Denver Law Review

Volume 56
Issue 3 *Tenth Circuit Surveys*

Article 2

January 1979

Chapter 13 of the Bankruptcy Act of 1978

Glenn Warren Merrick

Follow this and additional works at: https://digitalcommons.du.edu/dlr

Recommended Citation
Glenn Warren Merrick, Chapter 13 of the Bankruptcy Act of 1978, 56 Denv. L.J. 585 (1979).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu,dig-commons@du.edu.

Chapter 13 of the Bankruptcy Act of 1978

This article is available in Denver Law Review: https://digitalcommons.du.edu/dlr/vol56/iss3/2

DENVER LAW JOURNAL

VOLUME 56 1979 NUMBER 4

CHAPTER 13 OF THE BANKRUPTCY REFORM ACT OF 1978

BY GLENN WARREN MERRICK*

INTRODUCTION

Wage earner plans were conceived in Birmingham, Alabama, in the early years of the great depression by Special Referee Valentine Nesbitt, who created them out of "the whole cloth of former Section 74."[1] He perceived the need for a relief provision for individual debtors comparable to that afforded corporations by section 77B, the ancestor to Chapter X. Building on his framework, Congress enacted Chapter XIII[2] as part of the Chandler Act of 1938.[3] The basic theory behind wage earner relief has been to allow hard pressed debtors to avoid bankruptcy, judgment process, and creditor harassment by applying disposable income in excess of necessary living expenses to the payment of debts under a plan of extension, composition, or a combination of the two.[4] Periodic payments are made to a trustee under the protection of the bankruptcy court, and the trustee distributes the appropriate shares to creditors until the plan has been fulfilled or abandoned.[5]

The growth in the utilization of Chapter XIII was slow and geographically skewed until fairly recently.[6] However, the 1970s

* The author is a clerk for Judge Thomas Reavley of the United States Court of Appeals, Fifth Circuit. He received his B.A. from University of Colorado in 1976 and a J.D. from University of Texas in 1979.

[1] Cyr, *Setting the Record Straight for a Comprehensive Revision of the Bankruptcy Act of 1898*, 49 AM. BANKR. L.J. 99, 115-16 (1975).

[2] 11 U.S.C. §§ 1001-1086 (1976). In the Bankruptcy Reform Act of 1978, the wage earner relief chapter has been designated using arabic numeral 13. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2645 (1978) [The Bankruptcy Reform Act of 1978 is hereinafter cited in text and notes as the new act or the 1978 Act]. In the text and notes following, the designation "Chapter XIII" refers to wage earner relief provisions of the Bankruptcy Act of 1898, while the designation "Chapter 13" is reserved for the wage earner relief chapter of the 1978 Act.

[3] Act of June 22, 1938, ch. 575, 52 Stat. 840.

[4] 11 U.S.C. § 1006(7) (1976).

[5] *Id.* § 1033(4).

[6] For fiscal 1951, there were only 6924 plans filed in the United States and 84% of these were filed in Alabama. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, TABLES OF

have seen more extensive and uniform utilization among the districts of this form of debtor relief.[7] The recent rapid growth in filings can be attributed to greater awareness of its availability and benefits among attorneys and debtors.[8]

From the debtor's perspective, the advantages of Chapter XIII over liquidation are legion.[9] The debtor is allowed to keep his

---

BANKRUPTCY STATISTICS, Table F2 (1952) [hereinafter cited as TABLES OF BANKRUPTCY STATISTICS]. By 1969, almost 29,000 wage earner plans were being filed annually but vast discrepancies in Chapter XIII use between districts still existed. TABLES OF BANKRUPTCY STATISTICS, Table F2 (1971).

One of the early motivating factors in revising the Bankruptcy Act, the Brookings Report, D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORMATION (1971), reported this disproportionality and the report of the Commission on Bankruptcy Laws of the United States echoed the finding. H.R. Doc. No. 137, 93d Cong., 1st Sess. (1973) [hereinafter cited as H.R. Doc. No. 137]. The Commission suggested that lack of awareness on the part of debtors and lawyers as to the existence of wage earner relief, differing creditor and community attitudes toward insolvency, and reluctance from the bar and bankruptcy judges in certain geographical areas all combined to produce the variation in use. *Id.* at 12, 157. Other causative factors which have been mentioned include the relative stringency of the state's wage garnishment laws, *Proposed Bankruptcy Reform Act: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 167 (1975) (statement of Prof. Frank Kennedy) [hereinafter cited as *1975 House Hearings*], the liberality of the state's exemptions, *id.* at 192, the practicality of wage earner plans in areas where the cost of living consumes most of disposable earnings, *id.* at 1346 (statement of Paul Winkler), and differences of opinion about the purpose of Chapter XIII as primarily a tool for debtor relief or as a collection device for creditors. Cyr, *supra* note 1, at 117.

Some bankruptcy judges have been unenthusiastic about Chapter XIII because they lack familiarity with it. A few devote most of their time to complex corporate reorganizations while others are only part-time judges. *Id.* at 116-17. Attorneys may be reluctant to take on a Chapter XIII case because they fear it will prove uneconomical, requiring numerous, sporadic court appearances. In addition, an attorney's volume of Chapter XIII cases may not justify the expense. *1975 House Hearings*, *supra* at 1325 (statement of U.S. Bankruptcy Judge Conrad K. Cyr); *id.* at 1346 (statement of Paul Winkler). *But cf.* Meth, *Making Wage Earner Proceedings More Effective*, 80 COM. L.J. 14, 14-15 (1975) (attorneys not usually required to render extensive service).

However, one commentator pointed out that the Commission's criticism as to lack of utilization and nonuniformity of use of Chapter XIII was based on findings by the Brookings Institution which were ten to fifteen years old and inconsistent with current facts. *Proposed Bankruptcy Reform Act: Hearings on S. 235 and S. 236 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 590 (1975) (statement of Claude L. Rice, Chairman of the Legislative Committee for the National Association of Chapter XIII Trustees) [hereinafter cited as *1975 Senate Hearings*].

[7] TABLES OF BANKRUPTCY STATISTICS, *supra* note 6 at Table F2 (1978).

[8] At least one commentator has criticized the Commission's view that most debtors are unaware of wage earner relief. Presson, *Let's Talk Some Common Sense About the Administration of Consumer Bankruptcies*, 49 AM. BANKR. L.J. 263, 283 (1975).

[9] One advantage has been eliminated by the Bankruptcy Reform Act of 1978. Under current law, credit information concerning bankruptcies must be purged from credit re-

property and build equity because liquidation is not the focus. Bankruptcy is more likely to have an adverse effect on future employment, job advancement, bondability, and social status. Some lending organizations will not make purchase money home loans to those who have been in liquidation while Chapter XIII debtors have obtained FHA insured home loans during the pendency of their plan. After bankruptcy, the bankrupt may be forced to defend against exceptions to discharge but these are less likely to be filed after wage earner cases since the debtor generally will have proposed significant payment rather than avaricious composition. Moreover, bankruptcy remains an alternative should financial problems recur within six years of the petition for extension relief.[10] In addition, Chapter XIII allows the debtor to retain a sense of pride in attempting to meet his obligations and avoid a perceived stigma of bankruptcy.[11] Finally, the automatic stay of suits against the debtor and actions to enforce liens on his property are broader in Chapter XIII than in bankruptcy because all creditors are stayed regardless of whether their claims are dischargeable.[12]

---

cords after a lapse of fourteen years. 15 U.S.C. § 1681c(a)(1) (1976). Information regarding wage earner relief can be kept only seven years. *Id.* § 1681s(a)(6). Section 312(b) of the Bankruptcy Reform Act amends the law to provide that information regarding either form of relief can be kept for ten years. 1978 Act § 312(b) (to be codified in 15 U.S.C. § 1681c(a)(1)).

[10] 10 COLLIER ON BANKRUPTCY ¶ 20.01 (14th ed. 1940); 3 D. COWANS, BANKRUPTCY LAW AND PRACTICE § 1121 (2d ed. 1978); Girth, *The Bankruptcy Reform Process: Minimizing Judicial Control in Wage Earners' Plans*, 11 U. MICH. J.L. REF. 51, 54 (1977); Goldstein, *A Solution to Consumer Bankruptcy: Chapter XIII, an Alternative*, 76 COM. L.J. 261 (1971). Under the 1978 Act, liquidation will be a viable alternative within six years of a composition petition in certain circumstances. 1978 Act, § 727(a)(9) (to be codified in 11 U.S.C. § 727(a)(9)). *See* note 263 and accompanying text *infra*.

[11] *See* authorities cited at note 10 *supra*. It is difficult to establish concretely whether the slur of bankruptcy is actually more severe than the stigma of Chapter XIII. Intuitively, it would seem that the credit community would be more receptive to those with wage earner relief in their background. H.R. REP. No. 595, 95th Cong., 1st Sess. 118 (1977) [hereinafter cited as H.R. REP. No. 595]; 3 D. COWANS, *supra* note 10 at 423-24; Goldstein, *supra* note 10. However, it may be that creditors in some locales are not sophisticated enough to distinguish between the two. *See 1975 Senate Hearings*, *supra* note 6, at 607 (statement of Sam Plowden, Past President of the Association of Chapter XIII Trustees). Where competition between creditors is stiff, neither form of relief is particularly condemning. *See id.* at 608-09 (statement of Andrew Leoni). In other areas, both forms of relief may be fatal to a credit rating. *See generally* S. REP. No. 989, 95th Cong., 2d Sess. 12 (1978) [hereinafter cited as S. REP. No. 989].

[12] 10 COLLIER ON BANKRUPTCY ¶ 23.05 (14th ed. 1940); Note, 4 MEM. ST. U. L. REV. 554 (1974). *But cf.* Power-Pak Products, Inc. v. Royal Globe Ins. Co., 433 F. Supp. 684 (W.D.N.Y. 1974) (intimates a contrary result under BANKR. R. 11-44). The 1978 Act will

It has been suggested that consumer credit counseling organizations, prevalent in some parts of the country, are viable alternatives for the debtor contemplating wage earner relief. These organizations advertise themselves as non-profit entities which counsel the debtor and attempt to work out arrangements between him and his creditors.[13] However, these organizations cannot guarantee a cessation of creditor garnishment and harassment. Moreover, interest charges, late charges, and revolving charges do not abate when the debtor seeks assistance from them. Finally, Chapter XIII presents an opportunity to reject unprofitable executory contracts and unexpired leases, while these mediators, funded by creditors, do not offer this alternative.[14] Thus, while they advertise themselves as free, their actual cost can be much higher than wage earner relief.

Chapter XIII's advantages to creditors are obvious. The creditor who is not fully secured is likely to receive a greater percentage of his claim under a wage earner plan than in liquidation, and he may retain the debtor as a future customer.[15] Wage earner plans also provide a more equitable distribution for those creditors whose claims would not be reaffirmed subsequent to bankruptcy.[16]

A wage earner's employer may find that the employee is less accident prone after relief from financial pressure. The employer will find that he no longer is required to respond to repeated garnishment proceedings. Moreover, his community stature may be enhanced to some extent by encouraging financial responsibility among his workers.[17]

I. THE BANKRUPTCY REFORM ACT OF 1978

A growing dissatisfaction with the operation of the Bankruptcy Act of 1898 stimulated studies and proposals for new legislation in recent years. The Brookings Report[18] spurred Congress

---

stay virtually all actions in liquidation and Chapter 13 regardless of whether the debt is dischargeable in bankruptcy. 1978 Act § 362 (to be codified in 11 U.S.C. § 362).

[13] *1975 Senate Hearings*, *supra* note 6, at 176 (statement of Robert Norris, General Counsel, National Consumer Finance Association).

[14] *1975 House Hearings*, *supra* note 6, at 1401-02 (statement of Duncan Kester). *Id.* at 1326 (statement of U.S. Bankruptcy Judge Conrad K. Cyr).

[15] This takes on added importance under the 1978 Act because business debtors are eligible for Chapter 13 relief. *See* notes 36-43 and accompanying text *infra*.

[16] 3 D. COWANS, *supra* note 10, at 424; Girth, *supra* note 10.

[17] 3 D. COWANS, *supra* note 10, at 424.

[18] D. STANLEY & M. GIRTH, *supra* note 6.

to form the Commission on Bankruptcy Laws of the United States to study current laws and draft new legislation.[19] The Commission's report was published in 1973 and its proposed revision was introduced into the Ninety-Third Congress.[20] However, bankruptcy judges and others were displeased with the Commission's bill because they felt that the new government agency it would create to handle administrative matters arrogated judicial functions. In addition, they disagreed with the bill's form of a new bankruptcy court system.[21] Consequently, the National Conference on Bankruptcy Judges drafted a counterproposal, which was introduced into the Ninety-Fourth Congress.[22] After a series of compromises, the Bankruptcy Reform Act of 1978[23] passed both houses of the Ninety-Fifth Congress and was signed into law by President Carter in November of 1978.[24]

---

[19] Previously, the Consumer Bankruptcy Committee of the ABA's Corporation, Banking and Business Law Section had drafted amendments to modernize Chapter XIII. Twinem, *A New Version of Chapter XIII of the Bankruptcy Act*, 25 BUS. LAW. 1741 (1970).

[20] H.R. 10, 792 and S. 2565, 93d Cong., 1st Sess. (1973).

[21] *See, e.g.*, Cyr. *The Bankruptcy Act of 1973: Back to the Drafting Board*, 48 AM. BANKR. L.J. 45 (1974); Hertzberg & Weingarten, *The Powers of the Administrator Under the Proposed Bankruptcy Act*, 79 COM. L.J. 82 (1974); Lee, *A Critical Comparison of the Commission Bill and the Judges' Bill for the Amendment of the Bankruptcy Act*, 49 AM. BANKR. L.J. 1 (1975); Seidman, *The Bankruptcy Act of 1973—A Critique*, 79 COM. L.J. 297 (1974).

