>

### Other Necessary Expenses: taxes

Enter the total average monthly expense that you actually incur for all federal, state and local taxes, other than real estate and sales taxes, such as income taxes, self-employment taxes, social-security taxes, and Medicare taxes. **Do not include real estate or sales taxes.**

### Other Necessary Expenses: involuntary deductions for employment

Enter the total average monthly payroll deductions that are required for your employment, such as retirement contributions, union dues, and uniform costs. **Do not include discretionary amounts, such as voluntary 401(k) contributions.**

### Other Necessary Expenses: life insurance

Enter total average monthly premiums that you actually pay for term life insurance for yourself. **Do not include premiums for insurance on your dependents, for whole life or for any other form of insurance.**

### Other Necessary Expenses: court-ordered payments

Enter the total monthly amount that you are required to pay pursuant to the order of a court or administrative agency, such as spousal or child support payments. **Do not include payments on past due obligations included in Line 44.**
### Chapter 4—Means Testing

<table>
<thead>
<tr>
<th>Line</th>
<th>Description</th>
<th>Instructions</th>
</tr>
</thead>
<tbody>
<tr>
<td>29</td>
<td><strong>Other Necessary Expenses:</strong> education for employment or for a physically or mentally challenged child.</td>
<td>Enter the total average monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.</td>
</tr>
<tr>
<td>30</td>
<td><strong>Other Necessary Expenses:</strong> childcare.</td>
<td>Enter the total average monthly amount that you actually expend on childcare—such as baby-sitting, day care, nursery and preschool. <strong>Do not include other educational payments.</strong></td>
</tr>
<tr>
<td>31</td>
<td><strong>Other Necessary Expenses:</strong> health care.</td>
<td>Enter the total average monthly amount that you actually expend on health care that is required for the health and welfare of yourself or your dependents, that is not reimbursed by insurance or paid by a health savings account, and that is in excess of the amount entered in Line 19B. <strong>Do not include payments for health insurance or health savings accounts listed in Line 34.</strong></td>
</tr>
<tr>
<td>32</td>
<td><strong>Other Necessary Expenses:</strong> telecommunication services.</td>
<td>Enter the total average monthly amount that you actually pay for telecommunication services other than your basic home telephone and cell phone service—such as pagers, call waiting, caller id, special long distance, or internet service—to the extent necessary for your health and welfare or that of your dependents. <strong>Do not include any amount previously deducted.</strong></td>
</tr>
<tr>
<td>33</td>
<td><strong>Total Expenses Allowed under IRS Standards.</strong></td>
<td>Enter the total of Lines 19 through 32.</td>
</tr>
</tbody>
</table>

### Subpart B: Additional Living Expense Deductions

**Note:** Do not include any expenses that you have listed in Lines 19-32

<table>
<thead>
<tr>
<th>Line</th>
<th>Description</th>
<th>Instructions</th>
</tr>
</thead>
<tbody>
<tr>
<td>34</td>
<td><strong>Health Insurance, Disability Insurance, and Health Savings Account Expenses.</strong> List the monthly expenses in the categories set out in lines a-c below that are reasonably necessary for yourself, your spouse, or your dependents.</td>
<td></td>
</tr>
<tr>
<td>a.</td>
<td>Health Insurance</td>
<td>$</td>
</tr>
<tr>
<td>b.</td>
<td>Disability Insurance</td>
<td>$</td>
</tr>
<tr>
<td>c.</td>
<td>Health Savings Account</td>
<td>$</td>
</tr>
<tr>
<td></td>
<td>Total and enter on Line 34</td>
<td>$</td>
</tr>
<tr>
<td></td>
<td>If you do not actually expend this total amount, state your actual total average monthly expenditures in the space below:</td>
<td>$</td>
</tr>
<tr>
<td>35</td>
<td><strong>Continued contributions to the care of household or family members.</strong></td>
<td>Enter the total average monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses.</td>
</tr>
<tr>
<td>36</td>
<td><strong>Protection against family violence.</strong></td>
<td>Enter the total average reasonably necessary monthly expenses that you actually incurred to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law. The nature of these expenses is required to be kept confidential by the court.</td>
</tr>
<tr>
<td>37</td>
<td><strong>Home energy costs.</strong></td>
<td>Enter the total average monthly amount, in excess of the allowance specified by IRS Local Standards for Housing and Utilities, that you actually expend for home energy costs. <strong>You must provide your case trustee with documentation of your actual expenses, and you must demonstrate that the additional amount claimed is reasonable and necessary.</strong></td>
</tr>
<tr>
<td>38</td>
<td><strong>Education expenses for dependent children less than 18.</strong></td>
<td>Enter the total average monthly expenses that you actually incur, not to exceed $156.25* per child, for attendance at a private or public elementary or secondary school by your dependent children less than 18 years of age. <strong>You must provide your case trustee with documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.</strong></td>
</tr>
</tbody>
</table>

*Amount subject to adjustment on 4/01/16, and every three years thereafter with respect to cases commenced on or after the date of adjustment.*
### Chapter 4—Means Testing

<table>
<thead>
<tr>
<th><strong>39</strong></th>
<th><strong>Additional food and clothing expense.</strong> Enter the total average monthly amount by which your food and clothing expenses exceed the combined allowances for food and clothing (apparel and services) in the IRS National Standards, not to exceed 5% of those combined allowances. (This information is available at <a href="http://www.usdoj.gov/ust/">www.usdoj.gov/ust/</a> or from the clerk of the bankruptcy court.) You must demonstrate that the additional amount claimed is reasonable and necessary.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>40</strong></td>
<td><strong>Continued charitable contributions.</strong> Enter the amount that you will continue to contribute in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2).</td>
</tr>
<tr>
<td><strong>41</strong></td>
<td><strong>Total Additional Expense Deductions under § 707(b).</strong> Enter the total of Lines 34 through 40</td>
</tr>
</tbody>
</table>

### Subpart C: Deductions for Debt Payment

<table>
<thead>
<tr>
<th><strong>42</strong></th>
<th><strong>Future payments on secured claims.</strong> For each of your debts that is secured by an interest in property that you own, list the name of the creditor, identify the property securing the debt, state the Average Monthly Payment, and check whether the payment includes taxes or insurance. The Average Monthly Payment is the total of all amounts scheduled as contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. Enter the total of the Average Monthly Payments on Line 42.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>43</strong></td>
<td><strong>Other payments on secured claims.</strong> If any of debts listed in Line 42 are secured by your primary residence, a motor vehicle, or other property necessary for your support or the support of your dependents, you may include in your deduction 1/60th of any amount (the “cure amount”) that you must pay the creditor in addition to the payments listed in Line 42, in order to maintain possession of the property. The cure amount would include any sums in default that must be paid in order to avoid repossession or foreclosure. List and total any such amounts in the following chart. If necessary, list additional entries on a separate page.</td>
</tr>
<tr>
<td><strong>44</strong></td>
<td><strong>Payments on prepetition priority claims.</strong> Enter the total amount, divided by 60, of all priority claims, such as priority tax, child support and alimony claims, for which you were liable at the time of your bankruptcy filing. Do not include current obligations, such as those set out in Line 28.</td>
</tr>
</tbody>
</table>
### Chapter 4—Means Testing

**Chapter 13 administrative expenses.** If you are eligible to file a case under chapter 13, complete the following chart, multiply the amount in line a by the amount in line b, and enter the resulting administrative expense.

<table>
<thead>
<tr>
<th>Line</th>
<th>Description</th>
<th>Monthly Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>45a</td>
<td>Projected average monthly chapter 13 plan payment</td>
<td>$</td>
</tr>
<tr>
<td>45b</td>
<td>Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at <a href="http://www.usdoj.gov/ust/">www.usdoj.gov/ust/</a> or from the clerk of the bankruptcy court.)</td>
<td>x</td>
</tr>
<tr>
<td>45c</td>
<td>Average monthly administrative expense of chapter 13 case</td>
<td>Total: Multiply Lines a and b $</td>
</tr>
</tbody>
</table>

**Total Deductions for Debt Payment.** Enter the total of Lines 42 through 45. $

**Subpart D: Total Deductions from Income**

<table>
<thead>
<tr>
<th>Line</th>
<th>Description</th>
<th>Monthly Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>47</td>
<td>Total of all deductions allowed under § 707(b)(2). Enter the total of Lines 33, 41, and 46.</td>
<td>$</td>
</tr>
</tbody>
</table>

**Part VI. DETERMINATION OF § 707(b)(2) PRESUMPTION**

<table>
<thead>
<tr>
<th>Line</th>
<th>Description</th>
<th>Monthly Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>48</td>
<td>Enter the amount from Line 18 (Current monthly income for § 707(b)(2))</td>
<td>$</td>
</tr>
<tr>
<td>49</td>
<td>Enter the amount from Line 47 (Total of all deductions allowed under § 707(b)(2))</td>
<td>$</td>
</tr>
<tr>
<td>50</td>
<td>Monthly disposable income under § 707(b)(2). Subtract Line 49 from Line 48 and enter the result</td>
<td>$</td>
</tr>
<tr>
<td>51</td>
<td>60-month disposable income under § 707(b)(2). Multiply the amount in Line 50 by the number 60 and enter the result.</td>
<td>$</td>
</tr>
</tbody>
</table>

**Initial presumption determination.** Check the applicable box and proceed as directed.

- The amount on Line 51 is less than $7,475*. Check the box for “The presumption does not arise” at the top of page 1 of this statement, and complete the verification in Part VIII. Do not complete the remainder of Part VI.
- The amount set forth on Line 51 is more than $12,475*. Check the box for “The presumption arises” at the top of page 1 of this statement, and complete the verification in Part VIII. You may also complete Part VII. Do not complete the remainder of Part VI.
- The amount on Line 51 is at least $7,475*, but not more than $12,475*. Complete the remainder of Part VI (Lines 53 through 55).

<table>
<thead>
<tr>
<th>Line</th>
<th>Description</th>
<th>Monthly Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>52</td>
<td>Enter the amount of your total non-priority unsecured debt</td>
<td>$</td>
</tr>
<tr>
<td>54</td>
<td>Threshold debt payment amount. Multiply the amount in Line 53 by the number 0.25 and enter the result.</td>
<td>$</td>
</tr>
</tbody>
</table>

**Secondary presumption determination.** Check the applicable box and proceed as directed.

- The amount on Line 51 is less than the amount on Line 54. Check the box for “The presumption does not arise” at the top of page 1 of this statement, and complete the verification in Part VIII.
- The amount on Line 51 is equal to or greater than the amount on Line 54. Check the box for “The presumption arises” at the top of page 1 of this statement, and complete the verification in Part VIII. You may also complete Part VII.

**Part VII: ADDITIONAL EXPENSE CLAIMS**

**Other Expenses.** List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.

<table>
<thead>
<tr>
<th>Expense Description</th>
<th>Monthly Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>$</td>
</tr>
<tr>
<td>b.</td>
<td>$</td>
</tr>
<tr>
<td>c.</td>
<td>$</td>
</tr>
</tbody>
</table>

Total: Add Lines a, b and c $

*Amounts are subject to adjustment on 4/01/16, and every three years thereafter with respect to cases commenced on or after the date of adjustment.*
### Part VIII: VERIFICATION

I declare under penalty of perjury that the information provided in this statement is true and correct. *(If this is a joint case, both debtors must sign.)*

<table>
<thead>
<tr>
<th>Date: __________________________</th>
<th>Signature: __________________________</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Debtor)</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Date: __________________________</th>
<th>Signature: __________________________</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Joint Debtor, if any)</td>
<td></td>
</tr>
</tbody>
</table>
**Official Form 122C-1**

**Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period**

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

### Part 1: Calculate Your Average Monthly Income

1. **What is your marital and filing status?** Check one only.
   - Not married. Fill out Column A, lines 2-11.
   - Married. Fill out both Columns A and B, lines 2-11.

   Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

<table>
<thead>
<tr>
<th>Column A</th>
<th>Column B</th>
</tr>
</thead>
<tbody>
<tr>
<td>Debtor 1</td>
<td>Debtor 2 or non-filing spouse</td>
</tr>
</tbody>
</table>

2. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).
   $________ $________

3. **Alimony and maintenance payments.** Do not include payments from a spouse.
   $________

4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Do not include payments from a spouse. Do not include payments you listed on line 3.
   $________ $________

5. **Net income from operating a business, profession, or farm**
   - Gross receipts (before all deductions)
     $______ $______
   - Ordinary and necessary operating expenses
     $______ $______
   - Net monthly income from a business, profession, or farm
     $______ $______

6. **Net income from rental and other real property**
   - Gross receipts (before all deductions)
     $______ $______
   - Ordinary and necessary operating expenses
     $______ $______
   - Net monthly income from rental or other real property
     $______ $______

**Check as directed in lines 17 and 21:**

- 1. Disposable income is not determined under 11 U.S.C. § 1325(b)(3).
- 3. The commitment period is 3 years.
- 4. The commitment period is 5 years.

☐ Check if this is an amended filing
Part 1: Determine Your Income

7. Interest, dividends, and royalties
   $________________ $________________

8. Unemployment compensation
   Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ............................................
   For you: $________________
   For your spouse: $________________

9. Pension or retirement income. Do not include any amount received that was a benefit under the Social Security Act.
   $________________ $________________

10. Income from all other sources not listed above. Specify the source and amount.
    Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total below.

   $________________ $________________
   $________________ $________________
   + $________________ + $________________
   Total amounts from separate pages, if any.

11. Calculate your total average monthly income. Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.

   Column A  
   Debtor 1  
   $________________
   + $________________ 
   Column B  
   Debtor 2 or non-filing spouse  
   $________________
   + $________________ 
   Total average monthly income: $________________

Part 2: Determine How to Measure Your Deductions from Income

12. Copy your total average monthly income from line 11. $________________

13. Calculate the marital adjustment. Check one:
   - You are not married. Fill in 0 below.
   - You are married and your spouse is filing with you. Fill in 0 below.
   - You are married and your spouse is not filing with you.
     Fill in the amount of the income listed in line 11, Column B, that was NOT regularly paid for the household expenses of you or your dependents, such as payment of the spouse’s tax liability or the spouse’s support of someone other than you or your dependents.
     Below, specify the basis for excluding this income and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page.
     If this adjustment does not apply, enter 0 below.

     $________________ $________________
     + $________________
     Total: $________________

14. Your current monthly income. Subtract the total in line 13 from line 12. $________________

15. Calculate your current monthly income for the year. Follow these steps:
   15a. Copy line 14 here $________________
   Multiply line 15a by 12 (the number of months in a year). $________________

   15b. The result is your current monthly income for the year for this part of the form. $________________
Chapter 4—Means Testing

Debtor 1 ______________________________________________________
First Name Middle Name Last Name

Chapter 4—Means Testing

16. Calculate the median family income that applies to you. Follow these steps:
   16a. Fill in the state in which you live. __________
   16b. Fill in the number of people in your household. __________
   16c. Fill in the median family income for your state and size of household. ................................................................. $__________
       To find a list of applicable median income amounts, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk’s office.

17. How do the lines compare?
   17a. □ Line 15b is less than or equal to line 16c. On the top of page 1 of this form, check box 1, Disposable income is not determined under 11 U.S.C. § 1325(b)(3). Go to Part 3. Do NOT fill out Calculation of Your Disposable Income (Official Form 122C–2).
   17b. □ Line 15b is more than line 16c. On the top of page 1 of this form, check box 2, Disposable income is determined under 11 U.S.C. § 1325(b)(3). Go to Part 3 and fill out Calculation of Your Disposable Income (Official Form 122C–2).


18. Copy your total average monthly income from line 11. .......................................................................................................................... $__________
19. Deduct the marital adjustment if it applies. If you are married, your spouse is not filing with you, and you contend that calculating the commitment period under 11 U.S.C. § 1325(b)(4) allows you to deduct part of your spouse’s income, copy the amount from line 13.
   19a. If the marital adjustment does not apply, fill in 0 on line 19a. ........................................................................................................ $__________
   19b. Subtract line 19a from line 18. ........................................................................................................................................ $__________
20. Calculate your current monthly income for the year. Follow these steps:
   20a. Copy line 19b......................................................................................................................................................... $__________
       Multiply by 12 (the number of months in a year).
   20b. The result is your current monthly income for the year for this part of the form. $__________
   20c. Copy the median family income for your state and size of household from line 16c. ........................................................... $__________
21. How do the lines compare?
   □ Line 20b is less than line 20c. Unless otherwise ordered by the court, on the top of page 1 of this form, check box 3, The commitment period is 3 years. Go to Part 4.
   □ Line 20b is more than or equal to line 20c. Unless otherwise ordered by the court, on the top of page 1 of this form, check box 4, The commitment period is 5 years. Go to Part 4.

Part 4: Sign Below

By signing here, under penalty of perjury I declare that the information on this statement and in any attachments is true and correct.

X ____________________________  X ____________________________
Signature of Debtor 1           Signature of Debtor 2

Date _______ MM / DD / YYYY    Date _______ MM / DD / YYYY

If you checked 17a, do NOT fill out or file Form 122C–2.
If you checked 17b, fill out Form 122C–2 and file it with this form. On line 39 of that form, copy your current monthly income from line 14 above.
Chapter 4—Means Testing

Official Form 122C-2

Chapter 13 Calculation of Your Disposable Income

To fill out this form, you will need your completed copy of Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period (Official Form 122C–1). Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Deductions from Your Income

The Internal Revenue Service (IRS) issues National and Local Standards for certain expense amounts. Use these amounts to answer the questions in lines 6-15. To find the IRS standards, go online using the link specified in the separate instructions for this form. This information may also be available at the bankruptcy clerk’s office.

Deduct the expense amounts set out in lines 6-15 regardless of your actual expense. In later parts of the form, you will use some of your actual expenses if they are higher than the standards. Do not include any operating expenses that you subtracted from income in lines 5 and 6 of Form 122C–1, and do not deduct any amounts that you subtracted from your spouse’s income in line 13 of Form 122C–1.

If your expenses differ from month to month, enter the average expense.

Note: Line numbers 1-4 are not used in this form. These numbers apply to information required by a similar form used in chapter 7 cases.

5. The number of people used in determining your deductions from income

Fill in the number of people who could be claimed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support. This number may be different from the number of people in your household.

National Standards
You must use the IRS National Standards to answer the questions in lines 6-7.

6. Food, clothing, and other items: Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for food, clothing, and other items.

$________

7. Out-of-pocket health care allowance: Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for out-of-pocket health care. The number of people is split into two categories—people who are under 65 and people who are 65 or older—because older people have a higher IRS allowance for health care costs. If your actual expenses are higher than this IRS amount, you may deduct the additional amount on line 22.

Debtor 1 __________________________________________________________________
First Name Middle Name Last Name

Debtor 2 ________________________________________________________________
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: __________ District of __________
Case number ___________________________________________
(If known)

☐ Check if this is an amended filing

Fill in this information to identify your case:

Official Form 122C-2
Chapter 13 Calculation of Your Disposable Income

30th Annual Northwest Bankruptcy Institute

4–42
Chapter 4—Means Testing

Debtor 1 _______________________________________________________ Case number (if known) _______________________

First Name Middle Name Last Name

Chapter 13 Calculation of Your Disposable Income

People who are under 65 years of age

7a. Out-of-pocket health care allowance per person $___________

7b. Number of people who are under 65

7c. Subtotal. Multiply line 7a by line 7b. $___________

People who are 65 years of age or older

7d. Out-of-pocket health care allowance per person $___________

7e. Number of people who are 65 or older

7f. Subtotal. Multiply line 7d by line 7e. $___________

7g. Total. Add lines 7c and 7f. $___________

Local Standards

You must use the IRS Local Standards to answer the questions in lines 8-15.

Based on information from the IRS, the U.S. Trustee Program has divided the IRS Local Standard for housing for bankruptcy purposes into two parts:

- Housing and utilities – Insurance and operating expenses
- Housing and utilities – Mortgage or rent expenses

To answer the questions in lines 8-9, use the U.S. Trustee Program chart. To find the chart, go online using the link specified in the separate instructions for this form. This chart may also be available at the bankruptcy clerk’s office.

8. Housing and utilities – Insurance and operating expenses: Using the number of people you entered in line 5, fill in the dollar amount listed for your county for insurance and operating expenses. $___________

9. Housing and utilities – Mortgage or rent expenses:

9a. Using the number of people you entered in line 5, fill in the dollar amount listed for your county for mortgage or rent expenses. $___________

9b. Total average monthly payment for all mortgages and other debts secured by your home.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Next divide by 60.

<table>
<thead>
<tr>
<th>Name of the creditor</th>
<th>Average monthly payment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$___________</td>
</tr>
<tr>
<td></td>
<td>$___________</td>
</tr>
<tr>
<td></td>
<td>$___________</td>
</tr>
<tr>
<td></td>
<td>+ $___________</td>
</tr>
</tbody>
</table>

9b. Total average monthly payment $___________

10. If you claim that the U.S. Trustee Program’s division of the IRS Local Standard for housing is incorrect and affects the calculation of your monthly expenses, fill in any additional amount you claim. $___________

Explain why: ____________________________________________

Copy here $___________

Repeat this amount on line 33a.

Official Form 122C-2

Chapter 13 Calculation of Your Disposable Income

30th Annual Northwest Bankruptcy Institute
11. **Local transportation expenses:** Check the number of vehicles for which you claim an ownership or operating expense.

- □ 0. Go to line 14.
- □ 1. Go to line 12.
- □ 2 or more. Go to line 12.

12. **Vehicle operation expense:** Using the IRS Local Standards and the number of vehicles for which you claim the operating expenses, fill in the Operating Costs that apply for your Census region or metropolitan statistical area. $____

13. **Vehicle ownership or lease expense:** Using the IRS Local Standards, calculate the net ownership or lease expense for each vehicle below. You may not claim the expense if you do not make any loan or lease payments on the vehicle. In addition, you may not claim the expense for more than two vehicles.

<table>
<thead>
<tr>
<th>Vehicle 1</th>
<th>Describe Vehicle 1:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

13a. Ownership or leasing costs using IRS Local Standard $________

13b. Average monthly payment for all debts secured by Vehicle 1.

   Do not include costs for leased vehicles.

   To calculate the average monthly payment here and on line 13e, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

<table>
<thead>
<tr>
<th>Name of each creditor for Vehicle 1</th>
<th>Average monthly payment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$________</td>
</tr>
<tr>
<td></td>
<td>$________</td>
</tr>
<tr>
<td>Total average monthly payment</td>
<td>$________</td>
</tr>
</tbody>
</table>

13c. Net Vehicle 1 ownership or lease expense

   Subtract line 13b from line 13a. If this number is less than $0, enter $0. ................ $________

   Copy net Vehicle 1 expense here $____

<table>
<thead>
<tr>
<th>Vehicle 2</th>
<th>Describe Vehicle 2:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

13d. Ownership or leasing costs using IRS Local Standard $________

13e. Average monthly payment for all debts secured by Vehicle 2.

   Do not include costs for leased vehicles.

<table>
<thead>
<tr>
<th>Name of each creditor for Vehicle 2</th>
<th>Average monthly payment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$________</td>
</tr>
<tr>
<td></td>
<td>$________</td>
</tr>
<tr>
<td>Total average monthly payment</td>
<td>$________</td>
</tr>
</tbody>
</table>

13f. Net Vehicle 2 ownership or lease expense

   Subtract line 13e from 13d. If this number is less than $0, enter $0........ $________

   Copy net Vehicle 2 expense here $____

14. **Public transportation expense:** If you claimed 0 vehicles in line 11, using the IRS Local Standards, fill in the Public Transportation expense allowance regardless of whether you use public transportation. $____

15. **Additional public transportation expense:** If you claimed 1 or more vehicles in line 11 and if you claim that you may also deduct a public transportation expense, you may fill in what you believe is the appropriate expense, but you may not claim more than the IRS Local Standard for Public Transportation. $____
Chapter 4—Means Testing

<table>
<thead>
<tr>
<th>Other Necessary Expenses</th>
<th>In addition to the expense deductions listed above, you are allowed your monthly expenses for the following IRS categories.</th>
</tr>
</thead>
</table>
16. **Taxes:** The total monthly amount that you actually pay for federal, state and local taxes, such as income taxes, self-employment taxes, social security taxes, and Medicare taxes. You may include the monthly amount withheld from your pay for these taxes. However, if you expect to receive a tax refund, you must divide the expected refund by 12 and subtract that number from the total monthly amount that is withheld to pay for taxes. Do not include real estate, sales, or use taxes. |
| **Involuntary deductions:** The total monthly payroll deductions that your job requires, such as retirement contributions, union dues, and uniform costs. Do not include amounts that are not required by your job, such as voluntary 401(k) contributions or payroll savings. |
17. **Life insurance:** The total monthly premiums that you pay for your own term life insurance. If two married people are filing together, include payments that you make for your spouse’s term life insurance. Do not include premiums for life insurance on your dependents, for a non-filing spouse’s life insurance, or for any form of life insurance other than term. |
18. **Court-ordered payments:** The total monthly amount that you pay as required by the order of a court or administrative agency, such as spousal or child support payments. Do not include payments on past due obligations for spousal or child support. You will list these obligations in line 35. |
19. **Education:** The total monthly amount that you pay for education that is either required:  
- as a condition for your job, or  
- for your physically or mentally challenged dependent child if no public education is available for similar services. |
20. **Childcare:** The total monthly amount that you pay for childcare, such as babysitting, daycare, nursery, and preschool. Do not include payments for any elementary or secondary school education. |
21. **Additional health care expenses, excluding insurance costs:** The monthly amount that you pay for health care that is required for the health and welfare of you or your dependents and that is not reimbursed by insurance or paid by a health savings account. Include only the amount that is more than the total entered in line 7. Payments for health insurance or health savings accounts should be listed only in line 25. |
22. **Optional telephones and telephone services:** The total monthly amount that you pay for telecommunication services for you and your dependents, such as pagers, call waiting, caller identification, special long distance, or business cell phone service, to the extent necessary for your health and welfare or that of your dependents or for the production of income, if it is not reimbursed by your employer. Do not include payments for basic home telephone, internet or cell phone service. Do not include self-employment expenses, such as those reported on line 5 of Form 122C-1, or any amount you previously deducted.  
+ $_______ |
23. **Add all of the expenses allowed under the IRS expense allowances.**  
Add lines 6 through 23. |
24. **Health insurance, disability insurance, and health savings account expenses.** The monthly expenses for health insurance, disability insurance, and health savings accounts that are reasonably necessary for yourself, your spouse, or your dependents.  
| Health insurance | $_______  
| Disability insurance | $_______  
| Health savings account | + $_______  
| Total | $_______  
Do you actually spend this total amount?  
☐ No. How much do you actually spend? $_______  
☐ Yes |
25. **Continuing contributions to the care of household or family members.** The actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. These expenses may include contributions to an account of a qualified ABLE program. 26 U.S.C. § 529A(b). |
26. **Protection against family violence.** The reasonably necessary monthly expenses that you incur to maintain the safety of you and your family under the Family Violence Prevention and Services Act or other federal laws that apply.  
By law, the court must keep the nature of these expenses confidential. $_______
### Chapter 4—Means Testing

**Debtor 1**

First Name Middle Name Last Name

Case number (if known)

---

**Chapter 13 Calculation of Your Disposable Income**

#### 28. Additional home energy costs.

Your home energy costs are included in your insurance and operating expenses on line 8.

If you believe that you have home energy costs that are more than the home energy costs included in expenses on line 8, then fill in the excess amount of home energy costs.

You must give your case trustee documentation of your actual expenses, and you must show that the additional amount claimed is reasonable and necessary.

$_____

#### 29. Education expenses for dependent children who are younger than 18.

The monthly expenses (not more than $160.42* per child) that you pay for your dependent children who are younger than 18 years old to attend a private or public elementary or secondary school.

You must give your case trustee documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in lines 6-23.

- Subject to adjustment on 4/01/19, and every 3 years after that for cases begun on or after the date of adjustment.

$_____

#### 30. Additional food and clothing expense.

The monthly amount by which your actual food and clothing expenses are higher than the combined food and clothing allowances in the IRS National Standards. That amount cannot be more than 5% of the food and clothing allowances in the IRS National Standards.

To find a chart showing the maximum additional allowance, go online using the link specified in the separate instructions for this form. This chart may also be available at the bankruptcy clerk’s office.

You must show that the additional amount claimed is reasonable and necessary.

$_____

#### 31. Continuing charitable contributions.

The amount that you will continue to contribute in the form of cash or financial instruments to a religious or charitable organization. 11 U.S.C. § 548(d)(3) and (4).

Do not include any amount more than 15% of your gross monthly income.

$_____

#### 32. Add all of the additional expense deductions.

Add lines 25 through 31.

$_____

---

**Deductions for Debt Payment**

#### 33. For debts that are secured by an interest in property that you own, including home mortgages, vehicle loans, and other secured debt, fill in lines 33a through 33e.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

**Mortgages on your home**

33a. Copy line 9b here ............................................................... ➔ $_____

**Loans on your first two vehicles**

33b. Copy line 13b here. ........................................................... ➔ $_____

33c. Copy line 13e here. ........................................................... ➔ $_____

33d. List other secured debts:

<table>
<thead>
<tr>
<th>Name of each creditor for other secured debt</th>
<th>Identify property that secures the debt</th>
<th>Does payment include taxes or insurance?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>No</td>
</tr>
</tbody>
</table>
|                                             |                                        | $_____
|                                             |                                        | Yes                                      |
|                                             |                                        | $_____
|                                             |                                        | No                                       |
|                                             |                                        | $_____
|                                             |                                        | Yes                                      |
|                                             |                                        | $_____

33e. Total average monthly payment. Add lines 33a through 33d. ............................................................... ➔ $_____

**Official Form 122C-2**

Chapter 13 Calculation of Your Disposable Income

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Chapter 4—Means Testing

Debtor 1 _______________________________________________________ Case number (if known)_____________________________________

First Name Middle Name Last Name

Chapter 13 Calculation of Your Disposable Income

34. Are any debts that you listed in line 33 secured by your primary residence, a vehicle, or other property necessary for your support or the support of your dependents?

☐ No. Go to line 35.
☐ Yes. State any amount that you must pay to a creditor, in addition to the payments listed in line 33, to keep possession of your property (called the cure amount). Next, divide by 60 and fill in the information below.

<table>
<thead>
<tr>
<th>Name of the creditor</th>
<th>Identify property that secures the debt</th>
<th>Total cure amount</th>
<th>Monthly cure amount</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>$ _______ + 60 = $_______</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>$ _______ + 60 = $_______</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>$ _______ + 60 = + $_______</td>
<td></td>
</tr>
</tbody>
</table>

Total $____________________ Copy total here $_______

35. Do you owe any priority claims—such as a priority tax, child support, or alimony—that are past due as of the filing date of your bankruptcy case? 11 U.S.C. § 507.

☐ No. Go to line 36.
☐ Yes. Fill in the total amount of all of these priority claims. Do not include current or ongoing priority claims, such as those you listed in line 19.

Total amount of all past-due priority claims. ........................................ $___________ + 60 $_______

36. Projected monthly Chapter 13 plan payment $___________

Current multiplier for your district as stated on the list issued by the Administrative Office of the United States Courts (for districts in Alabama and North Carolina) or by the Executive Office for United States Trustees (for all other districts). X ______

To find a list of district multipliers that includes your district, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk’s office.

Average monthly administrative expense $___________ Copy total here $_______

37. Add all of the deductions for debt payment. Add lines 33e through 36. $_______

Total Deductions from Income

38. Add all of the allowed deductions.

Copy line 24, All of the expenses allowed under IRS expense allowances........................................ $___________

Copy line 32, All of the additional expense deductions.......................................................... $___________

Copy line 37, All of the deductions for debt payment .................................................................+$___________

Total deductions....................................................................................................................... $___________ Copy total here $_______

39. Copy your total current monthly income from line 14 of Form 122C-1, Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period. $_______

40. Fill in any reasonably necessary income you receive for support for dependent children. The monthly average of any child support payments, foster care payments, or disability payments for a dependent child, reported in Part I of Form 122C-1, that you received in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child. $_______

41. Fill in all qualified retirement deductions. The monthly total of all amounts that your employer withheld from wages as contributions for qualified retirement plans, as specified in 11 U.S.C. § 541(b)(7) plus all required repayments of loans from retirement plans, as specified in 11 U.S.C. § 362(b)(19). $_______

42. Total of all deductions allowed under 11 U.S.C. § 707(b)(2)(A). Copy line 38 here $_______

43. Deduction for special circumstances. If special circumstances justify additional expenses and you have no reasonable alternative, describe the special circumstances and their expenses. You must give your case trustee a detailed explanation of the special circumstances and documentation for the expenses.

<table>
<thead>
<tr>
<th>Describe the special circumstances</th>
<th>Amount of expense</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$_______</td>
</tr>
<tr>
<td></td>
<td>$_______</td>
</tr>
<tr>
<td>+ $</td>
<td>$_______</td>
</tr>
<tr>
<td>Total</td>
<td>$_______</td>
</tr>
</tbody>
</table>

44. Total adjustments. Add lines 40 through 43. $_______

45. Calculate your monthly disposable income under § 1325(b)(2). Subtract line 44 from line 39. $_______

Part 3: Change in Income or Expenses

46. Change in income or expenses. If the income in Form 122C-1 or the expenses you reported in this form have changed or are virtually certain to change after the date you filed your bankruptcy petition and during the time your case will be open, fill in the information below. For example, if the wages reported increased after you filed your petition, check 122C-1 in the first column, enter line 2 in the second column, explain why the wages increased, fill in when the increase occurred, and fill in the amount of the increase.

<table>
<thead>
<tr>
<th>Form</th>
<th>Line</th>
<th>Reason for change</th>
<th>Date of change</th>
<th>Increase or decrease?</th>
<th>Amount of change</th>
</tr>
</thead>
<tbody>
<tr>
<td>122C-1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>122C-2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>122C-1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>122C-2</td>
<td></td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>122C-1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>122C-2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Official Form 122C-2

Chapter 13 Calculation of Your Disposable Income
Chapter 4—Means Testing

Part 4: Sign Below

By signing here, under penalty of perjury you declare that the information on this statement and in any attachments is true and correct.

X ____________________________  X ____________________________
Signature of Debtor 1          Signature of Debtor 2

Date MM / DD / YYYY          Date MM / DD / YYYY

Debtor 1 _______________________________________________________ Case number (if known) ____________________________
First Name          Middle Name          Last Name
In re ______________________________
Debtor(s)

Case Number: __________________
(If known)

According to the calculations required by this statement:
☐ The applicable commitment period is 3 years.
☐ The applicable commitment period is 5 years.
☐ Disposable income is determined under § 1325(b)(3).
☐ Disposable income is not determined under § 1325(b)(3).
(Check the boxes as directed in Lines 17 and 23 of this statement.)

CHAPTER 13 STATEMENT OF CURRENT MONTHLY INCOME
AND CALCULATION OF COMMITMENT PERIOD AND DISPOSABLE INCOME

In addition to Schedules I and J, this statement must be completed by every individual chapter 13 debtor, whether or not filing jointly. Joint debtors may complete one statement only.

<table>
<thead>
<tr>
<th>Part I. REPORT OF INCOME</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1 Marital/filing status.</strong> Check the box that applies and complete the balance of this part of this statement as directed.</td>
</tr>
<tr>
<td>a. ☐ Unmarried. <strong>Complete only Column A (&quot;Debtor’s Income&quot;) for Lines 2-10.</strong></td>
</tr>
<tr>
<td>b. ☐ Married. <strong>Complete both Column A (&quot;Debtor’s Income&quot;) and Column B (&quot;Spouse’s Income&quot;) for Lines 2-10.</strong></td>
</tr>
<tr>
<td>All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.</td>
</tr>
<tr>
<td><strong>Column A</strong></td>
</tr>
<tr>
<td><strong>Debtor’s Income</strong></td>
</tr>
<tr>
<td><strong>2 Gross wages, salary, tips, bonuses, overtime, commissions.</strong></td>
</tr>
<tr>
<td><strong>3 Income from the operation of a business, profession, or farm.</strong> Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 3. If you operate more than one business, profession or farm, enter aggregate numbers and provide details on an attachment. Do not enter a number less than zero. <strong>Do not include any part of the business expenses entered on Line b as a deduction in Part IV.</strong></td>
</tr>
<tr>
<td>a. Gross receipts</td>
</tr>
<tr>
<td>b. Ordinary and necessary business expenses</td>
</tr>
<tr>
<td>c. Business income</td>
</tr>
<tr>
<td>$</td>
</tr>
<tr>
<td><strong>4 Rent and other real property income.</strong> Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. Do not enter a number less than zero. <strong>Do not include any part of the operating expenses entered on Line b as a deduction in Part IV.</strong></td>
</tr>
<tr>
<td>a. Gross receipts</td>
</tr>
<tr>
<td>b. Ordinary and necessary operating expenses</td>
</tr>
<tr>
<td>c. Rent and other real property income</td>
</tr>
<tr>
<td>$</td>
</tr>
<tr>
<td><strong>5 Interest, dividends, and royalties.</strong></td>
</tr>
<tr>
<td><strong>6 Pension and retirement income.</strong></td>
</tr>
<tr>
<td><strong>7 Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor’s dependents, including child support paid for that purpose.</strong> Do not include alimony or separate maintenance payments or amounts paid by the debtor’s spouse. Each regular payment should be reported in only one column; if a payment is listed in Column A, do not report that payment in Column B.</td>
</tr>
</tbody>
</table>
### Chapter 4—Means Testing

**Unemployment compensation.** Enter the amount in the appropriate column(s) of Line 8. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below:

| Unemployment compensation claimed to be a benefit under the Social Security Act | Debtor $ ________ | Spouse $ ________ |

**Income from all other sources.** Specify source and amount. If necessary, list additional sources on a separate page. Total and enter on Line 9. **Do not include alimony or separate maintenance payments paid by your spouse, but include all other payments of alimony or separate maintenance. Do not include** any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism.

| a. | $ |
| b. | $ |

**Subtotal.** Add Lines 2 thru 9 in Column A, and, if Column B is completed, add Lines 2 through 9 in Column B. Enter the total(s).

| $ | $ |

**Total.** If Column B has been completed, add Line 10, Column A to Line 10, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 10, Column A.

| $ |

### Part II. CALCULATION OF § 1325(b)(4) COMMITMENT PERIOD

**Enter the amount from Line 11.**

| $ |

**Marital adjustment.** If you are married, but are not filing jointly with your spouse, AND if you contend that calculation of the commitment period under § 1325(b)(4) does not require inclusion of the income of your spouse, enter on Line 13 the amount of the income listed in Line 10, Column B that was NOT paid on a regular basis for the household expenses of you or your dependents and specify, in the lines below, the basis for excluding this income (such as payment of the spouse’s tax liability or the spouse’s support of persons other than the debtor or the debtor’s dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If the conditions for entering this adjustment do not apply, enter zero.

| a. | $ |
| b. | $ |
| c. | $ |

Total and enter on Line 13.

| $ |

**Subtract Line 13 from Line 12 and enter the result.**

| $ |

**Annualized current monthly income for § 1325(b)(4).** Multiply the amount from Line 14 by the number 12 and enter the result.

| $ |

**Applicable median family income.** Enter the median family income for applicable state and household size. (This information is available by family size at [www.usdoj.gov/ust/](http://www.usdoj.gov/ust/) or from the clerk of the bankruptcy court.)

| a. Enter debtor’s state of residence: _______________ | b. Enter debtor’s household size: __________ |

| $ |

**Application of § 1325(b)(4).** Check the applicable box and proceed as directed.

- [ ] The amount on Line 15 is less than the amount on Line 16. Check the box for “The applicable commitment period is 3 years” at the top of page 1 of this statement and continue with this statement.
- [ ] The amount on Line 15 is not less than the amount on Line 16. Check the box for “The applicable commitment period is 5 years” at the top of page 1 of this statement and continue with this statement.

### Part III. APPLICATION OF § 1325(b)(3) FOR DETERMINING DISPOSABLE INCOME

**Enter the amount from Line 11.**

| $ |
Chapter 4—Means Testing

Marital adjustment. If you are married, but are not filing jointly with your spouse, enter on Line 19 the total of any income listed in Line 10, Column B that was NOT paid on a regular basis for the household expenses of the debtor or the debtor’s dependents. Specify in the lines below the basis for excluding the Column B income (such as payment of the spouse’s tax liability or the spouse’s support of persons other than the debtor or the debtor’s dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If the conditions for entering this adjustment do not apply, enter zero.

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>$</td>
</tr>
<tr>
<td>b.</td>
<td>$</td>
</tr>
<tr>
<td>c.</td>
<td>$</td>
</tr>
</tbody>
</table>

Total and enter on Line 19.

Current monthly income for § 1325(b)(3). Subtract Line 19 from Line 18 and enter the result.

Annualized current monthly income for § 1325(b)(3). Multiply the amount from Line 20 by the number 12 and enter the result.

Applicable median family income. Enter the amount from Line 16.

Application of § 1325(b)(3). Check the applicable box and proceed as directed.

- The amount on Line 21 is more than the amount on Line 22. Check the box for “Disposable income is determined under § 1325(b)(3)” at the top of page 1 of this statement and complete the remaining parts of this statement.
- The amount on Line 21 is not more than the amount on Line 22. Check the box for “Disposable income is not determined under § 1325(b)(3)” at the top of page 1 of this statement and complete Part VII of this statement. Do not complete Parts IV, V, or VI.

Part IV. CALCULATION OF DEDUCTIONS FROM INCOME

Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)

National Standards: food, apparel and services, housekeeping supplies, personal care, and miscellaneous. Enter in Line 24A the “Total” amount from IRS National Standards for Allowable Living Expenses for the applicable number of persons. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) The applicable number of persons is the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.

<p>| |</p>
<table>
<thead>
<tr>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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</tbody>
</table>

National Standards: health care. Enter in Line a1 below the amount from IRS National Standards for Out-of-Pocket Health Care for persons under 65 years of age, and in Line a2 the IRS National Standards for Out-of-Pocket Health Care for persons 65 years of age or older. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) Enter in Line b1 the applicable number of persons who are under 65 years of age, and enter in Line b2 the applicable number of persons who are 65 years of age or older. (The applicable number of persons in each age category is the number in that category that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.) Multiply Line a1 by Line b1 to obtain a total amount for persons under 65, and enter the result in Line c1. Multiply Line a2 by Line b2 to obtain a total amount for persons 65 and older, and enter the result in Line c2. Add Lines c1 and c2 to obtain a total health care amount, and enter the result in Line 24B.

<table>
<thead>
<tr>
<th>Persons under 65 years of age</th>
<th>Persons 65 years of age or older</th>
</tr>
</thead>
<tbody>
<tr>
<td>a1.</td>
<td>Allowance per person</td>
</tr>
<tr>
<td>b1.</td>
<td>Number of persons</td>
</tr>
<tr>
<td>c1.</td>
<td>Subtotal</td>
</tr>
</tbody>
</table>

Local Standards: housing and utilities; non-mortgage expenses. Enter the amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) The applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.
### Local Standards: housing and utilities; mortgage/rent expense

Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county and family size (this information is available at [www.usdoj.gov/ust/](http://www.usdoj.gov/ust/) or from the clerk of the bankruptcy court) (the applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 47; subtract Line b from Line a and enter the result in Line 25B. **Do not enter an amount less than zero.**

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>IRS Housing and Utilities Standards; mortgage/rent expense</td>
<td>$</td>
</tr>
<tr>
<td>b.</td>
<td>Average Monthly Payment for any debts secured by your home, if any, as stated in Line 47</td>
<td>$</td>
</tr>
</tbody>
</table>

### Local Standards: housing and utilities; adjustment

If you contend that the process set out in Lines 25A and 25B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention in the space below:

________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________

### Local Standards: transportation; vehicle operation/public transportation expense

You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation.

Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 7. □ 0 □ 1 □ 2 or more.

If you checked 0, enter on Line 27A the “Public Transportation” amount from IRS Local Standards: Transportation. If you checked 1 or 2 or more, enter on Line 27A the “Operating Costs” amount from IRS Local Standards: Transportation for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (These amounts are available at [www.usdoj.gov/ust/](http://www.usdoj.gov/ust/) or from the clerk of the bankruptcy court.)

### Local Standards: transportation; additional public transportation expense

If you pay the operating expenses for a vehicle and also use public transportation, and you contend that you are entitled to an additional deduction for your public transportation expenses, enter on Line 27B the “Public Transportation” amount from IRS Local Standards: Transportation. (This amount is available at [www.usdoj.gov/ust/](http://www.usdoj.gov/ust/) or from the clerk of the bankruptcy court.)

### Local Standards: transportation ownership/lease expense; Vehicle 1

Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.) □ 1 □ 2 or more.

Enter, in Line a below, the “Ownership Costs” for “One Car” from the IRS Local Standards: Transportation (available at [www.usdoj.gov/ust/](http://www.usdoj.gov/ust/) or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 47; subtract Line b from Line a and enter the result in Line 28. **Do not enter an amount less than zero.**

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>IRS Transportation Standards, Ownership Costs</td>
<td>$</td>
</tr>
<tr>
<td>b.</td>
<td>Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 47</td>
<td>$</td>
</tr>
<tr>
<td>c.</td>
<td>Net ownership/lease expense for Vehicle 1</td>
<td>Subtract Line b from Line a.</td>
</tr>
</tbody>
</table>
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Local Standards: transportation ownership/lease expense; Vehicle 2. Complete this Line only if you checked the “2 or more” Box in Line 28.

Enter, in Line a below, the “Ownership Costs” for “One Car” from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 47; subtract Line b from Line a and enter the result in Line 29. **Do not enter an amount less than zero.**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>IRS Transportation Standards, Ownership Costs $</td>
</tr>
<tr>
<td>b.</td>
<td>Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 47 $</td>
</tr>
<tr>
<td>c.</td>
<td>Net ownership/lease expense for Vehicle 2 Subtract Line b from Line a. $</td>
</tr>
</tbody>
</table>

Other Necessary Expenses: taxes. Enter the total average monthly expense that you actually incur for all federal, state, and local taxes, other than real estate and sales taxes, such as income taxes, self-employment taxes, social-security taxes, and Medicare taxes. **Do not include real estate or sales taxes.**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Other Necessary Expenses: taxes</td>
</tr>
<tr>
<td></td>
<td>Enter the total average monthly expense that you actually incur for all federal, state, and local taxes, other than real estate and sales taxes, such as income taxes, self-employment taxes, social-security taxes, and Medicare taxes. <strong>Do not include real estate or sales taxes.</strong></td>
</tr>
</tbody>
</table>

Other Necessary Expenses: involuntary deductions for employment. Enter the total average monthly deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. **Do not include discretionary amounts, such as voluntary 401(k) contributions.**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Other Necessary Expenses: involuntary deductions for employment</td>
</tr>
<tr>
<td></td>
<td>Enter the total average monthly deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. <strong>Do not include discretionary amounts, such as voluntary 401(k) contributions.</strong></td>
</tr>
</tbody>
</table>

Other Necessary Expenses: life insurance. Enter total average monthly premiums that you actually pay for term life insurance for yourself. **Do not include premiums for insurance on your dependents, for whole life or for any other form of insurance.**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Other Necessary Expenses: life insurance</td>
</tr>
<tr>
<td></td>
<td>Enter total average monthly premiums that you actually pay for term life insurance for yourself. <strong>Do not include premiums for insurance on your dependents, for whole life or for any other form of insurance.</strong></td>
</tr>
</tbody>
</table>

Other Necessary Expenses: court-ordered payments. Enter the total monthly amount that you are required to pay pursuant to the order of a court or administrative agency, such as spousal or child support payments. **Do not include payments on past due obligations included in Line 49.**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Other Necessary Expenses: court-ordered payments</td>
</tr>
<tr>
<td></td>
<td>Enter the total monthly amount that you are required to pay pursuant to the order of a court or administrative agency, such as spousal or child support payments. <strong>Do not include payments on past due obligations included in Line 49.</strong></td>
</tr>
</tbody>
</table>

Other Necessary Expenses: education for employment or for a physically or mentally challenged child. Enter the total average monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Other Necessary Expenses: education for employment or for a physically or mentally challenged child</td>
</tr>
<tr>
<td></td>
<td>Enter the total average monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.</td>
</tr>
</tbody>
</table>

Other Necessary Expenses: childcare. Enter the total average monthly amount that you actually expend on childcare—such as baby-sitting, day care, nursery and preschool. **Do not include other educational payments.**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
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<tbody>
<tr>
<td></td>
<td>Other Necessary Expenses: childcare</td>
</tr>
<tr>
<td></td>
<td>Enter the total average monthly amount that you actually expend on childcare—such as baby-sitting, day care, nursery and preschool. <strong>Do not include other educational payments.</strong></td>
</tr>
</tbody>
</table>

Other Necessary Expenses: health care. Enter the total average monthly amount that you actually expend on health care that is required for the health and welfare of yourself or your dependents, that is not reimbursed by insurance or paid by a health savings account, and that is in excess of the amount entered in Line 24B. **Do not include payments for health insurance or health savings accounts listed in Line 39.**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
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</tr>
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<tbody>
<tr>
<td></td>
<td>Other Necessary Expenses: health care</td>
</tr>
<tr>
<td></td>
<td>Enter the total average monthly amount that you actually expend on health care that is required for the health and welfare of yourself or your dependents, that is not reimbursed by insurance or paid by a health savings account, and that is in excess of the amount entered in Line 24B. <strong>Do not include payments for health insurance or health savings accounts listed in Line 39.</strong></td>
</tr>
</tbody>
</table>

Other Necessary Expenses: telecommunication services. Enter the total average monthly amount that you actually pay for telecommunication services other than your basic home telephone and cell phone service—such as pagers, call waiting, caller id, special long distance, or internet service—to the extent necessary for your health and welfare or that of your dependents. **Do not include any amount previously deducted.**

<p>| | |</p>
<table>
<thead>
<tr>
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<tbody>
<tr>
<td></td>
<td>Other Necessary Expenses: telecommunication services</td>
</tr>
<tr>
<td></td>
<td>Enter the total average monthly amount that you actually pay for telecommunication services other than your basic home telephone and cell phone service—such as pagers, call waiting, caller id, special long distance, or internet service—to the extent necessary for your health and welfare or that of your dependents. <strong>Do not include any amount previously deducted.</strong></td>
</tr>
</tbody>
</table>

Total Expenses Allowed under IRS Standards. Enter the total of Lines 24 through 37.

<p>| | |</p>
<table>
<thead>
<tr>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total Expenses Allowed under IRS Standards</td>
</tr>
<tr>
<td></td>
<td>Enter the total of Lines 24 through 37.</td>
</tr>
</tbody>
</table>

Subpart B: Additional Living Expense Deductions

**Note:** Do not include any expenses that you have listed in Lines 24-37
### Health Insurance, Disability Insurance, and Health Savings Account Expenses

List the monthly expenses in the categories set out in lines a-c below that are reasonably necessary for yourself, your spouse, or your dependents.

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>Health Insurance</td>
<td>$</td>
</tr>
<tr>
<td>b.</td>
<td>Disability Insurance</td>
<td>$</td>
</tr>
<tr>
<td>c.</td>
<td>Health Savings Account</td>
<td>$</td>
</tr>
</tbody>
</table>

Total and enter on Line 39 $

If you do not actually expend this total amount, state your actual total average monthly expenditures in the space below: $ ____________

### Continued contributions to the care of household or family members

Enter the total average actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. **Do not include payments listed in Line 34.**

$ ____________

### Protection against family violence

Enter the total average reasonably necessary monthly expenses that you actually incur to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law. The nature of these expenses is required to be kept confidential by the court.

$ ____________

### Home energy costs

Enter the total average monthly amount, in excess of the allowance specified by IRS Local Standards for Housing and Utilities that you actually expend for home energy costs. **You must provide your case trustee with documentation of your actual expenses, and you must demonstrate that the additional amount claimed is reasonable and necessary.**

$ ____________

### Education expenses for dependent children under 18

Enter the total average monthly expenses that you actually incur, not to exceed $156.25 per child, for attendance at a private or public elementary or secondary school by your dependent children less than 18 years of age. **You must provide your case trustee with documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.**

$ ____________

### Additional food and clothing expense

Enter the total average monthly amount by which your food and clothing expenses exceed the combined allowances for food and clothing (apparel and services) in the IRS National Standards, not to exceed 5% of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) **You must demonstrate that the additional amount claimed is reasonable and necessary.**

$ ____________

### Charitable contributions

Enter the amount reasonably necessary for you to expend each month on charitable contributions in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2). **Do not include any amount in excess of 15% of your gross monthly income.**

$ ____________

### Total Additional Expense Deductions under § 707(b)

Enter the total of Lines 39 through 45.

$ ____________

---

**Subpart C: Deductions for Debt Payment**

### Future payments on secured claims

For each of your debts that is secured by an interest in property that you own, list the name of the creditor, identify the property securing the debt, state the Average Monthly Payment, and check whether the payment includes taxes or insurance. The Average Monthly Payment is the total of all amounts scheduled as contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. Enter the total of the Average Monthly Payments on Line 47.

<table>
<thead>
<tr>
<th>Name of Creditor</th>
<th>Property Securing the Debt</th>
<th>Average Monthly Payment</th>
<th>Does payment include taxes or insurance?</th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>$</td>
<td>☐ yes ☐ no</td>
<td></td>
</tr>
<tr>
<td>b.</td>
<td>$</td>
<td>☐ yes ☐ no</td>
<td></td>
</tr>
<tr>
<td>c.</td>
<td>$</td>
<td>☐ yes ☐ no</td>
<td></td>
</tr>
</tbody>
</table>

Total: Add Lines a, b, and c $ ____________
Other payments on secured claims. If any of debts listed in Line 47 are secured by your primary residence, a motor vehicle, or other property necessary for your support or the support of your dependents, you may include in your deduction 1/60th of any amount (the “cure amount”) that you must pay the creditor in addition to the payments listed in Line 47, in order to maintain possession of the property. The cure amount would include any sums in default that must be paid in order to avoid repossess or foreclosure. List and total any such amounts in the following chart. If necessary, list additional entries on a separate page.

<table>
<thead>
<tr>
<th>Name of Creditor</th>
<th>Property Securing the Debt</th>
<th>1/60th of the Cure Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td></td>
<td>$</td>
</tr>
<tr>
<td>b.</td>
<td></td>
<td>$</td>
</tr>
<tr>
<td>c.</td>
<td></td>
<td>$</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Total: Add Lines a, b, and c</td>
</tr>
</tbody>
</table>

Payments on prepetition priority claims. Enter the total amount, divided by 60, of all priority claims, such as priority tax, child support and alimony claims, for which you were liable at the time of your bankruptcy filing. Do not include current obligations, such as those set out in Line 33.

Chapter 13 administrative expenses. Multiply the amount in Line a by the amount in Line b, and enter the resulting administrative expense.

| a. Projected average monthly chapter 13 plan payment. | $ |
| b. Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) | x |
| c. Average monthly administrative expense of chapter 13 case | Total: Multiply Lines a and b |

Total Deductions for Debt Payment. Enter the total of Lines 47 through 50.

Subpart D: Total Deductions from Income

Total of all deductions from income. Enter the total of Lines 38, 46, and 51.

Part V. DETERMINATION OF DISPOSABLE INCOME UNDER § 1325(b)(2)

Total current monthly income. Enter the amount from Line 20.

Support income. Enter the monthly average of any child support payments, foster care payments, or disability payments for a dependent child, reported in Part I, that you received in accordance with applicable nonbankruptcy law, to the extent reasonably necessary to be expended for such child.

Qualified retirement deductions. Enter the monthly total of (a) all amounts withheld by your employer from wages as contributions for qualified retirement plans, as specified in § 541(b)(7) and (b) all required repayments of loans from retirement plans, as specified in § 362(b)(19).

Total of all deductions allowed under § 707(b)(2). Enter the amount from Line 52.

Deduction for special circumstances. If there are special circumstances that justify additional expenses for which there is no reasonable alternative, describe the special circumstances and the resulting expenses in lines a-c below. If necessary, list additional entries on a separate page. Total the expenses and enter the total in Line 57. You must provide your case trustee with documentation of these expenses and you must provide a detailed explanation of the special circumstances that make such expenses necessary and reasonable.

<table>
<thead>
<tr>
<th>Nature of special circumstances</th>
<th>Amount of expense</th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>$</td>
</tr>
<tr>
<td>b.</td>
<td>$</td>
</tr>
<tr>
<td>c.</td>
<td>$</td>
</tr>
<tr>
<td>Total: Add Lines a, b, and c</td>
<td>$</td>
</tr>
</tbody>
</table>
### Chapter 4—Means Testing

#### Part VI: ADDITIONAL EXPENSE CLAIMS

**Other Expenses.** List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.

<table>
<thead>
<tr>
<th>Expense Description</th>
<th>Monthly Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>$</td>
</tr>
<tr>
<td>b.</td>
<td>$</td>
</tr>
<tr>
<td>c.</td>
<td>$</td>
</tr>
<tr>
<td><strong>Total:</strong></td>
<td>Add Lines a, b, and c</td>
</tr>
</tbody>
</table>

#### Part VII: VERIFICATION

I declare under penalty of perjury that the information provided in this statement is true and correct. *(If this is a joint case, both debtors must sign.)*

<table>
<thead>
<tr>
<th>Date:</th>
<th>Signature:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>(Debtor)</em></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Date:</th>
<th>Signature:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>(Joint Debtor, if any)</em></td>
</tr>
</tbody>
</table>

---

**Total adjustments to determine disposable income.** Add the amounts on Lines 54, 55, 56, and 57 and enter the result. $ 

**Monthly Disposable Income Under § 1325(b)(2).** Subtract Line 58 from Line 53 and enter the result. $
STATEMENT OF THE U.S. TRUSTEE PROGRAM’S POSITION ON LEGAL ISSUES ARISING UNDER THE CHAPTER 7 MEANS TEST

Following is a line-by-line summary of Form 22A and various recurring disposable income issues likely to arise in chapter 7 under the BAPCPA provisions of 11 U.S.C. § 707(b). The summary gives the position of the United States Trustee Program (USTP) on these issues. For ease of reference, the USTP positions are listed in summary fashion without citation to legal authority. The referenced lines are those on the Form 22A. Unless a circuit court has decided an issue to the contrary, United States Trustees should, absent unusual circumstances, maintain these positions when interpreting section 707(b).

Line 1A, Declaration of Disabled Veterans

- Must have at least 30% disability from service or released/discharged due to disability.
- Debt primarily incurred during period of active duty/homeland defense activity.
- Only if BOTH conditions apply is debtor exempt from further completing Form 22A.

Line 1B, Declaration of Non-Consumer Debts

- Less than 50% of total scheduled debt was incurred for personal, household or family purposes.
- Purpose of debt is judged at the time the debt was incurred.
- Home mortgages are typically consumer debt.
- Most tax debts are not typically consumer debt.

Line 1C, Declaration of Reservists and National Guard Exclusion

- Must be either a member of a reserve component or National Guard; AND
- Must have been on active duty or performing a homeland defense activity for at least 90 days.
- Exclusion applies after the minimum 90 day period of service, and for 540 days after the service ends.
- Exclusion applies only to cases filed between December 19, 2008 and December 18, 2011, unless extended by Congress.

Line 2, Filing Status

- The only four options permitted are those listed on the Form 22A.
- No option for legally separated but filing joint case; joint cases generally should be treated as a single household for means test purposes.
- May be asserted as special circumstances to rebut the presumption of abuse under section 707(b)(2)(B).
- May be considered by the UST when stating the reasons under section 704(b)(2) that a motion to dismiss is not appropriate.
Chapter 4—Means Testing

- Information should be consistent with household size on Schedule I.

**Line 3, Gross wages, salary, tips, bonuses, overtime, commissions.**

- Includes pay/shift differentials.
- Includes income, whether or not taxable.
- Figures are gross amounts, before any deductions.

**Lines 4 & 5, Business and real property income and expenses.**

- Must be "ordinary and necessary," i.e., a reasonable operating expense.
- Depreciation is not included.
- Line "c" cannot be a negative number.

**Line 6, Interest, dividends, and royalties.**

- Includes automatic dividend reinvestment program.

**Line 7, Pension and retirement income.**

- Does not include Social Security payments.
- Includes all other retirement, including government, 401(k), and IRA.

**Line 8, Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor’s dependents, including child or spousal support.**

- Includes payments made monthly, quarterly, or annually.
- Includes payments regardless of written agreement with contributor.
- Includes payments from roommate, partner, parent, or relative, regardless of whether living with debtor.
- Includes payments made directly to creditors on behalf of debtor, e.g., rent, car, or insurance.
- Does not include payments from non-filing spouse (which are already included as income in Column B).

**Line 9, Unemployment compensation.**

- Unemployment compensation is not a "benefit under SSA" and should be included; USTP opposes any entry in the boxes to the left of Columns A and B.
Chapter 4—Means Testing

A-1 ln 10 **Line 10, Income from all other sources.**
- Includes net gambling, cash gifts, litigation proceeds, and trust income.
- Includes private disability income.
- Does not include SSA benefits.
- Does not include tax refunds.
- Does not include loan proceeds.
- Whether it meets IRS test for income could be relevant, but whether it is taxable income or non-taxable income is not a factor.

A-1 ln 13 **Line 14, Applicable median family income.**
- "Applicable state" is state of residence at filing.
- If married and two different households, residence is where most family members reside.
- If no plurality of family members are in any one state, use state of spouse with highest income.
- "Household size" is the debtor, debtor’s spouse, and any dependents that the debtor could claim under IRS dependency tests. The USTP uses the same IRS test for the definition of both "household" and "family." IRS Publication 501 explains the IRS tests for "dependent."
- The USTP departs from the IRS dependent test (as does the IRS when it determines family size for collection purposes) in cases justifying "reasonable exceptions" (e.g. a long standing economic unit of unmarried individuals and their children). However, if an individual is counted as a family member for median income purposes, that individual’s income should be included as income on Part II of Form 22A.

A-2 lns 2/3 **Line 17, Marital adjustment.**
- All income of the non-debtor spouse should be included, except the following expenses of the non-debtor spouse may be excluded:
  - withholding taxes;
  - student loan payments;
  - prior support obligations;
  - debt payments on which only the non-filing spouse is legally liable and where the consideration for the loan exclusively benefits the non-filing spouse. (Credit cards used to pay for household expenses may not be deducted on Line 17).
Line 19A, National Standards: food, apparel and services, housekeeping supplies, personal care, and miscellaneous.

- The following expenses are covered by the National Standards and may not be counted separately elsewhere:
  - apparel and services (includes shoes and clothing, laundry and dry cleaning, and shoe repair);
  - meals at home or away (unless unreimbursed business expenses);
  - housekeeping supplies (includes laundry and cleaning supplies; other household products such as cleaning and toilet tissue, paper towels and napkins; lawn and garden supplies; postage and stationary; and other miscellaneous household supplies);
  - personal care products and services (includes hair care products, haircuts and beautician services, oral hygiene products and articles, shaving needs, cosmetics, perfume, bath preparations, deodorants, feminine hygiene products, electric personal care appliances, personal care services, and repair of personal care appliances)
  - miscellaneous personal expenses.
- National Standard amount that may be claimed is based on the debtor, the debtor’s dependents, and the debtor’s spouse in a joint case if the spouse is not otherwise a dependent.


- National Standard amounts may be claimed based on debtor, debtor’s dependents, debtor’s spouse, and the age of household members.
- Actual amounts expended by the debtor exceeding the National Standards that are required for the health and welfare of the debtor, debtor’s dependents, and debtor’s spouse, which are not reimbursed by insurance or paid by a health savings account, may be claimed on line 31.

Line 20A, Local Standards: housing and utilities; non-mortgage expenses.

- Based on county of residence; see line 14 for resolving multiple residences.
- The following expenses are covered by the Local Standards and may not be counted elsewhere:
  - maintenance and repair;
  - homeowner association dues;
  - condominium fees;
  - gas, electricity, water, heating oil, bottled gas, trash and garbage collection, wood and other fuels, septic cleaning;
  - basic telephone and cell phone service.

Line 20B, Local Standards: housing and utilities, mortgage/rent expense.
Chapter 4—Means Testing

- Based on county of residence; see line 14 for resolving multiple residences.
- The following are included in the Local Standard and may not be counted elsewhere, except as provided on lines 42 and 43:
  - principal and interest on mortgage loan;
  - rent;
  - homeowners/renters insurance;
  - local property taxes.
- Line 20B(b) is the same figure as line 42 for house payments.
- Debtor may not "double dip," that is take the full amount of the Local Standard for mortgage/rent on line 20B(a) and then fail to deduct the monthly mortgage payment on line 20B(b). The overall effect of disallowing double-dipping is to allow the debtor to take only the higher of the actual mortgage payment or the Local Standard.
- If the home is being surrendered, the debtor may not include the mortgage payment on lines 42 and 43, and may not deduct the mortgage payment on line 20B(b). The debtor may, however, claim the full amount of the Local Standard for housing on line 20A.
- Debtors and joint debtors are entitled to only one Local Standard mortgage/rent payment, even if maintaining two separate households.
- Vacation homes do not entitle a debtor to the Local Standard on line 20B.
- Debtor may not claim a Local Standard on line 20B when the debtor:
  - is and has been living with a friend or relative for an extended period of time at no cost;
  - is and has been living in military or other employer-paid housing.

**Line 21, Local Standards: housing and utilities; adjustment.**

**A-2 ln 10**

- This line is often used improperly by debtors to claim housing expenses in excess of the IRS standards; USTP policy is to object to that use of line 21.
- This line is occasionally used by debtors who claim that Form 22A incorrectly captures the separation of the IRS housing Local Standard into two components, a mortgage component and a non-mortgage component; the USTP will object to that use of line 21.

**Line 22A, Local Standards: transportation, vehicle operation/public transportation expense.**

**A-2 ln 11/14/12**

- Based on metro area or region.
- See line 14 to resolve multiple residences.
- The Local Standard for vehicle operation may be taken when the debtor owns, leases, or pays the operating expenses on a vehicle.
- The Local Standard for vehicle operation for zero vehicles may be taken if the debtor does not own, operate, or pay operating expenses on any vehicle.
- A vehicle must be "street ready" and licensable.
- A vehicle designed without an engine does not qualify, e.g., camper or trailer.
- Debtors located outside of the Fifth, Seventh, and Eighth Circuits who operate
vehicles not subject to a loan or lease may deduct an additional $200 if the vehicle is owned by the debtor, and is older than six (6) model years or has more than 75,000 miles.

**Line 22B, Local Standards: transportation, additional public transportation expense.**

- If debtor claims vehicle operating expense for one or more vehicles on Line 22A, debtor may only claim additional public transportation expense if reasonable and necessary for the health and welfare of the debtor, debtor’s dependents, and debtor’s spouse, or for the production of income.
- If additional public transportation expense is applicable, it is capped by Local Standard amount for public transportation.

**Lines 23 & 24, Local Standards: transportation ownership/lease expenses.**

- Outside the Fifth, Seventh, and Eighth circuits, debtor cannot claim the vehicle ownership expense if the debtor does not have a secured loan or a lease on the vehicle.
- In the Fifth, Seventh, and Eighth circuits debtor may claim this expense if the debtor owns a vehicle regardless of whether the debtor has a loan or lease payment. However, if the debtor owns a vehicle free and clear the USTP position is that the lack of any actual ownership expense may be considered in determining whether the case constitutes an abuse under the totality of the debtor’s financial circumstances pursuant to section 707(b)(3)(B).
- If the vehicle is being surrendered without replacement, the debtor may not claim the expense. But see discussion regarding line 42.
- If the vehicle is borrowed, the debtor may not claim the expense.
- Debtor may not "double dip," that is take the full amount of the vehicle ownership expense on line 23(a) and then fail to deduct the monthly lien payment on line 23(b). The overall effect is to allow the debtor to take the higher of the actual loan or lease payment and vehicle ownership expense.
- A debtor whose household contains a single driver is generally entitled to an ownership expense for only one vehicle.

**Line 25, Other Necessary Expenses: taxes.**

- Based on monthly amount of actual taxes owed, not taxes withheld.
- Includes FICA, Social Security, Medicare, state and local taxes.
- Non-debtor spouse’s taxes is not included if "backed out" on line 17.

**Line 26, Other Necessary Expenses: involuntary deductions for employment.**

- Includes retirement, union dues, uniform costs, work shoes.
- Does not include voluntary 401(k) contributions, voluntary 401(k) loan repayments,
or other voluntary retirement or profit sharing deductions.

- Does not include United Way or charitable contributions.
- Does not include elective insurance.

**Line 27, Other Necessary Expenses: life insurance.**

A-2  ln 18

- Includes only amounts for term insurance on the debtor’s life.
- If the policy is whole life, debtor must determine what portion of the premium is attributable to term coverage.
- Does not include premiums on policies for non-debtor spouse or children.

**Line 28, Other Necessary Expenses: court-ordered payments.**

A-2  ln 19

- Includes the current monthly amount of support and alimony, not any past due amounts, which are entered on line 44.
- Does not include purely voluntary amounts for which there is no legal obligation.

**Line 29, Other Necessary Expenses: education for employment or for a physically or mentally challenged child.**

A-2  ln 20

- Employment education must be as a condition of employment.
- Expenses for challenged children must be for "health or welfare."
- Expenses for challenged children cannot be otherwise provided by public school system.
- Expenses for challenged children cannot be already included on line 30 or 38.

**Line 30, Other Necessary Expenses: childcare.**

A-2  ln 21

- These are actual expenses only.
- Includes babysitting, nursery school, daycare, preschool.
- Premium daycare may be permitted, depending on the justification.
- May not be permitted if one parent is "stay at home;" depends on the circumstances.

**Line 31, Other Necessary Expenses: health care.**

A-2  ln 22

- Includes only unreimbursed, out-of-pocket expenses, exceeding the National Standard amounts provided for at line 19B, including items traditionally reimbursable through a flexible spending or “cafeteria” medical saving plan. For example:
  - deductibles
  - medications
  - therapy
  - co-pays
- Does not include payments for health insurance or health savings account; those are
covered by line 34.

- Does not include elective or cosmetic surgery.
- May not duplicate items on line 34.

**Line 32, Other Necessary Expenses: telecommunication services.**

A-2  ln  23  

- Does not include basic phone or cell service, which is included in the Local Standards on line 20A.
- Pagers, call waiting, long distance, caller ID, and internet may be included, depending on amount and circumstance; test is whether "necessary for health and welfare or production of income."
- Does not include business expenses already deducted on line 4b or 5b.

**Line 34, Health Insurance, Disability Insurance, and Health Savings Account Expenses.**

A-2  ln  25  

- Includes actual expense for debtor, spouse, and dependents.
- Does not include flexible spending account or “cafeteria” medical saving plan contributions, which should be deducted as excess costs on line 31 to the extend they exceed to line 19B IRS standard amounts.

**Line 35, Continued contributions to the care of household or family members.**

A-2  ln  26  

- Includes only actual, not anticipated expenses.
- Family member must live with the debtor or be a member of the debtor’s immediate family, i.e., parent, grandparent, sibling, child, grandchild.
- Elderly, chronically ill, or disabled person must be unable to pay the expense.

**Line 36, Protection against family violence.**

A-2  ln  27  

- Include only ongoing expenses related to a real threat.
- Legal costs related to a restraining order may qualify.
- Home security system costs will not qualify in all cases.
- Nature of expense, but not the amount, must be kept confidential by the court.

**Line 37, Home energy costs.**

A-2  ln  28  

- Insert the amount by which the twelve-month average home energy costs exceed line 20A.
- Amount claimed is unlimited, but must be documented.

**Line 38, Education expenses for dependent children under 18.**

A-2  ln  29  

- Includes public or private elementary or secondary education.
- Does not include college or preschool education.
Chapter 4—Means Testing

- Child must be under 18 at filing.
- Amount may not exceed $147.92 per child.
- Expenses must be documented.
- Cannot duplicate expenses claimed on line 30.
- Does not include school lunches, which are included in National Standards on line 19A.
- Can include home schooling expenses.

**Line 39, Additional food and clothing expense.**

A-2 ln 30

- The USTP Web site breaks out the food/clothing standard for application of the 5 percent limit.
- Expenses must be actual, not merely anticipated.
- Special dietary and allergy restrictions can be covered.
- Documentation is required.

**Line 40, Continued charitable contributions.**

A-2 ln 31

- Contribution is limited to 15 percent of gross income.
- The USTP position is that charitable contributions under section 707(b) are available to both below median and above median debtors. The Religious Liberty and Charitable Donation Clarification Act of 2006, Pub. L. 109-439 clarifies the Bankruptcy Code to ensure that above-median debtors may make continued charitable contributions.

**Line 42, Future payments on secured claims.**

A-2 ln 33

- Total all payments coming due in the 60 months following filing and divide by 60.
- In the case of a variable rate loan, use the loan rate in effect on the petition date to calculate the payments.
- In the case of a "balloon" payment within 60 months, use the full amount of the balloon to calculate the average payment.
- Does not include property subject to a lease rather than a loan.
- Includes all secured debt, even "toys" and luxury items. Although the USTP position is to allow secured payments for luxury items on this line, the Program believes that luxury expenses may demonstrate that a petition was filed in bad faith warranting dismissal of the case under section 707(b)(3)(A), and may be considered in determining the totality of the debtors financial circumstances under section 707(b)(3)(B).
- Includes a secured loan payment, even when the value of the collateral is less than the amount of the loan.
- Outside the First Circuit, does not include payments when the debtor intends to surrender the collateral securing the loan.
- In the First Circuit, debtor may include payments on line 42 when the debtor intends...
to surrender the collateral securing the loan. However, the USTP position is that the failure of the debtor to continue to make the payments post-petition in surrendering the property may be considered in determining the totality of the debtor’s financial circumstances under section 707(b)(3)(B).

**Line 43, Other payments on secured claims.**

- Does not include arrearage on luxury items; the item must be "necessary for the support of the debtor or dependents."
- See line 42 for a discussion of when the collateral is surrendered.

**Line 44, Payments on prepetition priority claims.**

- The total of priority debt includes only amounts due as of filing.
- Does not include figures already listed on line 28.

**Line 45, Chapter 13 administrative expenses.**

- Debtor must project a hypothetical chapter 13 plan payment to calculate the figure on line 45a. The USTP does not insist on mathematical exactitude and allows a reasonable estimation of the hypothetical chapter 13 plan payment.
- Generally the plan payment should be calculated based on the amount of monthly disposable income suggested by the completion of the means test, or shown on Schedules I and J.
- The multiplier for line 45b is found on the USTP Web site by state.

**Line 56, Other Expenses.**

- Generally this line should be used to assert special circumstances to rebut the presumption of abuse under section 707(b)(2)(B).
- Also may provide information for the UST to consider under section 704(b)(2) when determining whether a motion to dismiss is appropriate.
- Should not be included by debtor in calculating disposable income on line 51, or in determining whether the presumption of abuse arises on lines 52-55.

April 23, 2010
STATEMENT OF THE U.S. TRUSTEE PROGRAM’S POSITION ON LEGAL ISSUES ARISING UNDER THE CHAPTER 13 DISPOSABLE INCOME TEST

Following is a line-by-line summary of Form 22C and various recurring disposable income issues likely to arise in chapter 13 under the BAPCPA provisions of 11 U.S.C. § 1325(b). The summary gives the position of the United States Trustee Program (USTP) on these issues. For ease of reference, the USTP positions are listed in summary fashion without citation to legal authority. The referenced lines are those on the Form 22C. Unless a circuit court has decided an issue to the contrary, United States Trustees should maintain these positions when interpreting section 1325(b).

Many of the issues listed below are identical to issues arising in the chapter 7 means test under 11 U.S.C. § 707(b). However, several of the issues below are unique to the chapter 13 disposable income test. The USTP positions listed below reflect an intent to harmonize the chapter 7 means test with the chapter 13 disposable income test for above-median debtors.

