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Where In The Bankruptcy Code Does It Say . . .

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Where In The Code Does It Say . . .

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Mortgage "arrearages" can be cured through the plan while regular mortgage payments resume?	**11 U.S.C. § §§ 1322(c)(1) and 1322(b)(5)**

One significant power that chapter 13 grants to debtors is the right to cure defaults on long-term debts pursuant to § 1322(b)(5). Section 1322(b)(5) is the Bankruptcy Code section that allows a debtor to cure defaults on a mortgage debt and maintain regular payments on the mortgage.[1] That provision – limited to debts "on which the last payment is due after the date on which the final payment under the plan is due" – states that a chapter 13 plan may "provide for the curing of any default within a reasonable time," but only if the plan also provides for "maintenance of payments while the case is pending." Section 1322(c) allows debtors to cure defaults on their principal residence until the "hammer falls" at a foreclosure sale.[2]

Chapter 13 plans utilizing this provision are called "cure and maintain plans." Cure and maintain plans are quite common and beneficial for debtors allowing them the ability to take up to 5 years to pay an often substantial pre-petition mortgage arrearage while otherwise not impairing the lender's contractual rights. If this "cure and maintain" approach is chosen by chapter 13 debtor, then the plan must provide for maintenance of payments while debtor's case is pending, which requires the same principal and interest payments as provided in the note, within

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[1] Section 1322(b) provides in part:

> Subject to subsections (a) and (c) of this section, the plan may—
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> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;
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> (3) provide for the curing or waiving of any default;
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> . . .
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> (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

11 U.S.C. § 1322(b).

[2] Section 1322(c) provides:

> Notwithstanding subsection (b)(2) and applicable nonbankruptcy law—
> (1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law; . . .

11 U.S.C. § 1322(c) (emphasis added).

the time frame specified in the note. If chapter 13 debtor is successful in curing her default, the debt is reinstated to its pre-default position, thereby returning the debtor and creditor to their respective positions before the default.

The filing of a chapter 13 case operates to “de-accelerate” a mortgage that was accelerated by the debtor’s prepetition default:

> Section 1322(b)(5) begins with the phrase “notwithstanding paragraph (2) of subsection.” Additionally, § 1322(c) begins with the phrase “Notwithstanding subsection (b)(2) ...” referencing the same subsection. It is apparent from the plain reading of the Bankruptcy Code that the limiting language of subsection § 1322(b)(2) does not disallow the cure of the default of a debtor's residence. This section of the code safeguards a debtor's right in a chapter 13 case to cure a home mortgage default. The Tenth Circuit has long-standing law that states that 1322(b)(3) and (5) permit the plan to cure an default. If a residential mortgage is in default triggering contractual acceleration of the mortgage debt, a chapter 13 plan to “de-accelerate” by paying the amount of the original default rather than the entire accelerated debt, is a permissible cure, not a prohibited modification.

In re Monson, No. 09-20487, 2009 WL 4663864, at *2 (Bankr. D. Wyo. Dec. 7, 2009); s*ee also* Oliveiri, David, *Right of Debtor to "De-acceleration" of Residential Mortgage Indebtedness under Chapter 13 of Bankruptcy*, 67 A.L.R. Fed. 217 (Originally published in 1984).

Where In The Code Does It Say:	Statute(s)
What it means to pay a claim "outside the plan"?	**11 U.S.C. §§ 1322(b)(2); 1322(b)(5); 1326(c)**

Under the Bankruptcy Act of 1938, if a secured creditor objected to a plan in a Chapter XIII case, the plan could not be confirmed. To deal with the objecting creditor, the solution was to not pay the claim through the plan and to make payments to the creditor directly. Eventually the phrase "outside the plan" came into favor as descriptive of the exclusion of an objecting creditor from the plan. *See* Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy*, 4th Ed. § 103.2 at para. 2 (rev. Jan. 5, 2011), www.ch13online.com.

Under the present Bankruptcy Code, the use of the phrase "outside the plan" is a misnomer to describe the payment of a claim directly by the debtor to the creditor. The chapter 13 plan needs to designate how each secured claim is to be treated. The claim is not "outside the plan"; instead, the plan provides that the debtor will pay the creditor directly. *Foster v. Heitkamp (In re Foster)*, 670 F.2d 478 (5th Cir. 1982).

Start with 11 U.S.C. § 1322, which describes what a plan may do. Section 1322(b)(2) provides that a plan may modify the rights of holders of claims ". . . or leave unaffected the rights of holders of any class of claims."

Under section 1322(b)(5), the plan may provide for the curing of any default within a reasonable time "and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due." 11 U.S.C. § 1322(b)(5).

Section 1322(b)(2) and 1322(b)(5) describe how a plan may treat claims, but neither paragraph mentions who is to make payments on those claims.

Go next to 11 U.S.C. § 1326 ("Payments"). Subsection (c) states: "Except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan." 11 U.S.C. § 1326(c) (emphasis added). Thus, it would appear that a plan may provide that the debtor will make payments to directly to creditors.

That right is not absolute. It is within the bankruptcy court's discretion whether to allow a debtor to be the "disbursing agent" based on factors "such as administrative efficiency, tracking of payments, fairness and treatment of creditors, and the determination that there is a reduction of plan failure when all payments are made through the plan." *Cohen v. Lopez (In re Lopez)*, 550 F.3d 1202 (9th Cir. BAP 2008); see also *Foster v. Heitkamp (In re Foster)*, 670 F.2d 478 (5th Cir. 1982). Another factor, discussed elsewhere in these materials, is whether it is "feasible" for the debtor to make payments directly to creditors as well as plan payments. *See, e.g.*, *In re Carey*, 402 B.R. 327 (Bankr. W.D. Mo. 2009).