[22] H.R. 32 and S. 235, 94th Cong., 1st Sess. (1974). The Commission's chairman criticized this bill for failing to delegate any administrative duties from the bankruptcy judge to the Bankruptcy Division of the Administrative Office of the U.S. Courts. *1975 Senate Hearings, supra* note 6, at 19 (statement of Harold Marsh, Jr.).

[23] Pub. L. No. 95-598, 92 Stat. 2549 (1978) (to be codified principally in 11 U.S.C. §§ 101-151326 and in scattered sections of 28 U.S.C.). *See* 11 U.S.C.A. Sp. Pamph. (1979).

[24] The pertinent legislative history of the 1978 Act can be summarized as follows. Senate Joint Resolution 88, seeking to create a Commission on Bankruptcy Laws of the United States, was introduced into the first session of the Ninety-First Congress to replace Senate Joint Resolution 100 which had not survived the Ninetieth Congress. As amended, it was enacted in 1970. Pub. L. No. 91-354, 84 Stat. 468. The Commission's final report was sent to Congress in July of 1973, H.R. Doc. No. 137, *supra* note 6, and its proposed bill was introduced into the Ninety-Third Congress. H.R. 10, 792 and S. 2565, 93d Cong., 1st Sess. (1973). A modified version was introduced the following year, H.R. 16, 643, 93d Cong., 2d Sess. (1974). Since neither bill was enacted into law by that Congress, it was reintroduced in the following one, H.R. 31 and S. 236, 94th Cong., 1st Sess. (1975). The Judges' Bill was introduced in the same session. H.R. 32 and S. 235, 94th Cong., 1st Sess. (1975). Hearings were held and published on both bills in both houses. *1975 House Hearings, supra* note 6; *1975 Senate Hearings, supra* note 6. Since neither bill was enacted before the end of the second session, a compromise bill was introduced into the Ninety-Fifth Congress. H.R. 6, 95th Cong., 1st Sess. (1977). The sponsors of the bill introduced two subsequent clean versions into this same session. H.R. 7330, 95th Cong., 1st Sess. (1977) and H.R. 8200, 95th Cong., 1st Sess. (1977). The Judiciary Committee of th House recommended passage of the final version. H.R. REP. NO. 595, *supra* note 11. Meanwhile,

On October 1, 1973, the Federal Rules of Bankruptcy became effective.[25] The enabling legislation provides that the rules, confined to "the forms of process, writs, pleadings, and motions, and the practice and procedure" under the Bankruptcy Act of 1898 are not to "abridge, enlarge, or modify any substantive right."[26] However, to the extent the rules remained within their domain, they are to supersede the Bankruptcy Act.[27] The new act amends this enabling statute to provide that the rules will no longer control over conflicting statutes.[28] To date, no new rules have been drafted to complement the recently enacted legislation so the current rules will remain in effect. However, Chief Justice Burger has announced the formation of an Advisory Committee on Bankruptcy Rules to draft new rules pursuant to the Supreme Court's rulemaking power.[29]

II. STRUCTURAL CHANGES IN CHAPTER XIII

A. *Availability of Relief*

The availability of Chapter XIII relief has been greatly expanded. Originally, plans under Chapter XIII were known as wage earner plans because there was a dollar limitation on the maximum annual income of an eligible debtor.[30] The Chandler Act had set this figure at $3600,[31] but it was raised to $5000 in

a similar bill had been introduced into the Senate, S. 2266, 95th Cong., 1st Sess. (1977), and hearings were held and printed on this bill, *Proposed Bankruptcy Reform Act: Hearings on H.R. 8200 and S. 2266 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *1977 Senate Hearings*], as was the Judiciary Committee's report which recommended passage. S. REP. No. 989, *supra* note 11. S. 2266 was incorporated into H.R. 8200 on the floor of the Senate and H.R. 8200 passed the Senate as amended while consideration of S. 2266 was discontinued. 124 CONG. REC. S14,745 (daily ed. Sept. 7, 1978). After a series of amendments on the floors of both houses, time was running out on H.R. 8200 in the Ninety-Fifth Congress. Consequently, in lieu of a joint conference report, the amended bill was read to the House where it passed with a final amendment, 124 CONG. REC. H11,047,117 (daily ed. Sept. 28, 1978), and this final version was read to the Senate where it passed as amended. 124 CONG. REC. S17,403-434 (daily ed. Oct. 6, 1978).

[25] *See* BANKR. R. 1-600, 11 U.S.C. app. (1976).

[26] 28 U.S.C. § 2075 (1976).

[27] *Id.* For an extensive treatment of the current Chapter XIII rules, *see* Countryman, *New Rules for Chapter XIII*, 46 AM. BANKR. L.J. 129 (1972); Leffler, *The New Bankruptcy Rules: Chapter XIII—An Evolution of Modern Bankruptcy Philosophy*, 4 MEM. ST. U. L. REV. 449 (1974); Note, *The Chapter XIII Wage Earner Petition Under the New Federal Rules of Bankruptcy*, 4 MEM. ST. U. L. REV. 554 (1974).

[28] 1978 Act § 247 (to be codified in 28 U.S.C. § 2075).

[29] [1979 NEWS AND COMMENT] BANKR. CT. DEC. (CRR) D-21 A121 (Feb. 1, 1979).

[30] Meth, *supra* note 6, at 14.

[31] Complete congruity never existed between the definition of a wage earner in Chap-

1950[32] and was eliminated altogether in 1959.[33] Currently, any individual "whose principal income is deprived from wages, salary or commissions" is eligible,[34] and court decisions under this definition have construed it liberally.[35] Nevertheless, the Commission's report felt that this form of relief should be available to any individual debtor who could reasonably be expected to make payments out of an anticipated regular income.[36] The major disagreement arose over whether a self-employed individual has a sufficiently regular income to permit resort to Chapter XIII. The Commission was of the view that it was unrealistic to expect self-employed persons to propose and faithfully execute a plan contemplating recurrent, periodic payments.[37] The National Bankruptcy Conference[38] and the National Conference of Bankruptcy Judges[39] were unwilling to make such a conclusive presumption, and were more concerned with providing relief for small business debtors for whom the elaborate procedures of Chapter XI were not feasible.[40] This latter view prevailed in the 1978 Act, although relief is restricted to an individual (and his spouse is they file a joint petition) with a "regular income" and noncontingent, liquidated, unsecured debts of less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000. These ceilings will apply to both individual and joint petitions.[41] The monetary restrictions were deemed necessary to prevent sole proprietors with large businesses from abusing creditors by opting for the somewhat more protective provisions of Chapter 13 over Chapter 11.[42] However, one commentator de-

---

ter XIII and the definition applicable to the remainder of the Bankruptcy Act which sets a ceiling of $1500 on annual income. 11 U.S.C. § 1(32) (1976).

[32] Act of Dec. 29, 1950, Pub. L. No. 81-905, 64 Stat. 1134.

[33] Act of May 13, 1959, Pub. L. No. 86-24, 73 Stat. 24.

[34] 11 U.S.C. § 1006(8) (1976).

[35] *In re* Hawks, 471 F.2d 305 (4th Cir. 1973); *In re* Reed, 368 F. Supp. 615 (E.D. Va. 1968); *In re* Bradford, 268 F. Supp. 896 (N.D. Ala. 1967); *In re* Shamma, 369 A.2d 191 (N.H. 1977).

[36] H.R. Doc. No. 137, *supra* note 6, at 165.

[37] *1975 Senate Hearings, supra* note 6, at 23-24 (statement of Prof. Frank Kennedy, Executive Director, Commission on Bankruptcy Laws of the United States).

[38] *1975 House Hearings, supra* note 6, at 1421 (statement of Prof. Vern Countryman, National Bankruptcy Conference).

[39] *Id.* at 1316 (Statement of U.S. Bankruptcy Judge Conrad K. Cyr).

[40] The ABA's proposed amendments to Chapter XIII also favored allowing self-employed business debtors access to wage earner relief. Twinem, *supra* note 19, at 1742.

[41] 1978 Act § 109(e) (to be codified in 11 U.S.C. § 109(e)).

[42] H.R. REP. No. 595, *supra* note 11, at 119. *See* notes 272-94 and accompanying text *infra*.

scribed this view as an "irrelevant and excessive response to unsubstantiated conjecture that a few debtors may attempt to use Chapter 13 to their own advantage."[43]

B. *Abstention*

A second structural change provides the court with unreviewable power to short-circuit any form of relief under the 1978 Act. The abstention provision contained in Chapter 3 provides that, after notice and a hearing,[44] the court may dismiss a case or suspend any proceedings at any time if the interests of creditors and the debtor would be better served by such action.[45]

C. *The Stay*

The automatic stay enjoining suits against the debtor and actions to enforce liens against his property has also undergone change. Prior to the arrival of the bankruptcy rules, the courts found power to stay creditors' actions in sections 611 and 614.[46] This latter provision permits the court, without notice, to stay or enjoin all actions against the debtor until final decree.[47] In addition, upon notice and for cause shown, the court may stay or enjoin any action to enforce any lien against the property of the debtor until final decree. This power extends to suits by holders of claims who cannot be provided for in wage earner plans, such as claims secured by real property,[48] even if the mortgage was held by the Veterans' Administration[49] or by the Federal National Mortgage Association.[50] Similarly, the stay power has been held

---

[43] *1977 Senate Hearings, supra* note 24, at 662 (statement of U.S. Bankruptcy Judge Conrad K. Cyr).

[44] Creditors should be alert to the fact that this phrase does not guarantee them a hearing if they do not request it. 1978 Act § 102(1) (to be codified in 11 U.S.C. § 102(1)).

[45] *Id.* § 305 (to be codified in 11 U.S.C. § 305).

[46] 11 U.S.C. §§ 1011, 1014 (1976). Prior to the Chandler Act, the courts found power to stay creditors in railroad reorganization cases under § 77 even without express statutory authorization. Continental Illinois National Bank v. Chicago, Rock Island & Pacific Ry., 294 U.S. 648 (1935). For a more comprehensive treatment, *see* Countryman, *Treatment of Secured Claims in Chapter Cases*, 82 COM. L.J. 349, 350 (1977).

[47] *In re* Arzaga, 204 F. Supp. 617 (S.D. Cal. 1962) held FED. R. CIV. P. 65, which limits the duration of ex parte restraining orders at 10 days, inapplicable to this section.

[48] *In re* Hawks, 471 F.2d 305, 306 (4th Cir. 1973); Hallenbeck v. Penn Mutual Life Ins. Co., 323 F.2d 566 (4th Cir. 1963); *In re* Townsend, 348 F. Supp. 1284 (W.D. Mo. 1972); *In re* Pizzolato, 281 F. Supp. 109 (W.D. Ark. 1967); *In re* Willett, 265 F. Supp. 999 (S.D. Cal. 1967); *In re* Garrett, 203 F. Supp. 459 (N.D. Ala. 1962).

[49] *In re* Townsend, 348 F. Supp. 1284 (W.D. Mo. 1972).

[50] *In re* Scott, [1970-1973 Transfer Binder] BANKR. L. REP. (CCH) ¶ 64,320 (E.D. Mich. 1971).

to extend to claims secured by personal property which were not provided for in the plan.[51] However, a few courts have suggested that the court cannot prevent a partially[52] or fully secured[53] creditor from reclaiming his collateral or pursuing other remedies.

The courts have generally required several conditions for the continuation of the stay. Among these are: (1) the plan is proposed in good faith and is feasible; (2) the stay is necessary to preserve the estate or execute the plan; and (3) the stay should not impair the secured creditor's collateral.[54] Several courts have added that the secured creditor cannot be forced to accept less than the full periodic contract payments[55] and that the stay should be conditioned on the curing of defaults within a reasonably short period.[56]

When rule 13-401 became effective, it changed prior law by automatically staying all creditor actions against the debtor or to enforce liens against his property upon filing of a Chapter XIII petition. It is no longer necessary for the debtor to request a stay.[57] The rule provides for relief from the stay for any creditor who timely files his claim or who is secured by the debtor's real property.[58] This relief provision is somewhat confusing because it provides that the stay will not be terminated, annulled, modified, or conditioned except upon "cause shown."[59] Simultaneously, the rule requires a party seeking to continue the stay to "show he is entitled thereto."[60] This quagmire over the burden of proof can

---

[51] *In re* Clevenger, 282 F.2d 756 (7th Cir. 1960); *In re* Burke, [1967-1970 Transfer Binder] BANKR. L. REP. (CCH) ¶ 63,507 (E.D. Pa. 1970).

[52] *In re* Worley, [1970-1973 Transfer Binder] BANKR. L. REP. (CCH) ¶ 64,283 (E.D. Mich. 1970); *aff'd sub nom.* Worley v. Budget Credit, Inc., [1970-1973 Transfer Binder] BANKR. L. REP. (CCH) ¶ 64, 285 (6th Cir. 1971), *cert. denied*, 406 U.S. 907 (1972).

[53] *In re* Pappas, 216 F. Supp. 819 (S.D. Ohio 1962); *In re* Copes, 206 F. Supp. 329 (D. Kan. 1962).

[54] *In re* Wall, 403 F. Supp. 357 (E.D. Ark. 1975); *In re* Cassidy, 401 F. Supp. 757 (E.D.N.Y. 1975); *In re* Garcia, 396 F. Supp. 518 (C.D. Cal. 1974).

[55] *In re* Thompson, [1970-1973 Transfer Binder] BANKR. L. REP. (CCH) ¶ 64, 769 (5th Cir. 1973); Cheetham v. Universal C.I.T. Credit Corp., 390 F.2d 234, 238 (1st Cir. 1968); Hallenbeck v. Penn Mutual Life Ins. Co., 323 F.2d 566 (4th Cir. 1963); *In re* Townsend, 348 F. Supp. 1284 (W.D. Mo. 1972); *In re* Rutledge, 277 F. Supp. 933 (E.D. Ark. 1967); *In re* Pizzolato, 268 F. Supp. 353 (W.D. Ark. 1967).

[56] *In re* Cassidy, 401 F. Supp. 757 (E.D.N.Y. 1975); *In re* Townsend, 348 F. Supp. 1284 (W.D. Mo. 1972); *In re* Rutledge, 277 F. Supp. 933 (E.D. Ark. 1967).

