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Determining Eligibility for a Discharge

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Chapter 13 Discharge Issues

1.

Overview

It may come as a surprise to some attendees at this Conference that I sometimes file Chapter 13 cases knowing that the client will not be eligible to receive a Chapter 13 Discharge, even if they complete all their Chapter 13 Plan Payments. It is also accurate to say that many of the clients we file Chapter 13 cases for will not complete their Chapter 13 Plans for various reasons.

While most consumer debtors file their Chapter 13 cases with the expectation that they will receive a discharge, the reality is that most Chapter 13 debtors will not complete the payments due under their plan. Additionally, some Chapter 13 cases are filed with the understanding that a discharge will not be received. This paper discusses scenarios where the debtor will not receive a discharge, either because a discharge is not available or because circumstances do not permit the debtor to continue with their case. My goal is to provide practical tools for managing those situations and preventing them from being a drag on the profitability of your firm, while obtaining as much relief as possible for your client.

Getting a Chapter 13 Discharge is a good thing. Section 1328 of the Bankruptcy Code provides that *"... as soon as practicable after completion by the Debtor of all payments under the plan ... the court shall grant the Debtor a discharge of all debts provided for by the plan…"* 11 U.S.C. §1328. However, since it is likely that the majority of the clients who you file Chapter 13 cases for will not be able to complete the 36 or 60 month plans they propose, knowing the available options when the plan cannot be completed is important to help your practice run smoothly and maximize the relief you obtain for the client.

2.

Why don't Chapter 13 Debtors Complete their Plans?

Most Chapter 13 debtors fail to complete their Chapter 13 Plan because **they do not make the payments required by their Chapter 13 Plan.** In some cases, voluntary choices made by the debtor prevent them from making their payments. In other words, they choose to use their limited income on something other than making their plan payments. Sometimes those choices may seem frivolous to counsel, like wanting a new car, or perhaps unwise, such as investing in a startup business. Most of the time the choices are objectively understandable, even admirable, like helping their children or obtaining needed medical care. In any event, it is important to recognize that our role as counsel in a Chapter 13 case is that of an advocate or an advisor regarding the consequences of the choices made by our client. The Chapter 13 case

belongs to our client and our client bears the ultimate responsibility for whether the case fails or succeeds.

In other cases, the events leading to the inability of the debtor to make the Plan payments are outside of their control, typically a loss of income. This can be in many forms, for example the debtor may get laid off from their job, a vehicle can break down preventing the debtor from getting to work or an illness can limit, or even end, the debtor's ability to work. The debtor can also get divorced or suffer a business setback if self-employed. Regardless of the cause, failing to make the Chapter 13 Plan payments is going to lead to difficulty in moving forward with and completing the Chapter 13 case.

3.

Dealing with Plan Payment delinquencies

A. Philosophy

When the debtor falls behind on their Chapter 13 Plan payments, the Chapter 13 Trustee will ask the Court to dismiss their case. Typically, this will be the first time that debtor's counsel is aware that there is a problem. While, I suggest encouraging your clients to let you know immediately if they are unable to make their plan payments (since that is when their options are the greatest), my experience is that few of them will do so.

Since counsel will generally be facing a Motion to Dismiss when the Chapter 13 Plan Payment default is discovered, the time to respond will be limited in accordance with the Court's Motion to Dismiss procedures. Accordingly, I suggest that your office have an established protocol to follow as soon as you learn that the Chapter 13 Trustee has asked the Court to dismiss the case. While you can certainly deviate from the protocol to meet the needs of a particular case, Motions to Dismiss are a routine part of Chapter 13 practice. Thus, I believe that if a practice is going to be financially viable, one thing that it needs is an established systematic way to deal with Chapter 13 Plan Payment defaults. I suggest that the protocol should include:

1) Looking at the online records of the Chapter 13 Trustee to confirm that a default is shown;
2) Adding the deadline for the debtor to cure the default to the calendar;
3) Adding the date of a hearing (if there is one) to the calendar;
4) Contacting the debtor to find out what is going on (I suggest a combination of phone, letter, text and email) with the level of effort customized to the case; and
5) Filing (if appropriate) a response with the Court.

A copy of the protocol that my firm uses is attached, as an Exhibit to this paper. Note that the primary purpose of reviewing the Trustee's online records as shown above is not to determine if the payments are in default (while a Chapter 13 Trustee can certainly make mistakes, that is not common in my experience) but so that when the Debtor contends that they are current you or your staff can respond with something like *"Well the Trustee's records show*

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