C-1 ln 2 Line 2, Gross wages, salary, tips, bonuses, overtime, commissions.
- Includes pay/shift differentials.
- Includes income, whether or not taxable.
- Figures are gross amounts, before any deductions.

Lines 3 & 4, Business and real property income and expenses.
C-1 lns 5/6
- Must be “ordinary and necessary,” i.e., a reasonable operating expense.
- Depreciation is not included.
- Line “c” cannot be a negative number.

C-1 ln 7 Line 5, Interest, dividends, and royalties.
- Includes automatic dividend reinvestment program.

C-1 ln 9 Line 6, Pension and retirement income.
- Does not include Social Security payments.
- Include all other retirement, including government, 401(k), and IRA.

Line 7, Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor’s dependents, including child or spousal support.
C-1 lns 3/4
- Includes payments made monthly, quarterly, or annually.
- Includes payments regardless of written agreement with contributor.
- Includes payments from roommate, partner, parent, or relative, regardless of whether living with debtor.
- Includes payments made directly to creditors on behalf of debtor, e.g., rent, car,
insurance, or tuition.

- Does not include payments from non-filing spouse (which are already included as income in Column B).

C-1 ln 8 **Line 8, Unemployment compensation.**

- Unemployment compensation is not a “benefit under SSA” and should be included; USTP opposes any entry in the boxes to the left of Columns A and B.

C-1 ln 10 **Line 9, Income from all other sources.**

- Includes net gambling, cash gifts, litigation proceeds, and trust income.
- Includes private disability income.
- Does not include SSA benefits.
- Does not include tax refunds.
- Does not include loan proceeds.
- Whether it meets IRS test for income could be relevant, but whether it is taxable income or non-taxable income is not a factor.

C-1 ln 19 **Line 13, Marital adjustment.**

- For purposes of determining the “applicable commitment period,” section 1325(b)(4) refers to the income of “the debtor and debtor’s spouse combined.” By using line 13, a debtor contends that the income of a spouse should not be included as chapter 13 income in a non-joint case for purposes of determining the applicable commitment period. The USTP position is to oppose any amount listed on line 13.

C-1 ln 20 **Line 16, Applicable median family income.**

- “Applicable state” is state of residence at filing.
- If married and two different households, residence is where most family members reside.
- If no plurality of family members are in any one state, use state of spouse with highest income.
- “Household size” is the debtor, debtor’s spouse, and any dependents that the debtor could claim under IRS dependency tests. The USTP uses the same IRS test for the definition of both “household” and “family.” IRS Publication 501 explains the IRS tests for “dependent.”
- The USTP departs from the IRS dependent test (as does the IRS when it determines family size for collection purposes) in cases justifying “reasonable exceptions” (e.g. a long standing economic unit of unmarried individuals and their children). However, if an individual is counted as a family member for median income purposes, that individual’s income should be included as income on Part I of Form 22C.
C-1 ln 21 **Line 17, Application of § 1325(b)(4).**

- The USTP has not adopted a position on whether the “applicable commitment period” is a “length of time” or “multiplier.”

C-1 ln 13 **Line 19, Marital adjustment.**

- All income of the non-debtor spouse should be included, except the following expenses of the non-debtor spouse may be excluded:
  - withholding taxes;
  - student loan payments;
  - prior support obligations;
  - debt payments on which only the non-filing spouse is legally liable and where the consideration for the loan exclusively benefit the non-filing spouse.
- A car payment on the non-debtor spouse’s car cannot be excluded if the car is counted as a family car for the purpose of lines 28 and 29.

C-2 ln 6 **Line 24A, National Standards: food, apparel and services, housekeeping supplies, personal care, and miscellaneous.**

- The following expenses are covered by the National Standards and may not be counted separately elsewhere:
  - apparel and services (includes shoes and clothing, laundry and dry cleaning, and shoe repair);
  - meals at home or away (unless unreimbursed business expenses);
  - housekeeping supplies (includes laundry and cleaning supplies; other household products such as cleaning and toilet tissue, paper towels and napkins; lawn and garden supplies; postage and stationary; and other miscellaneous household supplies);
  - personal care products and services (includes hair care products, haircuts and beautician services, oral hygiene products and articles, shaving needs, cosmetics, perfume, bath preparations, deodorants, feminine hygiene products, electric personal care appliances, personal care services, and repair of personal care appliances);
  - miscellaneous personal expenses.
- National Standard amount that may be claimed is based on the debtor, the debtor’s dependents, and the debtor’s spouse in a joint case if the spouse is not otherwise a dependent.

C-2 ln 7 **Line 24B, National Standards: health care.**

- National Standard amounts may be claimed based on debtor, debtor’s dependents, debtor’s spouse, and the age of household members.
- Actual mounts expended by the debtor exceeding the National Standards that are
required for the health and welfare of the debtor, debtor’s dependents, and debtor’s spouse, which are not reimbursed by insurance or paid by a health savings account, may be claimed on line 36.

**Line 25A, Local Standards: housing and utilities; non-mortgage expenses.**

- Based on county of residence; see line 16 for resolving multiple residences.
- The following expenses are covered by the Local Standards and may not be counted elsewhere:
  - maintenance and repair;
  - homeowner association dues;
  - condominium fees;
  - gas, electricity, water, heating oil, bottled gas, trash and garbage collection, wood and other fuels, septic cleaning;
  - basic telephone and cell phone service.

**Line 25B, Local Standards: housing and utilities, mortgage/rent expense.**

- Based on county of residence; see line 16 for resolving multiple residences.
- The following are included in the Local Standard and may not be counted elsewhere, except as provided on lines 47 and 48:
  - principal and interest on mortgage loan;
  - rent;
  - homeowners/renters insurance;
  - local property taxes.
- Line 25B(b) is the same figure as line 47 for house payments.
- Debtor may not “double dip,” that is take the full amount of the Local Standard for mortgage/rent on line 25B(a) and then fail to deduct the monthly mortgage payment on line 25B(b). The overall effect of disallowing double-dipping is to allow the debtor to take only the higher of the actual mortgage payment or the Local Standard.
- If the home is being surrendered, the debtor may not include the mortgage payment on lines 47 and 48, and may not deduct the mortgage payment on line 25B(b). The debtor may, however, claim the full amount of the Local Standard for housing on line 25A.
- Debtors and joint debtors are entitled to only one Local Standard mortgage/rent payment, even if maintaining two separate households.
- Vacation homes do not entitle a debtor to the Local Standard on line 25B.
- Debtor may not claim a Local Standard on line 25B when the debtor:
  - is and has been living with a friend or relative for an extended period of time at no cost;
  - is and has been living in military or other employer-paid housing.

**Line 26, Local Standards: housing and utilities; adjustment.**

- This line is often used improperly by debtors to claim housing expenses in excess of the IRS standards; USTP policy is to object to that use of line 26.
This line is occasionally used by debtors who claim that the form incorrectly captures the separation of the IRS housing Local Standard into two components, a mortgage component and a non-mortgage component; the USTP will object to that use of line 26.

**Line 27A, Local Standards: transportation, vehicle operation/public transportation expense.**

- Based on metro area or region.
- See line 16 to resolve multiple residences.
- The Local Standard for vehicle operation may be taken when the debtor owns, leases, or pays the operating expenses on a vehicle.
- The Local Standard for vehicle operation for zero vehicles may be taken if the debtor does not own, operate, or pay operating expenses on any vehicle.
- A vehicle must be “street ready” and licensable.
- A vehicle designed without an engine does not qualify, e.g., camper or trailer.
- Debtors located outside of the Fifth, Seventh, and Eighth Circuits who operate vehicles not subject to a loan or lease may deduct an additional $200 if the vehicle is owned by the debtor, and is older than six (6) model years or has more than 75,000 miles.

**Line 27B, Local Standards: transportation, additional public transportation expense.**

- If debtor claims vehicle operating expense for one or more vehicles on Line 27A, debtor may only claim additional public transportation expense if reasonable and necessary for the health and welfare of the debtor, debtor’s dependents, and debtor’s spouse, or for the production of income.
- If additional public transportation expense is applicable, it is capped by Local Standard amount for public transportation.

**Lines 28 & 29, Local Standards: transportation ownership/lease expenses.**

- Outside the Fifth, Seventh, and Eighth circuits, debtor cannot claim the vehicle ownership expense if the debtor does not have a secured loan or a lease on the vehicle.
- In the Fifth, Seventh, and Eighth circuits debtor may claim this expense if the debtor owns a vehicle regardless of whether the debtor has a loan or lease payment. However, if the debtor owns a vehicle free and clear the USTP position is that the lack of any actual ownership expense may be considered in calculating projected disposable income under section 1325(b)(1)(B).
- If the vehicle is being surrendered without replacement, the debtor may not claim the expense. But see discussion regarding line 47.
- If the vehicle is borrowed, the debtor may not claim the expense.
- Debtor may not “double dip,” that is take the full amount of the vehicle ownership expense on line 28(a) and then fail to deduct the monthly lien payment on line 28(b). The overall effect is to allow the debtor to take the higher of the actual loan or lease payment and vehicle ownership expense.
A debtor whose household contains a single driver is generally entitled to an
ownership expense for only one vehicle.

**Line 30, Other Necessary Expenses: taxes.**

- Based on monthly amount of actual taxes owed, not taxes withheld.
- Includes FICA, Social Security, Medicare, state and local taxes.
- Non-debtor spouse’s taxes not included if “backed out” on line 19.

**Line 31, Other Necessary Expenses: involuntary deductions for employment.**

- Includes retirement, union dues, uniform costs, work shoes.
- Does not include voluntary 401(k) contributions, voluntary 401(k) loan repayments, or other voluntary retirement or profit sharing deductions.
- Does not include United Way or charitable contributions.
- Does not include elective insurance.
- But see line 55 for exclusion of retirement payments and loan repayments in chapter 13.

**Line 32, Other Necessary Expenses: life insurance.**

- Includes only amounts for term insurance on the debtor’s life.
- If the policy is whole life, debtor must determine what portion of the premium is attributable to term coverage.
- Does not include premiums on policies for non-debtor spouse or children.

**Line 33, Other Necessary Expenses: court-ordered payments.**

- Includes the current monthly amount of support and alimony, not the past due amounts, which are entered on line 49.
- Does not include purely voluntary amounts for which there is no legal obligation.

**Line 34, Other Necessary Expenses: education for employment or for a physically or mentally challenged child.**

- Employment education must be as a condition of employment.
- Expenses for challenged children must be for “health or welfare.”
- Expenses for challenged children cannot be otherwise provided by public school system.
- Expenses for challenged children cannot be already included on line 35 or 43.
Chapter 4—Means Testing

C-2  ln 21  **Line 35, Other Necessary Expenses: childcare.**

- These are actual expenses only.
- Includes babysitting, nursery school, daycare, preschool.
- Premium daycare may be permitted, depending on the justification.
- May not be permitted if one parent is “stay at home;” depends on the circumstances.

C-2  ln 22  **Line 36, Other Necessary Expenses: health care.**

- Includes only unreimbursed, out-of-pocket expenses, exceeding the National Standard amounts provided for at line 24B, including items traditionally reimbursable through a flexible spending or “cafeteria” medical saving plan. For example:
  - deductibles
  - medications
  - therapy
  - co-pays
- Does not include payments for health insurance or health savings account; those are covered by line 39.
- Does not include elective or cosmetic surgery.
- May not duplicate items on line 39.

C-2  ln 23  **Line 37, Other Necessary Expenses: telecommunication services.**

- Does not include basic phone or cell service, which is included in the Local Standards on line 25A.
- Pagers, call waiting, long distance, caller ID, and internet may be included, depending on amount and circumstance; test is whether “necessary for health and welfare or production of income.”
- Does not include business expenses already deducted on line 3b or 4b.

C-2  ln 25  **Line 39, Health Insurance, Disability Insurance, and Health Savings Account Expenses.**

- Includes actual expense for debtor, spouse, and dependents.
- Does not include flexible spending account or “cafeteria” medical saving plan contributions, which should be deducted as excess costs on line 31 to the extend they exceed to line 19B IRS standard amounts.

C-2  ln 26  **Line 40, Continued contributions to the care of household or family members.**

- Includes only actual, not anticipated expenses.
- Family member must live with the debtor or be a member of the debtor’s immediate family, i.e., parent, grandparent, sibling, child, grandchild.
- Elderly, chronically ill, or disabled person must be unable to pay the expense.
Line 41, Protection against family violence.

- Include only ongoing expenses related to a real threat.
- Legal costs related to a restraining order may qualify.
- Home security system costs will not qualify in all cases.
- Nature of expense, but not the amount, must be kept confidential by the court.

Line 42, Home energy costs.

- Insert the amount by which the twelve-month average home energy costs exceed line 25A.
- Amount claimed is unlimited, but must be documented.

Line 43, Education expenses for dependent children under 18.

- Includes public or private elementary or secondary education.
- Does not include college or preschool education.
- Child must be under 18 at filing.
- Amount may not exceed $147.92 per child.
- Expenses must be documented.
- Cannot duplicate expenses claimed on line 35.
- Does not include school lunches, which are included in National Standards on line 24.
- Can include home schooling expenses.

Line 44, Additional food and clothing expense.

- The USTP Web site breaks out the food/clothing standard for application of the 5 percent limit.
- Expenses must be actual, not merely anticipated.
- Special dietary and allergy restrictions can be covered.
- Documentation is required.

Line 45, Continued charitable contributions.

- Contribution is limited to 15 percent of gross income.
- The USTP position is that charitable contributions under section 1325(b)(2)(A)(ii) are available to both below median and above median debtors. The Religious Liberty and Charitable Donation Clarification Act of 2006, Pub. L. 109-439 clarifies the Bankruptcy Code to ensure that above-median debtors may make continued charitable contributions.

Line 47, Future payments on secured claims.

- Total all payments coming due in the 60 months following filing and divide by 60.
- In the case of a variable rate loan, use the loan rate in effect on the petition date to
calculate the payments.

- In the case of a “balloon” payment within 60 months, use the full amount of the balloon to calculate the average payment.
- Does not include property subject to a lease rather than a loan.
- Includes all secured debt, even “toys” and luxury items. Although the USTP position is to allow secured payments for luxury items on this line, the Program believes that luxury expenses may demonstrate a lack of good faith that could prevent confirmation or support dismissal of the case.
- Includes a secured loan payment, even when the value of the collateral is less than the amount of the loan.
- Outside the First Circuit, does not include payments when the debtor intends to surrender the collateral securing the loan either in the plan or independent of the plan.
- In the First Circuit, debtor may include payments on line 47 when the debtor intends to surrender the collateral securing the loan either in the plan or independent of the plan. However, the USTP position is that the lack of a monthly car payment may be considered in calculating projected disposable income under section 1325(b)(1)(B).
- It is the Program’s position that the secured payment under the plan is the figure to be included on line 47. This includes “crammed down” plan payments, as well as zero for payments on property on which a lien is to be avoided.

**Line 48, Other payments on secured claims.**

- Does not include arrearage on luxury items; the item must be “necessary for the support of the debtor or dependents.”
- See line 47 for a discussion of liens which are crammed down or avoided, or where the collateral is surrendered.

**Line 49, Payments on prepetition priority claims.**

- The total of priority debt includes only amounts due as of filing.
- Does not include figures already listed on line 33.

**Line 50, Chapter 13 administrative expenses.**

- Debtor must project a hypothetical chapter 13 plan payment to calculate the figure on line 50a. The USTP does not insist on mathematical exactitude and allows a reasonable estimation of the hypothetical chapter 13 plan payment.
- The multiplier for line 50b is found on the USTP Web site by state.

**Line 54, Support income.**

- Support income may be deducted here, but must be included on line 7.

**Line 57, Deduction for Special Circumstances.**
Governed by section 707(b)(2)(B).

**Line 58, Monthly Disposable Income Under § 1325(b)(2).**

- The disposable income determined on line 58 is not the same as the “projected disposal income” of section 1325(b)(2)(B). Historical income is not conclusive; rather, the disposable income projected over the life of the plan should be used.
- The disposable income and the calculations shown on Form 22C are a “starting point” or framework for the calculation of “projected disposable income.”
  - The term “projected disposable income” is forward-looking and reality-based, and is not grounded in any artificial or mechanical formulation.
  - Known or reasonably foreseeable changes in financial circumstances as established by any party should be considered.
  - The object is to reach a determination based on the reality of a debtor’s capability to repay creditors.
- The type of income allowed under the definition of Current Monthly Income, rather than the income shown on Schedule I, is the framework for projecting the debtor’s income over the life of plan.
- The type and amount of expenses allowed under section 707(b)(2), rather than the expenses shown on Schedule J, are the framework for projecting the debtor’s expenses over the life of the plan.
- Using chapter 13 to preserve luxury items at the expense of unsecured creditors and acquiring payments on luxury items on the eve of bankruptcy may be evidence that the plan has not been proposed or filed in good faith.
- A chapter 13 trustee need not object to confirmation when “special circumstances” of section 707(b)(2)(B) justify additional expenses or adjustments to current monthly income for which there is no reasonable alternative.

Rev’d April 20, 2010
COMMITTEE NOTE

Official Forms 22A-1, 22A-1Supp, 22A-2, 22C-1, and 22C-2 are new versions of the “means test” forms used by individuals in chapter 7 and 13, formerly Official Forms 22A and 22C. The original forms were substantially revised as part of the Forms Modernization Project. Official Form 22B, used by individuals in chapter 11, has also been revised as part of the project, which was designed so that the individuals completing the forms would do so more accurately and completely.

The revised versions of the means test forms present the relevant information in a format different from the original forms. For chapter 7, former Official Form 22A has been split into two forms: 22A-1 and 22A-2. The first form, Official Form 22A-1, Chapter 7 Statement of Your Current Monthly Income, is to be completed by all chapter 7 debtors. It calculates a debtor’s current monthly income and compares that calculation to the median income for households of the same size in the debtor’s state. The second form, Official Form 22A-2, Chapter 7 Means Test Calculation, is to be completed only by those chapter 7 debtors whose income is above the applicable state median. The prior version of Official Form 22A was introduced by several questions bearing on the applicability of the means test. Debtors who do not have primarily consumer debts, as well as certain members of the armed forces, are exempt from a presumption of abuse under the means test, and so are excused from completing the form. However, the great majority of individual debtors in chapter 7 do not fall within the exemptions. Accordingly, the exemptions from means testing have been placed in a separate supplement, Official Form 22A-1Supp, that will be filed only where applicable, making Form 22A present the relevant information more directly and in a manner consistent with the parallel chapter 13 form.

For chapter 13, there is a similar split of income and expense calculations. All chapter 13 debtors must complete Official Form 22C-1, Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period, which calculates current monthly income and the plan commitment period. Debtors only need to complete the second form, Official Form 22C-2, Chapter13 Calculation of Your Disposable Income, if their current monthly income exceeds the applicable median. Form 22C-2 calculates disposable income under 11 U.S.C. § 1325(b)(3), through a report of allowed expense deductions.
Line 60 of former Official Form 22C has not been repeated in Official Form 22C-2. This line allowed debtors to list, but not deduct from income, “Other Necessary Expense” items that are not included within the categories specified by the Internal Revenue Service. Because debtors are separately allowed to list—and deduct—any expenses arising from special circumstances, former Line 60 was rarely used.

Form 22C-2 also reflects the Supreme Court’s decision in *Hamilton v. Lanning*, 560 U.S. 505 (2010). Adopting a forward-looking approach, the Court held in *Lanning* that the calculation of a chapter 13 debtor’s projected disposable income under § 1325(b) required consideration of changes to income or expenses reported elsewhere on former Official Form 22C that, at the time of plan confirmation, had occurred or were virtually certain to occur. Those changes could result in either an increased or decreased projected disposable income. Because only debtors whose annualized current monthly income exceeds the applicable median family income have their projected disposable income determined by the information provided on Official Form 22C-2, only these debtors are required to provide the information about changes to income and expenses on Official Form 22C-2. Part 3 of Official Form 22C-2 provides for the reporting of those changes.

In reporting changes to income a debtor must indicate whether the amounts reported in Official Form 22C-1—which are monthly averages of various types of income received during the six months prior to the filing of the bankruptcy case—have already changed or are virtually certain to change during the pendency of the case. For each change, the debtor must indicate the line of Official Form 22C-1 on which the amount to be changed was reported, the reason for the change, the date of its occurrence, whether the change is an increase or decrease of income, and the amount of the change. Similarly, in reporting changes to expenses, a debtor must list changes to the debtor’s actual expenditures reported in Part 1 of Official Form 22C-2 that are virtually certain to occur while the case is pending. With respect to the deductible amounts reported in Part 1 that are determined by the IRS national and local standards, only changed amounts that result from changed circumstances in the debtor’s life—such as the addition of a family member or the surrender of a vehicle—should be reported. For each change in expenses, the same information required to be provided for income changes must be reported.

Unlike former Official Forms 22A and 22C, Official Forms 22A-2 and 22C-2 permit, at line 23, the deduction of cell phone
expenses necessary for the production of income if those expenses have not been reimbursed by the debtor’s employer or deducted by the debtor in calculating net self-employment income. The same line also states that expenses for internet service may be deducted as a telecommunication services expense only if necessary for the production of income. Under IRS guidelines adopted in 2011, expenses for home internet service used for other purposes are included in the Local Standards for Housing and Utilities—Insurance and Operating Expenses. Also, Official Forms 22A-2 and 22C-2 now provide, at line 18, for deductions of the premiums paid by one jointly filing debtor on term life insurance policies of the other joint debtor as well as for premium payments on the debtor’s own policies.
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<th>B122A Line</th>
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<tr>
<td>1C</td>
<td>Reservist/National Guard</td>
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<td>Rent or Other RP Income</td>
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<tr>
<td>Family Care</td>
<td>A-2 In 26</td>
<td>C-2 In 26</td>
<td></td>
</tr>
<tr>
<td>Protection from Family Violence</td>
<td>A-2 In 27</td>
<td>C-2 In 27</td>
<td></td>
</tr>
<tr>
<td>Home Energy Costs</td>
<td>A-2 In 28</td>
<td>C-2 In 28</td>
<td></td>
</tr>
<tr>
<td>Education Expenses Child Under 18</td>
<td>A-2 In 29</td>
<td>C-2 In 29</td>
<td></td>
</tr>
<tr>
<td>Additional Food &amp; Clothing Expense</td>
<td>A-2 In 30</td>
<td>C-2 In 30</td>
<td></td>
</tr>
<tr>
<td>Continued Charitable Contributions</td>
<td>A-2 In 31</td>
<td>C-2 In 31</td>
<td></td>
</tr>
<tr>
<td>Future Payments on Secured Claims</td>
<td>A-2 In 33</td>
<td>C-2 In 33</td>
<td></td>
</tr>
<tr>
<td>Other Payments on Secured Claims</td>
<td>A-2 In 34</td>
<td>C-2 In 34</td>
<td></td>
</tr>
<tr>
<td>Payments on Priority Claims</td>
<td>A-2 In 35</td>
<td>C-2 In 35</td>
<td></td>
</tr>
<tr>
<td>Chapter 13 Administrative Expenses</td>
<td>A-2 In 36</td>
<td>C-2 In 36</td>
<td></td>
</tr>
<tr>
<td>Monthly Disposable Income</td>
<td>A-2 In 39</td>
<td>C-2 In 45</td>
<td></td>
</tr>
<tr>
<td>Deduction of Child Support</td>
<td>C-2 In 40</td>
<td>Not on A-2</td>
<td></td>
</tr>
<tr>
<td>Qualified Retirement Deductions</td>
<td>C-2 In 41</td>
<td>Not on A-2</td>
<td></td>
</tr>
<tr>
<td>Special Circumstances</td>
<td>A-2 In 43</td>
<td>C-2 In 43</td>
<td></td>
</tr>
<tr>
<td>Change in Income or Expenses</td>
<td>C-2 In 46</td>
<td>Not on A-2</td>
<td></td>
</tr>
</tbody>
</table>

C-2 notes no more than 15% of gross monthly income.
### PROPOSED SCHEDULE I

<table>
<thead>
<tr>
<th>Income</th>
<th>DEBTOR</th>
<th>SPOUSE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Est. Overtime</td>
<td>$0.00</td>
<td>$0.00</td>
</tr>
<tr>
<td><strong>SUBTOTAL</strong></td>
<td>$0.00</td>
<td>$0.00</td>
</tr>
</tbody>
</table>

**Less Payroll Deductions**

- Payroll Taxes and SS
- Insurance
- Union Dues
- Other

<table>
<thead>
<tr>
<th>Subtotal Payroll Deductions</th>
<th>$0.00</th>
<th>$0.00</th>
</tr>
</thead>
</table>

| Net Monthly Take Home | $0.00 | $0.00 |

**Business Income**

- Real Property Income
- Interest and Dividends
- Support Payments
- Social Security
- Pension/Retirement

<table>
<thead>
<tr>
<th>Other:</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Subtotal other income items</td>
<td>$0.00</td>
<td>$0.00</td>
</tr>
<tr>
<td><strong>Total Monthly Income</strong></td>
<td>$0.00</td>
<td>$0.00</td>
</tr>
<tr>
<td><strong>Combined Total Income</strong></td>
<td>$0.00</td>
<td>$0.00</td>
</tr>
</tbody>
</table>

### Lanning Calculation

<table>
<thead>
<tr>
<th>Case #:</th>
<th>County</th>
<th>Notes:</th>
<th>Line 24B</th>
<th># Under 65</th>
<th># Over 65</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

- **6** Food, clothing, etc. **FALSE**
- **7** Health Care **$0.00**
- **8** Housing & Utilities **$ -**
- **9** Housing Mort/Rent **$ -**
- **10** Housing adjustment **$0.00**
- **11 or 14** Transportation expense **$ -**
- **15** Transportation Additional **$0.00**
- **18** Life Insurance **$0.00**
- **19** Court ordered payments **$0.00**
- **20** Ed challenged children **$0.00**
- **21** Childcare **$0.00**
- **22** Healthcare **$0.00**
- **23** Telecommunication **$0.00**
- **25** Health/Disb Insurance **$0.00**
- **26** Contributions for ill/disb **$0.00**
- **27** Family violence **$0.00**
- **28** Energy costs **$0.00**
- **29** Education expenses **$0.00**
- **30** Additional food/clothing **$0.00**
- **31** Charitable contributions **$0.00**
- **33** Secured clms pd outside **$0.00**

<table>
<thead>
<tr>
<th>Trustee</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

- **House** **$0.00**
- **Vehicle 1** **$0.00**
- **Vehicle 2** **$0.00**
- **Other** **$0.00**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>41</strong></td>
<td>Retirement contributions <strong>$0.00</strong></td>
</tr>
<tr>
<td><strong>43</strong></td>
<td>Special Circumstances <strong>$0.00</strong></td>
</tr>
<tr>
<td><strong>42</strong></td>
<td>Total Deductions <strong>$ -</strong></td>
</tr>
</tbody>
</table>

**Plan Payment**

**$0.00**
New Bankruptcy Forms: 22C-1 AND 22C-2
By James M. Davis, Attorney Representing Chapter 13 Trustee Henry E. Hildebrand, III, Nashville, TN

On December 1, 2014, the Official Bankruptcy Form 22C (or B22C) will be replaced by two separate forms, Form 22C-1 and Form 22C-2. The new forms do not involve major changes—anyone familiar with the current form will recognize most of what appears on the new versions—but the forms do have a new look and involve some material changes.

General Matters

The most immediately apparent changes are stylistic revisions under the Forms Modernization Project, designed to make the forms more user-friendly (especially for unrepresented filers) and more readable. The format is similar to the new forms for Schedules I and J which went into effect in December 2013. As practitioners familiar with these new forms know, one notable side effect of the modernization effort is to increase form length.

The new forms do counteract the lengthening trend to some degree by splitting the current Form 22C into two different forms, with the second form completed only by above-median-income debtors. Form 22C-1 must be completed by all debtors. It contains the calculations in Parts I, II, and III of the existing Form 22C—the calculations of average monthly income and current monthly income and the determinations of whether the debtor is above or below the state’s median income for purposes of § 1325(b)(4) (the applicable commitment period) and § 1325(b)(3) (determination of “amounts reasonably necessary to be expended”). Only debtors that are above the median income under § 1325(b)(3) must complete Form 22C-2. The existing Form 22C is functionally similar, instructing below-median-income debtors not to complete Parts IV, V, and VI. The approach under the new forms should eliminate the pages of blank forms that accompany the majority of filings under the existing form.

Changes to Reflect Supreme Court Decisions

The new forms include revisions to reflect two Supreme Court decisions. The first revision is straightforward. In Ransom v. FIA Card Services, N.A., the Supreme Court held that a “debtor who does not make loan or lease payments may not take the car-ownership deduction.” The new Forms finally catch up to this ruling, adding a specific prohibition to the instructions for the vehicle ownership standard (at Line 13 of the B22C-2):

The new forms also include a more interesting revision designed to accommodate the holding in Hamilton v. Lanning. In that case, the Court held that “when a bankruptcy court calculates a debtor’s projected disposable income, the Court may account for changes in the debtor’s income or expenses that are known or virtually certain at the time of confirmation.” The new form addresses this holding by...

adding new lines at the end of Form 22C-2 that provide space to list known or virtually certain changes in income or expenses:

This revision is consistent with the clear majority approach in the reported decisions, which holds that the statutory formula in §§ 707(b) and 1325(b) applies even when circumstances have changed. The references to specific line items and the requirement to identify the reason for the change clearly imply that a change in circumstances does not automatically shift the entire projected disposable income analysis to a debtor’s actual income and expenses on Schedules I and J. To the extent it remains, the pure “I and J” approach to above-median-income cases will be more difficult to sustain since the new forms provide an official method for presenting Lanning-like adjustments.

Functionally, the lines for reporting changes in circumstances may present some minor challenges. First, the new form lists the changes after the calculation of monthly “disposable income,” but it does not follow up with a calculation of projected monthly disposable income. Though completing the calculation is a matter of basic addition and subtraction, the omission is odd. The Supreme Court’s decision in Lanning confirmed that the ultimate determination under § 1325(b) depends on “projected disposable income.” Why the new form continues to calculate only “disposable income” is not clear when it collects the information necessary to calculate the projected number.

The answer may be based in practical considerations. The new lines for reporting changes in circumstances apply to both Form 22C-1 and Form 22C-2. Check boxes allow a debtor to indicate whether each listed change is a change to the Form 22C-1 (the income side) or to Form 22C-2 (the expense side). And a second set of boxes allows the debtor to indicate whether the change is an increase or a decrease. The result ensures a concise and clear form, but it does mean that calculating the projected number requires an algorithm—whether each number in the new lines represents an increase or a decrease to the disposable income depends on the check boxes. It also means that the instructions for calculating the projected number would probably be somewhat complicated. The same factors that would make the

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instructions difficult complicate any automation of the review of the new forms. Extracting the data from these lines requires a person or a computer to follow a process to determine whether the number should be added to or subtracted from the monthly disposable income.

One other potential area of confusion: When a debtor reports a change anticipated to occur at a future date, the “amount of change” the debtor reports most likely will not be the amount of the change to the average monthly disposable income; it will just be the amount of the change that will occur in the future. Because this future change will not apply over all 60 months, calculating the projected monthly disposable income in this situation will require more than just addition and subtraction. Suppose, for example, that a debtor’s employer currently pays the full cost of a debtor’s health insurance but will stop subsidizing it in ten months and the debtor, therefore, projects that he will have insurance expenses of $300 per month beginning in month 11. The debtor is likely to list an “amount of change” of $300 and list a “date of change” as the beginning of month 11. The effect of this change on the 60-month disposable income calculation is not $300 per month, because the change does not apply over all 60 months; it applies for only 50 months, so the change to the monthly disposable income is only $250 ($300 times 50 and divided by 60).

Taxes

The new Form 22C-2 also wades into the murky area of accounting for income tax refunds. The current form takes a fairly hands-off approach, simply instructing debtors to list the amount that they “actually incur.” This instruction certainly implies—and courts have generally concluded—that the deduction for taxes should account for any anticipated refund, but it does not state so expressly, and it provides no guidance for arriving at the estimate of the actual tax expense.

The new form provides additional instructions. It expressly authorizes debtors to estimate taxes based on withholding, but it requires the debtors that do so to also reduce the amount by any anticipated tax refund:

\[
18. \text{Tax:} \text{The total monthly amount that you actually pay for federal, state and local taxes, such as income taxes, self-employment taxes, social security taxes, and Medicare taxes. You may include the monthly amount withheld from your pay for these taxes. However, if you expect to receive a tax refund, you must divide the expected refund by 12 and subtract that number from the total monthly amount that is withheld to pay for taxes.}
\]

Though this instruction is little more than a clarification of the existing instructions, it does remove some of the cover debtors may have had under the current form to just “estimate” taxes by calculating the average withholding (an approach that might have some legitimacy in jurisdictions that treat post-petition tax refunds as disposable income\(^5\)). The instructions now clearly preclude that approach.

The approach the new form adopts is the simplest to administer and it is likely to be relatively accurate in cases without significant changes in circumstances from the prior tax year. Unfortunately, it is not very helpful in the not-uncommon event that a debtor has experienced some changes or disruptions in income prepetition; in those cases, the prior year’s tax refund may provide only marginal evidence regarding future tax refunds and determining the expected refund may not be much easier than determining the expected tax expense. The new form does not require debtors to provide any detail


regarding their estimation of taxes, so this item is likely to remain something of a black box in the calculation.

**Household Size and Number of People Used in Determining Expenses**

The new Form 22C provides greater clarity regarding the possible distinction between (1) the household size used to determine whether a debtor is above or below the applicable median income and (2) the number of people used for purposes of determining the applicable IRS Standards. In most instances, both measures yield the same result. But different statutory language governs the two numbers, so the new forms require debtors to specify two separate numbers.

The new forms instruct debtors to report household size on Line 16 of the new Form 22C-1 as follows, in essentially the same manner they report it on Line 16 of the current Form 22C:

![Image of Form 22C-1 Line 16](image1)

The term “household” derives from §§ 1322(d) and 1325(b). Both of these subsections compare the debtor’s annualized current monthly income to the median income for a family of the same size as the debtor’s “household.”

The new Form 22C-2, however, also requires debtors to separately specify the number of people used in determining the deductions from income:

![Image of Form 22C-2 Line 5](image2)

The “number of dependents” in this line derives from § 707(b) (made applicable to above-median-income chapter 13 cases by § 1325(b)(3)). Section 707(b)(2)(A)(I) specifies the means test expense deduction for the IRS Standards and indicates that a debtor is entitled to claim the applicable IRS Standards and other expenses “for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case.”

A number of cases consider the proper method of determining one or both of these numbers. The cases, however, sometimes fail to distinguish clearly between the two numbers. And some basis exists for making that distinction. The “household” size applies in the context of Census data regarding “median family income.”

This connection has led some courts to adopt a so-called “heads-on-beds” approach based on the Census Bureau’s definition of “household”: “all of the people, related and unrelated, who occupy a housing unit.” The number of people for purposes of determining expenses, on the other hand, applies in the context of IRS data. In applying its Standards, the IRS generally determines

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7 See, e.g., *Johnson v. Zimmer (In re Johnson)*, 686 F.3d 224, 230 (4th Cir. 2012) (noting the parties’ contention that the dispositive issue in their case concerned the number of dependents for the expense determination but holding that the only issue on appeal was the issue decided by the bankruptcy court: the household size for purposes of determining whether the debtor was above the applicable median income), *cert. denied*, 133 S. Ct. 846 (2013)

8 Sections 101(39A) defines “median family income” by reference to Census data.

9 Id. at 235-36 (quoting *In re Ellringer*, 370 B.R. 905, 911 (Bankr. D. Minn. 2007)).
family size by reference to the number of people allowed as exemptions on the person’s most recent tax return. \(^{10}\)

The current Form 22C already acknowledges the possible distinction between the household size and the number of people for purposes of determining expenses. The instructions for the lines stating the IRS Standards do not refer debtors back to the household size number. Instead, they instruct the debtor to fill in the IRS Standards for the “applicable number of persons” and state: “The applicable number of persons is the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.” The new Form 22C-2 carries over this same instruction. The change, therefore, should not affect the calculation of disposable income. It should only alter the presentation of the information by requiring debtors to specify the number used to determine the applicable Standards. The revision, however, may also heighten awareness of the potential distinction and, in the rare cases in which a debtor actually claims two different numbers, it should make the debtor’s intent more clear.

**Telecommunications**

The new Form 22C-2 updates the instructions regarding the deduction of additional telecommunications expenses. The instructions in the current form include internet service among the permissible ‘other necessary expenses’:

<table>
<thead>
<tr>
<th>Line 37</th>
<th>Other Necessary Expenses: telecommunication services. Enter the total average monthly amount that you actually pay for telecommunication services other than your basic home telephone and cell phone service, such as pages, call waiting, caller id, special long distance, or internet service, to the extent necessary for your health and welfare or that of your dependents. Do not include any amount previously deducted.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$ 0.00</td>
</tr>
</tbody>
</table>

IRS guidelines adopted in 2011, however, brought home internet service within the Local Standard for Housing and Utilities, making the expense unavailable as an additional expense. \(^{11}\) The new Form 22C-2, therefore, specifically instructs debtors not to include expenses for home internet service:

| Line 23 | Optional telephones and telephone services: The total monthly amount that you pay for telecommunication services for you and your dependents, such as pages, call waiting, caller identification, special long distance, or business cell phone service, to the extent necessary for your health and welfare or that of your dependents or for the production of income, if it is not reimbursed by your employer. Do not include payments for basic home telephone, internet or cell phone service. Do not include self-employment expenses, such as those reported on line 5 of Form 22C-1, or any amount you previously deducted. + $ |

**Unresolved Issues and New Issues**

The most surprising unresolved issue is the reporting of business income. The new Form 22C-1 maintains the same format as the existing Form 22C, instructing debtors to report net business income. Numerous courts, however, including a Bankruptcy Appellate Panel, have found this approach inconsistent with the statutory text. \(^{12}\) Jurisdictions that follow this line of cases will continue to be stuck forcing business expenses onto another line of Form 22C-2. The new forms even remove the line that one

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\(^{10}\) Internal Revenue Service, *National Standards: Food, Clothing and Other Items* (“Generally, the total number of persons allowed for National Standards should be the same as those allowed as exemptions on the taxpayer’s most recent year income tax return.”), http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/National-Standards-Food-Clothing-and-Other-Items.

\(^{11}\) See Official Form 22 Committee Note, available at http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms/BankruptcyFormsPendingChanges.aspx

\(^{12}\) See, e.g., Drummond v. Wiegand (In re Wiegand), 386 B.R. 238 (B.A.P. 9th Cir. 2008).
court suggested debtors use as an alternative—\(^{13}\) the line for “Other Expenses” (Line 60 of the current Form 22C).\(^{14}\)

The new forms also do nothing to improve the reporting of retirement-related expenses. As in the current Form 22C, the new Form 22C-2 splits the reporting of retirement contributions into two lines in two different parts of the form. Mandatory contributions appear on Line 17 of the new Form 22C-2 (Line 31 of the existing Form 22C) and voluntary contributions appear on Line 41 (Line 55 of Form 22C). Admittedly, this fragmentation occurs because the forms are organized around statutory provisions, and the two deductions derive from different Code sections.\(^{15}\) But the new forms also maintain the current approach of lumping retirement loan payments in with voluntary retirement contributions and these two deductions also derive from different statutory provisions.\(^{16}\) Some courts perceive a material distinction between them, concluding that the Code permits chapter 13 debtors to deduct retirement loan payments, but not voluntary retirement loan contributions, in calculating disposable income.\(^{17}\) Many courts, moreover, conclude that “projecting” disposable income requires accounting for the anticipated completion of retirement loan payments during the plan.\(^{18}\)

Secured Debt Expenses Associated with IRS Standards

The new forms also effect a minor reorganization of the reporting of secured debt expenses. The current form instructs debtors to list secured debt expenses on Line 47:

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\(^{13}\) *In re Arnold*, 376 B.R. 652, 655 (Bankr. M.D. Tenn. 2007) (“These [business] expenses do not have a specific line item on Official Form 22C but may be deducted in the ‘Other Expenses’ category in Part VI of the form.”).

\(^{14}\) Official Form 22 Committee Note (“Line 60 of former Official Form 22C has not been repeated in Official Form 22C-2. . . . Because debtors are separately allowed to list—and deduct—any expenses arising from special circumstances, former Line 60 was rarely used.”).

\(^{15}\) Part 1 of the new Form 22C-2 (like Part IV of the current Form 22C) provides for the deductions allowed under 11 U.S.C. § 707(b)(2)(A) and (B). The deduction for mandatory retirement contributions appears in this part because it represents an allowable other expense under the IRS framework and is, therefore, an allowable deduction under 11 U.S.C. § 707(b)(2)(A). The deductions for voluntary contributions and for retirement loan payments appear derive from other Code sections, see 11 U.S.C. §§ 541(b)(7), 1322(f), and, therefore, appear in the part of forms that provides for additional deductions—Part 2 of the new Form 22C-2 (Part V of Form 22C).


\(^{17}\) See, e.g., *Seafort v. Burden (In re Seafort)*, 669 F.3d 662, 669-71, 674 n.7 (6th Cir. 2012).

Chapter 4—Means Testing

But debtors need these numbers to complete prior lines on the form (Lines 25B, 27A, and 27B). Line 25B, for example, lists the IRS Standard for mortgage or rent expense. Because the actual mortgage payments appear as an expense on Line 47, the existing form instructs debtors to reduce the Standard amount by the amounts of the secured debt payments:

19 This structure implements the statutory language of § 707(b)(2)(A)(ii)(I), which provides for the deduction of IRS Standard amounts but also specifies that the amounts under clause “shall not include any payments for debts.” The new forms, like the existing form, only instruct debtors to reduce the Standard by the future debt payments, not the arrearage amounts.
Line 33 lists the secured debt payments, and simply carries over the total from Line 9b (and the similar totals for vehicle ownership expenses):

This structure scatters the detail regarding the secured debt payments in a few different places on the form, but it permits debtors to complete the form in order. It also has the benefit of establishing designated lines for the secured debt payments associated with the IRS Standards, which simplifies both the input and the review of these data (especially electronic input and review).

One odd detail, however, is that the new form omits the check boxes that would indicate whether the home mortgage payment includes taxes or insurance (though it retains the check boxes for other
secured debts). The reason for this omission is unclear, as the information seems relevant. For bankruptcy purposes, the United States Trustee provides a division of the IRS Housing and Utilities Standard into a mortgage and rent portion and an insurance and operating expense portion. The purpose of this division seems to be to ensure that debtors are able to deduct the full non-mortgage standard amounts even when their mortgage payments exceed the mortgage standard. (Without this division, a principal and interest payment that exceeded the mortgage portion of the housing standard would reduce the non-mortgage portion as well.) But when a debtor lists a mortgage payment that includes escrow items as a secured debt expense, the debtor arguably obtains duplicative deductions for the insurance and tax expenses—not only the standard amounts included in the insurance and operating expense standard but also the escrow included in the amount the mortgage payment exceeds the mortgage standard.

For example, suppose a debtor has a mortgage with principal and interest payments of $1100 and escrow expenses that average $400. Suppose that the applicable mortgage standard for this debtor is $1000 and the applicable non-mortgage standard is $500. With a non-escrowed loan, this debtor’s housing deductions would total $1600: $500 for the non-mortgage standard, $0 for the mortgage standard (reduced by the secured debt payment) and $1100 for the mortgage principal and interest payment. With an escrowed loan, on the other hand, this debtor might claim housing deductions totaling $2000: $500 for the non-mortgage standard, $0 for the mortgage standard, and $1500 for the mortgage payment ($400 of which represents expenses for items included in the non-mortgage standard).
Potential Ninth Circuit Decision in the Making: Where do Voluntary Contributions to Retirement Fit in Chapter 13 Bankruptcy Plans?

BY CONSIDERCHAPTER13, ON AUGUST 9TH, 2015

By Ansley Owens, Contributing Writer and Intern for The Academy (Nashville, TN)

Trustees and debtors should keep an eye on the Ninth Circuit and the nine states it covers regarding the treatment of voluntary contributions to retirement plans.

A recent decision in the Western District of Washington held contributions to an employee retirement plan should be excluded from the computation of current monthly income and, therefore, not deducted from disposable income in the Means Test. In re Vu, No. 15-41405 (Bankr. W.D. June 16, 2015).

Anh-Thu Thi Vu was an above-median debtor who filed for chapter 13 bankruptcy. Prior to filing her petition, Ms. Vu made regular, voluntary contributions to a Thrift Savings Plan (TSP) offered by her employer in amounts averaging $877 per month. On her Form B22C-2, she listed $877 on Line 41 for “all qualified retirement deductions,” leaving $74 as her disposable income on Line 45.

The Chapter 13 Trustee filed an objection arguing that Ms. Vu’s pre-petition contributions to her Thrift Savings Plan were not an allowable deduction in her Means Test. The trustee also argued the plan was not proposed in good faith noting that her monthly payments of $80 would repay only nine percent of her $50,342 unsecured debts, while she would contribute over $50,000 to her TSP over the same 60 months.

This objection required Ms. Vu to devote all of her projected disposable income to the plan pursuant to § 1325(b)(1)(B). “Disposable income” is “current monthly income . . . less amounts reasonably necessary” for the maintenance or support of the debtor or the debtor’s dependents. 11 U.S.C. § 1325(b)(2). Under § 541, property of the estate does not include those amounts “withheld by an employer from the wages of employees for payment as contributions” to qualifying retirement plans. 11 U.S.C. §
541(b)(7)A)(i)(I). An exception, known as the “hanging paragraph,” states that such amount is not disposable income as defined in § 1325(b)(2).

Courts generally treat voluntary contributions to retirement plans in one of three ways: some hold the contributions are never included in disposable income, some hold the contributions are excluded from disposable income if they were being contributed prior to filing, and others hold the contributions are to be included in the disposable income calculation.

_In re Prigge_, 441 B.R. 667 (Bankr. D. Mont. 2010) followed the majority of courts reaching the third holding. The _Prigge_ decision turns on two lines of reasoning: (1) voluntary retirement contributions are not a reasonably necessary expense under § 707(b)(2); (2) if Congress intended to exclude voluntary retirement contributions from disposable income it would have enacted a provision making it clear. _Prigge_, 441 B.R. at 676-77. In reaching its holding, the _Prigge_ court shortly mentioned section 541(b)(7)(A) and its hanging paragraph in a footnote simply stating: “It seems intended to protect amounts withheld by employers from employees that are in the employer’s hands at the time of filing bankruptcy, prior to remission of the funds to the plan.” _Id._ at n. 5.

The 9th Circuit BAP later agreed with the _Prigge_ holding and attempted to reconcile its result with the language in § 541(b)(7)(A)(i)’s hanging paragraph by concluding that only pre-petition voluntary retirement contributions are excluded from disposable income as defined in § 1325(b)(2). _In re Parks_, 475 B.R. 703, 708 (B.A.P. 9th Cir. 2012). The _Parks_ court explained that “such amount” means that only pre-petition contributions shall not constitute disposable income, and “except that” simply clarifies that such voluntary retirement contributions excluded from property of the estate are not post-petition income to the debtor. _Id._

The _Vu_ court, noted Collier’s criticism of the _Prigge_ line of reasoning in 5 COLLIER ON BANKRUPTCY, ¶ 541.23[1] (16th ed. Rev.), that explained how such conclusions “makes no sense” because disposable income encompasses only post-petition income and funds paid pre-petition are addressed in other sections of the Bankruptcy Code. Collier “conclude[d] that the reference to § 1325(b) in § 541(b)(7)(A)(i)’s hanging paragraph ‘removes any doubt’ that qualifying voluntary retirement contributions ‘are to be excluded from the disposable income calculation.’”

_In re Bruce_, 484 B.R. 387 (Bankr. W.D. Wash. 2012) attempted to harmonize _Parks_ and _Prigge_ by reasoning that § 541(b)(7)(A)(i)’s hanging paragraph excluded pre-petition voluntary retirement contributions from current monthly income in the six-month CMI look-back period, and, therefore, such contributions should not be included in the calculation of
disposable income which relies on CMI. Neither *Parks nor Prigge* considered whether or not such contributions should be included in the calculation of CMI. *Vu*, No. 15-41405 at n. 4.

The *Vu* court agreed with the *Bruce* decision holding that voluntary contributions to an employee retirement plan are to be excluded from the calculation of CMI rather than deducted from disposable income in the Means Test. The court found the reasoning in Bruce applicable to all chapter 13 debtors because calculating current monthly income is the starting point for determining disposable income under § 1325(b)(2), regardless of whether the debtor falls above or below the median-income mark. The court explained that such an interpretation “gives substantive application to the hanging paragraph, unlike the very narrow interpretation of that paragraph in *Prigge et al.*”

Clarifying its decision, the *Vu* court said: “Using this approach, Debtor would not have treated her voluntary retirement contributions as a deduction in Line 41 of her Form B22C-2; rather, she should have subtracted those contributions made in the six-month pre-petition period in calculating CMI. In practice, this will result in virtually the same projected disposable income as Debtor’s approach because she made the same contributions during each of the six months used to calculate CMI."

The *Vu* court declined to rule on the issue of good faith, but found that voluntary contributions to a retirement plan are subject to a good faith analysis under § 1325. The court instructed the parties to resolve their differences based on its ruling regarding the appropriate calculation of CMI.

Looking forward, if *Prigge* gets appealed, it could lead to a 9th Circuit Court of Appeals decision, and although there is not a clear split among circuits at this time, this decision could create a split triggering Supreme Court review.
HOLY CREEPING LANNINGISM BATMAN! – CHAPTER 13 CONCEPTS INVADING THE CHAPTER 7 MEANS TEST?
BY JOHN GUSTAFSON, ON JANUARY 19TH, 2013

By John P. Gustafson, Chapter 13 Trustee for the Northern District of Ohio, Western Division

Once upon a time, a short time ago, there was pretty much a consensus on a bankruptcy issue.

Shocking, I know!

The concept that the Chapter 7 Means Test was essentially a mechanical, backward-looking test was relatively settled. Thus, deductions for secured claims – such as mortgage or a motor vehicle loan – would be deductible if it remained “contractually due” at the time of filing, based on the language of Section 707(b)(2)(A)(iii)(I).

This view of the Chapter 7 Means Test has been supported by the holding in Morse v. Rudler, (In re Rudler), 576 F.3d 37, 45 (1st Cir. 2009), and a number of other decisions. See, In re Rivers, 466 B.R. 558 (Bankr. M.D. Fla. 2012)(Chapter 7 debtor may deduct mortgage payments on home she planned to surrender in performing “means test” calculation to determine whether her petition was presumptively abusive); Walton v. Hardigan (In re Hardigan), 2012 Bankr. LEXIS 5873 (Bankr. S.D. Ga. December 19, 2012); In re Sonntag, 2011 Bankr. LEXIS 3304, 2011 WL 3902999 (Bankr. N.D. W.Va. September 6, 2011)(rejecting argument that Lanning and Ransom prevented Chapter 7 debtors from taking a deduction for secured debt on property they intended to surrender); In re Ng, 2011 Bankr. LEXIS 583, 2011 WL 576067 (Bankr. D. Hawaii February 9, 2011)(“when calculating monthly income under the means test, [Chapter 7 debtors] are permitted to deduct their mortgage payments notwithstanding their intentions to surrender the Property.”); In re Grinkmeyer, 456 B.R. 385, 387-89 (Bankr. S.D. Ind. 2011)(finding that Lanning and Ransom are applicable to Chapter 13’s concept of projected disposable income, which does not exist in Chapter 7, and holding that a Chapter 7 debtor may deduct...

There were a few older cases that went the other way. In re Skaggs, 349 B.R. 594 (Bankr. E.D. Mo. 2006); In re Harris, 353 B.R. 304 (Bankr. E.D. Okla. 2006); In re Ray, 362 B.R. 680 (Bankr. D.S.C. 2007).

Recent Supreme Court cases that addressed Means Test issues in Chapter 13 cases have begun to impact the case law in Chapter 7s. Specifically, after Hamilton v. Lanning, ___ U.S. ___, 130 S. Ct. 2464, 177 L. Ed. 2d 23 (2010) and Ransom v. FIA Card Servs., N.A., ___ U.S. ___, 131 S.Ct. 716, 178 L. Ed. 2d 603 (2011).

Some of the newer cases interpreting the Chapter 7 Means Test have embraced “creeping Lanningism” – a term I just made up. One aspect of this new trend is to use a ‘forward looking approach’ in evaluating the Chapter 7 Means Test in determining whether the presumption of abuse exists, or not.

In my view, the holding in Lanning that embraced the “forward looking approach”, should be limited to Chapter 13 cases. As I will explain, arguments based on the holding in Lanning are weak.

On the other hand, departure from the “snapshot approach” based upon the Ransom decision may have some legs. The argument that certain expenses are “not applicable” should not ultimately win the day – but there is some “meat” to that approach. But, in my view, not enough to depart from the present majority view.

The recent cases that have departed from the snapshot approach in interpreting the Chapter 7 Means Test are: In re Sterrenberg, 471 B.R. 131 (Bankr. E.D.N.C. 2012); In re Fredman, 471 B.R. 540 (Bankr. S.D. Ill. 2012); In re Krawczyk, 2012 Bankr. LEXIS 3466 (Bankr. E.D.N.C. July 27,
2012). The discussions in Sterrenberg and Fredman are more detailed, and it should be noted that those two decisions were issued less than two weeks apart, and the later case (Fredman) does not reference the earlier case (Sterrenberg).

These decisions make arguments based on a number of considerations. Some of these arguments fail to take into account an underlying statutory difficulty that is completely absent from the analysis in these decisions. For example, the Fredman decision states:

[T]he Seventh Circuit has examined the meaning of §707(b)(2)(A)(iii)(I)’s phrase, “scheduled as contractually due to secured creditors in each month of the 60 months following the date of the filing of the petition.” In Turner, the Court of Appeals rejected the notion that the calculation of secured debt must be fixed on the Chapter 13 petition date. Turner, 574 F.3d at 355. In light of the Seventh Circuit’s construction of this phrase, this Bankruptcy Court can find no basis for defining the phrase one way when it is incorporated by reference into Chapter 13 means testing, 11 U.S.C. §1325(b)(3), and a different way when it is applied in Chapter 7 means testing. The rules of statutory construction demand that a discrete provision be read consistently wherever it appears in the same statute. E.g., Powerex Corp. v. Reliant Energy Services, Inc., 551 U.S. 224, 232, 127 S. Ct. 2411, 168 L. Ed. 2d 112 (2007)(“identical words and phrases within the same statute should normally be given the same meaning”); Belom v. National Futures Ass’n, 284 F.3d 795, 798 (7th Cir. 2002)(a court “can assume that Congress intended the same terms used in different parts of the same statute to have the same meaning”). Therefore, the Seventh Circuit’s construction of the language of §707(b)(2)(A)(iii)(I), rejecting a determination of the amount of secured debt that is frozen on the petition date, applies equally in Chapter 7 means testing.

The Turner decision was issued prior to the Supreme Court’s decision in Lanning. Like Lanning, Turner was a Chapter 13 case – and it essentially made the arguments that the Supreme Court would later adopt in crafting the opinion that cemented the “forward-looking” approach onto the Chapter 13 Means Test.

The Turner court stated:

Chapter 13 does say that the plan, in order to be approved, must provide “that all of the debtor’s projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.” 11 U.S.C. §1325(b)(1)(B). But it is unclear as a matter of semantics whether “projected” in the statute means “expected,”
on the one hand, or mechanically extrapolated from the debtor’s disposable income as calculable from the plan submitted by him, on the other.

In re Turner, 574 F.3d 349, 355 (7th Cir. 2009).

Like Lanning, Turner finds a problem with the mechanical approach because of the language of §1325(b)(1)(B), which includes the undefined term “projected disposable income”. Unlike “current monthly income”, which is a defined term under Section 101(10A). See, Hamilton v. Lanning, ___ U.S. ___, 130 S.Ct. 2464, 2469, 177 L.Ed.2d 23, 31 (2010).

The importance of the word “projected” in Section 1325(b)(1)(B) is highlighted by the analysis in Hamilton v. Lanning. The first argument that supports a forward looking approach is the ordinary meaning of the term “projected”. Second is that the word “projected” appears in many federal statutes. While the third argument is based on pre-BAPCPA practices, the majority goes right back to focusing on the term “projected” in listing why the mechanical approach should not be followed:

First, §1325(b)(1)(B)’s reference to projected disposable income “to be received in the applicable commitment period” strongly favors the forward-looking approach.

* * * * * *

Second, §1325(b)(1) directs courts to determine projected disposable income “as of the effective date of the plan,” which is the date on which the plan is confirmed and becomes binding, see §1327(a).

* * * * * *

Third, the requirement that projected disposable income “will be applied to make payments” is most naturally read to contemplate that the debtor will actually pay creditors in the calculated monthly amounts. § 1325(b)(1)(B). But when, as of the effective date of a plan, the debtor lacks the means to do so, this language is rendered a hollow command.


Why does it matter that five of the six main reasons for the forward-looking approach depend on the language of §1325(b)(1) and the term “projected”? After all, as Judge Grandy stated in Fredman: “this Bankruptcy Court can find no basis for defining the phrase one way when it is incorporated by reference into Chapter 13 means testing, 11 U.S.C. §1325(b)(3), and a different way when it is applied in Chapter 7 means
testing.” The Fredman and Sterrenberg cases discuss the various maxims of statutory construction – the plain meaning rule, the reasons to depart from it, discrete provisions being read consistently in the same statute, etc.

What these decisions don’t discuss is the rules for construing the Bankruptcy Code that Congress has specifically and unambiguously directed.

These decisions don’t discuss 11 U.S.C. Section 103(i).

§103 Applicability of chapters

(i) Chapter 13 of this title applies only in a case under such chapter.

“Section 103 is the road map for the various chapters and subchapters. It contains 11 paragraphs that explain which chapters and sections apply in which parts of the Code.” 2 Collier on Bankruptcy, ¶103.01, at 103-3 (16th ed. 2011).

Accordingly, none of the “projected” disposable income arguments that arise from the use of that term in §1325(b)(1) can be used to enhance an argument for changing the Chapter 7 Means Test from a mechanical test to a forward-looking test. While §1325(b)(3) explicitly incorporates §707(b)(2) into Chapter 13, there is no language in Chapter 7 that incorporates ‘projected’ disposable income into Chapter 7. Cf., In re Bloebaum, 311 B.R. 473, 477 (Bankr. W.D. Tex. 2004)(reference to §726(a)(1-3) in §502(b)(9) does not create an exception to the proof of claim timeliness requirement in Chapter 13 cases); In re Husman, 276 B.R. 596, 598 (Bankr. N.D. Ill. 2002)(§502(b)(9) ambiguity resolved by §103(b)).

The proper rule of statutory construction is that §707(b) must be interpreted without reference to §1325(b)(1), because a Chapter 13 provision can have no application to Chapter 7.

In other words, read Justice Scalia’s dissent in Hamilton v. Lanning and take out any countervailing arguments based on §1325(b)(1)’s use of the term “projected”. That is the argument for a mechanical approach to the presumption of abuse in Chapter 7 cases.

I submit that without the presence of the word “projected” in Section 1325(b)(1), even the majority in Lanning would have had a difficult time coming up with good arguments for a “forward-looking approach”. In addition, an interpretation of Section 101(10A) and Section 707(b), without reference to “projected” disposable income, is exactly what the rule of construction in Section 103(i) requires. The language of Chapters 1, 3, 5 and 7 is all that can be used in determining whether “scheduled as contractually due” secured payments may properly be included as
deductions on Line 42 of the Means Test. See, Section 103(a) and (b). A desire to “harmonize” Chapter 13 and Chapter 7 cannot supplant the statutory directive that Chapter 13 provisions only apply in Chapter 13 cases.

So, the question becomes: Does allowing the deduction of ‘scheduled as contractually due’ secured debt payments produce an absurd or senseless result?

In Chapter 7 cases, it does not.

In Chapter 7, there are two paths to a finding of abuse. One is backward looking and mechanical – the Form 22A Means Test. The other is forward-looking and holistic – the Section 707(b)(3) determination that under the “totality of the circumstances” allowing the case to go forward under Chapter 7 would be an abuse. That “totality of the circumstances” includes circumstances where property is being surrendered in Chapter 7. Because there is no real secured debt payment to be made on property that is being surrendered, and therefore no expense to reduce the future ability to fund a Chapter 13 plan, (or otherwise satisfy creditors outside of bankruptcy) abuse can be found on the exact same circumstances under Section 707(b)(3).

As the Hardigan court stated:

This “snapshot” view does not lead to “senseless results”, as the UST suggests, because Congress has provided that these additional forward-looking circumstances be taken into account under the totality of the circumstances analysis pursuant to 11 U.S.C. §707(b)(3).

Section 707(b)(3) requires a hearing – a messy, time consuming hearing where debtors weep on the stand, and harsh things have to be said about lifestyle choices. It isn’t the wonderfully efficient, clean, mathematically derived ‘presumption of abuse’ that arises without the need for a time consuming hearing. But, there are two hurdles a Chapter 7 debtor must clear in order to go forward, and Section 707(b)(3)’s broad ‘totality of the circumstances test’ clearly operates to prevent a senseless result, even if contractually due secured debts are permitted as a deduction on Line 42 of the Chapter 7 Means Test for presumption of abuse purposes.

The other main argument for not allowing the deduction is based on the Supreme Court’s decision in Ransom v. FIA Card Servs., N.A., ___ U.S. ___, 131 S.Ct. 716, 178 L. Ed. 2d 603 (2011). There are essentially two arguments for not allowing a Line 42 deduction for surrendered property: 1) the acknowledgement in Ransom that the legislative goal of BAPCPA was to ensure that debtors paid creditors the maximum amount that the debtor
could reasonably afford; and, 2) the rationale for not allowing a motor vehicle ownership deduction – that it was not an “applicable” expense.

While there is no denying the power of Ransom’s statements about the purpose of BAPCPA being to ensure that debtors pay the maximum amount they can afford. But, that purpose only comes into play when the language of the statute gives clear direction – as is illustrated by the holdings on Social Security income. Even though excluding Social Security income is contrary to the purpose of requiring debtors to pay the maximum they can afford, the statutory exclusion has been trumping arguments based upon the “purpose” of the statute.

Looking at the language of Section 707 – without reference to any of the Chapter 13 concepts that muddy the statutory intent – the “plain meaning” argument for the Line 42 deduction appears difficult to undermine. For example, some of the cases cited in Fredman, in support of ambiguity, appear to be a bit of a stretch. The decision in In re Clary, 2012 Bankr. LEXIS 1077, 2012 WL 868717 (Bankr. M.D. Fla. March 14, 2012) talks about a real estate expense being denied on the Means Test, but deduction was being taken on Line 21 (for a housing and utility adjustment) and was NOT a Line 42 deduction. Fredman, 471 B.R. at 550. Similarly, in arguing for the concept that “scheduled as” should be viewed as a ‘term of art’, Fredman cites In re Haar., 360 B.R. 759, 764-65 (Bankr N.D. Ohio 2007). While Haar does consider whether a dictionary meaning or a ‘bankruptcy’ meaning of “scheduled” would be appropriate – the actual holding is: It doesn’t matter. “[W]hether the word “scheduled” is read according to its dictionary meaning or in conformity with its common bankruptcy usage is really a distinction without a difference. Under either interpretation, the antecedent language “scheduled as” does not alone modify the term “contractually due” in such a way so as to prevent a debtor from utilizing in the ‘means test’ equation payments being made on collateral that will ultimately be surrendered.” Haar, 360 B.R. at 766.

The second half of the Ransom argument is that the payments that are merely ‘contractually due’ are not “applicable” to the debtor, because the debtor won’t actually be making them in the future because the property is being surrendered. That “applicable” argument was one of the main reasons for disallowing the “ownership” deduction for debtors without a vehicle payment. However, the word “applicable” was important in Ransom because it is used in §707(b)(2)(A)(ii)(I): “The debtor’s monthly expenses shall be the debtor’s applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor’s actual monthly expenses for the categories specified as Other Necessary Expenses issued by
the [IRS] for the area in which the debtor resides.” Ransom, 131 S.Ct. at 724.

The “contractually due” provision is a fair distance from the use of the word ‘applicable’. Looking at §707(b)(2)(A)(ii), there are subparts (I) through (V). The word ‘applicable’ appears in subpart (I). The provision for debts that are “scheduled for contractually due” is at §707(b)(2)(A)(iii). While ‘applicable’ is used in relation to the IRS National and Local Standards for living expenses, the directions on the deduction of secured claims that are “scheduled as contractually due” has no such limiting language.

While the discussion of ‘applicable’ has taken on greater import because of Ransom’s reliance on that limiting word – it isn’t a limiting word in the text of §707(b)(2)(A)(iii).

So, is the rejection of a ‘phantom’ expense under the IRS guidelines a blank check to strike all portions of the Means Test legislation that doesn’t comport with “reality”? Are the vehicle ownership deductions only allowed in the actual amount of the secured debt payment? Does Social Security income have to be listed on the Form 22A? Do we revert from the Chapter 7 Means Test to Schedules I and J in cases when expenses have changed?

So far, in other areas where the provisions of BAPCPA are being interpreted, Lanning and Ransom are not creating that kind of paradigm shift in interpretation. And Line 42 of the Form 22A shouldn’t be any different.

Last, the Fredman decision argues: “A forward looking approach is supported further by form B22A’s instructions to list “Future payments on secured claims” at line 42. The significance of this instruction should not be minimized. Form B22A was created by the Judicial Conference of the United States in October 2005, after passage of BAPCPA, for the purpose of assisting practitioners in calculating disposable income.”

While the Official Forms cannot contradict either Code or the Federal Rules of Bankruptcy Procedure, there is a more fundamental problem with this argument – it places importance on the words of the heading: “Future payments on secured claims”, and then doesn’t quote the more detailed instructions for Line 42, which state:

Future payments on secured claims. For each of your debts that is secured by an interest in property that you own, list the name of the creditor, identify the property securing the debt, state the Average Monthly Payment, and check whether the payment includes taxes or insurance. The Average Monthly Payment is the total of all amounts scheduled as contractually due to each Secured Creditor in the 60 months following the filing of the
bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. Enter the total of the Average Monthly Payments on Line 42.

Official Form 22A, Line 42.

There is no limitation in the instructions that would require debtors to leave out scheduled contractually due secured claims. Rather, the language of the Official Form appears to support the majority view that “all” amounts that are scheduled as contractually due may be listed and deducted on Line 42.

Once again, this is not to say that non-needy debtors are getting a free pass to Chapter 7 using phantom expenses. Judges can, and should, conduct a forward looking analysis in both Chapter 13 and Chapter 7 cases under the majority case law views. But, in Chapter 7 cases, that forward look should be under Section 707(b)(3), not by attempting to graft a forward-looking approach onto the Chapter 7 Means Test.
Chapter 5

Understanding Implicit Bias—Presentation Slides

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Understanding Implicit Bias

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Implicit Bias: A Cognitive Explanation

- Implicit Bias is...
  - Automatic stereotyping and evaluation
  - Generally *not* an indication of what we believe or would endorse
  - A result of how our brains organize information
Goals for this Session:

1. Know the basic Psychological Science behind Implicit Bias.
2. Begin to discuss and reflect on how it might impact your work and what strategies you might use to avoid those impacts.

Demonstration 1

- Stroop Task
- You automatically understand
  - the meaning of a color word (e.g., GREEN) and
  - the color in which a word is displayed (e.g., XXXXX).
- Automatic understandings can help or inhibit one another.
  - Quick and easy to correctly identify the color in which this word is displayed: GREEN (i.e., “green”)
  - Slower and harder to correctly identify the color in which this word is displayed: GREEN (i.e., “red”)
Stroop Task

- Our thinking is easier when the meaning of the word and the color in which it is written are consistent (Part 1) than when they are inconsistent (Part 2).

Automatic Activation: Demonstration 2

- Implicit Association Test
- Like the Stroop Task but involves the automatic understandings of the “meaning” of social groups (i.e., stereotypes and attitudes) instead of colors.
Implicit Association Test (IAT)

Example:
- Do people associate Men with Careers and Women with Family?
- If so, then they will be relatively fast and accurate categorizing:
  - Male names (Ben, John) with Career-related words (Salary, Office) and Female names (Julia, Anna) with Family-related words (Parents, Children)
- And relatively slow and inaccurate categorizing:
  - Male names with Family words and Female names with Career words

Gender-Career IAT

- Most people are faster and more accurate when the gender and setting are congruent with stereotypes & traditional roles (1st set) than when they are incongruent (2nd set).
Our Perceptions are Biased by Context

Implicit Bias is...

- Mostly unrelated to people’s consciously endorsed beliefs about stereotypes and evaluative attitudes.
Implicit Bias is...

...fairly pervasive. (Nosek et al., 2007)

<table>
<thead>
<tr>
<th>IAT</th>
<th>N</th>
<th>% with Bias</th>
</tr>
</thead>
<tbody>
<tr>
<td>Old/Negative – Young/Positive</td>
<td>351,204</td>
<td>80%</td>
</tr>
<tr>
<td>Black/Negative – White/Positive</td>
<td>732,811</td>
<td>68%</td>
</tr>
<tr>
<td>Male/Career – Female/Family</td>
<td>83,084</td>
<td>76%</td>
</tr>
<tr>
<td>Male/Science – Female/Humanities</td>
<td>299,298</td>
<td>72%</td>
</tr>
</tbody>
</table>

Predictive Validity (Field)

- Measures of implicit bias have been found to predict the extent to which:
  - **Interviewers** discriminated against:
    - Arab-Muslim job applicants (Rooth, 2010)
    - Obese job applicants (Agerström & Rooth, 2011)
  - **Registered Democrats** voted against Barack Obama in 2008 (Payne et al., 2010)
  - **Teachers’** expected their minority students to perform more poorly than non-minority students and the actual gap in performance of those students on standardized tests (van den Bergh et al, 2010)
  - **Pediatricians** recommended less pain medication for African American children than White children with identical symptoms (Sabin & Greenwald, 2012)
  - **Police Officers** used force when arresting African American compared to White children (Goff et al, 2014)
  - **Arbitrators** decided labor grievances in favor of women compared to men (Girvan, Deason, & Borgida, 2015)
Implicit Bias is...

...Most influential in:

- **Ambiguous judgments** and discretionary decisions about which more than one alternative can be easily justified
- **Snap decisions** or those for which there is **little time** or **low motivation** to gather and consider better information

Effective Interventions to Reduce the Effects of Implicit Bias on Your Decisions

1. Develop blinded procedures that focus on relevant information
2. Reduce ambiguity/use clear decision guides and flowcharts
3. Actively consider evidence for the opposite conclusion
4. Build in evaluation and feedback mechanisms
5. Hold yourselves and others accountable for making unbiased decisions
Thank you!

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Selected Resources

- National Center for State Courts Implicit Bias Education (http://www.ncsc.org/ibeducation)
- Google Work re: Unbiasing (https://rework.withgoogle.com/subjects/unbiasing/)
- Project Implicit (https://implicit.harvard.edu/implicit/)
- UCLA Implicit Bias Resources (https://equity.ucla.edu/programs-resources/educational-materials/implicit-bias-resources/)
Insurance In Bankruptcy:
Asset, Liability or Both?

An Overview of Selected
Insurance-Related Bankruptcy
Issues Facing Debtors, Creditors
and Insurers

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I. Insurance As Property of the Estate

Q: What Happens to the Policy Upon Bankruptcy?
A: The policy is property of the debtor's bankruptcy estate.

- "Property of the Estate" includes all of the Debtor's legal and equitable interest in property as of the commencement of the case. 11 U.S.C. § 541(a)(1).
- Property of the Estate also includes all "proceeds, product, offspring, rents or profits of or from property of the estate." 11 U.S.C. § 541(a)(6).
- It is universally held that a Debtor's interest in its insurance policies is property of its bankruptcy estate. See In re Minoco Group of Cos., Ltd., 799 F.2d 517 (9th Cir. 1986). See also In re Equinox Oil Co., Inc., 300 F.3d 614 (5th Cir. 2002); A.H. Robbins Co. v. Piccinin, 788 F.2d 994 (4th Cir. 1986).

Q: How About the Policy Proceeds?
A: The answer may depend on who is entitled to the proceeds when the insurer pays the claim.

- Casualty and Debtor Beneficiary Policies: If the Debtor is entitled to receive the proceeds of a policy upon receipt of payment of a claim - for example, a fire casualty policy - then proceeds of the policy are property of the estate. See, In re Edgeworth, 993 F.2d 51 (5th Cir. 1993)("Examples of insurance policies whose proceeds are property of the estate include casualty, collision, life and fire insurance policies in which the debtor is a beneficiary.)

- Third Party Liability Policies: If the Debtor has no right to receive the proceeds of the policy upon payment of a claim - for example, a commercial general liability policy - then the proceeds are typically not property of the estate. See In re Edgeworth, 993 F.2d 51 (5th Cir. 1993)("Under the typical liability policy, the debtor will not have a cognizable interest in the proceeds of the policy.)
Property of the Estate Cont.

- **D&O Policies**: D&O proceeds are not property of the estate if the proceeds benefit only the directors and officers. See *Louisiana World Exposition v. Federal Ins. Co.* (In re Louisiana World Exposition, Inc.), 832 F.2d 1391 (5th Cir. 1987).

- But if the D&O Policy provides coverage to the Debtor-company, then the proceeds may also be property of the estate. In such cases, the Bankruptcy Court must balance the interest of the debtor and non-debtor beneficiary of the D&O Policy. See *In re MF Global Holdings, Ltd.*, 469 B.R. 177 (Bankr. S.D.N.Y. 2012) (granting relief from the automatic stay to directors and officers to obtain policy proceeds after considering competing interests and harms to the debtor and the directors and officers); see also *In re Circle K Corp.*, 121 B.R. 257 (Bankr. D. Ariz. 1990) (finding that D&O proceeds were indemnity policies and not just liability policy and, thus, the debtor had a right to the proceeds); but see *In re Mila, Inc.*, 423 B.R. 537, 543 (B.A.P. 9th Cir. 2010) (noting that "whether D&O policy proceeds are an estate asset has not been decided in the Ninth Circuit").

Property of the Estate Cont.

- **Mass Tort Cases**: Special consideration is given to insurance policies in a mass tort bankruptcy to prevent "free-for-all." Bankruptcy Courts may administer policy proceeds for the benefit of larger creditor body, including by approving trust mechanism to which policy proceeds are assigned. 11 U.S.C. § 524(g).
II. Insurance Issues in Consumer Cases

Q. What special considerations apply to debtors?

A: Schedule any and all assets, including claims.

- Assets that are not scheduled are not abandoned when a case is closed. 11 U.S.C. § 554(c).

- Insurance defense counsel routinely research whether the plaintiff has previously filed bankruptcy and whether they have adequately scheduled the claim at issue. If they have not, defense counsel may take the following approaches:
  - Raise judicial estoppel and the case of Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778 (9th Cir. 2001) to bar plaintiff, who was formerly a debtor, from pursuing the claim. See, Monje v Spin Master Inc., Slip. at p. 3. No. 15-16480 (9th Cir. Feb. 14, 2017) (unpublished) (Judicial estoppel barred claims for loss of consortium, emotional distress, and medical expenses because the plaintiff omitted his claims from his bankruptcy schedules.)
  - Take the position that the trustee is the real-party-in-interest who owns the claim and should be substituted for the debtor. Insurance counsel may want to settle with the trustee because it is often easier.

Consumer Issues Con.