[57] The constitutionality of a similar stay in BANKR. R. 11-44 was sustained in Fidelity Mortgage Investors v. Camelia Builders, Inc., 550 F.2d 47 (2d Cir. 1976).

[58] BANKR. R. 13-401(d).

[59] *Id.*

[60] *Id.*

be resolved by charging the creditor with the burden of going forward and presenting a prima facie case for relief. Thereafter, the burden of persuasion shifts to the debtor to justify continuing the stay.[61] The rule also provides for annulment of the stay thirty days after the first creditor's meeting for a creditor whose claim is not listed by the debtor and who does not file a proof of claim.[62] Ex parte relief is available for a case where irreparable injury will occur before notice and a hearing can be had.[63]

The automatic stay will be found in section 362 of the 1978 Act. Like its predecessor in the rule, it serves to give the debtor a breathing spell from his creditors by stopping all collection efforts, all harassment, and all foreclosure actions.[64] It also affords creditor protection by preventing a scramble to obtain payment in preference to and to the detriment of other creditors.[65]

Subsection (a) defines the scope of the stay. It prevents the commencement or continuation of any proceeding against the debtor,[66] including the issuance or employment of process,[67] that was or could have been commenced before the filing of the petition. It precludes enforcement of prior judgments against the debtor or his property and any acts to obtain possession of his property. Conduct aimed at creating, perfecting, or enforcing any lien against property of the estate, or similar action against property of the debtor,[68] to the extent the underlying

---

[61] Kennedy, *The Automatic Stay in Bankruptcy*, 11 U. MICH. J.L. REF. 177, 226-27 (1978).

[62] BANKR. R. 13-401(c).

[63] BANKR. R. 13-401(e).

[64] H.R. REP. No. 595, *supra* note 11, at 121, 340; S. REP. No. 989, *supra* note 11, at 54-55.

[65] H.R. REP. No. 595, *supra* note 11, at 340.

[66] This includes arbitration, license revocation or any other judicial or administrative proceeding. However, the court should ordinarily lift the stay for proceedings before specialized and nongovernmental tribunals to allow these proceedings to come to a conclusion. Thereafter, enforcement of the order or collection of assets would come under the supervision of the bankruptcy court. *Id.* at 340-41.

[67] This was included to prevent the issuance of a writ of execution by a judgment creditor to obtain property that was property of the debtor before commencement of the case but which was transferred, subject to the judgment lien, before filing. Since the remainder of subsection (a) pertains only to property of the debtor or property of the estate, it would not prevent pursuit of the transferred property by issuance of process. However, the creditor is permitted to foreclose on the property. *Id.* at 341.

[68] This subsection is aimed at property that does not become property of the estate such as exempt property and other property that is not included in the estate under 1978 Act § 1306(a) (to be codified in 11 U.S.C. § 1306(a)). H.R. REP. No. 595, *supra* note 11, at 341.

claim arose before the filing of the petition, is enjoined. Creditor harrassments in the form of any action to collect, assess, or recover a claim that arose before filing of the petition are similarly prohibited. Contrary to a result reached under the rule,[69] post-petition setoffs are not permitted. The final provision in this subsection stays the commencement or continuation of any suit concerning the debtor before the United States Tax Court.

Subsection (b) lists eight exceptions to the automatic stay.[70] These include criminal actions against the debtor, the collection of alimony, maintenance, or support from property that is not property of the estate,[71] and acts to perfect an interest in property when perfection would be effective against the trustee under section 546(b). Actions commenced or continued by a governmental unit to enforce governmental or regulatory power[72] and the enforcement of non-monetary judgments obtained by a governmental unit in enforcing its regulatory or police power are also excepted. Similarly, the setoff of any mutual debt that arises from commodities futures contracts, forward commodity contracts, leverage transactions, options, warrants, or rights to purchase or sell contracts or securities, or options to purchase or sell commodities or securities will be permitted. The seventh exemption, concerning foreclosure actions by the Secretary of Housing and Urban Development on property consisting of five or more living units, will not be of major significance in Chapter 13 due to the dollar limitations. The final exception permits any governmental unit to issue a notice of tax deficiency.

Subsection (c) provides that the stay of any act against property of the estate continues until it is no longer a part of the

---

[69] *In re* Williams, 422 F. Supp. 342 (N.D. Ga. 1976).

[70] The Justice Department wanted to include judicial foreclosure proceedings initiated prior to the commencement of the case because mortgagees lose substantial sums with any delay. *1975 House Hearings, supra* note 6, at 2116.

[71] The automatic stay is one means of protecting the debtor's discharge. Stay of these collections does not further that goal because these obligations are not dischargeable, 1978 Act §§ 1328(a), 1328(c) (to be codified in 11 U.S.C. §§ 1328(a), 1328(c)), and does not prejudice other creditors because collections are from property that is not a part of the estate. Moreover, a stay could lead to hardship on the part of the protected spouse or children. H.R. REP. NO. 595, *supra* note 11, at 342-43.

[72] This provision is intended to be construed narrowly to permit actions to protect the public health and safety and not to apply to suits by a governmental entity to protect a pecuniary interest in property of the debtor or the estate. 124 CONG. REC. S17,409 (daily ed. Oct. 6, 1978).

estate.[73] The stay of any other acts continues until the case is closed, dismissed, or a discharge is granted or denied.

Subsection (d) contains the relief provision in the new act. It provides that a court shall grant relief, such as terminating, annulling, modifying, or conditioning the stay, if certain conditions are met. The movant may seek relief for any reason constituting "cause," including lack of adequate protection of his interest in the debtor's property.[74] The burden of proving that relief is not warranted lies with the party opposing relief.[75] Alternatively, with respect to a stay of an act against property, the moving party may allege and show the debtor has no equity in the property.[76] If this is successfully established, a party opposing relief can still defeat it by proving that the property is essential to the debtor's rehabilitation.[77]

Subsection (e) adds protection which is not currently available to creditors. The stay is automatically terminated as to a creditor requesting relief from the stay of any act against property of the estate thirty days after such request unless the court, after notice and a hearing, orders the stay continued in effect.[78] For more complex cases, the court may make a temporary ruling after a preliminary hearing.

---

[73] Property is no longer part of the estate when it is exempt, sold, or abandoned. The stay does not terminate as to property of the debtor which leaves the estate and goes to the debtor. H.R. REP. No. 595, *supra* note 11, at 343.

[74] 1978 Act § 361 (to be codified in 11 U.S.C. § 361) provides guidelines for adequate protection. However, lack of adequate protection is not the sole basis for relief under this section. A desire to allow proceedings before specialized and non-governmental tribunals to proceed to conclusion may be another reason for granting the request. *See* note 66 *supra*. Other bases might include pending cases lacking any connection with or interference with the pending Chapter 13 case. Examples include divorce or child custody proceedings, or probate proceedings where the debtor is named as executor or administrator. Generally, proceedings in which the debtor is a fiduciary or involving postpetition activities of the debtor need not be stayed because they bear no relation to the purpose of the stay, which is protection of the debtor from his creditors. H.R. REP. No. 595, *supra* note 11, at 343-44.

[75] 1978 Act § 362(g) (to be codified in 11 U.S.C. § 362(g)).

[76] *Id.* §§ 362(d), 362(g) (to be codified in 11 U.S.C. §§ 362(d), 362(g)). This is aimed at the problem of real property mortgagees where the petition is filed on the eve of foreclosure. It is not intended to apply if the business of the debtor is managing or leasing real property, such as a hotel operation, even if the debtor has no equity, if the property is essential to rehabilitation. 124 CONG. REC. S17,409 (daily ed. Oct. 6, 1978).

[77] 1978 Act §§ 362(d), 362(g) (to be codified in 11 U.S.C. §§ 362(d), 362(g)). The Department of Justice suggested that judicial and power of sale foreclosures should be permitted solely upon a showing of a lack of equity in the property. *1975 House Hearings, supra* note 6, at 2116-17.

[78] This section did not meet with universal acclaim. *See, e.g., 1977 Senate Hearings, supra* note 24, at 815 (statement of L.E. Creel III).

At all hearings on relief from the stay, the only issues which are relevant are the adequacy of protection, the debtor's equity in the property, the necessity of the property to rehabilitation of the debtor, or the existence of other bases for relief. Other issues, such as counterclaims against the creditor, are not to be decided.[79] However, this should not preclude the party seeking continuance of the stay from presenting evidence as to the existence of claims which the court may consider in exercising its discretion.[80]

Subsection (f) provides for ex parte relief from the stay for a creditor who will suffer irreparable damage before notice and a hearing can be had.

D. Turnovers

An issue related to the stay of creditor actions has been resolved by the 1978 Act. Under current law, it has been argued that a Chapter XIII court may have no power to order a turnover of collateral which has been in the possession of the creditor for more than four months[81] prior to filing the petition when the property is needed by the debtor to effectuate the plan.[82] Section 542 of the 1978 Act provides that any entity which has possession, custody, or control of property of the estate or exempt property must deliver it to the trustee or account for it unless the value of such property is inconsequential. Section 543 extends this duty to a custodian of property of the debtor.[83]

E. Codebtor Stay

One of the most controversial changes is the stay of actions against a codebtor.[84] Under the current Chapter XIII, a creditor cannot be enjoined from proceeding against one jointly liable with the debtor.[85] However, if the creditor accepts a plan calling for

---

[79] H.R. REP. No. 595, *supra* note 11, at 344; S. REP. No. 989, *supra* note 11, at 55. *See generally In re* Essex Properties, Ltd., 430 F. Supp. 1112 (N.D. Cal. 1977).

[80] S. REP. No. 989, *supra* note 11, at 55.

[81] *See* 11 U.S.C. § 96a(1) (1976).

[82] Countryman, *Treatment of Secured Claims in Chapter Cases*, 82 COM. L.J. 349, 351-52 (1977), makes this observation and then argues that such power can be implied from 11 U.S.C. §§ 11(a)(15), 1011, 1014 (1976).

[83] The term "custodian" is defined at 1978 Act § 101(10) (to be codified in 11 U.S.C. § 101(10)).

[84] *Id.* § 1301 (to be codified in 11 U.S.C. § 1301).

[85] *In re* Shelor, 391 F. Supp. 384 (W.D. Va. 1975); Heckman v. National Bank of Washington, 201 A.2d 688 (D.C. App. 1964).

payment of the debt and actually accepts an initial payment, one court has held that he will not be permitted to pursue the co-maker during the pendency of the plan.[86] If the debtor fears reprisal against a codebtor, his plan may include a provision waiving the right to proceed against the codebtor as long as the debtor is not in default under the plan. Such a clause would bind any creditor who accepts the plan.[87]

The Commission's report concluded that a moratorium on collection from codebtors is necessary to prevent undue pressure being brought to bear on the debtor indirectly through accommodation parties. Often these endorsors are coworkers, relatives, or friends who cosign at the request of the debtor.[88] The prospect of creditor action against these persons was also thought to unduly encourage payments conforming to contract terms under the plan, thus making it more difficult to fulfill.[89] Moreover, cosignors may be in similar financial straights and recourse against them will increase petitions under the Act.[90] Finally, if creditors are permitted to proceed against codebtors, this may undermine the purposes of Chapter 13 by encouraging the debtor to file a liquidation petition and to reaffirm the codebtor's claim subsequent to discharge.[91] Nevertheless, while the codebtor stay enjoyed strong support in the legislative history,[92] many admonished against its advisability. Some urged that terms are often extended based on the added security of a codebtor and inclusion of the section would tend to tighten credit.[93] In addition, the

---

[86] *In re* Tesmer, [1970-1973 Transfer Binder] BANKR. L. REP. (CCH) ¶ 63,984 (W.D. Mich. 1971). *But see* Heckman v. National Bank of Washington, 201 A.2d 688 (D.C. App. 1964) (creditor cannot be stayed unless he accepts a plan which releases his right to proceed against a codebtor).

[87] *See* 11 U.S.C. §§ 1046(7), 1057; Schraer v. G.A.C. Finance Corp., 408 F.2d 891 (6th Cir. 1969); 3 D. COWANS, *supra* note 10, at 446-47.

[88] H.R. DOC. NO. 137, *supra* note 6, at 166-67.

[89] H.R. REP. NO. 595, *supra* note 11, at 122.

[90] *1977 Senate Hearings*, *supra* note 24, at 661 (statement of U.S. Bankruptcy Judge Conrad K. Cyr).

[91] *Id.*

[92] *E.g.*, *1976 House Hearings*, *supra* note 6, at 1324 (statement of U.S. Bankruptcy Judge Conrad K. Cyr); *id.* at 1400 (statement of Duncan Kester on behalf of the National Association of Chapter XIII Trustees); *1975 Senate Hearings*, *supra* note 6, at 315-16 (statement of Richard Hesse, Consultant to the National Consumer Law Center); *id.* at 622 (statement of California State Bar: Committee on Relations of Debtor and Creditor).

[93] *1975 House Hearings*, *supra* note 6, at 904 (statement of Lynn Twinem on behalf of Beneficial Finance System). *Contra*, *1977 Senate Hearings*, *supra* note 24, at 661 (statement of U.S. Bankruptcy Judge Conrad K. Cyr). *Cf. 1975 House Hearings*, *supra* note 6, at 1432 (statement of Prof. Vern Countryman) (any reduction in credit would be beneficial to reducing the number of avoidable bankruptcy cases).

constitutionality of enjoining actions against one who has not filed under the Bankruptcy Act has been challenged.[94] Nevertheless, Professor Countryman believes that the provision will withstand scrutiny because it deals with debtor relief and with the debtor's obligations to his creditors. He argues that if the creditor is permitted to harass accommodation parties, the pressure these people will bring to bear on the debtor may frustrate any chance of rehabilitation.[95]

Section 1301 is a compromise measure tailored to meet the situations which present the greatest potential for abuse.[96] The stay extends only to acts or suits to collect from an individual codebtor on a consumer debt.[97] Moreover, it does not protect a surety if that person is in the business of guaranteeing or securing such debts. The stay endures until the case is closed, dismissed, or converted to Chapter 11 or liquidation. The creditor retains power to preserve his rights on negotiable instruments by presenting and giving notice of dishonor,[98] but he cannot attempt to collect from the codebtor while the stay is in effect.[99] Relief from the stay is afforded by subsection (c). After notice and a hearing, to the extent that (1) the codebtor rather than the debtor received

---

[94] *1975 Senate Hearings, supra* note 6, at 130 (statement of Walter Vaughn on behalf of the American Bankers Association and the Consumer Bankers Association); *id.* at 143 (statement of Alvin Weise, Jr., Chairman of the Subcommittee on Bankruptcy of the Law Forum of the National Consumer Finance Association); *id.* at 606 (statement of Claude L. Rice, Chairman of the Legislative Committee of the National Association of Chapter XIII Trustees). *See In re* Nine North Church Street, Inc., 82 F.2d 186 (2d Cir. 1936); 1 H. REMINGTON, REMINGTON ON BANKRUPTCY § 11 (1908).