Whether or not the debtor makes direct payments on their home mortgages usually depends on the customs and rules of the local jurisdiction. Having the trustee make the debtor's mortgage payments while in a chapter 13 case (with the debtor taking over after completion of the plan) is often referred to as paying mortgages "through the plan" or making "conduit" mortgage payments through the trustee (in addition to saying the debtor is paying the mortgage "outside the plan").

The various arguments for and against permitting a debtor to make direct payments on secured claims is beyond the scope of this handout. However, practitioners should be aware of the prevailing law in their jurisdictions as to whether the automatic stay is affected by the decision to make direct payments. In *Telfair v. First Union Mortgage Corp.*, 216 F.3d 1333 (11th Cir. 2000), the 11th Circuit Court of Appeals concluded that the automatic stay terminates as to a creditor receiving direct payments from the debtor when confirmation vested property of the estate in the debtor.[3]

Proposing to make direct payments to an unsecured creditor will often trigger an objection to confirmation by the trustee. Treating one unsecured creditor differently from other unsecured creditors is a separate "classification" of the claim. Title 11 U.S.C. § 1322(b)(1) provides that a plan may "designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated . . . ." Paying one unsecured creditor in full by direct payments to the creditor would be unfair to those creditors receiving less than payment in full through the plan.

However, in some jurisdictions plans providing for the payment of long-term unsecured debts pursuant to 11 U.S.C. § 1322(b)(5), such as student loans, are confirmed.

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[3] *See* 11 U.S.C. § 1327(b) ("Except as otherwise provided by the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor"), and 11 U.S.C. § 362(c)(1) ("(c) Except as provided in subsections (d), (e), (f), and (h) of this section – (1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate.").

Where In The Code Does It Say:	Statute(s)
Debtors may "cram down" a secured claim to the value of the collateral?	**11 U.S.C. §§ 1322(b)(2); 1325(a)(5)(B)(ii); 506(a).**

First of all, just what is a "cram down"? There is no definition of the phrase in 11 U.S.C. § 101. The term came into use with respect to an amendment to section 77 of the old Bankruptcy Act in 1935 dealing with business reorganizations.[4] As one district judge described in a 1976 pre-Bankruptcy Code opinion:

> "Cram down" is a term used by some bankruptcy lawyers and bankruptcy commentators to describe the application of § 461 under Chapter XII and § 216 under Chapter X of the [Bankruptcy] Act upon a dissenting class of creditors where the proposed plan failed to receive approval of the requisite majority. The Court has found no judicial or other authoritative definition or discussion of the term or, indeed, few articles which discuss the term oft used by lawyers. Nevertheless, <u>it is a self-evident, vivid connotation of the involuntary administration of bad medicine upon a recalcitrant victim, the secured creditor who opposes the effects of the reorganization proceedings in the Bankruptcy Court</u>.

In the Matter of Pine Gate Assoc, Ltd., 1976 WL 359641 (N.D. Ga. 1976) (emphasis added). Although the term "cram down" is most commonly used in connection with chapter 11, its use has crept into the parlance of chapter 13 practitioners.

A "cram down" is a bifurcation or splitting of a claim into a secured claim to the extent of the value of the collateral, and an unsecured claim as to any deficiency. Debtors propose plans to retain property and pay for it through the plan. The amount that must be paid as a secured claim is equal to the value of the property being retained. Creditors often object, arguing that the collateral is worth more than what the debtors are proposing to pay for the collateral. It is not uncommon for courts to conduct evidentiary hearings to determine the value of the collateral.

So where is the "cram down" power in chapter 13 cases found in the Bankruptcy Code?

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[4] *See Callaway v. Benton*, 336 U.S. 132 (1949).

Start with 11 U.S.C. § 1322(b), which describes what a chapter 13 plan may do. Section 1322(b)(2) provides that the plan may "modify the rights of holders of <u>secured claims</u> . . . ."[5] (emphasis added).

Then look at the confirmation requirements of 11 U.S.C. § 1325. Under section 1325(a), the court shall confirm a plan if a number of conditions are met. Right now, we are only concerned with relevant parts of 11 U.S.C. § 1325(a)(5), which provides in part: "(5) with respect to <u>each allowed secured claim provided for by the plan</u> - . . . (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of <u>such claim</u> is not less than <u>the allowed amount of such claim</u>; . . . ." (emphasis added).

To determine the allowed amount of a secured claim, we go to 11 U.S.C. § 506(a)(1) (which was just § 506(a) prior to BAPCPA). The Supreme Court has pointed out that the phrase "allowed secured claim" is found throughout the Bankruptcy Code. As Justice Scalia described in his dissent in *Dewsnup v. Timm*,

> Congress did not leave the meaning of "allowed secured claim" to speculation. Section 506(a) says that an "allowed secured claim" (the meaning of which is obvious) is also a secured claim "to the extent of *the value of [the] creditor's interest in the estate's interest in [the securing] property.*" (Emphasis added.) (This means, generally speaking, that an allowed claim "is secured only to the extent of the value of the property on which the lien is fixed; the remainder of that claim is considered unsecured." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 239, 109 S.Ct. 1026, 1029, 103 L. Ed.2d 290 (1989)).

Dewsnup v. Timm, 502 U.S. 410, 420-21 (1992) (Scalia, J., dissenting) (emphasis and bracketed words original).

The cram down power in chapter 13 cases was discussed in the case of *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997), a case in which the method of valuing collateral was decided. Section 506 was amended in 2005 by BAPCPA to provide for a "replacement value" standard for valuation in chapter 13 cases. *See* 11 U.S.C. § 506(a)(2).