B. Exemptions.

- The trustee becomes the owner of the claims, that are often of dubious value, and subject to exemptions. The debtor will want to do three things with respect to claims that the debtor owns:
  - Make sure that they are properly scheduled and valued so that there is no argument that they were not abandoned and/or exempted.
  - Claim any and all exemptions that are possible. Among possible exemptions are:
    - O.R.S. 18.345(1)(k) – $10,000 exemption for personal bodily injury.
    - O.R.S. 18.346(1)(L) – compensation for loss of future earnings to the extent reasonably necessary for the support of the debtor and/or the debtor’s dependents.
    - O.R.S. 743.046(3) – life insurance proceeds not payable to the decedent’s estate.
    - OR 11 U.S.C. § 522(d)(10) and (11) – disability and life insurance, wrongful death claims and future wage claims to the extent reasonably necessary for the support of the debtor and/or the debtor’s dependents, a payment not to exceed $22,975 for personal bodily injury, but not including pain and suffering.
  - Move to compel abandonment if appropriate. 11 U.S.C. § 554(b).
Q: What special considerations apply to Trustees?

- Issues arising when trustee wants to hire the same lawyer as the debtor is using to pursue the claim. Although there are cases which do not permit a lawyer to represent both the trustee and the debtor to pursue a partially exempt claim, this is often done. *In re Rice*, 224 B.R. 464 (D. Or. 1998) (Attorney cannot represent debtor and trustee because of actual conflict.)

- Negotiation between trustee and debtor re right to claim proceeds often leads to aligned interests and the ability to use a single lawyer. The parties may settle in advance on the percentage of proceeds attributable to particular claim components and the extent of the exemption with respect to the components.

- Discovery – trustee will want to avoid spending a lot of time on discovery.

- Attorney – client privilege and the duty to cooperate with the insurer.

Special considerations that apply to trustee cont.

- Trustee does not inherit the judicial estoppel applicable to debtor because the trustee inherits and assets claims subject to pre-petition claims and the trustee acts for the benefit of the creditors, not the debtor. *Copelan v. Techtronics Industries Co., Ltd.*, 95 F.Supp.3d 1230 (SD CA 2015).

- The analysis with respect to the debtor in possession is more complex. It is a question of whether the accepted earlier position is clearly inconsistent with the later position given the different capacities and whether the inconsistent positions will provide an unfair advantage or impose an unfair detriment if not estopped. *In re Cheng*, 308 B.R. 448 (9th Cir. BAP 2004).
III. Maintaining Insurance During Bankruptcy

Q: Is the Debtor required to maintain insurance?

A: Yes. In a Chapter 11 case, insurance is required.

- Failure to maintain appropriate insurance is cause for dismissing a chapter case or converting the case to a case under chapter 7. 11 USC 1112(b).

- At the beginning of every Chapter 11 case, the United States Trustee delivers the United States Trustee’s Operating Guidelines to the debtor in possession.

- The Operating Guidelines provide, among other things, that the debtor is required to maintain adequate insurance to protect estate assets. The insurance should include fire and casualty insurance, general liability insurance and other coverage customary in the debtor’s business. The dollar amount of the insurance coverage must be sufficient to cover the fair market value of the estate’s property.

- The debtor must instruct its insurers and agents to include the United States Trustee as a notice party on all policies.

Q: Can the debtor finance the purchase of insurance?

A: Yes, but the financing will require court authority.

- It is common for debtors in possession to obtain insurance premium financing.

- Premium financing is a loan secured by a lien on property of the estate and must be authorized by court order pursuant to 11 USC 364(c) and Rule 4001 of the Federal Rules of Bankruptcy Procedure.
Q: How About Secured Creditors?
A: Insurance proceeds payable to the Debtor by reason of loss or damage to collateral will be cash collateral.
   • Under UCC Sections 9-102(1)(kkk)(E) and 9-315, a secured creditor’s security interest will attach to insurance proceeds payable to the Debtor by reason of loss of, infringement of rights in, or damage to the secured creditor’s collateral.
   • The insurance proceeds will be an asset of the estate and will be cash collateral as defined in 11 USC 363(a). Absent relief from the automatic stay, the insurance proceeds will not be paid to the secured creditor.
   • If the Debtor can provide adequate protection pursuant to 11 USC 361 and 363(c), the Debtor may be authorized to use the insurance proceeds.

IV. Effect of the Automatic Stay

Q: What Is Stayed?

• Actions to obtain proceeds that may be property of the estate (e.g. first party insurance and shared liability insurance).
• Suits against the Debtor for declaration of insurance coverage.
• Garnishment actions.
• Cancellation of policy insurer (and enforcement of ipso facto termination clauses for insolvency or bankruptcy of insured).
• Direct actions against insurers are typically stayed upon the bankruptcy of the insured.
Chapter 6—Insurance in Bankruptcy: Asset, Liability, or Both? Presentation Slides

Q: Is Automatic Stay Permanent?

- The automatic stay ceases to exist at the close of the case or once property is no longer property of the bankruptcy estate. However, stay is replaced with permanent injunction upon discharge. 11 U.S.C. § 524(a), 1141(d).
- Stay may be "lifted" for "cause." 11 U.S.C. § 362(d)(1)(on request and after notice and a hearing, the court shall grant relief from stay . . . for cause . . .)."
- Cause to lift stay to cancel policy has been found to exist where Debtor fails to pay post-petition premiums. See In re Payless Cashways, Inc., 305 B.R. 303 (Bankr.W.D.Mo.2004).
- Stay may be lifted to allow claimant to collect claim against Debtor to the extent of available insurance policy. See In re Holtkamp, 669 F.2d 505 (7th Cir. 1982).
- Stay may be lifted to permit directors and officers to collect D&O coverage, provided no harm to estate. See In re Dowrey Financial Corp., 428 B.R. 595 (Bankr.D.Del.2010).

V. Proof of Claim Issues

Q: Do I need to file proof of claim to get insurance?
A: It depends on the circumstances.

- Section 501(a) allows, but does not require, creditors to file proofs of claim. Pursuant to Section 502, a proof of claim is deemed allowed unless a party in interest files an objection.
- In order to participate in any distributions from the bankruptcy estate, a creditor must have an allowed claim. To the extent that insurance proceeds are property of the estate, only creditors with allowed claims will receive a distribution from those proceeds.
- This includes cases such as mass tort cases where the claims against the Debtor’s liability insurance exceed or are likely to exceed the insurance limits. In such cases, the recovery and distribution of insurance proceeds will probably be administered within the bankruptcy case. Consequently an allowed claim will be necessary to receive insurance proceeds.
Q: Can I proceed against the insurer without filing?
A: Probably. Filing a proof of claim is not necessary.

- Bankruptcy courts will usually grant a creditor relief from the automatic stay to initiate a lawsuit naming the Debtor as a nominal defendant for the purpose of collecting solely from insurance proceeds.

- After the automatic stay terminates because a discharge has been granted in a Chapter 7 or plan has been confirmed in a Chapter 11, the stay is replaced by an injunction. Section 524(a)(2) imposes a permanent injunction on any action to collect a discharged debt from the debtor. Pursuant to Section 524(e), the discharge does not affect the liability of any entity other than the debtor. The discharge does not preclude an action naming the debtor as a defendant in an action to collect on the debtor’s insurance policy. In re Beeney, 142 B.R. 360 (9th Cir BAP, 1992); Arreygue v. Lutz, 116 Wash.App. 938, 69 P. 3d 881 (2003)

- Filing a proof of claim in the bankruptcy case is not required to proceed against the debtor’s insurer. Hawxhurst v. Pettibone Corporation, 40 F3d 175 (7th Cir., 1994)

Q: What is the impact of filing a proof of claim?
A: It may or may not be preclusive.

- The Bankruptcy Court’s allowance (including a “deemed allowance” pursuant to Section 502(a)) or disallowance of a claim is a final judgment for the purposes of res judicata. In re Los Gatos Lodge, Inc., 278 F. 3d 890, (9th Cir., 2002); Siegel v. Federal Home Loan Mortg. Corp., 143 F. 3d 525 (9th Cir. 1998)

- Whether the Bankruptcy Court’s order allowing or disallowing a claim has preclusive effect in a subsequent action to collect on the debtor’s insurance policy probably turns on whether the order was based on the merits of claim and the level of the involvement of the insurance company in the bankruptcy case. See Wolkowitz v. Redland Ins. Co., 112 Cal. App.4th 154 (2003) holding that the bankruptcy court’s allowance of an uncontested claim without an evidentiary hearing is not binding on the insurer. The Court noted that the insurer had no obligation to appear in bankruptcy court or to object to a claim against the insured debtor.
Preclusive Effect of Allowance or Disallowance cont.

See also Bursch v. Beardsley & Piper, Div. of Pettibone Corp., 971 F2d 108 (8th Cir. 1992) holding: “Where a claim is disallowed, however, the debt is not recognized and the creditor is unable to share in any distribution of the debtor’s assets. Citations omitted In this situation, an insurer cannot be derivatively liable for the debt because the debtor was never principally liable for it.”

VI. Insurance Settlements

- Standards for insurance settlements are governed by Section 363 and Rule 9019 and will be approved when settlement is "fair and equitable" and "in the best interests of the estate." See In re A&C Properties, 784 F.2d 1377 (9th Cir. 1986).

- Settlement may provide for "coverage in place" wherein the insurer agrees to continue coverage and disputes such as indemnification obligations and defense costs are resolved. In a coverage in place settlement, the insurer will retain control over the defense of claims.

- Policy buyback settlements occur when the insurer "buys back" the policy in exchange for releases and extinguishment of future coverage responsibilities. This involves a full monetary settlement of all coverage issues in exchange for a free and clear sale order approved pursuant to Section 363(f). See In re General Motors Corp., 407 B.R. 463 (Bankr. S.D.N.Y. 2009).
### VII. Litigating Insurance Disputes

#### Q: Where and When?
- Insurance coverage issues may lead to high stakes, "bet the company" litigation in large, multi-party bankruptcy cases. This is particularly true in mass tort cases where the potential insurance recoveries present the largest asset available to creditors.
- Coverage actions to declare rights in insurance policies may be brought by the Debtor or the insurer in the bankruptcy court.
- Insurers are often wary of the Debtor's "home court" and would prefer a perceived friendlier forum. See *In re United States Brass Corp.*, 110 F.3d 1261 (7th Cir. 1997).
- Insurers often invoke mandatory or permissive abstention doctrines to avoid determination of insurance rights by the bankruptcy court. See 28 U.S.C. 1334(c).
- Insurers may seek to have district court withdraw the automatic reference to the bankruptcy court. See 28 U.S.C. § 157(d).

#### Coverage litigation cont.
- Insurer seeking to bring or continue coverage action in a different forum may only do so upon obtaining relief from the automatic stay.
- Parties may seek to transfer venue of a pending coverage suit to the district where the bankruptcy is pending under 28 U.S.C. §§ 1404, 1412. See *Mello v. Hare, Wynn, Newell 7 Newton, LLP, 2010 U.S. Dist. Lexis 53518 (M.D. Tenn. May 30, 2010)* (there is a "strong presumption" for that case related to a bankruptcy proceed in the district where the bankruptcy is pending).
- Removal of an entire cause of action or a single claim in a proceeding from state court to the district court may be accomplished under 28 U.S.C. § 1452(a).
- In summary, the determination of how to approach a coverage dispute is a very fact intensive and strategy driven process.
Thank you
# Chapter 7A

## Washington State Receivership Statute, RCW 7.60 et seq.

**Deborah Crabbe**  
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1. **OVERVIEW.**

Since 2004, Washington State has had in place a comprehensive statutory system for the appointment of a receiver. The receivership statute is set forth in RCW 7.60 et seq. (the “Act”) and is a detailed statutory scheme governing two types of receiverships: general receiverships and custodial receiverships. The distinction between these two types of receiverships is set forth in RCW 7.60.015, including the limitation on certain powers granted to a custodial receiver.

The Act is intended to be a comprehensive “playbook” for operating a receivership and is modeled after federal bankruptcy law. The Act sets forth in detail the legal powers that general and custodial receivers may exercise, the procedures, including notice provisions that govern a receivership and the rights of defendants, creditors and parties in interest during the pendency of the receivership.

A summary of the sections of the Act is attached at Exhibit A hereto.

2. **WHY SEEK THE APPOINTMENT OF A RECEIVER?**

The decision to seek the appointment of a receiver is fact dependent. A custodial receiver is generally sought to protect the property pending foreclosure, preserve and collect the rents associated with the property and lease and manage the property without the interference or involvement of the debtor.

The appointment of a custodial receiver also provides the petitioner with an opportunity to educate itself about the property operations, issues and problems prior to taking title. For example, if environmental issues are discovered during the pendency of the receivership, the petitioner can then make an informed decision about whether to delay taking title until such issues are resolved.

A general receiver is usually appointed to manage a business or series of businesses where the debtor is either mismanaging the property or is failing to fulfill its duties under the loan documents. A general receiver may also be appointed to liquidate a debtor’s operations when a debtor indicates it wishes to shutter its operations. An appointment under these circumstances is done to ensure that there is no breach of duties during the liquidation process and to put the collection efforts for any accounts receivable in the hand of a third party with Court ordered powers.

The appointment of a receiver has also been seen as a way to preempt a Chapter 11 bankruptcy filing by a debtor whose ability to reorganize is in doubt. Bankruptcy reorganizations can be time consuming and expensive involving payments for quarterly fees to the United States Trustee, expensive cash collateral proceedings and an extensive failed confirmation processes. Where a debtor’s ability to reorganize is unlikely, the process consumes a great deal of the lenders’ collateral and time while simply delaying the inevitable. As a result, lenders view receiverships as a process by which a neutral can exercise control over the collateral securing the lenders’ loans allowing for maximum return to the lenders. In other words, a receivership reduces the lenders’ risk of becoming entangled in unsuccessful Chapter 11 reorganizations, which are ultimately converted or dismissed.
The primary downside to a receivership is that the petitioner is generally responsible for the costs and expenses associated with the receivership. However, the income derived from the property is generally used by the receiver to pay such costs and expenses of operating the property and managing the receivership in order to minimize or extinguish such liability.

3. **BASIS TO APPOINT A RECEIVER.**

The various statutory basis to appoint a receiver are set forth in RCW 7.60.025(1) (a)-(nn). A copy of this statute is set forth in full at Exhibit B hereto. In addition to making a showing that there is a statutory basis for the appointment of a receiver, the party moving for the appointment must also show (1) that a receiver is reasonably necessary, and (2) that other available remedies either are not available or are inadequate to protect the petitioner’s interests. See RCW 7.60.025(1). See also MONY Life Ins. v. Cissne Family LLC, 135 Wn.App 948 (2006).

When the appointment of a receiver is sought in conjunction with a judicial or non-judicial foreclosure, the party seeking the appointment of a receiver only needs to make a showing that (1) there is a contractual right to the appointment of a receiver to collect the rents and lease property, and (2) a foreclosure action has been commenced. It is not necessary to satisfy the higher standard set forth in RCW 7.60.025(1) that the appointment of a receiver is reasonably necessary and that other available remedies either are not available or are inadequate to protect the petitioner’s interests.

4. **TYPES OF RECEIVERS.**

As mentioned above, RCW 7.60.015 distinguished between two types of receivers: a general receiver and a custodial receiver. The statute provides that a “receiver must be a general receiver if the receiver is appointed to take possession and control of all or substantially all of a person’s property with authority to liquidate that property and, in the case of a business over which the receiver is appointed, wind up affairs.” RCW 7.60.015. This means that when a company is put into a general receivership, all of the company’s assets and liabilities become part of the receivership with the company to be sold as a going concern or the company’s assets to be sold piecemeal. In either case, the company is usually shut down.

Because all of the company’s assets and liabilities are included in a general receivership, the party moving for the appointment of a receiver (lender) may find that other secured creditors have priority to assets. This occurs if the lender does not have a blanket lien on all of the company’s assets or the lender has an intercreditor/subordination agreement with other lenders. This type of scenario can complicate issues in the receivership creating issues such as who is responsible for paying the receiver’s fees and costs or who is responsible for paying the receivership expenses if the income or rents from business operations is not sufficient. As a result, it is important to ensure that an order appointing a general receiver address all such issues. (See below for further discussion on the receivership order.)

A custodial receiver is “appointed to take charge of limited or specific property of a person or is not given authority to liquidate property.” This type of receiver has also been called a “receiver in aid of foreclosure”. As a general rule, if you are simply conducting a non-judicial foreclosure or seeking to recover on a judgment you will want to protect the property and the rents during the
pendency of the foreclosure or sheriff’s sale. As a result, the custodial receivership provisions are designed to facilitate these protections.

As set forth in RCW 7.60.015, a custodial receiver does not have a statutory power of sale. Nevertheless, this has not stopped some from attempting to have a custodial receiver have power of sale. This is contrary to the plain language of the statute, which reserved power of sale for general receivers. The Act does not contemplate that the custodial receiver will play an active role in the recovery of assets for the benefit of the party moving to appoint a receiver. Rather, the Act contemplates that a custodial receiver will merely preserve the status quo while the moving party pursues its recovery efforts through a non-judicial foreclosure or execution proceeding.

If a general or custodial receiver is appointed, the Court has the power under the Act to later convert one type of receivership to the other.

5. WHO CAN SERVE AS A RECEIVER?

The Act includes limitations on who can serve as a receiver as set forth in RCW 7.60.035. The Act precludes the appointment of anyone who:

(a) has been convicted of a felony or other crime involving moral turpitude or is controlled by a person who has been convicted of a felony or other crime involving moral turpitude;

(b) is a party to the action, or is a parent, grandparent, child, grandchild, sibling, partner, director, officer, agent, attorney, employee, secured or unsecured creditor or lienor of, or holder of any equity interest in, or controls or is controlled by, the person whose property is to be held by the receiver, or who is the agent or attorney of any disqualified person;

(c) has an interest materially adverse to the interest of persons to be affected by the receivership generally; or

(d) is the sheriff of any county.

As a general rule, a receiver should be appointed who has a familiarity and expertise to deal with the type of business or property over which the receiver will be appointed.

6. PROCEDURE FOR THE APPOINTMENT OF A RECEIVER.

A receivership is commenced by the preparation and filing of a complaint/petition for the appointment of a receiver. The complaint should set forth all of the relevant facts regarding the basis for the receivership. In the case of a custodial receivership, the facts should include a recitation of the loan history, the collateral description, the indebtedness and the status of the foreclosure. In addition to the complaint, a motion to show cause for the appointment of a receiver must also be prepared and filed along with a declaration from the petitioner setting forth the sworn facts regarding the basis for the appointment of a receiver and authenticating the loan documents that are relevant to and support the basis for the receivership. A declaration from the
The proposed receiver should also be prepared and filed and should include the proposed receiver’s qualifications, experience, compensation and a statement of disinterestedness. See ¶ 5 for more information on disinterestedness.

The motion to show cause for the appointment of a receiver is filed at the same time as the complaint to appoint a receiver. A judge will be assigned to the case when the complaint is filed. The next step is to obtain a show cause order from the Court. The show cause order merely directs the defendant to appear for the show cause hearing to appoint a receiver on the date and time designated in the order. This process is accomplished ex-parte and should be undertaken on the day the complaint is filed.

Once the order to show cause is signed setting forth the date and time for the show cause hearing to appoint a receiver, the summons, complaint, motion to show cause, order to show cause, declarations, and proposed order appointing receiver must be served on the defendant not less than 7 days prior to the scheduled hearing date. RCW 7.60.025(3). It is recommended that the show cause date be set out at least 14 days from the date the complaint and motion to show cause are filed in order to ensure that service is effectuated on the defendant.

The time for setting a hearing for the appointment of a receiver may be shortened or expanded upon good cause shown. RCW 7.60.025(3).

7. **RECEIVER’S BOND.**

As a general rule, a receiver must post a receivership bond or cash deposit in lieu of bond. RCW 7.60.045. The amount of the bond varies depending upon whether the receivership is a custodial or general receivership, the type of property subject to the receivership, the risks associated with the receivership, the amount of insurance already carried by the potential receiver and the rights and duties of the receiver as set forth in the receivership order. There is, however, no required minimum or maximum bond amount.

In a custodial receivership, it is common to set the bond based upon the amount of rents the receiver will control and the projected length of the receivership. It is standard to argue that the bond should only be equal to one month of rents to be collected provided the property subject to the custodial receivership is fully insured and the receiver carries at least $1,000,000 in liability coverage. The cost of the bond is charged to the receivership estate and is paid from the rents collected.

8. **AUTOMATIC STAY.**

RCW 7.60.110 codifies the generally accepted common law principal that assets of the receivership are deemed to be in custodia legis of the receivership court and not generally subject to new liens or transfers after the order appointing the Receiver. *Ginsberg v. Katz*, 27 Wash.App. 593, 597, 619 P.2d 995 (1980). The statute stays certain, but not all proceedings. Specifically, the filing of a custodial or general receivership operates to stay

(a) The commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the person over whose property the receiver is appointed that was or could have been commenced
before the entry of the order of appointment, or to recover a claim against the person that arose before the entry of the order of appointment;

(b) The enforcement, against the person over whose property the receiver is appointed or any estate property, of a judgment obtained before the order of appointment;

(c) Any act to obtain possession of estate property from the receiver, or to interfere with, or exercise control over, estate property;

(d) Any act to create, perfect, or enforce any lien or claim against estate property except by exercise of a right of setoff, to the extent that the lien secures a claim against the person that arose before the entry of the order of appointment; or

(e) Any act to collect, assess, or recover a claim against the person that arose before the entry of the order of appointment.

The stay automatically expires sixty days after the appointment unless continued for good cause shown. As a result, it is important for the receiver to file a motion to extend the stay to avoid any argument that the in custodia legis grounds no longer apply to prohibit new liens. This is especially important where construction or maintenance was performed prior to the appointment of a receiver and/or the institution of the foreclosure providing the opportunity for mechanics or materialman lien claims to arise.

Anyone affected by the stay may move to lift or modify the stay for good cause. RCW 7.60.110(2). There are exceptions to the stay, including the prosecution of criminal proceedings, proceedings regarding support obligations, regulatory actions, or issuance of a notice of tax deficiency.

9. **THE RECEIVERSHIP ORDER.**

The receivership order governs the rights, duties and powers of the receiver. A form of Washington State Receivership Order is appended as Exhibit C. The appointment of a receiver generally acts to place the property affected in custodia legis. *Ginsberg v. Katz*, 27 Wn.App. 594, 597 (1980). There is no statutory form of receivership order, so the receivership order can take varying forms, subject only to the statutory duties and powers imposed on the receiver and the receivership under RCW 7.60 et seq. The receivership order should set forth, at a minimum, the property subject to the receivership, the scope of the receiver’s duties and powers, the receiver’s reporting requirements to the Court, including the preparation and submission of budgets, the employment by the receiver of other professionals, the receivership financing and the party responsible for payment of operational expenses and receivership costs if income or rents are insufficient and the receiver’s ability to borrow. In addition, the receivership order should set forth the proposed compensation for the receiver. There are no statutory fees for the receiver in Washington State, so the receiver’s compensation is dependent upon the scope of the work, the market rate and the negotiated terms of employment between the proposed receiver and the party moving for the appointment of a receiver.

Counsel for the proposed receiver should review and sign off on the proposed receivership order prior to the entry of the order by the Court.
a. Receiver’s Powers and Duties.

The primary function of a receivership order is to set forth the powers and duties of the receiver. The receiver’s powers are generally set forth in RCW 7.60.060, although additional powers are set forth in RCW 7.60.070 (power to seek turnover of property), RCW 7.60.130 (power to assume or reject contracts), RCW 7.60.140 (power to obtain credit and incur debt), RCW 7.60.150 (power to abandon property), RCW 7.60.180 (power to hire) and RCW 7.60.260 (power to sell free and clear of liens).

While the powers of a receiver may be statutory, it is still important to list all of the powers and constraints on those powers in the receivership order. For example, if the receiver is to have the power of sale, does the petitioner want to limit the time period for selling assets or limit specific procedures for liquidating the property? It is important to review the powers with the receiver and ensure there are no ambiguities in those powers when the powers are set forth in the receivership order.

The receiver’s duties are generally set forth in RCW 7.60.190 as well as RCW 7.60.090 (file schedules), RCW 7.60.100 (file monthly reports), RCW 7.60.110 (extend the automatic stay). The receiver’s duties generally include deadlines for undertaking actions such as notifying taxing agencies about the receivership, filing schedules for the receivership and recording the order appointing the receiver. The duties set forth in the Act are generally mandatory actions the receiver must take with little ambiguity or room for interpretation. Nevertheless, it is important to set these provisions out in the order appointing receiver.

b. Payment of Receivership Expenses.

The receivership order should set forth specific authority for the receiver to pay the operational costs and management expenses of the receivership from the rent proceeds. A budget should be prepared by the receiver and filed with the first monthly report to the Court, detailing the projected operational costs and management expenses the receiver expects to incur during the pendency of the receivership. In addition, the receivership order should set forth the receiver’s duties for maintenance and repairs as well as the source for funding the repairs.

The costs and expenses will be paid from rents and/or income and, to the extent these funds are insufficient, the petitioner is usually required to pay the difference. (This is a term of the order negotiated in advance of the filing of the receivership.)

The Act restricts the discontinuance of utility service during the pendency of a receivership. See RCW 7.60.120. These restrictions apply to any utility providing service to receivership estate property regardless of whether it is a general or custodial receivership. A “utility” is defined as “a person providing any service regulated by the Utilities and Transportation Commission.” RCW 7.60.120. This provision also prohibits a utility from discontinuing service without providing the receiver at least fifteen days’ notice of default. The statute does not enjoin utilities from terminating service but, instead, provides “[t]his section does not prohibit the court, upon motion by the receiver, to prohibit the alteration or cessation of utility service if the receiver can furnish adequate assurance of payment (for service to be provided after entry of the order appointing the receiver).”
In order to avoid any utility issues, the receiver must ensure that all utility bills are paid during the pendency of the receivership. The receivership order should include payment options such as financing or borrowing from the petitioner if the receiver has insufficient funds to pay the utility bills.

c. Receivership Priorities.

The receivership order should set forth the order in which the receiver is to pay claims in the case. As a general rule, the receivership priorities follow those of the Bankruptcy Code. RCW 7.60.230. This means that while the receiver is continuing to operate a business, the costs and expense of the receivership, including the receiver’s fees and expenses and the fees and costs of the Receiver’s professionals, insurance, utilities and taxes are paid first from income and rents. If there are funds remaining each month, the receiver may set up a reasonable working capital fund; and may service the monthly debt to secured creditors.

It is important to note that receivership expenses do not include pre-petition debts owed by the person or entity placed into receivership. These claims will only be paid if the receivership has excess funds after payment of all receivership expenses and secured claims. However, pre-petition salary claims and pre-petition deposits are given priority up to the sum of $2,000 and $900 respectively. RCW 7.60.230.

Once the receiver liquidates the property, the receiver will pay costs of closing, including any brokers fees, property taxes (including delinquent pre-receivership taxes) and secured creditors claims. Any portion of a secured creditor’s claim that is not paid is treated as an unsecured claim. RCW 7.60.230. In addition, the receiver will generally set aside enough money to wind up the receivership including payment of professionals receivership expenses. Once this set aside is accounted for, the receiver will pay any pre-receivership claims.

d. Employment and Compensation of Professionals.

The receivership order should also set forth the extent to which the receiver may hire and compensate other professionals. RCW 7.60.180 allows the receiver to hire professionals upon court approval, including counsel for the receiver and managers as necessary to operate the property. Such professionals must not “hold or represent an interest adverse to the estate,” but are not disqualified by representation of or relationship with a creditor or other party in interest if the relationship is disclosed in the application and the court determines that there is no actual conflict of interest or inappropriate appearance of conflict.

As a general rule, the receivership order provides that the receiver’s compensation has priority over all other payments in the receivership. However, the receiver and the receiver’s professionals can only be paid upon notice and opportunity for hearing. RCW 7.60.180 As a result, a receivership order should set forth that, if no objections to the fee application are filed within a set period of time, the fees are deemed allowed. If an objection is filed, the matter may be set for hearing on five days notice. RCW 7.60.180(4).

All fee applications must include billing statements that list the work performed, the time spent on the work, the rate being charged for each person performing the work to be compensated and all expenses. RCW 7.60.180(4)
It is customary for the receiver to use collected rents and income to pay the receivership fees and professional fees in a receivership proceeding. This again is a term usually set forth in the receivership order. If the rents collected are insufficient, the order usually provides that the petitioner will be responsible for the payment of fees.

**e. Receivership Financing and Use of Cash Collateral.**

Although RCW 7.60.140 authorizes a receiver to obtain unsecured credit in the ordinary course of business without order of the court, the receivership order should specifically set forth the parameters within which a receiver can incur indebtedness on a secured or unsecured basis. This alleviates any potential dispute between the petitioner and the receiver, since the petitioner may be responsible for expenses that exceed the income of the receivership. The authority to obtain financing applies to both custodial and general receivers.

The Act does not authorize the priming of existing security interests. However, the petitioner generally subordinates its right to be paid from its collateral to the costs of receivership, including compensation of professionals. This too should be set forth in the receivership order.

The use of cash collateral should also addressed in the receivership order. The Act provides that any prepetition security interests that include an after-acquired property clause will attach to after-acquired property of the receivership. RCW 7.60.240. As a result, the secured creditor’s lien continues in after-acquired property to the extent its prepetition property is used by the Receiver. This fact should be set forth in the order.

**f. Personal Liability of Receiver.**

The receivership order should set forth the limitations on the receiver’s personal liability for the actions taken as receiver. Specifically, a receiver has no personal liability to any person for acts or omissions specifically contemplated by an order of the court. See RCW 7.60.170. In addition, the receivership order should provide that the receiver has no personal liability for receivership expenses and claims or environmental issues associated with any real property in the custody of the receiver provided the receiver did not cause such environmental issues. Such a provision comports with the Act, which provides that a receiver is personally liable

“to the person over whose property the receiver is appointed or its record or beneficial owners, or to the estate, for loss or diminution in value of or damage to estate property, only if (i) the loss or damage is caused by a failure on the part of the receiver to comply with an order of the court, or (ii) the loss or damage is caused by an act or omission for which members of a board of directors of a business corporation organized and existing under the laws of this state who vote to approve the act or omission are liable to the corporation in cases in which the liability of directors is limited to the maximum extent permitted by RCW 23B.08.320.

RCW 7.60.170(1)
In addition, receivers can be personally liable for the failure to pay taxes. Specifically,

1. A general receiver is personally liable to state agencies for failure to remit sales tax collected after appointment. RCW 7.60.170(2).

2. A custodial receiver is personally liable to state agencies for failure to remit sales tax collected after appointment with regard to assets administered by the receiver. Id.

As a result, the receivership order should set forth a contingency plan for the receiver to pay taxes in the event that the rents or income from the operations of the receivership are insufficient.

**g. Resignation of Receiver and Termination of Receivership.**

The receivership order should include a mechanism for the appointed receiver to resign. This generally involves a requirement that the receiver file a motion requesting that it be exonerated, discharged and released from its appointment as the Receiver, pursuant to RCW 7.60.280 and 7.60.290.

In addition, the receivership order should provide a mechanism for the petitioner to terminate the receivership in circumstances where the debt is reinstated, the foreclosure is completed or the sale of the assets. When the receivership is terminated, the receiver is required to file and final report and obtain an order exonerating the bond.

10. **SALES FREE AND CLEAR.**

Prior to the enactment of the receivership statute, receivers relied on case law to sell receivership assets. RCW 7.60.260 codified this case law. The statute authorized a general receiver to sell asset of the receivership estate free and clear of liens. As previously mentioned some have sought to have custodial receivers sell property free and clear of liens theorizing that this was the practice at common law. However, the statute is clear that the power to sell free and clear of liens only vests in a general receiver and had the legislature intended custodial receivers to have the power of sale the legislature would have included this power in the statute or not made a distinction between custodial and general receivers.

Motions to approve sales must be made with 30 days’ notice to all creditors and parties in interest in the case. Secured creditors are allowed to bid their debt, but if there are creditors senior to the bidding secured creditor, the bidding secured creditor must make arrangements to pay the senior secured creditor. Farm property may only be sold with the consent of the title holder. If junior lienholders object to the sale, the court may only sustain the objection if “the amount likely to be realized by the objecting person from the receiver’s sale is less than the person would realize within a reasonable time in the absence of the receiver’s sale. RCW 7.60.260(2)(ii).

11. **CLAIMS IN RECEIVERSHIPS.**

Pursuant to RCW 7.60.210, claims are only filed in general receiverships in Washington State. Creditors must receive 30 days’ notice of the deadline to file claims, while state agencies are entitled to 120 days’ notice. The Receiver is required to provide each creditor with a copy of a
claim form that must be completed and filed with the Court. The claim should also include evidentiary support for the claim. Claims are then paid in accordance with a priority protocol similar to that set forth in the Bankruptcy Code. See RCW 7.60.230; see also § 9.c. supra.

12. **EXECUTORY CONTRACTS AND UNEXPIRED LEASES.**

Executory contracts and unexpired leases may only be assumed or rejected by a general receivership in accordance with the provisions RCW 7.60.130. This means that a custodial receiver has no power to alter leases or contracts and, thus, takes control of property of the receivership subject to all the terms and conditions of such leases and contracts executed by the debtor.

13. **ABANDONMENT OF PROPERTY.**

RCW 7.60.150 allows a custodial or general receiver, after notice and hearing, to abandon estate property that is burdensome or of inconsequential value. A receiver may not abandon property that is a hazard or potential hazard to the public in contravention of state statute.

14. **EFFECT OF THE RECEIVERSHIP ON CREDITORS AND NON-PARTIES.**

RCW 7.60.190 permits creditors and other parties in interest to participate in the receivership proceeding without being joined as a defendant party to the receivership. However, as a general rule, the only participants in a custodial receivership proceeding are the petitioner, the debtor, and the receiver. If there are junior lienholders or guarantors, such parties should be added to any notice list prepared by the receiver, to the extent they were not already joined in the receivership proceeding, to ensure that the junior lienholders and guarantors are notified of any actions respecting the property subject to the receivership, and are bound by such orders in accordance with RCW 7.60.190. There is, however, nothing in the Act that requires junior lienholders to be named as defendants in the receivership action be it for a receivership in aid of a nonjudicial foreclosure (custodial receivership) or a general receivership.

If persons have actual knowledge of the receivership, such persons are bound by orders authorizing sales free and clear of liens or other matters affecting real property irrespective of whether the persons attended any sales hearing or participated in the receivership.

15. **FEDERAL PREEMPTION LAW AND RCW 7.60 ET SEQ.**

The case of *Sherwood Partners Inv. v. Lycos Inc.*, 394 F.3d 1189 (9th Cir. 2005) cast doubt on the constitutionality of the Act within one year of its enactment. In *Sherwood Partners*, the Court examined a preference action brought by a state court assignee for the benefit of creditors. The defendant moved to dismiss the case on the grounds that federal bankruptcy law preempted state law preference actions. The Court ruled that when a state enacts laws to achieve the results achieved by federal bankruptcy laws, the state is preempted by federal law.

Because the Act was drafted with reference to bankruptcy code provisions, it remains unclear whether the Act violates preemption law. An article about this issue is attached as Exhibit D.
16. **CHANGES TO RCW 7.60 ET SEQ.**

The Washington State Debtor-Creditor Bar has been working on a series of changes to the Washington State Receivership statute. The proposed changes have been posted on the Washington State Bar Association ("WSBA") website under the Creditor-Debtor Section Legislative Updates since May 2014. However, additional revisions have recently been proposed. The latest version of the changes is set forth in Exhibit E hereto and can also be found on the WSBA website at: [http://www.wsba.org/Legal-Community/Sections/Creditor-Debtor-Rights-Section/Legislative-Updates](http://www.wsba.org/Legal-Community/Sections/Creditor-Debtor-Rights-Section/Legislative-Updates). The proposed changes are summarized as follows:

**a. Power of Sale to Custodial Receiver.**

The Act would be amended to give a custodial receiver authority to sell property of the receivership estate if the basis to appoint the receiver is to foreclose a lien, forfeit an interest or execute on a judgment. The custodial receiver would have no other power of sale except in the ordinary course of business or where there was less than two years remaining in a leasehold estate or a vendor’s interest in a real estate contract.

This proposed change is the most controversial of all changes proposed to the receivership statute and is the likely reason that the changes have stalled for almost three years. Many attorneys have been vocal about the fact that the changes would result in a derogation of the protections afforded borrowers, guarantors and junior secured creditors in other Washington State statutory provisions. As a result, attorneys have called for the inclusion of provisions that would ensure that protections such as redemption rights and limitations on lawsuits against guarantors be preserved in the event the power of sale provisions for a custodial receiver go forward.

**b. When a Custodial Receiver Must be Appointed.**

The Act would be amended to provide that a custodial receiver must be appointed if (i) the sole basis for the appointment is to foreclose a lien on real property (ii) the giving of notice of a trustee’s sale under RCW 61.24.040; or (iii) the forfeiture of a real estate contract under RCW 61.30.040.

This appears to be a departure from existing law, which provides that if there is a contractual basis for the appointment of a receiver (i.e. a contractual provision set forth in a deed of trust) a custodial or general receiver may be appointed. It is presumed this change is being made because a custodial receiver would have power of sale under the other changes being proposed. However, if the moving party wants a general receiver appointed, this change would place a greater burden on the moving party to satisfy other statutory basis for the appointment of a receiver set forth in RCW 7.60.025.

**c. Change in Notice Provisions**

The Act would be amended to remove the various notice provisions, including those found in RCW 7.60.190 and set the notice provision in one new statutory provision entitled “Notice Requirements”. This is a much needed change as the Act has notice provisions imbedded
throughout making it difficult for non-lawyers to find the required notice provisions that must be
given for a particular action.

d. Changes to Service.

The Act would be amended to alter the service requirements and provide that if an owner has
abandoned property subject to the receivership, service of actions to be taken in the receivership
can be accomplished by publication or mailing. There would be no need for service at all if
exigent circumstances were presented such as where property is perishable or is in danger of
being wasted or removed.

e. Compromise and Settlements.

The Act would be amended to establish standards by which the Court would approve a receiver’s
proposed compromises or settlement of controversies.

f. Elimination of the Stay Deadline.

The Act would be amended to eliminate the automatic expiration of the stay provisions after 60
days unless a motion has been filed to extend the stay. This is sensible change because most
general receiverships are only just commencing when the receiver bumps up against the
expiration of the stay. This provision will eliminate the expense of bringing a motion to extend
the stay and the resulting hearing.

g. Executory Contracts.

The Act would be amended to permit the custodial receiver to assume or reject executory
contracts. This change is in step with the other amendments to the Act, which blurs the line
between the power of a custodial receiver and the power of a general receiver.

h. Notice to Other Secured Creditors.

The Act would be amended to provide that secured creditors with actual notice of the
receivership, and who were served in the same manner as a summons and complaint, will be
deemed to have consented to the appointment of a receiver unless, within 30 days of the entry of
the order appointing receiver, the secured creditor(s) files an objection to the compensation of
the receiver, seeks removal of the appointed receiver or seeks dismissal of the case.

i. Proof of Claims

The Act would be amended to require a custodial receiver to provide all known creditors with a
proof of claim and an opportunity to file claims in the receivership. Again, this change is in step
with the other amendments to the Act, which blurs the line between the power of a custodial
receiver and the power of a general receiver.
j. **Credit Bids.**

The Act would be amended to specifically provide that credit bids could be made for the purchase of property of the estate provided the Court has entered an order allowing an offset by the credit bidding creditor and the Court has fixed the amount of such claim. In practice, this already occurs, but there is not statutory basis for this result.

k. **Oversecured Creditors Claims.**

The Act would be amended to specifically authorize the payment to oversecured creditors of interest, attorneys’ fees and costs as provided in a contract or by statute provided all receivership administrative expenses have been or will be paid in full. Again, this already occurs, but there is not statutory basis for this result.

l. **Agriculture Property.**

The Act would be amended to provide that property primarily used in agriculture could be sold in a receivership where the receivership is commenced as an assignment for the benefit of creditors (“ABC”). The rationale for this change is that if an ABC has been commenced, the owner of the agriculture property has already consented to the sale.
EXHIBIT A
RECEIVERSHIP STATUTE CHAPTER 7.60

RCW SECTIONS
7.60.005 Definitions.
7.60.015 Types of receivers.
7.60.025 Appointment of receiver.
7.60.035 Eligibility to serve as receiver.
7.60.045 Receiver’s bond.
7.60.055 Powers of the court.
7.60.060 Powers and duties of receiver generally.
7.60.070 Turnover of property.
7.60.030 Duties of person over whose property the receiver is appointed.
7.60.090 Schedules of property and liabilities—Inventory of property—Appraisals.
7.60.100 Receiver’s reports.
7.60.110 Automatic stay of certain proceedings.
7.60.120 Utility service.
7.60.130 Executory contracts and unexpired leases.
7.60.140 Receivership financing.
7.60.150 Abandonment of property.
7.60.160 Actions by and against the receiver or affecting property held by receiver.
7.60.170 Personal liability of receiver.
7.60.180 Employment and compensation of professionals.
7.60.190 Participation of creditors and parties in interest in receivership proceeding—Effect of court orders on nonparties.
7.60.200 Notice to creditors and other parties in interest.
7.60.210 Submission of claims in general receiverships.
7.60.220 Objection to and allowance of claims.

7.60.230 Priorities.

7.60.240 Secured claims against after-acquired property.

7.60.250 Interest on claims.

7.60.260 Receiver’s disposition of property—Sales free and clear.

7.60.270 Ancillary receiverships.

7.60.280 Resignation or removal of receiver.

7.60.290 Termination of receivership.

7.60.300 Applicability.

**Applicable Court Rules** CR 43(e)(2); CR 66.
EXHIBIT B
SPECIFIC STATUTORY BASIS FOR APPOINTMENT OF RECEIVER
RCW 7.60.025

Appointment of receiver.

(1) A receiver may be appointed by the superior court of this state in the following instances, but except in any case in which a receiver’s appointment is expressly required by statute, or any case in which a receiver’s appointment is sought by a state agent whose authority to seek the appointment of a receiver is expressly conferred by statute, or any case in which a receiver’s appointment with respect to real property is sought under (b)(ii) of this subsection, a receiver shall be appointed only if the court additionally determines that the appointment of a receiver is reasonably necessary and that other available remedies either are not available or are inadequate:

(a) On application of any party, when the party is determined to have a probable right to or interest in property that is a subject of the action and in the possession of an adverse party, or when the property or its revenue-producing potential is in danger of being lost or materially injured or impaired. A receiver may be appointed under this subsection (1)(a) whether or not the application for appointment of a receiver is combined with, or is ancillary to, an action seeking a money judgment or other relief;

(b) Provisionally, after commencement of any judicial action or nonjudicial proceeding to foreclose upon any lien against or for forfeiture of any interest in real or personal property, on application of any person, when the interest in the property that is the subject of such an action or proceeding of the person seeking the receiver’s appointment is determined to be probable and either:

(i) The property or its revenue-producing potential is in danger of being lost or materially injured or impaired; or

(ii) The appointment of a receiver with respect to the real or personal property that is the subject of the action or proceeding is provided for by agreement or is reasonably necessary to effectuate or enforce an assignment of rents or other revenues from the property. For purposes of this subsection (1)(b), a judicial action is commenced as provided in superior court civil rule 3(a), a nonjudicial proceeding is commenced under chapter 61.24 RCW upon the service of notice of default described in RCW 61.24.030(8), and a proceeding for forfeiture is commenced under chapter 61.30 RCW upon the recording of the notice of intent to forfeit described in RCW 61.30.060;

(c) After judgment, in order to give effect to the judgment;

(d) To dispose of property according to provisions of a judgment dealing with its disposition;

(e) To the extent that property is not exempt from execution, at the instance of a judgment creditor either before or after the issuance of any execution, to preserve or protect it, or prevent its transfer;
(f) If and to the extent that property is subject to execution to satisfy a judgment, to preserve the property during the pendency of an appeal, or when an execution has been returned unsatisfied, or when an order requiring a judgment debtor to appear for proceedings supplemental to judgment has been issued and the judgment debtor fails to submit to examination as ordered;

(g) Upon an attachment of real or personal property when the property attached is of a perishable nature or is otherwise in danger of waste, impairment, or destruction, or where the abandoned property’s owner has absconded with, secreted, or abandoned the property, and it is necessary to collect, conserve, manage, control, or protect it, or to dispose of it promptly, or when the court determines that the nature of the property or the exigency of the case otherwise provides cause for the appointment of a receiver;

(h) In an action by a transferor of real or personal property to avoid or rescind the transfer on the basis of fraud, or in an action to subject property or a fund to the payment of a debt;

(i) In an action against any person who is not an individual if the object of the action is the dissolution of that person, or if that person has been dissolved, or if that person is insolvent or is not generally paying the person’s debts as those debts become due unless they are the subject of bona fide dispute, or if that person is in imminent danger of insolvency;

(j) In accordance with RCW 7.08.030 (4) and (6), in cases in which a general assignment for the benefit of creditors has been made;

(k) In quo warranto proceedings under chapter 7.56 RCW;

(l) As provided under RCW 11.64.022;

(m) In an action by the department of licensing under RCW 18.35.220(3) with respect to persons engaged in the business of dispensing of hearing aids, RCW 18.85.430 in the case of persons engaged in the business of a real estate broker, associate real estate broker, or real estate salesperson, or RCW 19.105.470 with respect to persons engaged in the business of camping resorts;

(n) In an action under RCW 18.44.470 or 18.44.490 in the case of persons engaged in the business of escrow agents;

(o) Upon a petition with respect to a nursing home in accordance with and subject to receivership provisions under chapter 18.51 RCW;

(p) Under RCW 19.40.071(3), in connection with a proceeding for relief with respect to a transfer fraudulent as to a creditor or creditors;

(q) Under RCW 19.100.210(1), in an action by the attorney general or director of financial institutions to restrain any actual or threatened violation of the franchise investment protection act;

(r) In an action by the attorney general or by a prosecuting attorney under RCW 19.110.160 with respect to a seller of business opportunities;
(s) In an action by the director of financial institutions under RCW 21.20.390 in cases involving actual or threatened violations of the securities act of Washington or under RCW 21.30.120 in cases involving actual or threatened violations of chapter 21.30 RCW with respect to certain businesses and transactions involving commodities;

(t) In an action for or relating to dissolution of a business corporation under RCW 23B.14.065, 23B.14.300, 23B.14.310, or 23B.14.320, for dissolution of a nonprofit corporation under RCW 24.03.271, for dissolution of a mutual corporation under RCW 24.06.305, or in any other action for the dissolution or winding up of any other entity provided for by Title 25 RCW;

(u) In any action in which the dissolution of any public or private entity is sought, in any action involving any dispute with respect to the ownership or governance of such an entity, or upon the application of a person having an interest in such an entity when the appointment is reasonably necessary to protect the property of the entity or its business or other interests;

(v) Under RCW 25.05.215, in aid of a charging order with respect to a partner’s interest in a partnership;

(w) Under and subject to *RCW 30.44.100, 30.44.270, and 30.56.030, in the case of a bank or trust company or, under and subject to RCW 32.24.070 through 32.24.090, in the case of a mutual savings bank;


(y) Upon the application of the director of financial institutions under RCW 31.35.090 in actions to enforce chapter 31.35 RCW applicable to agricultural lenders, under RCW 31.40.120 in actions to enforce chapter 31.40 RCW applicable to entities engaged in federally guaranteed small business loans, under RCW 31.45.160 in actions to enforce chapter 31.45 RCW applicable to persons licensed as check cashers or check sellers, or under RCW 19.230.230 in actions to enforce chapter 19.230 RCW applicable to persons licensed under the uniform money services act;

(z) Under RCW 35.82.090 or 35.82.180, with respect to a housing project;

(aa) Under RCW 39.84.160 or 43.180.360, in proceedings to enforce rights under any revenue bonds issued for the purpose of financing industrial development facilities or bonds of the Washington state housing finance commission, or any financing document securing any such bonds;

(bb) Under and subject to RCW 43.70.195, in an action by the secretary of health or by a local health officer with respect to a public water system;

(cc) As contemplated by RCW 61.24.030, with respect to real property that is the subject of nonjudicial foreclosure proceedings under chapter 61.24 RCW;

(dd) As contemplated by RCW 61.30.030(3), with respect to real property that is the subject of judicial or nonjudicial forfeiture proceedings under chapter 61.30 RCW;
(ee) Under RCW 64.32.200(2), in an action or proceeding commenced under chapter 61.12 or 61.24 RCW to foreclose upon a lien for common expenses against a dwelling unit subject to the horizontal property regimes act, chapter 64.32 RCW. For purposes of this subsection (1)(ee), a judicial action is commenced as provided in superior court civil rule 3(a) and a nonjudicial proceeding is commenced under chapter 61.24 RCW upon the service of notice of default described in RCW 61.24.030(8);

(ff) Under RCW 64.34.364(10), in an action or proceeding commenced under chapter 61.12 or 61.24 RCW by a unit owners’ association to foreclose a lien for nonpayment of delinquent assessments against condominium units. For purposes of this subsection (1)(ff), a judicial action is commenced as provided in superior court civil rule (3)(a) and a nonjudicial proceeding is commenced under chapter 61.24 RCW upon the service of notice of default described in RCW 61.24.030(8);

(gg) Upon application of the attorney general under RCW 64.36.220(3), in aid of any writ or order restraining or enjoining violations of chapter 64.36 RCW applicable to timeshares;

(hh) Under RCW 70.95A.050(3), in aid of the enforcement of payment or performance of municipal bonds issued with respect to facilities used to abate, control, or prevent pollution;

(ii) Upon the application of the department of social and health services under RCW 74.42.580, in cases involving nursing homes;

(jj) Upon the application of the utilities and transportation commission under RCW 80.28.040, with respect to a water company or wastewater company that has failed to comply with an order of such commission within the time deadline specified therein;

(kk) Under RCW 87.56.065, in connection with the dissolution of an irrigation district;

(ll) Upon application of the attorney general or the department of licensing, in any proceeding that either of them are authorized by statute to bring to enforce Title 19 RCW; the securities act of Washington, chapter 21.20 RCW; the Washington commodities act, chapter 21.30 RCW; the land development act, chapter 58.19 RCW; or under chapter 64.36 RCW relating to the regulation of timeshares;

(mm) Upon application of the director of financial institutions in any proceeding that the director of financial institutions is authorized to bring to enforce chapters 31.35, 31.40, and 31.45 RCW; or

(nn) In such other cases as may be provided for by law, or when, in the discretion of the court, it may be necessary to secure ample justice to the parties.

(2) The superior courts of this state shall appoint as receiver of property located in this state a person who has been appointed by a federal or state court located elsewhere as receiver with respect to the property specifically or with respect to the owner’s property generally, upon the application of the person or of any party to that foreign proceeding, and following the appointment shall give effect to orders, judgments, and decrees of the foreign court affecting the property in this state held by the receiver, unless the court determines that to do so would be
manifestly unjust or inequitable. The venue of such a proceeding may be any county in which the person resides or maintains any office, or any county in which any property over which the receiver is to be appointed is located at the time the proceeding is commenced.

(3) At least seven days’ notice of any application for the appointment of a receiver must be given to the owner of property to be subject thereto and to all other parties in the action, and to other parties in interest as the court may require. If any execution by a judgment creditor under Title 6 RCW or any application by a judgment creditor for the appointment of a receiver, with respect to property over which the receiver’s appointment is sought, is pending in any other action at the time the application is made, then notice of the application for the receiver’s appointment also must be given to the judgment creditor in the other action. The court may shorten or expand the period for notice of an application for the appointment of a receiver upon good cause shown.

(4) The order appointing a receiver in all cases must reasonably describe the property over which the receiver is to take charge, by category, individual items, or both if the receiver is to take charge of less than all of the owner’s property. If the order appointing a receiver does not expressly limit the receiver’s authority to designated property or categories of property of the owner, the receiver is a general receiver with the authority to take charge over all of the owner’s property, wherever located.

(5) The court may condition the appointment of a receiver upon the giving of security by the person seeking the receiver’s appointment, in such amount as the court may specify, for the payment of costs and damages incurred or suffered by any person should it later be determined that the appointment of the receiver was wrongfully obtained.
SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY AT KENT

BANK, a Washington banking institution,                  No.

v.                                                      (PROPOSED)

BORROWER,                                               ORDER APPOINTING GENERAL

Defendants.                                             RECEIVER

THIS MATTER came before the Court on the motion of Bank (“Bank”), for entry of an order directing Borrower (“defendant Borrower”) to appear and show cause why a General Receiver should not be appointed over the assets of defendant Borrower (the “Motion”).

I. FINDINGS OF FACT

The Court reviewed the pleadings filed herein, including the Motion for Order to Appear and Show Cause Why a General Receiver Should not be Appointed (the “Motion”), the Complaint for Money Due and Owing, Judicial Foreclosure and Appointment of a General Receiver (the “Complaint”), the Declaration of Employee filed in support of the Motion and exhibits thereto, and the Declaration of John Doe filed in support of the Motion. The Court is now fully advised and finds as follows:

1. The Loan.

Bank made a loan to defendant Borrower. The loan is evidenced by a Promissory Note in writing dated January 31, 2010 for the principal sum of $1,000,000, which was to accrue interest
at a fixed rate of 5.25% per annum. The default rate for the Note is +5%. The maturity date for
the Note is December 1, 2030.

2. **The Property.**

The Note is secured by a first lien on certain real and personal property of defendant
Borrower:

(a) **The Real Property.** The real property is commonly known as ________________
and legally described in Exhibit 1 hereto.

Bank's security interest in the Real Property is evidenced by a Deed of Trust, Assignment
of Leases and Rent, Security Agreement and Fixture Filing dated January 31, 2010 (the “Deed”)
for the Real Property and all personal property attendant to the Real Property. The grantor under
the Deed is defendant Borrower. The Deed was properly recorded in the King County official
records on February 1, 2010, under recording no. 20100000000000.

The Deed also constitutes a security agreement. Thus, in addition to securing the Real
Property, the Deed also secures all existing or subsequently erected appurtenances, easements,
rights of way, improvements and fixtures, insurance proceeds, rents, royalties and enforcement
actions, accounts and income, leases, books and records, all senior housing facility rights
including contracts, licenses, rights to rent and income, inventory, deposits, and rights to
payment, and all proceeds therefrom (collectively the “Collateral”).

The Real Property is revenue producing property and is not principally used in the
production of crops, livestock or aquaculture. The Real Property is not homestead property
under RCW 6.13.010(1).

(b) **Personal Property.**

As additional security for repayment of the Note, defendant Borrower executed a
Security Agreement dated November 13, 2013 (“Security Agreement”) in which it granted to
Bank a security interest in the Accounts, Contracts, Goods, Leases, License, Personalty, Rents
and Third Party Payments as each of those capitalized terms are defined in the Security

Agreement (collectively the “Security Agreement Collateral” and with the Real Property and the Collateral, the “Property”).

Bank perfected its security interest in the Security Agreement Collateral by filing a UCC-1 Financing Statement with the Washington State Department of Licensing against defendant Borrower on February 1, 2010 under recording number 2010-000-0000-0.

(c) The Business

Defendant Borrower operates a two story commercial storage facility located at the Real Property.

The Collateral and the Security Agreement Collateral are derived from and used in conjunction with the Business.

4. The Default and Remedies.

On or about December 1, 2016, Bank provided written notice of certain defaults to defendant Borrower. To date, the defaults have not been cured.

Bank has filed a complaint for money due and owing, judicial foreclosure of the Deed, and appointment of a General Receiver.

Under the terms of the Deed, upon an event of default, Bank is entitled to the appointment of a receiver to take possession and control of the Property with the power to collect the rents from the Real Property, apply the proceeds, and preserve, protect and operate the Property pending foreclosure or sale.


The proposed General Receiver, Best Receiver, Inc. (“Best” or the “Receiver”), has experience as a receiver, is not interested in this action, is competent, and is otherwise qualified to act as the General Receiver of the Property evidenced by the Declaration of John Doe that was filed in support of the Motion.

The term “Receivership” as used herein shall mean the action commenced herein whereby the Receiver has been granted authority to take possession of, preserve, protect,
manage, operate, lease, improve, liquidate and deliver the Property in accordance with this
Order, Chapter 7.60 RCW, and the proceedings herein.

II. CONCLUSIONS OF LAW

Jurisdiction and venue are property in King County – Kent Superior Court pursuant to
RCW 4.12.010 as the Business and the Property subject to this action are located in King
County, Washington and defendant Borrower does business in King County, Washington.

The Court has jurisdiction over the parties and the subject matter of this litigation.

Bank has performed all conditions required of it under the Note, the Deed and the
Security Agreement prior to instituting this action.

The appointment of Best as General Receiver is appropriate pursuant to the paragraph in
the Deed entitled “Rights and Remedies on Default”, and RCW 7.60.025(1)(a), (b)(1) and (nn)
because:

(i) Bank has instituted a judicial foreclosure of the Deed;

(ii) Bank’s rights in and to the Business and the Property are probable;

(iii) the appointment of a receiver is provided for in the Deed;

(iv) the appointment of a General Receiver is reasonably necessary to collect the rents
and preserve and protect the Business and the Property;

(v) the Business and the Property is in danger of being lost or materially impaired;

and

(vi) Bank has no adequate alternative remedy at law.

Seven days’ notice of Bank’s motion to appoint a General Receiver has been provided to
defendant Borrower in accordance with RCW 7.60.025(3).

This Order is not conditioned upon Bank giving security as set forth in RCW 7.60.025(5).

Good cause exists for the establishment of the General Receiver’s powers and duties set
forth in this Order and for the expansion, modification or limitation of the General Receiver’s
powers and duties under in RCW 7.60.060(3).
III. ORDER APPOINTING RECEIVER

Based upon the foregoing, it is hereby ORDERED as follows:

A. Best Appointment and Receiver’s Bond.

Best is hereby appointed as a General Receiver with the authority to exclusively possess, preserve, protect, manage, operate, lease, improve, liquidate and deliver the Property, to manage the Business, and to collect the income and profits therefrom. Appointment of the Receiver shall be effective upon the filing of this Order. The entry of this Order, countersigned by the Receiver, evidences the Receiver’s acceptance of its rights and duties hereunder and constitutes administration of any required oath of office.

During the term of the Receiver’s appointment, and until further order of the Court, the Property and the Business shall remain under the Court’s exclusive jurisdiction in accordance with this Order and Chapter 7.60 RCW. The Receiver shall not be subject to the control of any of the parties to this matter, but shall be subject only to the Court’s direction in the fulfillment of the Receiver’s duties.

Pursuant to the terms of the Deed, no receivership bond shall be required.

B. The Receiver’s Fees.

1. The Receiver shall be compensated at a variable rate per hour depending upon the classifications of the persons performing work. The following are the approved rates for the Receiver:

<table>
<thead>
<tr>
<th>Staff Classification</th>
<th>Approved rate per hour</th>
</tr>
</thead>
<tbody>
<tr>
<td>John Doe</td>
<td>$___</td>
</tr>
<tr>
<td></td>
<td>Approved rate per hour</td>
</tr>
<tr>
<td>Staff</td>
<td>$___</td>
</tr>
</tbody>
</table>

In addition, the Receiver shall be reimbursed for all reasonable and necessary costs incurred by the Receiver in the performance of its duties. Costs will be billed with no markup.

ORDER

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3000
SEATTLE, WASHINGTON 98101-3292
PHONE (206) 447-4400  FAX (206) 447-9700

30th Annual Northwest Bankruptcy Institute
including mileage, which will be billed at the current IRS rate.

The Receiver’s fees shall be an expense of the receivership estate (the “Estate”) senior to all other claims except as provided in section II.D.3.a. The Receiver’s compensation shall be payable in accordance with the procedures set forth in section II.D.3.b. herein.

C. The Receiver’s Powers and Duties.

Unless and until otherwise ordered by the Court, the Receiver shall be a General Receiver charged with the exclusive possession and control over the Business and the Property with the power and authority to take such actions as are or may be necessary to possess, preserve, protect, manage, operate, lease, improve, liquidate and deliver the Business and the Property and any proceeds thereof. To the extent provided under Chapter 7.60 RCW and as ordered herein, the Receiver is vested with the rights, powers and duties to:

1. Take, keep possession of, and control the Business and the Property.

2. Receive and collect the income, rents, profits and monies from the Business and the Property (the “Revenues”), including all forms of payment from the residents of the Business, and endorse and present for payment any check, money orders, and other forms of payment and negotiable instruments made payable to defendant Borrower, or any one of them, that constitute Revenues from the Property or sums due to defendant Borrower, from the Business, and deposit all Revenues into the Account described in section II.D.2 herein.

3. Operate and manage the Business and the Property consistent with this Order, with the power and authority to enforce contracts, including service contracts, if any, relating to the Business and the Property.

4. Prepare an operating budget for the Receivership (the “Initial Budget”) within forty-five (45) days of the date of this Order and submit the Budget to Bank for approval. The Receiver may not exceed any line item in an approved Budget by more than 10% without the written consent of Bank. The Receiver shall give Bank and defendant Borrower prompt notice of any expenses in excess of $2,500 for any single item for which the Receiver does not have
sufficient Revenues. If Revenues are not sufficient to pay such expenses, the Receiver shall request an advance in accordance with section II.D.2. The Receiver shall prepare additional operating budgets if the Initial Budget or any subsequent budget expires. Any subsequent budget must be submitted for approval to Bank. A copy of any budget, including the Initial Budget, must be attached to next filed Monthly Report in accordance with section II.D.5.

5. The Receiver shall make the following operating decisions regarding the Business and the Property, including, without limitation:

5.1 Provide ordinary maintenance and repair services for the Business and the Property, including without limitation security, landscaping, equipment maintenance, paving repair, general maintenance and extraordinary maintenance or repair services where required by emergency conditions; provided, however, that the Receiver shall not contract for maintenance or repair services costing $5,000.00 or more without the written consent of Bank;

5.2 Use or lease the Business and the Property pursuant to RCW 7.60.260, including the authority, in the Receiver’s business judgment, to make, cancel, enforce, assume or reject any leases or executory contracts now or hereafter in effect for the Business and the Property pursuant to RCW 7.60.130 except to the extent restricted by 18.20 RCW;

5.3 Fix or modify residence rates for the Business except as restricted by 18.20 RCW;

5.4 Procure goods and services for the Business and the Property;

5.5 Hire employees and retain existing employees of defendant Borrower, in the Receiver’s sole discretion, in order to continue any business operations, in which event payroll taxes, workers compensation insurance, and related costs will be carried and reported as those of defendant Borrower and not of the receivership estate;

5.6 Contract for or otherwise purchase goods, materials, equipment, services and supplies for the Business as determined by the Receiver in its reasonable business judgment to be necessary and appropriate in accordance with the Initial Budget and any subsequent budget;

ORDER
and

5.7 Keep current and accurate records of all Revenues, receipts and disbursements for the Business and permit the parties to examine those records at any reasonable time upon written request.

6. Pay the operating expenses of the Business, including but not limited to payroll, payroll taxes, employee benefits, utilities, insurance, business, use and property taxes, landscaping, janitorial services, and maintenance, to the extent reasonably possible from the Revenues generated by the Property, and such payments shall not require prior approval of the Court provided the payments are in accordance with the Initial Budget and any subsequent budget.

7. Do any act or incur any costs or expenses outside the ordinary course of business, including but not limited to extraordinary construction, repairs, maintenance and alterations for and to the Property respecting the Property and the Receivership up to the sum of $5,000 for any single expense without the consent of Bank provided such sum is set forth in the Initial Budget and any subsequent budget. Any expenditure outside the ordinary course of business in excess of $5,000 for any single expense may only be incurred upon written consent by Bank. Notwithstanding the foregoing, if an emergency expenditure is necessary to prevent imminent damage to the Property, the Receiver may incur such expenses in excess of $5,000 as are reasonably necessary to protect the Property without the prior written consent of Bank; however, the Receiver must undertake prompt notification to Bank as soon as reasonably possible.

8. Contract for public utilities and other services, including garbage services, which are reasonably necessary for the management, maintenance and operation of the Business and the Property. All utilities contracts shall be in the name of the Receiver, as the Receiver for defendant Borrower, with all notices to be addressed to the Receiver at its address.

9. Contract for, hire, pay and direct all persons and/or professionals deemed necessary by the Receiver for the operation, maintenance and protection of the Business and the
Property upon approval by the Court in accordance with RCW 7.60.180.

10. Select, employ and pay legal counsel, accountants, marketing professionals and any other professionals as may be necessary to represent or assist the Receiver pursuant to RCW 7.60.180.

11. Review all existing insurance coverage with respect to the Business and the Property and retain existing casualty insurance upon entry of this Order, or obtain or maintain for the Business and the Property casualty insurance against all risks covered by a standard fire insurance policy, with an endorsement for extended coverage, in the full amount of the insurable value for the Business and the Property in form and content that complies with the Loan Documents. The Receiver shall also obtain or maintain public liability insurance with a contractual liability endorsement and with no less than $1,000,000 combined single limit coverage for the Business and the Property in form and content that complies with the Loan Documents. The Receiver shall pay all premiums in connection therewith, whether presently due or becoming due after the date of this Order. All insurance policies and contracts shall be in the name of defendant Borrower, with Bank and the Receiver named as additional insureds. All insurance notices are to be addressed to defendant Borrower, in care of the Receiver, at the Receiver’s address. Should the current policy or policies be cancelled through no fault of defendant Borrower, or any of them, the Receiver shall use his best efforts to procure replacement insurance. Defendant Borrower shall be required to forward to the Receiver any cancellation notice for any insurance for the Business and the Property. No party to this action shall cancel existing insurance or attempt to obtain a refund of any prepaid premium.

12. Request that the U.S. Postal Service grant the Receiver exclusive possession and control of mail addressed or directed to Defendants at the Business addresses and that it direct that mail addressed or directed to defendant Borrower at the Business addresses be re-directed to the Receiver. Defendant Borrower shall promptly forward to the Receiver any mail they receive that is addressed or directed to defendant Borrower and that concerns the Business and the
13. Deliver a copy of this Order to all depositories, banks, brokerages, credit card companies and otherwise opened in the name of defendant Borrower (collectively “Financial Institutions”) that are used for the deposit of funds arising from or related to the operation of the Business or the Property. Upon delivery of this Order, the Financial Institutions shall allow the Receiver to take possession of and exercise control over all bank and other deposit accounts open in the name of defendant Borrower at such Financial Institutions to the extent such accounts contain funds arising from or related to the operation of the Business or the Property except that the Receiver is not authorized to take possession of funds held in reserves or escrow accounts by Bank or its servicers or agents or held in reserves or escrow accounts by Umpqua Bank or its servicers or agents. The Financial Institutions shall also provide to the Receiver copies of any requested records regarding any such accounts. To the extent the Receiver is unable to obtain control over any account related to the Business or the Property that is maintained by or on behalf of defendant Borrower, the Receiver shall file a motion with the Court to resolve the issue of the Receiver’s control over such accounts.

14. Acquire or renew all governmental licenses, permits, or other authorizations, in the name of defendant Borrower pertaining to the Business or the Property.

15. List, market, sell, liquidate and dispose of the Business and the Property in accordance with RCW 7.60.260.

16. Bring and prosecute actions for recovery of any Property that may be in the possession of any third party, with Bank’s consent.

17. Do all things that may be necessary or appropriate to preserve, protect, manage, operate, lease, improve, liquidate and deliver the Business and the Property in the ordinary and usual course without further order of the Court subject only to the limits on the Receiver’s ability to make expenditures as provided in this Order.
D. Administration.

The Receiver is authorized to employ the following procedures and case administration:

1. Bank Accounts.
   a. Operating Accounts.

   The Receiver shall maintain a non-interest-bearing bank account (the “Account”) in its name, as Receiver, at any federally insured banking institution selected by the Receiver in its sole discretion without further Court approval. The Receiver shall use the Account to deposit, upon receipt, all Revenues derived from the Business and the Property and to pay expenses as authorized by this Order and upon further order of this Court. The Account is for use by the Receiver and is not and shall not be a lawyer’s trust account.

   The Receiver may also open, close, transfer and change all bank and trade accounts relating to the Business or the Property so that all such accounts are in the name of the Receiver.

2. Payment of Expenses; Advances.

   From the Revenues, the Receiver shall pay only those expenses that are reasonable and necessary for the operation and protection of the Business and the Property in the following order of priority: (i) the cost and expense of providing all necessary care and services to the residents of each Facility, including staff salaries, will be paid from the income from each Facility before the Revenue is used for any other purpose (the “Facility Expenses”); (ii) the costs and expense of the Receivership, including the Receiver’s fees and expenses and the fees and costs of the Receiver’s professionals, current real property taxes, utilities and insurance on the Property; (ii) the creation and retention by the Receiver of a reasonable working capital fund; and (iii) the monthly loan payment to Bank under the Loan Documents. The Receiver shall have no responsibility to pay pre-receivership unsecured debts of defendant Borrower.

   In conjunction with the reasonable working capital fund, Bank agrees to fund an account in the amount of $10,000 for initial working capital (the “Initial Working Capital Loan”).
In the event the Receiver has insufficient funds derived from the Business and/or the Property to pay expenses relating to the possession, preservation, protection, management, operation, leasing, improvement, liquidation and delivery of the Business and/or the Property, including its fees and expenses and the fees and expenses of its attorneys and its other professionals, the Receiver shall request that Bank advance additional funds to pay any such expenses that the Receiver and Bank deem necessary and appropriate. Bank will underwrite the Facility Expenses and advance funds for any shortfall for Facility Expenses. Bank may, but will have no obligation to, advance funds to the Receiver as are necessary to pay any other expenses for which the Receiver has insufficient funds (collectively, the “Receivership Loans”).

In the event that Bank must make or agrees to make one or more Receivership Loans, Bank and the Receiver shall agree on such terms and shall execute such documents satisfactory to Bank and the Receiver evidencing the loan obligation of the receivership estate (and not the Receiver individually or in its corporate capacity), including, without limitation, one or more receivership certificates, to repay such sums. Any such loans made by Bank, including the Initial Working Capital Loan, shall receive a first priority lien on the receivership estate in favor of Bank, and shall be entitled to all of the benefits of the advances clause contained in the Deed. All such loans shall be deemed secured by the Deed, with interest accruing on such advances at the default rate of interest described in the Note.

b. Procedure for Obtaining Approval of Fees and Costs.

The Receiver shall include a request for fees and costs for the Receiver in its monthly report to the Court as required by section II.D.6. herein for the period as well as any back up documentation evidencing the accounting for fees and costs incurred. The Receiver shall send a copy of its accounting with back up documentation for the fees and costs incurred for the period and with a notice of intent to compensate to Bank, defendant Borrower and any party requesting special notice. Bank may stipulate to the payment of the Receiver’s fees.

If Bank stipulates to the payment of such fees and no party in interest objects to such
payments or portions of such payments within ten (10) calendar days following the date that the
Receiver serves the notice or files a motion with the Court to resolve the objection, the fees and
costs shall be deemed approved as being fully and finally earned without further order or leave of
the Court.

If Bank does not stipulate to the payment of the fees for the Receiver or if any person
objects to such payments or portions thereof, such person shall notify the Receiver of the nature
of the objection within ten (10) calendar days following the date that the Receiver serves the
notice. If the Receiver or affected professionals cannot consensually resolve the dispute or if the
dispute is not resolved within thirty (30) days of the date of such objection, the objecting party
may file a motion with the Court to resolve the objection.

The approved fees and costs of the Receiver and its professionals shall be paid from the
collections from the Receivership and if such funds are insufficient, then Bank shall pay such
fees and costs, with amounts paid by Bank added to the principal balance of the Note and
secured by the Deed as provided in section II.D.3.a. herein.


In accordance with RCW 7.60.120, any utility company providing services for the
Business and the Property, including gas, electricity, water, sewer, trash collection, telephone,
communications or similar services, shall be prohibited from discontinuing service to the
Business or the Property based upon unpaid bills incurred by defendant Borrower for the
Business or the Property. Further, such utilities shall transfer any deposits held by the utility to
the exclusive control of such Receiver and be prohibited from demanding that the Receiver
deposit additional funds in advance to maintain or secure such services.

4. Accounting.

The Receiver shall maintain such accounting, bookkeeping, and record-keeping systems
as they determine to be advisable in their business judgment in connection with the operation and
management of the Business and the Property. The Receiver may perform or, in accordance
with section II.C.10, contract for accounting, consulting and tax services with respect to the
Business and the Property as necessitated by this proceeding or as may be required by law in the
performance of the duties of the Receiver.

The Receiver a may use records and information for each Facility resident as needed
to fulfill their obligations under this Order and RCW 7.60 et seq., but the Receiver shall
preserve the confidentiality of such records and shall not disclose or release the records,
except as authorized by an order from this Court.

Notwithstanding any other provision herein, the Receiver shall be under no obligation to
complete or file tax returns or other regulatory or governmental filings on behalf of defendant
Borrower, the Business or the Property. The Receiver shall furnish defendant Borrower with
such access to books and records within the Receiver’s custody or control as reasonably
necessary in order for defendant Borrower to complete and file tax returns and other reports on
their own behalf.

5. Monthly Reports.

The Receiver shall file with the Court a monthly report (based upon the Receiver’s
applicable accounting cutoff date) of the Receiver’s financial and operational affairs, including:
(1) all receipts and disbursements, in reasonable detail; (2) maintenance and/or repair issues; and
(3) any other issues affecting the operation of the Business or the Property. Such report shall
comply with RCW 7.60.100. Each report shall cover the applicable calendar month and shall be
filed not later than the 15th day of the month immediately following the month for which the
report was prepared. The Receiver shall send a complete copy of the report by first class mail or
by e-mail on or before the 15th day of the month immediately following the month for which the
report was prepared to Bank and defendant Borrower at the addresses provided in section II.L.

Within 45 days from the date of this Order, the Receiver shall file its first report with the
Court and, in addition to setting forth the disclosures as required above, the Receiver shall also
include in its first report a reasonably detailed description of the Business and the Property and a
copy of the Initial Budget.

E. Cooperation with the Receiver.

1. Defendants.

Defendant Borrower shall cooperate with the Receiver in connection with the performance of its duties. Defendant Borrower shall relinquish and deliver possession of the Business and the Property and all documents related thereto to the Receiver within five calendar days of the date of this Order and thereafter within 48 hours of the Receiver’s demand, including, without limitation, all of the following items:

a. all keys and personal property belonging to the Business and the Property;

b. all documents evidencing accounts payable that are currently outstanding;

c. all documents relating to any unresolved claims by or against the Business or the Property other than this action;

d. all documents pertaining to casualty and public liability insurance upon the Business and the Property and improvements thereon during the last year;

e. all documents, including contracts and correspondence with the Washington State Department of Health and Social Services;

f. all documents, including contracts, evidencing or relating to any resident of the Business;

g. all books, records, including payroll records and personal files, and accounts respecting the Business and the Property, in addition to all operating statements and financial records for the Business and the Property;

h. all other documents, records and instruments of whatever kind and nature which relate to the operation and control of any part of the Business and the Property that are reasonably necessary for the Receiver to assume control of the Business and the Property, including but not limited to all records of building permits, preliminary and final plat approval and all related documents, construction records and appraisals of the Real Property, and all other...
documents relating in any way whatsoever to the financing, management, control, operation, design, development and preservation of the Business and the Property; and

i. all deposits and checks for the Business, including any checks not yet deposited in the name of the defendant Borrower, in addition to all other forms of payment for the Business.

Defendant Borrower are enjoined from interfering with the possession, control, development, management, maintenance, operation and sale of the Business and the Property by the Receiver. Upon reasonable written request of any one or more of defendant Borrower, the Receiver shall provide copies of the records or files of defendant Borrower as reasonably required or requested by defendant Borrower.