[95] *1975 House Hearings, supra* note 6, at 1431-32. Professor Countryman feels that an expansive reading of the Act is permissible by analogizing to the breadth of the reading the current law was given in Continental Illinois Nat'l Bank v. Chicago, Rock Island & Pacific Ry., 290 U.S. 648 (1935). *Accord* H.R. REP. No. 595, *supra* note 11, at 123 (not constitutionally infirm because any codebtor protection is only incidental to the effect which protects the debtor).

[96] The counterproposals to the codebtor stay ran the gamut from giving them more protection in the form of procedures for obtaining a discharge in the proceedings, *1975 House Hearings, supra* note 6, at 943-44 (statement of Ernest Sarason, Jr., attorney for the National Consumer Law Center, Inc.), to permitting collection from the comaker if the creditor could show that the coparty is financially able to pay from assets other than current earnings or property reasonably needed to support his family. *Id.* at 1433 (statement of Prof. Vern Countryman).

[97] "Consumer debt" is defined at 1978 Act § 101(7) (to be codified in 11 U.S.C. § 101(7)).

[98] U.C.C. § 3-501 to -511 (1972 version).

[99] 1978 Act § 1301(b) (to be codified in 11 U.S.C. § 1301(b)). *See also 1975 House Hearings, supra* note 6, at 1413 (statement of Prof. Vern Countryman).

the consideration for the joint obligation;[100] (2) the debtor's plan omits the claim; or (3) the creditor's interest would be irreparably harmed by the stay;[101] relief will be forthcoming.

F. *Debtors' Powers*

The new act provides that all debtors may use, sell, and lease property of the estate, other than in the ordinary course of business,[102] after notice and a hearing and subject to certain protections for affected creditors.[103] In addition, a debtor engaged in business[104] is authorized to continue operation of the business, and may, subject to certain creditor protections,[105] use, sell, and lease property and obtain credit in the ordinary course of business.[106] This is a complete reversal of current law which limits the rights, privileges, and duties of a Chapter XIII debtor to those of a bankrupt after adjudication.[107]

G. *Trustees' Powers*

Any surviving controversy over the extent of the powers of a trustee in wage earner relief[108] will be laid to rest by Chapter 13. A narrow reading of the current statute has led some to conclude that a Chapter XIII trustee is a mere collecting and disbursing agent.[109] Nevertheless, the Chapter XIII rules[110] and the over-

---

[100] In other words, the debtor is the codebtor. This section is designed to protect the individual who does not ultimately bear the liability, regardless of any agreement to share liabilities in a different manner than profits. 124 CONG. REC. S17,423 (daily ed. Oct. 6, 1978).

[101] This would include cases where the codebtor is deteriorating financially because of a loss of employment or where the codebtor plans to leave the jurisdiction and would no longer be available to insure payment should the debtor default on the plan. H.R. REP. No. 595, *supra* note 11, at 122.

[102] 1978 Act §§ 1303, 363(b), (to be codified in 11 U.S.C. §§ 1303, 363(b)).

[103] *Id.* §§ 363(d)-(f) (to be codified in 11 U.S.C. §§ 363(d)-(f)).

[104] "Debtor engaged in business" is defined at *id.* § 1304(a) (to be codified in 11 U.S.C. § 1304(a)).

[105] *Id.* §§ 363(c)-(f), 364(b)-(d) (to be codified in 11 U.S.C. §§ 363(c)-(f), 364(b)-(d)).

[106] *Id.* §§ 1304(b), 363, 364 (to be codified in 11 U.S.C. §§ 1304(b), 363, 364).

[107] 11 U.S.C. § 1036 (1976).

[108] *1975 House Hearings, supra* note 6, at 1331 (statement of U.S. Bankruptcy Judge Conrad K. Cyr); 3 D. COWANS, *supra* note 10, § 1134, at 450; Comment, *The Chapter XIII Trustee: "Trustee" or Disbursing Agent?*, 21 ME. L. REV. 53 (1969). *See also* Cyr, *Chapter XIII and the Commission on Bankruptcy Laws of the United States: A Time of Reckoning*, 75 COM. L.J. 385, 389-91 (1970).

[109] 11 U.S.C. § 1033(4) (1976); Bare, *Chapter XIII, Wage Earner Plan* in PROCEEDINGS OF SECOND SEMINAR FOR REFEREES IN BANKRUPTCY 467-68 (1965). *See also 1975 Senate Hearings, supra* note 6, at 34 (statement of Harold Marsh, Jr.).

[110] *See* BANKR. R. 13-307(a), 13-605, 13-606, 13-607, 13-608.

whelming weight of the case law[111] have allowed much greater power for the trustee. The Bankruptcy Reform Act of 1978 provides a laundry list in Chapter 13 of the powers and duties of the trustee. These include: (1) being accountable for all property received; (2) investigating the financial affairs of the debtor; (3) examining proofs of claims and objecting to improper claims; (4) opposing discharge of the debtor, if advisable; (5) furnishing information about the estate and its administration to a party in interest who requests such information, unless the court orders otherwise; and (6) making a final report and filing a final account of the administration of the estate with the court.[112] He must appear and be heard at any hearings concerning the value of property subject to a lien, confirmation of the plan, and modification of the plan after confirmation.[113] The trustee will also offer nonlegal[114] advice and assist the debtor in the performance of the plan.[115] This last duty is a compromise in a stormy controversy over the proper roles of the trustee, debtor's attorney, and the Commission's proposed new government agency.[116] It permits the

[111] City Nat'l Bank & Trust Co. v. Oliver, 230 F.2d 686 (10th Cir. 1956); *In re* Truman, 1 BANKR. CT. DEC. (CRR) 1702, 1711-13 (D. Me. 1975); *In re* Cote, 313 F. Supp. 509 (D. Me. 1970); *In re* Sparks, 306 F. Supp. 676 (N.D. Ala. 1969); *In re* Maye, 180 F. Supp. 43 (E.D. Va. 1959); *In re* Heger, 180 F. Supp. 147 (D. Minn. 1959). *See also* 10 COLLIER ON BANKRUPTCY ¶¶ 25.10, 26.01[3] (14th ed. 1940).

[112] 1978 Act § 1302(b)(1) (to be codified in 11 U.S.C. § 1302(b)(1)).

[113] *Id.* § 1302(b)(2) (to be codified in 11 U.S.C. § 1302(b)(2)).

[114] The trustee should advise debtors in advance that he cannot give legal advice and any communication between them will not be privileged. *See generally 1975 Senate Hearings, supra* note 6, at 876 (statement of Prof. Marjorie Girth).

[115] 1978 Act § 1302(b)(3) (to be codified in 11 U.S.C. § 1302(b)(3)).

[116] The Commission felt that counseling prior to the selection of a form of relief was essential to alerting debtors to the availability of Chapter XIII. H.R. Doc. No. 137, *supra* note 6, at 158-59. Both the Commission and Judges' Bills provides for such counseling. Under the former, a newly formed government agency would perform the counseling. H.R. 31 and S. 236, 94th Cong., 1st Sess. § 4-203 (1975). The latter bill authorized the local office of the Bankruptcy Division of the Administrative Office of the United States Courts, or another entity under contract with them, to assist the debtor in the preparation of documents. Thereafter, he was to have been referred to an attorney on a referral list for counseling and the selection of a remedy. H.R. 32 and S. 235, 94th Cong., 1st Sess. § 4-203 (1975).

Some felt the bureaucratic counseling from a government agency might prompt the debtor to choose wage earner relief when it was inadvisable. *1975 Senate Hearings, supra* note 6, at 863 (statement of Prof. Samuel Donnelly); *1975 House Hearings, supra* note 6, at 866 (statement of Prof. Philip Shuchman). Others felt that attorneys on a referral list could not afford to be completely independent in their advice. *Id.* at 1264 (statement of George Ritner). *See generally 1975 Senate Hearings, supra* note 6, at 619 (statement of California State Bar: Committee on Relations of Debtor and Creditor).

Judge Cyr reported remarkable success keeping down legal fees by maintaining a list

trustee to assist the debtor in the preparation of documents and the formulation of the plan[117] and to counsel the debtor throughout the duration of the plan.[118] Finally, if the debtor is engaged in business, unless the court orders otherwise, the trustee will investigate the debtor's financial condition, the health of his business, the desirability of continuing the business, and other pertinent matters. Thereafter, he must submit a statement of the investigation, including any irregularities in the affairs of the debtor, to the court. He will transmit a copy or summary of the statement to any entity that the court directs.[119]

In light of the dispute over the scope of the powers of a Chapter XIII trustee, it would have been more advisable to explicitly make reference in Chapter 13 to the trustee's avoidance powers. This is especially true since earlier bills provided that the power of the wage earner trustee and the bankruptcy trustee were to be coextensive.[120] Moreover, some had argued that the avoidance powers should be limited to situations where creditors would benefit rather than extending to those occasions when only the debtor would gain because the property was not to be distributed.[121] However, the enumeration of powers and duties of the trustee in subsections 1302(b) and (c) is not inconsistent with the

---

of attorneys willing to accept a Chapter XIII debtor at set rates. He also reported dramatic increases in the success of Chapter XIII plans through the use of varied forms of counseling. Cyr, *supra* note 1, at 153-54; *1975 Senate Hearings, supra* note 6, at 60-61. He felt that further reductions in attorneys' fees were possible if preparation of documents accompanying filing was done by someone other than an attorney. *1975 House Hearings, supra* note 6, at 1326; *see also id.* at 27-28 (statement of H. Kent Presson, Assistant Chief, Bankruptcy Division, Administrative Office of the United States Courts). *Contra, 1975 Senate Hearings, supra* note 6, at 618 (statement of California State Bar: Committee on Relations of Debtor and Creditor).

[117] It has been suggested that neither the debtor nor the debtor's attorney tends to formulate a plan with any degree of sophistication. *1975 House Hearings, supra* note 6, at 1327-28 (statement of U.S. Bankruptcy Judge Conrad K. Cyr).

[118] Judge Cyr has suggested that ongoing counseling by a functionary other than the debtor's attorney is necessary because few attorneys are trained or interested in extralegal problems such as credit, domestic, employment, and medical problems which befall a family pending completion of a plan. *Id.* at 1320. For a survey of the types of Chapter XIII counseling that have been used, *see* Lee, *The Counseling of Debtors in Bankruptcy Proceedings*, 45 AM. BANKR. L.J. 387 (1971).

[119] 1978 Act §§ 1302(c), 1106(a)(3)-(4) (to be codified in 11 U.S.C. §§ 1302(c), 1106(a)(3)-(4)).

[120] H.R. 31 and S. 236, 94th Cong., 1st Sess. § 6-101 (1975); H.R. 32 and S. 235, 94th Cong., 1st Sess. § 6-601 (1975).

[121] *1975 Senate Hearings, supra* note 6, at 130 (statement of Walter Vaughn on behalf of the American Bankers Association and the Consumer Bankers Association).

avoidance powers contained in sections 544 through 549. In addition, Chapter 1 explicitly makes the powers enumerated in Chapters 3 and 5 available to the Chapter 13 trustee.[122]

The current system under which the trustee is appointed by the bankruptcy court has given rise to claims of "cronyism."[123] Consequently, the draftsmen of the 1978 Act, while rejecting proposals to allow creditors to elect the trustee,[124] provided that the court is to select a trustee from a list prepared by the Administrative Office of the United States Courts.[125] In those districts selected for the experimental United States Trustee System,[126] the United States Trustee will serve as the trustee in the case unless he has appointed a standing trustee and that individual has qualified to serve.[127]

Chapter 13 retains the power of the court to appoint a standing trustee if the number of cases filed in the district so warrants.[128] This provision has met with general approval in its operation under current law.[129]

H. Creditor Control

Several structural changes are noteworthy because certain provisions do not appear in the 1978 Act. Foremost among these is the deletion in Chapter 13 of the requirement of creditor consent before a plan can be confirmed. Under current law, a plan cannot be confirmed unless it is accepted by a majority, in number and amount, of unsecured claims "affected by"[130] the plan. In addition, all secured creditors "dealt with" by the plan must consent to it.[131] The new act eliminates the need for any acceptance from unsecured creditors and provides that the plan can be confirmed over the opposition of the secured creditors "provided

---

[122] 1978 Act § 103(a) (to be codified in 11 U.S.C. § 103(a)).

[123] *1977 Senate Hearings, supra* note 24, at 431 (statement of U.S. District Judge Robert DeMascio); *1975 Senate Hearings, supra* note 6, at 19-20 (statement of Harold Marsh, Jr., Chairman, Commission on Bankruptcy Laws of the United States).

[124] *Cf.* H.R. 8200, 95th Cong., 1st Sess. § 1302(a) (1977); S. 2266, 95th Cong., 1st Sess. § 1302(a) (1977) (proposal contained in the earlier version of the 1978 Act).

[125] 1978 Act § 225(b) (to be codified in 28 U.S.C. § 604(f)).

[126] These districts are listed at 1978 Act § 1501 (to be codified in 11 U.S.C. § 1501).