There are exceptions to the claim bifurcation or "cram down" power. In particular, a plan may not modify the rights of a creditor holding a claim secured only by a security interest in real property that is the debtor's principal residence. 11 U.S.C. § 1322(b)(2). This is often referred to as the "anti-modification" clause of § 1322(b)(2). And section 506 does not apply to a secured claim if the creditor has a purchase money security interest in the debt, the debt was incurred within 910 days prior to the filing of the bankruptcy petition, and the collateral is a motor vehicle

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[5] The plan may: . . .

> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

11 U.S.C. § 1322(b)(2).

acquired for the personal use of the debtor (often referred to as "910-claims"); nor does section 506 apply if the collateral is "any other thing of value" and the debt was incurred within one year of the petition. 11 U.S.C. § 1325 (unnumbered paragraph following (a)(9)).

The process of bifurcating a claim in chapter 13 in a way mimics what would occur to the creditor's claim outside of bankruptcy. A secured creditor would repossess its collateral, sell it, and thereby realize the value of the collateral through the sale. Any remaining unpaid portion of the debt would be (in most jurisdictions) an unsecured deficiency claim. The creditor would have state law remedies of garnishment, execution, etc., and may collect all or part of the unsecured claim, or the debt may turn out to be uncollectible.

In a chapter 13 case, the creditor will receive the value of its collateral through plan payments over time, and to compensate the creditor for the delay in realizing the full value of the collateral, the creditor is paid through the plan with interest (discussed elsewhere in these handouts). The creditor has an unsecured deficiency claim, and it might receive a distribution on its unsecured claim through the plan. When considered from this perspective, a chapter 13 "cram down" is not quite the "involuntary administration of bad medicine upon a recalcitrant victim" described above.

Where In The Code Does It Say:	Statute(s)
Debtors can "strip off" a second lien and treat it as unsecured?	**11 U.S.C. §§ 506 and 1322(b)**

One notable exception of loans for property that cannot be crammed down under chapter 13 is with respect to liens secured only by a security interest in real property that is the debtor's principal residence (11 U.S.C. § 1322(b)(2), the "anti-modification clause"). The Supreme Court in *Nobelman v. Am. Sav. Bank*, 508 U.S. 324 (1993), interpreted § 1322(b)(2) as precluding a "strip down" of a partially secured lien against a principal residence in chapter 13. That is, a debtor may not reduce an underwater mortgage to the value of the principal residence because partially secured lien-holders are "holders of secured claims" protected against lien modification.

Nobelman notwithstanding, however, courts have generally permitted a "strip off" of completely valueless liens in chapter 13 cases because, unlike the lienholder in *Nobelman*, holders of such liens are not "holders of secured claims" and, therefore, are not entitled to the protection of § 1322(b)(2). A number of circuit courts of appeal and bankruptcy appellate panels have weighed in since *Nobelman* and every circuit court that has addressed the issue has held that § 1322(b)(2)'s anti-modification provisions do not bar a chapter 13 debtor from stripping off wholly unsecured liens on the debtor's principal residence.[6]

To exercise this authority, bankruptcy courts rely on §§ 506 and 1322(b) of the Bankruptcy Code. First, courts apply the valuation procedure in § 506(a) to bifurcate a claim into a secured and unsecured portion. Sections 506(a)(1) and (d) provide:

> (a)(1) <u>An allowed claim of a creditor secured by a lien on property in which the estate has an interest</u>, or that is subject to setoff under section 553 of this title, <u>is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property</u>, or to the extent of the amount subject to setoff, as the case may be, <u>and is an unsecured claim to the extent that the value of such creditor's interest</u> or the amount so subject to setoff <u>is less than the amount of such allowed claim</u>. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.
> . . .
> (d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void. . . .

[6] *TD Bank, N.A. v. Davis (In re Davis)*, 716 F.3d 331 (4th Cir. 2013); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lane v. W. Interstate Bancorp (In re Lane)*, 280 F.3d 663 (6th Cir. 2002); *Pond v. Farm Specialist Realty (In re Pond)*, 252 F.3d 122 (2d Cir. 2001); *Tanner v. FirstPlus Fin. (In re Tanner)*, 217 F.3d 1357 (11th Cir. 2000); *Bartee v. Tara Colony Homeowners Ass'n (In re Bartee)*, 212 F.3d 277 (5th Cir. 2000); *McDonald v. Master Fin. (In re McDonald)*, 205 F.3d 606 (3d Cir. 2000).

11 U.S.C. § 506(a)(1), (d) (emphasis added).

Next, courts look to § 1322(b)(2), which provides that, subject to certain exceptions, a chapter 13 bankruptcy plan may modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims. Section 1322(b) provides that:

> Subject to subsections (a) and (c) of this section, the plan may—
>
> . . .
>
> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

11 U.S.C. § 1322(b)(2) (emphasis added).

Applying this framework, a completely valueless lien is classified as an unsecured claim under § 506(a). Only then does a bankruptcy court consider the rights of lienholders under § 1322, which affords protection to holders of secured claims against principal residences. Section 1322, however, expressly permits modification of the rights of unsecured creditors. The end result is that § 506(a), which classifies valueless liens as unsecured claims, operates with § 1322(b)(2) to permit a bankruptcy court, in a chapter 13 case, to strip off a lien against a primary residence with no value.