In the event of a dispute between the Receiver and defendant Borrower over the operation of the Facility, the matter shall be brought before the Court on reasonable notice. In any such dispute, Bank and the State of Washington shall have standing to be heard. If the dispute involves financial issues or matters deemed by the Receiver in its sole discretion to be emergent, the Receiver’s directives, decisions and actions shall prevail, pending a hearing before this Court.

2. Others.

All financial institutions, credit card processors, insurance agents or underwriters, utility providers, vendors, suppliers, tradesmen, materialmen, service providers, franchisors, taxing agencies, and all government agencies and departments are hereby ordered to cooperate with and take direction from the Receiver as such relates to the Business and the Property and the powers and duties of the Receiver set forth in this Order set forth in RCW 7.60 et seq.

F. Sale of the Business and the Property.

As set forth in section II.C.15. above, the Receiver is authorized to list, sell, liquidate or otherwise dispose of the Business and the Property for the value thereof, subject to the approval of the Court. In accordance with section II.C.10, RCW 7.60.180 and RCW 7.60.260, the Receiver is authorized to engage a real estate listing broker to list and market the Business and the Property.
The Business and the Property shall only be sold after obtaining an order of this Court upon notice and hearing as provided in RCW 7.60.260, to sell the Business and the Property, free and clear of liens, claims, encumbrances and all rights of redemption, whether or not the sale will generate proceeds sufficient to fully satisfy the claims secured by the Business and the Property.

Notice of any proposed sale of the Business and the Property shall be provided to those individuals or entities entitled to notice, including defendant Borrower and any creditors having liens on the Business or the Property. Each notice shall include a description of the Business or the Property being sold, the price offered and the proposed time of closing.

If a sale is approved, all security interests and liens encumbering the Business and the Property to be conveyed shall attach to the proceeds of sale, net of reasonable expenses incurred in the disposition of the Business and the Property, in the same order, priority, and validity as the liens had with respect to the Business and the Property immediately before the conveyance. The Court may authorize the Receiver at the time of sale to satisfy, in whole or in part, any allowed claim secured by the Business or the Property out of the proceeds of sale, including the claim of Bank, if the interest of any other creditor having a lien against the proceeds of the sale would not thereby be impaired.

Except as provided in this Order, and subject to further order of the Court, the Receiver’s rights, powers, and authority, including its rights to possess, preserve, protect, manage, operate, lease, improve, liquidate and deliver the Business and the Property, shall not impair, diminish, or otherwise prejudice valid and enforceable security interests or claims in or to the Business or the Property.

G. Stay of Actions.

1. Actions Stayed.

In accordance with RCW 7.60.080, defendant Borrower and its agents, partners, property managers and employees, and all other persons acting in concert with defendant Borrower, and all third parties, including lessors, lessees, customers, principals, investors, suppliers, and or
creditors and their officers, agents, servants, employees, and attorneys, who have actual or constructive knowledge of this Order, are enjoined from:

(a) interfering with the Receiver’s possession, preservation, protection, management, operation, leasing, improvement, liquidation and delivery of the Business or the Property;

(b) committing or permitting any waste of the Business, the Property or any part thereof, or committing or permitting any act against the Business, the Property, or any part thereof in violation of law, or removing, transferring, encumbering or otherwise disposing of any of the Business, the Property, or any part thereof, or destroying, concealing, transferring, or failing to preserve any document that evidences, reflects, or pertains to the ownership or operation of the Business or the Property;

(c) demanding, collecting, receiving, discounting, or in any other way diverting or using any of the income and profits from the Business or the Property;

(d) expending, disbursing, transferring, assigning, selling, conveying, devising, pledging, mortgaging, creating a security interest in, encumbering, concealing or in any manner whatsoever dealing in or disposing of the whole or any part of the Business or the Property, including, but not limited to, the income and profits of the Business or the Property; and

(e) seeking to enforce any claim, right, or interest against the Business or the Property or undertaking any “self-help” remedies or taking any action whatsoever to interfere in any way with the Receiver and its fulfillment of its duties under this Order and Chapter 7.60 RCW.

2. Extension of Stay.

In accordance with RCW 7.60.110(2), the injunction for certain acts shall expire sixty days after the entry of this Order unless before the expiration of the sixty-day period the Receiver, for good cause shown, obtains an order from the Court extending the stay.
H. No Personal Obligation of the Receiver.

Any liability of the Receiver and its authorized representatives is limited as set forth in RCW 7.60.170, and nothing in this Order shall be construed to contradict or modify the provisions of RCW 7.60.170. In the event of a contradiction or ambiguity, the provisions of RCW 7.60.170 shall control.

The Receiver and its authorized representatives shall have no liability for, and shall not be obligated to undertake, any claim, remediation or cleanup with respect to hazardous substances or materials existing under, on, adjacent to, or about the Real Property. The Receiver and its authorized representatives shall not be liable to any party in any way for any damages resulting from the existence or use, discharge or storage on the Real Property by any person of any hazardous substance defined in 42 U.S.C. §§ 9602-57. Any liability relating to or damages arising from hazardous substances or materials under, on, adjacent to, or about the Real Property shall be attached to the Real Property and shall not be the responsibility of the Receiver or its authorized representatives personally. The Receiver’s management or continued operations of the Business and the Property shall not subject the Receiver and its authorized representatives to any liability for or damages arising from or in connection with any claim, remediation or cleanup with respect to hazardous substances under, on, adjacent to, or about the Real Property occurring as a result of the continuing Business operations.

The Receiver and its authorized representatives shall have no personal liability to any person for acts or omissions of the Receiver or its authorized representatives specifically contemplated by any order of the Court. Any loss, damage or expense suffered or incurred by the Receiver or its authorized representatives in any claim, suit, action or other demand or proceeding brought against the Receiver and its authorized representatives in connection with their performance of their duties for the receivership, except any damage or expense resulting from the negligence, willful misconduct or omission of the Receiver or its authorized representatives, will be an expense solely of the Estate that survives the termination of the

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receivership, but such claim shall be junior to any claim of Bank. The recourse of any person or entity to whom the Receiver or its authorized representatives becomes obligated in connection with the performance of its duties and responsibilities hereunder (other than with respect to the negligence or willful or intentional misconduct of the Receiver or its authorized representatives) shall be solely against the unencumbered assets of the Receivership. In the event the Receiver or its authorized representatives becomes obligated in connection with the performance of its duties and responsibilities hereunder as a result of negligence or willful or intentional misconduct, recourse of any person or entity shall be against the Receiver and its liability insurance.

The Receiver shall have no obligation to make any advances to pay any obligations associated with the Business, the Property, or this Receivership.

The Court acknowledges the Receiver’s ability to perform its duties under this Order may be limited by various factors, including but not limited to the Receiver’s limited access to information and funds. The Court therefore requires only the Receiver’s best efforts to comply with the duties set forth in this Order, and the Receiver may at any time apply to this Court for further or other instructions, or for a modification of this Order, or for further powers necessary to enable the Receiver to properly perform its duties, or for discharge of the Receiver and termination of the Receivership.

I. Bankruptcy.

1. Notice to Receiver.

In the event that any one or more of defendant Borrower become a debtor in bankruptcy on account of the filing of a voluntary or involuntary bankruptcy petition during the pendency of the Receivership, such Defendant or Defendants shall give notice within twenty four hours of the bankruptcy filing to this Court and the Receiver, and shall provide reasonably prompt notice to all other persons included on the Receiver’s master mailing list.

2. Receiver’s Duties if Bankruptcy is Filed.

(a) If one or more of defendant Borrower becomes a debtor in bankruptcy, the
Chapter 7A—Washington State Receivership Statute, RCW 7.60 et seq.

Receiver shall immediately contact Bank, and determine whether Bank intends to immediately move in the Bankruptcy Court for an order (1) for relief from the automatic stay or dismissal of the case, or, in the alternative, (2) to continue the Receiver in its custodial role with regard to the Business and the Property, including making a request to approve or ratify transactions undertaken by the Receiver that occur following the bankruptcy filing. If Bank advises the Receiver that it has no intention of immediately filing such a motion, then the Receiver shall immediately turn over the Business and the Property to the trustee in bankruptcy or, if one has not been appointed, then to defendant Borrower, and otherwise comply with 11 U.S.C. § 543.

(b) If Bank notifies the Receiver of its intention to immediately move the Bankruptcy Court for an order (1) for relief from the automatic stay or dismissal of the case, or, in the alternative, (2) to continue the Receiver in its custodial role with regard to the Business and the Property, including making a request to approve or ratify transactions undertaken by the Receiver that occur following the bankruptcy filing, then the Receiver is authorized to remain in possession of and preserve the Business and the Property pending the outcome of the motion pursuant 11 U.S.C. § 543(a). The Receiver’s authority to preserve the Business and the Property is limited as follows: (1) to continue to collect income and profits from the Business and the Property; (2) to make disbursements, but only those disbursements that are necessary to preserve and protect the Business and the Property; (3) to do nothing that would effect a material change in circumstances of the Business and the Property; and (4) preserve the status quo with respect to the residents of the Business.

(c) If Bank fails to file the above-described motion with the Bankruptcy Court within three days after notice by the Receiver of the bankruptcy filing, the Receiver shall immediately turn over the Business and the Property to the trustee in bankruptcy, or if one has not been appointed, then to defendant Borrower, and otherwise comply with 11 U.S.C. § 543.

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Foster Pepper PLLC
1111 Third Avenue, Suite 3000
Seattle, Washington 98101-3292
Phone (206) 447-4400 Fax (206) 447-9700
J. Legal Representation.

The Receiver anticipates retaining ____________ as its counsel in this case. ______ will be compensated at the regular or reduced hourly rates as follows: ____________ as supervising attorney will be compensated at the rate of $_____ per hour while associates and other partners, will be compensated at a rate of between $250 to $475 per hour. Paralegal rates will be set at $220 per hour. Where possible, ____________ shall utilize the professional with the lowest billing rate who is qualified to perform a particular task.

K. Licenses and Permits.

In accordance with section II.C.14 and this Order, the Receiver may acquire or renew all governmental licenses, permits, or other authorizations in the Receiver’s name or in defendant Borrower’s name, pertaining to the Business, and the Property and to do all other things necessary or appropriate to manage, maintain and operate the Business and the Property.

L. Notice.

The Receiver shall provide notice to parties and other persons as required under RCW 7.60.190. Any motion filed by the Receiver seeking Court approval of an action to be taken by the Receiver shall be served on each party hereto and each other person who has filed and served on the Receiver a notice of appearance or request for special notice. The Receiver may file requests for special notice on behalf of any party; however, such request filed by the Receiver shall not be deemed consent to the jurisdiction of this Court. In addition to service by mail or personal service, service may be made by email. Notwithstanding any provision of this Order requiring Court approval of any act of the Receiver, the Receiver may nonetheless undertake any action without prior Court approval if it obtains the written consent of each party hereto and each other person who has filed and served on the Receiver a notice of appearance or a request for special appearance.

Notice by the Receiver may be made by personal service, mail or email nine (9) calendar days in advance of any hearing, or by confirmed facsimile nine (9) calendar days in advance of
any hearing. The Receiver shall be deemed to have provided adequate notice if it complies with this section.

With respect to any written notice required to be served on the Bank, the Receiver and/or defendant Borrower, such notice may be given by delivering the same via first class mail or email, as follows:

For Bank:

Bank
c/o Deborah Crabbe
Foster Pepper PLLC
1111 Third Avenue, Suite 3000
Seattle, Washington 98101-3299
deborah.crabbe@foster.com

For the Receiver:
Best Receiver, Inc.
c/o John Doe
4th Street
Seattle, Washington 98010
johndoe@email.com

with a copy to:

Receiver Counsel:

Defendants:

M. Termination and Discharge of the Receiver.

The Receiver may at any time, upon proper notice, file a motion requesting that it be exonerated, discharged and released from its appointment as the Receiver, pursuant to RCW 7.60.280 and 7.60.290.
In addition, the receivership may be terminated by the Receiver or by Bank as follows: (i) immediately upon the reinstatement or full payoff of the Note secured by the Deed; (ii) upon the completion of a valid foreclosure sale of the Property, or upon the acquisition of the Property by Bank or any assignee by deed in lieu of foreclosure. Without further order of this Court, the Receiver shall relinquish possession and control of the Business and the Property to defendant Borrower under subsection (i) above or relinquish possession and control of the Business and the Property to Bank or the purchaser under section (ii) above. Upon relinquishing possession and control of the Business and the Property, the Receiver shall be relieved from all further duties, liabilities and responsibilities relating to the Business and the Property, and the Receiver shall thereafter submit the Receiver’s final account and report for Court approval and discharge.

Nothing contained in this Order shall prohibit Bank from hereafter foreclosing its Deed either judicially or non-judicially and thereafter terminating the Receivership in accordance with the provision above.

N. Further Instructions and Jurisdiction.

In accordance with RCW 7.60.060(1)(g), the Receiver may at any time apply to this Court for further or other instructions, or for a modification of this Order, or for further powers necessary to enable the Receiver to properly perform its duties.

The Court shall retain jurisdiction over any disputes arising from the receivership, or relating to the Receiver, which jurisdiction shall be exclusive and shall survive the termination of the receivership.

DATED this ______ day of __________________________, 2017.

JUDGE/COURT COMMISSIONER

ORDER

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3000
SEATTLE, WASHINGTON 98101-3292
PHONE (206) 447-4400 FAX (206) 447-9700
Presented by:

FOSTER PEPPER PLLC

Deborah A. Crabbe, WSBA #22263
Attorneys for Bank

Acceptance of Responsibilities of the Receiver:

BEST RECEIVER, INC., a Washington corporation

By: ______________________
    John Doe, its President

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EXHIBIT 1
(Legal Description of Real Property)
EXHIBIT D
PREEMPTION AND THE BANKRUPTCY CODE:
LESSONS FROM SHERWOOD PARTNERS INC. V. LYCOS INC.*

Contributing Editor: Deborah A. Crabbe
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In a recent 3-2 decision, the Ninth Circuit Court of Appeals held that California’s statute governing preference recoveries by a voluntary assignee for the benefit of creditors was preempted by federal bankruptcy law. The decision has raised doubts in the Ninth Circuit about whether state laws such as assignments for the benefit of creditors and receivership actions can co-exist with the Bankruptcy Code. This issue is particularly important in view of the passage of the Bankruptcy Reform Act and the anticipated search for alternative debtor/creditor remedies.

What Is Preemption?

Preemption occurs when Congress enacts a federal law or statutory scheme that is intended to preclude enforcement of state laws on the same subject. Congressional “intent is most easily detected where the statute expressly preempts other laws, but preemption may also be inferred where it is clear from the statute and surrounding circumstances that Congress intended to occupy the field, leaving no room for state regulation.”

In describing preemption, the Supreme Court has stated that:

[a]bsent explicit pre-emptive language, Congress’s intent to supersede state law altogether may be found from a “scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it,’ because ‘the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,’ or because ‘the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.’

Bankruptcy law is clearly a pervasive statutory scheme. However, there are dozens of statutes in every state that regulate the rights and duties of debtors and creditors. In addition, there are dozens of decisions from both federal and state courts that examine whether these state statutes are preempted by bankruptcy law. Based on a review of these cases, it appears that the primary

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1 Sherwood Partners Inc. v. Lycos Inc., 394 F.3d 1198, 1200 (9th Cir. 2005).


3 See, e.g., Pobreslo v. Boyd, 287 U.S. 518 (1933) (upholding a Wisconsin statute governing assignments for the benefit of creditors containing a preference avoidance provision, but not a discharge provision); International Shoe v. Pinkus, 278 U.S. 261 (1929) (striking down Arkansas receivership statute that granted a discharge to a debtor otherwise ineligible for a bankruptcy discharge); Stellwagen v. Clum, 245 U.S. 605 (1918) (state statutes intended to avoid conveyances actually or constructively fraudulent are not preempted by national bankruptcy law); Moskowitz v. Prentice (In re Wisconsin Builders Supply Co.), 239 F.2d 649 (7th Cir. 1956) (involuntary receivership provisions superseded by Bankruptcy Act); In re Newport Offshore Ltd., 219 B.R. 341 (Bankr. D. R.I. 1998) (Rhode Island
questions to examine in determining whether a state statute is preempted by bankruptcy law is “whether a state insolvency law is a ‘bankruptcy’ law and thus generally preempted by Congress’s exercise of its power under the Bankruptcy clause . . . [or] whether a particular state statute conflicts with some specific aspect of the federal bankruptcy law.”

The Decision

Sherwood Partners Inc. became the assignee for the benefit of creditors of Thinklink Corp. In this capacity, Sherwood commenced a lawsuit against Lycos Inc. for recovery of a $1 million preferential transfer pursuant to Cal. Civ. Proc. Code §1800(b). This statute provides that:

[t]he assignee of any general assignment for the benefit of creditors . . . may recover any transfer of property of the assignor:
1. to or for the benefit of a creditor;
2. for or on account of an antecedent debt owed by the assignor before the transfer was made;
3. made while the assignor was insolvent;
4. made on or within 90 days before the date of the making of the assignment . . . and
5. that enables the creditor to receive more than another creditor of the same class.5

Lycos removed the lawsuit to federal court on diversity grounds, where the district court granted summary judgment to Sherwood Partners. Lycos appealed.

The Ninth Circuit began its analysis by recognizing the basic premise that federal preemption occurs where the federal statutory scheme is so pervasive as to occupy the field and displace any and all state regulation in a specific area. However, the Ninth Circuit further noted that “state law is [also] preempted . . . where [it] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”6

Based on this observation, the court undertook an analysis of the goals of the Bankruptcy Code and specifically liquidation proceedings to determine whether the California assignment statute could peaceably co-exist with the Code. The court noted that bankruptcy liquidation proceedings embody two functions: “(1) giving the individual debtor a fresh start by giving him a discharge of most of his debts, and (2) equitably distributing a debtor’s assets among competing creditors.”7 It has long been held that state statutes that give a debtor a discharge are preempted.8

involuntary receivership statute not preempted); Goldstein v. Columbia Diamond Ring Co. Inc., 366 Mass. 835, 323 N.E. 2d 344 (1975) (state insolvency law, which was a full and complete bankruptcy law with discharge provisions, was preempted by federal bankruptcy law).

6 Sherwood Partners, 394 F.3d at 1201 (quoting Pacific Gas & Electric Co., supra at 204).
7 Sherwood Partners at 1203.
8 See Intl’ Shoe Co., supra.
However, if a state statute also invades the province of the federal bankruptcy scheme by precluding an equitable distribution to creditors, then such a scheme, the Ninth Circuit noted, is also preempted.9

In examining the California statute, the court found that §1800 was problematic because it was not merely another creditor provision of the kind tolerated by the Bankruptcy Code. Rather, the California statute gave the state assignees special avoidance powers by virtue of their position.10 As a result, such actions invaded the province of bankruptcy trustees who operate under a system in which they are charged with the orderly collection, liquidation and distribution or the debtor’s assets, including the right to commence preference actions.11 The court concluded that “statutes that give state assignees or trustees avoidance powers beyond those that may be exercised by individual creditors trench too close upon the exercise of the federal bankruptcy power.”12 In other words, a state law cannot go beyond contract or trust law to give entirely new rights to third parties that would not otherwise be held by debtors or creditors.13 The consequence of giving such power to third parties jeopardized the federal goal of equitable distribution and was thus preempted.14

Reconciling Sherwood Partners

Throughout its analysis, the Ninth Circuit attempted to reconcile its decision with holdings from other jurisdictions in which state preference and bankruptcy type provisions were not preempted by the Code. The Ninth Circuit appeared to draw three distinctions between the California statute and other state statutes that have not been preempted. First, the court noted that statutes cannot give new rights to third parties that do not already belong to debtors and creditors, and those that have been upheld do not grant new or greater rights.15

Second, the court found it significant that a state statute must not affect the incentives of various parties to avail themselves of the bankruptcy laws.16 Because an action by the state assignee under §1800 might diminish the likelihood that creditors would join the affected creditor in an involuntary bankruptcy filing, such a state scheme must be preempted.17

Finally, the court was concerned by the fact that a state assignee could recover preferential transfers and preclude a federal trustee from recovering the same sum. In other words, “distribution of the recovered sum would have been made by a state assignee subject to state procedures and

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9 Sherwood Partners at 1203.
10 Sherwood Partners at 1205.
11 Id. at 1204.
12 Id.
13 Id. at 1206 at n. 8.
14 Id.
15 Id. at 1205, n. 7, n .8.
16 Id. at 1205.
17 Id. at 1204–05.
substantive standards, rather than by the federal trustee subject to bankruptcy law’s substantive standards and procedural protections.”

**Application to Other States’ Laws**

Does the holding in *Sherwood Partners* mean that preference laws may not be utilized in other nonbankruptcy liquidation proceedings? It is certainly too early to tell. However, *Sherwood Partners* casts a large shadow over other alternative state provisions such as receivership statutes and statutes governing assignments for the benefit of creditors. Are these kinds of statutes preempted in their entirety? What about receivership statutes such as the Washington state receivership statute that was amended in 2004 to mimic many of the sections of the Code? It would appear that based on the holding in *Sherwood Partners*, any statute that vests in third parties’ power that is reserved for debtors or trustees in bankruptcy invades the province of the Code and would be preempted. For example, under the Washington statute, receivers can now assume or reject leases. Clearly, this is not a right that belongs to debtors or creditors under state contract law and can only be found in the Code. As a result, it would appear under the holding in *Sherwood Partners* that such a provision is preempted. What about the stay provisions that arise automatically under the Washington state receivership statute upon the filing of a receivership? Can such a provision be likened to a TRO, or is the provision too invasive of the province of the Code?

It is expected that the Bankruptcy Reform Act will send debtors and creditors searching for alternative state statutes to seek redress of their rights. As a result, there will likely be a surge in challenges across the country to such statutory schemes that mimic or invade the province of the Code.

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18 *Id.* at 1204.
EXHIBIT E
PROPOSED CHANGES TO RCW 7.60 ET SEQ.

AN ACT Relating to receiverships; amending RCW [insert amended sections] {if chapter 7.08 is amended to require disclosure of pre-assignment transfers, then a broader title will be necessary; probably either “relating to receiverships and assignments for creditors” or “relating to insolvency proceedings”}

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. PURPOSE. [purpose/preamble, if desired]

[Sec. ___. Reserved for addition to Chapter 7.08]

Sec. 2. RCW 7.60.015 and 2004 c 165 s 3 are each amended to read as follows:

(1) A receiver must be either a general receiver or a custodial receiver

(a) A receiver must be a general receiver if the receiver is appointed to take possession and control of all or substantially all of a person’s property with authority to liquidate that property and, in the case of a business over which the receiver is appointed, wind up affairs.

(b) A receiver must be a custodial receiver if the receiver:

(i) is appointed to take charge of limited or specific property of a person

(ii) is not given authority to liquidate property, or

(iii) is given authority to sell real property only pursuant to RCW 7.60.260(2).

(c) When the sole basis for the appointment is the pendency of an action to foreclose upon a lien against real property, or the giving of a notice of a trustee’s sale under RCW 61.24.040 or a notice of forfeiture under RCW 61.30.040, the court shall appoint the receiver as a custodial receiver.

(2) The court shall specify in the order appointing a receiver whether the receiver is appointed as a general receiver or as a custodial receiver. (When the sole basis for the appointment is the pendency of an action to foreclose upon a lien against real property, or the giving of a notice of a trustee’s sale under RCW 61.24.040 or a notice of forfeiture under RCW 61.30.040, the court shall appoint the receiver as a custodial receiver.)

(3) The court by order may convert either a general receivership or a custodial receivership into the other.

Sec. 3. RCW 7.60.025 and 2011 c 214 s 27 are each amended to read as follows:

(1) A receiver may be appointed by the superior court of this state in the following instances, but except in any case in which a receiver’s appointment is expressly required by statute, or any case in which a receiver’s appointment is sought by a state agent whose authority to seek the appointment of a receiver is expressly conferred by statute, or any case in which a receiver’s
appointment with respect to real property is sought under (b)(ii) of this subsection, a receiver shall be appointed only if the court additionally determines that the appointment of a receiver is reasonably necessary and that other available remedies either are not available or are inadequate:

(a) On application of any party, when the party is determined to have a probable right to or interest in property that is a subject of the action and in the possession of an adverse party, or when the property or its revenue-producing potential is in danger of being lost or materially injured or impaired. A receiver may be appointed under this subsection (1)(a) whether or not the application for appointment of a receiver is combined with, or is ancillary to, an action seeking a money judgment or other relief;

(b) Provisionally, after commencement of any judicial action or nonjudicial proceeding to foreclose upon any lien against or for forfeiture of any interest in real or personal property, on application of any person, when the interest in the property that is the subject of such an action or proceeding of the person seeking the receiver’s appointment is determined to be probable and either:

(i) The property or its revenue-producing potential is in danger of being lost or materially injured or impaired; or

(ii) The appointment of a receiver with respect to the real or personal property that is the subject of the action or proceeding is provided for by agreement or is reasonably necessary to effectuate or enforce an assignment of rents or other revenues from the property. For purposes of this subsection (1)(b), a judicial action is commenced as provided in superior court civil rule 3(a), a nonjudicial proceeding is commenced under chapter 61.24 RCW upon the service of notice of default described in RCW 61.24.030(8), and a proceeding for forfeiture is commenced under chapter 61.30 RCW upon the recording of the notice of intent to forfeit described in RCW 61.30.060;

(c) After judgment, in order to give effect to the judgment;

(d) To dispose of property according to provisions of a judgment dealing with its disposition;

(e) To the extent that property is not exempt from execution, at the instance of a judgment creditor either before or after the issuance of any execution, to preserve or protect it, or prevent its transfer;

(f) If and to the extent that property is subject to execution to satisfy a judgment, to preserve the property during the pendency of an appeal, or when an execution has been returned unsatisfied, or when an order requiring a judgment debtor to appear for proceedings supplemental to judgment has been issued and the judgment debtor fails to submit to examination as ordered;

(g) Upon an attachment of real or personal property when the property attached is of a perishable nature or is otherwise in danger of waste, impairment, or destruction, or where the abandoned property’s owner has absconded with, secreted, or abandoned the property, and it is necessary to collect, conserve, manage, control, or protect it, or to dispose of it promptly, or when the court determines that the nature of the property or the exigency of the case otherwise provides cause for the appointment of a receiver;
(h) In an action by a transferor of real or personal property to avoid or rescind the transfer on the basis of fraud, or in an action to subject property or a fund to the payment of a debt;

(i) In an action against any person who is not an individual if the object of the action is the dissolution of that person, or if that person has been dissolved, or if that person is insolvent or is not generally paying the person’s debts as those debts become due unless they are the subject of bona fide dispute, or if that person is in imminent danger of insolvency;

(j) In accordance with RCW 7.08.030 (4) and (6), in cases in which a general assignment for the benefit of creditors has been made;

(k) In quo warranto proceedings under chapter 7.56 RCW;

(l) As provided under RCW 11.64.022;

(m) In an action by the department of licensing under RCW 18.35.220(3) with respect to persons engaged in the business of dispensing of hearing aids, RCW 18.85.430 in the case of persons engaged in the business of a real estate broker, associate real estate broker, or real estate salesperson, or RCW 19.105.470 with respect to persons engaged in the business of camping resorts;

(n) In an action under RCW 18.44.470 or 18.44.490 in the case of persons engaged in the business of escrow agents;

(o) Upon a petition with respect to a nursing home in accordance with and subject to receivership provisions under chapter 18.51 RCW;

(p) Under RCW 19.40.071(3), in connection with a proceeding for relief with respect to a transfer fraudulent as to a creditor or creditors;

(q) Under RCW 19.100.210(1), in an action by the attorney general or director of financial institutions to restrain any actual or threatened violation of the franchise investment protection act;

(r) In an action by the attorney general or by a prosecuting attorney under RCW 19.110.160 with respect to a seller of business opportunities;

(s) In an action by the director of financial institutions under RCW 21.20.390 in cases involving actual or threatened violations of the securities act of Washington or under RCW 21.30.120 in cases involving actual or threatened violations of chapter 21.30 RCW with respect to certain businesses and transactions involving commodities;

(t) In an action for or relating to dissolution of a business corporation under RCW 23B.14.065, 23B.14.300, 23B.14.310, or 23B.14.320, for dissolution of a nonprofit corporation under RCW 24.03.271, for dissolution of a mutual corporation under RCW 24.06.305, or in any other action for the dissolution or winding up of any other entity provided for by Title 23, 23B, 24, or 25 RCW;

(u) In any action in which the dissolution of any public or private entity is sought, in any action involving any dispute with respect to the ownership or governance of such an entity, or upon the
application of a person having an interest in such an entity when the appointment is reasonably necessary to protect the property of the entity or its business or other interests;

(v) Under RCW 25.05.215, in aid of a charging order with respect to a partner’s interest in a partnership;

(w) Under and subject to RCW 30.44.100, 30.44.270, and 30.56.030, in the case of a bank or trust company or, under and subject to RCW 32.24.070 through 32.24.090, in the case of a mutual savings bank;


(y) Upon the application of the director of financial institutions under RCW 31.35.090 in actions to enforce chapter 31.35 RCW applicable to agricultural lenders, under RCW 31.40.120 in actions to enforce chapter 31.40 RCW applicable to entities engaged in federally guaranteed small business loans, under RCW 31.45.160 in actions to enforce chapter 31.45 RCW applicable to persons licensed as check cashers or check sellers, or under RCW 19.230.230 in actions to enforce chapter 19.230 RCW applicable to persons licensed under the uniform money services act;

(z) Under RCW 35.82.090 or 35.82.180, with respect to a housing project;

(aa) Under RCW 39.84.160 or 43.180.360, in proceedings to enforce rights under any revenue bonds issued for the purpose of financing industrial development facilities or bonds of the Washington state housing finance commission, or any financing document securing any such bonds;

(bb) Under and subject to RCW 43.70.195, in an action by the secretary of health or by a local health officer with respect to a public water system;

(cc) As contemplated by RCW 61.24.030, with respect to real property that is the subject of nonjudicial foreclosure proceedings under chapter 61.24 RCW;

(dd) As contemplated by RCW 61.30.030(3), with respect to real property that is the subject of judicial or nonjudicial forfeiture proceedings under chapter 61.30 RCW;

(ee) Under RCW 64.32.200(2), in an action or proceeding commenced under chapter 61.12 or 61.24 RCW to foreclose upon a lien for common expenses against a dwelling unit subject to the horizontal property regimes act, chapter 64.32 RCW. For purposes of this subsection (1)(ee), a judicial action is commenced as provided in superior court civil rule 3(a) and a nonjudicial proceeding is commenced under chapter 61.24 RCW upon the service of notice of default described in RCW 61.24.030(8);

(ff) Under RCW 64.34.364(10), in an action or proceeding commenced under chapter 61.12 or 61.24 RCW by a unit owners’ association to foreclose a lien for nonpayment of delinquent assessments against condominium units. For purposes of this subsection (1)(ff), a judicial action is commenced as provided in superior court civil rule 3(a) and a nonjudicial proceeding is
commenced under chapter 61.24 RCW upon the service of notice of default described in RCW 61.24.030(8);

(gg) Upon application of the attorney general under RCW 64.36.220(3), in aid of any writ or order restraining or enjoining violations of chapter 64.36 RCW applicable to timeshares;

(hh) Under RCW 70.95A.050(3), in aid of the enforcement of payment or performance of municipal bonds issued with respect to facilities used to abate, control, or prevent pollution;

(ii) Upon the application of the department of social and health services under RCW 74.42.580, in cases involving nursing homes;

(jj) Upon the application of the utilities and transportation commission under RCW 80.28.040, with respect to a water company or wastewater company that has failed to comply with an order of such commission within the time deadline specified therein;

(kk) Under RCW 87.56.065, in connection with the dissolution of an irrigation district;

(ll) Upon application of the attorney general or the department of licensing, in any proceeding that either of them are authorized by statute to bring to enforce Title 18 or 19 RCW; the securities act of Washington, chapter 21.20 RCW; the Washington commodities act, chapter 21.30 RCW; the land development act, chapter 58.19 RCW; or under chapter 64.36 RCW relating to the regulation of timeshares;

(mm) Upon application of the director of financial institutions in any proceeding that the director of financial institutions is authorized to bring to enforce chapters 31.35, 31.40, and 31.45 RCW; or

(nn) In such other cases as may be provided for by law, or when, in the discretion of the court, it may be necessary to secure ample justice to the parties.

(2) The superior courts of this state shall appoint as receiver of property located in this state a person who has been appointed by a federal or state court located elsewhere as receiver with respect to the property specifically or with respect to the owner’s property generally, upon the application of the person or of any party to that foreign proceeding, and following the appointment shall give effect to orders, judgments, and decrees of the foreign court affecting the property in this state held by the receiver, unless the court determines that to do so would be manifestly unjust or inequitable. The venue of such a proceeding may be any county in which the person resides or maintains any office, or any county in which any property over which the receiver is to be appointed is located at the time the proceeding is commenced.

(3) At least seven days’ notice of any application for the appointment of a receiver must be given to the owner of property to be subject thereto and to all other parties in the action, and to other parties in interest as the court may require. If any execution by a judgment creditor under Title 6 RCW or any application by a judgment creditor for the appointment of a receiver, with respect to property over which the receiver’s appointment is sought, is pending in any other action at the time the application is made, then notice of the application for the receiver’s appointment also must be given to the judgment creditor in the other action. The court may shorten or expand the period for notice of an application for the appointment of a receiver upon good cause shown.
(4) If it appears to the court that the owner of property subject to an application for the appointment of a receiver has abandoned the property, the court may authorize that the notice required by subsection (3) of this section be provided by publication, consistent with the procedures prescribed by RCW 4.28.110 or by mail, consistent with the procedures prescribed in RCW 26.50.123, however, in advance of the return date for such service, the court shall have the ability to appoint a receiver if presented with exigent circumstances requesting such appointment, including those factors set forth in RCW 7.60.025(1)(g).

((4)) (5) The order appointing a receiver in all cases must reasonably describe the property over which the receiver is to take charge, by category, individual items, or both if the receiver is to take charge of less than all of the owner’s property. If the order appointing a receiver does not expressly limit the receiver’s authority to designated property or categories of property of the owner, the receiver is a general receiver with the authority to take charge over all of the owner’s property, wherever located.

((5)) (6) The court may condition the appointment of a receiver upon the giving of security by the person seeking the receiver’s appointment, in such amount as the court may specify, for the payment of costs and damages incurred or suffered by any person should it later be determined that the appointment of the receiver was wrongfully obtained.

Sec. 4. RCW 7.60.055 and 2011 c 34 s 2 are each amended to read as follows:

(1) Except as otherwise provided for by this chapter, the court in all cases has exclusive authority over the receiver, and the exclusive possession and right of control with respect to all real property and all tangible and intangible personal property with respect to which the receiver is appointed, wherever located, and the exclusive jurisdiction to determine all controversies relating to the collection, preservation, application, and distribution of all the property, and all claims against the receiver arising out of the exercise of the receiver’s powers or the performance of the receiver’s duties. However, the court does not have exclusive jurisdiction over actions in which a state agency is a party and in which a statute expressly vests jurisdiction or venue elsewhere.

(2) For good cause shown, the court has the power to shorten or expand the time frames specified in this chapter.

(3) On motion by the receiver, and after notice and a hearing, the court may approve the receiver’s compromise or settlement of controversies. Notice of such motion shall be given to creditors, the person over whose property the receiver is appointed, and other interested parties as the court may direct. In deciding whether to approve any proposed settlement or compromise of a controversy, the court shall consider:

(a) The probability of the receiver’s success in the matter to be settled,

(b) If the matter involves a claim by the receiver, the receiver’s ability to collect or otherwise enforce a judgment in favor of the receiver, or otherwise realize upon the claim,

(c) If the matter involves the receiver’s defense of or opposition to a claim, the consequences to the receivership estate if the matter were to be resolved adversely to the receiver;
(d) The complexity of the litigation, including the expense, inconvenience, and delay attendant to further proceedings in the receivership action, and

(e) The interests otherwise of creditors generally, with appropriate deference to their reasonable views.

Sec. 5. RCW 7.60.060 and 2004 c 165 s 8 are each amended to read as follows

(1) A receiver has the following powers and authority in addition to those specifically conferred by this chapter or otherwise by statute, court rule, or court order:

(a) The power to incur or pay expenses incidental to the receiver’s preservation and use of the property with respect to which the appointment applies, and otherwise in the performance of the receiver’s duties, including the power to pay obligations incurred prior to the receiver’s appointment if and to the extent that payment is determined by the receiver to be prudent in order to preserve the value of property in the receiver’s possession and, subject to the provision of RCW 7.60.180 (5), the funds used for this purpose are not subject to any lien or right of setoff in favor of a creditor who has not consented to the payment and whose interest is not otherwise adequately protected;

(b) If the appointment applies to all or substantially all of the property of an operating business or any revenue-producing property of any person, to do all things which the owner of the business or property might do in the ordinary course of the operation of the business as a going concern or use of the property including, but not limited to, the purchase and sale of goods or services in the ordinary course of such business, and the incurring and payment of expenses of the business or property in the ordinary course;

(c) The power to assert any rights, claims, or choses in action of the person over whose property the receiver is appointed relating thereto, if and to the extent that the claims are themselves property within the scope of the appointment or relate to any property, to maintain in the receiver’s name or in the name of such a person any action to enforce any right, claim, or chose in action, and to intervene in actions in which the person over whose property the receiver is appointed is a party for the purpose of exercising the powers under this subsection (1)(c);

(d) The power to intervene in any action in which a claim is asserted against the person over whose property the receiver is appointed relating thereto, for the purpose of prosecuting or defending the claim and requesting the transfer of venue of the action to the court. However, the court shall not transfer actions in which both a state agency is a party and as to which a statute expressly vests jurisdiction or venue elsewhere. This power is exercisable with court approval in the case of a ((liquidating)) custodial receiver, and with or without court approval in the case of a general receiver;

(e) The power to assert rights, claims, or choses in action of the receiver arising out of transactions in which the receiver is a participant;

(f) The power to pursue in the name of the receiver any claim under chapter 19.40 RCW assertable by any creditor of the person over whose property the receiver is appointed, if pursuit of the claim is determined by the receiver to be appropriate;
Chapter 7A—Washington State Receivership Statute, RCW 7.60 et seq.

(g) The power to seek and obtain advice or instruction from the court with respect to any course of action with respect to which the receiver is uncertain in the exercise of the receiver’s powers or the discharge of the receiver’s duties;

(h) The power to obtain appraisals with respect to property in the hands of the receiver;

(i) The power by subpoena to compel any person to submit to an examination under oath, in the manner of a deposition in a civil case, with respect to estate property or any other matter that may affect the administration of the receivership; and

(j) Other powers as may be conferred upon the receiver by the court or otherwise by statute or rule.

(2) A receiver has the following duties in addition to those specifically conferred by this chapter or otherwise by statute or court rule:

(a) The duty to notify all federal and state taxing and applicable regulatory agencies of the receiver’s appointment in accordance with any applicable laws imposing this duty, including but not limited to 26 U.S.C. Sec. 6036 and RCW 51.14.073, 51.16.160, and 82.32.240, or any successor statutes;

(b) The duty to comply with state law;

(c) If the receiver is appointed with respect to any real property, the duty to file with the auditor of the county in which the real property is located, or the registrar of lands in accordance with RCW 65.12.600 in the case of registered lands, a certified copy of the order of appointment, together with a legal description of the real property if one is not included in that order; and

(d) Other duties as the receiver may be directed to perform by the court or as may be provided for by statute or rule.

(3) The various powers and duties of a receiver provided for by this chapter may be expanded, modified, or limited by order of the court for good cause shown.

Sec. 6. RCW 7.60.100 and 2004 c 165 s 12 are each amended to read as follows:

(1) A general receiver shall file with the court a monthly report of the receiver’s operations and financial affairs unless otherwise ordered by the court. Except as otherwise ordered by the court, each report of a general receiver shall be due by the last day of the subsequent month and shall include the following:

((1)) (a) A balance sheet;

((2)) (b) A statement of income and expenses;

((3)) (c) A statement of cash receipts and disbursements;

((4)) (d) A statement of accrued accounts receivable of the receiver. The statement shall disclose amounts considered to be uncollectable;
Chapter 7A—Washington State Receivership Statute, RCW 7.60 et seq.

((5)) (e) A statement of accounts payable of the receiver, including professional fees. The statement shall list the name of each creditor and the amounts owing and remaining unpaid over thirty days; and

((6)) (f) A tax disclosure statement, which shall list taxes due or tax deposits required since the entry of the order appointing the receiver, the name of the taxing agency, the amount due, the date due, and an explanation for any failure to make payments or deposits.

(2) A custodial receiver shall file with the court all such reports the court may require.

Sec. 7. RCW 7.60.110 and 2011 c 34 s 4 are each amended to read as follows:

(1) Except as otherwise ordered by the court, the entry of an order appointing a general receiver or a custodial receiver shall operate as a stay, applicable to all persons, of:

(a) The commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the person over whose property the receiver is appointed that was or could have been commenced before the entry of the order of appointment to the extent it affects or concerns estate property, or to recover a claim against the person that arose before the entry of the order of appointment against the property the receiver is appointed over;

(b) The enforcement, against the person over whose property ((the)) a general receiver is appointed or any estate property included in the receivership, of a judgment obtained before the order of appointment;

(c) Any act to obtain possession of estate property from the receiver, or to interfere with, or exercise control over, estate property;

(d) Any act to create, perfect, or enforce any lien or claim against estate property except by exercise of a right of setoff, to the extent that the lien secures a claim against the person that arose before the entry of the order of appointment; or

(e) Any act to collect, assess, or recover a claim against ((the person)) estate property that arose before the entry of the order of appointment.

(2) ((The stay shall automatically expire as to the acts specified in subsection (1)(a), (b), and (e) of this section sixty days after the entry of the order of appointment unless before the expiration of the sixty-day period the receiver, for good cause shown, obtains an order of the court extending the stay, after notice and a hearing.)) A person whose action or proceeding is stayed ((by motion to the court)) may seek relief from the stay for good cause shown by filing a motion with the court. Any judgment obtained against the person over whose property the receiver is appointed or estate property following the entry of the order of appointment is not a lien against estate property unless the receivership is terminated prior to a conveyance of the property against which the judgment would otherwise constitute a lien.

(3) The entry of an order appointing a receiver does not operate as a stay of:
(a) The continuation of a judicial action or nonjudicial proceeding of the type described in RCW 7.60.025(1) (b), (ee), or (ff), if the action or proceeding was initiated by the party seeking the receiver’s appointment;

(b) The commencement or continuation of a criminal proceeding against the person over whose property the receiver is appointed;

(c) The commencement or continuation of an action or proceeding to establish paternity, or to establish or modify an order for alimony, maintenance, or support, or to collect alimony, maintenance, or support under any order of a court;

(d) Any act to perfect, or to maintain or continue the perfection of, an interest in estate property if the interest perfected would be effective against a creditor of the person over whose property the receiver is appointed holding at the time of the entry of the order of appointment either a perfected nonpurchase money security interest under chapter 62A.9A RCW against the property involved, or a lien by attachment, levy, or the like, whether or not such a creditor exists. If perfection of an interest would require seizure of the property involved or the commencement of an action, the perfection shall instead be accomplished by filing, and by serving upon the receiver, or receiver’s counsel, if any, notice of the interest within the time fixed by law for seizure or commencement;

(e) The commencement or continuation of an action or proceeding by a governmental unit to enforce its police or regulatory power;

(f) The enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce its police or regulatory power, or with respect to any licensure of the person over whose property the receiver is appointed;

(g) The exercise of a right of setoff, including but not limited to (i) any right of a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency to set off a claim for a margin payment or settlement payment arising out of a commodity contract, forward contract, or securities contract against cash, securities, or other property held or due from the commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency to margin, guarantee, secure, or settle the commodity contract, forward contract, or securities contract, and (ii) any right of a swap participant to set off a claim for a payment due to the swap participant under or in connection with a swap agreement against any payment due from the swap participant under or in connection with the swap agreement or against cash, securities, or other property of the debtor held by or due from the swap participant to guarantee, secure, or settle the swap agreement; or

(h) The establishment by a governmental unit of any tax liability and any appeal thereof.

Sec. 8. RCW 7.60.130 and 2011 c 34 s 5 are each amended to read as follows:

(1) A general receiver or a custodial receiver with power of sale may assume or reject any executory contract or unexpired lease with respect to such property over which the receiver is appointed, upon order of the court following notice to the other party to the contract or lease upon notice and a hearing. The court may condition assumption or rejection of any executory contract or unexpired lease on the terms and conditions the court believes are just and proper under the
particular circumstances of the case. A ((general)) receiver’s performance of an executory contract or unexpired lease prior to the court’s authorization of its assumption or rejection shall not constitute an assumption of the contract or lease, or an agreement by the receiver to assume it, nor otherwise preclude the receiver thereafter from seeking the court’s authority to reject it.

(2) Any obligation or liability incurred by a ((general)) receiver on account of the receiver’s assumption of an executory contract or unexpired lease shall be treated as an expense of the receivership. A ((general)) receiver’s rejection of an executory contract or unexpired lease shall be treated as a breach of the contract or lease occurring immediately prior to the receiver’s appointment; and the receiver’s right to possess or use property pursuant to any executory contract or lease shall terminate upon rejection of the contract or lease. The other party to an executory contract or unexpired lease that is rejected by a ((general)) receiver may take such steps as may be necessary under applicable law to terminate or cancel the contract or lease. The claim of a party to an executory contract or unexpired lease resulting from a ((general)) receiver’s rejection of it shall be served upon the receiver in the manner provided for by RCW 7.60.210 within thirty days following the rejection.

(3) A ((general)) receiver’s power under this section to assume an executory contract or unexpired lease shall not be affected by any provision in the contract or lease that would effect or permit a forfeiture, modification, or termination of it on account of either the receiver’s appointment, the financial condition of the person over whose property the receiver is appointed, or an assignment for the benefit of creditors by that person.

(4) A ((general)) receiver may not assume an executory contract or unexpired lease of the person over whose property the receiver is appointed without the consent of the other party to the contract or lease if:

(a) Applicable law would excuse a party, other than the person over whose property the receiver is appointed, from accepting performance from or rendering performance to anyone other than the person even in the absence of any provisions in the contract or lease expressly restricting or prohibiting an assignment of the person’s rights or the performance of the person’s duties;

(b) The contract or lease is a contract to make a loan or extend credit or financial accommodations to or for the benefit of the person over whose property the receiver is appointed, or to issue a security of the person; or

(c) The executory contract or lease expires by its own terms, or under applicable law prior to the receiver’s assumption thereof.

(5) A receiver may not assign an executory contract or unexpired lease without assuming it, absent the consent of the other parties to the contract or lease.

(6) If the receiver rejects an executory contract or unexpired lease for:

(a) The sale of real property under which the person over whose property the receiver is appointed is the seller and the purchaser is in possession of the real property;
(b) The sale of a real property timeshare interest under which the person over whose property the receiver is appointed is the seller;

(c) The license of intellectual property rights under which the person over whose property the receiver is appointed is the licensor; or

(d) The lease of real property in which the person over whose property the receiver is appointed is the lessor;

then the purchaser, licensee, or lessee may treat the rejection as a termination of the contract, license agreement, or lease, or alternatively, the purchaser, licensee, or lessee may remain in possession in which case the purchaser, licensee, or lessee shall continue to perform all obligations arising thereunder as and when they may fall due, but may offset against any payments any damages occurring on account of the rejection after it occurs. The purchaser of real property in such a case is entitled to receive from the receiver any deed or any other instrument of conveyance which the person over whose property the receiver is appointed is obligated to deliver under the executory contract when the purchaser becomes entitled to receive it, and the deed or instrument has the same force and effect as if given by the person. A purchaser, licensee, or lessee who elects to remain in possession under the terms of this subsection has no rights against the receiver on account of any damages arising from the receiver’s rejection except as expressly provided for by this subsection. A purchaser of real property who elects to treat rejection of an executory contract as a termination has a lien against the interest in that real property of the person over whose property the receiver is appointed for the recovery of any portion of the purchase price that the purchaser has paid. The rights and responsibilities of the tenant or a purchaser arising pursuant to RCW 61.24 et. seq. shall not be affected by this section.

(7) Any contract with the state shall be deemed rejected if not assumed within sixty days of appointment of a receiver unless the receiver and state agency agree to its assumption or as otherwise ordered by the court for good cause shown.

(8) Nothing in this chapter affects the enforceability of antiassignment prohibitions provided under contract or applicable law.

Sec. 9  RCW 7.60.180 and 2004 c 165 s 20 are each amended to read as follows:

(1) The receiver, with the court’s approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons that do not hold or represent an interest adverse to the estate to represent or assist the receiver in carrying out the receiver’s duties.

(2) A person is not disqualified for employment under this section solely because of the person’s employment by, representation of, or other relationship with a creditor or other party in interest, if the relationship is disclosed in the application for the person’s employment and if the court determines that there is no actual conflict of interest or inappropriate appearance of a conflict.

(3) This section does not preclude the court from authorizing the receiver to act as attorney or accountant if the authorization is in the best interests of the estate.
(4) The receiver, and any professionals employed by the receiver, is permitted to file an itemized billing statement with the court indicating both the time spent, billing rates of all who perform work to be compensated, and a detailed list of expenses and serve copies on any person who has been joined as a party in the action, or any person requesting the same, advising that unless objections are filed with the court, the receiver may make the payments specified in the notice. If an objection is filed, the receiver or professional whose compensation is affected may request the court to hold a hearing on the objection on five days’ notice to the persons who have filed objections. If the receiver is a custodial receiver appointed in aid of foreclosure, payment of fees and expenses may be allowed upon the stipulation of any creditor holding a security interest in the property for whose benefit the receiver is appointed.

(5) Any secured creditor who has been served with actual notice of the receivership in the same manner as a summons under RCW 4.28.080 and fails to seek the removal of the receiver pursuant to RCW 7.08.030(5), seek the dismissal of the receivership or file an objection to the compensation of the receiver, within 30 days following the date upon which notice is served on it, shall be deemed to have consented to the receivership for purposes of RCW 7.60.230(b) if so indicated in the order appointing the receiver.

NOTE: This is a new addition from Task Force and addresses the issue of non-consenting secured creditors who are potentially benefiting from the Receivership, however, they did not consent to the Receivership and under the current law may be able to avoid being surcharged for the Receivership estate’s professionals. Thus, a fair noticing procedure is recommended.

Sec. 10. RCW 7.60.190 and 2011 c 34 s 7 are each amended to read as follows:

(1) Creditors and parties in interest to whom written notice of the pendency of the receivership is given in accordance with RCW 7.60.210, and creditors or other persons submitting written claims in the receivership or otherwise appearing and participating in the receivership, are bound by the acts of the receiver with regard to management and disposition of estate property whether or not they are formally joined as parties.

(2) Any person having a claim against or interest in any estate property or in the receivership proceedings may appear in the receivership, either in person or by an attorney. Appearance must be made by filing a written notice of appearance, including the name and mailing address of the party in interest, and the name and address of the person’s attorney, if any, with the clerk, and by serving a copy of the notice upon the receiver and the receiver’s attorney of record, if any. The receiver shall maintain a master mailing list of all persons joined as parties in the receivership and of all persons serving and filing notices of appearance in the receivership in accordance with this section. A creditor or other party in interest has a right to be heard with respect to all matters affecting the person, whether or not the person is joined as a party to the action.

(3) Any request for relief against a state agency shall be mailed to or otherwise served on the agency and on the office of the attorney general.

(4) Orders of the court with respect to the treatment of claims and disposition of estate property, including but not limited to orders providing for sales of property free and clear of liens, are
effective as to any person having a claim against or interest in the receivership estate and who has actual knowledge of the receivership, whether or not the person receives written notice from the receiver and whether or not the person appears or participates in the receivership.

(5) The receiver shall give not less than ten days’ written notice by mail of any examination by the receiver of the person with respect to whose property the receiver has been appointed and to persons who serve and file an appearance in the proceeding.

(6) Persons on the master mailing list are entitled to not less than thirty days’ written notice of the hearing of any motion or other proceeding involving any proposed:

(a) Allowance or disallowance of any claim or claims;

(b) Abandonment, disposition, or distribution of estate property, other than an emergency disposition of property subject to eroding value or a disposition of property in the ordinary course of business;

(c) Compromise or settlement of a controversy that might affect the distribution to creditors from the estate;

(d) Compensation of the receiver or any professional employed by the receiver; or

(e) Application for termination of the receivership or discharge of the receiver. Notice of the application shall also be sent to state taxing and applicable regulatory agencies.

Any opposition to any motion to authorize any of the actions under (a) through (e) of this subsection must be filed and served upon the receiver and the receiver’s attorney, if any, at least three days before the date of the proposed action. Persons on the master mailing list shall be served with all pleadings or in opposition to any motion. The court may require notice to be given to persons on the master mailing list of additional matters the court deems appropriate. The receiver shall make a copy of the current master mailing list available to any person on that list upon the person’s request.

(7) All persons duly notified by the receiver of any hearing to approve or authorize an action or a proposed action by the receiver is bound by any order of the court with respect to the action, whether or not the persons have appeared or objected to the action or proposed action or have been joined formally as parties to the particular action.

(8) Whenever notice is not specifically required to be given under this chapter, the court may consider motions and grant or deny relief without notice or hearing, if it appears that no person joined as a party or who has appeared in the receivership would be prejudiced or harmed by the relief requested.

Sec. 11. RCW 7.60.200 and 2011 c 34 s 7 are each amended to read as follows:

(1) A general receiver and a custodial receiver with power of sale shall give notice of the receivership: (a) by publication in a newspaper of general circulation published in the county or
counties in which estate property is known to be located once a week for three consecutive weeks, the first notice to be published within thirty days after the date of appointment of the receiver; and (b) by mailing notice to all known creditors and other known parties in interest within thirty days after the date of appointment of the receiver. The notice of the receivership shall include the date of appointment of the receiver; the name of the court and the case number; the last day on which claims may be (filed with the court) provided to the receiver and mailed to or served upon the receiver; and the name and address of the debtor, the receiver, and the receiver’s attorney, if any. For purposes of this section, all intangible property of a person is deemed to be located in the county in which an individual owner thereof resides, or in which any entity owning the property maintains its principal administrative offices.

(2) The notice of the receivership shall be in substantially the following form:

IN THE SUPERIOR COURT, IN AND FOR
_________ COUNTY, WASHINGTON

[Case Name]   )   Case No.

)   NOTICE OF RECEIVERSHIP

)   ____________________

TO CREDITORS AND OTHER PARTIES IN INTEREST:

PLEASE TAKE NOTICE that a receiver was appointed for ________, whose last known address is ___________, on ______, ___.

YOU ARE HEREBY FURTHER NOTIFIED that in order to receive any dividend in this proceeding you must ((file)) deliver a proof of claim ((with the court)) to the receiver within 30 days after the date of this notice. If you are a state agency, you must ((file)) deliver a proof of claim ((with)) to the receiver within 180 days after the date of this notice. ((A copy of your claim must also be either mailed to or served upon the receiver.))

________________________
RECEIVER

Attorney for receiver (if any):
________________________________________________________
Address: ________________________________________________________

NEW SECTION Sec. 12. RCW 7.60.205: Notice Requirements in Receiverships

(1) The receiver shall give not less than ten days’ written notice by mail of any examination by the receiver of the person with respect to whose property the receiver has been appointed and to persons who serve and file an appearance in the proceeding.
(2) Persons on the master mailing list are entitled to not less than thirty days’ written notice of the hearing of any motion or other proceeding involving any proposed:

(a) Allowance or disallowance of any claim or claims;

(b) Abandonment, disposition, or distribution of estate property, other than an emergency disposition of property subject to eroding value or a disposition of property in the ordinary course of business;

(c) Compromise or settlement of a controversy that might affect the distribution to creditors from the estate; or

(d) Application for termination of the receivership or discharge of the receiver. Notice of the application shall also be sent to state taxing and applicable regulatory agencies.

Any opposition to any motion to authorize any of the actions under (a) through (e) of this subsection must be filed and served upon the receiver and the receiver’s attorney, if any, at least three days before the date of the proposed action. Persons on the master mailing list shall be served with all pleadings or in opposition to any motion. The court may require notice to be given to persons on the master mailing list of additional matters the court deems appropriate. The receiver shall make a copy of the current master mailing list available to any person on that list upon the person’s request.

(3) All persons duly notified by the receiver of any hearing to approve or authorize an action or a proposed action by the receiver is bound by any order of the court with respect to the action, whether or not the persons have appeared or objected to the action or proposed action or have been joined formally as parties to the particular action.

(4) Notice of any motion not expressly provided for herein shall be made on such notice given in such manner as required under the applicable rules for non-dispositive motions in the superior court having jurisdiction over the receivership.

(5) Whenever notice is not specifically required to be given under this chapter, the court may consider motions and grant or deny relief without notice or hearing, if it appears that no person joined as a party or who has appeared in the receivership would be prejudiced or harmed by the relief requested.

(6) Whenever a thirty (30) day notice is required under any provision of RCW 7.60, responses shall be filed eleven (11) calendar days prior to the hearing, and the moving party may file a brief in strict reply five (5) days prior to the hearing. For good cause shown, the court has the power to shorten or expand these time frames.

Sec. 13. RCW 7.60.210 and 2004 c 165 s 23 are each amended to read as follows:

(1) All claims, whether contingent, liquidated, unliquidated, or disputed, other than claims of creditors with security interests in or other liens against property of the estate, arising prior to the receiver’s appointment, must be served in accordance with this chapter, and any claim not so filed is barred from participating in any distribution to creditors in any general receivership or a
custodial receivership when the court has granted the custodial receiver the power of sale. Custodial receivers shall not be required to solicit and administer claims unless surplus funds are received from such a sale. The court may relieve a custodial receiver from being required to solicit and administer claims upon a showing that the surplus funds would provide a de minimus distribution in relation to the administrative costs of administering claims.

(2) Claims must be served by delivering the claim to the ((general)) receiver within thirty days from the date notice is given by mail under this section, unless the court reduces or extends the period for cause shown, except that a claim arising from the rejection of an executory contract or an unexpired lease of the person over whose property the receiver is appointed may be filed within thirty days after the rejection. Claims need not be filed. Claims must be served by state agencies on the ((general)) receiver within one hundred eighty days from the date notice is given by mail under this section.

(3) Claims must be in written form entitled “Proof of Claim,” setting forth the name and address of the creditor and the nature and amount of the claim, and executed by the creditor or the creditor’s authorized agent. When a claim, or an interest in estate property of securing the claim, is based on a writing, the original or a copy of the writing must be included as a part of the proof of claim, together with evidence of perfection of any security interest or other lien asserted by the claimant.

(4) The receiver must provide all known creditors with a proof of claim form, [place holder – insert standard form or rulemaking delegation – consider Deskbook form]

(4)) (5) A claim, executed and served in accordance with this section, constitutes prima facie evidence of the validity and amount of the claim.

Sec. 14. RCW 7.60.220 and 2004 c 165 s 24 are each amended to read as follows:

(1) At any time prior to the entry of an order approving the general receiver’s final report, the ((general)) receiver or any party in interest may file with the court an objection to a claim, which objection must be in writing and must set forth the grounds for the objection. A copy of the objection, together with notice of hearing, must be mailed to the creditor at least thirty days prior to the hearing. Claims properly served upon the general receiver and not disallowed by the court are entitled to share in distributions from the estate in accordance with the priorities provided for by this chapter or otherwise by law.

(2) Upon the request of a creditor, the ((general)) receiver, or any party in interest objecting to the creditor’s claim, or upon order of the court, an objection is subject to mediation prior to adjudication of the objection, under the rules or orders adopted or issued with respect to mediations. However, state claims are not subject to mediation absent agreement of the state.

(3) For a creditor to offset its claim against the purchase price at a sale described in RCW 7.60.260(4), the court must have, prior to such sale, following notice and a hearing enter an order allowing the creditor’s offsetting claim and fixing the amount thereof. {as written, this requires a motion prior the sale; should the actual order be required? And should this section or 7.60.260 establish more specific default timelines (i.e., for the sale process or the claims-allowance process)?
(4) Upon motion of the ((general)) receiver or other party in interest, the following claims may be estimated for purpose of allowance under this section under the rules or orders applicable to the estimation of claims under this subsection:

(a) Any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(b) Any right to payment arising from a right to an equitable remedy for breach of performance.

Claims subject to this subsection shall be allowed in the estimated amount thereof.

Sec. 15. RCW 7.60.230 and 2011 c 34 s 8 are each amended to read as follows:

(1) Allowed claims in a ((general)) receivership shall receive distribution under this chapter in the order of priority under (a) through (h) of this subsection and, with the exception of (a) and (c) of this subsection, on a pro rata basis.

(a) Creditors with liens on property of the estate, which liens are duly perfected under applicable law, shall receive the proceeds from the disposition of their collateral. However, the receiver may recover from property securing an allowed secured claim the reasonable, necessary expenses of preserving, protecting, or disposing of the property to the extent of any benefit to the creditors. If and to the extent that the proceeds are less than the amount of a creditor’s allowed claim or a creditor’s lien is avoided on any basis, the creditor is an unsecured claim under (h) of this subsection. Secured claims shall be paid from the proceeds in accordance with their respective priorities under otherwise applicable law.

(b) Actual, necessary costs and expenses incurred during the administration of the estate, other than those expenses allowable under (a) of this subsection, including allowed fees and reimbursement of reasonable charges and expenses of the receiver and professional persons employed by the receiver under RCW 7.60.180. Notwithstanding (a) of this subsection, expenses incurred during the administration of the estate have priority over the secured claim of any creditor obtaining or consenting to the appointment of the receiver.

(c) Creditors with liens on property of the estate, which liens have not been duly perfected under applicable law, shall receive the proceeds from the disposition of their collateral if and to the extent that unsecured claims are made subject to those liens under applicable law.

(d) Claims for wages, salaries, or commissions, including vacation, severance, and sick leave pay, or contributions to an employee benefit plan, earned by the claimant within one hundred eighty days of the date of appointment of the receiver or the cessation of the estate’s business, whichever occurs first, but only to the extent of ten thousand nine hundred fifty dollars.

(e) Allowed unsecured claims, to the extent of two thousand four hundred twenty-five dollars for each individual, arising from the deposit with the person over whose property the receiver is appointed before the date of appointment of the receiver of money in connection with the purchase, lease, or rental of property or the purchase of services for personal, family, or household use by individuals that were not delivered or provided.
(f) Claims for a support debt as defined in RCW 74.20A.020(10), but not to the extent that the debt is assigned to another entity, voluntarily, by operation of law, or otherwise; or (ii) includes a liability designated as a support obligation unless that liability is actually in the nature of a support obligation.

(g) Unsecured claims of governmental units for taxes which accrued prior to the date of appointment of the receiver.

(h) Other unsecured claims.

(2) If all of the classes under subsection (1) of this section have been paid in full, any residue shall be paid to the person over whose property the receiver is appointed.

Sec. 16. RCW 7.60.250 and 2004 c 165 s 27 are each amended to read as follows:

To the extent. If there are sufficient funds in the estate to fully pay all interest owing to all members of the class, then interest shall be paid proportionately to each member of the class.

To the extent (that funds are available in the estate for distribution to creditors in a general receivership, the holder of an allowed noncontingent, liquidated claim is entitled to receive interest at the legal rate or other applicable rate from the date of appointment of the receiver or the date on which the claim became a noncontingent, liquidated claim) that an allowed secured claim is secured by property the value of which, after payment of any administrative expenses that are senior to such secured claim pursuant to RCW 7.60.230(1)(b), is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or statute under which such claim arose. If there are sufficient funds in the estate to fully pay all interest owing to all members of the class, then interest shall be paid proportionately to each member of the class.

Sec. 17. RCW 7.60.260 and 2011 c 34 s 9 are each amended to read as follows:

(1) (The) A general receiver, with the court’s approval after notice and a hearing, may use, sell, or lease estate property other than in the ordinary course of business. (Except in the case of a leasehold estate with a remaining term of less than two years or a vendor’s interest in a real estate contract, estate property consisting of real property may not be sold by a custodial receiver other than in the ordinary course of business.)

(2) When the basis for the appointment of a custodial receiver is either (i) the pendency of an action to foreclose upon a lien against or the forfeiture of an interest in personal or real property, or (ii) after judgment, in order to give effect to the judgment against personal or real property, the court may grant the custodial receiver the power of sale, provided that the custodial receiver with power of sale complies with the notice requirements in RCW 7.60.200, and the real property is not owner-occupied residential real property. In all other cases, a custodial receiver may not sell real property other than in the ordinary course of business or in the case of a leasehold estate with a remaining term of less than two years or a vendor’s interest in a real estate contract, unless otherwise ordered pursuant to RCW 7.60.060(3).
((2)) (3) The court may order that a ([general]) receiver’s sale of estate property either (a) under subsection (1) or (2) of this section, or (b) consisting of property which the debtor intended to sell in its ordinary course of business be effected free and clear of liens and of all rights of redemption, whether or not the sale will generate proceeds sufficient to fully satisfy all claims secured by the property, unless either:

(i) The real property is real property used principally in the production of crops, livestock, or aquaculture, or the property is a homestead under RCW 6.13.010(1), and the owner of the property has not consented to the sale following the appointment of the receiver provided, however, that if the receivership is initiated pursuant to an assignment for the benefit of creditors, the assignee shall be deemed to have consented for purposes of this subsection; or

(ii) The owner of the property or a creditor with an interest in the property serves and files a timely opposition to the receiver’s sale, and the court determines that the amount likely to be realized by the objecting person from the receiver’s sale is less than the person would realize within a reasonable time in the absence of the receiver’s sale.

Upon any sale free and clear of liens authorized by this section, all security interests and other liens encumbering the property conveyed transfer and attach to the proceeds of the sale, net of reasonable expenses incurred in the disposition of the property, in the same order, priority, and validity as the liens had with respect to the property immediately before the conveyance. The court may authorize the receiver at the time of sale to satisfy, in whole or in part, any allowed claim secured by the property out of the proceeds of its sale if the interest of any other creditor having a lien against the proceeds of the sale would not thereby be impaired.

((3)) (4) At a public sale of property under subsection (1) or (2) of this section, a creditor with an allowed claim secured by a lien against the property to be sold may bid at the sale of the property. A secured creditor who purchases the property from a receiver may offset against the purchase price its allowed secured claim against the property, provided that claim has been allowed pursuant to RCW 7.60.220(3) and the secured creditor tenders cash sufficient to satisfy in full all secured claims payable out of the proceeds of sale having priority over the secured creditor’s secured claim. If the lien or the claim it secures is the subject of a bona fide dispute, the court may order the holder of the claim to provide the receiver with adequate security to assure full payment of the purchase price in the event the lien, the claim, or any part thereof is determined to be invalid or unenforceable.

((4)) (5) If estate property includes an interest as a co-owner of property, the receiver shall have the rights and powers of a co-owner afforded by applicable state or federal law, including but not limited to any rights of partition.

((5)) (6) The reversal or modification on appeal of an authorization to sell or lease estate property under this section does not affect the validity of a sale or lease under that authorization to a buyer that purchased or leased the property in good faith, whether or not the entity knew of the pendency of the appeal, unless the authorization and sale or lease were stayed pending the appeal.

Sec. 18. RCW 7.60.290 and 2004 c 165 s 31 are each amended to read as follows:
(1) Upon distribution or disposition of all property of the estate, or the completion of the receiver’s duties with respect to estate property, the receiver shall move the court to be discharged upon notice and a hearing.

(2) The receiver’s final report and accounting setting forth all receipts and disbursements of the estate shall be annexed to the motion for the receiver’s discharge and termination of the receivership.

(3) Upon approval of the final report, the court shall discharge the receiver.

(4) The receiver’s discharge releases the receiver from any further duties and responsibilities as receiver under this chapter.

(5) Upon motion of any party in interest, or upon the court’s own motion, the court has the power to discharge the receiver and terminate the court’s administration of the property over which the receiver was appointed. If the court determines that the appointment of the receiver was wrongfully procured or procured in bad faith, the court may assess against the person who procured the receiver’s appointment (a) all of the receiver’s fees and other costs of the receivership and (b) any other sanctions the court determines to be appropriate.

{Sec. 19. [if necessary, insert effective date clause; otherwise effective 90 days after adjournment sine die]}


EXHIBIT A – PROOF OF CLAIM FORM

SUPERIOR COURT, __________________ COUNTY,  
STATE OF WASHINGTON

In re: | Case No.

PROOF OF CLAIM

| Name of Creditor (The person or other entity to whom the debtor owes money or property): |
| Name and address where notices should be sent: |
| Telephone number: |
| Account or other number by which creditor identifies debtor: |

☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check box if you have never received any notices from the court in this case.

☐ Check box if the address differs from the address on the envelope sent to you with this Proof of Claim.

☐ Check here if this claim:  
☐ Replaces  ☐ Amends  
a previously filed claim dated: ________

1. **Basis for Claim:**
   - Goods sold
   - Services performed
   - Money loaned
   - Personal injury/wrongful death
   - Taxes
   - Other:  
   - Retiree benefits
   - Wages, salaries, benefits and commissions
   - Unpaid compensation for services performed from  
     (date) to (date)

2. **Date debt was incurred:**

3. **If court judgment, date obtained:**
4. **Total amount of Claim at Time Case Filed:**

$_________________

If all or part of your claim is secured or entitled to priority, also complete Item 5 or 6 below.

- [ ] Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

5. **Secured Claim.**

- [ ] Check this box if your claim is secured by collateral (including a right of setoff).

  **Brief Description of Collateral:**
- [ ] Real Estate
- [ ] Motor Vehicle
- [ ] Other: ______________________________________

  **Value of Collateral:** $____________________

  **Amount of arrearage and other charges at time case filed included in secured claim, if any:** $__________________

6. **Unsecured Priority Claim.**

- [ ] Check this box if you have an unsecured priority claim.

  **Amount entitled to priority:** $________________

  **Specify the priority of the claim:**
- [ ] Wages, salaries, or commissions, including vacation, severance, and sick leave pay
- [ ] Contributions to an employee benefit plan
- [ ] Deposits toward purchase, lease, or rental of property or purchase of services for personal, family, or household use
- [ ] Obligation to provide for the necessary care, support, and maintenance of a dependent child or other person as required by law
- [ ] Taxes or penalties owed to governmental units
- [ ] Other – Specify applicable law: ______________

7. **Credits:** The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

8. **Supporting Documents:** Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.

9. **Date-Stamped Copy:** To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

**Date:**

**Sign and print** the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):

GSB: 7244563.1
LPPC: 6694209.1
### Chapter 7B

**Information and Highlights of the New Proposed Oregon Receivership Law**

*Teresa Pearson*
Miller Nash Graham & Dunn LLP
Portland, Oregon

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Summary and Highlights of the Proposed Act

Purpose

The purpose of the legislation is to bring clarity to receivership practice in Oregon. Historically, we have had very few specific rules and laws governing receivership. Instead, receivership has primarily been governed by common law. The case law in this area is often old and difficult to read, particularly for counsel and judges who do not specialize in this area. As a result, cases are more expensive and less predictable for the parties.

Philosophically, the Oregon Law Commission work group saw its mission as one to bring clarity to existing law, rather than attempt to make wholesale substantive changes to existing law. Many of the proposed provisions are simply codifications of existing Oregon common law. While some decisions had to be made where the law was silent or unclear, these decisions were made after considering the balanced input of judges, receivers, and lawyers who represent all types of constituencies in receivership.

Status of the Legislation

The Oregon Law Commission adopted the work group’s report and approved the filing of the bill with the Oregon Legislature for adoption. A “placeholder” bill, Senate Bill 899, sponsored by the Committee on Judiciary, was submitted. We presently anticipate that the SB 899 will be amended to include the work group’s draft bill (with minor edits and clarifications). To obtain an up-to-date version of the bill, please go to the following website:

https://olis.leg.state.or.us/liz/2017R1/Measures/Overview/SB899

It is the work group’s hope that the bill will be enacted in the 2017 legislative session.

Starting Points

The work group considered a number of receivership statutes as part of its drafting process, including the Washington receivership statutes (RCW 7.60 et seq.) and the Uniform Commercial Real Estate Receivership Act. Ultimately, the work group crafted its own statute, taking the best from each of the sources it considered.

Scope

The new receivership act is generally not intended to be used in consumer cases, nor is it intended to be a substitute for residential foreclosure. For example, the power of a court to entrust residential property to a receiver and for a receiver to sell that property is only available in very limited circumstances, such as those involving waste and destruction, or enforcement of domestic relations orders.

The new receivership act is also not intended to supplant existing law regarding specialized types of receiverships, such as insurance company receiverships. Where a state agency is authorized to
commence a receivership for regulatory purposes, the agency is given its choice of using its own existing statutes or opting in to the terms of the new receivership act.

**Powers of the Receiver**

Common law contains a distinction between custodial receivers and general receivers. In practice, the lines between these two types of receivers are very difficult to locate. The proposed receivership act does not rely on this historical distinction. Instead, the statute takes the “menu approach”. The menu approach is simple: the statute sets forth a non-comprehensive list of powers that may be granted to a receiver. The party requesting the receiver chooses what items off the menu that party believes the receiver should have, and asks the court to include those powers in the order appointing the receiver. The opposing party or interested parties may object and ask that the powers be different or limited. The judge then has the authority to consider the facts and decide what powers he will use from the menu.

The advantage to this approach is that it forces the parties and the court to consider at the outset of the case what the receiver should be doing. This helps to avoid uncertainty during the case about whether the receiver really does or does not have authority to take certain actions.

Of course, the statute has preserved the possibility for any party, or the court on its own motion, to modify the powers granted to the receiver as events in the case develop.

**Participation and Service Rules**

The proposed act clarifies that interested parties may appear and participate in a receivership without intervening to become formal parties to the case.

The proposed act clarifies how notice must be given to various constituencies in the receivership case. The work group tried to balance the need to keep interested parties informed with the equally important need to conserve limited estate resources.

Under the proposed act, at the outset of the case, the receiver is required to send a notice of the receivership to all known creditors by mail (or by another method approved by the court), as well as to publish notice in a newspaper.

Otherwise, service of all interested parties is not required for every action in the receivership. The parties to the case (i.e., the entities in the caption) receive regular service of all pleadings as required by the Oregon Rules of Civil Procedure. Any interested person can file a request for special notice and indicate a preferred means of receiving notices. Notices must then be provided to the people on the special notice list. Notice must be given to all known persons whose property interests may be directly affected by a proposed action. In addition, various provisions in the proposed act specify who must be served for particular purposes.

**Automatic Stay**

The proposed act provides for a six month automatic stay, which can be extended by court order.
Executory Contracts

The proposed act adopts rules similar to the bankruptcy code regarding assumption and rejection of executory contracts. Contracts must be assumed in their entirety, with all benefits and burdens.

Receiver Sales

A receivership sale is very different from a foreclosure sale. With a foreclosure sale, the property is sold at auction to the highest bidder on the courthouse steps. Bidders must pay cash on the date of the sale, have little to no opportunity to do due diligence, have limited information about the title to the property, and take ownership of the property with unknown risks. As a result, the typical bidder at a foreclosure sale is the lender who commenced the foreclosure. If others bid at foreclosure, the prices at foreclosure sales are often depressed due to uncertainty about the property.

By contrast, a receiver stands in the shoes of the owner of the property and can sell it as if the receiver were the owner. A receiver can hire regular commercial brokers (subject to employment by the court), can show the property, and can coordinate due diligence efforts. Buyers can propose purchase and sale agreements with more traditional contingencies (such as financing or due diligence) and closing can occur in more commercially reasonable time frames and manner. During the process, interested parties will have the opportunity to assert their ideas about how marketing should be done and to whom in order to maximize the value obtained at sale. Ultimately, a receiver is an arm of the court, and the court will decide what sale process is fair under the facts of the case.