[127] 1978 Act § 151302(a) (to be codified in 11 U.S.C. § 151302(a)).

[128] *Id.* § 1302(d) (to be codified in 11 U.S.C. § 1302(d)); *cf.* BANKR. R. 13-205(a).

[129] *See, e.g.*, Lavien, *Water a Myth and Watch It Grow!*, 79 COM. L.J. 116, 117 (1974); Presson, *supra* note 8, at 284.

[130] This term is defined at 11 U.S.C. § 1007 (1976).

[131] 11 U.S.C. § 1052(1) (1976).

for" by the plan if certain creditor protections are met. These protections are either: (1) the plan provides that the secured creditor will retain his lien and the value of property to be distributed to the secured creditor as of the effective date of the plan is not less than the allowed amount of his claim; or (2) the debtor surrenders the collateral to the secured creditor.[132] In this regard, the new legislation carries forward the dichotomy of rule 13-307(d) between fully and partially secured creditors, by providing that a creditor is secured only to the extent of the value of his collateral.[133] This will remove all remaining doubt as to the validity of the rule.[134] Creditors secured by a security interest in exempt property should be considered to hold secured claims under the 1978 Act, because, unlike the current bankruptcy act, the 1978 Act contains no definition of secured creditor.[135] Consequently, secured claims are not restricted to security interests in property that is assignable in bankruptcy.[136]

It has been suggested that the lack of creditor control is a fundamental shift in a wage earner policy. Creditors' groups have argued that higher down payments and shorter repayment terms are inescapable results which will dry up credit availability to some consumers.[137] Moreover, they have argued that beyond tangible security interests in collateral, creditors possess an intangible security interest, the leverage of being able to insist on full contract payment of the property, regardless of its value. They argue that the value to the debtor may have been exactly what the creditor bargained for in extending credit.[138] The 1978 Act rejects this argument as unwarranted on constitutional grounds and as a matter of policy.[139] The elimination of creditor control is also

---

[132] 1978 Act §§ 1325(a)(5)(B)-(C) (to be codified in 11 U.S.C. § 1325(a)(5)(B)-(C)).

[133] *Id.* §§ 506(a), 1325(a)(5) (to be codified in 11 U.S.C. §§ 506(a), 1325(a)(5)).

[134] *Compare In re* Moralez, 400 F. Supp. 1352 (N.D. Cal. 1975), *appeal dismissed* 553 F.2d 1192 (9th Cir. 1977), *and In re* Derryberry, 4 C.B.C. (Mathew Bender & Co.) 492 (N.D. Cal. 1974) *with In re* McKee, 416 F. Supp. 652 (E.D. Ark. 1976); *In re* Wall, 403 F. Supp. 357 (E.D. Ark. 1975), *and* Countryman, *Partially Secured Creditors Under Chapter XIII*, 50 AM. BANKR. L.J. 269 (1976).

[135] 11 U.S.C. § 1(28) (1976).

[136] *See In re* Strickle, [1962-1966 Transfer Binder] BANKR. L. REP. (CCH) ¶ 61,551 (E.D. Ky. 1965).

[137] *E.g., 1975 Senate Hearings, supra* note 6, at 141 (statement of Alvin Weise, Jr., Chairman of the Subcommittee on Bankruptcy of the Law Forum of the National Consumer Finance Association).

[138] *Id.* at 142.

[139] H.R. REP. No. 595, *supra* note 11, at 124.

expected to reduce the number of persons, eligible for Chapter 13, who opt for liquidation because they believe their creditors will not accept a feasible plan of extension or composition.[140]

The shift of attention from creditors to the court increases the court's role. The judge is now the sole protection for legitimate creditor interests through a determination of whether the plan is proposed in good faith and whether it is feasible.[141] However, as a practical matter, creditor control under current law has been exaggerated. Secured creditors have been curbed by developing case law, and unsecured creditors fail to exercise their check on pragmatic grounds.

While the authorities are in complete agreement that a plan which deals with a secured creditor cannot be confirmed without his consent, considerable doubt exists about when a plan actually deals with the creditor. One line of cases steadfastly holds that a plan cannot be confirmed where the secured creditor does not receive full contract payments.[142] However, at least one case has held that where the creditor's total payments under the plan total at least as much as he would receive under the terms of the contract or upon immediate liquidation, as long as his collateral is not impaired, the plan may be confirmed notwithstanding his objection.[143] This result has met with favor among the commentators.[144] Moreover, a developing line of cases suggests that while the plan may not be confirmed, the creditor can be removed from the plan which can then be confirmed. The secured creditor can be restrained from seizing his security if it is essential to the success of any plan and payments to the creditor insure that his collateral will not be impaired.[145] Thus, the stay can be used in a

---

[140] *Id.* at 123.

[141] 1978 Act §§ 1325(a)(3), 1325(a)(6) (to be codified in 11 U.S.C. §§ 1325(a)(3), 1325(a)(6)).

[142] *In re* Worley, [1970-1973 Transfer Binder] BANKR. L. REP. (CCH) ¶ 64,283 (E.D. Mich. 1970), *aff'd sub. nom.* Worley v. Budget Credit, Inc., [1970-1973 Transfer Binder] BANKR. L. REP. (CCH) ¶ 64,285 (6th Cir. 1971), *cert. denied*, 406 U.S. 907 (1972); Terry v. Colonial Stores Employee's Credit Union, 411 F.2d 553 (5th Cir. 1969); *In re* Pappas, 216 F. Supp. 819 (S.D. Ohio 1962); *In re* Copes, 206 F. Supp. 329 (D. Kan. 1962); *In re* O'Dell, 198 F. Supp. 389 (D. Kan. 1961).

[143] *In re* Teegarden, 330 F. Supp. 1113 (E.D. Ky. 1971); *see also In re* Wilder, 225 F. Supp. 67 (M.D. Ga. 1963).

[144] D. COWANS, *supra* note 10, at 436-40; Comment, *The Uncertain Status of Secured Creditors Under Chapter XIII of the Bankruptcy Act*, 9 JOHN MARSHALL J. OF PRACTICE AND PROCEDURE 377, 387-89 (1975-1976); Note, 46 AM. BANKR. L.J. 165 (1972).

[145] *In re* Garcia, 396 F. Supp. 518 (C.D. Cal. 1974); *In re* Rutledge, 277 F. Supp. 933

number of circumstances to circumvent the leverage the secured creditor has over confirmation.

In practice, unsecured creditors have not shown a great deal of interest in voting on the plan.[146] Once the plan has been confirmed, one study indicates that creditors also fail to contest modifications or request dismissal or liquidation even after numerous defaults under the plan.[147] Apparently they realize that they have nothing to gain by moving for dismissal or conversion.

Real property mortgagees should be counseled that a plan under the 1978 Act will be able to modify the rights of any creditor other than a creditor secured by a security interest in the debtor's principal residence.[148] The Chandler Act does not currently permit a debtor to affect claims secured by real property because, in the words of the House report, such claims are "not essential to or a proper part of a plan of settlement."[149] The Commission[150] and Bankruptcy Judge Conrad Cyr[151] both strongly urged that the new act expand the ability of the debtor to provide for continued payment on these claims but, understandably, mortgage lenders were not enthusiastic about the proposal.[152] The new provision is a compromise designed to afford protection for creditors while allowing the debtor greater flexibility. Moreover, it is intended that a claim secured by the debtor's principal residence may be treated in the plan under section 1322(b)(5).[153]

(E.D. Ark. 1967); *In re* Pizzolato, 268 F. Supp. 353 (W.D. Ark. 1967). *See also In re* Wall, 403 F. Supp. 357 (E.D. Ark. 1975); H.R. Doc. No. 137, *supra* note 6, at 165-67.

[146] Meth, *supra* note 6, at 14; H.R. Doc. No. 137, *supra* note 6, at 162.

[147] Girth, *supra* note 10, at 55-61.

[148] 1978 Act § 1322(b)(2) (to be codified in 11 U.S.C. § 1322(b)(2)).

[149] H.R. REP. No. 1409, 75th Cong., 1st Sess. 54 (1937). Another explanation is that, normally, payments under a wage earner plan will be so small as not to permit any reduction in mortgage payments, or the claim is so well secured that, in case of difficulty, the debtor is able to refinance the debt with a mortgage extending beyond the period for a normal plan. *In re* Garrett, 203 F. Supp. 459, 461 (N.D. Ala. 1962). *See also* 3 D. COWANS, *supra* note 10, at 435.

[150] H.R. Doc. No. 137, *supra* note 6, at 166. The Commission seemed to believe that the availability of Chapter XII relief was the reason that claims secured by an interest in real property could not be dealt with in Chapter XIII. *Id.*

[151] *1975 House Hearings*, *supra* note 6, at 1330-31; *1977 Senate Hearings*, *supra* note 24, at 663.

[152] *1977 Senate Hearings*, *supra* note 24, at 714 (statement of Edward Julik, Senior Vice President, Real Estate Division, Massachusetts Mutual Life Ins. Co.); *id.* at 963 (statement of Daniel Goldberg, General Counsel, Federal Home Loan Bank Board).

[153] 124 CONG. REC. H11,106 (daily ed. Sept. 28, 1978); 124 CONG. REC. S17,423 (daily ed. Oct. 6, 1978).

I. *Administrative Costs*

The second major exclusion from the 1978 Act is the omission of the "Seattle Plan." This device, conceived in its namesake, would have provided that creditors pay the costs and expenses of a Chapter 13 proceeding, including filing fees, the debtor's attorney's fees, and other administrative costs. Both the Commission's Bill[154] and the Judges' Bill[155] had adopted the suggestion and it had received the approval of the Commission on Bankruptcy Laws, the National Bankruptcy Conference,[156] and Judge Cyr.[157] Nevertheless, substantial doubt existed as to whether the Seattle Plan produces a composition which would bar further composition or bankruptcy relief for six years.[158] Others objected because it precluded the debtor from ever paying his creditors in full and avoiding the stigma of a compromise plan.

Finally, some doubt persists regarding the assessment and collection of taxes in the 1978 Act. The Bankruptcy Act of 1898 provides that federal taxes found to be owing within one year of filing of the petition which have not been assessed prior to confirmation and any tax which may become due and owing during the pendency of the plan, may be assessed against that collected from the debtor, notwithstanding any other provision in Chapter XIII.[160] This provision also controls over section 57(n)[161] of the act which requires claims to be filed within six months of the first meeting of creditors.[162] While it was pointed out that such power in the taxing authority to proceed within or outside the plan is potentially disruptive to an otherwise feasible plan,[163] a similar provision was included in both the initial House[164] and Senate[165]

---

[154] H.R. 31 and S. 236, 94th Cong., 1st Sess. §§ 1-102(10), -102(25) (1975).

[155] H.R. 32 and S. 235, 94th Cong., 1st Sess. §§ 6-402, -701 (1975).

[156] *1975 House Hearings*, *supra* note 6, at 1434 (statement of Prof. Vern Countryman).

[157] *Id.* at 1320-21. However, Judge Cyr favors a general revenue tax over both the Seattle Plan and current practice for financing Chapter 13. *Id.*

[158] *Id.* at 1327 (statement of U.S. Bankruptcy Judge Conrad K. Cyr); *id.* at 1429 (statement of Claude L. Rice, National Association of Chapter XIII Trustees).

[159] *E.g.*, *1975 Senate Hearings*, *supra* note 6, at 600 (statement of Claude L. Rice, National Association of Chapter XIII Trustees).

[160] 11 U.S.C. § 1080 (1976).

[161] *Id.* § 93(n).

[162] *In re* Gates, 256 F. Supp. 1 (E.D. Wis. 1966).

[163] *1975 House Hearings*, *supra* note 6, at 1317-18 (statement of U.S. Bankruptcy Judge Conrad K. Cyr).

[164] H.R. 8200, 95th Cong., 1st Sess. § 1331 (1977).

[165] S. 2266, 95th Cong., 1st Sess. § 1331 (1977).

versions of the bill introduced into the ninety-fifth Congress. This special tax section was deleted before final passage so the tax aspects of Chapter 13 are controlled by section 505. This provision allows a governmental unit to assess any tax, notwithstanding the stay of section 362, after a determination of tax liability by the court.[166] The final reading and explanation of the bill to the House, however, which took the place of a joint conference report,[167] indicated that the tax could also be collected after court determination.[168]

III. MECHANICS OF CHAPTER 13

A. *Commencing the Case*

The Chapter 13 petition commences the case.[169] Unlike current law, there is no requirement of an allegation of insolvency or inability to pay debts as they mature.[170] The 1978 Act continues the rule under current law[171] that no involuntary petitions are permitted in Chapter 13[172] on the rationale that to compel an individual to labor under a plan without his consent would impinge on the thirteenth amendment[173] and federal statutes.[174] Moreover, an unwilling debtor is unlikely to retain his job or cooperate in repayment under the plan; failure would be a virtual certainty.[175] Nevertheless, it has been suggested that collaboration between creditors and a bankruptcy judge can, in some cases, virtually compel what amounts to an involuntary petition. If creditors file for an involuntary bankruptcy under section 303, a bankruptcy judge who is so inclined may use his discretion under section 305 to dismiss the petition provided the debtor will file for relief under Chapter 13.[176]

---

[166] 1978 Act § 505(c) (to be codified in 11 U.S.C. § 505(c)).

[167] *See* note 24 *supra*.

[168] 124 CONG. REC. H11,115 (daily ed. Sept. 28, 1978).

[169] 1978 Act § 301 (to be codified in 11 U.S.C. § 301).

[170] 11 U.S.C. § 1023 (1976).

[171] *Id.* §§ 1021, 1022; *In re* Hale, 274 F. Supp. 813, 816 (W.D. Va. 1967).

[172] 1978 Act § 303(a) (to be codified in 11 U.S.C. § 303(a)).

[173] H.R. REP. No. 595, *supra* note 11, at 120; *1977 Senate Hearings*, *supra* note 24, at 499 (statement of Irving Sulmeyer); *1975 House Hearings*, *supra* note 6, at 360 (statement of Prof. Vern Countryman).