<u>Where In The Code Does It Say:</u>	**<u>Statute(s)</u>**
Interest must be paid on secured claims?	**11 U.S.C. § 1325(a)(5)(B)(ii)**

In a chapter 13, the debtor can pay for the value of a secured claim (i.e., usually the value of the secured property) by paying the present value of the collateral rather than the whole debt through the plan. This in a procedure that is referred to as a "cramdown" because the terms of the repayment are forced on the creditor, or crammed down its throat.

Since the creditor will only be receiving full payment over the time that the debtor pays the claim, which is usually over the span of the plan, the creditor is entitled to an interest rate on the value of the allowed secured claim. In essence, the present value of the debtor's payments must equal the value of the collateral, which means that the payments must be discounted by an interest rate that will be equal to the allowed secured claim.

Section 1325(a) of the Bankruptcy Code sets forth the requirements for confirmation of a chapter 13 plan.[7] Unless a secured creditor consents to different treatment, where the debtor retains the property securing the claim, the plan must provide that (a) a creditor of an allowed secured claim retains the lien securing the claim until the claim is paid in full or discharged, § 1325(a)(5)(B)(i)(I); (b) "the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim," § 1325(a)(5)(B)(ii); and (c) the creditor must receive periodic payments in equal monthly

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[7] Section 1325 provides in part:

> (a) Except as provided in subsection (b), the court shall confirm a plan if—
> . . .
> (5) with respect to each allowed secured claim provided for by the plan—
> (A) the holder of such claim has accepted the plan;
> (B) (i) the plan provides that—
> (I) the holder of such claim retain the lien securing such claim until the earlier of—
> (aa) the payment of the underlying debt determined under nonbankruptcy law; or
> (bb) discharge under section 1328; and
> (II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;
> (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and
> (iii) if—
> (I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and
> (II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or
> (C) the debtor surrenders the property securing such claim to such holder;

11 U.S.C. § 1325(a)(5) (emphasis added).

amounts, § 1325(a)(5)(B)(iii)(I). With only a few exceptions, § 506(a) applies and provides, in pertinent part, that "an allowed claim of a creditor secured by a lien on property . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim." § 506(a)(1).

Where a chapter 13 debtor retains property subject to a secured claim, the creditor retains a lien securing the claim, and the debtor must compensate the creditor with installment payments throughout the plan. The amount of each installment must be calibrated to ensure that, over time, the creditor receives disbursements whose total present value equals or exceeds that of the allowed claim. Thus, although not expressly stated in the Code, § 1325(a)(5)(B)(ii) suggests that the debtor must pay interest on a secured claim that is paid in installments. The Bankruptcy Code, however, does not provide guidance on how to determine this interest rate.

In *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), a pre-BAPCPA case, the Supreme Court addressed the appropriate method for determining the interest rate on the secured portion of a claim that was bifurcated under § 506. There, the debtor's chapter 13 plan proposed a 9.5% interest rate on the secured portion of the claim, calculated using a "formula rate." However, the creditor argued that the 21% contract rate should apply. *Id.* at 470–71. After considering four different methods used by lower courts for determining the proper interest rate, a plurality of the Court decided that the formula approach is the appropriate method for calculating interest on the secured portion of a loan. *Id.* at 479–80. The *Till* Court defined the formula approach as the national prime rate plus an additional risk adjustment rate, which accounts for the debtor's risk of nonpayment. *Id.* at 479. The national prime rate "reflects the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower." *Id.* The risk adjustment rate reflects that bankrupt debtors typically pose a greater risk of defaulting than commercial debtors. *Id.* In selecting the formula approach, the Court reasoned that § 1325(a)(5)(B) does not require a court to use the rate provided in the original loan, nor consider the creditor's individual circumstances, prior dealings with the debtor, or alternative loans if permitted to foreclose. *Id.* at 476–77. The Court concluded that § 1325(a)(5)(B) only requires that the distributions under the claim equal the present value of the secured claim. *Id.* at 474. The *Till* Court did not define how to compute the risk adjustment, but provided some guidance in noting that § 1325 "obligates the court to select a rate high enough to compensate the creditor for its risk but not so high as to doom the plan." 541 U.S. at 480.

With *Till* as guidance, courts have used different methods to calculate the appropriate interest rate. The formula method (aka prime plus) uses the current prime rate plus a certain amount; courts generally add 1% to 3%, but allow the creditor to prove that a higher percentage is more appropriate. Since the prime rate already compensates for opportunity cost and for inflation according to the market's view of those factors, the additional percentage is added to compensate the creditor for the greater risk of default by the debtor, since the prime rate is only available to the most creditworthy corporations. Other methods include the presumptive contract rate method which uses the interest rate specified in the original contract, the coerced loan method which considers what the creditor could earn if it were allowed to immediately foreclose on the property and then invest the proceeds by lending the proceeds out with the same risk and duration as the cramdown payments, and the cost of funds method which considers what it would cost the creditor to borrow the amount of money equal to its allowed secured claim.

Where In The Code Does It Say:	**Statute(s)**
Whether interest must be paid on arrearage claims?	**11 U.S.C. §1322(e).**

If a loan contract has been entered into after October 22, 1994, and the plan proposes to cure defaults and maintain payments on the claim,[8] state law and the terms of the agreement control whether the creditor is entitled to interest on arrearages (as well as costs, fees, and other charges). Where in the Code does it say that?

Title 11 U.S.C. § 506(b) authorizes interest on oversecured claims, and any reasonable fees, costs or charges provided for by the agreement or state law.[9] In *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), the Supreme Court interpreted section 506 to provide for interest on oversecured claims, plus reasonable fees, costs and charges if provided for in the agreement or applicable state law.[10]

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[8] 11 U.S.C. § 1322(b)(5) provides that a plan may:

> **(5)** notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

11 U.S.C. § 1322(b)(5). As discussed elsewhere in these materials, paragraph (2) of section 1322(b) says that a plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence. . . ." 11 U.S.C. § 1322(b)(2).