As a result of the differences between foreclosure and receivership sales, it made sense to the work group to propose that receiver’s sales be made without rights of redemption. Often sale prices for properties are depressed if borrowers have rights of redemption, because the buyers do not have certainty that they will end up owning the property. In addition, buyers may feel hampered in using the property until after the redemption period ends, which further depresses prices.

Since the purpose of a receiver’s sale is to maximize the value of the property, and all interested parties are able to participate in the process of crafting the sale (subject to the court’s oversight), the need for a redemption right to prevent sales at artificially low prices is not needed.

Claims

The receiver may set a claims bar deadline and object to claims. The proposed act gives the receiver control over the process for submitting claims. The proposed act also contains a process for objecting to claims and for allowance or disallowance of claims.

If the state is insufficient to provide distributions to creditors, the receiver may give notice that no claims process will take place.
The proposed receivership act sets forth priorities for payment of claims. The order of priorities is (1) recovery of costs of preserving secured property in the estate, (2) secured claims, (3) administrative expenses, (4) claims under 31 U.S.C. § 3713, (5) claims asserting liens that do not have to be perfected under applicable law (6) unperfected secured claims to the extent of their collateral, (7) wages, salaries, and commissions, including vacation, severance, and sick leave pay, (8) consumer deposits up to $2,850, (9) spousal or child support obligations, (10) taxes, (11) general unsecured claims, and (12) interests.

**Protection of the Receiver**

It was the general view of the work group that, in order to encourage the best qualified people to serve as receivers, receivers should be protected from personal liability, except for their failure to follow court orders, fraud, intentional misconduct, and similar bad acts. Parties wanting to sue the receiver must first obtain authority from the court that appointed the receiver.

**Employment and Compensation of Receiver and Professionals**

The proposed act sets forth the qualifications required for someone to serve as a receiver and required disclosures by proposed receivers. The proposed act contains straightforward processes for employment and payment of professionals.

**General Administration**

There are various options for providing bonds, security, or insurance for the receiver’s actions, which can be tailored by the court to the needs of the case. There are also provisions governing receivership financing.

The proposed act requires the receiver to provide reports of the receiver’s activities and the financial condition of the estate.

An owner of property is required to cooperate with the receiver.

The receiver, with court approval, may apply for the commencement ancillary receiverships if some property of the estate is located outside the boundaries of the state of Oregon.

**Termination**

The proposed act provides for the receiver to file a final report. Once the court approves the report, the court may discharge the receiver, exonerate the receiver’s bond or any alternative security, and release the receiver from any further liability regarding the estate.
**PROPOSED AMENDMENTS TO**

**SENATE BILL 899**

On page 1 of the printed bill, line 2, after “receivership;” delete the rest of the line and insert “creating new provisions; and amending ORS 60.667, 62.702, 65.667, 86.752, 93.915, 94.642, 100.418 and 465.255 and ORCP 80 A.”.

Delete lines 4 through 30 and delete page 2 and insert:

“SECTION 1. Short title. Sections 2 to 41 of this 2017 Act may be cited as the Oregon Receivership Code.

“SECTION 2. Receivership described. Receivership is the process by which a court appoints a person to take charge of property during the pendency of an action or upon a judgment or order entered therein and to manage or dispose of the property as the court may direct.

“SECTION 3. Definitions. As used in the Oregon Receivership Code:

“(1) ‘Affiliate’ means:

“(a) With respect to an individual:

“(A) A companion of the individual;

“(B) A lineal ancestor or descendant, whether by blood or adoption, of the individual or a companion of the individual;

“(C) A companion of an ancestor or descendant described in sub-
paragraph (B) of this paragraph;

“(D) A sibling, aunt, uncle, great-aunt, great-uncle, first cousin, niece, nephew, grandniece or grandnephew of the individual, whether related by the whole or the half blood or adoption, or a companion of
any of them; or
“(E) Any other individual occupying the residence of the individual;
and
“(b) With respect to any person:
“(A) Another person that directly or indirectly controls, is con-
trolled by or is under common control with the person;
“(B) An officer, director, manager, member, partner, employee or
trustee or other fiduciary of the person; or
“(C) A companion of, or an individual occupying the residence of,
an individual described in subparagraph (A) or (B) of this paragraph.
“(2) ‘Companion’ means spouse or domestic partner.
“(3) ‘Domestic relations suit’ has the meaning given that term in
ORS 107.510.
“(4) ‘Entity’ means a person other than a natural person.
“(5) ‘Estate’ means the entirety of the property over which a re-
ceiver is appointed.
“(6) ‘Executory contract’ means:
“(a) A contract, including an unexpired lease, under which the ob-
ligations of both parties are so far unperformed that the failure of ei-
ther to complete performance would constitute a material breach
excusing the performance of the other; or
“(b) A contract, including an unexpired lease, under which a party
has an unexercised option to require its counterparty to perform.
“(7) ‘Foreign action’ means an action in a federal or state court
outside of this state.
“(8) ‘Insolvency’ means a financial condition of a person such that:
“(a) The sum of the person’s debts and other obligations is greater
than a fair valuation of all of the person’s property, excluding:
“(A) Property transferred, concealed or removed with intent to
hinder, delay or defraud any creditors of the person; and
“(B) Any property exempt from execution under any law of this state; or

“(b) The person is generally not paying debts as they become due.

“(9) ‘Interested person’ means any person having a claim against the owner or a claim or interest in any estate property.

“(10) ‘Lien’ means a charge against or interest in property to secure payment of a debt or the performance of an obligation.

“(11) ‘Owner’ means the person over whose property a receiver is appointed.

“(12) ‘Party’ means:

“(a) When used in relation to an action, a person named in the caption of the action; or

“(b) When used in relation to a contract, a signatory to the contract.

“(13) ‘Person’ means an individual, corporation, limited liability company, general partnership, limited partnership, limited liability partnership, cooperative, business trust, governmental entity or other entity, of any kind or nature.

“(14) ‘Property’ includes all right, title and interests, both legal and equitable, in or with respect to any property with respect to which a receiver is appointed, including any proceeds, products, offspring, rents or profits, regardless of the manner by which the property has been or is acquired.

“(15) ‘Receiver’ means a person appointed by the court as the court’s agent, and subject to the court’s direction, to take possession of, manage or dispose of property.

“(16) ‘Receivership’ means an action in which a receiver is appointed.

“(17) ‘Residential property’ means real property:

“(a) Upon which are situated four or fewer residential units, one
of which is occupied as a principal residence by the owner, the owner’s spouse or a dependent of the owner; and

“(b) Where residential use is the primary activity occurring on the real property.

“(18) ‘Security interest’ means a lien created by agreement.
“(19) ‘Special notice list’ means a special notice list maintained by a receiver as required under section 16 of this 2017 Act.
“(20) ‘State agency’ has the meaning given that term in ORS 36.110.
“(21) ‘Utility’ means a person providing any service regulated by the Public Utility Commission.

“SECTION 4. Applicability. (1) Except as otherwise provided by law, the Oregon Receivership Code applies to all receiverships initiated in a court of this state, except for:

“(a) Actions in which a state agency or officer is expressly authorized by statute to seek or obtain the appointment of a receiver; and
“(b) Actions authorized by or commenced under federal law.
“(2) In cases in which a state agency or officer is expressly authorized by statute to seek or obtain the appointment of a receiver, the state agency or officer may elect, when seeking appointment, for the receivership to be governed by the provisions of the Oregon Receivership Code.

“(3) Except as otherwise provided by law, the provisions of the Oregon Receivership Code control over conflicting provisions of state law, including ORCP 80, with respect to receiverships governed by the Oregon Receivership Code.

“SECTION 5. Property not subject to receivership. (1) A court may not appoint a receiver with respect to the following:

“(a) Personal property of an individual that is used primarily for personal, family or household purposes.
“(b) Property of an individual exempt from execution under the
laws of this state.

“(c) Any power or interest that a person may exercise solely for the
benefit of another person.

“(d) Property held in trust for another person.

“(2) Notwithstanding subsection (1) of this section, a court may
appoint a receiver with respect to property described in subsection
(1)(a) of this section in a domestic relations suit.

“(3) A court may appoint a receiver with respect to any nonexempt
interest in property that is partially exempt from execution, including
fee title to real property subject to a homestead exemption.

“SECTION 6. Appointment of receiver. (1) A court may appoint a
receiver in the following cases, upon motion by any person or upon its
own motion:

“(a) Before judgment, if the property that is the subject of the
action, or rents or profits deriving from the property, are in danger
of being lost or materially injured or impaired.

“(b) After judgment, if reasonably necessary to carry the judgment
into effect.

“(c) After judgment, to dispose of property according to the judg-
ment, to preserve the property during the pendency of an appeal or
when an execution has been returned unsatisfied and the debtor re-
fuses to apply the property in satisfaction of the judgment.

“(d) In an action under ORS 95.200 to 95.310.

“(e) When property is attached by a creditor, if:

“(A) The property is of a perishable nature or is otherwise in danger
of waste, impairment or destruction; or

“(B) The debtor has abandoned the property and receivership is
reasonably necessary to conserve, protect or dispose of the property.

“(f) After judgment, either before or after the issuance of an exe-
cution, to preserve, protect or prevent the transfer of property subject
to execution and sale thereunder.

“(g) When an entity has been dissolved or is insolvent or in imminent danger of insolvency, if receivership is reasonably necessary to protect the property of the entity or to conserve or protect the interests of the entity’s stockholders, members, partners or creditors.

“(h) In any situation in which the appointment of a receiver is expressly required or permitted by statute.

“(i) In any situation in which, in the discretion of the court, appointment of a receiver is reasonably necessary to secure justice to the parties.

“(2) In determining whether to appoint a receiver, a court may consider the existence of a contract provision providing for the appointment of a receiver, but the court is not bound by such a provision.

“(3) If a court in a foreign action has appointed a person as receiver with respect to property in this state, whether with respect to the property specifically or the owner’s property generally, a court in this state shall:

“(a) Upon motion by the receiver or by any party to the foreign action, appoint the person as receiver of the property in this state, if the person is eligible under section 7 of this 2017 Act and fulfills such other requirements as are required by statute or imposed by the court.

“(b) Following the appointment, give effect to orders, judgments and decrees of the foreign court affecting the property in this state held by the receiver, unless the court determines that to do so would be manifestly unjust or inequitable.

“(4) The venue of an action described in subsection (3) of this section may be any county in which the receiver appointed in the foreign action resides or maintains an office, or any county in which any property over which the receiver is to be appointed is located at the
time the action is commenced.

“(5)(a) An order appointing a receiver must reasonably describe the property over which the receiver is to take charge, by category, individual items or any combination thereof, if the receiver is appointed over less than all of a person’s property.

“(b) An order appointing a receiver may appoint the receiver over all of a person’s property, wherever located.

“(c) An order that appoints a receiver over a person and does not describe the property over which the receiver is to take charge is construed to appoint the receiver over all of the person’s property, except for property not subject to receivership under section 5 of this 2017 Act.

“(6) A court may condition the appointment of a receiver upon the giving of security by the person seeking the receiver’s appointment, in such amount as the court may specify, for the payment of costs incurred or damages suffered by any person if a receivership is determined to be wrongfully obtained.

“SECTION 7. Eligibility to serve as receiver. (1) Any person, whether or not a resident of this state, may serve as a receiver, except for:

“(a) An entity that is not authorized to conduct business in this state;

“(b) A person who has been convicted of a crime involving moral turpitude, or is controlled by a person who has been convicted of a crime involving moral turpitude; and

“(c) The sheriff of any county, except as expressly permitted by statute.

“(2) If a court appoints an entity as a receiver, the court may require a specific individual to appear in the receivership on behalf of the entity.
“SECTION 8. Required disclosures relating to conflicts of interest.
A court may not appoint a person as a receiver unless the person first:
“(1) Discloses whether the person:
“(a) Is an affiliate of a party to the receivership;
“(b) Has an interest materially adverse to an interest of a party to
the receivership;
“(c) Has a material financial interest in the outcome of the action,
other than compensation approved by the court;
“(d) Has a debtor-creditor relationship with the owner; or
“(e) Holds an equity interest in a party to the receivership, other
than a noncontrolling interest in a publicly traded company; and
“(2) Affirms under oath that the person’s disclosure under sub-
section (1) of this section is true and complete.

“SECTION 9. Receiver’s bond, alternative security or insurance. (1)
Except as otherwise provided by law, a court may, at any time before
or during the service of a receiver, require a receiver or person nomi-
nated as a receiver to post a bond that:
“(a) Is conditioned on the faithful discharge of the receiver’s duties;
“(b) Is in an amount that is determined by the court to be adequate
to secure payment of any costs, damages and attorney fees that may
be sustained or suffered by any person due to a wrongful act of the
receiver; and
“(c) Has one or more sureties that meet the qualifications set forth
in ORCP 82 D or that are approved by the court.
“(2) Except as otherwise provided by law, the court may require the
posting of alternative security in lieu of a bond, such as a letter of
credit or a deposit of funds with the clerk of the court, to be held to
secure the receiver’s faithful performance of the receiver’s duties until
the court authorizes the release or return of the alternative security.
The court shall remit any interest that may accrue on a deposit under
this subsection to the receiver upon the receiver's discharge.

“(3) Except as otherwise provided by law, the court may require the receiver or person nominated as receiver to carry an insurance policy with coverage and limits determined by the court in lieu of a bond.

“(4) A receiver may charge the cost of a bond, alternative security or insurance policy required by the court under this section against the estate.

“(5) The court may authorize a receiver to act before the receiver posts a required bond or alternative security or acquires a required insurance policy.

“SECTION 10. Exclusive jurisdiction of appointing court. (1) The court appointing a receiver has:

“(a) Exclusive authority over the receiver;

“(b) Exclusive jurisdiction over and right to control all real property and all tangible and intangible personal property constituting the estate, wherever located, to the full extent of the court's jurisdiction; and

“(c) Exclusive jurisdiction to determine all controversies relating to the collection, preservation, application and distribution of the estate and all claims against the receiver arising out of the exercise of the receiver's powers or the performance of the receiver's duties.

“(2) Notwithstanding subsection (1) of this section, if any part of the estate is subject to the jurisdiction of another court under ORS 107.105, the court appointing the receiver may not exercise authority over such part of the estate unless expressly permitted by order of the other court.

“SECTION 11. Powers of receiver. (1) The court appointing a receiver may confer upon the receiver the power to perform any of the following actions, in any combination:

“(a) Collect, control, manage, conserve and protect estate property;
“(b) Operate a business constituting estate property, including preservation, use, sale, lease, license, exchange, collection or disposition of property in the ordinary course of business;

“(c) In the ordinary course of business, incur unsecured debt and pay expenses incidental to the receiver’s preservation, use, sale, lease, license, exchange, collection or disposition of estate property;

“(d) Assert a right, claim, cause of action or defense of the owner that relates to estate property;

“(e) Assert in the name of the receiver any claim under ORS 95.200 to 95.310 assertible by any creditor of the owner;

“(f) Seek and obtain instruction from the court concerning estate property, exercise of the receiver’s powers and performance of the receiver’s duties;

“(g) On subpoena, compel a person to submit to examination under oath in the manner of a deposition in a civil case, or to produce and permit inspection and copying of designated records or tangible things, with respect to estate property or any other matter that may affect administration of the receivership;

“(h) Engage and pay compensation to one or more professionals under section 31 of this 2017 Act;

“(i) Apply to a court of another state for appointment as ancillary receiver with respect to estate property in that state under section 39 of this 2017 Act;

“(j) Incur debt for the use or benefit of estate property other than in the ordinary course of business under section 26 of this 2017 Act;

“(k) Make improvements to estate property;

“(L) Use or transfer estate property other than in the ordinary course of business under section 25 of this 2017 Act;

“(m) Assume an executory contract of the owner under section 24 of this 2017 Act;
“(n) Pay compensation to the receiver;
“(o) Determine whether or not to establish a claims procedure under section 34 of this 2017 Act;
“(p) Allow or disallow a claim of a creditor under section 36 of this 2017 Act;
“(q) Make a distribution of estate property under section 37 of this 2017 Act;
“(r) Take any other action authorized under the Oregon Receivership Code; and
“(s) Take any other actions that the court deems reasonably necessary to avoid injustice.
“(2) The court may limit, expand or modify the powers conferred by the court on the receiver at any time.
“(3) A receiver has powers conferred by the court under this section in addition to the powers conferred on the receiver by statute.

“SECTION 12. Duties of receiver. (1) A receiver shall notify all federal and state taxing and applicable regulatory agencies of the receiver’s appointment in accordance with any applicable laws imposing this duty, including 26 U.S.C. 6036.
“(2) A receiver shall comply with applicable law.
“(3) If appointed with respect to any real property, a receiver shall file with the recorder of the county in which the real property is located a certified copy of the order of appointment, together with a legal description of the real property if one is not included in the order.
“(4) The court appointing a receiver may impose additional duties on the receiver at any time. The court may limit, expand or modify duties imposed by the court on a receiver at any time.

“SECTION 13. Turnover of property. (1) Upon demand by a receiver, a person shall turn over to the receiver any estate property within the possession, custody or control of the person.
“(2) If a bona fide dispute exists over whether property is estate
property, the court in which the receivership is pending shall resolve
the dispute.

“(3) A receiver may not demand a turnover of residential property
without specific judicial approval, which the court may grant only in
case of waste, destruction, obstruction of marketing of the property,
enforcement of an order in a domestic relations suit or other good
cause shown.

“(4) If a creditor has possession or control of estate property and
the validity, perfection or priority of the creditor's lien depends on the
creditor's possession or control, the creditor may retain possession or
control of the property until the court orders adequate protection of
the creditor's lien.

“SECTION 14. Collection by receiver of debts owed to owner. (1)
Upon demand by a receiver, a person that owes a debt that is estate
property and is matured or payable on demand shall pay the debt to
the receiver, except to the extent that the debt is subject to setoff or
recoupment.

“(2) A person who has notice of the appointment of a receiver and
owes a debt that is estate property may not satisfy the debt by pay-
ment to the owner.

“SECTION 15. Duties of owner. (1) An owner shall:
“(a) Assist and cooperate fully with the receiver in the adminis-
tration of the estate and the discharge of the receiver's duties, and
comply with all orders of the court;
“(b) Supply to the receiver information necessary to enable the re-
ceiver to complete any schedules that the receiver is required to file
under section 19 of this 2017 Act, and otherwise assist the receiver in
the completion of the schedules;
“(c) Upon the receiver's appointment, deliver to the receiver all of
the estate property in the person’s possession, custody or control, in-
cluding accounts, books, papers, records and other documents; and
“(d) After the receiver’s appointment, submit to examination under
oath by the receiver, or by any other person upon order of the court,
concerning the acts, conduct, property, liabilities and financial condi-
tion of the owner or any matter relating to the receiver’s adminis-
tration of the estate.
“(2) When the owner is an entity, each officer, director, manager,
member, partner or other individual exercising or having the power
to exercise control over the affairs of the entity are subject to the re-
quirements of this section.
“SECTION 16. Mailing lists to be maintained by receiver. (1) A re-
ceiver shall maintain a master mailing list of the names and addresses
of all parties to the receivership, all known creditors of the owner and
interested persons who have filed notices of appearance in the
receivership. The receiver shall make a copy of the current master
mailing list available to any person on the list upon the person’s re-
quest.
“(2)(a) A receiver shall maintain a special notice list of the names
and addresses of all parties to the receivership and any other person
who requests to be placed on the list. The receiver shall make a copy
of the current special notice list available to any person on the list
upon the person’s request.
“(b) Any person on the special notice list may notify the receiver
of the person’s preferred means of receiving notices and other com-
 munications. If the receiver is so notified, the receiver shall add the
information to the special notice list.
“SECTION 17. Notices. (1)(a) Whenever a person is required to give
notice under a provision of the Oregon Receivership Code, the person
must:

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“(A) Serve notice on all persons specified by the provision;
“(B) Serve notice on all persons on the special notice list;
“(C) File notice with the court; and
“(D) File proof of service with the court.
“(b) If the provision does not specify to whom notice must be given, the person must give notice to all known persons whose property interests will or may be directly affected by the proposed action, as well as comply with paragraph (a)(B) to (D) of this subsection.
“(2) Whenever a person is required to give notice under a provision of the Oregon Receivership Code, the person must give at least as much time notice as specified by the relevant provision, or 14 days if no time is specified.
“(3)(a) Except as otherwise provided, notice to any person not on the special notice list must be served by first class mail or as otherwise directed by the court.
“(b) Notice to any person on the special notice list who has specified a preferred means of receiving notice must be served by those means, except as otherwise ordered by the court.
“(4)(a) Except as provided in section 18 of this 2017 Act, whenever a provision of the Oregon Receivership Code authorizes a person to take an action after giving notice, the person may take the action without specific authorization from the court if:
“(A) The person gives notice that describes the action that the person will take unless an objection is filed and describes a procedure for objecting to the proposed action; and
“(B) No objections are filed.
“(b) If an objection is filed, the court shall hear the objection and issue an order allowing, disallowing or allowing a modified form of the action.
“(c) The court may, on its own motion, require a hearing on any
proposed action.

“(d) If a person is allowed under this subsection to take an action without specific authorization from the court, the person may nonetheless move the court for an order authorizing the action.

“(5) The court may extend or shorten any notice periods for good cause shown.

“(6) The court may order that notice of any proposed action be given to any person, regardless of whether such notice is otherwise required under the Oregon Receivership Code.

“(7) In all circumstances, the court may consider motions and grant or deny relief without notice or hearing, if it appears to the court that no party to the receivership or interested person would be prejudiced or harmed by the relief requested.

SECTION 18. When court order required. (1) A receiver may not take any of the following actions unless the receiver, after giving notice, obtains a court order specifically authorizing the action, except as provided in subsection (2) of this section:

“(a) Sale or other disposition of real property;

“(b) Use or transfer of property outside the ordinary course of business;

“(c) Sale of a co-owner’s interest in jointly owned property;

“(d) Assumption of an executory contract;

“(e) Obtaining credit or incurring debt outside the ordinary course of business;

“(f) Compromise or settlement of a controversy that might affect the distribution to creditors from the estate;

“(g) Disallowance of all or part of a claim against the estate; and

“(h) Termination of the receivership.

“(2) For any action described in subsection (1)(a) to (f) of this section, a court may establish conditions under which a receiver may
take the action without first obtaining an order specifically authoriz-
ing the action, if the court finds that the burden of seeking a court
order is likely to outweigh the materiality of the actions under those
conditions. The court may establish such conditions in the order ap-
pointing the receiver or in any other order.

“SECTION 19. Creditor list and inventory. (1) Within 60 days after
appointment, or within such other time as the court may specify, a
receiver shall file with the court a schedule of all known creditors of
the owner, their last known mailing addresses, the amount and nature
of their claims and whether their claims are disputed.

“(2) If the court concludes that the estate is unlikely to be suffi-
cient to make material distributions to unsecured creditors, the court
may order that the receiver need not file a schedule as described in
subsection (1) of this section. The court may order the receiver to file
a schedule of any appropriate subset of creditors.

“(3) Within 60 days after appointment, or within such other time
as the court may specify, a receiver shall file with the court a true
inventory of all estate property of which the receiver has taken pos-
session, custody or control, except that the inventory need not include
legal claims that are estate property.

“SECTION 20. Receiver’s periodic reports. (1) A receiver shall file
with the court a monthly report of the receiver’s operations and fi-
ancial affairs, unless the court orders a different reporting period.
The receiver shall file each report no later than 30 days after the end
of a reporting period. The initial report under this section must be
filed no later than 60 days after the receiver is appointed, unless the
court orders a different deadline.

“(2) Each periodic report must include:

“(a) A concise narrative summary of the receiver’s activities during
the period and a description of any major upcoming events;
“(b) Beginning and ending cash balances;
“(c) A statement of cash receipts and disbursements;
“(d) A statement of noncash receipts and payments;
“(e) A statement of receipts and dispositions of estate property outside the ordinary course of business, including a description of the property, the value of the property and the amounts received from any disposition of the property;
“(f) A statement of accounts receivable;
“(g) A statement of fees and expenses of the receiver;
“(h) A tax disclosure statement listing taxes due or tax deposits required, the name of the taxing agency, the date due and an explanation for any failure to make payments or deposits; and
“(i) Any other information required by the court.

SECTION 21. Claims bar date. A receiver may, after providing notice to all known creditors of the owner, set a deadline for the submission of claims by creditors. The receiver, upon court order, may disallow any claims submitted after the deadline.

SECTION 22. Automatic stay of certain proceedings. (1) Except as otherwise ordered by the court, the entry of an order appointing a receiver operates as a stay, applicable to all persons, of:
“(a) The commencement or continuation, including the issuance or employment of process, of a judicial, administrative or other action or proceeding against the owner that was or could have been commenced before the entry of the order of appointment, or to recover a claim against the owner that arose before the entry of the order of appointment;
“(b) The enforcement, against the owner or any estate property, of a judgment entered before the entry of the order of appointment;
“(c) Any act to obtain possession of estate property from the receiver, or to interfere with, or exercise control over, estate property;
“(d) Any act to create, perfect or enforce any lien or claim against estate property, to the extent that the lien secures a claim against the owner that arose before the entry of the order of appointment;

“(e) Any act to collect, assess or recover a claim against the owner that arose before the entry of the order of appointment; or

“(f) The exercise of a right of setoff against the owner.

“(2) The stay automatically expires as to the acts specified in subsection (1)(a), (b) and (e) of this section six months after the entry of the order of appointment, unless the stay is extended by court order.

“(3) A person whose action or proceeding is stayed may move the court for relief from the stay, and the court shall grant such relief for good cause shown. A motion for relief from stay under this subsection is deemed granted if the court does not act on the motion within 60 days after the motion is filed. A person may move the court ex parte for an expedited hearing on a motion for relief from stay.

“(4) Any judgment obtained against the owner or estate property after entry of the order of appointment is not a lien against estate property unless the receivership is terminated before a conveyance of the property against which the judgment would otherwise constitute a lien.

“(5) The entry of an order appointing a receiver does not operate as a stay of:

“(a) The continuation of a judicial or nonjudicial foreclosure action that was initiated by the party seeking the receiver’s appointment, unless otherwise ordered by the court;

“(b) The commencement or continuation of a criminal action against the owner;

“(c) The commencement or continuation of an action or proceeding to establish paternity, to establish or modify an order for spousal or child support or to collect spousal or child support under any order
of a court;

“(d) Any act to perfect, or to maintain or continue the perfection of, an interest in estate property if the interest perfected would be effective against a creditor of the owner holding at the time of the entry of the order of appointment either a perfected nonpurchase money security interest under ORS chapter 79 against the property, or a lien by attachment, levy or the like, including liens under ORS chapter 87, whether or not such a creditor exists, except that if perfection of an interest would require seizure of the property involved or the commencement of an action, the perfection may and must instead be accomplished by filing and serving on the receiver notice of the interest within the time fixed by law for seizure or commencement;

“(e) The commencement or continuation of an action or proceeding by a governmental unit to enforce its police or regulatory power;

“(f) The enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce its police or regulatory power, or with respect to any licensure of the owner; or

“(g) The establishment by a governmental unit of any tax liability and any appeal thereof.

“(6) The court may void an act that violates the stay imposed by this section.

“(7) If a person knowingly violates the stay imposed by this section, the court may:

“(a) Award actual damages caused by the violation, reasonable attorney fees and costs; and

“(b) Sanction the violation as civil contempt.

“(8) The stay described in this section expires upon the termination of the receivership.
“SECTION 23. Utility service. (1) A utility providing service to estate property may not alter, refuse or discontinue service to the property without first giving the receiver 14 days’ notice of any default or intention to alter, refuse or discontinue service to estate property.

“(2) Nothing in this section precludes the court from prohibiting the alteration or cessation of utility service if the receiver can furnish adequate assurance of payment, in the form of deposit or other security, for service to be provided after entry of the order appointing the receiver.

“SECTION 24. Executory contracts. (1) A receiver may, upon order of the court, assume any executory contract of the owner. A receiver may, after giving notice, reject any executory contract of the owner. The court may condition assumption or rejection of any executory contract on terms and conditions that the court deems just and proper. A receiver’s performance of an executory contract does not constitute an assumption of the contract or an agreement by the receiver to assume it, nor otherwise preclude the receiver from rejecting it.

“(2) If a receiver assumes an executory contract, the receiver must assume the contract in its entirety.

“(3) Any obligation or liability incurred by a receiver due to the receiver’s assumption of an executory contract is an expense of the receivership. A receiver’s rejection of an executory contract is treated as a breach of the contract occurring immediately before the receiver’s appointment, and the receiver’s right to possess or use property pursuant to an executory contract terminates upon rejection of the contract. The other party to an executory contract that is rejected by a receiver may take any necessary steps to terminate or cancel the contract. Any claims resulting from a receiver’s rejection of an executory contract must be submitted to the receiver in the manner
provided for by section 35 of this 2017 Act within 30 days after the rejection.

“(4) A receiver’s power under this section to assume an executory contract is not affected by any provision in the contract that would effect or permit a forfeiture, modification or termination of the contract on account of the receiver’s appointment, the financial condition of the owner or an assignment for the benefit of creditors by the owner.

“(5) A receiver may not assume an executory contract of the owner without the consent of the other party to the contract if:

“(a) Applicable law would excuse the other party from accepting performance from or rendering performance to anyone other than the owner even in the absence of any provisions in the contract expressly restricting or prohibiting an assignment of rights or duties;

“(b) The contract is a contract to make a loan or extend credit or financial accommodations to or for the benefit of the owner, or to issue a security of the owner; or

“(c) The contract expires by its own terms, or under applicable law, prior to the receiver’s assumption thereof.

“(6) A receiver may not assign an executory contract lease without assuming it, unless the receiver obtains consent from all other parties to the contract.

“(7) If the receiver rejects an executory contract for the sale of real property under which the owner is the seller and the purchaser is in possession of the real property, the sale of a real property timeshare interest under which the owner is the seller, the license of intellectual property rights under which the owner is the licensor or the lease of real property under which the owner is the lessor, then:

“(a) The purchaser, licensee or lessee may:

“(A) Treat the rejection as a termination of the contract, license
agreement or lease; or

“(B) Remain in possession and continue to perform all obligations arising under the contract, but offset against any payments any damages occurring on account of the rejection after it occurs.

“(b) A purchaser of real property is entitled to receive from the receiver any deed or any other instrument of conveyance that the owner is obligated to deliver under the contract when the purchaser becomes entitled to receive it, and the deed or instrument has the same force and effect as if given by the owner.

“(c) A purchaser, licensee or lessee who elects to remain in possession under the terms of this subsection has no claim or rights against the receiver on account of any damages arising from the receiver's rejection except as expressly permitted by this subsection.

“(d) A purchaser of real property who elects to treat rejection of an executory contract as a termination has a lien against the real property for the portion of the purchase price that the purchaser has paid.

“(8)(a) If a receiver does not seek authorization from the court to assume an executory contract within 180 days after the receiver's appointment, the receiver is deemed to have rejected the contract.

“(b) The court may shorten or extend the time period described in paragraph (a) of this subsection for good cause shown.

“(9) Nothing in this section affects the enforceability of prohibitions against assignment that exist under contract or applicable law.

“SECTION 25. Use or transfer of estate property outside ordinary course of business. (1) Upon court order, a receiver may use estate property outside the ordinary course of business.

“(2) Upon court order, a receiver may transfer estate property other than in the ordinary course of business by sale, lease, license, exchange or other disposition. Unless the transfer agreement provides
otherwise, a transfer under this section is free and clear of a lien of
the person that obtained appointment of the receiver, any subordinate
liens and any right of redemption, but is subject to any senior liens.
A transfer under this section may occur by means other than a public
auction sale. On motion by any party or interested person, the court
may prescribe standards or procedures calculated to maximize the
proceeds of the transfer.

“(3) If a lien on estate property is extinguished by a transfer under
this section, the lien attaches to the proceeds of the transfer with the
same validity, perfection and priority that the extinguished lien had
on the transferred property immediately before the transfer, regard-
less of whether the proceeds are sufficient to satisfy all obligations
secured by the lien.

“(4) A creditor holding a valid lien on the property to be transferred
may purchase the property and offset against the purchase price all
or part of the allowed amount secured by the lien, if the creditor
tenders sufficient funds to satisfy the reasonable expenses of transfer
and any obligation secured by any senior lien extinguished by the
transfer.

“(5) A reversal or modification of an order authorizing a transfer
under this section does not affect the validity of the transfer to a
person that acquired the property in good faith or revive against any
person any lien extinguished by the transfer, regardless of whether the
transferee knew of the request for reversal or modification before the
transfer, unless the court stayed the order before the transfer.

“(6) If estate property includes an interest as a co-owner of prop-
erty, the receiver has all rights and powers of a co-owner afforded by
applicable law, including any rights of partition.

“(7) If at the time of appointment of a receiver an owner holds an
undivided interest in property as a tenant in common, joint tenant or
tenant by the entirety, the receiver may sell both the interest that is
estate property and the interest of any co-owner upon court order if
the court determines that:

“(a) Partition in kind of the property is impracticable;
“(b) Sale of the estate’s undivided interest in the property would
realize significantly less for the estate than sale of the property free
and clear of the interests of the co-owner; and
“(c) The benefit to the estate of the sale outweighs the detriment,
if any, to the co-owner.

“(8) A receiver may not sell, transfer or otherwise dispose of resi-
dential property, or an undivided interest therein, without specific ju-
dicial approval, which a court may grant only in case of waste,
destruction, obstruction of marketing of the property, enforcement of
an order in a domestic relations suit or other good cause shown.

“(9) As used in this section, ‘good faith’ means honesty in fact and
the observance of reasonable commercial standards of fair dealing.

“SECTION 26. Receivership financing. (1) If a receiver is authorized
to operate the business of a person or manage a person’s property, the
receiver may obtain credit and incur debt in the ordinary course of
business. Expenses related to such credit and debt are allowable under
section 37 of this 2017 Act as an administrative expense of the receiver.

“(2) Upon court order, a receiver may obtain credit or incur debt
other than in the ordinary course of business. The court may allow the
receiver to mortgage, pledge, hypothecate or otherwise encumber es-
tate property as security for repayment of any debt incurred under
this subsection. A creditor’s security interest may be in the form of a
receiver’s certificate.

“SECTION 27. Recovery of costs related to secured property. A re-
ceiver may recover from property securing a secured claim the neces-
sary costs and expenses of preserving, or disposing of, the property to
Abandonment of property. (1) A receiver, after giving notice, may abandon estate property that is burdensome to the receiver or is of inconsequential value or benefit. Property that is abandoned no longer constitutes estate property.

“(2) A receiver may not abandon property in contravention of a state statute or rule that is reasonably designed to protect the public health or safety from identified hazards, including ORS chapters 465 and 466.

Actions by or against the receiver or affecting estate property. (1) A person may not sue a receiver personally for an act or omission in administering estate property unless permitted by the court that appointed the receiver.

“(2) A person may not initiate or continue an action seeking to dispossess the receiver of any estate property or to otherwise interfere with the receiver’s management or control of any estate property unless permitted by the court that appointed the receiver.

“(3) Actions by or against a receiver are adjunct to the receivership. All pleadings in adjunct actions must include the case number of the receivership. All adjunct actions shall be referred to the judge assigned to the receivership action, unless:

“(a) The court does not have jurisdiction over the adjunct action; or

“(b) The assignment would not promote judicial efficiency.

“(4) If an action is filed against a receiver in a court in this state other than the court in which the receivership is pending, the court in which the action is filed shall transfer the action to the court in which the receivership is pending upon the receiver’s motion if the receiver files the motion within 30 days after service of original pro-
cess upon the receiver. However, if a state agency is a party to the
action, the action may not be transferred under this subsection unless
the agency consents to the transfer.

“(5) The receiver may be joined or substituted as a party in any
action that was pending at the time of the receiver’s appointment and
in which the owner is a party, upon motion by the receiver to the
court or agency in which the action is pending.

“(6) In case of the death, removal or resignation of the receiver, an
action by or against a receiver continues by or against the successor
receiver or, if a successor receiver is not appointed, by or against the
owner.

“(7) Whenever the assets of any domestic or foreign entity that has
been doing business in this state have been placed in the hands of a
receiver, service of all process upon the entity may be made upon the
receiver.

“(8) A judgment against a receiver is not a lien on the property or
funds of the receivership, and no execution may issue thereon. Upon
entry of the judgment in the court in which the receivership is pend-
ing, or upon filing in the receivership of a certified copy of a judgment
from another jurisdiction, the judgment is treated as an allowed claim
in the receivership.

“(9) No person other than a successor receiver duly appointed by
the court has a right of action against a former receiver to recover
property or the value thereof for or on behalf of the estate.

“SECTION 30. Personal liability of receiver. (1) A receiver may be
personally liable to the owner, or a record or beneficial owner of estate
property, for loss or diminution in value of or damage to estate prop-
erty only if the loss, diminution or damage is caused by:

“(a) Failure of the receiver to comply with an order of the court;
or

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“(b) An act or omission for which liability could not be limited under ORS 60.047 if the receiver were an Oregon corporation.

“(2) A receiver may be personally liable to a person other than the owner, or the record or beneficial owner of estate property, for any loss, diminution or damage caused by the receiver’s performance of the receiver’s duties, or the receiver’s authorized operation of a business, only if the loss, diminution or damage is caused by:

“(a) Fraud by the receiver;

“(b) An act intended by the receiver to cause loss, diminution or damage to the specific claimant; or

“(c) An act or omission for which an officer or director of an Oregon corporation would be liable to the claimant under the same circumstances.

“(3) Notwithstanding subsections (1) and (2) of this section, a receiver has no personal liability to any person for acts or omissions of the receiver permitted by any order of the court.

“(4) A receiver is entitled to all defenses and immunities provided by law for an act or omission within the scope of the receiver’s appointment.

“(5) Nothing in this section may be construed to expand any obligation or liability of a receiver under state law, common law or federal law for remediation of environmental damages or hazards.

“SECTION 31. Employment and compensation of professionals. (1) After giving notice, a receiver may employ attorneys, accountants, appraisers, brokers, real estate licensees, auctioneers or other professionals to represent or assist the receiver in carrying out the receiver’s duties.

“(2) The notice given by the receiver before employing a professional must disclose:

“(a) The identity and qualifications of the professional;
“(b) The scope and nature of the proposed engagement;
“(c) Any potential conflict of interest; and
“(d) The proposed compensation.
“(3) If an objection is filed after the receiver provides notice of the professional’s employment, the professional may continue to perform the professional’s duties while the objection is pending.
“(4)(a) A receiver may not employ a professional who holds or represents an interest adverse to the estate, except by order of the court.
“(b) A professional is not disqualified for employment under this subsection solely because of the professional’s employment by, representation of or other relationship with a creditor or other interested person, if the relationship is disclosed in the notice of the professional’s employment.
“(5) Nothing in this section precludes the receiver from acting as attorney or accountant if doing so is in the best interests of the estate.
“(6) After giving notice, the receiver may make payments to professionals for services rendered to the receiver. The notice must include an itemized billing statement indicating the time spent, billing rates of all persons who performed work to be compensated and a detailed list of expenses.

“SECTION 32. Participation of creditors and other interested persons in receivership; effect of receivership on nonparties. (1) Any interested person may appear in a receivership, either in person or by an attorney. Before appearing in the receivership, an interested person who is not party to the receivership must file with the court a written notice of appearance, including the name and mailing address of the interested person, and the name and address of the person’s attorney, if any, and serve a copy of the notice upon the receiver. A creditor or other interested person may be heard with respect to all matters affecting the person, whether or not the person is joined as a party to
the receivership.

“(2) Persons who receive notice of the pendency of a receivership, whether actual or constructive, and creditors or other persons submitting written claims in the receivership or otherwise appearing and participating in the receivership, are bound by the acts of the receiver with respect to management and disposition of estate property, regardless of whether they are formally joined as parties to the receivership.

“(3) Any person having a claim against or interest in estate property and having actual or constructive knowledge of the receivership is bound by acts of the receiver or orders of the court with respect to the treatment of claims and disposition of estate property, including sales of property free and clear of liens, regardless of whether the person receives written notice from the receiver and regardless of whether the person appears in the receivership.

“(4) A person duly notified by the receiver of a proposed act by the receiver is bound with respect to the act, regardless of whether the person objected to the act or is joined formally as a party in the receivership.

“(5) As used in this section, ‘bound’ means barred from bringing a motion or proceeding to contest an act or order, either within or outside of the receivership.

“SECTION 33. Initial notice to creditors and other interested persons. (1) A receiver shall, within 30 days after the receiver’s appointment, provide notice of the receivership to all known creditors of the owner and any other known interested persons that includes:

“(a) The date of appointment of the receiver;

“(b) The name of the court and the case number of the receivership;

“(c) The deadline for the submission of claims by creditors, if known;

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“(d) The name and address of the owner;
“(e) The name and address of the receiver and receiver’s attorney, if any;
“(f) A procedure for notifying the receiver if the recipient is represented by an attorney;
“(g) A procedure for being placed on the special notice list; and
“(h) A statement that the person may not receive notice of all further proceedings in the receivership unless the person requests to be placed on the special notice list.
“(2) The notice required under this section must be given by first class mail or by such other methods as the court may approve or require.
“(3) In addition to the methods described in subsection (2) of this section, the notice required under this section must be published at least once per week for two consecutive weeks in a newspaper of general circulation in all counties in which estate property is known to be located.

“SECTION 34. Claims process. (1) If a receiver determines that the estate is sufficient to provide distributions to creditors, the receiver shall, upon notice, establish a claims process by sending a written document describing a claims process, including relevant dates and deadlines, to all known creditors of the owner. The receiver may prescribe forms or otherwise specify information required to be included in a claim.
“(2) If the receiver determines that the estate is insufficient to provide distributions to creditors, the receiver may give notice that no claims process will take place in the receivership.

“SECTION 35. Submission of claims by creditors. (1) Claims may not be submitted until a claims process is established under section 34 of this 2017 Act.
“(2) All claims that arose before the receiver’s appointment, whether contingent, liquidated, unliquidated or disputed, other than claims of creditors with security interests in or other liens against estate property, must be submitted in accordance with this section. Any claim not so submitted is barred from participating in any distribution to creditors.

“(3) Claims must be submitted by delivering the claim to the receiver or an agent designated by the receiver within 30 days after the claims process is established, except that a claim arising from the rejection of an executory contract of the owner must be submitted within 30 days after the rejection. Claims by state agencies must be submitted within 180 days after the claims process is established. The court may shorten or extend any time period set forth in this subsection.

“(4) Claims must be submitted in a form prescribed by the receiver. If no form is prescribed, claims must be in written form and must:

“(a) Include the name and address of the claimant;
“(b) Set forth the nature and amount of the claim;
“(c) Be executed by the claimant or the claimant’s agent; and
“(d) Include any other information required by the receiver.

“(5) Claims may not be filed with the court. If a claim is incorrectly filed with the court, the court shall forward the claim to the receiver or an agent designated by the receiver.

“(6) A claim executed and submitted in accordance with this section constitutes prima facie evidence of the validity and amount of the claim.

“SECTION 36. Objection to and allowance of claims. (1)(a) At any time before the entry of an order approving the receiver’s final report, a receiver may, upon court order and after at least 21 days’ notice, disallow a claim. The notice must set forth the grounds for the disal-
“(b) At any time before the entry of an order approving the receiver's final report, any interested person may object to a claim. The objector must mail a copy of the objection, together with a notice of hearing, to the receiver and claimant at least 21 days before the hearing. The court shall hear the objection and enter an order allowing or disallowing the claim.

“(2) Upon request of a creditor, the receiver or a person objecting to a creditor's claim, or upon order of the court, an objection is subject to mediation before adjudication of the objection, under the rules or orders adopted or issued with respect to mediations. However, claims by the state are not subject to mediation unless the state consents to mediation.

“(3) Upon motion of the receiver or an interested person, the following claims may be estimated for purpose of allowance under this section under the rules or orders applicable to the estimation of claims under this subsection:

“(a) Any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the receivership; or

“(b) Any right to payment arising from a right to an equitable remedy for breach of performance.

“(4) Claims estimated under subsection (3) of this section are allowed in the estimated amount thereof.


“(a) The first priority is unpaid costs and expenses allowable under section 27 of this 2017 Act.

“(b) The second priority is claims of creditors with liens on estate
property that are duly perfected under applicable law. Such creditors receive the proceeds from the disposition of their collateral. Secured claims must be paid from the proceeds in accordance with their respective priorities under otherwise applicable law.

“(c) The third priority is actual, necessary costs and expenses incurred during the administration of the estate, other than those expenses allowable under subsection (2) of this section, including allowed fees and reimbursement of reasonable charges and expenses of the receiver and professional persons employed by the receiver under section 31 of this 2017 Act. Notwithstanding paragraph (b) of this subsection, expenses incurred during the administration of the estate have priority over the secured claim of any creditor obtaining the appointment of the receiver.

“(d) The fourth priority is claims to which 31 U.S.C. 3713 applies.

“(e) The fifth priority is claims of creditors with liens on estate property that are not required to be perfected under applicable law. Such creditors receive the proceeds of the disposition of their collateral.

“(f) The sixth priority is claims of creditors with liens on estate property that have not been duly perfected under applicable law. Such creditors receive the proceeds from the disposition of their collateral if and to the extent that unsecured claims are made subject to those liens under applicable law.

“(g) The seventh priority is claims for wages, salaries or commissions, including vacation, severance and sick leave pay, or contributions to an employee benefit plan, earned by the claimant within 180 days of the earlier of the date of appointment of the receiver and the cessation of the estate’s business, but only to the extent of $12,850 in aggregate for each claimant.

“(h) The eighth priority is unsecured claims of individuals, to the
extent of $2,850 for each claimant, arising from the deposit with the owner before the date of appointment of the receiver of moneys in connection with the purchase, lease or rental of property or the purchase of services for personal, family or household use that were not delivered or provided.

“(i) The ninth priority is claims for a spousal support debt or child support debt, except to the extent that the debt:

“(A) Is assigned to another entity, voluntarily, by operation of law, or otherwise; or

“(B) Includes a liability designated as a support obligation, unless that liability is actually in the nature of a support obligation.

“(j) The tenth priority is unsecured claims of state governmental units for taxes that accrued before the appointment of the receiver.

“(k) The eleventh priority is other unsecured claims.

“(L) The last priority is interests of the owner.

“(2) If the proceeds from the disposition of collateral securing an allowed secured claim are less than the amount of the claim or a creditor’s lien is avoided on any basis, the creditor has an unsecured claim in the amount of the deficiency.

“(3) Except for claimants described in subsection (1)(b) and (d) of this section, claimants receive distributions on a pro rata basis.

“(4) If all of the claims under subsection (1) of this section have been paid in full, the receiver shall pay any residue to the owner.

“SECTION 38. Secured claims against after-acquired property. Property acquired by the estate or by the owner after the date of appointment of the receiver is subject to an allowed secured claim to the same extent as would be the case in the absence of a receivership.

“SECTION 39. Ancillary receiverships. (1) A receiver appointed in any action pending in the courts of this state may, upon court order, apply to any court outside of this state for appointment as receiver
with respect to any estate property that is located in any other juris-

diction, if the appointment is necessary to the receiver’s possession, 
control, management or disposition of property in accordance with 
orders of the court. The receiver may move the court ex parte for an 
expedited hearing on a motion for leave to apply for an ancillary 
receivership.

“(2) A receiver appointed in a foreign action, or any party to the 
foreign action, may move a court of this state for appointment of that 
same receiver with respect to any property of the foreign receivership 
that is located in this state. The court shall act on the motion as 
provided in section 6 (3) of this 2017 Act. A receiver appointed in an 
ancillary receivership in this state is subject to the requirements im-
posed on receivers by statutes of this state, except as expressly ex-
empted by the court.

“SECTION 40. Removal of receiver. (1) On motion of the owner, the 
receiver or any creditor, or on the court’s own motion, the court shall 
remove a receiver if the receiver resigns or refuses or fails to serve for 
any reason, or for other good cause.

“(2) Upon removal of the receiver, the court shall appoint a suc-
cessor receiver if the court determines that further administration of 
the estate is required. Upon appointment, the successor receiver im-
mediately takes possession of the estate and assumes the duties of 
receiver.

“(3) If the court is satisfied that a replaced receiver has fully ac-
counted for and turned over to the successor receiver all of the prop-
erty of the estate and has filed a report of all receipts and 
disbursements during the person’s tenure as receiver, the court shall, 
after notice to all persons on the special notice list and hearing, enter 
an order discharging the replaced receiver from all further duties and 
responsibilities as receiver.
“SECTION 41. Termination of receivership. (1) Upon distribution or disposition of all property of the estate or the completion of the receiver’s duties with respect to estate property, or for other good cause, the receiver shall move the court for an order discharging the receiver.

“(2) The receiver shall attach to the motion for discharge a final report and accounting setting forth:

“(a) A list of estate property received during the receivership;
“(b) A list of disbursements, including payments to professionals engaged by the receiver;
“(c) A list of dispositions of estate property;
“(d) A list of distributions made or proposed to be made from the estate for creditor claims;
“(e) If not filed separately, a request for approval of the payment of fees and expenses of the receiver; and
“(f) Any other information required by the court.

“(3) If the court approves the final report and accounting, the court shall discharge the receiver. The court may issue an order exonerating the receiver’s bond or alternative security.

“(4) The receiver’s discharge:

“(a) Releases the receiver from any further duties and responsibilities under the Oregon Receivership Code; and
“(b) Releases the receiver and any persons acting on behalf of the receiver from all further liability in connection with the administration of estate property or the receivership.

“(5) Upon motion of any interested person, or upon the court’s own motion, the court may discharge the receiver and terminate the court’s administration of the property over which the receiver was appointed.

“(6) Upon termination of the receivership under any circumstances,
if the court determines that the appointment of the receiver was
wrongfully procured or procured in bad faith, the court may assess
against the person who procured the receiver's appointment all of the
receiver's fees and other costs of the receivership, and any other
sanctions the court deems appropriate.

“SECTION 42. Applicability. Sections 2 to 41 of this 2017 Act apply
to receiverships in which the receiver is appointed on or after the ef-
fective date of this 2017 Act.

“SECTION 43. ORCP 80 A is amended to read:

“A Receiver defined and applicability.

“A(1) A receiver is a person appointed by a circuit court, or judge
thereof, to take charge of property during the pendency of a civil action or
upon a judgment or order therein, and to manage and dispose of it as the
court may direct.

“A(2) The provisions of the Oregon Receivership Code control over
conflicting provisions of this rule with respect to receiverships gov-
erned by the Oregon Receivership Code.

“SECTION 44. ORS 465.255 is amended to read:

“465.255. (1) The following persons shall be strictly liable for those re-
medial action costs incurred by the state or any other person that are at-
tributable to or associated with a facility and for damages for injury to or
destruction of any natural resources caused by a release:

“(a) Any owner or operator at or during the time of the acts or omissions
that resulted in the release.

“(b) Any owner or operator who became the owner or operator after the
time of the acts or omissions that resulted in the release, and who knew or
reasonably should have known of the release when the person first became
the owner or operator.

“(c) Any owner or operator who obtained actual knowledge of the release
at the facility during the time the person was the owner or operator of the
facilities and then subsequently transferred ownership or operation of the fac-
ility to another person without disclosing such knowledge.

“(d) Any person who, by any acts or omissions, caused, contributed to or
exacerbated the release, unless the acts or omissions were in material com-
pliance with applicable laws, standards, regulations, licenses or permits.

“(e) Any person who unlawfully hinders or delays entry to, investigation
of or removal or remedial action at a facility.

“(2) Except as provided in subsection (1)(c) to (e) of this section and
subsection (4) of this section, the following persons shall not be liable for
remedial action costs incurred by the state or any other person that are at-
tributable to or associated with a facility, or for damages for injury to or
destruction of any natural resources caused by a release:

“(a) Any owner or operator who became the owner or operator after the
time of the acts or omissions that resulted in a release, and who did not
know and reasonably should not have known of the release when the person
first became the owner or operator.

“(b) Any owner or operator if the release at the facility was caused solely
by one or a combination of the following:

“(A) An act of God. ‘Act of God’ means an unanticipated grave natural
disaster or other natural phenomenon of an exceptional, inevitable and irre-
sistible character, the effects of which could not have been prevented or
avoided by the exercise of due care or foresight.

“(B) An act of war.

“(C) Acts or omissions of a third party, other than an employee or agent
of the person asserting this defense, or other than a person whose acts or
omissions occur in connection with a contractual relationship, existing di-
rectly or indirectly, with the person asserting this defense. As used in this
subparagraph, ‘contractual relationship’ includes but is not limited to land
contracts, deeds or other instruments transferring title or possession.

“(3) Except as provided in subsection (1)(c) to (e) of this section or sub-
section (4) of this section, the following persons shall not be liable for re-
medial action costs incurred by the state or any other person that are
attributable to or associated with a facility, or for damages for injury to or
destruction of any natural resources caused by a release:

“(a) A unit of state or local government that acquired ownership or con-
trol of a facility in the following ways:

“(A) Involuntarily by virtue of its function as sovereign, including but
not limited to escheat, bankruptcy, tax delinquency or abandonment; or

“(B) Through the exercise of eminent domain authority by purchase or
condemnation.

“(b) A person who acquired a facility by inheritance or bequest.

“(c) Any fiduciary exempted from liability in accordance with rules
adopted by the Environmental Quality Commission under ORS 465.440.

“(d) An authority that becomes the owner or operator of the facility as
authorized in ORS 465.609.

“(e) A receiver appointed under sections 2 to 41 of this 2017 Act.

“(4) Notwithstanding the exclusions from liability provided for specified
persons in subsections (2) and (3) of this section such persons shall be liable
for remedial action costs incurred by the state or any other person that are
attributable to or associated with a facility, and for damages for injury to
or destruction of any natural resources caused by a release, to the extent
that the person’s acts or omissions contribute to such costs or damages, if
the person:

“(a) Obtained actual knowledge of the release and then failed to promptly
notify the Department of Environmental Quality and exercise due care with
respect to the hazardous substance concerned, taking into consideration the
characteristics of the hazardous substance in light of all relevant facts and
circumstances; or

“(b) Failed to take reasonable precautions against the reasonably fore-
seeable acts or omissions of a third party and the reasonably foreseeable
consequences of such acts or omissions.

“(5)(a) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from any person who may be liable under this section, to any other person, the liability imposed under this section. Nothing in this section shall bar any agreement to insure, hold harmless or indemnify a party to such agreement for any liability under this section.

“(b) A person who is liable under this section shall not be barred from seeking contribution from any other person for liability under ORS 465.200 to 465.545 and 465.900.

“(c) Nothing in ORS 465.200 to 465.545 and 465.900 shall bar a cause of action that a person liable under this section or a guarantor has or would have by reason of subrogation or otherwise against any person.

“(d) Nothing in this section shall restrict any right that the state or any person might have under federal statute, common law or other state statute to recover remedial action costs or to seek any other relief related to a release.

“(6) To establish, for purposes of subsection (1)(b) of this section or subsection (2)(a) of this section, that the person did or did not have reason to know, the person must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability.

“(7)(a) Except as provided in paragraph (b) of this subsection, no person shall be liable under ORS 465.200 to 465.545 and 465.900 for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance or advice in accordance with rules adopted under ORS 465.400 or at the direction of the department or its authorized representative, with respect to an incident creating a danger to public health, safety, welfare or the environment as a result of any release of a hazardous substance. This para-
graph shall not preclude liability for costs or damages as the result of negligence on the part of such person.

“(b) No state or local government shall be liable under ORS 465.200 to 465.545 and 465.900 for costs or damages as a result of actions taken in response to an emergency created by the release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the state or local government. For the purpose of this paragraph, reckless, willful or wanton misconduct shall constitute gross negligence.

“(c) This subsection shall not alter the liability of any person covered by subsection (1) of this section.

“SECTION 45. ORS 60.667 is amended to read:

“60.667. (1) A court in a judicial proceeding brought to dissolve a corporation, or in a judicial proceeding for shareholder remedies described in ORS 60.952, may appoint one or more receivers to wind up and liquidate the business and affairs of the corporation or one or more custodians to manage the business and affairs of the corporation. The court shall hold a hearing, after notifying all parties to the proceeding and any interested persons designated by the court, before appointing a receiver or custodian. The court appointing a receiver or custodian has exclusive jurisdiction over the corporation and all its property wherever located.

“(2) The court may appoint an individual or a domestic or foreign corporation, authorized to transact business in this state, as a receiver or custodian. The court may require the receiver or custodian to post bond, with or without sureties, in an amount the court directs.

“(3) The court shall describe the powers and duties of the receiver or custodian in its appointing order, which may be amended periodically. Among other powers:

“(a) The receiver may dispose of all or any part of the assets of the cor-
poration wherever located, at a public or private sale, if authorized by the court and may sue and defend in the receiver’s own name as receiver of the corporation in all courts of this state.

“(b) The custodian may exercise all of the powers of the corporation, through or in place of its board of directors or officers, to the extent necessary to manage the affairs of the corporation in the best interests of its shareholders and creditors.

“(4) The court during a receivership may redesignate the receiver a custodian, and during a custodianship may redesignate the custodian a receiver, if doing so is in the best interests of the corporation, its shareholders and creditors.

“(5) The court periodically during the receivership or custodianship may order compensation paid and expense disbursements or reimbursements made to the receiver or custodian and the receiver’s or custodian’s counsel from the assets of the corporation or proceeds from the sale of the assets.

“(6) If applicable under section 4 of this 2017 Act, the Oregon Receivership Code controls over conflicting provisions of this section.

SECTION 46. ORS 62.702 is amended to read:

“62.702. (1) A court in a judicial proceeding brought to dissolve a cooperative may appoint one or more receivers to wind up and liquidate the business and affairs of the cooperative or one or more custodians to manage the business and affairs of the cooperative. The court shall hold a hearing, after notifying all parties to the proceeding and any interested persons designated by the court, before appointing a receiver or custodian. The court appointing a receiver or custodian has exclusive jurisdiction over the cooperative and all its property wherever located.

“(2) The court may appoint an individual or a domestic or foreign corporation, authorized to transact business in this state, as a receiver or custodian. The court may require the receiver or custodian to post bond, with or without sureties, in an amount the court directs.
“(3) The court shall describe the powers and duties of the receiver or custodian in its appointing order, which may be amended periodically. Among other powers:

“(a) The receiver may dispose of all or any part of the assets of the cooperative wherever located, at a public or private sale, if authorized by the court and may sue and defend in the receiver's own name as receiver of the cooperative in all courts of this state.

“(b) The custodian may exercise all of the powers of the cooperative, through or in place of its board of directors or, creditors and any holders of other equity interest in the cooperative officers, to the extent necessary to manage the affairs of the cooperative in the best interests of its members, shareholders, creditors and any holders of other equity interest in the cooperative.

“(4) The court during a receivership may redesignate the receiver a custodian, and during a custodianship may redesignate the custodian a receiver, if doing so is in the best interests of the cooperative, its members, shareholders, creditors and any holders of other equity interest in the cooperative.

“(5) The court periodically during the receivership or custodianship may order compensation paid and expense disbursements or reimbursements made to the receiver or custodian and the receiver’s or custodian’s counsel from the assets of the cooperative or proceeds from the sale of the assets.

“(6) If applicable under section 4 of this 2017 Act, the Oregon Receivership Code controls over conflicting provisions of this section.

“SECTION 47. ORS 65.667 is amended to read:

“65.667. (1) A court in a judicial proceeding brought to dissolve a public benefit or mutual benefit corporation may appoint one or more receivers to wind up and liquidate the affairs of the corporation, or one or more custodians to manage the affairs of the corporation. The court shall hold a hearing, after notifying all parties to the proceeding and any interested persons...
designated by the court, before appointing a receiver or custodian. The court appointing a receiver or custodian has exclusive jurisdiction over the corporation and all its property wherever located.

“(2) The court may appoint an individual or a domestic or foreign business or nonprofit corporation, authorized to transact business in this state, as a receiver or custodian. The court may require the receiver or custodian to post bond, with or without sureties, in an amount the court directs.

“(3) The court shall describe the powers and duties of the receiver or custodian in its appointing order, which may be amended periodically.

Among other powers:

“(a) The receiver:

“(A) May dispose of all or any part of the assets of the corporation wherever located, at a public or private sale, if authorized by the court, provided, however, that the receiver’s power to dispose of the assets of the corporation is subject to any trust and other restrictions that would be applicable to the corporation; and

“(B) May sue and defend in the receiver’s own name as receiver of the corporation in all courts of this state.

“(b) The custodian may exercise all of the powers of the corporation, through or in place of its board of directors or officers, to the extent necessary to manage the affairs of the corporation in the best interests of its members and creditors.

“(4) The court during a receivership may redesignate the receiver a custodian, and during a custodianship may redesignate the custodian a receiver, if doing so is in the best interest of the corporation, its members and creditors.

“(5) The court periodically during the receivership or custodianship may order compensation paid and expense disbursements or reimbursements made to the receiver or custodian and the receiver’s or custodian’s attorney from the assets of the corporation or proceeds from the sale of the assets.
“(6) If applicable under section 4 of this 2017 Act, the Oregon Receivership Code controls over conflicting provisions of this section.

“SECTION 48. ORS 86.752 is amended to read:

“86.752. A trustee may not foreclose a trust deed by advertisement and sale in the manner provided in ORS 86.764 to 86.782 unless:

“(1) The trust deed, any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in the mortgage records in the counties in which the property described in the deed is situated;

“(2) There is a default by the grantor or other person that owes an obligation, the performance of which is secured by the trust deed, or by the grantor’s or other person’s successors in interest with respect to a provision in the deed that authorizes sale in the event of default of the provision;

“(3) The trustee or beneficiary has filed for record in the county clerk’s office in each county where the trust property, or some part of the trust property, is situated, a notice of default containing the information required by ORS 86.771 and containing the trustee’s or beneficiary’s election to sell the property to satisfy the obligation;

“(4) The beneficiary has filed for recording in the official records of the county or counties in which the property that is subject to the residential trust deed is located:

“(a) A certificate of compliance that a service provider issued to the beneficiary under ORS 86.736 that is valid and unexpired at the time the notice of default is recorded; or

“(b) A copy of the affidavit with which the beneficiary claimed, under ORS 86.726 (1)(b), an exemption that has not expired;

“(5) The beneficiary has complied with the provisions of ORS 86.748;

“(6) The grantor has not complied with the terms of any foreclosure avoidance measure upon which the beneficiary and the grantor have agreed; and
“(7) An action has not been commenced to recover the debt or any part of the debt then remaining secured by the trust deed, or, if an action has been commenced, the action has been dismissed, except that:

“(a) Subject to ORS 86.010 and the procedural requirements of ORCP 79 and 80 and the Oregon Receivership Code, as applicable, an action may be commenced to appoint a receiver or to obtain a temporary restraining order during foreclosure of a trust deed by advertisement and sale, except that a receiver may not be appointed with respect to a single-family residence that the grantor, the grantor’s spouse or the grantor’s minor or dependent child occupies as a principal residence.

“(b) An action may be commenced to foreclose, judicially or nonjudicially, the same trust deed as to any other property covered by the trust deed, or any other trust deeds, mortgages, security agreements or other consensual or nonconsensual security interests or liens that secure repayment of the debt.

“SECTION 49. ORS 93.915 is amended to read:

“93.915. (1) In the event of a default under a contract for conveyance of real property, a seller who wishes to enforce a forfeiture remedy must give written notice of default by service pursuant to ORCP 7 D(2) and 7 D(3), or by both first class and certified mail with return receipt requested, to the last-known address of the following persons or their legal representatives, if any:

“(a) The purchaser.

“(b) An occupant of the property.

“(c) Any person who has caused to be filed for record in the county clerk’s office of a county in which any part or parcel of the real property is situated, a duly acknowledged request for a copy of any notice of default served upon or mailed to the purchaser. The request shall contain the name and address of the person requesting copies of the notice and shall identify the contract by stating the names of the parties to the contract, the date of
recording of the contract and the book and page where the contract is recorded. The county clerk shall immediately make a cross-reference of the request to the contract, either on the margin of the page where the contract is recorded or in some other suitable place. No request, statement or notation placed on the record pursuant to this section shall affect title to the property or be deemed notice to any person that any person so recording the request has any right, title, interest in, lien or charge upon the property referred to in the contract.

“(2) Notices served by mail are effective when mailed.

“(3) The notice shall specify the nature of the default, the amount of the default if the default is in the payment terms, the date after which the contract will be forfeited if the purchaser does not cure the default and the name and address of the seller or the attorney for the seller. The period specified in the notice after which the contract will be forfeited may not be less than:

“(a) Sixty days, when the purchaser has reduced the unpaid balance to an amount greater than 75 percent of the purchase price;

“(b) Ninety days, when the purchaser has reduced the unpaid balance to an amount which is more than 50 percent but less than 75 percent of the purchase price; or

“(c) One hundred twenty days, when the purchaser has reduced the unpaid balance to an amount which is 50 percent or less of the purchase price.

“(4) The seller shall cause to be recorded in the real property records of each county in which any part of the property is located a copy of the notice, together with an affidavit of service or mailing of the notice of default, reciting the date the notice was served or mailed and the name and address of each person to whom it was given. From the date of recording, the notice and affidavit shall constitute constructive notice to third persons of the pending forfeiture. If, not later than one year after the time for cure stated in a recorded notice and affidavit or any recorded extension thereof, no
declaration of forfeiture based upon the recorded notice and affidavit has been recorded and no extension of time for cure executed by the seller has been recorded, the notice and affidavit shall not be effective for any purpose nor shall it impart any constructive or other notice to third persons acquiring an interest in the purchaser’s interest in the contract or the property or any portion of either. Any extension of time for cure executed by the seller shall be recorded in the same manner as the original notice and affidavit.

“(5) The statement contained in the notice as to the time after which the contract will be forfeited if the default is not cured shall conclusively be presumed to be correct, and the notice adequate, unless one or more recipients of such notice notifies the seller or the attorney for the seller, by registered or certified mail, that such recipient claims the right to a longer period of time in which to cure the default.

“(6) Subject to the procedural requirements of the Oregon Rules of Civil Procedure and the Oregon Receivership Code, as applicable, an action may be instituted to appoint a receiver or to obtain a temporary restraining order during forfeiture under a land sale contract, except that a receiver shall not be appointed with respect to a single-family residence which is occupied at the time the notice of default is given, as the principal residence of the purchaser, the purchaser’s spouse or the purchaser’s minor dependent children.

“SECTION 50. ORS 94.642 is amended to read:

“94.642. (1) Subject to subsection (2) of this section, if a homeowners association fails to fill vacancies on the board of directors sufficient to constitute a quorum in accordance with the bylaws, an owner or a first mortgagee may request the circuit court of the county in which the planned community is located to appoint a receiver [under ORCP 80] to manage the affairs of the association.

“(2) At least 45 days before an owner or first mortgagee requests the
circuit court to appoint a receiver under subsection (1) of this section, the
owner or first mortgagee shall mail, by certified or registered mail, a notice
to the association and shall post a copy of the notice at a conspicuous place
or places on the property or provide notice by a method otherwise reasonably
calculated to inform owners of the proposed action.

“(3) The notice shall be signed by the owner or first mortgagee and in-
clude:

“(a) A description of the intended action.
“(b) A statement that the intended action is pursuant to this section.
“(c) The date, not less than 30 days after mailing of the notice, by which
the association must fill vacancies on the board sufficient to constitute a
quorum.
“(d) A statement that if the association fails to fill vacancies on the board
by the specified date, the owner or first mortgagee may file a petition with
the court under subsection (1) of this section.
“(e) A statement that if a receiver is appointed, all expenses of the
receivership will be common expenses of the association as provided in sub-
section (4) of this section.
“(4) If a receiver is appointed, the salary of the receiver, court costs, at-
torney fees and all other expenses of the receivership shall be common ex-
penses of the association.
“(5) A receiver appointed under this section has all of the powers and
duties of a duly constituted board of directors and shall serve until a suffi-
cient number of vacancies on the board are filled to constitute a quorum.
“(6) If at a turnover meeting held in accordance with ORS 94.616 the
owners fail to elect the number of directors sufficient to constitute a quorum
of the board of directors, in addition to the notice requirements specified in
subsections (2) and (3) of this section, an owner shall give the notice to all
other owners as provided in the bylaws.
“(7) Notwithstanding subsections (2) and (3) of this section, in the case
of an emergency, the court may waive the notice requirements of subsections (2) and (3) of this section.

“SECTION 51. ORS 100.418 is amended to read:

100.418. (1) Subject to subsection (2) of this section, if an association of unit owners fails to fill vacancies on the board of directors sufficient to constitute a quorum in accordance with the bylaws, a unit owner or a first mortgagee of a unit may request the circuit court of the county in which the condominium is located to appoint a receiver [under ORCP 80] to manage the affairs of the association.

“(2) At least 45 days before a unit owner or first mortgagee of a unit requests the circuit court to appoint a receiver under subsection (1) of this section, the unit owner or first mortgagee shall mail, by certified or registered mail, a notice to the association and shall post a copy of the notice at a conspicuous place or places on the property or provide notice by a method otherwise reasonably calculated to inform unit owners of the proposed action.

“(3) The notice shall be signed by the unit owner or first mortgagee of the unit and include:

“(a) A description of the intended action.
“(b) A statement that the intended action is pursuant to this section.
“(c) The date, not less than 30 days after mailing of the notice, by which the association must fill vacancies on the board sufficient to constitute a quorum.
“(d) A statement that if the association fails to fill vacancies on the board by the specified date, the unit owner or first mortgagee may file a petition with the court under subsection (1) of this section.
“(e) A statement that if a receiver is appointed, all expenses of the receivership will be common expenses of the association as provided in subsection (4) of this section.
“(4) If a receiver is appointed, the salary of the receiver, court costs, at-
torney fees and all other expenses of the receivership shall be common ex-

“(5) A receiver appointed under this section has all of the powers and
duties of a duly constituted board of directors and shall serve until a suffi-
cient number of vacancies on the board are filled to constitute a quorum.
“(6) If at a turnover meeting held in accordance with ORS 100.210 the unit
owners fail to elect the number of directors sufficient to constitute a quorum
of the board of directors, in addition to the notice requirements specified in
subsections (2) and (3) of this section, a unit owner shall give the notice to
all other unit owners as provided in the bylaws.
“(7) Notwithstanding subsections (2) and (3) of this section, in the case
of an emergency, the court may waive the notice requirements of subsections
(2) and (3) of this section.

“SECTION 52. Section 53 of this 2017 Act is added to and made a
part of ORS 105.420 to 105.455.
“SECTION 53. If applicable under section 4 of this 2017 Act, the
Oregon Receivership Code applies to receiverships commenced under
ORS 105.420 to 105.455, except that the provisions of ORS 105.420 to
105.455 control over conflicting provisions of the Oregon Receivership
Code.
“SECTION 54. Section 55 of this 2017 Act is added to and made a
part of ORS 652.510 to 652.570.
“SECTION 55. If applicable under section 4 of this 2017 Act, the
Oregon Receivership Code controls over conflicting provisions of ORS
652.510 to 652.570.
“SECTION 56. Section 57 of this 2017 Act is added to and made a
part of ORS chapter 734.
“SECTION 57. Notwithstanding section 4 of this 2017 Act, the
Oregon Receivership Code does not apply to delinquency proceedings
under this chapter.
“SECTION 58. The section captions used in this 2017 Act are provided only for the convenience of the reader and do not become part of the statutory law of this state or express any legislative intent in the enactment of this 2017 Act.”.
OREGON LAW COMMISSION

Oregon Receivership Code


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I. INTRODUCTION & STATEMENT OF THE PROBLEM:

Courts may appoint a receiver to manage the real and/or personal property of a person or business in a variety of contexts. For purposes of the proposed Oregon Receivership Code (the “Code”), the most notable context for appointment of a receiver is at the behest of the property owner’s creditors, for the purpose of administering, collecting, liquidating and distributing the property when the owner is insolvent or there is a deadlock among owners. The powers of a receiver are broad and are rooted in equity, but it is important for lenders, debtors, receivers and courts to have guidance on the manner in which receivership proceedings may be conducted, and on the permissible scope and consequences of the court’s orders and the receiver’s actions.

Oregon currently has a little guidance on these matters, with the result that receivership proceedings have an ad hoc nature that may vary from court to court or from county to county. Existing law is limited to ORCP 80-82 and sparse case law stretching from the 1880’s to an attorney disciplinary opinion in 1985, with little relevance to current commercial practices or statutory enactments. A survey of the Oregon Revised Statutes yields reference to “receivers” or “receiverships’ of over 248 statutory references. Yet there is virtually no statutory or rule guidance to the Courts, attorneys or receivers. Good sources of possible statutory guidelines have, however been developed elsewhere, and Oregon is in a position to benefit from these sources, as well as from a knowledgeable cadre of lawyers, judges and others who are experienced in the field.

II. HISTORY OF THE PROJECT:

The process leading to the proposed Oregon Receivership Code has its indirect roots in the work of the Uniform Law Commission (“ULC”). The ULC’s Joint Editorial Board for Uniform Real Property Acts proposed in 2011 that the ULC study the feasibility of codifying procedures and other matters affecting the receivership of commercial real estate. This study was undertaken, and a drafting committee was subsequently appointed, which led to the ULC’s adoption in 2015 of the Uniform Commercial Real Estate Receivership Act (UCRERA).

During this process it also became clear to Oregon Law Commission personnel that there was substantial interest among members of the Oregon State Bar in legislation that would amplify upon the existing Oregon receivership provisions. It was noted at this time that Washington State had a distinctively well-developed set of receivership statutes that had, in fact, been one important source for UCRERA. It was also noted that UCRERA’s limitation to commercial real estate might be less than ideal for an Oregon project, given the importance of receiverships affecting other assets as well.

The Oregon Law Commission Work Group for this project was first convened in March, 2016, for the purpose of evaluating the suitability for Oregon of a substantial set of receivership statutes and, if suitable, preparing a draft bill for legislative introduction. Members of the Work Group were as follows:
The Work Group considered adopting UCRERA more or less as a whole; adopting the Washington statutes more or less as a whole; and various possibilities for tailoring an Oregon-specific set of statutes. Ultimately the Work Group took the last and most ambitious of these routes. The proposed Oregon Receivership Code brings together important provisions from UCRERA, from the Washington Act, and from the Work Group’s own discussions carried out over the course of 16 meetings.

III. SECTION-BY-SECTION ANALYSIS OF SB 899 -1 AMENDMENT:

 sections 1 through 3. Short title; Receivership described; Definitions:

The -1 amendment completely replaces the current placeholder contents of SB 899.

Section 1 formally entitles Sections 2 through 41 of the Code as the Oregon Receivership Code.

Section 2 briefly describes “receivership” as the process by which a court appoints a person to take charge of property during the pendency of an action or upon a judgment or order entered therein and to manage or dispose of the property as the court may direct. This section is drawn substantially from ORCP 80A.

Some of the more noteworthy definitions include the following:

The term “residential property” is defined as “real property upon which are situated four or fewer residential units, one of which is occupied as a principal residence by the owner, the owner’s spouse, or a dependent of the owner; and (b) Where residential use
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is the primary activity occurring on the real property.” This definition is relevant in Section 13 on “turnover of property” and Section 25 on “use of transfer of estate property outside of the ordinary course of business” described below.