[174] 18 U.S.C. § 1581 (1976); 42 U.S.C. § 1994 (1976).

[175] H.R. REP. No. 595, *supra* note 11, at 120; *1975 House Hearings*, *supra* note 6, at 1420 (statement of Prof. Vern Countryman).

[176] This observation is drawn from *1975 Senate Hearings*, *supra* note 6, at 861-62 (statement of Prof. Samual Donnelly).

The 1978 Act omits the provision in current law for a bond to indemnify the estate against diminution thereof pending a stay of adjudication and administration of a debtor who originally filed in bankruptcy.[177] The provision is of limited usefulness because it is restricted to cases filed after bankruptcy and the bond is always discretionary with the court.[178]

B. Filing of Claims

The filing of claims by creditors will be controlled by the statute. Any creditor may file a claim[179] and if he fails to do so, the debtor, a codebtor, or the trustee may file his claim.[180] Unlike current law, there is no requirement in the statute that each creditor filing a claim prove that the debt is free from usury.[181] However, such a requirement remains in the current rules and the rule may be valid under the 1978 Act.[182] Post-petition claims arising from (1) the rejection of executory contracts and leases, (2) the recovery of exempt property by the debtor under section 552(i), (3) transfers avoided by the trustee under section 550, (4) the recovery by the trustee for improper setoffs, and (5) a tax entitled to a section 507(a)(1) priority may be filed subject to the same rules as pre-petition claims.[183] In addition, a claim may be filed by any entity that holds a claim against the debtor for taxes that become payable during the case or for a post-petition consumer debt for services or property essential to the debtor's performance under the plan.[184]

C. Allowance of Claims

The allowance of claims will be controlled by section 502 generally. However, post-petition consumer debts for property or services which are necessary to the debtor's performance under

---

[177] 11 U.S.C. § 1026 (1976).

[178] 10 COLLIER ON BANKRUPTCY ¶ 24.14 (14th ed. 1940).

[179] 1978 Act § 501 (to be codified in 11 U.S.C. § 501). *Cf.* BANKR. R. 13-301, 13-302 (mechanics of filing will still be controlled by the rules).

[180] 1978 Act §§ 501(b)-(c) (to be codified in 11 U.S.C. §§ 501(b)-(c)). *Cf.* BANKR. R. 13-303, 13-304 (filing of claims by debtor, trustee, and codebtor).

[181] 11 U.S.C. § 1056(b) (1976). For an exhaustive review of the history of this provision, *see In re* Perry, 272 F. Supp. 73 (D. Me. 1967).

[182] BANKR. R. 13-301(a).

[183] 1978 Act §§ 502(g)-(i) (to be codified in 11 U.S.C. §§ 502(g)-(i)). *Cf.* BANKR. R. 13-305 (post-petition claims).

[184] 1978 Act § 1305(a) (to be codified in 11 U.S.C. § 1305(a)). *Cf.* BANKR. R. 13-305 (post-petition claims). Apparently this provision precludes the debtor, codebtor, or trustee from filing such a claim under BANKR. R. 13-303, 13-304 if the creditor fails to do so.

the plan will be disallowed if the creditor knew or should have known that prior approval of the obligation from the trustee was practicable and was not obtained.[185] While the apparent purpose of such an inclusion was to prevent unauthorized credit extensions to overburdened debtors,[186] it has been criticized as opening the door for subsequent suit in state court on the debt, interest, and late charges in the situation where the trustee should have approved the debt but does not.[187]

D. *Setoffs*

Despite strong criticism that setoffs are inconsistent with the Chapter 13 policy of freeing the debtor's assets in return for a commitment of payment out of future earnings,[188] pre-petition setoffs are permitted under the 1978 Act under certain conditions.[189] A similar result has been reached under the current statute.[190]

E. *The Plan*

The plan is to be filed by the debtor[191] and may provide for payments to continue for up to three years, or, with court approval, for not longer than five years.[192] This limitation is designed to protect debtors from unduly onerous plans and the taxpaying public from excessive use of the bankruptcy courts as collection vehicles for protracted cases.[193] It may be that the limi-

---

[185] 1978 Act § 1305(c) (to be codified in 11 U.S.C. § 1305(c)). The disallowed claims are not discharged by completion of the plan. *See* note 246 and accompanying text *infra*.

[186] *1975 House Hearings*, *supra* note 6, at 1317 (statement of U.S. Bankruptcy Judge Conrad K. Cyr).

[187] *Id.* at 1425 (statement of Claude Rice).

[188] *Id.* at 1411 (statement of Prof. Vern Countryman).

[189] 1978 Act § 553 (to be codified in 11 U.S.C. § 553). *Cf.* 1978 Act § 362(a)(7) (to be codified in 11 U.S.C. § 362(a)(7)) (enjoins post-petition setoffs).

[190] *In re* Foutz, 271 F. Supp. 847 (W.D. Va. 1967). *Accord* 47 Comp. Gen. 522 (1968).

[191] 1978 Act § 1321 (to be codified in 11 U.S.C. § 1321). *Cf.* 11 U.S.C. § 1033(2) (1976); BANKR. R. 13-201 (similar provision under current law).

[192] 1978 Act § 1322(c) (to be codified in 11 U.S.C. § 1322(c)). While there is no explicit limitation on the duration of a plan under current law, most plans are limited to three years as a result of 11 U.S.C. § 1061 (1976). This allows the debtor to seek a hardship discharge if he has performed under the plan for three years. H.R. DOC. NO. 137, *supra* note 6, at 160.

[193] Girth, *supra* note 10, at 67. These limits are the result of a compromise. Some felt three years was too long to allow a debtor to subject himself and his family to the restraints of Chapter 13 and to forecast the financial fate of debtors. *1975 House Hearings*, *supra* note 6, at 1323 (statement of U.S. Bankruptcy Judge Conrad K. Cyr). Others wanted to permit plans to extend beyond three years because the terms of credit purchases of big ticket items often extend for up to five years and beyond. *Id.* at 1406 (statement of Duncan

tation on the duration of the plan will have less significance than is expected. Initial statistical studies indicate that creditors and debtors allow plans to continue well beyond scheduled completion dates even after several defaults[194] and, absent a hardship discharge or conversion to another Chapter, the defaulting debtor will not be able to earn a discharge until all payments called for in the plan have been made.[195]

The plan subjects so much of the debtor's future income as is necessary to payment of creditors under the plan.[196] In addition, the debtor will be permitted to provide for the payment of all or any part of a claim from property of the estate or property of the debtor.[197] Actual payment to creditors is to be made by the trustee unless otherwise provided in the plan or order confirming the plan.[198]

The rights of any creditor other than a creditor secured by a lien on the debtor's principal residence may be modified.[199] However, the plan must provide for full payment for all claims entitled to a priority under section 507 unless the holder of the claim agrees to different treatment.[200] It may classify claims but must provide for uniform treatment for each claim within a particular class.[201] Unsecured creditors may be classified on the basis of an

---

Kester, President, National Association of Chapter XIII Trustees). The Department of Justice suggested that no plan be allowed which called for performance in less than three years unless all creditors were to be paid in full. *Id.* at 2126.

[194] Girth, *supra* note 10, at 55-61.

[195] 1978 Act § 1328(a) (to be codified in 11 U.S.C. § 1328(a)).

[196] *Id.* § 1322(a)(1) (to be codified in 11 U.S.C. § 1328(a)(1)). *Cf.* 11 U.S.C. § 1046(4) (1976) (similar provision in current law).

[197] 1978 Act § 1322(b)(8) (to be codified in 11 U.S.C. § 1322(b)(8)). The Commission felt that such a provision would reduce creditor objections to composition plans. They also felt that a plan that intended to pay a composition plan solely from future income might not meet the statutory standards of good faith and best interests of creditors. H.R. Doc. No. 137, *supra* note 6, at 163-64.

[198] 1978 Act § 1326(b) (to be codified in 11 U.S.C. § 1326(b)).

[199] *Id.* § 1322(b)(2) (to be codified in 11 U.S.C. § 1322(b)(2)). Under current law, a plan may not deal with claims secured by "estates in real property or chattels real." 11 U.S.C. § 1006(1) (1976); Hallenbeck v. Penn Mutual Life Ins. Co., 323 F.2d 566 (4th Cir. 1966); *In re* Willett, 265 F. Supp. 999 (S.D. Cal. 1967).

[200] 1978 Act § 1322(a)(2) (to be codified in 11 U.S.C. § 1322(a)(2)). There is no similar requirement that the plan include such a provision. However, 11 U.S.C. § 1059(6) (1976) and BANKR. R. 13-309(a) require debts entitled to a priority under section 64 of the current Bankruptcy Act, 11 U.S.C. § 104, to be paid first and in full before any distribution to creditors.

[201] 1978 Act § 1322(a)(3) (to be codified in 11 U.S.C. § 1322(a)(3)). No definition for classification of claims exists in Chapter 13 but the reference to section 1122 in section

arbitrary dollar ceiling but the debtor may not discriminate unfairly against any such class.[202] In addition, the plan may provide for the curing or waiving of any default[203] and for the payment of any unsecured claim to be made concurrently with the payment of any other secured or unsecured claims.[204] With regard to any claim on which the last payment is due after completion of the plan, it may provide for the curing of any defaults within a reasonable time and for maintenance of payments while the case is pending.[205] All or any part of a post-petition claim for taxes or for a consumer debt allowed under section 1305 can be dealt with in the plan.[206] However, others will continue to deal with the debtor with assurance of being paid, irrespective of whether they have section 1305 claims provided for in the plan if the claims are section 507(a)(1) administrative expenses which are entitled to payment before satisfaction of other creditors under the plan.[207] The plan may also provide for the assumption or rejection of executory contracts and leases[208] and the vesting of property of the estate upon confirmation of the plan or at a later time in the debtor or any other entity.[209] Finally, it may include any other appropriate provision not inconsistent with the new act.[210]

1322(b)(1) suggests that a class consists of claims "substantially similar to other claims in such class." Under current law, the debtor can treat each secured creditor severally, 11 U.S.C. § 1046(2) (1976), but general creditors must be treated alike, *id.* § 1046(1).

[202] 1978 Act § 1322(b)(1) (to be codified in 11 U.S.C. § 1322(b)(1)). The ability to treat unsecured creditors by classes was urged because it allows for added flexibility in dealing with diverse claims. *1975 House Hearings, supra* note 6, at 1425-26 (statement of Claude L. Rice); *1975 Senate Hearings, supra* note 6, at 855 (statement of Prof. Samuel J.M. Donnelly).

[203] 1978 Act § 1322(b)(3) (to be codified in 11 U.S.C. § 1322(b)(3)).

[204] *Id.* § 1322(b)(4) (to be codified in 11 U.S.C. § 1322(b)(4)). Apparently, this was the result of the feeling of the Commission that this would cure the inequity created when a debtor pays his secured creditors to free his collateral and then defaults on the plan before payment is made to the unsecured creditors. *1975 Senate Hearings, supra* note 6, at 603 (statement of Senator Burdick).

[205] 1978 Act § 1322(b)(5) (to be codified in 11 U.S.C. § 1322(b)(5)). *See also* note 153 and accompanying text *supra*. Such a claim would not be discharged by the Chapter 13 discharge. *See* note 244 and accompanying text *infra*.

[206] 1978 Act § 1322(b)(6) (to be codified in 11 U.S.C. § 1322(b)(6)).

[207] *Id.* § 1326(a) (to be codified in 11 U.S.C. § 1326(a)). *See* note 235 and accompanying text *infra*.

[208] 1978 Act § 1322(b)(7) (to be codified in 11 U.S.C. § 1322(b)(7)). *Cf.* 11 U.S.C. § 1046(6) (1976) (similar provision in current law).

[209] 1978 Act § 1322(b)(9) (to be codified in 11 U.S.C. § 1322(b)(9)). *Cf.* 11 U.S.C. § 110(i) (1976) (similar provision in current law).

[210] 1978 Act § 1322(b)(10) (to be codified in 11 U.S.C. § 1322(b)(10)). *Cf.* 11 U.S.C. § 1046(7) (1976) (similar provision in current law). *See also* 3 D. COWANS, *supra* note 10, at 442-48.

F. *Modifications of the Plan*

Pre-confirmation modifications of the plan will be somewhat similar to the procedure under the present statute.[211] The debtor may modify the plan at any time before confirmation subject to the provisions required to be contained in the plan by section 1322. Since only secured creditors will accept or reject the plan under the 1978 Act,[212] the debtor will not solicit acceptances from unsecured creditors. A secured creditor is deemed to accept or reject the modified plan the same as he accepted or rejected the original plan unless the modified plan alters his rights and he affirmatively rejects the plan.[213]

Post-confirmation modifications will be crucial in Chapter 13 due to layoffs, strikes, illness, accidents, and other unforeseen circumstances. On any plan providing for an extension, the current bankruptcy act authorizes the court to increase or reduce the amount of any installment payment under the plan, extend or shorten the time for such payments, alter the amount of the distribution to any creditor provided for in the plan to take account of any satisfaction to such creditor outside the plan, or otherwise alter the payment or confirmation order. Such action may only be taken after a hearing and notice to such parties as the court may designate.[214] Nevertheless, no reduction in the total amount to be paid to creditors under the plan is sanctioned. The court is limited to increasing or reducing the amount or frequency of the installment payments.[215] The 1978 Act eliminates the restriction to extension plans and the requirement for notice and a hearing before a plan can be modified. The plan as modified becomes the plan unless a creditor objects and the plan is disapproved after notice and a hearing.[216] While it is not clear who is to modify the plan, this latter change indicates the power lies exclusively with the debtor rather than the court as under current law. This would conform with the suggestion of a noted commentator during the legislative hearings on an earlier version of the act.[217]

---

[211] 11 U.S.C. §§ 1053-1055 (1976); BANKR. R. 13-212.

[212] 1978 Act § 1325(a)(5) (to be codified in 11 U.S.C. § 1325(a)(5)).