[9] 11 U.S.C. § 506(b) provides:

> (b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, 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 State statute under which such claim arose.

11 U.S.C. § 506(b). Interest is also required on secured claims provided for under 11 U.S.C. § 1325(a)(5), which is addressed elsewhere in these materials.

[10] In *Ron Pair Enterprises*, the Supreme Court explained:

> The relevant phrase in § 506(b) is "[T]here 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 under which such claim arose." "Such claim" refers to an oversecured claim. The natural reading of the phrase entitles the holder of an oversecured claim to postpetition interest and, in addition, gives one having a secured claim created pursuant to an agreement the right to reasonable fees, costs, and charges provided for in that agreement. <u>Recovery of postpetition interest is unqualified. Recovery of fees, costs, and charges, however, is allowed only if they are reasonable and provided for in the agreement under which the claim arose.</u> Therefore,

In *Rake v. Wade*, 508 U.S. 464 (1993), the Supreme Court applied its ruling in *Ron Pair Enterprises* to oversecured mortgage claims and held that section 506(b) authorizes the payment of interest on the amounts necessary to cure defaults ("arrearages"), even if interest is not authorized by the agreement or applicable state law.

Thereafter, Congress enacted subsection (e) of section 1322, which now provides:

> (e) Notwithstanding subsection (b)(2) of this section and sections 506(b) and 1325(a)(5) of this title, if it is proposed in a plan to cure a default, <u>the amount necessary to cure the default, shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.</u>

11 U.S.C. § 1322(e) (emphasis added). The legislative history makes clear that 1322(e) was enacted to overrule *Rake v. Wade.* The statute was made applicable prospectively only, so it applies only to mortgages entered into after October 22, 1994.[11]

> in the absence of an agreement, postpetition interest is the only added recovery available.

Ron Pair Enterprises, 489 U.S. 235, at 241 (emphasis added).

[11] Section 305 of HR 5116 amended 11 U.S.C. § 1322 by adding subsection (e). It also amended 11 U.S.C. §§ 1123 and 1222 in like fashion. The commentary included in the House Report accompanying the bill explained the purpose of the amendments as follows:

> Section 305. Interest on interest.
>
> This section will have the effect of overruling the decision of the Supreme Court in *Rake v. Wade*, 113 S.Ct. 2187 (1993). In that case, the Court held that the Bankruptcy Code required that interest be paid on mortgage arrearages paid by debtors curing defaults on their mortgages. Notwithstanding State law, this case has had the effect of providing a windfall to secured creditors at the expense of unsecured creditors by forcing debtors to pay the bulk of their income to satisfy the secured creditors' claims. This had the effect of giving secured creditors interest on interest payments, and interest on the late charges and other fees, even where applicable laws prohibits such interest and even when it was something that was not contemplated by either party in the original transaction. This provision will be applicable prospectively only, i.e., it will be applicable to all future contracts, including transactions that refinance existing contracts. It will limit the secured creditor to the benefit of the initial bargain with no court contrived windfall. It is the Committee's intention that a cure pursuant to a plan should operate to put the debtor in the same position as if the default had never occurred.

H.R. Rep. No. 103-835, Pub. L. 103-394 (1994) ("Bankruptcy Reform Act of 1994"). The law became effective on October 22, 1994.

Pursuant to 11 U.S.C. § 1322(e), interest must be paid on arrearages only if required by the underlying agreement <u>and</u> authorized under applicable nonbankruptcy law.

Mortgage arrearage claims consist of missed payments, each of which comprises interest and (in most instances) principal. But arrearage claims might also include various fees (including attorneys' fees, late fees, etc.), costs, and numerous other charges. It is rare for state laws (such as usury laws) as well as loan agreements to authorize the recovery of "interest on interest." Although the general rule since the enactment of section 1322(e) is that no interest is payable on arrearage claims, attorneys representing debtors and creditors need to review the note and mortgage documents as well as applicable state law to determine what other fees, costs, and charges are permissibly included in the arrearage claim,[12] whether those fees must be reasonable, and whether interest is allowed on any component of the arrearage claim.[13]

[12] *See Deutsche Bank National Trust Company v. Tucker*, 621 F.3d 460 (6th Cir. 2010) (arrearage claim of an undersecured mortgage creditor may include attorneys' fees which are authorized by the note and state law).

[13] *Compare In re Bumgarner*, 225 B.R. 327 (Bankr. D. S.C. 1998) (no interest on arrearages authorized); *In re Trabal*, 254 B.R. 99 (D. N.J. 2000) (interest on certain fees and charges included in the arrearage claim authorized); *In re Hence*, 225 Fed. Appx. 28 (5th Cir. 2007) (interest due on arrearages only after maturity date per the agreement); *In re Koster*, 294 B.R. 734 (Bankr. E.D. Mo. 2003) (agreement and state law permitted interest on the principal component of the arrearage claim as well as on attorney fees and advanced costs, but not on late fees and other additional charges); *In re Boyd*, 401 B.R. 137 (Bankr. D. N.J. 2008) (note authorized recovery of reasonable attorney's fees plus interest).

<u>Where In The Code Does It Say:</u>	**<u>Statute(s)</u>**
A chapter 13 plan must be "feasible" to be confirmed?	**11 U.S.C. § 1325(a)(6)**

The idea for including feasibility in this discussion came from the case of *In re Jones (Southeast Bank v. Jones),* 105 B.R. 1007 (N.D. Ala. 1989), where the district judge, in reciting the facts of a case on appeal, said:

> Instead of granting the relief requested by Southeast Bank, the bankruptcy court, on the sudden and gratuitous motion of the Trustee, orally dismissed [the case]. . . . [T]he record reflects that the only ground for the requested dismissal stated by the Trustee was that the plan then was <u>"not feasible" (whatever that meant)</u> . . . .