The term “executory contract” is defined as: (a) A contract, including an unexpired lease, under which the obligations of both parties are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other; or (b) A contract, including an unexpired lease, under which a party has an unexercised option to require its counterparty to perform. The intent was to adopt the broadly recognized definition of the executory nature of such contracts promulgated by Professor Vern Countryman. See, e.g., Countryman, Executory Contracts in Bankruptcy: Part I, 57 Minn. L. Rev. 439, 460 (1973). While recognizing the benefits of the Countryman definition, the Work Group also was mindful of its limitations, namely that certain contracts, like option contracts, do not fit neatly into the narrow confines of the definition (and yet we would want option contracts to be executory so that the receiver could assume beneficial ones and reject burdensome ones). So, the definition also includes option contracts. This definition is relevant chiefly in Section 24 on executory contracts, described below, but is also referenced in Section 11 on the powers of a receiver; Section 18 on when a court order is required;” and Section 35 on submission of claims by creditors.

The term “foreign action” is used to define an action in a federal or state court outside of Oregon. The definition has relevance in Section 6 (appointment of receiver) described below.

The definition of “insolvency” includes both: (i) balance sheet insolvency – the sum of a person’s debts exceeds a fair valuation of all of that person’s property (excluding property transferred with fraudulent intent and exempt property); and (ii) generally not paying debts as they come due. This definition is relevant in Section 6 on appointment of receiver, described below.

To clarify that a receiver may be an entity, “person” is defined to include an individual, limited liability company, general partnership, limited partnership, limited liability partnership, cooperative, business trust, governmental entity, or other entity of any kind or nature.

The term “affiliate” is defined with respect to an individual and with respect to any other person. The definition of affiliate has particular relevance in Section 8 governing required disclosures of conflicts of interest by the person seeking appointment as a receiver. The term “party” is defined in two ways. When used in relation to an action, it means a person named in the caption of the action, and in this way, like the definition of “affiliate”, the definition of “party” has particular relevance in Section 8. It is also defined, when used in relation to a contract, to mean the signatory to the contract.

The term “owner” is defined as the person over whose property a receiver is appointed.
Section 4. Applicability

This section provides that this Code will apply in all receiverships commenced in a court of this state except for federal receiverships and receiverships commenced by a state agency pursuant to statutory authority. For receiverships commenced by a state agency, the Code explicitly permits the state agency to opt in – that is, to elect for the receivership to be governed by this Code. To the extent that the provisions of ORCP 80 conflict with this Code, the provisions of this Code will control.

The Code will be applicable to receiverships in which the receiver is appointed after January 1, 2018.

Section 5. Property not subject to receivership:

This section lists the types of property with respect to which a receiver may not be appointed. The effect of the section is generally to exclude the types of property which creditors generally would not otherwise have access to, and so, as a creditor remedy, a receivership should not give creditors any greater access.

Section 6. Appointment of a receiver:

This section is drawn from existing provisions of ORCP 80B, and other statutory models and delineates, as more fully described below, the bases for appointment of a receiver; the procedure for appointing a person who, in a foreign action, has been appointed receiver over property in Oregon and providing the rules for determining the venue for such an appointment; sets out the extent of the appointment that may be provided for in the receivership order (though Section 11 more explicitly addresses the powers of the receiver); and permits the court to condition the appointment on the giving of security by the person seeking the receiver’s appointment.

The bases for appointment generally speak to the very purpose of a receivership – to protect and preserve value. To that end, subsections (a) through (i) include the circumstances or reasons that would warrant the appointment of a receiver. And subsection (i) grants the court broad discretion to appoint a receiver in any situation where appointment is necessary to secure ample justice to the parties. And while it is not determinative, a court, in making its determination whether to appoint a receiver, may consider the existence of a contractual provision providing for the appointment.

Section 7. Eligibility to serve as receiver:

This section closely dovetails with Section 8 (described below) requiring disclosure of certain conflicts of interest which would trigger ineligibility.
This section itself provides that any person, whether or not a resident of Oregon, may serve as a receiver except: (a) an entity that is not authorized to conduct business in Oregon; (b) a person who has been convicted of a crime involving moral turpitude, or is controlled by a person convicted of such a crime; and (c) a sheriff of any county, unless as expressly permitted by statute.

The court may also require a specific individual to appear on behalf of the entity appointed.

**Section 8. Required disclosures relating to conflicts of interest:**

This section is something of an adjunct to Section 7 (eligibility to serve as receiver) because it requires the disclosure of certain conflicts of interest which would render a person ineligible to serve as receiver. Specifically, a person must disclose, and affirm under oath, whether the person is an affiliate of a party to the receivership; has an interest materially adverse to an interest of a party to the receivership; has a material financial interest in the outcome of the action (other than compensation); has a debtor-creditor relationship with the owner; or holds an equity interest in a party to the receivership.

**Section 9. Receiver’s bond, alternative security, or insurance:**

This section retains the basis of the protections of ORCP 82A (2) and existing case law but clarifies that a court may waive or use alternative methods to address the purpose of this protection. The purpose of a receiver’s bond is to ensure that the receiver faithfully performs the receiver’s duties, renders a true accounting of receivership property and receivership receipts and disbursements, and obeys the lawful orders of the court. 1 Clark in Receivers §119, at 172(3d ed. 1959). Thus, the bond provides a source of recovery for persons harmed by the receiver’s malfeasance, such as the wrongful disbursement of receivership property.

This section permits the court to require, at any time during the service of the receiver, that the receiver post a bond, some alternative form of security such as a letter of credit, or to carry insurance to secure the receiver’s faithful performance of the receiver’s duties. The section also permits the receiver to charge the cost of such bond, alternative form of security or insurance against the estate.

**Section 10. Exclusive jurisdiction of appointing court:**

Subject to the federal Constitution Supremacy Clause and its jurisprudence in relation to federal courts, this section grants the appointing court exclusive jurisdiction over the receiver, exclusive jurisdiction over and right to control all property constituting the estate, wherever located, to the full extent of the court’s jurisdiction, and exclusive jurisdiction to determine all controversies relating to the collection, preservation,
application and distribution of the estate and all claims against the receiver arising out of the receiver’s exercise of powers or performance of duties as receiver.

The only exception to this grant of exclusive jurisdiction is for any part of the estate subject to the jurisdiction of another court under ORS 107.105.

**Section 11. Powers of receiver:**

This section, more than any other, provides direction to the court, makes explicit the basis of authority and somewhat broadens the provisions of ORCP 80D by setting forth a menu of powers from which a court may choose to confer upon the receiver. It includes, among other things, such powers as collecting, controlling and managing estate property; operating a business constituting estate property; engaging and compensating professionals; making improvements to estate property; using or transferring estate property outside of the ordinary course of business – a power more fully set out in Section 25 of the Code; assuming an executory contract; and allowing or disallowing claims of creditors. But the section makes explicit that the receiver may take any other action authorized under the Code and has powers conferred by the court under this section and by statute. And the court is granted the discretion to empower the receiver to take any other action that the court deems reasonably necessary to avoid injustice. Though this menu will most often be used to create the receivership order at the beginning of a proceeding, the statute makes clear that the court may at any time limit, expand or modify the powers conferred upon the receiver.

**Section 12. Duties of receiver:**

This section governs the receiver’s duties, and provides that the court may limit, expand or modify the receiver’s duties at any time. The section requires the receiver to notify all state and federal taxing authorities and relevant regulatory agencies of the receiver’s appointment in accordance with any applicable laws imposing this duty (such as 26 U.S.C. 6036), comply with applicable law, and if appointed with respect to real property, to file a certified copy of the appointment order with the recorder of the county in which the real property is located.

**Sections 13 & 14. Turnover of property; Collection by receiver of debts owed to owner:**

To enable the receiver to carry out the receiver’s duties, this section requires, upon the demand of the receiver, the turnover of estate property, with two exceptions. The receiver may not demand the turnover of residential real property without specific judicial approval, which the court may grant in the case of waste, destruction, obstruction of marketing of the property, enforcement of a domestic relations order, or other good cause shown. The other exception is for a creditor who has possession or
control of estate property and the validity, perfection or priority of whose lien depends on that creditor’s continued possession or control – that creditor may retain possession or control unless and until the court orders adequate protection of the creditor’s lien. The section derives from UCRERA Section 11(c), the comments to which refer to Bankruptcy Code notions of adequate protection.

The section also provides that any bona fide disputes over whether property is estate property, will be resolved by the court in which the receivership is pending.

Just as Section 13 provides for the turnover of property that is estate property upon the receiver’s demand, Section 14 provides for the payment of debts owing to the owner to be paid to the receiver upon the receiver’s demand (except to the extent that the debt is subject to setoff or recoupment). Strengthening this requirement, the section also provides that a person who has notice of the appointment of a receiver may not satisfy the debt by payment to the owner.

Section 15. Duties of owner:

This section describes the duties of the owner and derives from Wash. Rev. Code Ann. §7.60.080. Subsection (1)(a) requires the owner to generally assist and cooperate fully with the receiver in the administration of the receivership and the receiver’s performance of its duties.

Subsection (1)(c) requires the owner to deliver to the receiver all of the estate property in the person’s possession, custody, or control, including accounts, books and records, including any passwords or authorizations needed to facilitate the receiver’s access to this information.

To facilitate the receiver’s ability to carry out its duties, subsection (1)(d) requires the owner to submit to examination under by the receiver, under oath regarding the owner’s financial condition, the owner’s acts, conduct, liabilities or any matter relating to the receiver’s administration of the estate.

Subsection (2) makes clear that when the owner is an entity, the owner’s duties under this Code extend to each officer, director, manager, member, partner, or other individual exercising or having the power to exercise control over the affairs of the entity.

Sections 16, 17 & 18. Mailing lists to be maintained by the receiver; Notices; When court order required:

All of these sections relate to the nature and process of notice.

Section 16 requires the receiver to keep two mailing lists: (i) a master mailing list of all parties to the receivership, all known creditors and interested persons who have filed a
notice of appearance; and (ii) a special mailing list of all persons who request to be placed on the list. The request to be placed on the special mailing list can be accompanied with a request for a preferred form of notice, like, for example, email.

Section 17 provides that whenever a person is required to give notice under a provision of the Code, the person must notice all persons specified in the provision and all persons on the special mailing list, and file notice and proof of service with the court. And if the provision does not specify to whom notice must be given, all persons whose property interests would be affected must also be noticed. This section also provides for: (i) the amount of notice – at least as much time as the statutory provision requires, or 14 days if no time is specified; and (ii) the means of notice – by first class mail to persons not on the special notice list (or as otherwise directed by the court) and by whatever means may have been specified by those on the special notice list to those persons (or as otherwise directed by the court). The court may also shorten any notice periods for good cause shown.

Section 17 (3) provides for a form of notice that could be described as “negative notice” – that is, wherever the Code authorizes a person to take an action after giving notice (except for the actions listed in Section 18), the person may take the action without obtaining specific court authorization if the person gives notice that describes the action the person will take unless an objection is filed (and describes the procedure for objecting) and no objections are filed. If an objection is filed, the court will hear the objection and rule on it. The court may choose on its own motion to hold a hearing, and a person who otherwise would be authorized to take an action pursuant to this section may nonetheless move the court for an order authorizing the action if so desired. And the court is also permitted to consider motions and grant or deny relief without notice or a hearing, if it appears that no party to the receivership or interested person would be harmed by the relief requested.

Section 18. When court order required:

The “negative notice” procedure provided for in Section 17 may not be used by a receiver to obtain authorization to take any of the actions listed in Section 18. Rather, a receiver must, after giving notice, obtain a court order authorizing the following: sale or other disposition of real property; use or transfer of property outside of the ordinary course of business; sale of a co-owner’s interest in jointly owned property; assumption of an executory contract; obtaining credit or incurring debt outside of the ordinary course of business; compromise or settlement of a controversy that might affect distribution to creditors; disallowance of all or part of a claim; and termination of the receivership. But, if the court finds that for any of these actions (except for the allowance or disallowance of claims and the termination of the receivership) the burden of seeking a court order is greater than the materiality of the action, then the court may establish conditions under which the receiver may take those actions without first obtaining a court order.
Section 19. Creditor list and inventory:

This section governs the receiver’s obligation to file an inventory of estate property and a list of creditors, and provides that if the court concludes that it is unlikely that the estate is sufficient to make material distributions to creditors, then the receiver need not file list of creditors. The section requires an initial inventory report within 60 days of appointment, and explicitly grants the Court authority to modify the timeframes.

Section 20. Receiver’s periodic reports:

The section requires the receiver to file monthly reports of the receiver’s operations and financial affairs including such things as beginning and ending cash balances, a statement of cash receipts and disbursements, a statement of non-cash receipts and payments, a tax disclosure statement and any other information required by the court.

Section 21. Claims bar date:

To facilitate the administration of the estate, this section permits the receiver to set a deadline for submitting claims, and, upon court order, to disallow claims submitted after the deadline.

Section 22. Automatic stay of certain proceedings:

To prevent interference with the receiver's possession and management of estate property or the performance of the receiver’s duties, Section 22 provides for a stay which becomes effective upon entry of the order appointing the receiver. Subsection (1) sets out the actions which are stayed: the commencement or continuation of a proceeding that was or could have been commenced before the receivership or to recover a claim against the owner that arose before the receivership; the enforcement of judgments against the owner or any estate property; any act to obtain possession of estate property from the receiver, or to interfere with, or exercise control over estate property; any act to create, perfect, or enforce any lien against estate property, to the extent the lien secures a claim against the owner that arose before the receivership; any act to collect, assess or recover a claim that arose before the receivership; and the exercise of a right of setoff against the owner.

Subsection (5) provides a list of exceptions to the stay created by subsection (1). Subsection (5)(a) permits the creditor who sought appointment of the receiver to continue a pending foreclosure proceeding, unless the court orders otherwise. Subsection (5)(b) excepts from the stay the commencement or continuation of a criminal action against the owner and subsection (5)(c) excepts the commencement or continuation of certain domestic relations actions, including actions to establish paternity or to modify an order for spousal or child support. Subsection (5)(d) excepts any act to perfect, or to maintain or continue the perfection of, a security interest in
estate property which would have a super-priority over a preexisting non-purchase money security interest under ORS chapter 79, or a lien by attachment, levy or the like, including liens under ORS chapter 87. Purchase money security interests are an example of the type of lien that could be perfected after the appointment order. Subsection (5)(e) excepts from the stay the commencement or continuation of an action by a governmental unit to enforce its police or regulatory power, and if the governmental unit obtains a judgment in that police or regulatory action, subsection (5)(f) permits the enforcement of that judgment, other than a money judgment. Subsection (5)(g) permits a governmental unit to establish a tax liability or any appeal of one.

A person whose action is stayed by subsection (1), and not excepted by subsection (5), may seek relief from the stay, which the court may grant for good cause shown.

Actions in violation of the stay are voidable by the court per subsection (6), and if a person knowingly violates the stay, the court may award actual damages caused by the violation, and may sanction the violation as civil contempt per subsection (7).

The stay terminates upon the termination of the receivership.

**Section 23. Utility service:**

This section prohibits a utility providing service to estate property from altering, refusing, or discontinuing service without giving the receiver 14 days’ notice of any default or intention to alter, refuse, or discontinue service. This section provides a mechanism for a receiver to furnish a deposit or some other form of adequate assurance of payment, upon which the court may prohibit the alteration or cessation of service.

**Section 24. Executory contracts:**

At the time of appointment of a receiver, the owner is often party to a number of existing contracts to buy or sell goods or services as part of its ongoing business. The receiver will need to assess the value of these contracts, some of which may be beneficial and worth honoring, but others may be burdensome and more of a liability than an asset and the receiver will choose to reject them.

To that end, subsection (1) of Section 24 permits the receiver to evaluate these executory contracts and to assume the beneficial ones (upon order of the court) and reject the burdensome ones (after giving notice). To provide the counterparty with assurance of the receiver’s ability to perform, the court may condition the assumption or rejection upon terms that the court deems just and proper like, for example, a curing of defaults (other than an ipso facto default described below). Until a formal assumption is approved by court order, the receiver’s performance of a contract does not constitute assumption, nor does it preclude rejection of it.
It was the intent of the Work Group to adopt the bankruptcy principle that if an executory contract is assumed, it is assumed *cum onere* – that is, with all the benefits and burdens of the contract. To that end, subsection (2) requires that if a receiver assumes a contract, the receiver must assume the contract in its entirety. It was also understood that what constitutes “the contract” is a matter of state law other than this act.

Even beneficial executory contracts that the receiver assumes are both assets and liabilities in that they require some performance on the part of the receiver. Subsection (3) provides that any obligation or liability incurred by a receiver due to assumption of a contract is an expense of the receivership.

Rejection of an executory contract is treated as a breach of the contract occurring immediately before the receiver’s appointment, and the counterparty to the contract may take any necessary steps to terminate the contract and may submit a claim for damages from rejection of the contract. Unlike in bankruptcy, the receivership does not discharge the liability of the owner to the counterparty.

Contracts often contain clauses under which the appointment of a receiver constitute a default which permits the counterparty to terminate the contract. These so-called *ipso facto* defaults, were they permitted to be effective in a receivership, would prevent the receiver from assuming a valuable contract for the benefit of the creditor collective. Or they enable the counterparty to extract a ransom price from a receiver who chooses to assume. Neither result makes sense in a collective proceeding, and so just as these types of defaults are invalidated in bankruptcy (and in UA 17(d)), subsection (4) of this act permits a receiver to assume a contract despite the existence of an *ipso facto* default.

Subsection (5) provides three instances in which the receiver may not assume an executory contract without the consent of the counterparty. Subsection (5)(c) prohibits such assumption if the contract has prior to being assumed by the receiver. Subsection (5)(a) and (5)(b) are similar to the provisions in Bankruptcy Code Section 365(c)(1) and (2). Subsection (5)(a) requires the counterparty’s consent for assumption essentially if applicable law would excuse the counterparty from accepting performance from anyone other than the owner (even if the contract itself does not restrict assignment). Subsection (5)(b) requires the counterparty’s consent for the assumption of a contract to make a loan or extend credit or financial accommodations to the owner.

Subsection (6) provides that a receiver may not assign a contract without first assuming it, unless the counterparty consents to the assignment. Further regarding assignability, subsection (9) provides that nothing in this Code affects the enforceability of anti-assignment provisions in the contract or in applicable law. This is contrary to section 365(f) the bankruptcy code, which invalidates such anti-assignment provisions under certain circumstances.

Subsection (7) protects the property interests of certain counterparties in the event of rejection and, in that way, is similar to the protections afforded counterparties in Bankruptcy Code Sections 365(h)(i) and (h)(ii), 365(i), and 365(n). Generally, the
protected parties are given the choice of accepting the rejection and asserting their claim for rejection damages against the estate, or remaining in possession of the property under the terms of the contract. The protected parties are a purchaser in possession under a contract for the sale of real property of the owner; the purchaser of a real property time share interest; the licensee of intellectual property rights; and the lessee of real property.

The receiver is given 180 days from appointment to seek authorization from the court to assume an executory contract. Any contracts that the receiver does not assume during that time will be deemed rejected, but the court may shorten to lengthen that 180-day period for good cause shown.

Section 25. Use or transfer of estate property outside ordinary course of business:

This section permits the receiver to use and/or transfer estate property, outside the ordinary course of the owner’s business, and provides substantial guidance on the carrying out and results of the transfer.

Using the estate property outside the ordinary course of the owner’s business may be a fruitful source of income for the receivership; for example, the receiver of a vineyard and winery operation might decide to permit the occasional rental of the property for weddings or receptions.

The power of a receiver to sell estate property outside the ordinary course of the owner’s business has not always been clear, particularly when the receivership applied only to certain assets of the owner (for example, one parcel of land among many), in which case the receiver has sometimes been viewed as having only a custodial role. The recent real estate crisis, however, has spotlighted the idea that receivership sales may help to realize better value for all concerned as compared to foreclosure sales. Foreclosure sales do not consistently produce prices that approximate the market value that might be obtained in an arms-length, non-distress sale. By contrast, a receiver of mortgaged commercial real property could readily market that property to potential buyers in the context of operating the property during the receivership. Such marketing could permit potential buyers to perform more meaningful and complete due diligence.

Analogous to a foreclosure sale, the sale by the receiver under subsection (2) is free of the lien of the person that obtained appointment of the receiver, and of subordinate liens, but not free of liens having priority. This is because the nature of subordinate property interests is that they get extinguished by those having priority, and the nature of property interests having priority is that they ride through the process. (Under subsection (3), the subordinate liens attach to the proceeds of the transfer by the receiver.)

The transfer may be by public auction; or the transfer may be by other methods such as a privately negotiated agreement. Public auction procedures are generally thought to
ensure a fair price more or less as a matter of course, because unduly low bidders will
not prevail. Although privately negotiated agreements do not carry the same matter-of-
course safeguard, the fact that the sale is only “upon court order” and is also subject to
court-prescribed “standards or procedures calculated to maximize the proceeds of the
transfer” under subsection (2) should provide similar assurances. In fact, because
private negotiations provide buyers with the flexibility to investigate the property before
buying or bidding, they may often result in higher proceeds for the benefit of all
concerned.

Under subsection (4), a creditor who wishes to purchase may “credit-bid,” i.e. buy by
setoff. Because the debtor owes the creditor, the creditor may in effect pay the purchase
price by forgiving the debt owed by the debtor (in whole or in part, depending on the
amount the creditor wishes to bid and/or ultimately pay). However, if this credit-
bidding creditor is junior to another creditor, though, the credit-bidding creditor must
tender in cash the amount owed to the senior creditor. This is because forgiveness of the
debt owed by the debtor does not benefit the senior creditor.

There are two provisions designed to provide finality to the purchaser and thereby help
enable the securing of a workable purchase price. First, the sale is free of any right of
redemption that the owner may have (just as it is free of certain liens as noted above), so
that the purchaser does not risk an upset of the transaction. And second, under
subsection (5) the transfer to the purchaser remains valid (and the liens noted above
remain extinguished) even if, after the transfer, the order authorizing the transfer is
reversed or modified for some sufficient reason, such as the demonstration that the
order was procured through fraud on the court. This second protection is subject to a
requirement that the purchaser have been acting in good faith, which is defined in
subsection (9) as having both a subjective component (“honesty in fact”) and an
objective one (“the observance of reasonable commercial standards of fair dealing”).

The rights of co-owners of property are protected in a balancing test that takes into
account the need for receivers to carry out a transfer of the property. The interest of a
co-owner that is not estate property may be transferred (along with the interest that is
estate property) if the court makes a three-part determination: that partition is
impracticable; that the sale without the co-owner’s interest would realize significantly
less for the estate; and that the benefit to the estate of the sale outweighs the detriment
to the co-owner. Though not expressly stated in the statute, of course the portion of the
proceeds that is attributable to the interest of the co-owner that is not estate property
would go to that co-owner.

The ordinary course of an owner’s business is a fact-sensitive inquiry not defined in this
Code and is accordingly left to judicial development in particular cases.

Regarding the transfer of intellectual property under this section, the Work Group
adopted Comment 4 of Section 16 of the UCRERA, which provides:

*With respect to intellectual property, the rights of an owner may be limited to the rights of a nonexclusive licensee who has no ability to*
transfer the owner’s rights as licensee without the consent of the licensor. In such a situation, the receiver could assume no greater rights than the owner had, and those rights would remain subject to the provisions of Section 90408 of the Uniform Commercial Code.

Section 26. Receivership financing:

It may be necessary for a receiver to operate the business of the owner for a period of time and in doing so, the receiver may need to obtain credit or incur debt. Section 26 permits the receiver who is authorized to operate the business to obtain credit and incur debt in the ordinary course of business and expenses related to such debt are allowable as administrative expenses.

The receiver may also obtain credit, including secured credit, other than in the ordinary course of business but only with court approval.

Section 27. Recovery of costs related to secured property:

The ability to “surcharge” a secured creditor’s collateral is an important resource available to receivers (and to trustees in bankruptcy), particularly in cases where there is little or no equity to pay even administrative expenses. For this reason, Section 27 permits a receiver to recover from property securing a secured claim the necessary costs and expenses of preserving or disposing of such property to the extent of any benefit to the holder of the secured claim.

Section 28. Abandonment:

The ability to abandon property that is burdensome or of inconsequential value is often necessary to help conclude the administration of the estate. To that end, Section 28, gives the receiver that power to abandon such property after giving notice. Abandoned property is no longer estate property.

The receiver is explicitly prohibited from abandoning estate property in contravention of a state statute or rule designed to protect the public health or safety from identified hazards.

Section 29. Actions by & against the receiver or affecting estate property:

Section 29 provides that a person may not sue a receiver personally for an act or omission in administering estate property, unless permitted by the court that appointed the receiver. This section incorporates into the Code the Barton doctrine, which derives from the decision of the U.S. Supreme Court in Barton v. Barbour, 104 U.S. 126, 129 26 L.Ed. 672 (1881). In Barton, the Supreme Court held that in order to sue a court-
appointed receiver, the plaintiff must first seek approval of the appointing court.

A person may not commence or continue an action to dispossess the receiver of any estate property or otherwise interfere with the receiver’s management, unless permitted by the court.

This section also allows for the receiver to be joined or substituted as party in an action pending before the appointment in which the owner was a party.

The section also addresses the role of successor receivers in actions by or against the receiver in the event of the death, removal or resignation of the original receiver.

**Section 30. Personal Liability of the receiver:**

It is well established law that as an officer of the court, a receiver is shielded by judicial immunity for actions performed under the lawful authority of the appointment order. Consistent with that established law, this section provides that the receiver has no personal liability for acts or omissions consistent with the scope of the appointing order or any order of the court. And the receiver is entitled to all defenses and immunities provided by law for an act or omission within the scope of the receiver’s appointment.

While it is often possible for a receiver to determine before accepting an appointment whether any estate property is environmentally hazardous, it is possible that such information does not come to light until after the appointment. In order to protect the receiver, subsection (5) specifically provides that nothing in this section may be construed to expand any obligation or liability of a receiver under state law, common law, or federal law for remediation of environmental damages or hazards.

On the other hand, a receiver may be personally liable if the receiver has caused the loss or diminution of value to estate property through a failure to comply with a court order or performing acts or omissions of the kind for which liability is not limited for a director (like intentional misconduct or a knowing violation of law).

**Section 31. Employment & compensation of professionals:**

Sound management of estate property may require the employment of professionals to assist the receiver, including but not limited to attorneys, accountants, appraisers, brokers, real estate licensees, and auctioneers. Retention and compensation of such professionals is accordingly expressly permitted. Notice of the proposed employment must be given beforehand to the parties specified in Section 17, and under subsection (2) of this Section 31. The notice must include key facts including the rate of compensation and any potential conflicts of interest. In the event of an objection to the employment, the employment may continue until such time as the court sustains the objection.
Certain relationships that might be construed as presenting a possible conflict of interest – such as the professional’s having relationship with a creditor or other interested person – do not in themselves disqualify the professional from employment under this section. However, if by reason of such a relationship or otherwise the professional holds or represents an interest adverse to the estate, the professional may not be employed except by order of the court. For example, if an attorney represents an owner of land adjoining estate property with respect to an active dispute over the boundaries of the estate property, the attorney is disqualified from employment under this section except by order of the court.

Subsection (5) provides that the receiver him- or herself may act as attorney or accountant, but other professional roles such as appraiser are not similarly provided for and, by negative implication, the receiver is prohibited from acting in those other capacities, on the theory that the inherent potential for conflict is too great. Even for the roles of attorney or accountant, the receiver may employ him- or herself only if this is in the best interests of the estate. Circumstances such as the receiver’s high familiarity with complex facts may satisfy this standard, but an unrestricted right of the receiver to retain him- or herself in these capacities presents too great a potential conflict of interest.

Section 32. Participation of creditors & other interested persons in receivership; effect of receivership on nonparties:

This section provides broad rules on who is bound by the acts of the receiver and the orders of the court. (To be bound by an act or order under this section is to be barred from bringing a motion or proceeding to contest the act or order.) Generally, the status of having been joined as a party to the proceeding is immaterial.

Persons are bound by the acts of the receiver so long as they have actual or constructive notice of the pendency of a receivership. Constructive notice would presumably be found from publication in a newspaper of general circulation in the applicable counties, once a week for two consecutive weeks as required by Section 33(3). It could also presumably be found from information made widely available in appropriately directed social or other media. The particular reference to newspaper publication is attributable in part to the fact that sales of real property are often publicized by that medium.

Persons having a claim against estate property, or an interest in it, are bound by sales of estate property free and clear of liens, and by other orders of the court, if they have actual knowledge of the receivership. The actual knowledge standard may depend on proof of notice and a receiver’s compliance with the notice provision of the Code or court order.
Section 33. Initial notice to creditors & other interested persons:

The receiver will give notice of the receivership to all known creditors and any interested persons within 30 days of the receiver’s appointment. Subsections (a) through (h) set out the essential initial information for creditors that this notice must contain, such as the appointment of the receiver, the name of the court and the case number of the receivership, a claims bar date if one has been set, and a statement that the person may not receive further notices unless the person requests to join the special mailing list.

Unless otherwise ordered by the court, the receiver will give this notice by first class mail and by publication in a newspaper of general circulation in the applicable counties at least once a week for two consecutive weeks.

Section 34. Claims process:

If the receiver determines there are insufficient assets to make distributions to creditors, then there is no reason to have a claims process and the receiver will simply give notice of that determination. But, if the receiver determines that there are sufficient assets for distributions, then the receiver will send out notice announcing and describing the claims process, the relevant bar dates, and the forms or other information necessary for submitting claims.

Section 35. Submission of claims by creditors:

Once a claims process has been established, but not before that time, claims may be submitted by delivering them to the receiver rather than by filing them with the court. Subsection (5) requires the court to forward to the receiver any claims mistakenly filed with the court.

All unsecured claims that arose before the appointment date, whether contingent, liquidated, unliquidated or disputed, must be submitted in order to receive a distribution. Unless otherwise ordered by the court, claims must be submitted within 30 days after the claims process is established, but there are different deadlines for claims for damages arising from rejection of executory contracts and for claims by state agencies. The receiver may prescribe the claim form, but if none is prescribed, the claim must be in writing and satisfy the minimal requirements for the proof of claim in subsection 4(a) through (d). A claim submitted in accordance with these requirements constitutes prima facie evidence of the validity and amount of the claim.

Section 36. Objection to allowance of claims:

This section sets forth the procedures for disallowance of claims. At any time before entry of an order approving the receiver’s final report, a claim may be disallowed by the
receiver (upon court order after 21 days’ notice), or by the court (after a hearing on an objection by an interested person held after 21 days’ notice).

Any objection to a claim may be subject to mediation before adjudication by the court (except for claims held by the state, unless the state consents) upon a request by a creditor, the receiver, the objector, or upon court order.

Because the fixing of contingent or unliquidated claims may unduly delay the administration of the estate, this section permits the estimation of these claims for purposes of allowance. Similarly, it permits the estimation of any right to payment arising from breach of an equitable remedy. Claims estimated under this section are allowed in the estimated amount. Allowance of estimated claims are subject to payment by order of the court.

Section 37. Priorities:

Claims in a receivership will receive distributions in a set priority.

Secured creditors are to be paid from the proceeds of their collateral after payment of any “surcharge” (described in Section 27 infra) for the necessary costs and expenses of preserving, or disposing of, the collateral to the extent of any benefit to the holder of the secured claim.

The actual, necessary administrative expenses of the estate are a third priority, ahead of the secured claim of any creditor who sought the appointment of the receiver.

The claims of the U.S. government pursuant to 31 U.S.C. §3713 are a fourth priority.

Creditors with liens on estate property that do not have to be perfected under applicable law are a fifth priority. These creditors actually just receive the proceeds of the disposition of their collateral.

Secured creditors with unperfected liens are a sixth priority, and receive the proceeds of the disposition of their collateral if and to the extent that applicable law makes unsecured creditors subject to those liens.

The holder of wage, salary and commission claims earned within 180 days of the earlier of the receiver’s appointment and the cessation of the business have a dollar-capped claim which is a seventh priority. This priority is based on Bankruptcy Code §507(a)(4), which, along with the other dollar-capped provisions of the Bankruptcy Code, are increased at three-year intervals to reflect changes in the Consumer Price Index for All Urban Consumers, published by the Department of Labor. While the Work Group was cognizant of its limitations in drafting this periodic increase into this Code, the Work Group nonetheless recommends to the Legislature that it enact such periodic adjustments.
The holders of lay-away claims – claims arising from the deposit of money with the owner before the receivership in connection with the purchase, lease or rental of property or personal services for personal, family or household use – are an eighth priority. Like the seventh priority for wage claims above, this priority also has a dollar cap, and the Work Group makes the same recommendation to the Legislature to enact periodic adjustments.

Claims for spousal or child support are a ninth priority, except to the extent that the debt is assigned to another entity, voluntarily or by operation of law, or includes an obligation that is not actually in the nature of a support obligation (even if labeled as such).

Tax claims of state governmental units accrued before the receivership are a tenth priority.

Unsecured claims are an eleventh priority, followed only by the interests of the owner. So, only if all of the claims have been paid in this section may the receiver pay any residue to the owner.

To the extent any secured creditors are undersecured, they hold unsecured claims for the deficiency.

Except for the first priority “surcharge claims and the fourth priority U.S. government claims, all of the other claimants receive distributions on a pro rata basis within their priority.

Section 38. Secured claims against after-acquired property:

State law other than this Code provides that the collateral available to a secured creditor may, under certain circumstances, include property acquired by the debtor after the making of the loan. Section 38 of this Code provides that an allowed secured claim benefits, to that same extent, by property acquired by the estate or the owner after the appointment of the receiver.

The applicable circumstances most frequently include an express provision in a loan document. In addition, when a loan transaction involves collateral that naturally turns over, such as inventory or accounts receivable, but the documentation does not include an express after-acquired property provision, courts will sometimes construe such a provision as being tacitly implied.

SECTION 39. Ancillary receiverships:

An owner may have property located in more than one state, but the jurisdictional limitations of an Oregon court may cause an Oregon receiver to lack appropriate power over non-Oregon estate property. Section 39 addresses this problem in subsection (1) by
providing that the Oregon receiver may, by order of the Oregon court, apply to the court of another state for appointment as receiver with respect to estate property located in that state. In seeking the order of the Oregon court the receiver may move ex parte for an expedited hearing.

Subsection (2) addresses the converse problem in other states. It provides that a person appointed as receiver by another jurisdiction may move (more likely petition) an Oregon court for appointment as receiver with respect to property of the other jurisdiction’s receivership that is located in Oregon. Section 6(3)(a) of this Code provides that upon such a motion (or petition), the Oregon court shall so appoint the person, if the person is eligible under Section (7) of this Code. Section 6(3)(b) provides that the Oregon court shall, with limited exceptions for manifest injustice, give effect to orders of the other jurisdiction’s court affecting the Oregon property. For example, under Section (6)(3)(b), the Oregon court could enter an order authorizing a foreign receiver to repossess personal property collateral in Oregon, rather than requiring the petitioning receiver to incur the cost of having to obtain the appointment of an ancillary receiver in Oregon.

Section 40. Removal of receiver:

Subsection (1) permits the court to remove a receiver for “cause”, including the receiver’s resignation or refusal to serve. The Code does not define “cause” but instead leaves it to the discretion of the court. This Work Group chose to give the court flexibility because the facts and circumstances often vary substantially from one receivership to another.

If further administration of the estate is required after removal, resignation or death of the receiver, the court may appoint a successor who immediately takes possession of the estate and assumes the duties of receiver.

Under subsection (3), once a replaced receiver has provided a full accounting for all receivership property and full report of all receipts and disbursements during its tenure, the replaced receiver is discharged from further duties and responsibilities as receiver.

Section 41. Termination of receivership:

This section provides for the termination of the receivership and the discharge if the receiver once the receiver has filed a final report and accounting complying with subsection (2), the court has approved that report after notice and an opportunity for a hearing as required in Section 18, and the receiver has distributed or disposed of all receivership property in the manner directed by the court and this Code. The final report is based on the same general template as any of the periodic reports filed by the receiver pursuant to Section 20 of this Code.

If, upon termination for any reason, the court determines that the receiver was wrongfully procured or procured in bad faith, the court may impose on the person who
procured the receiver’s appointment all of the receiver’s fees and other costs, and any other sanctions the court finds appropriate.

**Section 42. Applicability:**

This Code will apply to receiverships in which the receiver is appointed on or after January 1, 2018.

**Section 43.**

In accordance with Section 4 of this Code, ORCP 80 is amended to provide that this Code controls over conflicting provisions of ORCP 80 with respect to receivership governed by this Code.

**Section 44.**

This section provides that, similar to the existing exemptions of fiduciaries and trustees, ORS 465.255(3) shall be amended to provide that “a receiver appointed under” this Code shall not be liable for remedial action costs incurred by the state or any other person that are attributable to or associated with a facility, or for damages for injury to or destruction of any natural resources caused by a release.

**Sections 45-58.**

These sections consist of necessary conforming amendments as well as miscellaneous provisions.

**IV. Conclusion:**

The Oregon Receivership Code should be adopted because it draws upon the state’s own expertise as well as respected Uniform Law Commission and Washington State statutes in order to provide well-tailored solutions to practical questions that have long afflicted the conduct of receivership proceedings in Oregon.
Senator Bill 899
Sponsored by COMMITTEE ON JUDICIARY

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor’s brief statement of the essential features of the measure as introduced.

Establishes Task Force on Receivership. Directs task force to study and recommend changes to law governing receivership in Oregon. Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to receivership; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. (1) The Task Force on Receivership is established.
(2) The task force consists of five members appointed as follows:
(a) The President of the Senate shall appoint three members from among members of the Senate.
(b) The Speaker of the House of Representatives shall appoint two members from among members of the House of Representatives.
(3) The task force shall study and recommend changes to the law governing receivership in Oregon.
(4) A majority of the members of the task force constitutes a quorum for the transaction of business.
(5) Official action by the task force requires the approval of a majority of the members of the task force.
(6) The task force shall elect one of its members to serve as chairperson.
(7) If there is a vacancy for any cause, the appointing authority shall make an appointment to become immediately effective.
(8) The task force shall meet at times and places specified by the call of the chairperson or a majority of the members of the task force.
(9) The task force may adopt rules necessary for the operation of the task force.
(10) The task force may presession file legislation in the manner provided in ORS 171.130 for interim committees. All legislation recommended by official action of the task force must indicate that it is introduced at the request of the task force.
(11) The task force shall report to the Legislative Assembly in the manner provided in ORS 192.245 at any time within 30 days after its final meeting or at a time the President and Speaker designate.
(12) The Legislative Policy and Research Director may employ persons necessary for the performance of the functions of the task force. The Legislative Policy and Research Director shall fix the duties and amounts of compensation of these employees. The task force shall

NOTE: Matter in boldfaced type in an amended section is new; matter [italic and bracketed] is existing law to be omitted. New sections are in boldfaced type.

LC 3278
use the services of continuing legislative staff, without employing additional persons, to the
greatest extent practicable.

(13) All agencies of state government, as defined in ORS 174.111, are directed to assist
the task force in the performance of the duties of the task force and, to the extent permitted
by laws relating to confidentiality, to furnish the information and advice the members of the
task force consider necessary to perform their duties.

SECTION 2. Section 1 of this 2017 Act is repealed on December 31, 2018.

SECTION 3. This 2017 Act being necessary for the immediate preservation of the public
peace, health and safety, an emergency is declared to exist, and this 2017 Act takes effect
on its passage.
Chapter 7B—Information and Highlights of the New Proposed Oregon Receivership Law
Chapter 8

Big Changes to the Chapter 13 Plan and Rules: To Opt Out Is Not the Only Question

**Moderator: The Honorable Fred Corbit**
U.S. Bankruptcy Court, Eastern District of Washington
Spokane, Washington

**The Honorable Brian Lynch**
U.S. Bankruptcy Court, Western District of Washington
Tacoma, Washington

**The Honorable Thomas Renn**
U.S. Bankruptcy Court, District of Oregon
Eugene, Oregon

**Andrea Breinholt**
Naliko Markel Trustee
Eugene, Oregon

**Michael Malaijer**
Office of the Chapter 13 Trustee
Tacoma, Washington

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Proposed Rule 3015

• New bankruptcy forms and rules are proposed by the Advisory Committee on Bankruptcy Rules. The Advisory Committee’s recommendations are highly regarded and ordinarily are adopted by the Supreme Court.

• A consensus of the Advisory Committee’s members and advisors concluded that a national Chapter 13 plan should be adopted.

• In 2013, the Committee circulated a mandatory national plan for public comment. In addition, the Committee circulated a proposed Rule 3015 which would have required Ch. 12 & 13 Debtors to use a national plan.
Substantial Disagreement

• Both the form of the proposed national plan, and the concept of making it mandatory, drew substantial opposition.

• Judge Lynch joined a group of 9 judges to organize an opposition. Eventually 144 bankruptcy judges signed a joint letter opposing the mandatory national plan.

Principal Concerns with National Plan

The letter signed by 144 Bankruptcy Judges expressed a wide range of concerns. These included:

– The absence of a demonstrable need for a national plan.
– The inability of a national plan adequately to address differences in the law across Circuits and states.
Concerns (continued)

– The failure of the national plan to provide adequate means for conduit mortgage payments.

– The absence of a distribution order to chapter 13 trustees.

– The potential for encouraging national debtor firms, with less attention to individual debtor needs.

Concerns (continued)

– An inability to adapt to changes arising by statute or through case law.

– The lack of consensus for a national plan creating a departure from historic practice.
The Compromise

• As a result of the widespread opposition, the Advisory Committee proposed a compromise with the adoption of Rule 3015.1.

• Under the proposed Rules 3015 and 3015.1, the national plan is mandatory unless a district “opts out”. Rule 3015.1 governs the criteria that a district should use to create a local plan.

• Absent an “opt out”, no district, debtor, trustee or lawyer may alter the national plan.

Opt Out Requirements

• A District may not opt-out unless it meets all of 3015.1’s requirements.

• Some are procedural, but some are substantive.

• The next slides will cover the details.
Overview of Requirements for a Local Form Chapter 13 Plan

Proposed Rule 3015.1 contains the following requirements for a local form Ch. 13 plan (a “Local Form Plan”):

a) A single Local Form Plan is adopted for the District and there is public notice and opportunity for comment;

b) Each paragraph is numbered and labeled in boldface type;

c) The local form plan includes an initial paragraph for the debtor to indicate that the plan does or does not accomplish various specified items.

d) The local form plan contains separate paragraphs for certain provisions; and

e) The local form plan contains a final paragraph for non-standard provisions and a debtor certification.

The Initial Paragraph

The initial paragraph of the Local Form Plan is to require the Debtor to indicate whether the plan does or does not:

(1) contain any non-standard provisions;

(2) limit the amount of a secured claim; or

(3) avoid a security interest or lien.
Separate Paragraphs for Specific Plan Provisions:

A Local Form Plan is to have separate paragraphs for the following provisions:

(1) curing any default and maintaining payments on a claim secured by the debtor’s principal residence;

(2) payment of a domestic support obligation;

(3) paying a 910-day claim (under the hanging paragraph of Section 1325(a)); or

(4) surrendering property that secures a claim with a request that the stay under Sections 362(a) and 1301(a) be terminated as to the surrendered collateral.

The Final Paragraph

The Local Form must have a final paragraph for the placement of nonstandard provisions (defined as “a provision not otherwise included in the Official or Local Form or deviating from it”) along with the statement that an nonstandard provision inserted elsewhere is void; and

It must also have a certification by the debtor’s attorney or by a pro se debtor, that the plan contains no nonstandard provision other than those set out in the final paragraph.
Summary

• Each district must use either national plan or a district-wide local plan.

• The local plan may only be adopted after “notice and an opportunity for public comment”.

• The likely deadline for adopting a local plan is December 1, 2017.

• If a local plan is not adopted, use of the national plan will be mandatory.
Proposed Revisions to Bankruptcy Rules

By Judge Rebecca B. Connelly, Chief U. S. Bankruptcy Judge, Western District of Virginia (1/5/17)

These proposed revisions may become effective December 1, 2017.

1. **Rule 2002 Notices:**
   a. The Clerk shall provide no less than 28 days’ notice of the hearing on confirmation of chapter 13 plans and no less than 21 days’ notice of the time to object to confirmation of the plan.
      i. Note: Current Rule 2002 directs the Clerk to provide 28 days’ notice of hearing on confirmation and 28 days’ notice of time for objecting to confirmation of a chapter 13 plan.
   b. Relatedly, Rule 3015(f) as amended specifies that objections to confirmation shall be filed no less than seven days in advance of the confirmation hearing.
      i. Note: Rule 2002 currently does not specifically direct that objection to confirmation must be filed in advance of the confirmation hearing.

2. **Rule 3002 Filing Proof of Claim or Interest:**
   a. The Rule is amended to clarify that all creditors, including secured creditors, shall file a proof of claim to have an allowed claim, although with specified exceptions.
   b. The bar date to file a proof of claim in voluntary chapter 7, chapter 13, and chapter 12 cases is reduced to 70 days after petition date.
      i. Note: Currently, Rule 3002 allows 90 days from the meeting of creditors and does not require secured creditors to file a proof of claim.
   c. The court may extend the time to file a claim up to 60 days based on the court’s determination that notice to a particular creditor was insufficient (but only for unlisted creditors or creditors with insufficient notice mailed to a foreign address).
   d. The Rule as amended clarifies that failure to file a proof of claim does not render the creditor’s lien void. See 11 U.S.C. § 506(d). Specifically, “A lien
that secures a claim against the debtor is not void due only to the failure of any entity to file a proof of claim.”

e. The Court may grant an extension of the deadline for a period of up to 60 days from the date of the order granting the extension.

f. Mortgage creditors secured by the debtor’s primary residence must file the proof of claim within 70 days of the petition but have until 120 days from the order for relief to file the supplement and attachments required by Rule 3001(c) and (d).

g. The exceptions to Rule 3002(c) apply in all cases noted, not only involuntary chapter 7 cases.

3. **Rule 3007** Objections to Claim:

   a. The objection and notice must be served on a claimant by first class mail to the person most recently designated on the claimant’s original or amended proof of claim as the person to receive notices, at the address so indicated; or

   (i) if the objection is to a claim of the United States, or any of its officers or agencies, in the manner provided for service of a summons and complaint by Rule 7004(b)(4) or (5); or

   (ii) if the objection is to a claim of an insured depository institution, in the manner provided by Rule 7004(h).

   (iii) If, in a chapter 9 or 11 case, no proof of claim was filed as authorized by Rule 3003(b)(1), then the objection and notice shall be served on the creditor by first class mail at the address contained in the schedule of liabilities and, if applicable, in the manner provided in subdivision (a)(2)(A)(i) or (a)(2)(A)(ii).

   (iv) The objection to claim must also be served on the debtor or debtor in possession and on the trustee if applicable, and if applicable the entity filing the proof of claim under Rule 3005 (guarantor, surety, indorser or codebtor).

   i. NOTE: Service of a plan seeking to determine the allowed amount of a secured or priority claim must be made in accordance with Rule 7004, under proposed amended Rule 3012(b).
b. The Rule clarifies that an objection to claim is a separate proceeding from plan confirmation, except that a plan may determine the value of a secured claim, except as to a governmental unit.

c. Service of the objection to claim must be made at least 30 days before any scheduled hearing on the objection or any deadline for the claimant to request a hearing.

4. **Rule 3012 Determining the Amount of Secured and Priority Claims:**

a. Determination of value of secured claim bifurcated under section 506(a) may be made through a chapter 12 or 13 plan. However, a request for determination of the amount of the secured claim of a governmental unit may be made only by motion or in a claim objection.

b. Accordingly, if made through a plan, no separate motion is required in order to bifurcate a secured claim under 506(a). The plan itself may accomplish the bifurcation.

c. The service of a plan seeking to determine the allowed amount of a secured claim, including a valuation motion, must be made in accordance with Rule 7004. **Notice** of the request to determine the amount of the secured or priority claim must be made to “the holder of the claim and any other entity the court designates.”

d. Determination of the amount that a claim is entitled to priority (section 507) may be made only by motion after a claim is filed or in a claim objection.

e. As with the above items, any plan which seeks to determine the allowed amount of a secured claim must be served in accordance with Rule 7004.

5. **Rule 4003(d) Exemptions:**

a. Proceeding to avoid a lien pursuant to section 522(f) may be made through a chapter 12 or 13 plan.

i. **NOTE:** The plan must alert creditors on the first page that the plan contains a lien avoidance provision.

ii. Service on the affected creditor must be made in accordance with Rule 7004.

iii. The creditor may object to the request under § 522(f) by challenging the validity of the exemption asserted to be impaired by the lien.
iv. The plan should disclose values and the elements necessary to meet the statutory requirements of section 522(f).

b. A request to avoid a lien under grounds other than § 522(f) will require an adversary proceeding. The Committee Note to this Rule provides “[l]ien avoidance not governed by this rule requires an adversary proceeding.”

6. **Rule 5009** Closing Chapter 7, Chapter 12, Chapter 13 and Chapter 15 Cases; Order Declaring Lien Satisfied:

a. Provides for a new procedure for a debtor to file an action to declare a lien satisfied.

b. The revised rule clarifies that the debtor may seek “an order declaring that the secured claim has been satisfied and the lien has been released under the terms of a confirmed plan.” *The rule provides a mechanism to obtain an order declaring the effects of a confirmed plan.*

c. The request shall be made by motion and served on the holder of the claim, and any other entity the court designates, in the manner provided by Rule 7004 for service of a summons and complaint.

d. This provision was added in order to deal with the often-troubling situation wherein a lien has been avoided but the lien remains of record in the state land records. The amendment provides the debtor with a mechanism to resolve this dilemma.

i. NOTE: This Rule does not mandate the action; it simply permits the option without prejudice to the debtor.

7. **Rule 7001**: Scope of Rules of Part VII

a. Amended to clarify that an action to determine the extent, validity and priority of a lien shall not include the actions contemplated under Rule 3012 or 4003(d).

8. **Rule 9009** Forms:

a. Prohibits deviations from the Official Form unless permitted by the national instructions for the form, the Bankruptcy Rules, or the form itself. “Official Forms may be modified to permit minor changes not affecting wording or the order of presenting information . . . .”
Official Form 113

Chapter 13 Plan

Part 1: Notices

To Debtors: This form sets out options that may be appropriate in some cases, but the presence of an option on the form does not indicate that the option is appropriate in your circumstances or that it is permissible in your judicial district. Plans that do not comply with local rules and judicial rulings may not be confirmable.

In the following notice to creditors, you must check each box that applies.

To Creditors: Your rights may be affected by this plan. Your claim may be reduced, modified, or eliminated. You should read this plan carefully and discuss it with your attorney if you have one in this bankruptcy case. If you do not have an attorney, you may wish to consult one.

If you oppose the plan’s treatment of your claim or any provision of this plan, you or your attorney must file an objection to confirmation at least 7 days before the date set for the hearing on confirmation, unless otherwise ordered by the Bankruptcy Court. The Bankruptcy Court may confirm this plan without further notice if no objection to confirmation is filed. See Bankruptcy Rule 3015. In addition, you may need to file a timely proof of claim in order to be paid under any plan.

The following matters may be of particular importance. Debtors must check one box on each line to state whether or not the plan includes each of the following items. If an item is checked as “Not Included” or if both boxes are checked, the provision will be ineffective if set out later in the plan.

| 1.1 | A limit on the amount of a secured claim, set out in Section 3.2, which may result in a partial payment or no payment at all to the secured creditor | Included | Not included |
| 1.2 | Avoidance of a judicial lien or nonpossessory, nonpurchase-money security interest, set out in Section 3.4 | Included | Not included |
| 1.3 | Nonstandard provisions, set out in Part 8 | Included | Not included |

Part 2: Plan Payments and Length of Plan

2.1 Debtor(s) will make regular payments to the trustee as follows:

$___________ per_______ for _____ months

[and $___________ per_______ for _____ months.] Insert additional lines if needed.

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.

Case number ___________________________________________
2.2 Regular payments to the trustee will be made from future income in the following manner:

Check all that apply.

- Debtor(s) will make payments pursuant to a payroll deduction order.
- Debtor(s) will make payments directly to the trustee.
- Other (specify method of payment): ____________________.

2.3 Income tax refunds.

Check one.

- Debtor(s) will retain any income tax refunds received during the plan term.
- Debtor(s) will supply the trustee with a copy of each income tax return filed during the plan term within 14 days of filing the return and will turn over to the trustee all income tax refunds received during the plan term.
- Debtor(s) will treat income tax refunds as follows:

2.4 Additional payments.

Check one.

- None. If “None” is checked, the rest of § 2.4 need not be completed or reproduced.
- Debtor(s) will make additional payment(s) to the trustee from other sources, as specified below. Describe the source, estimated amount, and date of each anticipated payment.

2.5 The total amount of estimated payments to the trustee provided for in §§ 2.1 and 2.4 is $__________.

Part 3: Treatment of Secured Claims

3.1 Maintenance of payments and cure of default, if any.

Check one.

- None. If “None” is checked, the rest of § 3.1 need not be completed or reproduced.
- The debtor(s) will maintain the current contractual installment payments on the secured claims listed below, with any changes required by the applicable contract and noticed in conformity with any applicable rules. These payments will be disbursed either by the trustee or directly by the debtor(s), as specified below. Any existing arrearage on a listed claim will be paid in full through disbursements by the trustee, with interest, at the rate stated. Unless otherwise ordered by the court, the amounts listed on a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) control over any contrary amounts listed below as to the current installment payment and arrearage. In the absence of a contrary timely filed proof of claim, the amounts stated below are controlling. If relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, then, unless otherwise ordered by the court, all payments under this paragraph as to that collateral will cease, and all secured claims based on that collateral will no longer be treated by the plan. The final column includes only payments disbursed by the trustee rather than by the debtor(s).

<table>
<thead>
<tr>
<th>Name of creditor</th>
<th>Collateral</th>
<th>Current installment payment (including escrow)</th>
<th>Amount of arrearage (if any)</th>
<th>Interest rate on arrearage (if applicable)</th>
<th>Monthly plan payment on arrearage</th>
<th>Estimated total payments by trustee</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>$______________________________</td>
<td>$__________</td>
<td>%</td>
<td>$________</td>
<td>$________</td>
</tr>
<tr>
<td>Disbursed by:</td>
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</tr>
<tr>
<td>Trustee</td>
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<tr>
<td>Debtor(s)</td>
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<td>Disbursed by:</td>
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<tr>
<td>Trustee</td>
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<tr>
<td>Debtor(s)</td>
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</tr>
</tbody>
</table>

Insert additional claims as needed.
3.2 Request for valuation of security, payment of fully secured claims, and modification of undersecured claims. Check one.

☐ None. If “None” is checked, the rest of § 3.2 need not be completed or reproduced.

The remainder of this paragraph will be effective only if the applicable box in Part 1 of this plan is checked.

☐ The debtor(s) request that the court determine the value of the secured claims listed below. For each non-governmental secured claim listed below, the debtor(s) state that the value of the secured claim should be as set out in the column headed Amount of secured claim. For secured claims of governmental units, unless otherwise ordered by the court, the value of a secured claim listed in a proof of claim filed in accordance with the Bankruptcy Rules controls over any contrary amount listed below. For each listed claim, the value of the secured claim will be paid in full with interest at the rate stated below.

The portion of any allowed claim that exceeds the amount of the secured claim will be treated as an unsecured claim under Part 5 of this plan. If the amount of a creditor’s secured claim is listed below as having no value, the creditor’s allowed claim will be treated in its entirety as an unsecured claim under Part 5 of this plan. Unless otherwise ordered by the court, the amount of the creditor’s total claim listed on the proof of claim controls over any contrary amounts listed in this paragraph.

The holder of any claim listed below as having value in the column headed Amount of secured claim will retain the lien on the property interest of the debtor(s) or the estate(s) until the earlier of:

(a) payment of the underlying debt determined under nonbankruptcy law, or

(b) discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor.

<table>
<thead>
<tr>
<th>Name of creditor</th>
<th>Estimated amount of creditor’s total claim</th>
<th>Collateral</th>
<th>Value of collateral</th>
<th>Amount of claims senior to creditor’s claim</th>
<th>Amount of secured claim</th>
<th>Interest rate</th>
<th>Monthly plan payment to creditor</th>
<th>Estimated total of monthly payments</th>
</tr>
</thead>
<tbody>
<tr>
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</tr>
</tbody>
</table>

Insert additional claims as needed.

3.3 Secured claims excluded from 11 U.S.C. § 506.

Check one.

☐ None. If “None” is checked, the rest of § 3.3 need not be completed or reproduced.

☐ The claims listed below were either:

(1) incurred within 910 days before the petition date and secured by a purchase money security interest in a motor vehicle acquired for the personal use of the debtor(s), or

(2) incurred within 1 year of the petition date and secured by a purchase money security interest in any other thing of value.

These claims will be paid in full under the plan with interest at the rate stated below. These payments will be disbursed either by the trustee or directly by the debtor(s), as specified below. Unless otherwise ordered by the court, the claim amount stated on a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) controls over any contrary amount listed below. In the absence of a contrary timely filed proof of claim, the amounts stated below are controlling. The final column includes only payments disbursed by the trustee rather than by the debtor(s).

<table>
<thead>
<tr>
<th>Name of creditor</th>
<th>Collateral</th>
<th>Amount of claim</th>
<th>Interest rate</th>
<th>Monthly plan payment to trustee</th>
<th>Estimated total payments by trustee</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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</tr>
</tbody>
</table>

Disbursed by:

☐ Trustee

☐ Debtor(s)

<table>
<thead>
<tr>
<th>Name of creditor</th>
<th>Collateral</th>
<th>Amount of claim</th>
<th>Interest rate</th>
<th>Monthly plan payment to trustee</th>
<th>Estimated total payments by trustee</th>
</tr>
</thead>
<tbody>
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</tr>
</tbody>
</table>

Disbursed by:

☐ Trustee

☐ Debtor(s)

Insert additional claims as needed.
### 3.4 Lien avoidance.

Check one.

- **None.** If "None" is checked, the rest of § 3.4 need not be completed or reproduced.

*The remainder of this paragraph will be effective only if the applicable box in Part 1 of this plan is checked.*

The judicial liens or nonpossessory, nonpurchase money security interests securing the claims listed below impair exemptions to which the debtor(s) would have been entitled under 11 U.S.C. § 522(b). Unless otherwise ordered by the court, a judicial lien or security interest securing a claim listed below will be avoided to the extent that it impairs such exemptions upon entry of the order confirming the plan. The amount of the judicial lien or security interest that is avoided will be treated as an unsecured claim in Part 5 to the extent allowed. The amount, if any, of the judicial lien or security interest that is not avoided will be paid in full as a secured claim under the plan. See 11 U.S.C. § 522(f) and Bankruptcy Rule 4003(d). If more than one lien is to be avoided, provide the information separately for each lien.

<table>
<thead>
<tr>
<th>Information regarding judicial lien or security interest</th>
<th>Calculation of lien avoidance</th>
<th>Treatment of remaining secured claim</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name of creditor</td>
<td>a. Amount of lien</td>
<td>Amount of secured claim after avoidance (line a minus line f)</td>
</tr>
<tr>
<td></td>
<td>$_________________________</td>
<td>$_________________________</td>
</tr>
<tr>
<td></td>
<td>b. Amount of all other liens</td>
<td></td>
</tr>
<tr>
<td></td>
<td>$_________________________</td>
<td></td>
</tr>
<tr>
<td></td>
<td>c. Value of claimed exemptions</td>
<td>+ $_________________________</td>
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<td></td>
</tr>
<tr>
<td></td>
<td>d. Total of adding lines a, b, and c</td>
<td>$_________________________</td>
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<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>e. Value of debtor(s)’ interest in property</td>
<td>- $_________________________</td>
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<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>f. Subtract line e from line d.</td>
<td>$_________________________</td>
</tr>
<tr>
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<tr>
<td></td>
<td>Extent of exemption impairment</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(Check applicable box):</td>
<td></td>
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<tr>
<td></td>
<td>Line f is equal to or greater than line a.</td>
<td>The entire lien is avoided. (Do not complete the next column.)</td>
</tr>
<tr>
<td></td>
<td>Line f is less than line a.</td>
<td>A portion of the lien is avoided. (Complete the next column.)</td>
</tr>
</tbody>
</table>

*Insert additional claims as needed.*

### 3.5 Surrender of collateral.

Check one.

- **None.** If "None" is checked, the rest of § 3.5 need not be completed or reproduced.

The debtor(s) elect to surrender to each creditor listed below the collateral that secures the creditor’s claim. The debtor(s) request that upon confirmation of this plan the stay under 11 U.S.C. § 362(a) be terminated as to the collateral only and that the stay under § 1301 be terminated in all respects. Any allowed unsecured claim resulting from the disposition of the collateral will be treated in Part 5 below.

<table>
<thead>
<tr>
<th>Name of creditor</th>
<th>Collateral</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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</tr>
</tbody>
</table>

*Insert additional claims as needed.*
Part 4: Treatment of Fees and Priority Claims

4.1 General
Trustee’s fees and all allowed priority claims, including domestic support obligations other than those treated in § 4.5, will be paid in full without postpetition interest.

4.2 Trustee’s fees
Trustee’s fees are governed by statute and may change during the course of the case but are estimated to be ________% of plan payments; and during the plan term, they are estimated to total $___________.

4.3 Attorney’s fees
The balance of the fees owed to the attorney for the debtor(s) is estimated to be $___________.

4.4 Priority claims other than attorney’s fees and those treated in § 4.5.
Check one.

☐ None. If “None” is checked, the rest of § 4.4 need not be completed or reproduced.

☐ The debtor(s) estimate the total amount of other priority claims to be _____________.

4.5 Domestic support obligations assigned or owed to a governmental unit and paid less than full amount.
Check one.

☐ None. If “None” is checked, the rest of § 4.5 need not be completed or reproduced.

☐ The allowed priority claims listed below are based on a domestic support obligation that has been assigned to or is owed to a governmental unit and will be paid less than the full amount of the claim under 11 U.S.C. § 1322(a)(4). This plan provision requires that payments in § 2.1 be for a term of 60 months; see 11 U.S.C. § 1322(a)(4).

<table>
<thead>
<tr>
<th>Name of creditor</th>
<th>Amount of claim to be paid</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$________________________</td>
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<tr>
<td></td>
<td>$________________________</td>
</tr>
</tbody>
</table>

Insert additional claims as needed.

Part 5: Treatment of Nonpriority Unsecured Claims

5.1 Nonpriority unsecured claims not separately classified.
Allowed nonpriority unsecured claims that are not separately classified will be paid, pro rata. If more than one option is checked, the option providing the largest payment will be effective. Check all that apply.

☐ The sum of $___________.

☐ ________% of the total amount of these claims, an estimated payment of $___________.

☐ The funds remaining after disbursements have been made to all other creditors provided for in this plan.

If the estate of the debtor(s) were liquidated under chapter 7, nonpriority unsecured claims would be paid approximately $___________. Regardless of the options checked above, payments on allowed nonpriority unsecured claims will be made in at least this amount.
5.2 Maintenance of payments and cure of any default on nonpriority unsecured claims. Check one.

☐ None. If “None” is checked, the rest of § 5.2 need not be completed or reproduced.

☐ The debtor(s) will maintain the contractual installment payments and cure any default in payments on the unsecured claims listed below on which the last payment is due after the final plan payment. These payments will be disbursed either by the trustee or directly by the debtor(s), as specified below. The claim for the arrearage amount will be paid in full as specified below and disbursed by the trustee. The final column includes only payments disbursed by the trustee rather than by the debtor(s).

<table>
<thead>
<tr>
<th>Name of creditor</th>
<th>Current installment payment</th>
<th>Amount of arrearage to be paid</th>
<th>Estimated total payments by trustee</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$___________________________</td>
<td>$___________________________</td>
<td>$___________________________</td>
</tr>
<tr>
<td>Disbursed by:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>☑ Trustee</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>☑ Debtor(s)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Insert additional claims as needed.

5.3 Other separately classified nonpriority unsecured claims. Check one.

☐ None. If “None” is checked, the rest of § 5.3 need not be completed or reproduced.

☐ The nonpriority unsecured allowed claims listed below are separately classified and will be treated as follows

<table>
<thead>
<tr>
<th>Name of creditor</th>
<th>Basis for separate classification and treatment</th>
<th>Amount to be paid on the claim</th>
<th>Interest rate (if applicable)</th>
<th>Estimated total amount of payments</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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<td>$___________________________</td>
<td>_____%</td>
<td>$___________________________</td>
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</tbody>
</table>

Insert additional claims as needed.

### Part 6: Executory Contracts and Unexpired Leases

6.1 The executory contracts and unexpired leases listed below are assumed and will be treated as specified. All other executory contracts and unexpired leases are rejected. Check one.

☐ None. If “None” is checked, the rest of § 6.1 need not be completed or reproduced.

☐ Assumed items. Current installment payments will be disbursed either by the trustee or directly by the debtor(s), as specified below, subject to any contrary court order or rule. Arrearage payments will be disbursed by the trustee. The final column includes only payments disbursed by the trustee rather than by the debtor(s).
Chapter 8—Big Changes to the Chapter 13 Plan and Rules: To Opt Out Is Not the Only Question

Debtor __________________________________________________________________________                Case number _______________ ____________

Name of creditor | Description of leased property or executory contract | Current installment payment | Amount of arrearage to be paid | Treatment of arrearage (Refer to other plan section if applicable) | Estimated total payments by trustee

_________________________  __________________________ $________  $________  ______________ $________
Disbursed by:

   ☐ Trustee
   ☐ Debtor(s)

_________________________  __________________________ $________  $________  ______________ $________
Disbursed by:

   ☐ Trustee
   ☐ Debtor(s)

Insert additional contracts or leases as needed.

Part 7: Vesting of Property of the Estate

7.1 Property of the estate will vest in the debtor(s) upon

Check the applicable box:

☐ plan confirmation.
☐ entry of discharge.
☐ other: ____________________________

Part 8: Nonstandard Plan Provisions

8.1 Check “None” or List Nonstandard Plan Provisions

☐ None. If “None” is checked, the rest of Part 8 need not be completed or reproduced.

Under Bankruptcy Rule 3015(c), nonstandard provisions must be set forth below. A nonstandard provision is a provision not otherwise included in the Official Form or deviating from it. Nonstandard provisions set out elsewhere in this plan are ineffective.

The following plan provisions will be effective only if there is a check in the box “Included” in § 1.3.

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
Chapter 8—Big Changes to the Chapter 13 Plan and Rules: To Opt Out Is Not the Only Question

Debtor ___________________________________________________________________________                Case number _______________ ____________

Official Form 113
Chapter 13 Plan

Part 9: Signature(s):

9.1 Signatures of Debtor(s) and Debtor(s)' Attorney

If the Debtor(s) do not have an attorney, the Debtor(s) must sign below; otherwise the Debtor(s) signatures are optional. The attorney for the Debtor(s), if any, must sign below.

[Signature of Debtor 1]
Executed on _________________

[Signature of Debtor 2]
Executed on _________________

[Signature of Attorney for Debtor(s)]
Date _________________

By filing this document, the Debtor(s), if not represented by an attorney, or the Attorney for Debtor(s) also certify(ies) that the wording and order of the provisions in this Chapter 13 plan are identical to those contained in Official Form 113, other than any nonstandard provisions included in Part 8.
**Exhibit: Total Amount of Estimated Trustee Payments**

The following are the estimated payments that the plan requires the trustee to disburse. If there is any difference between the amounts set out below and the actual plan terms, the plan terms control.

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Maintenance and cure payments on secured claims (Part 3, Section 3.1 total)</td>
<td>$__________</td>
</tr>
<tr>
<td>b. Modified secured claims (Part 3, Section 3.2 total)</td>
<td>$__________</td>
</tr>
<tr>
<td>c. Secured claims excluded from 11 U.S.C. § 506 (Part 3, Section 3.3 total)</td>
<td>$__________</td>
</tr>
<tr>
<td>d. Judicial liens or security interests partially avoided (Part 3, Section 3.4 total)</td>
<td>$__________</td>
</tr>
<tr>
<td>e. Fees and priority claims (Part 4 total)</td>
<td>$__________</td>
</tr>
<tr>
<td>f. Nonpriority unsecured claims (Part 5, Section 5.1, highest stated amount)</td>
<td>$__________</td>
</tr>
<tr>
<td>g. Maintenance and cure payments on unsecured claims (Part 5, Section 5.2 total)</td>
<td>$__________</td>
</tr>
<tr>
<td>h. Separately classified unsecured claims (Part 5, Section 5.3 total)</td>
<td>$__________</td>
</tr>
<tr>
<td>i. Trustee payments on executory contracts and unexpired leases (Part 6, Section 6.1 total)</td>
<td>$__________</td>
</tr>
<tr>
<td>j. Nonstandard payments (Part 8, total)</td>
<td>$__________</td>
</tr>
</tbody>
</table>

Total of lines a through j

$__________
Committee Note

Official Form 113 is new and is the required plan form in all chapter 13 cases, except to the extent that Rule 3015(c) permits the use of a Local Form. Except as permitted by Rule 9009, alterations to the Official Form are not permitted. As the form explains, spaces for responses may be expanded or collapsed as appropriate, and sections that are inapplicable do not need to be reproduced. Portions of the form provide multiple options for provisions of a debtor’s plan, but some of those options may not be appropriate in a given debtor’s situation or may not be allowed in the court presiding over the case. Debtors are advised to refer to applicable local rulings. Nothing in the Official Form requires confirmation of a plan containing provisions inconsistent with applicable law.

Part 1. This part sets out warnings to both debtors and creditors. For creditors, if the plan includes one or more of the provisions listed in this part, the appropriate boxes must be checked. For example, if Part 8 of the plan proposes a provision not included in, or contrary to, the Official Form, that nonstandard provision will be ineffective if the appropriate check box in Part 1 is not selected.

Part 2. This part states the proposed periodic plan payments, the estimated total plan payments, and sources of funding for the plan. Section 2.1 allows the debtor or debtors to propose periodic payments in other than monthly intervals. For example, if the debtor receives a paycheck every week and wishes to make plan payments from each check, that should be indicated in § 2.1. If the debtor proposes to make payments according to different “steps,” the amounts and intervals of those payments should also be indicated in § 2.1. Section 2.2 provides for the manner in which the debtor will make regular payments to the trustee. If the debtor selects the option of making payments pursuant to a payroll deduction order, that selection serves as a request by the debtor for entry of the order. Whether to enter a payroll deduction order is determined by the court. See Code § 1325(c). If the debtor selects the option of making payments other than by direct payments to the trustee or by a payroll deduction order, the alternative method (e.g., a designated third party electronic funds transfer program) must be specified. Section 2.3 provides
for the treatment of any income tax refunds received during the plan term.

**Part 3.** This part provides for the treatment of secured claims.

The Official Form contains no provision for proposing preconfirmation adequate protection payments to secured creditors, leaving that subject to local rules, orders, forms, custom, and practice. A Director’s Form for notice of and order on proposed adequate protection payments has been created and may be used for that purpose.

Section 3.1 provides for the treatment of claims under Code § 1322(b)(5) (maintaining current payments and curing any arrearage). For the claim of a secured creditor listed in § 3.1, an estimated arrearage amount should be given. A contrary arrearage or current installment payment amount listed on the creditor’s timely filed proof of claim, unless contested by objection or motion, will control over the amount given in the plan.

In § 3.2, the plan may propose to determine under Code § 506(a) the value of a secured claim. For example, the plan could seek to reduce the secured portion of a creditor’s claim to the value of the collateral securing it. For the secured claim of a non-governmental creditor, that determination would be binding upon confirmation of the plan. For the secured claim of a governmental unit, however, a contrary valuation listed on the creditor’s proof of claim, unless contested by objection or motion, would control over the valuation given in the plan. See Bankruptcy Rule 3012. Bankruptcy Rule 3002 contemplates that a debtor, the trustee, or another entity may file a proof of claim if the creditor does not do so in a timely manner. See Bankruptcy Rules 3004 and 3005. Section 3.2 will not be effective unless the appropriate check box in Part 1 is selected.

Section 3.3 deals with secured claims that under the so-called “hanging paragraph” of § 1325(a)(5) may not be bifurcated into secured and unsecured portions under Code § 506(a), but it allows for the proposal of an interest rate other than the contract rate to be applied to payments on such a claim. A contrary claim amount listed on the creditor’s timely filed proof of claim, unless contested by
objection or motion, will control over the amount given in
the plan. If appropriate, a claim may be treated under § 3.1
instead of § 3.3.

In § 3.4, the plan may propose to avoid certain
judicial liens or security interests encumbering exempt
property in accordance with Code § 522(f). This section
includes space for the calculation of the amount of the
judicial lien or security interest that is avoided. A plan
proposing avoidance in § 3.4 must be served in the manner
provided by Bankruptcy Rule 7004 for service of a
summons and complaint. See Bankruptcy Rule 4003.
Section 3.4 will not be effective unless the appropriate
check box in Part 1 is selected.

Section 3.5 provides for elections to surrender
collateral and requests for termination of the stay under
§ 362(a) and § 1301 with respect to the collateral
surrendered. Termination will be effective upon
confirmation of the plan.

Part 4. This part provides for the treatment of
trustee’s fees and claims entitled to priority status. Section
4.1 provides that trustee’s fees and all allowed priority
claims (other than those domestic support obligations
treated in § 4.5) will be paid in full. In § 4.2, the plan lists
an estimate of the trustee’s fees. Although the estimate
may indicate whether the plan will be feasible, it does not
affect the trustee’s entitlement to fees as determined by
statute. In § 4.3, the form requests a statement of the
balance of attorney’s fees owed. Additional details about
payments of attorney’s fees, including information about
their timing and approval, are left to the requirements of
local practice. In § 4.4, the plan calls for an estimated
amount of other priority claims. A contrary amount listed
on the creditor’s proof of claim, unless changed by court
order in response to an objection or motion, will control
over the amount given in § 4.4. In § 4.5, the plan may
propose to pay less than the full amount of a domestic
support obligation that has been assigned to, or is owed to,
a governmental unit, but not less than the amount that claim
would have received in a chapter 7 liquidation. See §§ 1322(a)(4)
and 1325(a)(4) of the Code. This plan
provision requires that the plan payments be for a term of
60 months. See § 1322(a)(4).
Part 5. This part provides for the treatment of unsecured claims that are not entitled to priority status. In § 5.1, the plan may propose to pay nonpriority unsecured claims in accordance with several options. One or more options may be selected. For example, the plan could propose simply to pay unsecured creditors any funds remaining after disbursements to other creditors, or it could also provide that a defined percentage of the total amount of unsecured claims will be paid. In § 5.2, the plan may propose to cure any arrearages and maintain periodic payments on long-term, nonpriority unsecured debts pursuant to § 1322(b)(5) of the Code. In § 5.3, the plan may provide for the separate classification of nonpriority unsecured claims (such as co-debtor claims) as permitted under Code § 1322(b)(1).

Part 6. This part provides for executory contracts and unexpired leases. An executory contract or unexpired lease is rejected unless it is listed in this part. If the plan proposes neither to assume nor reject an executory contract or unexpired lease, that treatment would have to be set forth as a nonstandard provision in Part 8.

The Official Form contains no provision on the order of distribution of payments under the plan, leaving that to local rules, orders, custom, and practice. If the debtor desires to propose a specific order of distribution, it must be contained in Part 8.

Part 7. This part defines when property of the estate will revest in the debtor or debtors. One choice must be selected—upon plan confirmation, upon entry of discharge the case, or upon some other specified event. This plan provision is subject to a contrary court order under Code § 1327(b).