[213] *Id.* § 1323(c) (to be codified in 11 U.S.C. § 1323(c)).

[214] 11 U.S.C. § 1046(5) (1976); BANKR. R. 13-214(a).

[215] 10 COLLIER ON BANKRUPTCY ¶ 28.06 (14th ed. 1940).

[216] 1978 Act § 1329(b)(2) (to be codified in 11 U.S.C. § 1329(b)(2)).

[217] *1975 House Hearings*, *supra* note 6, at 1319 (statement of U.S. Bankruptcy Judge Conrad K. Cyr).

While the 1978 Act generally carries forward the language of rule 13-214(a), two key changes have been made. The new act permits the plan to be modified to "increase or reduce the amount of [any of the installment] payments *on claims of a particular class* provided for by the plan."[218] The bracketed portion is language from the rule which has been deleted and the italicized section is new language added by the 1978 Act. Clearly, the plan can be modified with respect to one class without affecting payments to others under the new act. It should also be understood that this clause permits the modification of the total amount to be distributed to any class under the plan.[219] In addition, language in the rule allowing modification to account for payments to a creditor outside the plan has been excised in the 1978 Act because amendment of the plan to allow satisfaction of a creditor outside the plan was thought to be an invitation for abuse.[220]

The modified plan must comply with subsections 1322(a) and (b),[221] which control the contents of the plan, and cannot extend beyond three years after the initial payment on the original plan was due unless the court, for cause, extends the limit for up to five years.[222] Secured creditors are given the same voting protections they enjoy with respect to preconfirmation modifications and all creditors are protected by the confirmation requirements in section 1325(a) with which the modified plan must conform.[223]

G. *Confirmation*

The confirmation of plans has undergone significant changes. The plan will be confirmed if (1) it complies with the applicable provisions of Chapter 13 and other apposite sections of the 1978 Act;[224] (2) the filing fee has been paid;[225] (3) it has been

---

[218] 1978 Act § 1329(a)(1) (to be codified in 11 U.S.C. § 1329(a)(1)).

[219] Language referring to installment payments appeared in H.R. 31 and S. 236, 94th Cong., 1st Sess. § 6-205 (1975), and was criticized for not permitting a remodeling of the whole plan. *1975 House Hearings, supra* note 6, at 1427-28 (statement of Claude L. Rice). Moreover, since secured creditors are allowed to vote on the modification, 1978 Act § 1329(b)(1) (to be codified in 11 U.S.C. § 1329(b)(1)), and the modification is subject to the other creditor protections contained in the confirmation provision, *id.*, the power to alter the total amount of payments under the plan should be inferred.

[220] *1975 House Hearings, supra* note 6, at 1427 (statement of Claude L. Rice).

[221] 1978 Act § 1329(b)(1) (to be codified in 11 U.S.C. § 1329(b)(1)).

[222] *Id.* § 1329(c) (to be codified in 11 U.S.C. § 1329(c)).

[223] *Id.* § 1329(b)(1) (to be codified in 11 U.S.C. § 1329(b)(1)).

[224] *Id.* § 1325(a)(1) (to be codified in 11 U.S.C. § 1325(a)(1)). *Cf.* 11 U.S.C. § 1056(a)(1) (1976) (similar provision in current law).

[225] 1978 Act § 1325(a)(2) (to be codified in 11 U.S.C. § 1325(a)(2)). The 1978 Act adds

proposed in good faith and not by any means forbidden by law;[226] (4) each unsecured claim is scheduled to receive sums at least as large as it would receive upon immediate liquidation;[227] and (5) the debtor will be able to make all payments under and comply with the plan.[228] In addition, each creditor with an allowed, secured claim "provided for"[229] by the plan must (1) accept the plan; (2) have his collateral surrendered to him; or (3) retain his lien under the plan, and the value of the property to be distributed to him under the plan must not be less than the allowed amount of his claim.[230] Conspicuously absent is the requirement in current law that confirmation is conditioned on the debtor being innocent of any of the acts which would be a bar to discharge in bankruptcy.[231]

As under current law, an order of confirmation may be set aside within 180 days after its entry, after notice and a hearing, upon application of a party in interest. The present statute re-

---

a new section to title 28 which requires a $60 filing fee for a Chapter 13 case. *Id.* § 246 (to be codified in 28 U.S.C. § 1930). *Cf.* 11 U.S.C. § 1024(2) (1976) (current fee is $15).

[226] 1978 Act § 1325(a)(3) (to be codified in 11 U.S.C. § 1325(a)(3)). *Cf.* 11 U.S.C. § 1056(a)(4) (1976) (similar provision in current law).

[227] 1978 Act § 1325(a)(4) (to be codified in 11 U.S.C. § 1325(a)(4)). *Cf.* 11 U.S.C. § 1056(a)(2) (1976) (plan must be in best interests of creditors). Current law is clear that "best interests of creditors" is served by a plan which proposes to pay creditors substantially what they would receive in liquidation even if a more lucrative plan is feasible. *1975 House Hearings, supra* note 6, at 1319, 1321 (statement of U.S. Bankruptcy Judge Conrad K. Cyr); *cf.* Adler v. Jones, 109 F. 967 (6th Cir. 1901) (former section 12 proceeding).

[228] 1978 Act § 1325(a)(6) (to be codified in 11 U.S.C. § 1325(a)(6)). *Cf.* 11 U.S.C. § 1056(a)(2) (1976) (plan must be feasible); *In re* Thompson, 349 F. Supp. 990 (M.D. Ga. (1972) (test for determining whether plan is "feasible" is whether the plan can be accomplished as a practical matter with one factor being the debtor's earning power).

[229] This term is not defined in the 1978 Act. Current law does not permit a plan to "deal with" a secured creditor without his consent. 11 U.S.C. § 1052(1) (1976). Likewise, this term is undefined by the bankruptcy act now in force. Case law has split on whether a secured creditor is "dealt with" by a plan. *See* notes 142-45 and accompanying text. Current law also provides that the plan must be accepted by a majority in number and amount of all unsecured creditors "affected by" the plan. This term is defined at 11 U.S.C. § 1007 (1976). Under Chapter 11 of the 1978 Act, absent certain creditor protections, each class "impaired by" the plan must accept it. 1978 Act § 1129(a)(8) (to be codified in 11 U.S.C. § 1129(a)(8)). This latter phrase is defined at *id.* § 1124 (to be codified in 11 U.S.C. § 1124)).

[230] 1978 Act § 1325(a)(5) (to be codified in 11 U.S.C. § 1325(a)(5)).

[231] 11 U.S.C. § 1056(a)(3) (1976). The Commission felt that if the plan is in the best interests of creditors and has been proposed in good faith, the fact that the debtor may not be eligible for a discharge in bankruptcy should not prevent confirmation of a plan proposing payment from future earnings. H.R. REP. No. 137, *supra* note 6, at 163. *See also 1975 House Hearings, supra* note 6, at 1318 (statement of U.S. Bankruptcy Judge Conrad K. Cyr); *1975 Senate Hearings, supra* note 6, at 605 (statement of Claude L. Rice).

quires that fraud must be shown to have occurred in the procurement of the plan.[232] The 1978 Act alters this language and permits revocation upon a showing of fraud in the procurement of the order of confirmation.[233] Once the order of confirmation has been set aside, the court will dismiss the case, or convert it to liquidation, whichever is in the best interests of creditors and the estate, unless, within a time specified by the court, the debtor proposes a modified plan which is confirmed by the court.[234]

H. Payment

Before or at the time of each payment to creditors, all first priority claims must be brought current[235] and any fees due to a standing trustee must be paid.[236] In addition, the court has the power to order any person or entity which pays income to the debtor to make the payments directly to the trustee.[237] The more difficult question which remains unresolved is whether the debtor's employer is permitted to dismiss him based upon one of these court orders.[238]

I. Conversion

The debtor is given plenary power to convert the case to

---

[232] 11 U.S.C. § 1071 (1976). *But see* BANKR. R. 13-214(b), 13-215(a) (confirmation procured by fraud).

[233] 1978 Act § 1330(a) (to be codified in 11 U.S.C. § 1330(a)).

[234] *Id.* §§ 1330(b), 1307 (to be codified in 11 U.S.C. §§ 1330(b), 1307).

[235] *Id.* § 1326(a)(1) (to be codified in 11 U.S.C. § 1326(a)(1). *Cf.* 11 U.S.C. § 1059(b) (1976); BANKR. R. 13-309(a) (current law has a much more extensive list, including all priority claims). However, under Chapter XIII there has been a dispute over whether priority claims under section 64(a)(5), 11 U.S.C. § 104a(5) (1976), are entitled to prior payment. *Compare In re* Belkin, 358 F.2d 378 (6th Cir. 1966) *with In re* Bailey, 188 F. Supp. 47 (N.D. Ala. 1960).

[236] 1978 Act § 1326(a)(2) (to be codified in 11 U.S.C. § 1326(a)(2)).

[237] *Id.* § 1325(b) (to be codified in 11 U.S.C. § 1325(b)). *Cf.* 11 U.S.C. § 1058(2) (1976); BANKR. R. 13-213(b) (similar provision in current law). Under current law, it has been held that such an order may not run against the United States as an employer. United States v. Krakover, 377 F.2d 104 (10th Cir. 1967), *cert. denied*, 389 U.S. 845 (1967); *accord* 47 Comp. Gen. 522 (1968).

[238] *Compare In re* Jackson, 424 F.2d 1220 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970) *with In re* Stephenson, [1967-1970 Transfer Binder] BANKR. L. REP. (CCH) ¶ 63,566 (E.D. Tenn. 1970); *In re* Crutcher, [1967-1970 Transfer Binder] BANKR. L. REP. (CCH) ¶ 63,415 (E.D. Tenn. 1970); *and In re* Sparks, 306 F. Supp. 676 (N.D. Ala. 1969). Since these cases were decided prior to the effective date of Title III of the Federal Consumer Credit Protection Act, 15 U.S.C. §§ 1671-1677 (1976), it has not been decided what effect the statute will have on this question. *See* Comment, [1970] ILL. L.F. 571. The prohibition on discharge in section 304(a) of the Act, 15 U.S.C. § 1674(a) (1976), is based on a garnishment for any "one indebtedness." *See also* Brennan v. Kroger Co., 513 F.2d 961 (7th Cir. 1975); Johnson v. Pike Corp., 332 F. Supp. 490 (C.D. Cal. 1971).

liquidation or to dismiss the case if it has not been converted to another chapter. His rights in this respect cannot be waived.[239] On request of a party in interest and for cause shown, after notice and a hearing, the court may dismiss the case or convert it to liquidation, whichever is in the best interests of creditors and the estate.[240] The court also has the power to convert the case to Chapter 13 on request of a party in interest, after notice and a hearing, at any time before confirmation.[241]

J. Discharge

Unless the court approves a written waiver of discharge[242] after the filing of the petition, the debtor is entitled to a discharge from all debts which are disallowed or provided for by the plan after completion of payments under the plan.[243] The only debts which are excepted are (1) claims which were not to be exhausted within the duration of the plan;[244] (2) alimony, maintenance, or child support payments;[245] and (3) claims for post-petition consumer goods or services necessary for performance under the plan which are disallowed because the creditor failed to get prior approval of the trustee for the obligation.[246] Chapter XIII currently provides that the discharge extends to all claims provided for by the plan but excludes debts which are not dischargeable under section 17 where the holder of the claim has not accepted the plan.[247]

---

[239] 1978 Act §§ 1307(a), (b) (to be codified in 11 U.S.C. §§ 1307(a), (b)). *Cf.* BANKR. R. 13-215(a) (dismissal and conversion under current law).

[240] 1978 Act § 1307(c) (to be codified in 11 U.S.C. § 1307(c)). The statute provides a nonexhaustive list of factors constituting "cause." These are: (1) unreasonable delay by the debtor that is prejudicial to creditors; (2) nonpayment of the filing fee; (3) failure to timely file a plan; (4) denial of a plan and denial of additional time for filing another plan or modification; (5) material default by the debtor with respect to a confirmed plan; (6) revocation of confirmation and denial of confirmation of a modified plan; and (7) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan.

One court has held that claims which are listed in a previous plan, dismissed for nonpayment, are barred by res judicata from being listed in a subsequent plan. *In re* Dunn, 251 F. Supp. 637 (M.D. Ga. 1966).

Involuntary dismissal may be more difficult for the creditor to obtain than would appear from a reading of the statute. *In re* Beasley, [1970-1973 Transfer Binder] BANKR. L. REP. (CCH) ¶ 64,091 (M.D. Ga. 1971).

[241] 1978 Act § 1307(d) (to be codified in 11 U.S.C. § 1307(d)).

[242] *See* BANKR. R. 13-405, 13-406.

[243] 1978 Act § 1328(a) (to be codified in 11 U.S.C. § 1328(a)). *Cf.* 11 U.S.C. § 1060 (1976); BANKR. R. 13-404(a) (similar provision in current law).

[244] 1978 Act § 1328(a)(1) (to be codified in 11 U.S.C. § 1328(a)(1)).

[245] *Id.* § 1328(a)(2) (to be codified in 11 U.S.C. § 1328(a)(2)).

[246] *Id.* § 1328(d) (to be codified in 11 U.S.C. § 1328(d)).

[247] 11 U.S.C. § 1060 (1976).

A major change in the discharge provisions is the elimination of the three-year threshold requirement for a hardship discharge.[248] Section 661 was added to the Chandler Act to guard against the use of Chapter XIII as an instrument of "wage slavery."[249] However, legislators felt that this three-year condition placed an unnatural incentive for debtors to propose three-year plans regardless of their circumstances and to disregard wage earner relief when performance could not be accomplished within this time frame.[250] Moreover, there have been scores of cases where the debtor has fallen victim to unavoidable circumstances, such as illness or accident, before the lapse of three years. Under current law, the court has no alternative but to dismiss the case or to allow the debtor to convert to bankruptcy, the very stigma the wage earner had tried to avoid.[251] Under current law, it has been urged that a suspension or reduction in payments pursuant to section 646(5) should not entail a similar protraction of the three-year requirement as a prerequisite to a hardship discharge.[252] The elimination of the time limitation in the 1978 Act reinforces the wisdom of that position.