In re Jones, 105 B.R. at 1009 (emphasis added). "Feasibility" is not a term used in the statutory requirements for confirmation of a chapter 13 plan, yet confirmation is denied frequently on the grounds that a plan is "not feasible."

So where in the Code does it say that a plan cannot be confirmed if it is "not feasible"?

Title 11 U.S.C. § 1325(a)(6) provides that a plan can be confirmed if, among other conditions, "(6) the debtor will be able to make all payments under the plan and to comply with the plan." 11 U.S.C. § 1325(a)(6). One aspect of the feasibility test is that the debtor must be able to afford to make plan payments.

> To satisfy feasibility, a debtor's plan must have a reasonable likelihood of success, i.e., that it is likely that the debtor will have the necessary resources to make all payments as directed by the plan. . . . Before confirmation, the bankruptcy court should be satisfied that the debtor has the present as well as the future financial capacity to comply with the terms of the plan.

In re Fantasia, 211 B.R. 420, 422-23 (1st Cir. BAP 1997) (citations omitted).

Feasibility under section 1325(a)(6) and eligibility to be a debtor in a chapter 13 case sometimes go hand in hand. *See, e.g.*, *In re Crowder*, 179 B.R. 571, 574 (Bankr. E.D. Ark. 1995). Title 11 U.S.C. § 109(e) provides in pertinent part:

> (e) Only an <u>individual with regular income</u> . . . or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, . . . may be a debtor under chapter 13 of this title.

11 U.S.C. § 109(e) (emphasis added). There is actually a definition in 11 U.S.C. § 101 of "individual with regular income."

> (30) The term "individual with regular income" means individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stockbroker or a commodity broker.

11 U.S.C. § 101(30).

A corollary to the rule that the debtor must be able to afford payments is that the payments the debtor proposes must be adequate to fund the plan to completion within the maximum time allowed by statute.

A plan may not provide for payments over a period that is longer than 5 years. 11 U.S.C. § 1322(d)(1), (d)(2). Within that time, the plan must provide for the full payment of (almost) all claims entitled to priority, 11 U.S.C. § 1322(a)(2);[14] secured claims being paid through the plan must be paid in full, 11 U.S.C. § 1325(a)(5); and unsecured creditors must receive: at least as much as what they would receive in a chapter 7 liquidation (11 U.S.C. § 1325(a)(4), the so-called "liquidation test" or "best-interest-of-creditors test," discussed elsewhere in these handouts), or the amount required by the disposable income test (11 U.S.C. § 1325(b)).

For example, if the debtor's proposed monthly plan payments will not pay a secured claim in full within the 5-year maximum duration of the plan, the plan is said to be not feasible. *See, e.g., In re Shelly*, 458 B.R. 740 (Bankr. N.D. Ohio 2011). Therefore, the plan must be mathematically feasible, and the debtor must be able to make all payments under the plan and comply with the plan. 11 U.S.C. § 1325(a)(6).

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[14] Title 11 U.S.C. § 1322 provides in pertinent part:

> (a) The plan –
>
> . . .
>
> (2) shall provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim;
>
> . . .
>
> (4) notwithstanding any other provision of this section, may provide for less than full payment of all amounts owed for a claim entitled to priority under section 507(a)(1)(B) only if the plan provides that all of the debtor's projected disposable income for a 5-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

11 U.S.C. § 1322(a).

Where In The Code Does It Say:	Statute(s)
A plan must meet a "liquidation test" (aka "best interest of creditors" test) to be confirmed?	**11 U.S.C. § 1325(a)(4)**

Under chapter 7, a debtor liquidates his nonexempt assets to pay his unsecured creditors. Under chapter 13, the debtor gets to keep all of his property, but pays his creditors with his future income over a 3 or 5 year period. Section 1325(a)(4) requires that unsecured creditors receive at least the present value of what they would have received under a chapter 7 liquidation.[15]

Commonly known as the best-interests-of-creditors test or the liquidation test, this provision of the Code requires two separate calculations. First, the court must consider the value, as of the effective date of the proposed chapter 13 plan, of the property to be distributed to each unsecured creditor in chapter 13, taking into account the chapter 13 administrative expenses. Because the property to be distributed must have a certain value "as of the effective date of the plan," § 1325(a)(4), application of the liquidation test requires that creditors receive payments having a present value at least equal to what they would receive in a chapter 7 case which depends on the discount rate used. Next, the court must consider the amount that would be paid on each allowed unsecured claim if the debtor's estate were liquidated in a hypothetical chapter 7 case, taking into account the chapter 7 administrative expenses. In determining this amount, practitioners should keep in mind that under chapter 7, a trustee in bankruptcy would have the power to avoid fraudulent and preferential transfers, thereby increasing the assets in the estate and the overall payout to creditors. Where such avoidance actions would be successful in chapter 7, a chapter 13 debtor must propose a plan which would equal or exceed the payout to creditors under chapter 7, taking into account the value of the avoidance actions.

After the present value of the amount that is to be distributed under a chapter 13 plan is calculated and the amount that would be paid in chapter 7 is estimated, the two amounts must be compared. The chapter 13 plan will meet the best interests of creditors test if the distribution amount determined in the first, chapter 13, calculation is not less than the amount in the second, chapter 7, calculation. By contrast, if the present value of the amount to be distributed under the chapter 13 plan is less than the estimated amount that unsecured creditors would receive in a chapter 7 liquidation, the plan will not pass muster under § 1325(a)(4).