Part 8. This part gives the debtor or debtors the opportunity to propose provisions that are not otherwise in, or that deviate from, the Official Form. All such nonstandard provisions must be set forth in this part and nowhere else in the plan. This part will not be effective unless the appropriate check box in Part 1 is selected. See Bankruptcy Rule 3015(c).

Part 9. The plan must be signed by the attorney for the debtor or debtors. If the debtor or debtors are not
represented by an attorney, they must sign the plan, but the signature of represented debtors is optional. In addition to the certifications set forth in Rule 9011(b), the signature constitutes a certification that the wording and order of Official Form 113 have not been altered, other than by including any nonstandard provision in Part 8.
Chapter 8—Big Changes to the Chapter 13 Plan and Rules: To Opt Out Is Not the Only Question

UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

In re

Case No. ____________________________

(Note: If blank, Case No. will be on the Meeting of Creditors Notice)

CHAPTER 13 PLAN DATED _____________; AND

☐ MOTION TO VALUE COLLATERAL (See Paragraph 2(b)(1) and (2) below);

☐ MOTION TO AVOID LIENS (See Paragraph 6 below)

☐ THIS PLAN SETS OUT NONSTANDARD PROVISIONS BEGINNING WITH

PARAGRAPH 10

Debtor(s)

NOTICE TO INTERESTED PARTIES: Your rights may be affected. Your claim may be modified or eliminated. You should read these papers carefully and discuss them with your attorney. If you do not have one, you may wish to consult one.

If you oppose the Plan treatment of your claim or any provision of this Plan, you must file an objection to confirmation (or one must be filed on your behalf) within fourteen days after the conclusion of the meeting of creditors, unless otherwise ordered by the Bankruptcy Court or provided in a notice of amendment. See Local Bankruptcy Rule 3015-3(c). Failure of a creditor to file a written objection to the plan shall constitute acceptance of the plan and the Bankruptcy Court may confirm the plan without further notice. If there are any additional plan provisions or provisions that alter the language of paragraphs 1-9, they shall be outlined in paragraphs 10+ below.

1. The debtor shall pay to the trustee:

(a) a monthly payment of $________________________;

(b) all proceeds from avoided transfers, including proceeds from transfers avoided by the trustee;

(c) upon receipt by the debtor, all tax refunds attributable to prepetition tax years and, upon receipt by the debtor, net tax refunds (i.e., tax refunds not otherwise provided for in the plan, less tax paid by debtor for a deficiency shown on any tax return for that same tax year or tax paid by setoff by a tax agency for a postpetition tax year) attributable to postpetition tax years during the: □ 36 months or □ 60 months from the date the first plan payment is due (note: refunds for the first three years of the plan are due in cases with 36 month commitment periods; refunds for all five years are due in cases with 60 month commitment periods);

(d) a lump sum payment of $________________________ on or before ______________ (date); and

(e) __________________________.

Debtor acknowledges that if the debtor is ever more than 30 days delinquent on any payment due under section 1(a) of this plan, upon motion of the trustee granted by the court after appropriate notice, a wage deduction order to debtor’s employer may be issued immediately.

2. The trustee shall disburse all funds received pursuant to paragraph 1 as follows:

(a) First, to the trustee’s percentage fee and expenses.

(b) Second, to secured creditors as provided in (1) and (2) below. Should the trustee not have sufficient funds in trust to pay fully the disbursements listed below, disbursements of funds available shall be made pro rata. The terms of the debtor’s prepetition agreement with each secured creditor shall continue to apply, except as otherwise provided in this plan or in the order confirming plan. Secured creditors shall retain their liens until payment of the underlying debt, determined under nonbankruptcy law, or discharge under §1328(a), at which time the lien shall terminate and be released by the creditor.

(1) Cure of Default and Claim Modification. The debtor will cure the default and maintain the contractual installment payments (as provided in paragraph 4) on the secured claims listed below in the “Estimated Arrearage if Curing” column. The amount listed in this column is an estimate; the creditor’s timely filed and allowed claim shall control. Claims provided for in the “Collateral Value if Not Paying in Full” column are allowed secured claims only to the extent of the value indicated, and pursuant to §506(a), the debtor MOVES the court for an order fixing the value of the collateral in the amount stated below. Unless a creditor timely objects to confirmation, the value of the creditor’s interest in the collateral shall be limited to the amount listed below, and that amount will be paid under the plan with interest at the rate stated below.
For claims provided for in the "Estimated Secured Claim if Paying Secured Claim in Full" column, the creditor will receive the amount of the claim that is secured as set forth on the creditor's timely proof of claim, except as follows:

If the claim is a "910 claim" not subject to 11 U.S.C. §506 pursuant to the hanging paragraph of 11 U.S.C. §1325(a)(9), the creditor will receive the total amount of the claim set forth on the creditor's timely proof of claim, even if that amount exceeds the secured portion of the claim.

For all creditors provided for under this subparagraph, if the creditor’s claim will not be paid in full, the portion of the creditor’s claim that exceeds the amount of the allowed secured claim shall be treated as an unsecured claim under paragraph 2(e) (if the claim identifies the priority position of the claim) and 2(f) below.

**Instruction to debtor(s):** Use only one of the following columns for each creditor: “Estimated Arrearage if Curing,” or “Collateral Value if Not Paying in Full,” or “Estimated Secured Claim if Paying Secured Claim in Full.” All other columns must be completed.

### Table: Creditor Information

<table>
<thead>
<tr>
<th>Creditor</th>
<th>Collateral</th>
<th>Estimated Arrearage if Curing</th>
<th>OR</th>
<th>Collateral Value if Not Paying in Full</th>
<th>OR</th>
<th>Estimated Secured Claim if Paying Secured Claim in Full</th>
<th>OR</th>
<th>Post-confirmation Interest Rate</th>
<th>OR</th>
<th>Monthly Plan Payment</th>
</tr>
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<tbody>
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</table>

**(2) Secured Claim Modification Not Expressly Authorized by the Code.** This subparagraph may include, but is not limited to, modification of a claim secured by a purchase money security interest in either (1) a motor vehicle acquired for personal use by the debtor within 910 days before the bankruptcy filing date, or (2) any other personal property collateral acquired within one year before the bankruptcy filing. Secured claims provided for in this subparagraph shall be limited to the amount indicated in the “Amount of Claim as Modified (Value of Collateral)” column. The debtor MOVES the court for an order fixing the value of the collateral in the amount stated below.

DEBTOR PROPOSES THAT THE CREDITOR(S) SPECIFICALLY IDENTIFIED BELOW ACCEPT, EITHER EXPRESSLY OR IMPLIEDLY, THE FOLLOWING TREATMENT WHICH THE COURT MIGHT NOT BE ABLE TO APPROVE ABSENT CONSENT OF CREDITOR(S). FAILURE OF A CREDITOR TO FILE A WRITTEN OBJECTION TO THIS PLAN PRIOR TO CONFIRMATION SHALL CONSTITUTE ACCEPTANCE OF THE PLAN.

<table>
<thead>
<tr>
<th>Creditor</th>
<th>Collateral</th>
<th>Amount of Claim as Modified (Value of Collateral)</th>
<th>Post-confirmation Interest Rate</th>
<th>Monthly Plan Payment</th>
</tr>
</thead>
<tbody>
<tr>
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</tbody>
</table>

**(3) Adequate protection payments shall be disbursed by the trustee pre-confirmation from funds on hand with the trustee in the payment amounts specified in the plan for personal property secured creditors, absent a provision in this plan or a court order providing for a different amount to be paid pre-confirmation. If the debtor fails to make a monthly payment sufficient to pay the adequate protection payments in full, the trustee will disburse the funds pro rata according to the monthly payments proposed for those creditors. Adequate protection payments paid through the trustee pre-confirmation will be deducted from the amount of the allowed claim. Unless the concerned creditor is fully secured or oversecured for purposes of §506 or §1325(a)(9), no interest shall be paid from the date of the filing of the petition to the date of confirmation unless otherwise specifically provided for in the payment provisions set forth above.
(4) Attorney Compensation: Original attorney fees and expenses are $__________, of which $__________ remains unpaid. If debtor has agreed to an estimated rather than a fixed fee, upon application, the court in its sole discretion may award not more than $500 in addition to the above amount without further notice. Attorney fees are to be paid either: □ From all available funds after paragraph 2(b) payments are made; or □ Other ____________________________

(5) The debtor shall surrender any collateral not otherwise addressed by the terms of this plan no later than upon confirmation of this plan to the following (i.e., state creditor NAME followed by DESCRIPTION of collateral to be surrendered. If the debtor does not have possession of the collateral, this should be indicated below):

(c) Third, pro rata until fully paid, allowed unsecured domestic support obligations under §507(a)(1).

(d) Fourth, allowed administrative expenses under §507(a)(2).

(e) Fifth, pro rata, until fully paid, to allowed priority claims in the order stated in §507(a)(3)-(10), including §1305 claims.

(f) Sixth, pro rata, to timely filed and allowed nonpriority unsecured claims, the amounts required by §1325(b)(1). These monies will be distributed in the method indicated in the section marked below [MARK ONLY ONE].

(1) The creditors will receive approximately _______ % of their claims. Payment of any dividend will depend upon the amount of allowed secured claims, the amount of allowed priority claims (including costs of administration and the debtor's attorney's fees), and the total amount of allowed, nonpriority unsecured claims.

(2) The creditors will receive a minimum _______ % of their claims. This percentage will not be reduced regardless of the amount of total creditors' claims filed.

(g) Pursuant to §1325(a)(4), the "best interest of creditors" number is determined to be $______________, and not less than that amount shall be distributed to unsecured priority and, pro rata, non-priority creditors with timely filed and allowed claims. The total amount of allowed priority claims will reduce the amount distributed to unsecured, non-priority creditors.

(h) Pursuant to §1325(a)(4), all allowed unsecured claims shall receive interest of _______ % from the time of confirmation.

3. The debtor ASSUMES the following executory contracts and leases:

<table>
<thead>
<tr>
<th>Creditor</th>
<th>Amount of Default [State if None]</th>
<th>Cure Provisions</th>
</tr>
</thead>
<tbody>
<tr>
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</tbody>
</table>

Those executory contracts or leases not specifically mentioned above are treated as rejected. Any timely filed and allowed claim arising from rejection shall be treated under paragraph 2(f). The debtor will pay all assumed executory contracts and leases directly, including amounts required to cure. The debtor shall surrender any property covered by rejected executory contracts or leases to the affected creditor no later than upon confirmation of this plan.

4. The debtor shall pay directly to each of the following creditor(s), whose debts are either fully secured or are secured only by a security interest in real property that is the debtor's principal residence, the regular payment due post-petition on these claims in accordance with the terms of their respective contracts, list any pre-petition arrearages in paragraph 2(b)(1) and/or specify any other treatment of such secured creditor(s) in an additional paragraph at the end of this plan.

5. Subject to the provisions of §502, untimely claims are disallowed, without the need for formal objection, unless allowed by court order.

6. The debtor MOVES, pursuant to §522(f)(1), to avoid the judicial liens and/or non-purchase money security interests of 1300.14 (12/1/16) [Note: Printed text may not be stricken.]
the following creditors because they impair an exemption(s) of the debtor:

Absent objection from a creditor, the order of confirmation will avoid its lien and its claim will be treated in paragraph 2(f).

7. The applicable commitment period of this plan is □ 36 or □ 60 months. Debtor(s) shall make plan payments for the length of the commitment period unless the debtor(s) first pay 100% of all allowed claims with appropriate interest. If the commitment period is 36 months, the plan payments may continue for a longer period, not to exceed 60 months, as necessary to complete required payments to creditors. The approximate length of the plan is ______ months; cause to extend longer than 36 months is as follows:

8. This plan may be altered post-confirmation in a non-material manner by court order after notice to the debtor, the trustee, any creditor whose claim is the subject of the modification and any interested party who has requested special notice.

9. Debtor Certification. Debtor(s) certifies that the petition was filed in good faith, and this plan was proposed in good faith and not by any means forbidden by law. Debtor(s) further certifies that all postpetition domestic support obligations have been paid in full on the date of this plan and will be paid in full at the time of the confirmation hearing.

ADDITIONAL NONSTANDARD PROVISIONS (separately number below or on attachment(s), beginning with 10):

DEBTOR

CERTIFICATE OF SERVICE on Creditors/Parties Treated in Paragraphs 2(b)(1) (under the “Collateral Value if Not Paying in Full” column), 2(b)(2) (under the “Amount of Claim as Modified” column), 3, and 6 (see FRBP 3012, 4003(d), and 9014, and LBR 6006-1(b)). I certify that copies of this plan and the notice of hearing to confirm this plan were served as follows:

a) For creditors/parties who are not Insured Depository Institutions (served by court) (see FRBP 7004(b)), I either listed the creditors/parties in the mailing list filed with the court exactly as follows, OR, on (insert date) ____________, I served the above-documents by first-class mail to the creditors/parties at the names and addresses exactly as follows (list each creditor/party, the person or entity the creditor/party was served through, and the address):

b) For Insured Depository Institutions (see FRBP 7004(h)), on (insert date) ____________, I served the above-documents by certified mail, or by other authorized means (specify), at the name and address exactly as follows (list each insured depository institution, the person or entity the institution was served through, and the address):

DEBTOR OR DEBTOR’S ATTORNEY

1300.14 (12/1/16)  Page 4 of 4  [Note: Printed text may not be stricken.]
UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

In re
 ) Case No.________________
 ) CONFIRMATION HEARING DATE ___________
 )
 ) ORDER CONFIRMING PLAN
 ) AND RESOLVING MOTIONS

Debtor(s)

The debtor's plan having been provided to creditors and the Court having found that it complies with 11 USC §1325, now, therefore IT IS ORDERED:

1. The debtor's plan dated __________, as modified by any amendment shown in ¶11, is confirmed.

2. The debtor shall incur no credit or debt obligations during the life of the plan without the trustee's written consent unless made necessary by emergency or incurred in the ordinary course of operating the debtor's business. Unless waived by the trustee in writing, the debtor shall report immediately, upon receipt of notice of the change, to the trustee if actual or projected gross annual income exceeds by more than 10% the gross income projected by the debtor in the most recently filed Schedule I. Except for those amounts listed in the schedules, the debtor shall report immediately to the trustee any right of the debtor or debtor's spouse to a distribution of funds (other than regular monthly income) or other property which exceeds a value of $2,500.00. This includes the right to disbursements from any source, including, but not limited to, bonuses and inheritances. Any such funds to which the debtor becomes entitled shall be held by the debtor and not used without the trustee's permission, or, if such permission is not obtained, a court order. The debtor shall not buy, sell, use, lease (other than a lease of real property in which the debtor will reside), encumber or otherwise dispose of any interest in: (a) real property; or (b) personal property with a value exceeding $10,000.00 outside the ordinary course of business without notice to all creditors and the trustee, with an opportunity for hearing unless such property is acquired through the use of credit and the trustee's permission is obtained pursuant to the first sentence of this paragraph.

3. During the life of the plan, the debtor(s) shall timely file all required tax returns and provide copies of all tax returns to the trustee each year immediately upon filing with the taxing authority. The debtor's failure to pay postpetition tax and/or domestic support obligations may constitute cause for dismissal of the debtor's Chapter 13 case under 11 USC §1307(c).

[Note: Printed text may not be stricken]
4. (a) Per the filed Application for Compensation (LBF #1305), compensation to debtor’s counsel of $_______ is approved.

(b) If Schedule 2(b) was selected, and the fees and expenses as certified at the end of this document are less than those estimated on the filed Application for Compensation (LBF #1305), fees and expenses in the amount of $_______ are approved.

A total of $_______ has been paid, leaving $_______ to be paid as funds become available per ¶2(b)(4) of the plan.

5. The value of collateral securing debts due holders of secured claims is fixed at the values stated in the plan or the modifications in ¶11 below, only if a valuation motion(s) was included in the plan and served as required under FRBP 7004, or the allowed amount of the secured claim was fixed by consent of the concerned secured creditor. In all other circumstances, the value of such collateral, if contested, shall be established through the claims process or otherwise, as provided in title 11 or the FRBP. Executory contracts and unexpired leases are assumed or rejected as provided in the plan or the modifications in ¶11 below. The name and service address for each creditor affected by this paragraph are [Note: List alphabetically and only one creditor per line]:

6. Nothing in the proposed plan or in this order shall be construed to prohibit the trustee from prevailing in any adversary proceedings filed under 11 USC §§544, 545, 547, 548 or 549.

7. (a) Pursuant to 11 USC §522(f)(1)(A) the court hereby avoids the following judicial liens [Note: Listed alphabetically, and only one per line, include each creditor’s name and service address]:

(b) Pursuant to 11 USC §522(f)(1)(B) the court hereby avoids the following non-purchase money liens [Note: Listed alphabetically, and only one per line, include each creditor’s name and service address]:

8. The debtor, if operating a business without a tax account, shall open a separate bank account and promptly deposit all sums withheld from employees’ wages and all employer payroll taxes, and shall make no disbursements from such account except to pay tax liabilities arising from payment of wages.

9. All payments under the confirmed plan shall be paid no later than 5 years after the date the first payment was due under 11 USC §1326(a)(1). If all payments are not completed by that date, the case may be dismissed.

10. All creditors to which the debtor is surrendering property pursuant to the plan are granted relief from the automatic stay to effect possession and to foreclose.

[Note: Printed text may not be stricken]
11. The debtor moves to amend the plan by interlineation as follows, which amendments are allowed and become part of the confirmed plan [Note: Listed alphabetically, and only one per line, include the name and a service address for any creditor whose address is not listed in ¶5]:

12. Creditors with prepetition claims excepted from the debtor(s)' discharge are enjoined from initiating any collection actions against the debtor(s) until this case is closed, dismissed, or converted to another chapter under title 11, unless they obtain relief from this order.

13. The terms of this order are subject to any objection filed within 15 days by [Note: Listed alphabetically, and only one per line, include the name and a service address for any creditor whose address is not listed in ¶¶ 5, 7 or 11]:

14. The trustee is authorized to commence disbursements in accordance with the plan.

15. In the event this case is converted to Chapter 7, and the Chapter 13 trustee possesses funds aggregating more than $2,500.00 at the time of conversion, the Chapter 13 trustee shall forward all such funds to the debtor, in care of the debtor's attorney, if any, 10 days after the first scheduled §341(a) meeting in the Chapter 7 case unless, prior to that date, the Chapter 7 trustee files and serves a written objection pursuant to 11 USC §348(f)(2). In the event the funds in the trustee's possession at such time aggregate $2,500.00 or less, or in the event this case is dismissed, the Chapter 13 trustee shall forward all funds in the trustee's possession to the debtor in care of the debtor's attorney, if any. Nothing in this paragraph is to be construed as a determination of the rights of the parties to such funds.

16. All mortgage creditors are granted relief from the automatic stay and co-debtor stay to negotiate with the debtor and co-debtor regarding modification of the underlying loan agreements, providing that any modification must receive the written consent of the trustee or be approved by order of the Court in order to become effective. Negotiations with represented debtors must be with debtor's counsel who may consent to the creditor communicating directly with the debtor.

I certify that on __________ I served this Order on the trustee for submission to the court.

[To be completed if debtor's attorney elected to be paid per Schedule 2(b) on LBF #1305.] I further certify under penalty of perjury that, through __________ [date], I have incurred hourly fees of $__________, and expenses of $__________, for a total of $___________. A total of $__________ has been paid to me for the fees and expenses, leaving $__________ to be paid through the plan. I have contemporaneous time and expense records and will provide an itemization of my fees and expenses to the Court or any party in interest in this case upon request.

Approved: ________________________________

Debtor or Debtor's Attorney

Trustee

[Note: Printed text may not be stricken.]
Chapter 9

Judges Panel—Practical Guidance from the Bench

Moderator: The Honorable Frank Kurtz
U.S. Bankruptcy Court, Eastern District of Washington
Yakima, Washington

The Honorable Trish Brown
U.S. Bankruptcy Court, District of Oregon
Portland, Oregon

The Honorable Mary Jo Heston
Western District of Washington
Seattle, Washington

The Honorable David Hercher
U.S. Bankruptcy Court, District of Oregon
Portland, Oregon

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Sample Cover Letter to Debtor from Oregon DOJ Enclosing Request for Admission and Statement of Agreed Facts ........................................... 9–1
January 17, 2017

Re:  
State of Oregon, Employment Department v. 
Adversary Proceeding No.  
Bankruptcy Case No.

Dear [Name Redacted]:

This letter accompanies many pages. The first document is a request for admission. It has 95 questions, asking you to admit that certain statements are true. After the first 22 pages, I’ve included the documents I will use to prove the statements at trial if you do not admit that they are true, to help you understand why you should answer “Admit” to each question.

The proof documents are mostly from the Employment Department’s computers, and I don’t expect that you will automatically be able to understand what they are showing you, so I will walk you through the first several requests. The first request is to “Admit that you claimed that you worked 29 hours and earned $403 in gross pay for the week ending July 11, 2015.”

Go to the document marked with the blue tab. It’s the computer report that was generated from the report you made by computer on July 12, 2015 at 4:22 p.m. There is a separate page for each week you claimed benefits.

The second request is to “Admit that you earned $482.13 in gross pay for the week ending July 11, 2015.” Go to the page with the red tab and see the yellow highlighted column “Employer Reported Earnings.” That’s the easy place to see what your employer reported on the yellow-tabbed document. You’ll see I highlighted $482.13 there, too. There is one mistake on the red-tabbed document, on the line for the week ending October 17, 2015, where it is entered that you earned $8,108.19 that week! The typist misread the employer’s report that you earned $868.19. The correct amount doesn’t change the result for you at all, but I wanted to explain the huge wrong number on the report.

The third question asks you to “Admit that you received at least $285 in unemployment compensation from the Plaintiff for the week ending July 11, 2015.” Again, go to the red-tabbed document and see the blue highlighted column “Benefits Paid.” That’s the easy place to see how much you received for that week.
Please complete your answers to the Request for Admissions and return it so that my office receives it no later than February 1, 2017.

The second document is the Statement of Agreed Facts. We need to submit this document to Judge Brown by February 1, 2017 if we are going to trial. If I have not received this back from you by that date, I will submit a similar document to the court, and note that I have given this to you for your comments and received nothing back.

Finally, there is a stipulated judgment. If after reviewing everything, you acknowledge that the State will be able to prove its case and are willing to stipulate that we would receive a judgment in our favor declaring your debt to the state in the amount of $11,992.60 plus interest and costs to be not discharged in your bankruptcy, please sign the stipulated judgment and return it to me.

There is a warning that accompanies the requests for admission, and is the reason I include the back-up materials to show you how I intend to prove the allegations. If you do not admit an allegation in the request for admissions, and I later prove it in court at trial, I am entitled to receive my attorney fees for proving that fact that you should have admitted. I will take the position that any work I need to do after this point will be because you did not admit those facts which are clearly proven by those documents. That will add a significant amount to the already-significant debt you owe the Employment Department.

Please think about how the best way you can resolve this matter. If you want to talk to me about it, call me THIS WEEK, at

Thank you for your attention to this matter.

Very truly yours,

Carolyn G. Wade
Senior Assistant Attorney General

Enclosure(s)
Chapter 10

Individual and Closely Held Company Bankruptcies: Unique Legal Issues—Day Traders to Day Cares

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I. INTRODUCTION

The representation of individual debtors who own interests in closely held companies as well as the representation of small companies in Chapter 7 and Chapter 13 Bankruptcy cases involve a wide and complex range of issues that should be recognized and analyzed before any filing. Careful consideration must be given not only to direct factual and legal analysis, but also to the seemingly endless collateral issues that may negatively impact any bankruptcy filing. Such issues must be weighted with the goal to achieve efficient and economical administration of the bankruptcy case, and most importantly a reduction of the risk of malpractice. However, as we discuss below, there are circumstances where a corporate chapter 7 filing may be appropriate.

II. BANKRUPTCY BASICS INVOLVING COMPANY INTERESTS

A. Pre-Filing Considerations

Chapter 7 liquidation bankruptcy for individuals is the backbone of the Chapter 7 universe. Chapter 7 bankruptcy for closely held companies is rare, or at least should be because the tangible benefits to people who own and operate a business is “de minimis”. A company may not receive a discharge in bankruptcy and therefore cannot exempt its assets. As such, an attorney must correctly consider whether it is an individual that needs to file personal bankruptcy versus a company bankruptcy, or both. However, as we discuss below, there are circumstances where a corporate chapter 7 filing may be appropriate.

1. Community property and non-community property

In general, community property states take the view that all debts and property acquired during marriage belong to both spouses equally. The law presumes joint ownership, regardless of who acquired the asset. This includes ownership interests in a limited liability company or a corporation. Washington is a community property state and consideration must be given to the communal nature of such ownership interests. In the case of a divorce, the court will divide such ownership interests.

Unlike Washington, Oregon is not a community property state, and views property as belonging to the spouse who earned it. Deriving ownership
interests held by a client considering either personal or company bankruptcy is critical to meeting the goals of the prospective bankruptcy proceeding.

**B. Individual Ownership Interests**

1. **Debtor’s interest in a company**

   An individual debtor’s interest in either a corporation or a limited liability company is personal property. Federal courts have considered LLCs to be the same as corporations in a bankruptcy context. In the non-insider context, an LLC “fits comfortably within the Bankruptcy Code’s definition of ‘corporation.’” *Sherron Associates Loan Fund XXI (Lacey) L.L.C. V. Thomas (In re KRSM Props. L.L.C.),* 318 B.R. 712, 717 (9th Cir. BAP 2004) (where the court, considering whether an LLC was a “person” for purposes of the Code and thus eligible to be a debtor, held that an LLC fits within the definition of “corporation” as used in § 101(41)). Whether a corporation or a limited liability company, the nature of an individual’s personal property interest is a creation of contracts among members and shareholders, as well as a creature of state statute.

   A corporation is formed and regulated in accordance with a state’s laws. In Washington, corporations are regulated by the Washington Business Corporations Act, RCW 23B *et seq.* In Oregon, corporations are regulated by Oregon Private Corporations Act found at ORS 60 *et seq.* A corporation is governed by its bylaws, which specify the rules and guidelines for adhering to the requirements of the corporation’s operations. A shareholder’s agreement will specify the shareholder’s relationship to each other as it is not typically stated in the bylaws. This includes the buy-sell provision and what happens in the event of a bankruptcy of a shareholder.

   A limited liability company is likewise formed and regulated in accordance with state statute. In Washington, a limited liability company is subject to the provisions of RCW 25.15 *et. seq.* In Oregon, similar governing statutes are found at ORS 63 *et. seq.* A limited liability company’s business operations, member’s financial relationship to the company, and managerial rights, subject to statute, are all governed by an operating agreement. The
Operating Agreement will generally provide for buy-sell provisions, management, and operation of the company. It also accounts for the economic interest in the company, including right to distributions of money.

To properly advise a prospective client, counsel will want to review at a minimum:

- Copies of operating agreements and of by-laws, including amendments;
- Copies of any shareholder agreements;
- Prior tax returns and related tax documents;
- Verification of state of formation and good standing;
- Dissolution decree awarding any company interests; and
- Profit and loss statement.

C. Property of the Bankruptcy Estate

All an individual debtor’s contractual rights and interest in shares of a corporation or membership interests in an LLC, both legal and equitable, become property of the bankruptcy estate under 11 U.S.C. § 541(a)(1) by operation of law when the bankruptcy petition is filed. Although the question of whether an interest claimed by the debtor is ‘property of the estate’ is a federal question to be decided by federal law, bankruptcy courts must look to state law to determine whether and to what extent the debtor has any legal or equitable interests in property as of the commencement of the case.” McCarthy, Johnson Miller v. N. Bay Plumbing, Inc. (In re Pettit), 217 F3d 1072 (9th Cir. 2000) (citing Butner v. United States, 440 U.S. 48, 54-55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979)).

The United State Bankruptcy Code (hereinafter: the “Code”) provides that the “…estate is comprised of all the following property, wherever located and by whomever held…all legal or equitable interests of the debtor in property as of the commencement of the case.” See 11. U.S.C. § 541(a)(1). “Section 541(a)(1) speaks in terms of the debtor’s ‘interests…in property,’ rather than property in which the debtor has an interest, but this choice of language was not meant to limit the expansive scope of the section.” See, United States v. Whitting Pools, Inc., 462 U.S. 198, 205 n. 8, 103 S.Ct. 2309, 2314, 76 L.Ed.2d 515 (1983) (e.g., the estate includes property in which a
creditor holds a security interest); and Johnston v. Hazlett (In re Johnston), 209 F/3d 611, 613 (6th Cir.2000) (the estate is very broad and includes all property of the
debtor whether exempt or nonexempt). A debtor’s interest in stock of a corporation is
property of the estate. See Staats v. Meade (In re Meade), 84 B.R. 106, 107
(Bankr.S.D.Ohio 1988) (“Stocks and other forms of securities are regarded by the
courts as property of the estate.”) (citing In re Cumberland Enters., Inc., 22 B.R. 626
(Bankr.M.D.Tenn. 1982)).

1. Schedule B and SOFA Disclosures

A debtor’s interest in a corporation or limited liability company must be
fully disclosed at Schedule B. Category 19 – Non-publicly traded stock and
interests in incorporated and unincorporated businesses, including an interest in
an LLC partnership, and joint venture. The entity’s name and address must be
clearly identified along with percentage of ownership disclosed, communal
property nature defined, and said interest must be properly valued from official
Form 106.

In addition to Schedule B, care must be taken to accurately complete the
Statement of Financial Affairs (SOFA) Official Form B107 or 207 and answer the
following questions:

- 18 – property transactions outside ordinary course of business (two
  years)
- 27 – ownership connections to business (four years);
- 28 – parties to whom a financial statement was given (two years).

Both the debtor and counsel have an affirmative and continuous duty to
reflect the property and estate accurately. The Bankruptcy Code is not ambiguous
about the consequences of not reporting property of the estate as the debtor’s
discharge may be revoked pursuant to 11 U.S.C. § 727. The continuing nature of
the duty to assure accurate schedules of assets is essential because the viability of
the system of voluntary bankruptcy depends on the full, candid and complete
disclosure of the debtors of their financial affairs. In re Searles 314 B.R. 368, 378
(9th Cir. BAP 2004). Retaining a secret benefit of equity in property satisfies the
requirement of concealment of assets under § 727(a)(2)(A). See In re Lawson 122 F.3d 1237 (9th Cir. 1997) (debtor’s granting of a deed of trust to her mother supported a finding that debtor concealed property to satisfy the denial of discharge for concealment of assets under § 727(a)(2)(A)).

As bankruptcy courts have instructed, “A debtor cannot, merely by playing ostrich and burying his head deeply enough in the sand, disclaim all responsibility for statements which he has made under oath.” In re Pynn, 546 B.R. 425 (C.D. Cal 2016), quoting In re Tully, 818 F.2d 106, 111 (1st Cir. 1987).

2. Corporate Ownership Statement (Rule 7007.1)

Pursuant to Federal Rule of Bankruptcy Procedure 7007.1, counsel for the debtor is required to certify which, if any, corporation(s) directly or indirectly own 10% or more of any class of corporation’s equity interests.

D. Economic and Non-Economic Rights

Rights in a corporation or a limited liability company are not holistic, but are comprised of two fundamental categories of rights:

(1) Economic rights (right to distribution)

(2) Non-economic rights (management, sales of interests, etc.)

Upon a bankruptcy filing, the asset of stock or membership interest becomes property of the estate, and the Chapter 7 Trustee steps into the shoes of the debtor with respect to economic and non-economic rights. Apart from single member limited liability companies and 100% closely held corporations, all statutes restrict crediting remedies to the debtor’s economic rights and do not allow creditors to interfere with the debtor’s non-economic rights. Statutes accomplish this proclamation by only allowing creditors to take interest against stock or limited liability company interest by way of a Charging Order (for Oregon LLC’s, See ORS 63.259). Similarly, a Chapter 7 Trustee’s interest in a multi-member LLC or multi-shareholder company is also in some respect limited by state law. The limitations on a Chapter 7 Trustee’s noneconomic rights require a painstaking factual and legal analysis of relevant
controlling documents in conjunction with state statutes, as well as application of Section 365 and Section 541(c) of the Bankruptcy Code.

Because of the variation in the states’ LLC laws, and the wide-ranging possibilities of operating agreement provisions, each case must be evaluated on its own in order to determine the nature of the membership interest under non-bankruptcy law. Bankruptcy law and non-bankruptcy law may conflict, creating issues a court may ultimately need to decide upon.

1. Sole Member LLC or 100% Stock Ownership Corporation

When an individual files bankruptcy and owns 100% of stock of a corporation or is the sole member of a limited liability company, all the debtor’s rights in the corporation or limited liability corporation become property of the estate, both economic and management rights. *In re First Protection, Inc.*, 440 B.R. 821, 830 (9th Cir. BAP 2010); *In re B+M Land & Livestock, LLC*, 498 B.R. 262 (Bankr. D. Nevada 2013); *In re Parles*, 503 B.R. 820, 832 (Banker W.D. Wash. 2014); *A-Z Elecs. LLC*, 350 B.R. 886 (Bankr. D. Idaho 2006). The Chapter 7 Trustee steps into the shoes of the debtor and may, among other things:

- Abandon the interest in the company
- If granted authority under §721, Dissolve the company
- If granted authority under §721, Manage the company and operates the business
- Sell the interest of the company
- If granted authority under §721, Place the company into bankruptcy

2. Multi Member LLCs and Multi Shareholder Corporations

Generally, most closely held corporations and limited liability companies have provisions within governing documents that distinguish a member or shareholder of non-economic interest upon filing for bankruptcy. Such a restrictive provision treats the debtor member as an assignee. The debtor is entitled to retain an economic interest in the company, but may not be entitled to...
exercise any of its non-economic rights. This issue is prevalent in most limited liability company operating agreements. The legal issue surrounding the enforceability of such a provision, both legally and practically, is driven by the controlling governing documents and statutes. The legal issues presented can easily become a legal quagmire for debtor’s counsel, trustees, and fellow members or shareholders.

If the debtor has a membership interest in a multi-member LLC, the Chapter 7 Trustee can market the economic component of that membership interest (i.e. the right to receive distributions and pass-through of profits and/or losses during the ongoing operation of the LLC and upon its dissolution). However, the Trustee may have difficulty in exercising the debtor’s managerial or voting rights associated with the membership interest (although some jurisprudence suggests that trustees do obtain such rights), and the Trustee may face legal obstacles in forcing the liquidation of the LLC to get an immediate distribution of the full net asset value of the debtor’s membership interest for the benefit of the debtor’s bankruptcy estate. *In re Ehmann*, 319 B.R. 200 (Bankr. D. Arizona, 2005); *Northwest Wholesale, Inc., vs Pac Organic Fruit LLC et al.*, 184 Wn.2d 176, 357 Po.3d 650 (Wash. 2015).

In Washington, RCW 25.15.130(1)(d) provides that a person ceases to be a member of an LLC when he or she files for bankruptcy, unless the LLC agreement provides otherwise or unless all other members consent in writing to the debtor member’s continuation as a member. A similar provision exists under Oregon law at ORS 63.265(1). Absent written consent of the other members or language in an LLC agreement to the contrary, RCW 25.15.130(1)(d) terminates a member’s noneconomic interest in an LLC when he or she files for bankruptcy.

This issue of termination of a member’s noneconomic interest was addressed in the bankruptcy context by the Washington Supreme Court, which held that the disassociation provisions found in RCW 25.15.130(1)(d) are not preempted by federal law and affirmed the dismissal of the former LLC member’s derived claim under the facts of the case *Northwest Wholesale, Inc. vs. Pac*
Organic Fruit, LLC et al. In so ruling, the Washington Supreme Court acknowledged that § 365(e)(1) nullifies ipso facto clauses but relied on In re Catapult Entertainment, Inc., 165 F.3d 747 (9th Cir. 1999), for the proposition that § 365(e)(2)(A) expressly revives ipso facto clauses in situations where non-debtor parties do not consent to an assignment of another member’s interest. There, member GHI did not consent to any assignment of the Ostensons’ membership interests in the LLC. Accordingly, the Court concluded that “§ 365(e)(2)’s exception to § 365(e)(1)’s prohibition of ipso facto provisions applies” and the “express protections of associational rights of non-debtor members found in WALLCA (Washington Limited Liability Company Act) triggers § 365(e)(2)’s exception, rendering § 365(e)(1)’s prohibition of ipso facto clauses inapplicable. Generally, courts will evaluate an operating agreement using the “Countryman” criteria, and unless the bankrupt member had active managerial obligations, or mandatory cash-call obligations, courts will likely conclude that the operating agreement is not an executory conflict. See 11 U.S.C. § 365(c).

3. Authority to File

Bankruptcy courts must look to state law to determine who has authority to commence a bankruptcy case on behalf of a limited liability company organized pursuant to state law. In re Orchards Village Investments, LLC, 405 B.R. 341 (Bankr. D. Or. 2009); In re Avalon Hotel Partners, LLC, 302, B.R. 377 (Bankr. D. Or. 2003). Courts will look to the controlling of the governing documents of the company as well as state statutes for the authority and capacity of an officer or manager or member to file a bankruptcy on behalf of a company.

Although controlling a governing document of a company may purport to prohibit a bankruptcy filing by the company, such negative covenants are unreliable as a matter of public policy. See Continental Ins. Co. v. Thorpe Insulation CO. (In re Thorpe Insulation Co.), 671 F.3d 1011 (9th Cir. 2012); Wank v. Gordon (In re Wank), 505 B.R. 878 (B.A.P. 9th Cir. 2014). However, as a general rule, corporate formalities and applicable state law must be satisfied in commencing a bankruptcy case. See In re NNN 123 N. Wacker, LLC, 510 B.R.
854 (Bankr. N.D. Ill. 2014); Courts have refused to enforce contractual provisions
which erode a debtor’s ability to file bankruptcy. See In re Bay Club Partners-
472, LLC, 2014 BL 125871 (Bankr. D. Or. May 6, 2014) (refusing to enforce
restrictive covenant in debtor limited liability company’s operating agreement,
rather than loan agreement, prohibiting bankruptcy filing and stating that
covenant “is no less the maneuver of an ‘astute creditor’ to preclude [Bay Club
Partners] from availing itself of the protections of the Bankruptcy Code
prepetition, and it is unenforceable as such, as a matter of public policy”).

The Bankruptcy Code provides that, after notice and hearing, a Trustee
may sell, other than in the ordinary courses of business, property of the estate. See
11 U.S.C. § 363(b)(1). Under § 541(c), a debtor’s interest in property becomes
property of the estate notwithstanding any provision in an agreement or applicable
non-bankruptcy law “(A) that restricts or conditions transfer of such interest by
the debtor;” or (B) that is conditioned on the filing of a case under the Bankruptcy
Code and “that affects or gives an option to affect a forfeiture, modification, or
termination of the debtor’s interest in property.” See 11 U.S.C. § 541 (c)(1). Such
provisions are referred to as “ipso facto” clauses and are not effective in
preventing transfer of a debtor’s interest to the bankruptcy estate. A Trustee may
sell property under § 363(b) free and clear of any interest in such property of an
entity other than the estate, only if:

- Applicable non-bankruptcy law permits sale of such property free
  and clear of such interest;
- Such entity consents;
- Such interest is a lien and the price at which such property is to be
  sold is greater than the aggregate value of all liens on such
  property;
- Such interest is in bona fide dispute; or
- Such entity could be compelled, in a legal or equitable proceeding,
  to accept a money satisfaction of such interest.

Under Oregon and Washington law, stock and limited liability company interests may be transferred unless there is a restriction on the transferability of the stock or membership interest. Courts will look to the applicable governing documents and the company to determine if restrictions on a transfer are indeed a “ipso facto” provision conditioned on the commencement of a bankruptcy case concerning a member or shareholder. See In re Capital Acquisitions & Mgmt. Corp., 341 B.R. 362, 637 (Bankr. N.D. Ill. 2006) (filing right of first refusal was not an enforceable “ipso facto” clause, as it was not triggered by the debtor’s bankruptcy filing. Thus, 363(1) does not necessarily excuse a Trustee from compliance with the requirements of governing documents or state statutes in the process of selling membership interests.)

However, in the case of In Re Cutler, 165 B.R. 275 (Bankr. D. Ariz. 1994) the Bankruptcy Court upheld the Chapter 7 Trustee’s right to the ¼ interest in profits and surplus corresponding to the debtor’s 25% partnership interest in a company, free and clear of the partnership agreement’s provision granting the other partners the option to purchase the debtor’s interest at book value, but also holding that the Trustee could not assume the debtor-partner’s management function, nor could the Trustee compel the sale of the partnership assets.

E. Attorney/Client Privilege Owned by Closely Held Companies

“YOU WANT WHAT?” An often over looked issue arising from both an individual chapter 7 bankruptcy filing or a closely held company chapter 7 bankruptcy filing is transfer of “ownership of the attorney client privilege of the company and/or debtor as the Bankruptcy Trustee becomes responsible for administering the bankruptcy estate. As “owner” of the privilege, a Chapter 7 Trustee has rights and may request disclosure of all the petitioned communications, documents, files, notes, and the dreaded “emails of hypothetical” between debtor’s counsel and the debtor.
In *Commodity Futures Trading Comm. V. Weintraub*, 471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985), the Supreme Court held that a Chapter 7 Trustee may waive the attorney/client privilege on behalf of a corporate debtor. *See Weintraub*, 471 U.S. at 352-54. Thus, the Chapter 7 Trustee in *Weintraub* could require the debtor’s former attorney to testify as to conversations held between the attorney and the debtor. *See Weintraub*, 471 U.S. at 358. Likewise, *Weintraub*’s holding also means that a Trustee can require an officer/director of a corporate debtor to testify about conversations held between the officer/director and the debtor’s attorney, as the Trustee may waive the privilege on the debtor’s behalf. However, the Supreme Court in *Weintraub* stated “our holding today has no bearing on the problem of individual bankruptcy, which we have no reason to address in this case.” *See Weintraub*, 471 U.S. at 356. As such, divergent case law exists as to whether a Trustee has the power to waive an individual debtor’s attorney/client privilege. However, debtor’s counsel must take such issues into account prior to filing any bankruptcy proceeding on behalf of a company or a debtor who owns an interest in a closely held company.

F. Tax Implications

First and foremost admonition to a client: THIS IS NOT TAX ADVICE. Any tax information contained in this message was not intended or written to be used, and cannot be used, for the purpose of avoiding penalties that may be imposed under federal law. By regulation, a taxpayer cannot rely on professional advice to avoid federal tax penalties unless that advice is reflected in a comprehensive tax opinion that conforms to strict requirements.

The filing of bankruptcy of an LLC can have income tax consequences for individual members if the Trustee sells the asset. Income for such a sale might be taxable for the individual members and not the bankruptcy estate. An LLC is a “pass through” tax entity that does not pay income taxes and the bankruptcy estate assesses the taxpayer status of the debtor. Seek the advice of a tax professional.
III. CLIENT REPRESENTATION

1. Define the client, authority, and capacity;

2. Explain the requirement of full, complete, accurate and honest disclosure of all information required of the debtor;

3. Ask probing and pertinent questions designed to elicit full, complete, accurate, and honest disclosure from the debtor;

4. Check the debtor’s responses in the petition, statements and schedules to be sure they are internally and externally consistent, and follow up in they are not; check readily available Pacer information for previous bankruptcies;

5. Demand of the client full, complete, accurate and honest disclosure of all information required by the debtor prior to the attorney’s signature being placed upon the document, or before filing the client-signed document.

IV. BUSINESS SPECIFIC EXAMPLES

A. Children’s Day Care – typically minimal to no assets but potential liability issue. A Chapter 7 Trustee may allow operation without further action, especially if the only “customers” are family members.

B. Construction Contractor – In Oregon, the CCB license is held by a Responsible Managing Individual. ORS §701.102 allows the CCB to suspend, revoke or refuse to license NEWCO if the owner, officer or RMI of NEWCO was an owner, officer or RMI of OLDCO at a time OLDCO incurred an unpaid construction debt. But See Judge Alley opinion in Ray v. State of Oregon, 06-6025 that held denial of license to individual who had obtained a chapter 7 discharge violated anti-discrimination clause of § 525(a).

C. Day Trader – not to be confused with a stockbroker who is subject to the specific provisions of § 741 to 743. But an individual who trades on margin for his own investment benefit.

D. Foster Care Home - be aware of definition of a healthcare business under §101(27A) and section § 333 applicable in chapter 7 re: the appointment of a patient care ombudsman which MANDATES appointment UNLESS the Court
finds it is not necessary.  

*Saber* case out of Colorado lays out a four-part test 369 BR 631 (Bankr. D, Colo 2007) including:

1. Systems in place for protection of patient records
2. Business generates sufficient future cash flows to eliminate risk of moral hazard in patient record practices and to provide a consistent level of care
3. Business has received favorable industry recognition in quality of operations and lack of prior disciplinary history
4. Whether BK filing was precipitated by improper client record disclosures, privacy violations, or improper patient care practices.
DAY CARE TO DAY TRADER – SOLE PROPRIETORS AND CLOSELY HELD COMPANIES
IN CHAPTER 7 AND CHAPTER 13 CASES

I.  Eligibility


A debtor operating an entity such as a corporation must properly schedule her debts, which means she will have to ascertain whether the corporate debtors are debts of the debtor through guaranty, indemnity or otherwise. For closely held companies, the likelihood that the debtor personally guaranteed the company’s debt is high. However, debtors’ counsel should review this issue prior to filing the Chapter 13 case to determine if the debtor may in fact be eligible for relief under Chapter 13. Debtors’ counsel should be aware of these issues, particularly given the Chapter 13 debt limitations (presently $394,725.00 unsecured debt and $1,184,200.00 secured debt). 11 U.S.C. § 109(e).

One might be surprised how frequently debt limitations arise, which is why counsel should carefully conduct an analysis of their client’s business(ess) and carefully review the schedules before filing the case and the schedules. Unfortunately, too often Chapter 13 Trustees see schedules that were not reviewed carefully and reflect that a debtor is not eligible to be a debtor under Chapter 13. “[D]etermining Chapter 13 eligibility under § 109(e) . . . should normally be determined by the debtor’s originally filed schedules, checking only to see if the schedules were made in good faith.” *Scovis v. Henrichsen (In re Scovis)*, 249 F.3d 975, 982 (9th Cir. 2001). In addition, “ordinary events occurring subsequent to the filing (e.g., paying down debt) do not affect the eligibility determination.” *Id.* at 984. “[T]he unsecured portion of undersecured debt is counted as unsecured for § 109(e) eligibility purposes.” *Id.* at 983.

“However, the schedules are not dispositive. If the debtors’ schedules were dispositive, then eligibility could be created by improper or incomplete scheduling of creditors. A bankruptcy court should ‘look past the schedules to other evidence submitted when a good faith objection to the debtor’s eligibility has been brought by a party in interest.’” *Quintana v. Internal Revenue Service et al. (In re Quintana)*, 107 B.R. 234, 238 n.6 (B.A.P. 9th Cir. 1889) (citing *In re Williams Land Co.*, 91 B.R. 923, 927 (Bankr. D.Or. 1998)), aff’d, 915 F.2d. 513 (9th Cir. 1990). *See also Guastella v. Hampton (In re Guastella)*, 341 B.R. 908, 920 (B.A.P. 9th Cir. 2006) (“The phrase ‘checking only to see if the schedules were made in good faith’ does not mandate that the court make findings of ‘bad faith.’ Neither does it require that a debtor intentionally misrepresent her debts to create the appearance of eligibility before there can be an absence of good faith.”).

II.  Engaged in Business

“A debtor that is self-employed and incurs trade credit in the production of income from such employment is engaged in business.” 11 U.S.C. § 1304(a). Note the conditions to be “engaged in business”: (1) the debtor must be self-employed; (2) the debtor must incur trade credit; and (3) the debtor must produce income from the business. Debtors who are self-employed but do not incur trade credit are not “engaged in business.” *In re Whitcomb*, 310 B.R. 428, 431 (Bankr. W.D. Ark. 2004). While the U.S. Bankruptcy Code does not include a definition of “trade credit,” some “courts have described
‘trade credit’ as involving the exchange of goods and services for other goods and services without payment of money.” In re Green, No. 16-00308, 2016 WL 1398410, at *1 (Bankr. E.D.Wa. April 6, 2016) (determining that the debtor real estate agent was not engaged in business because her expenses of rent, signage installments and insurance payments did not rise to the level of “trade credit,” but noting that the Court would have been more inclined to find she was engaged in business if she had a continuous advertising relationship in which the advertiser provide materials on credit). In addition, a debtor is not “engaged in business” if the purported business does not produce income. In re Schnabel, 153 B.R. 809, 819 (Bankr. N.D. Ill. 1993) (the court found that the debtor’s venture was “a hobby more than a business”).

The most obvious examples of debtors engaged in business would be professionals, independent contractors and sole proprietors who incur trade credit and produce income from the self-employment. In other words, not all self-employed debtors are “engaged in business” as that term is used in Section 1304(a). While this is likely meaningless to a self-employed individual outside of bankruptcy, whether a debtor is “engaged in business” as a term of art makes a difference to other provisions of the U.S. Bankruptcy Code. As two commentators explained,

There is a technical difference between a self-employed debtor and a debtor “engaged in business.” 11 U.S.C. § 1304(a) states a debtor “that is self-employed and incurs trade credit in the production of income from such employment is engaged in business.” There are self-employed individuals who do not incur trade credit who have regular income and meet other Chapter 13 eligibility requirements but are not technically “engaged in business.” Chapter 13 authorizes a debtor engaged in business to continue to operate the business of the debtor. There is no specific provision authorizing a self-employed individual who is not engaged in business to continue to operate a business. There is no obvious logic to this oversight. A self-employed debtor who operates a business without incurring trade credit is no more or less an “individual with regular income” for whom Chapter 13 was intended. It is likely that a court would find such a debtor eligible if the debtor’s business could fund a Chapter 13 plan, without regard to whether the debtor incurs trade credit.


Is a debtor employed by a closely held company “engaged in business” under Section 1304(a)? Arguably not:

The Bankruptcy Code does not define “self-employed.” Easy examples would be a sole proprietorship or an independent contractor who is not incorporated and is not doing business in any other form such as a partnership. Although there are no reported cases, an individual who works for any other entity may fail the “self-employed” requirement for a debtor engaged in business under § 1304(a). For example, an incorporated individual—a professional corporation or a limited liability corporation—would be employed but probably not self-employed, though this quickly becomes a technical distinction without practical meaning when the debtor is the only shareholder and controls the business of the other entity.

Owners of a closely held company may also be employees. See, e.g., Maizner v. State of Hawaii et al., 405 F.Supp.2d 1225, 1234 (D. Haw. 2005) (case involving a 42 U.S.C. § 1983 claim); In re Gollomp, No. 93-41210, 1995 WL 877105, at *7 (Bankr. S.D. N.Y. Oct. 19, 1995). A Chapter 13 debtor wearing two hats as owner of a closely held company and as an employee of the company is likely “engaged in business” if the other conditions of Section 1304(a) are otherwise met.

III. Operating the Business

Unless the Court orders otherwise, a debtor engaged in business may operate the business, notwithstanding the appointment of a Chapter 13 Trustee. 11 U.S.C. § 1304(b); In re Rocchio, 125 B.R. 345, 346 n.1 (Bankr. D.R.I. 1991). A Chapter 13 debtor engaged in business can conduct her business in the ordinary course without notice and hearing, as well as obtain credit in the ordinary course of the business with certain conditions. 11 U.S.C. §§ 363(c), 364 and 1304(b). A Chapter 13 debtor engaged in business may arguably operate the business very similarly to a Chapter 11 debtor-in-possession, unless the Court orders otherwise, In re Pittman, 8 B.R. 299, 301 (D.Colo. 1981), but a Chapter 11 debtor-in-possession has much greater authority to operate because she has many of the rights and powers of a case trustee not afforded to the Chapter 13 debtor. 11 U.S.C. § 1107(a). A Chapter 13 debtor may not use cash collateral unless the entity which has an interest consents or the Court authorizes the use. 11 U.S.C. §§ 363(c)(2), 1304(b).

Can the Court authorize another person / entity such as the Chapter 13 Trustee to operate the business? At least one court thought so, citing the provision under Section 1304(b) that the Court may impose “limitations or conditions.” In re Clark, 91 B.R. 324, 340 (Bankr. E.D.Penn. 1998). That seems rather unusual and would raise a host of problems for a Chapter 13 Trustee. Moreover, there would seem to be many other remedies to deal with a Chapter 13 debtor who is not properly operating her business, such as conversion of the case to a Chapter 7 case or dismissal. 11 U.S.C. § 1307(c). “Section 1307(c) enumerates eleven non-exclusive grounds which may constitute ‘cause’ for dismissal [or conversion, if the Court finds conversion to be in the best interests of creditors and the estate].” Ellsworth v. Lifescape Medical Associates, P.C. et al. (In re Ellsworth), 455 B.R. 904, 915 (B.A.P. 9th Cir. 2011) (emphasis added).

Moreover, a Chapter 13 debtor remains in possession and control of property of the estate, unless otherwise provided in the confirmed plan or order confirming plan. 11 U.S.C. § 1306(b). A Chapter 13 Trustee would be hard-pressed to operate a business if the debtor is in possession and control of the business property (leaving aside the practical and business aspects of the Chapter 13 Trustee operating the business).

While only a trustee may assume or reject a lease under 11 U.S.C. § 365(d), a Chapter 13 debtor may assume or reject a lease through the plan subject to Section 365. 11 U.S.C. § 1322(b)(7); Benevides v. Alexander (In re Alexander), 670 F.2d 885, 887 (9th Cir. 1982). Chapter 13 debtors should be wary, though, to timely assume an unexpired lease of nonresidential property through the plan. Subject to a ninety day extension through a timely filed motion by the trustee or the lessor for cause,

an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of –

(i) The date that is 120 days after the date of the order for relief; or
(ii) The date of the entry of an order confirming a plan.

One court held that debtors operating a dry cleaning business were unable to assume a ten year commercial lease because the 120 days for the trustee to assume the lease under Section 365(d)(4)(A)(i) expired. In re Cho, No. 15-20638, 2016 WL 3597890, at *2 (Bankr. D.Me. June 27, 2016). The court granted the lessor relief from the automatic stay to exercise its state law remedies. Id. The court expressly rejected the Ninth Circuit’s Anderson decision because that decision preceded the 1984 amendments adding “subject to section 365 of this title” to 11 U.S.C. § 1322(b)(7). The Ninth Circuit wrote that “[a] Chapter 13 plan may provide for the assumption or rejection of any executory contract of the debtor not previously rejected under section 365 of title 11. 11 U.S.C. § 1322(b)(7).” Alexander, 670 F.2d at 887. For a view contrary to Cho, see In re Dodd, 73 B.R. 67, 69 (Bankr. E.D.Cal. 1987) (noting that it would not be practical to burden the Chapter 13 Trustee with a decision to assume or reject a lease for a business he will never operate and observing that two to four months for plan confirmation is sufficient time for a lessor to know if the debtor lessee intends to assume or reject the lease through the plan).

IV. Investigation and Reporting Requirements

If a Chapter 13 debtor is engaged in business, the Chapter 13 Trustee is obligated to investigate the debtor’s business and the desirability of continuing the business. 11 U.S.C. §§ 1106(a)(3), 1302(c). The Trustee shall also file a statement regarding any investigation, including any findings of misconduct or mismanagement. 11 U.S.C. §§ 1106(a)(4), 1302(c).

A Chapter 13 debtor engaged in business is obligated to file with the Court, United States Trustee and with any relevant governmental taxing authority “periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires.” 11 U.S.C. §§ 704(a)(8), 1304(c). A Chapter 13 debtor engaged in business shall:

1) Keep a record of receipts and the disposition of money and property received;
2) File the reports and summaries required 11 U.S.C. § 704(a)(8), which shall include a statement, if payments are made to employees, of the amounts of deductions for all taxes required to be withheld or aid for and in behalf of employees and the place where these amounts are deposited; and
3) As soon as possible after the commencement of the case, give notice of the case to every entity known to be holding money or property subject to withdrawal or order of the debtor, including every bank, savings or building and loan association, public utility company, and landlord with whom the debtor has a deposit, and to every insurance company which has issued a policy having a cash surrender value payable to the debtor, except that notice need not be given to any entity who has knowledge or has previously been notified of the case.

Fed. R. Bankr. P. 2015(c)(1). If the Court directs, the Chapter 13 debtor engaged in business shall also file and transmit to the United States Trustee a complete inventory of the property of the debtor within the time fixed by the Court. Fed. R. Bankr. P. 2015(c)(1).
V. Stay and Entities

In addition, the debtor’s automatic stay will not protect the corporate assets because the assets are not property of the estate and the corporation is a separate legal entity. See In re Russell, 121 B.R. 16, 17 (Bankr. W.D.Ark. 1990); In re Faulkner, No. 01-50944, 2002 WL 32114473, at *2 (Bankr. E.D. Ark. Sept. 6 2002). Unlike a corporation, a partnership is not a separate legal entity, but the sum of each individual owner’s interests. In re Brown, 250 B.R. 382, 385 (Bankr. D.Idaho 2000) (citations omitted). A limited liability company is a “corporation” for purposes of the U.S. Bankruptcy Code. 11 U.S.C. § 101(9)(A); In re KRSM Properties, LLC, 318 B.R. 712, 717 (B.A.P. 9th Cir. 2004). The debtor’s interest in property is determined under nonbankruptcy law. In re Farmers Markets, Inc., 792 F.2d 1400, 1402 (9th Cir. 1986).

Generally speaking, the individual’s interest in a partnership or corporation would be property of the estate, but the assets of the partnership or corporation would not be (leaving aside issues such as piercing the corporate veil because the debtor did not observe corporate formalities). In re Brown, 250 B.R. 382, 385 (Bankr. D.Idaho 2000) (citations omitted).

VI. Means Test

The debtor’s business entity also has an impact on determining a debtor’s monthly disposable income under the means test. A self-employed debtor may not deduct ordinary and necessary business expenses from gross receipts, but must instead take business deductions from the debtor’s current monthly income to arrive at disposable income under 11 U.S.C. § 1325(b)(2). Drummond v. Wiegand (In re Wiegand), 386 B.R. 238, 242 (B.A.P. 9th Cir. 2008). “[T]o determine the applicable commitment period,” one court explained,

§ 1325(b)(4) directs one to look at current monthly income and is silent with regard to business expenses. § 1325(b)(4). Neither § 1325(b)(4) nor § 101(10A) directs a chapter 13 business debtor to deduct ordinary and necessary business expenses in calculating current monthly income. §§ 101(10A), 1325(b)(4). Rather, the Code, at § 1325(b)(2)(B), directs a chapter 13 business debtor to deduct business expenses to calculate disposable income. § 1325(b)(2)(B). . . . Under the Code, a debtor engaged in a business must first look at current monthly income and then deduct from current monthly income reasonably necessary business expenses to deduce disposable income. § 1325(b)(2)(B). Succinctly, if the chapter 13 debtor is engaged in a business, the debtor’s CMI is income without regard to business expenses, while disposable income is income with regard to business expenses. §§ 101(10A), 1325(b)(2)(B), 1325(b)(4).

Chapter 11

U.S. Supreme Court Cases Every Bankruptcy Attorney Should Know

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Recent Bankruptcy Decisions in the Supreme Court

During the 2016-2017 term, the Supreme Court heard arguments in Czyzewski v. Jevic Holding Corp., no. 15-649, and Midland Funding, LLC v. Johnson, no. 16-348. During the previous term, the Court decided Husky v. Ritz, 136 S. Ct. 1581 (2016). This paper discusses these three cases, as well as the remand proceedings in the Fifth Circuit in Husky after the Supreme Court decided the matter.

A. Jevic

The Bankruptcy Code authorizes the dismissal of Chapter 11 bankruptcy cases and generally provides that, unless the court for cause orders otherwise, dismissal has the effect of returning the parties to the status quo immediately prior to the commencement of the case. See 11 U.S.C. §§ 349, 1112. Rather than return the parties to the status quo, however, some courts have approved “structured dismissals” that effectively distribute the value of the debtor’s assets in various ways, approve the release of various parties, and/or settle various claims. These structured dismissals may or may not comply with the Code’s priority rules. The question presented in Jevic was whether a structured dismissal that did not comply with absolute priority is something a bankruptcy court is authorized to approve and, if so, under what circumstances.

Jevic Transportation was in the trucking business. Prior to filing for bankruptcy, Jevic engaged in a leverage buyout transaction in which Sun Capital Partners acquired the company. Various lenders led by CIT financed the buyout and provided Jevic with an $85 million revolving line of credit. After Jevic’s finances continued to deteriorate, the company decided to file for bankruptcy. It ceased operations, notified its employees of their impending termination, and commenced a Chapter 11 proceeding in Delaware. At the time, Jevic owed its lenders and Sun approximately $53 million secured by liens on the company’s assets. It owed an additional $20 million to taxing
authorities and general unsecured creditors. An official committee of unsecured creditors was appointed.

After the commencement of the bankruptcy case, a group of Jevic’s terminated truck drivers filed a class action against Jevic and Sun, alleging violations of federal and state WARN acts, under which Jevic was supposed to provide 60 days’ written notice before laying them off. In addition, the creditors’ committee brought a fraudulent transfer action against CIT and Sun, alleging that Sun, with CIT’s help, took over Jevic with essentially none of its own money in an ill-conceived transaction that placed Jevic in an unreasonably precarious financial position.

Several years later, the bankruptcy court granted in part and denied in part CIT’s motion to dismiss the litigation. Thereafter, representatives of the committee, Sun, CIT, Jevic, and the drivers convened to negotiate a settlement. Previously, all of Jevic’s assets had been liquidated to pay the lender group led by CIT. By the time of the settlement discussions, all that was left of Jevic was about $1.7 million in cash, which was subject to Sun’s lien, and the fraudulent transfer action against CIT and Sun.

Eventually the committee, Jevic, CIT, and Sun reached a settlement agreement with four essential features. First, the parties would release each other, and the fraudulent transfer litigation would be dismissed. Second, CIT would pay $2 million to fund the payment of administrative expenses. Third, Sun would assign its lien on the $1.7 million in cash to pay tax and administrative creditors first, and then to distribute something to general unsecured creditors. Fourth, the bankruptcy case would be dismissed. In this way, the settlement contemplated a structured dismissal that provided for the distribution of Jevic’s remaining assets. It left out, however, the drivers, who had asserted approximately $8.3 million in wage claims entitled to priority under section 507(a)(4) of the Code. Apparently the drivers had been unable to reach a settlement against
Sun on their WARN act claims, and Sun was unwilling to agree to any distribution to the drivers so long as their litigation against Sun remained pending.

The drivers and the U.S. Trustee objected to the proposed settlement and structured dismissal. In particular, they claimed that the dismissal violated the Code’s priority scheme by authorizing a distribution to general unsecured creditors while the drivers’ priority wage claims received nothing. Rejecting these arguments, the bankruptcy court approved the settlement and the structured dismissal. The court reasoned that other courts has granted similar relief in other cases. The court also observed that dire circumstances existed and that, absent the settlement, there was no meaningful prospect of any distribution to anyone other than the secured creditors because completing a Chapter 11 bankruptcy was impractical, as was conversion to a Chapter 7 case. In essence, there was no cash available to fund any further bankruptcy proceedings because all of the available cash was encumbered by Sun’s lien.

Although the bankruptcy court observed that Chapter 11 plans cannot violate absolute priority over the objection of creditors, it concluded that there was no similar restriction for settlements. The court found that the drivers’ claims against Jevic were essentially worthless because there was no unencumbered cash that could be distributed to them. On appeal, the district court affirmed, as did the Third Circuit, which held that, in rare instances such as the present case, courts could approve structured dismissals. The Third Circuit believed that, in this case, there was no real alternative and observed that, although structured dismissals might not be used simply to evade the Code’s procedural protections and safeguards, there was in this matter no prospect of either a confirmable plan or a viable Chapter 7 case. In addition, the court determined that, although skipping a priority class in favor of distributions to a junior class raises justifiable concerns, it could be done where there are specific and credible grounds that justify the deviation. In this
matter, although the drivers were left out in the cold, the bankruptcy court concluded correctly, the court believed, that the settlement best served the interests of the estate and its creditors because further litigation would merely deplete the assets of the estate with little prospect of assisting anyone.

In the Supreme Court, the drivers argued that the absolute priority standard applied equally to settlements as well as plans of reorganization. The drivers reasoned that this was essential to effectuate Congress’s policy choice in elevating certain creditors over others. Unlike financial creditors, employees are poor loss spreaders, hence their priority treatment, which should be respected.

In addition, the drivers noted, if they could be skipped over in this case, doing so would serve to open the door to further violations of absolute priority in the future. Settling parties, they noted, should not be permitted to get away with deviations from absolute priority simply because they claim they would not settle unless another creditor group is cut out. The drivers warned that, if approved, exceptional deviations from absolute priority would likely become commonplace. This, they contended, would have dire effects for the negotiation of Chapter 11 plans because it would effectively provide a green light for collusion and undermine the kind of predictability that adherence to absolute priority fosters. This, the drivers warned, would effectively marginalize creditors like the drivers in this case, who generally lack the clout of financial creditors.

In contrast, the several respondents argued that the concept of absolute priority does not superintend the approval of settlements. By the Code’s terms, they argued, absolute priority has become codified in the confirmation provisions, but not the rules that govern settlements. Moreover, although a plan must comply with the Code’s priority regime set forth in section 507, nothing in the Code mandates the same for settlement agreements.
Respondents also focused on the impossibility of alternative relief. Absent a settlement, there was likely to be nothing to distribute to anyone, other than the secured creditors. Simply put, the settlement was the best vehicle to maximize distributions to creditors. Further, as the bankruptcy court determined, the drivers’ claims were essentially worthless because there was essentially no cash available to distribute to them. The distribution to the unsecured creditors simply took funds out of the secured creditors’ pockets, so there was no harm to the drivers in any event.

Countering the drivers’ policy concerns, respondents argued that siding with the drivers would grant recalcitrant priority creditors too much leverage by encouraging them to demand payment even when doing so would destroy any hope of maximizing value through the settlement process. Although the drivers might have that leverage in the plan process, respondents argued that they do not have it in the settlement context.

**B. Midland**

The Bankruptcy Code authorizes the filing of proofs of claim, and provides for the disallowance of claims to the extent they are unenforceable under applicable non-bankruptcy law, including owing to the expiration of any applicable statute of limitations. See 11 U.S.C. §§ 501, 502. The Fair Debt Collection Practices Act prohibits routine debt collectors from, among other things, engaging in false, deceptive, or misleading debt collection practices, including making any false claim about the legal status of any debt. See 15 U.S.C. § 1692e. Many courts have concluded that the filing of a state court action to collect a debt the creditor knows is stale because it is beyond the statute of limitations is a violation of the FDCPA. The question presented in *Midland* is whether the filing of a proof of claim seeking to collect on a time-barred debt also violates the FDCPA.
Midland Funding is in the business of purchasing and seeking to collect unpaid debts. Midland purchased a debt that Aleida Johnson at one point owed to Fingerhut Credit Advantage. The date of the last transaction on Johnson’s account with Fingerhut was in May of 2003. Johnson filed a Chapter 13 bankruptcy petition in March of 2014. In May of 2014, Midland filed a proof of claim in Johnson’s bankruptcy case, seeking to collect $1,879.71 on the debt purchased from Fingerhut. Midland’s claim is governed by Alabama law, which imposes a six-year statute of limitations on claims to collect on an overdue debt, and therefore under Alabama law the claim was time-barred.

Johnson commenced an action against Midland in the United States District Court for the District of Alabama, alleging that Midland’s time-barred attempt to collect the overdue debt was a violation of the FDCPA. The FDCPA prohibits a “debt collector” from “us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt,” including “false[ly] represent[ing] . . . the character, amount, or legal status of any debt.” 15 U.S.C. § 1692e. The FDCPA further prohibits a debt collector from “us[ing] unfair or unconscionable means to collect or attempt to collect any debt,” including collecting any amount that is not “expressly authorized by the agreement creating the debt or permitted by law.” Id. § 1692f. A “debt collector” under the statute is “any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect . . . debts owed or due or asserted to be owed or due another.” Id. § 1692a.

Midland moved to dismiss Johnson’s claim. The District Court recognized that it was bound by the Eleventh Circuit’s prior decision in Crawford v. LVNV Funding, LLC, 758 F.3d 1254 (11th Cir. 2014), determining that filing a proof of claim in bankruptcy to collect a time-barred debt is a violation of the FDCPA. Nevertheless, the court held that the FDCPA prohibition on filing stale proofs of claim is in “irreconcilable conflict” with section 501(a) of the Bankruptcy Code, which

The court held that where, as is the case under Alabama law, a statute of limitations period only extinguishes a creditor’s remedy, but not the underlying right to payment, a creditor has the right to file a proof of claim on a time-barred debt under section 501. The court then found that this right is in conflict with the FDCPA because a creditor may comply with the FDCPA only by “surrendering its right under the Code to file a proof of claim on a time-barred debt.” Because the Bankruptcy Code was enacted after the FDCPA, the court held that the former impliedly repealed the latter.

On appeal, the Eleventh Circuit reversed. The court first noted that it had faced a “nearly identical” question in Crawford and confirmed its decision in that case that filing a stale proof of claim in bankruptcy constitutes a violation of the FDCPA. The Eleventh Circuit also disagreed with the lower court’s conclusion that the FDCPA and the Bankruptcy Code conflicted irreconcilably. The court held that the FDCPA and the Bankruptcy Code “differ in their scopes, goals, and coverage, and can be construed together in a way that allows them to coexist.” The Bankruptcy Code allows—but does not require—all creditors to file proofs of claim, while the FDCPA prohibits those creditors that qualify as “debt collectors” from filing stale proofs of claim. Reasoning that the Bankruptcy Code’s filing rules “do not shield debt collectors from the obligations that Congress imposed on them,” the Eleventh Circuit concluded that a debt collector that chooses to file a time-barred proof of claim “is simply opening himself up to a potential lawsuit for an FDCPA violation.”

Federal courts have widely held that filing or threatening to file a lawsuit to collect a time-barred debt is a violation of the FDCPA. See Phillips v. Asset Acceptance, LLC, 736 F.3d 1076, 1079 (7th Cir. 2013); accord Buchanan v. Northland Grp., Inc., 776 F.3d 393, 399-400 (6th Cir.
(letter offering settlement of time-barred claim was a violation of FDCPA because “consumers might still be confused about the enforceability of a debt”); \textit{Huertas v. Galaxy Asset Mgmt.,} 641 F.3d 28, 33 (3d Cir. 2011) (recognizing that threatened or actual litigation on a time-barred debt is a violation of the FDCPA, but finding no threat of litigation); \textit{Castro v. Collecto, Inc.,} 634 F.3d 779, 783 (5th Cir. 2011) (recognizing that “threatening to sue on time-barred debt may well constitute a violation of the FDCPA,” but finding that claim was not time-barred); \textit{Freyermuth v. Credit Bureau Servs., Inc.,} 248 F.3d 767, 771 (8th Cir. 2001) (same as \textit{Huertas}). As one court has explained, “bringing or threatening to bring a lawsuit ‘which the debt collector knows or should know is unavailable or unwinnable by reason of a legal bar such as the statute of limitations is the kind of abusive practice the FDCPA was intended to eliminate.’” \textit{Herkert,} 655 F. Supp. 2d at 876 (quoting \textit{Ramirez v. Palisades Collection LLC,} No. 07-3840, 2008 WL 2512679, at *5 (N.D. Ill. June 23, 2008)); see also \textit{Beattie,} 754 F. Supp. at 393 (“[T]he [FDCPA] was designed to prevent debt collectors from threatening suit against persons whom the collector knows or should know are not legally liable for a debt.”). These decisions have observed that a lawsuit premised or threatened on the basis of a stale claim is an abuse of the litigation system. In the Supreme Court, Johnson argued that a proof of claim premised on time-barred debt is fundamentally no different.

The act of filing a proof of claim in a bankruptcy case is, Johnson argued, analogous to commencing litigation to collect a debt outside of bankruptcy. To begin with, a debtor commences a court-supervised bankruptcy case by filing a bankruptcy petition. 11 U.S.C. § 301. In turn, the filing of the petition triggers the automatic stay, which generally bars creditors from pursuing debt-collection activity outside the bankruptcy process. 11 U.S.C. § 362.
In lieu of pursuing immediate litigation outside the bankruptcy process, Johnson observed that creditors may, but are not required to, file proofs of claim setting forth the debts they assert they are owed. 11 U.S.C. § 501. The point is to give creditors who are stayed from pursuing legitimate debt-collection activity outside the bankruptcy system an opportunity to assert legitimate claims through the proof of claim procedure. In other words, the point is to provide a means for the creditor to be paid something on its claim, a classic debt-collection activity. In the event a creditor invokes the bankruptcy debt-collection procedure improperly by filing a proof of claim seeking to collect an unenforceable debt, the Code clearly provides that such claims must be disallowed. 11 U.S.C. § 502(b)(1). And the fact that such claims must be disallowed under section 502 dramatically undercuts any notion that it is somehow legitimate for creditors to file such claims in the first instance.

Although the proof of claim process acts generally as a non-bankruptcy litigation substitute, the filing of a proof of claim can easily morph into formal debt-collection litigation, either within or outside the bankruptcy court. For example, where a creditor has filed a proof of claim, relief from stay may be granted so that the claim may be liquidated in a traditional litigation forum, leaving only the consideration of unique aspects of bankruptcy law to be adjudicated in the bankruptcy court. See, e.g., Baldino v. Wilson (In re Wilson), 116 F.3d 87, 91 (3d Cir. 1997) (allowing relief from stay to “expedite the resolution of [the state tort] claim by eliminating it if [the debtor] prevails on appeal, or by rendering it final and nondischargeable if [the plaintiff] prevails”); In re Chacon, 438 B.R. 725, 736 (Bankr. D. N.M. 2010) (“A number of courts have . . . come up with the same solution: permit the liability and damages issues to be determined either in the state court or the U.S. district court, and then have the parties return to the bankruptcy court as needed for an adjudication of the dischargeability issue.”); In re Cummings, 221 B.R. 814, 819
n.9 (Bankr. N.D. Ala. 1998) (“Numerous courts have determined that, under appropriate circumstances, a bankruptcy court may grant relief from the stay to allow a debt to be liquidated in a pending state court proceeding, and then make a determination of dischargeability based on the state court record.”). In such circumstances where relief from stay has been granted and the creditor pursues a time-barred lawsuit against the debtor, the creditor’s claim would obviously be subject to any statute of limitations defense, and the pursuit of the litigation itself may well violate the FDCPA. See, e.g., Phillips, 736 F.3d at 1079; Kimber, 668 F. Supp. at 1487 (finding an FDCPA violation because “time-barred lawsuits are, absent tolling, unjust and unfair as a matter of public policy”).

Alternatively, creditors may file proofs of claim and have their claims adjudicated entirely in the bankruptcy court. Once again, such proofs of claim are likewise subject to any available statute of limitations defense and, if time-barred, must be disallowed as unenforceable under section 502 of the Bankruptcy Code. 11 U.S.C. § 502(b)(1). The question is whether, for purposes of the FDCPA, debt-collection activity involving the filing of a proof of claim should be viewed differently from the very non-bankruptcy debt-collection activity that the proof of claim process substitutes for.

Johnson observed that, just like a debt collector who threatens or commences a traditional lawsuit on a debt he knows is stale, a debt collector who knowingly files a proof of claim for a time-barred debt is plainly seeking to collect a debt that the collector “knows or should know is unavailable or unwinnable by reason of a legal bar.” Herkert, 655 F. Supp. 2d at 876 (citation and quotation marks omitted). Such conduct is precisely “the kind of abusive practice the FDCPA was intended to eliminate.” Id.; see also Beattie, 754 F. Supp. at 393. Thus, a debt collector’s filing of a proof of claim on a debt he knows is time-barred is similarly “unjust and unfair as a matter of
public policy” and violates the FDCPA for the same reasons applicable to a traditional debt-collection lawsuit. *Kimber*, 668 F. Supp. at 1487; *see also McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014) (“Whether a debt is legally enforceable is a central fact about the character and legal status of that debt. A misrepresentation about that fact thus violates the FDCPA.”).