Three requirements will have to be met before a hardship discharge will be possible under the new law. First, the debtor cannot be justly held accountable for his failure to complete payments. Second, each unsecured claim must have received a minimum of liquidation value as of the effective date of the plan. Finally, modification of the plan must be impracticable.[253] The hardship discharge is subject to the same exceptions to discharge as survive a total performance discharge and the additional exceptions found in Chapter 5.[254]

One of the major impediments to the use of a composition

---

[248] 1978 Act § 1328(b) (to be codified in 11 U.S.C. § 1328(b)).

[249] Cyr, *The 'Compassionate' Discharge, or is it The 'Perilous' Discharge of § 661*, 22 PERS. FIN. L.Q. REP. 96, 97 & n.8 (1968).

[250] H.R. REP. NO. 595, *supra* note 11, at 125.

[251] *1975 House Hearings*, *supra* note 6, at 1323, 1329 (statement of U.S. Bankruptcy Judge Conrad K. Cyr).

[252] *In re* West, [1973-1975 Transfer Binder] BANKR. L. REP. (CCH) ¶ 64,957 (D. Me. 1973).

[253] 1978 Act § 1328(b) (to be codified in 11 U.S.C. § 1328(b)). Only the first of these is a condition under current law. 11 U.S.C. § 1061 (1976). *But cf. In re* Bailey [1973-1975 Transfer Binder] BANKR. L. REP. (CCH) ¶ 65,409 (D. Me. 1974) (discharge denied where modification possible).

[254] 1978 Act §§ 1328(c), 523(b) (to be codified in 11 U.S.C. §§ 1328(c), 523(a)). See notes 244-46 *supra* and accompanying text.

plan under current law is the bar to a subsequent discharge.[255] This result stems from dicta in *Perry v. Commerce Loan Co.*[256] which held that a prior bankruptcy within six years would not bar confirmation of a plan of extension. The language of *Perry* strongly suggests it would have barred confirmation of a plan of composition.[257] The court's reasoning would also bar bankruptcy relief or confirmation of a plan calling for a composition of debts within six years after a discharge pursuant to a composition plan.[258] However, a discharge pursuant to an extension plan should not bar future relief under the act.[259] It has also been held that where the debtor never received the benefits of discharge because his prior plan was dismissed, a subsequent plan filed within six years could be confirmed.[260] Despite strong language in the cases that similar rules should apply to the hardship discharge under section 661,[261] at least one court has held that the entry of a hardship discharge does not bar future discharge relief under the bankruptcy act.[262]

The 1978 Act eliminates some of the deterrents to the use of composition plans. They will no longer bar confirmation of future Chapter 13 relief calling for composition relief. However, one hundred percent payments are encouraged by the limitation on the availability of a subsequent discharge in liquidation.[263] The limitation is designed to provide a slight brake on the use of

---

[255] H.R. Doc. No. 137, *supra* note 6, at 160-61; *1975 House Hearings*, *supra* note 6, at 1328-29 (statement of U.S. Bankruptcy Judge Conrad K. Cyr).

[256] 383 U.S. 392 (1966).

[257] *Id.* at 403.

[258] *Id.*

[259] Barnes v. Maley, 360 F.2d 922 (7th Cir. 1966); *In re* Autrey, [1960-1962 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 60,493 (D. Kan. 1962).

[260] *In re* Dow, [1967-1970 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 63,402 (D. Me. 1970).

[261] Perry v. Commerce Loan Co., 383 U.S. 392, 404 (1966); *In re* Schlageter, 319 F.2d 821, 822 (3d Cir. 1963).

[262] *In re* West, [1973-1975 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 64,957 (D. Me. 1973). The New Hampshire court was almost certainly wrong when it opined that a bankruptcy discharge entered within six years does not prevent confirmation of any Chapter XIII plan. *In re* Shamma, 369 A.2d 191 (N.H. 1977).

[263] 1978 Act § 727(a)(9) (to be codified in 11 U.S.C. § 727(a)(9)). This section provides that a debtor will not be denied a discharge in liquidation if he has been granted a discharge under section 1328 of the 1978 Act (to be codified in 11 U.S.C. § 1328) or sections 660 or 661 of the current statute, 11 U.S.C. §§ 1060, 1061 (1976), in a case commenced within six years of the liquidation petition if (1) full payment was made on all allowed, unsecured claims, or (2) seventy percent was paid on these claims and this represented the debtor's best effort.

Chapter 13 by small businessmen who wish to avoid some of the restrictions of Chapter 11.[264] The Senate Report felt that the provision was necessary to prevent Chapter 13 plans from becoming exclusively composition offers in which payments would total the value of the debtor's nonexempt assets.[265] It should be noted that a discharge in liquidation will no longer bar relief by way of a composition plan under Chapter 13 for six years since there is no bar comparable to section 14(c)(5) of the current law operative in Chapter 13.

The remodeled chapter allows a party in interest to request a revocation of discharge within one year after its entry. The court will have the power to grant the request only if the discharge was obtained through fraud and the moving party did not acquire knowledge of the fraud until after entry of the discharge order.[266] Chapter III of the present bankruptcy act contains a broader revocation provision[267] and while no published cases have applied it in a wage earner context, it applies to the extent not inconsistent with the provisions of Chapter XIII.[268]

IV. THE RELATIVE ADVANTAGES OF CHAPTER 13 AND CHAPTER 11

Assuming that an individual can qualify to file in Chapter 13 or Chapter 11,[269] it is expected that the advantages of Chapter 13 will prove more alluring. Under the current act, Chapter XI arrangements have proven too cumbersome[270] and costly[271] to be a viable alternative for the small businessman or the individual.

Chapter 11 will permit considerably more creditor involvement than Chapter 13. The former provides for creditors' and equity holders' committees[272] which will have the right to consult the debtor or the trustee in regard to the administration of the

---

[264] S. REP. No. 989, *supra* note 11, at 13. This reasoning is suspect because a discharge in Chapter 11 is a complete bar to liquidation relief for six years. 1978 Act § 727(a)(8) (to be codified in 11 U.S.C. § 727(a)(8)).

[265] *Id.*

[266] 1978 Act § 1328(e) (to be codified in 11 U.S.C. § 1328(e)).

[267] 11 U.S.C. § 33 (1976).

[268] *Id.* § 1002.

[269] The eligibility requirements for Chapter 11 are set forth in 1978 Act §§ 109(b), 109(d) (to be codified in 11 U.S.C. §§ 109(b), 109(d)). The eligibility requirements for Chapter 13 are discussed at notes 36-43 and accompanying text, *supra*.

[270] H.R. REP. No. 595, *supra* note 11, at 119.

[271] *1975 House Hearings*, *supra* note 6, at 1327 (statement of U.S. Bankruptcy Judge Conrad K. Cyr); Lake, *Chapter XIII: An Alternative to Straight Bankruptcy for the Wage Earner*, 46 L.A. B. BULL. 380, 384 (1971).

[272] 1978 Act § 1102(a) (to be codified in 11 U.S.C. § 1102(a)).

estate.[273] They also will have the right to participate in the formulation of the plan,[274] request the appointment of a trustee or examiner,[275] and perform such other services in the interests of creditors and equity holders.[276] Moreover, these committees, as well as any other party in interest, have the right to raise and appear and be heard in regard to any issue in the case.[277]

A debtor who files in Chapter 11 runs the risk that a trustee will be appointed[278] and divest him of the right to operate his business.[279] In addition, a Chapter 11 trustee, or an examiner appointed by the court in a case where a trustee has not been appointed,[280] will have broad investigative powers to inquire into the financial affairs and condition of the debtor's business similar to those granted to the Chapter 13 trustee.[281]

A Chapter 11 debtor must solicit approval from unsecured creditors and equity holders in addition to secured creditors while the Chapter 13 debtor need only seek approval from the latter group. Solicitation of approval of the plan from holders of claims or interests in Chapter 11 cannot take place prior to the holder being furnished a disclosure statement containing "adequate information"[282] about the debtor and his business.[283]

The debtor may find that confirmation is more difficult to obtain in Chapter 11. Therein, each class of creditors and equity holders impaired by the plan must consent to the plan[284] or be afforded certain protections against erosion of position. In addition, a class of creditors secured by an interest in property of the estate may be given an election to be treated as fully collateralized to the extent of their allowed claim.[285] This means such a class of secured creditors can elect to be treated as fully secured

---

[273] *Id.* § 1103(c)(1) (to be codified in 11 U.S.C. § 1103(c)(1)).

[274] *Id.* § 1103(c)(3) (to be codified in 11 U.S.C. § 1103(c)(3)).

[275] *Id.* § 1103(c)(4) (to be codified in 11 U.S.C. § 1103(c)(4)).

[276] *Id.* § 1103(c)(5) (to be codified in 11 U.S.C. § 1103(c)(5)).

[277] *Id.* § 1109(b) (to be codified in 11 U.S.C. § 1109(b)).

[278] *Id.* § 1104(a) (to be codified in 11 U.S.C. § 1104(a)).

[279] *Id.* § 1108 (to be codified in 11 U.S.C. § 1108).

[280] *Id.* § 1104(b) (to be codified in 11 U.S.C. § 1104(b)).

[281] *Id.* §§ 1104(b), 1106(a)(3)-(4), 1106(b) (to be codified in 11 U.S.C. §§ 1104(b), 1106(a)(3)-(4), 1106(b)).

[282] *Id.* § 1125(a)(1) (to be codified in 11 U.S.C. § 1125(a)(1)).

[283] *Id.* § 1125(b) (to be codified in 11 U.S.C. § 1125(b)).

[284] *Id.* § 1129(a)(8) (to be codified in 11 U.S.C. § 1129(a)(8)).

[285] *Id.* § 1111(b) (to be codified in 11 U.S.C. § 1111(b)).

creditors for purposes of the protection afforded secured creditors in a Chapter 11 "cash out."

The protection afforded a class of dissenting secured creditors in Chapter 11 corresponds to a provision in Chapter 13 protecting nonconsenting secured creditors.[286] The former requires that the plan may be confirmed over the opposition of a class of secured creditors if the plan does not discriminate unfairly and it is fair and equitable. Section 1129(b)(2) provides guidelines for the fair and equitable standard which are closely allied to the protections afforded objecting secured creditors in Chapter 13.[287] Since unsecured creditors and equity holders are not permitted to vote on the plan in Chapter 13, no protections need be incorporated into the plan for the benefit of objecting classes to insure confirmation as is required in Chapter 11.[288]

Chapter 11 offers more opportunities for the debtor to find himself controlled by third parties. While only the debtor may file the plan in Chapter 13, under certain conditions any party in interest may file a plan in Chapter 11.[289] Chapter 13 offers greater opportunities for the debtor to convert the case to liquidation[290] and fewer reasons to allow a party in interest to request dismissal of the case or conversion to liquidation.[291]

While Chapter 11 discharges the debtor upon confirmation of the plan,[292] and, absent a hardship discharge, the Chapter 13 debtor will not earn a discharge until fulfilling his obligations under the plan, the discharge in Chapter 11 is more limited. None of the claims excepted from discharge by section 523 are discharged in Chapter 11 whereas they would be upon completion

---

[286] *Compare id.* §§ 1129(b)(1), 1129(b)(2)(A) (to be codified in 11 U.S.C. §§ 1129(b)(a), 1129(b)(2)(A)) *with id.* § 1325(a)(5) (to be codified in 11 U.S.C. § 1325(a)(5)).

[287] The third alternative, providing secured creditors with the indubitable equivalent of their claims, is clearly satisfied by surrender of the collateral to the creditor or by extending a lien on similar property. 124 CONG. REC. S17,421 (daily ed. Oct. 6, 1978).

[288] 1978 Act §§ 1129(b)(2)(B)-(C) (to be codified in 11 U.S.C. §§ 1129(b)(2)(B)-(C)). It should be noted that the fair and equitable standard of section 1129(b)(2) of the 1978 Act applied only to dissenting classes. Hence, unlike the fair and equitable rule of Chapter X and section 77 of the present law, senior accepting classes of unsecured creditors and interest holders are permitted to surrender value to more junior classes as long as no dissenting intervening class receives less than the full amount of its claims. 124 CONG. REC. S17,420 (daily ed. Oct. 6, 1978).

[289] 1978 Act § 1121(c) (to be codified in 11 U.S.C. § 1121(c)).

[290] *Compare id.* § 1112(a) (to be codified in 11 U.S.C. § 1112(a)) *with id.* § 1307(a) (to be codified in 11 U.S.C. § 1307(a)).

[291] *Compare id.* § 1112(b) (to be codified in 11 U.S.C. § 1112(b)) *with id.* § 1307(c) (to be codified in 11 U.S.C. § 1307(c)).

[292] *Id.* § 1141(d) (to be codified in 11 U.S.C. § 1141(d)).

of the Chapter 13 plan.[293] Moreover, if the Chapter 11 plan essentially calls for a liquidation of the debtor's assets, a discharge will be denied in Chapter 11 if it would be denied in liquidation under section 727(a).[294]

CONCLUSION

On October 1, 1979, the nation will be confronted with the first comprehensive revision of bankruptcy law since the Chandler Act of 1938. The modernization of the American law of bankruptcy has come only after persistent effort by the major participants and compromise by all factions of the economy. The increasing use of Chapter XIII wage earner plans has prompted a major effort aimed at reform by the draftsmen who sculptured the new Chapter 13. They have widened the corridors of eligibility and have contemporized its structural provisions.

This analysis has attempted to explore the changes that will be taking place and to put them in perspective by examining the reasons for the modifications. Armed with a better understanding of the workings of Chapter 13, the attorney will be better able to serve his client and promote the economic health of the community.

---

[293] *Id.* § 1141(d)(2) (to be codified in 11 U.S.C. § 1141(d)(2)).

[294] *Id.* § 1141(d)(3) (to be codified in 11 U.S.C. § 1141(d)(3)).