[15] Section 1325(a) provides: "Except as provided in subsection (b), the court shall confirm a plan if— (4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date[.]"

<u>Where In The Code Does It Say:</u>	**<u>Statute(s)</u>**
Debtors may recover a car that was repossessed prepetition, and a creditor's failure to turn over the car is a violation of the automatic stay?	**11 U.S.C. §§ 541 (dependent on applicable state law); 542(a); 363; 1303; 362(a)(3)**

One of the benefits of filing a chapter 13 case in most jurisdictions is that the debtor may recover a car needed to get to and from work that was repossessed prior to bankruptcy, provided the car has not yet been disposed of by the creditor. The debtor's right to recover the property is very much dependent upon applicable state law.

Title 11 U.S.C. § 541 ("Property of the estate") provides in pertinent part as follows:

> (a) The commencement of a case . . . creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
> (1) . . . all legal or equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. § 541(a)(1).

Property interests are created and defined by state law. *Butner v. United States*, 440 U.S. 48, at 54-55 (1979). State law also defines a creditor's security interest. *Id*. However, when there is a direct conflict between state law and bankruptcy law, bankruptcy law controls. *Id*.

Title 11 U.S.C. § 542 provides in pertinent part as follows:

> (a) . . . <u>[A]n entity</u>, other than a custodian, <u>in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title</u>, or that the debtor may exempt under section 522 of this title, <u>shall deliver to the trustee, and account for, such property</u> or the value of such property, unless such property is of inconsequential value or benefit to the estate.

11 U.S.C. § 542(a) (emphasis added). Property of the debtor repossessed by a secured creditor falls under section 542 and may be drawn into the estate even though the debtor does not have a possessory interest in the property at the time of the commencement of the bankruptcy case. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, at 205-07 (1983).

"In effect, § 542(a) grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of the reorganization proceedings." *Id.* Although *Whiting Pools* was a chapter 11 case, it has been held to be applicable in chapter

13 cases. *See, e.g., In re Sharon (TranSouth Financial Corp. v. Sharon)*, 234 B.R. 676 (6th Cir. BAP 1999).[16]

Section 542 makes reference to "the trustee." In a chapter 13 case, section 1303 gives the debtor the sole right to use, sell, or lease property of the estate under section 363.[17]

Substituting "chapter 13 debtor" for "trustee", section 363 as applicable in a chapter 13 case would read:

> (b)(1) The [~~trustee~~ chapter 13 debtor], after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate . . . .
>
> . . .
>
> (e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the [~~trustee~~ chapter 13 debtor], the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide <u>adequate protection</u> of such interest. . . .

11 U.S.C. § 363 (emphasis and bracketed materials added).[18] Our focus is on property that the debtor intends to use during the chapter 13 case.

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[16] *But see In re Barringer*, 244 B.R. 402 (Bankr. E.D. Mich. 1999) (declining to follow the 6th Circuit BAP's opinion in *Sharon*).

[17] Title 11 U.S.C. § 1303 ("Rights and powers of debtor") provides:

> Subject to any limitations on a trustee under this chapter, the debtor shall have, exclusive of the trustee, the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l), of this title.

11 U.S.C. § 1303.

[18] Section 361 describes "adequate protection" as follows:

> When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by--
>
> (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;
>
> (2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or
>
> (3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

A creditor with a security interest in property the debtor has the right to use must rely on the Bankruptcy Code's adequate protection provisions rather than the nonbankruptcy remedy of possession to protect its interest in the property. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204 (1983).

In most jurisdictions, under section 9-623 of the UCC, a debtor may redeem collateral up until the time the creditor has disposed of the collateral. If under state law the debtor no longer has any rights in the collateral (e.g., the creditor has already sold the car, or if under state law the mere act of repossession constitutes a transfer of ownership to the creditor), the debtor may not recover the car. *See, e.g., In re Curry (Tidewater Finance Co. v. Curry)*, 347 B.R. 596 (6th Cir. BAP 2006) (discussing rulings of the 11th Circuit that reached different conclusions depending on applicable state law).

If the debtor has the right to seek a return of the repossessed vehicle, the majority rule is that the creditor must immediately return possession to the debtor, then seek adequate protection. *See, e.g., Thompson v. General Motors Acceptance Corp.*, 566 F.3d 699 (7th Cir. 2009).[19] The mere act of retaining the car is a violation of the automatic stay.

Title 11 U.S.C. § 362, the automatic stay, prohibits a creditor from taking any action "to exercise control over property of the estate."[20] "Holding onto an asset, refusing to return it, and otherwise prohibiting a debtor's beneficial use of an asset all fit within this definition [of "exercising control"]. *Id*. at 702.

The creditor may seek a termination or modification of the automatic stay on the grounds that its interest is not adequately protected, 11 U.S.C. § 362(d)(1); or that the debtor has no equity in the property and it is not necessary for an effective reorganization. 11 U.S.C. § 362(d)(2). [21] Usually a car needed for transportation to and from work is considered necessary to

11 U.S.C. § 361. Requiring the debtor to maintain full coverage insurance on the vehicle is a grant of adequate protection to the creditor.

[19] *But see* the dissenting opinion in *In re Sharon (TranSouth Financial Corp. v. Sharon)*, 234 B.R. 676, 688-90 (6th Cir. BAP 1999) (Stosberg, J. dissenting).