The parallel between a proof of claim and a traditional debt-collection lawsuit is even more apparent in the scenario in which a debtor in bankruptcy objects to a proof of claim and files a counterclaim. A claim combined with an objection and counterclaim gives rise to an “adversary proceeding” under the Bankruptcy Rules, which is just the bankruptcy term for what amounts to a traditional lawsuit commenced by a summons and complaint. *See Fed. R. Bankr. P. 3007(b); Fed. R. Bankr. P. 7001* (defining adversary proceedings); *see also, e.g., Mulvania v. United States (In re Mulvania)*, 214 B.R. 1, 7 (B.A.P. 9th Cir. 1997) (objection to claim joined with request to determine validity of lien is an adversary proceeding).

(adopting discovery rules in Fed. R. Civ. P. 26 to 37). The filing of a proof of claim, therefore, can easily give rise to a distinct piece of litigation virtually indistinguishable from ordinary civil litigation.

Midland countered that, in spite of the similarities between the filing of a proof of claim on a stale debt and a traditional lawsuit premised on the same stale debt, the filing of a proof of claim cannot be a violation of the FDCPA because “[d]ebt recovery within bankruptcy is fundamentally different from debt collection outside bankruptcy.” For example, “debtors in bankruptcy are protected by a panoply of procedures,” including the assignment of a trustee (and often counsel) to object to claims, regulations governing the content of proofs of claim and the procedures for administering them, and sanctions for abusive conduct. Johnson responded, however, that similar protections exist for debtors outside of bankruptcy. And just as none of these protections excuse application of the FDCPA in traditional litigation, the protections Midland identified, Johnson contended, do not excuse the application of the FDCPA to debt-collection activity involving a proof of claim.

For example, under both state and federal law, traditional complaints must meet all applicable pleading standards or risk dismissal. See, e.g., Fed. R. Civ. P. 8(a)(2) (a complaint must include a “short and plain statement of the claim showing that the pleader is entitled to relief”); Ala. R. Civ. P. 8(a) (same); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (dismissing a complaint that did not provide “enough facts to state a claim to relief that is plausible on its face”). Moreover, where counsel are involved, they must certify that the relevant pleadings are true and well-founded. For example, an attorney signing a pleading in federal court certifies that a reasonable inquiry has been made regarding the truth of the factual allegations contained therein, the claims are warranted, and the pleading is not motivated by an improper purpose. Fed. R. Civ. P. 11; see also, e.g., Ala.
R. Civ. P. 11. Under these standards, knowingly filing a time-barred lawsuit has been held to be sanctionable conduct. See Kimber, 668 F. Supp. at 1488 (citing cases). But that does not mean that the FDCPA also does not apply.

By the same token, Johnson argued, the mere fact that certain bankruptcy procedures may also shield a debtor from certain kinds of harm arising from illegitimate proofs of claim is not sufficient reason to excuse application of the FDCPA, which has its own focus and remedial scope. The relevant inquiry in determining if a debt-collection action violates the FDCPA is whether a debt collector’s conduct is misleading or deceptive, not whether other potential safeguards are in place to further combat abuses. See, e.g., Freyermuth, 248 F.3d at 771 (“The case law on this issue focuses on the debt collector’s actions, and whether an unsophisticated consumer would be harassed, misled or deceived by them.”).

Midland also contended that the FDCPA does not apply to proofs of claim premised on time-barred debts because a creditor has the right under the Bankruptcy Code to file a proof of claim and the debtor may always raise any applicable statute of limitations as a defense. But the same thing can be said, Johnson observed, of traditional debt-collection litigation: the creditor has the right to file a complaint and the debtor may raise any applicable statute of limitations as a defense. See Goins, 352 F. Supp. 2d at 272. Notably, courts have consistently rejected this argument as a reason to avoid application of the FDCPA to time-barred lawsuits. Id. (although statute of limitations is an affirmative defense that can be waived, it is “a complete defense” and “the threat to bring a suit under such circumstances can at best be described as a ‘misleading’ representation”); Kimber, 668 F. Supp. at 1488 (rejecting assertion that “because a statute of limitations is an affirmative defense which is waived if not raised, a plaintiff may not be penalized for knowingly filing a time-barred suit”). The same reasoning applies to proofs of claim.

On its face, Johnson recited, the FDCPA prohibits debt collectors from “us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt,” including “false[ly] represent[ing] . . . the character, amount, or legal status of any debt,” 15 U.S.C. § 1692e. The FDCPA also prohibits a debt collector from “us[ing] unfair or unconscionable means to collect or attempt to collect any debt,” including collecting any amount that is not “expressly authorized by the agreement creating the debt or permitted by law.” *Id.* § 1692f. There is no exception in the statute for filing proofs of claim in a bankruptcy proceeding. Rather, the FDCPA provides its own protections by expressly applying only to creditors that qualify as “debt
collectors” and allowing a safe harbor for those debt collectors whose violations are “not intentional and resulted from a bona fide error.” *Id.* § 1692k(c).

Johnson contended that a debt collector who knowingly attempts to collect a claim by filing a proof of claim premised on a time-barred debt violates the FDCPA no less than a debt collector who knowingly threatens to file or files a traditional lawsuit premised on the same time-barred debt. Both acts fall squarely within the plain terms and remedial scope of the FDCPA, and to read into the statute an exception for proofs of claim filed with a bankruptcy court would improperly apply a limitation to the statute that does not exist. *See Lamie*, 540 U.S. at 538.

Midland contended that the Bankruptcy Code and the FDCPA stand in conflict, with the later giving way to the former. In making its argument, Midland contended that the Bankruptcy Code provides all of the rules applicable to the filing of proofs of claim, leaving no room for the FDCPA. Johnson countered that the Bankruptcy Code does not supply the full universe of laws and rules that govern the conduct of bankruptcy proceedings. *See, e.g.*, 28 U.S.C. § 959(b) (requiring any trustee, receiver, or debtor in possession to “manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property is situated”); *Midlantic Nat’l Bank v. New Jersey Dept. of Envtl. Prot.*, 474 U.S. 494, 507 (1986) (finding that “[t]he Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public’s health and safety” as required by state law). Although it is true that provisions such as the automatic stay proscribe certain conduct, it is equally true that Congress did not intend for parties in bankruptcy “to have carte blanche to ignore nonbankruptcy law.” *Id.* at 502.

Moreover, Johnson reiterated that a creditor’s right to file a proof of claim is voluntary, not mandatory, observing that section 501 of the Bankruptcy Code provides that “a creditor . . . may
file a proof of claim.” 11 U.S.C. § 501(a) (emphasis added). In comparison, the FDCPA prohibits a “debt collector” from using “any false, deceptive, or misleading representation” or “unfair or unconscionable means” to collect a debt, 15 U.S.C. §§ 1692e, 1692f, unless the debt collector can show by a preponderance of the evidence that its FDCPA violation “was not intentional and resulted from a bona fide error,” id. § 1692k(c). Nothing in section 501, Johnson argued, creates an exception to the FDCPA for creditors filing proofs of claim in bankruptcy proceedings or suspends the operation of the FDCPA in the bankruptcy context. As the Supreme Court has stated, “[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” Morton v. Mancari, 417 U.S. 535, 551 (1974).

Johnson argued further that, because there is nothing in the language of section 501 that negates application of the FDCPA to debt collectors who file proofs of claim that are “false, deceptive, or misleading” or “unfair or unconscionable,” application of the FDCPA should continue in the absence of a clearly stated congressional expression to the contrary. See Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 227 (1957) (“It will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.”); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 521 (1989) (party contending Congress changed settled law has burden of showing intent). There is no such expression in section 501 (or anywhere else in the Bankruptcy Code), therefore both laws are effective.

In support of her position, Johnson invoked the cardinal rule of statutory construction that implicit repeals of one federal statute by another are not favored and will not be found unless the congressional intent to repeal is “clear and manifest.” Red Rock v. Henry, 106 U.S. 596, 602

The Supreme Court has identified two specific situations in which repeal by implication may occur: “where provisions in two statutes are in ‘irreconcilable conflict,’ or where the latter Act covers the whole subject of the earlier one and ‘is clearly intended as a substitute.’” Branch, 538 U.S. at 273 (quoting Posadas, 296 U.S. at 503). Midland did not claim that section 501 of the Bankruptcy Code covers the whole subject of, or is clearly intended to substitute for, the FDCPA. Midland’s sole contention was that the statutes “irreconcilably conflict” and that the FDCPA must yield to the later-enacted Bankruptcy Code. See Pet. Br. 43-44.

Irreconcilability may be found, however, only where it is “impossible for both provisions under consideration to stand.” Wilmot v. Mudge, 103 U.S. 217, 221 (1880); see also Morton, 417 U.S. at 550 (no implied repeal where the statutes in question “can readily co-exist”). Under this stringent standard, courts may find irreconcilable conflict only where there is “a clear repugnancy
between the old law and the new.” *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 457 (1945), *reh’g denied*, 324 U.S. 890 (1945); accord *Tennessee Valley Auth.*, 437 U.S. at 190. Where a party advocating for repeal fails to meet the heavy burden of demonstrating that two statutes cannot, under any circumstances, be reconciled, courts must apply both provisions. *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 143-44 (2001) (“[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” (quoting *Morton*, 471 U.S. at 551)); see also *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (“It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem.”).

Under the Supreme Court’s longstanding precedents, Johnson argued, the Court should not infer repeal of the FDCPA as to proofs of claim filed in bankruptcy unless such an inference “is absolutely necessary . . . in order that the words of the [Bankruptcy Code] shall have any meaning at all.” *Nat’l Ass’n of Home Builders*, 551 U.S. at 662. Midland, Johnson contended, could not meet the heavy burden of showing such a necessity exists because the Bankruptcy Code simply does not prohibit what the FDCPA directs. Once again, section 501 merely provides that “a creditor . . . may file a proof of claim.” 11 U.S.C. § 501(a) (emphasis added). In contrast, the FDCPA prohibits a “debt collector” from using “any false, deceptive, or misleading representation” or “unfair or unconscionable means” to collect a debt. 15 U.S.C. §§ 1692e, 1692f. A “debt collector” is defined as “any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect . . . debts owed or due or asserted to be owed or due another.” *Id.* § 1692a. Thus, while creditors generally are permitted to file proofs of claim in a debtor’s bankruptcy proceeding, the select creditors who also qualify
as “debt collectors” violate the FDCPA by knowingly and intentionally choosing to file a proof of claim on a time-barred debt.

Debt collectors can easily comply with both the Bankruptcy Code and the FDCPA, Johnson believed, and it is therefore in no way “impossible for both provisions . . . to stand.” *Wilmot*, 103 U.S. at 221. A debt collector is free to choose to file only proofs of claim that do not violate the FDCPA. The two provisions clearly “are capable of coexistence,” and it therefore “is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” *J.E.M. Ag Supply, Inc.*, 534 U.S. at 143-44.

But even if the FDCPA and the Bankruptcy Code could be said to “irreconcilably conflict” in some sense, repeal by implication is still not appropriate unless the legislature’s intent to cause such a result is “clear and manifest.” *Posadas*, 296 U.S. at 503; *see also Nat’l Ass’n of Home Builders*, 551 U.S. at 662; *Rodriguez*, 480 U.S. at 524. As the Eleventh Circuit acknowledged, Johnson argued, there was no “clear and manifest” Congressional intent to repeal the FDCPA with the enactment of the Bankruptcy Code.

C. Husky

Section 523(a)(2)(A) of the Bankruptcy Code excludes from an individual debtor’s bankruptcy discharge any debt for money, property, services, or credit to the extent “obtained by . . . actual fraud.” The provision is important because it creates an exception to an individual debtor’s fresh start for debts that fall within its scope.

In *Husky*, the Supreme Court construed section 523(a)(2)(A) in an unusual setting. In particular, the Court considered the meaning of the phrase “actual fraud,” as well as whether the debt in question had been one for goods “obtained by” fraud of some kind. A majority of the Court concluded that the term “actual fraud” may encompass the conduct of the recipient of a fraudulent
transfer who owes a debt for property obtained through the fraudulent transfer scheme if the recipient also had the requisite fraudulent intent, but the Court expressly declined to determine whether the particular debt in the case was for anything “obtained by” fraud. In dissent, Justice Thomas concluded that the debt at issue had not been “obtained by” fraud because there was no evidence that the debtor had induced the creditor to part with the goods giving rise to the debt through the use of any fraudulent means. The Court remanded the matter to the Fifth Circuit to resolve the open question that Justice Thomas essentially answered.

Between 2003 and 2007, the creditor, Husky International Electronics, Inc., sold goods to a business called Chrysalis Manufacturing Corp. An individual, Daniel Ritz, was involved in running Chrysalis. After Chrysalis failed to pay for the goods, Husky discovered that Ritz had caused Chrysalis to make various transfers of funds from Chrysalis to other businesses that Ritz controlled, leaving Chrysalis unable to pay its $163,999.38 debt to Husky. Husky sued Ritz personally, claiming that he should be liable for Chrysalis’ debt on a state-law veil-piercing theory.

As part of its theory, Husky contended that the transfers Ritz caused Chrysalis to make were fraudulent conveyances, and specifically that Ritz had acted with actual intent to defraud Husky in causing the transfers to be made. After Ritz filed for bankruptcy, Husky asserted that the debt was non-dischargeable under section 523(a)(2)(A). Husky’s theory was that Ritz’ fraudulent conveyances made with actual intent to defraud constituted “actual fraud” for purposes of section 523(a)(2)(A). Following prior circuit precedent, the Fifth Circuit ruled that Ritz’ conduct did not constitute “actual fraud” for purposes of section 523(a)(2)(A) because he never made any misrepresentation to Husky to induce Husky to deliver the goods to Chrysalis. In other words, the Fifth Circuit concluded that a misrepresentation of some kind was necessary to establish “actual fraud” for purposes of the statutory provision. A majority of the Supreme Court reversed,
concluding that it is possible for a debtor to commit actual fraud without making a misrepresentation. As noted, however, the Court expressly declined to address whether any debt that Ritz may owe was for money, property, services, or credit “obtained by” actual fraud.

Most of the majority’s opinion focuses on the meaning of term “actual fraud” and whether a fraudulent conveyance may constitute an example of actual fraud. Although the phrase typically encompasses conduct that includes a misrepresentation of some kind, the Court concluded that actual fraud within the meaning of section 523(a)(2)(A) could be shown in the absence of a misrepresentation in the rare instance in which the recipient of a fraudulent transfer obtained the property transferred with the requisite fraudulent intent and, correspondingly, owed a debt for the property so obtained. Such a debt, the court reasoned, could be a debt for property obtained by actual fraud even though the debtor had made no misrepresentation to anyone. The Court declined, however, to determine whether the facts and circumstances of the Husky case fit that paradigm. In particular, the Court expressly declined to address whether the debt at issue was for money, property, services, or credit obtained by fraud as the section requires, and for good reason. In Husky, the particular debt at issue was the $163,999.38 that Chrysalis owed for the goods that Husky delivered, not any debt that Ritz owed as the recipient of a fraudulent transfer.

Focusing on the particular wording of section 523(a)(2)(A) as a whole, Justice Thomas in his dissent reasoned that the phrase “actual fraud” appearing in section 523(a)(2)(A) applies only to debts for property “obtained by” actual fraud at the inception of a credit transaction, and, he noted, the relevant debt for $166,999.38 was not “obtained by” fraud in this sense. In his view, actual fraud for purposes of section 523(a)(2)(A) does not encompass fraudulent transfer schemes because no one ever uses a fraudulent transfer scheme to induce a creditor to part with the creditor’s money, goods, services, or credit. Rather, fraudulent transfer schemes are used to drain
a debtor of property, leaving the debtor’s creditors unpaid. Although a fraudulent transfer scheme may vest the transferee of the scheme with property, and the transferee may thereafter owe a debt under fraudulent conveyance principles for the value of the property transferred, that is not the kind of debt that section 523(a)(2)(A) envisions. Instead, section 523(a)(2)(A) envisions a debt owed to a creditor for money, property, services, or credit that the debtor fraudulently induced the creditor to part with. For discharge purposes, fraudulent transfer schemes are addressed in an entirely different provision—section 727(a)(2)(A)—which denies a debtor a discharge in a Chapter 7 case if the debtor made a fraudulent transfer of his or her property within a year before filing for bankruptcy.

Ultimately, the Court’s decision in Husky is a narrow one. Given the Court’s clear statement that it was not deciding whether the particular debt at issue was for money, property, services, or credit “obtained by” fraud, it seems fair to conclude that all the Court actually decided was that a fraudulent transfer could be an example of actual fraud, not whether Ritz’ particular obligation was actually non-dischargeable.

On remand, the Fifth Circuit observed that the Supreme Court had not determined that actual fraud had occurred. It only concluded that a misrepresentation was not absolutely necessarily to show actual fraud. Nor did the Supreme Court determine whether Husky could ultimately prevail in its attempt to prove that Ritz should be denied a discharge of the relevant debt. Whether the debt could be discharged, turned at least in part on whether in fact Ritz owed a debt to Husky. Although the district court had concluded that Ritz did owe a debt to Husky, the Fifth Circuit reversed that determination because it rested on factual determinations the bankruptcy court, as the trier of fact, had not actually made and the district court, sitting on appeal, was not entitled to make.
In particular, the bankruptcy court never drew the inference from its factual findings that Ritz’s various transfers were made with actual intent to hinder, delay, or defraud any creditor. Because the bankruptcy court never drew this inference from the facts, the district court erred in holding that Ritz was liable for the debt to Husky. That is so because whether Ritz was liable for the debt turned on whether the corporate veil could be pierced such that Ritz could be made liable for Chrysalis’ debt. And whether the corporate veil could be pierced turned on whether Ritz committed actual fraud. Under Texas law, whether Ritz intended to defraud Husky (and therefore whether he committed actual fraud necessary for the corporate veil to be pierced) is a question of fact for the trier of fact to make, not some other court. Hence, the Fifth Circuit vacated the district court’s decision and remanded to the bankruptcy court for further findings.
Section 523(a)(4) of the Bankruptcy Code provides that an individual’s discharge in bankruptcy does not discharge any debt “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.” 11 U.S.C. § 523(a)(4). In *Bullock v. BankChampaign, N.A.*, 569 U.S. __, 133 S. Ct. 1754 (2013), the Supreme Court addressed the question of what degree of misconduct by a debtor constitutes “defalcation” under section 523(a)(4) sufficient to disqualify the debt from discharge. The Court analyzed the term’s statutory context, its history, and the principle that exceptions to discharge should be construed narrowly in holding that “defalcation” “includes a culpable state of mind requirement.”

A. Factual Background

Petitioner Randy Bullock was named trustee of a trust established by his father, Curt Bullock, in 1978. *Bullock*, 133. S. Ct. at 1757. The trust, which was for the benefit of Curt Bullock’s children (including Randy), had as its sole asset an insurance policy on Curt Bullock’s life. *Id.* The trust allowed Randy Bullock, as trustee, to borrow funds against the insurance policy’s value. *Id.*

Bullock borrowed against the insurance policy three times during his tenure as trustee. *Id.* First, in 1981, at the direction of his father, he borrowed money to give to his mother, which she used to repay a debt to Curt Bullock’s company. *Id.* Three years later, Bullock borrowed from the trust to invest in a business run by himself and his mother. *Id.* Finally, in 1990, Bullock borrowed additional funds to buy some real property for his business. *Id.*

Bullock repaid all of the borrowed funds, with 6% interest. *Id.* Nonetheless, in 1999, Bullock’s brothers sued him in Illinois state court for breach of fiduciary duty. *Id.* The Illinois court held that Bullock had, indeed, breached his fiduciary duty by engaging in self-dealing
transactions with trust assets, but noted that Bullock “did not appear to have a malicious motive in borrowing the funds.” *Id.* (internal quotation marks omitted). The state court ordered Bullock to pay the trust “the benefits received from his breaches.” *Id.* (internal quotation marks omitted). The court also imposed constructive trusts over Bullock’s interest in the assets he had purchased with funds borrowed from the trust. *Id.*

When Bullock was unable to liquidate his interests in those assets to repay the judgment, he filed for bankruptcy in federal court. *Id.* BankChampaign, the successor trustee of Curt Bullock’s trust and the trustee of the constructive trusts on Bullock’s assets, opposed Bullock’s attempt to obtain a discharge of his debts to the trust. *Id.* The bankruptcy court granted summary judgment for BankChampaign, holding that Bullock’s debt fell within section 523(a)(4)’s exception “as a debt for defalcation while acting in a fiduciary capacity” and was therefore not dischargeable. *Id.* at 1758 (internal quotation marks omitted).

On appeal, the district court affirmed the bankruptcy court’s determination, despite the fact it was “convinced” that BankChampaign was “abusing its position of trust by failing to liquidate the assets.” *Id.* (internal quotation marks omitted). The court of appeals subsequently affirmed the district court, reasoning that “defalcation requires a known breach of fiduciary duty, such that the conduct can be characterized as objectively reckless” and that Bullock’s conduct met that standard. *Id.* (internal quotation marks omitted). Bullock sought review of that decision in the Supreme Court, which granted certiorari to resolve the profound disagreement among lower courts “about whether ‘defalcation’ includes a scienter requirement and, if so, what kind of scienter it requires.” *Id.*
B. Analysis

Justice Breyer, writing for a unanimous Court in *Bullock*, began his analysis by acknowledging that “legal authorities have disagreed about” the meaning of “defalcation” almost ever since the term was first included in a federal bankruptcy statute in 1867. *Id.* Because dictionary definitions of the term generally contain “broad definitional language” of an equivocal nature, the Court noted they “are not particularly helpful” in deciphering the term’s meaning. *Id.* Moreover, the Court observed that the courts of appeals and lower courts have “long disagreed about the mental state that must accompany the bankruptcy-related definition of ‘defalcation.’” *Id.* at 1759.

In light of the equivocal dictionary definitions and lower court interpretations of “defalcation,” the Court searched deeper into the term’s meaning, including the Court’s own analysis in *Neal v. Clark*, 95 U.S. 704, 709 (1878). *Id.* In *Neal*, the Court interpreted the term “fraud” as used in the statutory predecessor to section 523(a)(4) to “mean[] positive fraud, or fraud in fact, involving moral turpitude or intentional wrong . . . and not implied, fraud, or fraud in law, which may exist without the imputation of bad faith or immorality.” *Id.* (quoting *Neal*, 95 U.S. at 709). As the *Neal* Court did with “fraud,” the Court in *Bullock* looked to defalcation’s statutory context in deriving its meaning. Specifically, the Court applied the canon *noscitur a sociis*—“a word is known by the company it keeps”—concluding that this militated in favor of interpreting defalcation as requiring a type of scienter similar to the other terms used in the statutory provision. *Id.* at 1760. Because the other statutory terms surrounding “defalcation”—fraud, larceny, and embezzlement—all require a showing of wrongful intent, the Court reasoned, so too must “defalcation.” *Id.*
Seeking to differentiate the term “defalcation” to avoid rendering any of the terms in section 523(a)(4) superfluous, the Court further chose a meaning of the term that “does not make the word identical to its statutory neighbors.” *Id.* The Court held that an interpretation of “defalcation” including a scienter requirement “can encompass a breach of fiduciary duty that involves neither conversion [embezzlement], nor taking and carrying away another’s property [larceny], nor falsity [fraud].” *Id.*

Interpreting “defalcation” to include a showing of wrongful intent (or extreme recklessness), the Court noted, is also “consistent with the long-standing principle that exceptions to discharge should be confined to those plainly expressed.” *Id.* (internal quotation marks omitted). The Court observed that, because the Bankruptcy Code evinces a strong preference for granting debtors a “fresh start,” Congress has confined the exceptions to discharge to “circumstances where strong, special policy considerations, such as the presence of fault, argue for preserving the debt.” *Id.* at 1761. Here, the Court noted, where a scienter requirement would most likely help nonprofessional trustees (like Bullock), “it is difficult to find strong policy reasons favoring a broader exception.” *Id.*

Finally, the Court emphasized the importance of having a uniform interpretation of federal law, and noted the fact that some Circuits had used its interpretation of “defalcation” without encountering administrative or other practical difficulties. *Id.* Accordingly, the Court held that the term “defalcation” in section 523(a)(4) of the Bankruptcy Code “includes a culpable state of mind requirement akin to that which accompanies application of the other terms in the same statutory phrase.” *Id.* at 1757. Specifically, that state of mind is “one involving knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior.” *Id.*
C. Import of the Bullock Decision

*Bullock* squarely holds that avoiding discharge of a debt for defalcation under section 523(a)(4) requires a showing of knowledge of, or gross recklessness with respect to, the improper nature of the relevant behavior. Accordingly, a negligent breach of fiduciary duty is insufficient to make any resulting debts susceptible to the exception. In reaching that conclusion, the Court reiterated its position that, consistent with the Bankruptcy Code’s preference for granting debtors a “fresh start,” the exceptions to bankruptcy discharge are to be construed narrowly. This has obviously broader implications in the larger discharge context.

Crucially, however, *Bullock* should only be read as addressing the ability of a bankruptcy trustee to *discharge* a debt resulting from “defalcation” while acting in a fiduciary capacity. The Court addressed only “the scope of the term ‘defalcation’” in § 523(a)(4). *Bullock* does not implicate a fiduciary’s underlying liability for defalcation with respect to a fiduciary relationship; rather, it only addresses the circumstances in which a debt *resulting from that breach* is properly subject to discharge under the Code. Consequently, *Bullock* does not affect the duties owed by a fiduciary or the culpability required to make him liable for a breach.
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Law v. Siegel

In Law v. Siegel, 134 C. St. 1188 (2014) the Supreme Court addressed a split of authority between the Ninth and Tenth Circuits as to whether a bankruptcy court may impose a “surcharge” on a debtor’s statutorily exempt property to compensate the trustee for expenses caused by the debtor’s misconduct. The Court reversed the decision of the Ninth Circuit and, in a unanimous decision authored by Justice Scalia, held that the bankruptcy court exceeded its authority when it ordered that the debtor’s $75,000 homestead exemption be used to compensate the trustee for his attorneys’ fees and expenses.

A. The Relevant Statutory Scheme

The Bankruptcy Code allows debtors to “exempt” certain kinds of property from the estate, enabling the debtor to retain those assets post-bankruptcy free from the reach of creditors. 11 U.S.C. § 522(b)(1). Exempt property generally “is not liable” for the payment of “any [prepetition] debt” or “any administrative expense.” 11 U.S.C. § 522(c), (k).

Section 522(d) provides a number of allowed federal exemptions. 11 U.S.C. § 522(d). Among these, section 522(d)(1), known as the “homestead exemption,” protects up to $22,975 in equity in the debtor’s residence. 11 U.S.C. § 522(d)(1). Alternatively, a debtor may elect to forgo the federal exemptions and instead claim whatever exemptions are available under applicable state or local law (and, with certain exceptions, must forgo the federal exemptions if required under applicable state law). 11 U.S.C. § 522(b)(3)(A).

B. The Background of Law

Debtor/petitioner Stephen Law (the “Debtor”) filed for Chapter 7 in 2004, and respondent Alfred Siegel was appointed to serve as the bankruptcy trustee (the “Trustee”). Law v. Siegel, 134 C. St. at 1193. At the time of the bankruptcy filing, the Debtor’s only significant asset was his home, which he valued at approximately $360,000. Id. The Debtor claimed an exemption of
$75,000 of the home’s value pursuant California’s state homestead exemption. Id. The Trustee did not object to this exemption. The Debtor also claimed that the home was subject to two mortgages that together exceeded the home’s nonexempt value, leaving no equity recoverable for other creditors: one for $147,156.52 held by Washington Mutual Bank, and a second for $156,929.04 held by “Lin’s Mortgage and Associates.” Id.

Months after the Debtor’s filed his petition, the Trustee “initiated an adversarial proceeding, alleging the mortgage held by ‘Lin’s Mortgage & Associates’ was fraudulent.” Id. These claims lead to lengthy and expensive litigation surrounding the supposed beneficiary of the lien, Lili Lin, an alleged Chinese national. Id. In 2009, five years after the filing of the original bankruptcy petition, the bankruptcy court found that “no person named Lili Lin ever made a loan to [the Debtor] in exchange for the disputed deed of trust.” Id. (quoting In re Law, 401 B.R. 447, 453 (Bankr. C.D. Cal. 2009)). The bankruptcy court also found “that ‘the loan was a fiction meant to preserve [the Debtor’s] equity in his residence beyond what he was entitled to exempt’ by perpetrating ‘a fraud on his creditors and the court.’” Id. (quoting In re Law, 401 B.R. at 453).

The Trustee requested a “surcharge” of the Debtor’s $75,000 homestead exemption to compensate him for the fees and expenses incurred in uncovering and litigating the Debtor’s misrepresentation. Id. Determining that the Trustee had incurred upwards of $500,000 in legal fees in litigating the Debtor’s fraudulent mortgage claim, the bankruptcy court allowed the surcharge for the entire $75,000. Id.

The Ninth Circuit Bankruptcy Appellate Panel ultimately affirmed the decision of the bankruptcy court, citing the Ninth Circuit’s prior decision in Latman v. Burdette, 366 F.3d 774 (9th Cir. 2004), recognizing “a bankruptcy court’s power to ‘equitably surcharge a debtor’s statutory exemptions’ in exceptional circumstances, such as ‘when a debtor engages in inequitable
or fraudulent conduct.”” *Id.* (*quoting In re Law*, BAP No. CC–09–1077–PaMkH, 2009 WL 7751415, at *5, *7 (B.A.P. 9th Cir. Oct. 22, 2009)). The Court of Appeals for the Ninth Circuit likewise affirmed, determining that the surcharge was properly “calculated to compensate the estate for the actual monetary costs imposed by the debtor's misconduct, and was warranted to protect the integrity of the bankruptcy process.” *Id.* (*quoting In re Law*, 435 Fed. App’x. 697, 698 (9th Cir. 2011).

**C. The Supreme Court’s Decision**

The Supreme Court reversed, holding that the bankruptcy court exceeded the limits of its authority when it ordered the $75,000 protected by the Debtor’s homestead exemption to be made available to the Trustee. The Court acknowledged that a Bankruptcy Court may “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions” of the Bankruptcy Code, *Law*, 134 C. St. at 1194 (quoting 11 U.S.C. §105(a)), and may possess the “inherent power…to sanction ‘abusive litigation practices,’” *id.* (*quoting Marrama v. Citizens Bank of Mass.*, 549 U. S. 365, 376 (2007)). The Court held, however, that a bankruptcy court “may not contravene specific statutory provisions or take action prohibited elsewhere in the Code.” *Id.* The Court elaborated that a “[c]ourts’ inherent sanctioning powers are likewise subordinate to valid statutory directives and prohibitions.” *Id.* (*citing Degen v. United States*, 517 U.S. 820, 823 (1996)).

The Court concluded that the surcharge violated the Bankruptcy Code because, under section 522 and applicable California law, the Debtor was entitled to exempt $75,000 of equity in his home from the bankruptcy estate, 11 U.S.C. § 522(b)(3)(A), which exemption is expressly “not liable for payment of any administrative expense.” *Id.* at 1195 (*citing 11 U.S.C. § 522(k)). Because of this express limitation, the bankruptcy court exceeded both its authority under section
105(a) as well as its inherent powers by ordering that the $75,000 be made available to the Trustee to cover his fees and expenses. *Id.*

The Trustee argued that an equitable power to deny an exemption by “surcharging” exempt property in response to a debtor’s misconduct can coexist with section 522. *Id.* The Court, however, disposed of this argument by noting that the surcharge was not a denial of the homestead exemption because no one timely objected to the homestead exemption and, therefore, it became final before the surcharge was imposed. *Id.* at 1196 (citing *Taylor v. Freeland & Kronz*, 503 U.S. 638, 643-644 (1992), for the proposition that a “trustee’s failure to make a timely objection prevents him from challenging an exemption”). Where the statutory criteria for an exemption are met, the Court held that “a court may not refuse to honor the exemption.” *Id.*

Further, the Court pointed out that the Bankruptcy Code expressly lays out exceptions to the exemptions, some of which are based on the Debtor’s misconduct, and that “courts are not authorized to create additional exceptions.” *Id.* In response to the Trustee’s argument that other courts have claimed authority to revoke an exemption (or barred allowance of an exemption) based on the debtor’s fraudulent concealment of assets, the Court held that these decisions do not create a “general, equitable power in bankruptcy courts to deny exemptions based on a debtor’s bad-faith conduct.” *Id.* While a federal court may apply state law to disallow state-created exemptions, federal law, in and of itself, provides no authority for bankruptcy courts to deny exemptions on a ground not specified in the Bankruptcy Code. *Id.*

The Court explained that its decision in *Marrama v. Citizens Bank of Mass.*, 549 U. S. 365 (2007), on which the Trustee and the United States as *amicus* heavily relied, did not call for a different result. *Id.* at 1197. In *Marrama* the Court held that a debtor’s bad-faith conduct was a valid basis for a bankruptcy court to refuse to convert the debtor’s bankruptcy from a liquidation
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under Chapter 7 to a reorganization under Chapter 13, as permitted by section 706(a) of the Bankruptcy Code. *Id.* Section 706 gives the debtor the right to convert the case, but conditions conversion on “the debtor’s ‘ability to qualify as a debtor under Chapter 13.’” *Id.* (*quoting Marrama*, 549 U.S. at 372). Because Chapter 13 allows dismissal or conversion to a Chapter 7 proceeding based on bad-faith conduct, the Court held that that the debtor’s bad faith prevented him from satisfying an express condition of conversion. *Id.* (*citing Marrama*, 549 U.S. at 372-73). Since there was no allegation that the Debtor failed to satisfy an express condition to claiming his homestead exemption here, the Court held that *Marrama* had no relevance to *Law* and should not be read to “endorse, even in dictum, the view that equitable considerations permit a bankruptcy court to contravene express provisions of the Code.” *Id.*

To conclude, the Court noted that, while the outcome of this case seems somewhat inequitable due to the Trustee being required to shoulder the costs of the Debtor’s misconduct, “it is not for courts to alter the balance struck by the statute.” *Id.* at 1197-1198. Further, bankruptcy courts still retain “ample authority to deny the dishonest debtor a discharge. *Id.* at 1198 (*citing* 11 U.S.C. § 727(a)(2)-(6) and Fed. R. Bankr. P. 9011(c)(2)).
**Stern, Arkison, and Wellness**

Article III of the Constitution provides that the judicial power of the United States shall be vested in the Supreme Court and such inferior courts that Congress may establish. U.S. Const. art. III, §1. It further provides that the judges “both of the supreme and inferior courts, shall hold their Offices during good Behavior” and shall receive compensation, “which shall not be diminished during their continuance in office.” *Id.* As the Supreme Court explained in *Stern v. Marshall*, “Article III is an inseparable element of the constitutional system of checks and balances that both defines the power and protects the independence of the Judicial Branch.” 131 S. Ct. 2594, 2608 (2011) (internal quotations omitted).

In *Stern*, the Supreme Court addressed the interplay between Article III and 28 U.S.C. §157(b), authorizing bankruptcy judges (who do not enjoy Article III’s protections) to enter final judgments in certain “core” bankruptcy proceedings. Specifically, the Court addressed whether a bankruptcy judge may constitutionally enter a final judgment resolving the debtor’s state law counterclaim against a creditor who filed a proof of claim—a matter statutorily designated as “core” in section 157(b)(2)(C)—where the creditor objected to the judge’s exercise of jurisdiction. The counterclaim at issue was a garden-variety state law tort action essentially unrelated to the proof of claim. The Court held that Article III of the Constitution precludes Congress from assigning such matters involving the litigation of “private rights” to non-Article III bankruptcy judges for final adjudication. In sum, because the underlying tort claim at issue in *Stern* was a state law cause of action independent of the federal bankruptcy law, the bankruptcy court “lacked the constitutional authority to enter a final judgment.” *Id.* at 2621.

Following *Stern*, the Supreme Court granted *certiorari* in *Executive Benefits Ins. Agency v. Arkison*, to address two questions left unresolved by its decision in *Stern*: (1) whether Article
III of the Constitution permits bankruptcy judges to exercise the judicial power of the United States to finally decide a private-right controversy on the basis of litigant consent, and, if so, whether a litigant’s conduct can constitute “implied” consent; and (2) whether a bankruptcy judge may submit proposed findings of fact and conclusions of law for de novo review in the district court in a “core” proceeding under 28 U.S.C. § 157(b). Answering the second question in the affirmative, the Court determined that, when a bankruptcy court is presented with a “Stern claim”—a claim a bankruptcy court may fully adjudicate under section 157(b)(1), but not under the Constitution—the bankruptcy court should follow the procedures for non-core claims in section 157(c)(1) and issue proposed findings of fact and conclusions of law that the district court may review de novo. Id., 134 S. Ct. 2165, 2168. Having reached the second question, the Court did not reach the first. More recently, the Court granted certiorari in Wellness International Network v. Sharif, no. 13-935 (2014), ostensibly to address the first question left open in Arkison, as well as whether litigation over what constitutes property of the estate is a matter a bankruptcy court may finally decide. On May 26, 2015, the Court issued its opinion in Wellness, concluding that a litigant may by consent waive any right to an Article III judge, and that the requisite consent need not be express, but must be knowing and voluntary. The Court did not determine whether litigation over property of the estate is a matter a bankruptcy court may finally decide. Id., 135 S. Ct. 1932 (2015).

A. Stern and the Statutory Scheme

Generally, district courts have “original and exclusive jurisdiction of all cases under title 11,” as well as all proceedings (1) arising under the Bankruptcy Code, (2) arising in a case under the Code, and (3) related to a case under the Code. 28 U.S.C. § 1334; Stern, 131 S. Ct. at 2603. Under section 157(a), district judges enjoy discretion to refer any or all bankruptcy cases and
proceedings to the bankruptcy judges in their district. Bankruptcy judges are appointed to 14
year terms by the federal courts of appeals. *Id.*; 28 U.S.C. 152(a)(1). Every district court has
provided for the automatic referral of cases and proceedings by standing order.

The scope of a bankruptcy judge’s power depends on the type of proceeding involved. *Stern*, 131 S. Ct. at 2603. “Bankruptcy judges may hear and enter final judgments in ‘all core
proceedings arising under title 11, or arising in a case under title 11.’” *Id.* (quoting section
157(b)(1)). “‘Core proceedings include, but are not limited to’ 16 different types of matters,
including ‘counterclaims by [a debtor’s] estate against persons filing claims against the estate.’”
*Id.* (quoting section 157(b)(2)(c)).

When a bankruptcy judge determines that a referred proceeding is not a “core”
proceeding, but is instead merely related to a case under title 11, the judge may, without the
parties’ consent, only “submit proposed findings of fact and conclusions of law to the district
court.” 11 U.S.C. § 157(c)(1). After *de novo* review of any matter to which a party objects, the
district court may then enter final judgment in those cases. *Id.* at 2604.

In *Stern*, the Supreme Court held that Article III of the Constitution precludes Congress
from assigning certain statutorily “core” bankruptcy proceedings involving private-right
controversies to non-Article III bankruptcy judges for final adjudication. Because the tort claim
at issue in *Stern* was fundamentally a state law claim and did not implicate a public right, it was
only amenable to final determination and entry of judgment by an Article III judge, at least
absent the parties’ consent otherwise. In reaching that conclusion, the Court rejected the
argument that bankruptcy judges are mere “adjuncts” of the district courts because, in reality,
they “exercise[] the essential attributes of the judicial power.” *Id.* at 2619. Accordingly, without
the parties’ consent, only Article III judges can adjudicate certain claims not involving public rights.

**B. Background of Arkison**

Arkison arose out of the bankruptcy proceedings of the Bellingham Insurance Agency, Inc. (“BIA”). Nicholas Paleveda, an attorney, was largely responsible for managing BIA’s affairs. BIA was affiliated with Aegis Retirement Income Services, Inc. (“ARIS”), with which it kept joint accounting records.

In 2003—following a dispute between Paleveda and his partners concerning the distribution of certain insurance commissions—the partners instructed the relevant insurance carrier to deposit future commissions into an account not accessible by Paleveda. As a result of this falling out, Paleveda initiated arbitration against his former partners. He lost and was ordered to pay his former partners’ attorneys’ fees.

Before the arbitration award became final, Paleveda initiated a transfer of all of BIA’s assets to a newly-created company called Executive Benefits Insurance Agency (“EBIA”). EBIA occupied BIA’s headquarters, employed its staff, and engaged in its business. After discovering the transfer, the ex-partners commenced a state-court fraudulent conveyance action against Paleveda, BIA, ARIS, and others. Paleveda then placed BIA in Chapter 7 bankruptcy, halting the lawsuit by way of the automatic stay. Paleveda next removed the action to federal bankruptcy court and filed an answer in the newly initiated adversary proceeding.

The commencement of the Chapter 7 proceeding triggered the appointment of Peter Arkison, Respondent, as trustee, and deprived Paleveda of further control over BIA. Arkison subsequently commenced his own fraudulent conveyance action on behalf of BIA’s estate, pursuant to 11 U.S.C. § 548, against Paleveda, EBIA, ARIS, and others. As a result, an
adversary proceeding was opened and EBIA answered, denying many of the allegations. Notably, EBIA denied that the fraudulent conveyance action was a “core” proceeding, meaning that he contended that the proceeding was “non-core,” and he asserted that EBIA was entitled to all the Article III rights non-core proceedings entail. Consistent with that view, EBIA belatedly demanded a jury trial.

Pursuant to Bankruptcy Rule 7012, when a defendant denies in its answer that a proceeding is core, as EBIA did here, it is required to state in that same answer whether it consents to the bankruptcy court’s entry of a final judgment, or if it prefers to exercise its right to insist that the bankruptcy court only issue proposed findings of fact and conclusions of law to be reviewed *de novo* by the district court. EBIA failed to state in its answer whether it consented to a final adjudication by the bankruptcy court, thus violating Rule 7012.

After Arkison unsuccessfully sought summary judgment against ARIS, EBIA brought a motion in the bankruptcy court to vacate that court’s trial date, citing its jury demand, which would require trial in the district court. Arkison objected to the motion, highlighting EBIA’s tardiness in bringing its demand. Rather than holding a hearing on the matter, the bankruptcy court vacated the trial date and transmitted the record to the district court, which docketed the matter as a motion to withdraw the reference from the bankruptcy court. The district court then ordered a status conference and instructed the parties to prepare a Joint Status Report to inform the court’s decision with respect to the motion to withdraw the reference. All of the parties but Paleveda participated in a conference call. After the call, Arkison’s counsel circulated the agreed-upon report, indicating that summary judgment proceedings would be litigated in the bankruptcy court. EBIA’s counsel never signed the report before it was produced to the district court; on the other hand, EBIA made no objection at the time the report was circulated or after it
was filed. The district court subsequently re-calendared the withdrawal motion for three months hence.

Arkison thereafter moved for summary judgment against EBIA in the bankruptcy court. The court found there were no genuine issues of material fact concerning whether EBIA was the alter-ego of BIA or whether the assets had been transferred to EBIA fraudulently. Consequently, it concluded that Arkison was entitled to judgment as a matter of law and entered summary judgment against EBIA.

EBIA appealed the bankruptcy court’s judgment to the district court. After reviewing the bankruptcy court’s determinations de novo, the district court affirmed the bankruptcy court’s grant of summary judgment. EBIA then appealed the district court’s affirmance to the Ninth Circuit. After filing its brief, but before oral argument, EBIA for the first time objected to the proceedings in the bankruptcy court on the ground that Article III of the Constitution precluded the bankruptcy court’s entry of final judgment against it on the fraudulent conveyance claim. The Ninth Circuit invited amici curiae briefing, and the United States (among others) participated. Ultimately, the Court of Appeals affirmed.

In rendering its decision, the Court of Appeals recognized that, although bankruptcy judges have statutory authority to enter final judgments in fraudulent conveyance proceedings, they lack the constitutional authority to do so because fraudulent conveyance actions, like state law tort actions, are properly matters of private right. Nonetheless, the court held that, in this case, EBIA’s litigation conduct evidenced its acquiescence and obviated any Article III infirmity. The court additionally held that, in fraudulent conveyance cases where the defendant does not consent, bankruptcy judges may nonetheless enter proposed findings of fact and conclusions of law subject to de novo review in the district court.
C. The Parties’ Arguments

1. EBIA’s Argument

In its merits brief to the Supreme Court, EBIA argued that, as non-Article III judges, bankruptcy judges are constitutionally proscribed from entering final judgment on private-right claims in non-core proceedings, because entering final judgment is the “core function of the Judicial Branch.” Pet. Br. at 13. EBIA argued that, while “bankruptcy judgments carry all the attendant risks of district court judgments, bankruptcy judges have none of the Constitution’s structural protections.” Id. at 23. To allow bankruptcy judges to enter final judgments on private rights, EBIA asserts, “would ‘compromise the integrity of the system of separated powers and the role of the Judiciary in that system.’” Id. at 24 (quoting Stern, 131 S. Ct. at 2620).

Nor, EBIA asserted, can the consent of the parties cure the purported constitutional defect. Id. at 13. Where structural separation of powers issues are at stake, “notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.” Id. at 26 (quoting Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 851 (1986)). Accordingly, EBIA argued, the “consent or waiver of litigants in an individual case is insufficient to confer on non-Article III bankruptcy courts authority to enter final judgments on private rights.” Id. at 27.

EBIA argued in that alternative that consent could only cure the constitutional defect to the extent that Congress has made consent “a limiting feature of the statute permitting non-Article III adjudication.” Id. at 13. EBIA conceded that the Court has “at times given some consideration to the role of consent within a statutory scheme in evaluating whether a statute’s limited delegation of judicial authority violates the separation of powers in the first place.” Id. at 28. EBIA attempted to distinguish delegations to bankruptcy judges from other delegations to
quasi-judicial authorities by emphasizing the presence or absence of consent, the scope of review of the adjudicative body, and the review that body’s findings or determinations are subject to by Article III courts. See id. at 30-31. For example, the Magistrate Judge’s Act, EBIA suggested, “is distinctive in that it makes consent an explicit, statutory limitation on the non-Article III judge’s jurisdiction.” Id. at 31 (citing 28 U.S.C. 636(c)(1)). A statutory consent requirement, EBIA argued, “ensures that litigants are made aware of the need to consent and their right to refuse it, and ensures that Congress has carefully considered the constitutional issues at stake.” Id. at 13.

EBIA further asserted that, “[e]ven if consent in an individual case were relevant to the question whether a non-Article II judge may enter final judgment of the United States, such consent would need to be knowing and voluntary.” Id. at 38. EBIA contended that its “failure to assert an argument foreclosed by binding precedent” (that the bankruptcy court lacked authority to enter final judgment because an earlier Ninth Circuit decision had rejected such an argument) “could not confer on the bankruptcy judge constitutional authority that Article III otherwise forbids.” Id.

EBIA also maintained—contrary to the Ninth Circuit’s holding—that in core proceedings bankruptcy courts “lack[] statutory authority to issue proposed findings of fact and conclusions of law.” Id. at 15. The power granted by section 157(b) to the bankruptcy courts to “hear and determine” core proceedings “does not include authority to propose non-final findings and conclusions” because the plain meaning of “determine” is to decide conclusively. Id. Nor, EBIA asserts, can construing section 157(b) to permit issuance of proposed findings and conclusions be reconciled with section 158. Id. Section 158 grants district courts appellate jurisdiction over bankruptcy court judgments, but provides them with “no authority to enter
judgments in the first instance in a case that has been referred to (and not withdrawn from) the bankruptcy court.” *Id.* Thus, EBIA maintained, the task of “crafting a constitutional alternative to the existing partially unconstitutional framework”—wherein bankruptcy judges are not explicitly authorized to make non-final recommendations—“belongs to Congress, not the courts.” *Id.* at 46.

2. *Arkison’s Argument*

In its brief, Arkison traced the history of district court reliance on third-party bankruptcy adjudicators (referred to as commissioners or referees) from the first bankruptcy act, passed in 1800, through its numerous iterations to the present. Resp’t’s Br. at 9-12. Traditionally, Arkison explained, commissioners or referees oversaw “summary” matters, with abbreviated procedures. *Id.* at 11. Where a party demanded full legal process (for example, in so-called “plenary matters”), resort had to be made to state or Article III federal courts. *Id.* at 12. Generally, referees “had summary jurisdiction over property within the actual or constructive possession of the debtor.” *Id.* Assets outside the debtor’s possession generally could only be reached by plenary proceedings. *Id.* Nonetheless, Respondent observed, parties could “jointly consent to proceed before a referee in a summary proceeding, even with respect to an otherwise plenary matter.” *Id.*

In 1978, Congress overhauled the bankruptcy system, abolishing the summary/plenary division and granting bankruptcy judges jurisdiction over all matters arising in a bankruptcy case, arising under the Bankruptcy Code, or related to a case. *Id.* at 13. Additionally, Congress provided for mandatory assignment of all bankruptcy cases to the new bankruptcy courts for full and final determination, largely freeing those courts from the district courts’ oversight. *Id.*
After the Supreme Court struck down this nascent independent bankruptcy regime in *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), “Congress reverted to the historical reference-based model.” *Id.* at 14. Article III judges were again empowered to use or ignore bankruptcy judges as they desired and to take cases back from those judges “mid-stream” for cause. *Id.* And consistent with the language in Justice Brennan’s plurality opinion and Justice Rehnquist’s concurrence characterizing the restructuring of debtor-creditor relations as lying at the “core” of the federal bankruptcy power, Congress curtailed bankruptcy judges’ ability to enter final judgments with respect to matters that are non-core. *Id.*

Arkison also contended that EBIA waived its right to take its case initially to the district court, instead “tak[ing] its summary judgment chances in the bankruptcy court” and only after losing raising an Article III challenge on appeal. *Id.* Nor are structural Article III concerns present in this case, Arkison maintains, because “the bankruptcy court consensual adjudication system exists entirely within Article III, following longstanding judicial practice.” *Id.* Indeed, “[b]ecause resort to bankruptcy judges is fully at the joint election of district judges and the parties in private-rights controversies, the political branches have no involvement whatsoever and hence there is no encroachment on the judiciary violating the separation of powers.” *Id.* at 19. EBIA’s argument concerning structural concerns is inapposite, Arkison argued, because “the subset of cases implicating structural separation of powers concerns comprises those involving the encroachment or aggrandizement of one branch at the expense of the others,” which is not the case here. *Id.* at 37 (internal quotation marks and brackets omitted).

Furthermore, Arkison argued, consent to bankruptcy court adjudication “may be implied by conduct of the kind at issue here” just as consent can be implied in the analogous magistrate judge setting. *Id.* at 20. Indeed, the Court affirmed the permissibility of implied consent to final
judgments by federal magistrate judges in *Roell v. Winthrow*, 538 U.S. 580,585-86 (2003). And as Arkison noted, the “grant of authority to magistrate judges is even broader” than is the analogous grant of authority to bankruptcy judges. Resp’t’s Br. at 26. Additionally, Bankruptcy Rule 7012 provides the same protection as statutorily required consent because it requires responsive pleadings to “include a statement that the party does or does not consent to entry of final orders or judgments by a bankruptcy judge.” *Id.* at 51 (quoting Rule 7012).

In this case, the court below properly held that EBIA consented to bankruptcy judge determination by failing to object to the Joint Status Report both at the time it was drafted and when it was filed. *Id.* at 60. In any event, Arkison maintained, “[b]ecause an Article III district court conducted a full de novo review of the summary judgment order and entered its own judgment, EBIA got all the Article III consideration to which it was entitled.” *Id.* at 20.

Finally, Arkison contended, “*Stern* creates no insoluble statutory gap” because bankruptcy judges may issue proposed findings of fact and conclusions of law if the parties do not consent to final judgment in the bankruptcy court. *Id.* at 21. “The apparent gap arises because [§ 157] focuses on proposed findings of fact and conclusions of law for non-core claims, but *Stern* claims are statutorily core, and core claims do not have an analogously explicit provision for such reports and recommendations.” *Id.* at 63-4 (internal citation omitted). Understandably, Arkison posited, “almost all courts have done the only logical thing: treat *Stern* claims as though they were non-core, restricting bankruptcy judges in the absence of party consent to proposed findings of fact and conclusions of law.” *Id.* at 64.

3. United States as Amicus Curiae Supporting Arkison

The United States filed an *amicus curiae* brief in support of Respondent-Arkison, arguing that, through its litigation strategy, EBIA had waived its right to have the claim against it decided
by an Article III judge. Gov’t Amicus Br. at 11. The United States agreed with Arkison that the Supreme “Court and the courts of appeals have recognized that litigant consent can authorize the entry of final judgment by a non-Article III judge.” Id.

Consistent with the Ninth Circuit’s holding and Arkison’s argument in its merits brief, the United States submitted that EBIA could “consent to resolution of [its] claim by the bankruptcy court.” Id. at 16. Indeed, the United States quoted approvingly Arkison’s characterization of the paramount importance of consent in determining the permissibility of a non-Article III adjudication: “As respondent notes (Br. 34), every case in which this Court has found a violation of a litigant’s right to an Article III decisionmaker has involved an objecting defendant forced to litigate its private rights involuntarily before a non-Article III judge.” Id. at 18 (internal quotation marks omitted).

The United States, like Arkison, noted that EBIA’s “approach is at odds with decisions holding that federal magistrate judges may, with the litigant’s consent, enter final judgment in cases otherwise committed for resolution to an Article III court.” Id. at 20. Indeed, the United States noted that EBIA’s “argument against waiver impugns the constitutionality of the federal system’s well-established use of magistrate judges.” Id. at 22. Nor, the United States maintained, does the ability of bankruptcy judges to enter final judgments implicate structural separation of powers concerns. Id. at 23.

Even if EBIA had not consented to final determination by its conduct, the United States argued, it still “would not be entitled to relief from the judgment below” because EBIA’s disregard for the Rule requiring that it either consent or object in its answer to final determination by a bankruptcy judge and because it failed to comply with the district court’s order concerning the joint status report. Id. at 26, 28. And because the district court “reviewed
and sustained the bankruptcy court’s summary-judgment ruling under a *de novo* standard, there is no reason to suppose that the district court would have reached a different conclusion if the bankruptcy court had submitted” proposed findings and conclusions instead of a final judgment. *Id.* at 28.

With respect to the ability of a bankruptcy judge to enter recommendations and conclusions in core proceedings, the United States again agreed with Arkison that the Bankruptcy Code may be permissibly read as allowing a bankruptcy judge to make proposed findings of fact and conclusions of law. *Id.* at 29. This result is necessary, the United States argued, because EBIA’s approach “would create an anomalous statutory gap, preventing bankruptcy courts in matters like this one from exercising the statutory powers that apply to either core or non-core proceedings.” *Id.* at 31. Such a “crabbed” reading, the United States suggested, is contrary both to principles of severability and “the great weight of lower-court decisions.” *Id.* Moreover, such a reading is “in conflict with many local rules and orders that authorize bankruptcy judges” to do just that. *Id.*

**D. The Supreme Court’s Decision in Arkison**

The Court ultimately agreed with the Respondent-Arkison, and in a 9-0 decision held that when the Constitution does not permit a bankruptcy court to enter final judgment on a “core” (i.e., a “Stern claim”), the relevant statute nevertheless permits a bankruptcy court to issue proposed findings of fact and conclusions of law to be reviewed *de novo* by the district court. *Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2168 (2014). In this case, the District Court conducted a *de novo* review and entered a separate judgment, which cured any potential error in the Bankruptcy Court’s final judgment. *Id.* at 2174. Accordingly, the Court affirmed the Ninth Circuit’s decision. *Id.*
1. Stern claims may be treated as non-core within the meaning of Section 157(c)(1).

The Court held that when a bankruptcy court is presented with a “Stern claim,” the proper course is to submit proposed findings of fact and conclusions of law to the district court for de novo review and entry of judgment. Arkison, 134 S. Ct. at 2170. The Petitioner argued that Stern claims create a statutory “gap,” since bankruptcy judges are not explicitly authorized to issue proposed findings of fact and conclusions of law in a core proceeding. Id. at 2172. The Court disagreed and concluded that the plain text of the statute’s severability provision closed any such statutory “gap.” Id. at 2173. The severability provision instructs that where a “provision of the Act or [its] application ... is held invalid, the remainder of th[e] Act ... is not affected thereby.” 98 Stat. 344, note following 28 U.S.C. § 151. When a court identifies a Stern claim, it has “held invalid” the “application” of § 157(b)—the “core” label and its attendant procedures—and the “remainder...not affected thereby” includes section 157(c), which governs non-core proceedings. Id. at 2173 (quoting 98 Stat. 344). Accordingly, where a Stern claim otherwise satisfies section 157(c)(1), the bankruptcy court should simply treat the claim as non-core and submit proposed findings of fact and conclusions of law to the district court for de novo review and entry of judgment. Id.

The Court concluded that this approach accords with the general approach to severability. The Court ordinarily gives effect to valid portions of a partially constitutional statute so long as it “remains fully operative as a law” and it is not “evident” from the statutory text and context that Congress would have preferred no statute at all. Id. at 2173 (internal citations omitted). Neither concern was present in this case. Id. Further, the petitioners presented no evidence from the statute’s text or historical context that made it “evident” that Congress would prefer to suspend Stern claims in limbo. Id. On the contrary, if the severability clause did not apply and district
courts, rather than bankruptcy courts, were required to hear all *Stern* claims in the first instance, as EBIA contended, the division of responsibility set by Congress would be dramatically altered. *Id.* at 2173 n.8.

2. *Section 157(c)(1)’s procedures apply to the fraudulent conveyance claims in this case.*

After determining that *Stern* claims may proceed under the same procedural framework as non-core claims in section 157(c)(1), the Court next confronted the issue whether the fraudulent conveyance claims brought by the trustee were within the scope of section 157(c)(1)—“not…core” proceedings, but “otherwise related to a case under title 11.” The Court held that section 157(c)(1)’s procedures did apply in this case and stated that the “[fraudulent conveyance] claims fit comfortably within the category of claims governed by [the provision]” and therefore the bankruptcy court was permitted to follow the non-core procedure, i.e. submit proposed findings of fact and conclusions of law for the district court’s review *de novo.* *Id.* at 2174.

First, the Court assumed, without deciding, that the fraudulent conveyance claims were *Stern* claims, as held by the Ninth Circuit and undisputed by the parties. *Id.* The application of both the “core” label and the procedures in section 157(b) to the trustee’s claims had therefore been “held invalid.” *Id.* (quoting Note following section 151). Second, the fraudulent conveyance claims were “self-evidently related to a case under title 11” because the claim asserts that “property should have been part of the bankruptcy estate and therefore available for distribution to creditors pursuant to Title 11 and was improperly removed.” *Id.* at 2174 (internal citations omitted). Thus, the claims were properly within the scope of section 157(c)(1) and the courts were permitted to follow the provision’s procedures.
3. The District Court’s de novo review and entry of its own valid final judgment cured any potential error in the Bankruptcy Court’s entry of judgment.

The Court concluded that, because the district court reviewed the case de novo, it is inconsequential that the bankruptcy court decided the case in the first place. EBIA contended that it was constitutionally entitled to review by an Article III court regardless of whether the parties consented to bankruptcy court adjudication and in the alternative, that even if such consent were constitutionally permissible, it did not in fact consent. Id. at 2174. The Court held that even if the bankruptcy court’s entry of judgment was invalid, any error was cured because the district court “[i]n effect” provided “the same review” that EBIA claimed it was entitled to under Article III. Id.

The district court in this case conducted a de novo review of the summary judgment claims from the bankruptcy court and, in accordance with its statutory authority over matters related to bankruptcy under section 1334(b), separately entered judgment in favor of the trustee. Id. Thus, although the claims did not proceed as non-core under section 151(c)(1), the review nonetheless cured any defect caused by the procedural posture of the case. Id.

Because the Court concluded that EBIA received the de novo review and entry of judgment to which it was constitutional entitled, the case did not require the Court to address the other question for which it granted certiorari: whether EBIA in fact consented to the Bankruptcy Court’s adjudication of a Stern claim and whether Article III permits a bankruptcy court, with the consent of the parties, to enter final judgment on a Stern claim. Id. at 2169 n.4. The court explicitly reserved that question for another day. Id.

E. Background of Wellness

In July 2008, the District Court for the Northern District of Texas awarded Petitioner, Wellness International Network, Ltd. (“WIN”) $655,596.13 in attorneys’ fees incurred in a civil

Sharif’s bankruptcy petition listed WIN as a creditor, and WIN filed a proof of claim in Sharif’s bankruptcy. Pet. App. 6a-7a. During the proceedings in Texas, WIN had obtained a copy of a 2002 loan application that Sharif had submitted to Washington Mutual, in which he represented that he owned over $5 million in assets. Pet. App. 7a. At the section 341 creditors’ meeting, both WIN and the Chapter 7 trustee requested documents relating to these assets, which were not included in the Schedules filed with Sharif’s bankruptcy petition. Id. Sharif failed to produce the requested documents and later informed WIN that he had lied on the loan application and that the assets in fact belonged to the Soad Wattar Trust—a trust of which Sharif was the trustee—and not to Sharif individually. Id.

WIN initiated a five-count adversary proceeding in Sharif’s bankruptcy case. Counts I-IV sought to prevent the discharge of Sharif’s debts pursuant to 11 U.S.C. § 727, and Count V sought a declaratory judgment that the assets in the Soad Wattar Trust were part of Sharif’s bankruptcy estate. Pet. App. 8a. Sharif repeatedly failed to respond to WIN’s discovery requests. Pet. App. 9a. On April 15, 2010, WIN filed a motion for sanctions and, in the alternative, to compel discovery. Id. The bankruptcy court granted the motion to compel, ordering Sharif to comply with all outstanding discovery requests, and continued the motion for sanctions pending Sharif’s compliance with the discovery order. Id. Sharif again failed adequately to respond to the discovery requests. Pet. App. 9a-10a. On July 6, 2010, the bankruptcy court found that Sharif had failed to produce documents and disclose information
related to his assets, and entered a default judgment in favor of WIN on all five counts of the adversary complaint. Pet. App. 10a-14a.

Sharif appealed the bankruptcy court’s judgment to the district court. After Sharif filed his opening appellate brief, he filed a motion for supplemental briefing regarding this Court’s decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). Pet. App. 15a. The district court denied Sharif’s motion for supplemental briefing and affirmed the bankruptcy court’s judgment. Pet. App. 16a. Because *Stern* was decided more than a month prior to the time Sharif filed his opening brief, the district court determined that Sharif had waived any argument based on *Stern* by not raising it in his briefing. *Id.*

Sharif appealed the district court’s decision to the Seventh Circuit. Pet. App. 17a. On August 21, 2013, the Seventh Circuit affirmed the denial of Sharif’s discharge, holding that Counts I-IV of WIN’s adversary complaint “stem from federal law, not state law, as the provisions of 11 U.S.C. § 727 provide the relevant rules of decision,” and that “whether to grant or deny discharge is central to the restructuring of the debtor-creditor relationship.” Pet. App. 45a-46a.

In contrast to its disposition of Counts I-IV, the Seventh Circuit held that the bankruptcy court lacked constitutional authority to decide WIN’s declaratory judgment claim in Count V. Pet. App. 46a-51a. The court held that a determination as to whether the assets that Sharif alleged belonged to the Soad Wattar Trust were in fact property of the bankruptcy estate was a “state law claim between private parties that is wholly independent of federal bankruptcy law and is not resolved in the claims-allowance process,” Pet. App. 51a, and that, therefore, WIN’s claim “is indistinguishable from the tortious interference claim in *Stern*,” Pet. App. 48a. The Seventh Circuit further held that Sharif’s constitutional objection to the bankruptcy court’s
authority implicated the structural protections of Article III, and therefore could not be waived. Pet. App. 41a-42a.

F. The Parties’ Arguments

1. WIN’s Argument

In its merits brief, WIN traced the history of the adjudication in bankruptcy proceedings of the question whether property in the actual or constructive possession of the debtor constitutes property of the estate. Pet. Br. at 32-40. Under early English bankruptcy procedures, WIN explained, the commissioners in bankruptcy were vested with the authority to determine the extent of the debtor’s property upon the commencement of the bankruptcy case. Id. at 32-34. In the United States, Congress continued that practice with the first bankruptcy statute enacted in 1800. Id. at 34-35. The Bankruptcy Act of 1898 likewise continued the tradition, authorizing bankruptcy referees, in the exercise of their summary jurisdiction, to adjudicate whether property in the actual or constructive possession of the debtor constituted property of the estate, as well as disputes regarding that property. Id. at 36.

In 1978, Congress overhauled the bankruptcy system, granting bankruptcy judges jurisdiction over all matters arising in a bankruptcy case, arising under the Bankruptcy Code, or related to a bankruptcy case. Id. at 38. After the Supreme Court invalidated this broad grant of jurisdiction in Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), Congress responded with the current jurisdictional regime. Resp’t’s Br. at 38. Since that time, courts have “consistently upheld the authority of bankruptcy courts to decide disputes about property in the debtor’s possession.” Id. at 38-39. The Seventh Circuit’s decision, WIN argued, is contrary to this long tradition, id. at 40, and, if followed, would seriously jeopardize the efficient administration of bankruptcy matters, id. at 40-42.
Quoting Stern, WIN contended that the ability to adjudicate disputes over property in the actual or constructive possession of the debtor quintessentially “stems from the bankruptcy itself.” *Id.* at 20. Observing that bankruptcy jurisdiction is fundamentally *in rem* in nature, and likewise exclusive of the jurisdiction of other courts regarding dispositions of property of the estate, WIN argued that a bankruptcy court must be able to adjudicate disputes concerning the property in the debtor’s actual or constructive possession in order for the bankruptcy process to function properly. *Id.* at 21-25. Observing that Stern was not intended to fundamentally upend the administration of bankruptcy cases, WIN contended that the bankruptcy court properly resolved the dispute over the debtor’s property, notwithstanding that doing so required analysis of matters of state law. *Id.* at 25-32.

Turning to the question of consent, WIN contended that, even if the adjudication of Sharif’s ownership interest in property within his actual or constructive possession involved a “Stern claim,” the bankruptcy court’s resolution of the matter was proper because Sharif consented to the resolution. WIN began by arguing that the right to an Article III judge is a personal right that can be waived, *id.* at 42-43, and that Stern itself at least tacitly acknowledged this principle, *id.* at 44-45. Citing cases in which the Court has recognized that even defenses central to the Court’s structural independence can be waived, *id.* at 47-48, WIN contended that no unwaivable right is implicated here, *id.* at 49-52. Rather, waiver of the right to an Article III adjudication properly turns on the parties’ consent. *Id.* at 52-57. Moreover, even if structural rights were implicated in this case, litigant consent is still sufficient under the balancing test established in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). Resp’t’s Br. at 57-61.
As a factual matter, WIN argued that Sharif consented to the bankruptcy court’s adjudication of his interest in his property for two reasons. First, “Sharif provided his express consent by voluntarily filing for bankruptcy necessarily understanding that if he did so his property would be subject to the authority of the bankruptcy court.” *Id.* at 61. Second, “Sharif also implicitly consented to adjudication before the bankruptcy court through his conduct.” *Id.* at 64. In particular, Sharif asked the bankruptcy court to rule on his motion for summary judgment, admitted the action was core, and failed to object to the bankruptcy court’s exercise of jurisdiction in a timely manner. *Id.* at 64-65.

2. *Sharif’s Argument*

In his merits brief, Sharif argued that *Stern* “draws a clear, administrable distinction between matters that the bankruptcy courts may finally adjudicate, and those that must be adjudicated by Article III courts.” Resp’t’s Br. at 19. He contended that the adjudication of state law rights, even as necessary to determine what constitutes property of the estate, properly fall on the Article III side of the line. *Id.* To allow bankruptcy judges to enter final judgments on such private right matters, he asserted, would violate the public/private right distinction first established in *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855). *Id.*

Sharif claimed that, because the Soad Wattar Trust owned the property in question, he actually held “he held no legal or equitable interest” in the assets. Pet. Br. at 21. As a result, the only way to bring the assets into his estate was to “extinguish[] the competing property interests of third parties in the same assets.” *Id.* That, he contended, is properly a private right dispute.

Citing state law, Sharif argued that, as a trustee of the Soad Wattat Trust, he served merely as a representative of the trust entity. *Id.* at 23. As such, he did not possess any interest
in the trust assets that could pass to his bankruptcy estate. *Id.* He argued further that, in order to
determine whether he did, in fact, have an ownership interest, WIN had to pursue an action to
augment the estate, and that kind of a claim “can be adjudicated only by an Article III court. . . .”
*Id.* at 25.

Characterizing WIN’s theory as essentially an alter ego claim, it was no different, Sharif
asserted, from the tort claim at issue in *Stern*, the contract claim at issue in *Northern Pipeline*,
and the fraudulent transfer claim at issue in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33
(1989). Pet. Br. at 25. As such, it did not “stem from the bankruptcy itself”; nor was it a dispute
that was required to be resolved in the claims allowance process. *Id.* at 26. Rather, it was a
dispute governed entirely by state law. *Id.* at 27-28.

Describing the matter as akin to a lawsuit seeking property from a third party, Sharif
contended that, historically, “[p]lenary proceedings were required” to resolve such litigation. *Id.*
at 29. Moreover, regardless of whether the bankruptcy court could adjudicate Sharif’s discharge
as a core matter involving the determination of a public right, the alter ego claim here was
fundamentally different. *Id.* at 36.

Contrary to WIN’s argument, Sharif contended that requiring the district court to enter
final judgments on alter ego claims would not disrupt the efficient administration of bankruptcy
proceedings. *Id.* at 37. According to Sharif, bankruptcy courts may hear such claims, but are
limited to issuing proposed findings of fact and conclusions of law subject to *de novo* review in
the district court. *Id.* at 38. This, he argued, would not meaningful disrupt the division of labor
between the district and bankruptcy courts any more than as already required by *Stern*. *Id.* at
37-38.
Nor, Sharif argued, can the consent of the parties cure the purported constitutional defect. *Id.* at 39. The right to an Article III court, he contended, implicates fundamental structural considerations that cannot be rearranged by litigant consent. *Id.* at 40-41. Citing “separation-of-powers concerns,” he insisted that nonwaivability was crucial to maintaining the “‘integrity of judicial decisionmaking.’” *Id.* at 41-42 (quoting *Stern*). Distinguishing *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), Sharif contended that the bankruptcy court’s exercise of its broad statutory authority crossed the constitutional line in this case because, among other things, the court here purported to finally determined a state law claim that was not inextricably intertwined with the administration of a core public right controversy, such as the allowance or disallowance of a claim or the grant or denial of a discharge. *Id.* at 43-45.

Finally, Sharif argued that, even if a litigant could by consent cure the constitutional problem, the necessary consent must be express, and Sharif did not expressly consent in this matter. *Id.* at 50. First, the requisite consent, he asserted, must be “knowing and voluntary.” *Id.* Second, the relevant rules require express consent. *Id.* at 51. Because he did not provide his express consent, or otherwise knowingly and voluntarily agree to the bankruptcy court’s final determination of his rights, the court could not finally decide the state law issues. *Id.* at 52-55. Nor, he contended, did he forfeit his right by failing initially to raise it on appeal because, once again, the right is nonwaivable and the district court lacked appellate jurisdiction owing to the absence of a proper final judgment. *Id.* at 56-57.

3. *United States as Amicus Curiae Supporting WIN*

The United States filed an *amicus curiae* brief in support of Petitioner-WIN, arguing that Article III does not create an inflexible regime the confers an absolute right to the adjudication of every matter in federal court by an Article III judge. Gov’t Amicus Br. at 12. The United States
agreed with WIN that the determination of whether property in the actual or constructive possession of the debtor constitutes property of the estate is “precisely the kind of action that bankruptcy courts may decide.” *Id.* at 13. Noting that this kind of determination “stems from the bankruptcy itself,” the United States distinguished the matter from the tort claim at issue in *Stern.* *Id.* at 14-15.

Observing that the allegations in the case regarding Sharif’s property were also fundamental to WIN’s challenge to Sharif’s discharge, the United States contended that the two matters were, in fact, intertwined, and thus proper for the bankruptcy court to finally decide. *Id.* at 16-17. The United States also argued that the resolution of the controversy did not turn entirely on state law, and likewise was not one that sought to “augment” the estate. *Id.* at 18. Rather, it sought merely to determine whether what appeared to be the estate actually was so. *Id.* The presence of state law issues is common in federal litigation, but that does not convert the matter here into a state law controversy. Rather, the state law issues are simply subsumed within a “federal rule of decision” regarding the extent of the estate. *Id.* at 21.

Finally, the United States argued that Sharif impliedly consented to the bankruptcy court’s final adjudication of his rights, and this was sufficient to cure any constitutional concern. *Id.* at 21-26, 29-31. In addition, given the oversight district courts exercise in bankruptcy, the bankruptcy court’s final adjudication of the matter did not implicate any nonwaivable structural considerations. *Id.* at 27-28. Moreover, Sharif waived any objection to the bankruptcy court’s exercise of jurisdiction by failing to timely raise it on appeal. *Id.* at 31-33.

**G. The Supreme Court’s Decision in Wellness**

On May 26, 2015, the Supreme Court issued its decision in *Wellness*. In a split decision, the Court concluded that a litigant may by consent waive any right to an Article III judge. The
Court determined that the requisite consent need not be express, but must be knowing and voluntary.

In reaching its conclusion, the Court relied on its prior decision in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), in which it stated that the right to an Article III judge is primarily a personal right that is subject to waiver. The Court also relied on two decisions construing the Federal Magistrate Judge’s Act, *Gomez v. United States*, 490 U.S. 858 (1989) and *Peretz v. United States*, 501 U.S. 923 (1991). In *Gomez*, the Court concluded that, because of constitutional concerns, it would not construe the Magistrate Judge’s Act as authorizing a non-Article III magistrate judge to conduct felony *voir dire*. But in *Peretz*, the Court determined that doing so was permissible with the litigant’s consent.

Although the Court recognized that the right to an Article III judge implicated inter-branch structural concerns regarding the prerogative of the federal judiciary, the Court found that its review of any structural problems should be undertaken from a practical perspective. The Court concluded that having non-Article III bankruptcy judges decide matters did not constitute an impermissible threat to the integrity of the federal judiciary. Among other reasons, bankruptcy judges serve judicial officers of the district court, their decisions are subject to review by Article III courts, district judges may refer and remove matters from the bankruptcy courts as they see fit, and there was no evidence that, in enacting the current jurisdictional scheme, Congress sought to aggrandize itself or humble the federal judiciary.

In rendering its decision, the Court concluded that *Stern* did not compel a different result. In *Stern*, Pierce Marshall never consented to the bankruptcy court’s determination of the claims against him, and thus the issue whether a litigant could by consent waive any right to an Article III judge was not joined. Moreover, the Court determined that expanding *Stern* to prevent...
litigants from waiving a right to an Article III judge would be inconsistent with the premises of 
*Stern* that the decision was a narrow one that did not change much regarding the division of labor 
between the district and bankruptcy courts.

Finally, the Court concluded that, consistent with its decision in *Roell v. Winthrow*, 538 
U.S. 580 (2003), that the requisite consent necessary to waive a right to an Article III judge need 
not be express, but must be knowing and voluntary. The Court remanded the case to the Seventh 
Circuit for a determination of whether Sharif’s conduct met this standard.