[20] Section 362 provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of--
>
> (3) any act to obtain possession of property of the estate or of property from the estate or <u>to exercise control over property of the estate</u>;

11 U.S.C. § 362(a)(3) (emphasis added).

[21] Title 11 U.S.C. § 362(d) provides in pertinent part:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

a chapter 13 debtor's effective reorganization, leaving the creditor only with the argument that its interest is not adequately protected. At a minimum, the debtor will likely be required to show proof of full-coverage insurance as a form of adequate protection. In some jurisdictions, the creditor is not required to give the car back to the debtor unless and until the debtor shows proof of insurance.

Once the debtor recovers the vehicle, the plan may modify the claim pursuant to 11 U.S.C. § 1322(b)(2), although the claim may not be "crammed down" to the value if it is a so-called "910-claim" (discussed elsewhere in these materials). The analysis becomes much more complicated if the creditor's lien was not timely perfected or is otherwise avoidable by the trustee. That issue is beyond the scope of these materials, but practitioners should be aware of the potential issues.

> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; [or]
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if--
>
> > (A) the debtor does not have an equity in such property; and
> >
> > (B) such property is not necessary to an effective reorganization.
>
> . . . .

11 U.S.C. § 362(d)(1) and (d)(2).

<u>**Where In The Code Does It Say:**</u>	<u>**Statute(s)**</u>
Debtors can discharge divorce-related property settlement claims (unless they get a "hardship discharge")?	**§ 1328(a)(2) (by negative implication); § 1328(b); § 523(a)**

In a chapter 13 bankruptcy, a debtor can discharge most of his debts after he completes his bankruptcy plan payments, but among the debts that cannot be discharged are domestic support obligations. Some practitioners will recall that under pre-BAPCPA law there was a distinction between property settlements (dischargeable under certain circumstances) and debts for support payments (non-dischargeable). This has not changed for chapter 13 debtors.

Generally speaking, the Bankruptcy Code provides that debts are not dischargeable if they are "for a domestic support obligation," § 523(a)(5), or if they are owed "to a . . . former spouse . . . of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor . . . in connection with a . . . divorce decree." § 523(a)(15).[22] "Domestic support obligation" is a defined term meaning a debt owed to a former spouse that is "in the nature of alimony, maintenance or support" of the former spouse "without regard to whether such debt is expressly so designated." § 101(14A)(B). So § 523(a) provides that alimony, maintenance, and support debts ("DSOs") and spousal debts other than DSOs (such as property settlements) are non-dischargeable. However, spousal divorce obligations other than DSOs are dischargeable in chapter 13 cases because § 1328(a)(2) incorporates § 523(a)(5), but not § 523(a)(15). A reading of the statute illustrates this point. Section 1328(a) provides:

> Subject to subsection (d), <u>as soon as practicable after completion by the debtor of all payments under the plan</u>, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed,

[22] Section § 523(a) provides in part:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> > (5) for a domestic support obligation;
> >
> > . . .
> >
> > (15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit;

11 U.S.C. § 523(a)(5), (a) (15).

> but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—
>
> . . .
>
> (2) of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523 (a);

11 U.S.C. § 1328(a) (emphasis added). Overwhelming case law supports this statutory construction. *See, e.g., Benson v. Benson (In re Benson),* No. 11-12284, 2011 WL 4435560, *1 (11th Cir. Sept. 26, 2011) (recognizing that "[i]n a Chapter 13 bankruptcy, a debtor can discharge most of his debts after he completes his bankruptcy plan payments[,] [b]ut among the debts that cannot be discharged are domestic support obligations."). In a chapter 13 case, a former spouse and creditor of the debtor will likely want to litigate the issue of whether the debt is characterized as one under § 523(a)(15) (dischargeable) or under § 523(a)(5) (non-dischargeable).

In determining whether a debt is actually in the nature of alimony or support, a court will look beyond the label the parties have given to a particular debt. *Cummings v. Cummings,* 244 F.3d 1263, 1265 (11th Cir. 2001). A debt is a domestic support obligation if the parties intended it to function as support or alimony, even if they called it something else. The court's decision should also be informed by state law. But there are other factors a court should consider as well. They include: (1) the agreement's language; (2) the parties' financial positions when the agreement was made; (3) the amount of the division; (4) whether the obligation ends upon death or remarriage of the beneficiary; (5) the frequency and number of payments; (6) whether the agreement waives other support rights; (7) whether the obligation can be modified or enforced in state court; and finally (8) how the obligation is treated for tax purposes.

A discharge of § 523(a)(15) property settlement debts is possible under 11 U.S.C. § 1328(a) only if the debtor completes payments under the plan (and satisfies other conditions). A debtor has another option for a discharge in chapter 13: what is commonly referred to as a "hardship discharge" pursuant to 11 U.S.C. § 1328(b).[23] A § 523(a)(15) property settlement

[23] Section 1328(b) provides:

> **(b) [A]**t any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if—
>
> **(1)** the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
>
> **(2)** the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and
>
> **(3)** modification of the plan under section 1229 of this title is not practicable.

11 U.S.C. § 1328(b).

agreement is not dischargeable by a so-called "hardship discharge" under § 1328(b). In fact, all § 523(a) debts are nondischargeable if the debtor gets a § 1328(b) hardship discharge. Section 1328(c) provides as follows:

> **(c)** A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 of this title, except any debt—
> **(1)** provided for under section 1322(b)(5) of this title; or
> **(2)** of a kind specified in section 523(a) of this title.

11 U.S.C. § 1328(c). This is consistent with the opening sentence of § 523(a) which says "A discharge under section . . . 1328(b) of this title does not discharge an individual debtor from any debt. . ." enumerated in § 523(a).