

# RETHINKING CHAPTER 13

Lawrence Ponoroff\*

*As was true of its predecessor under the Bankruptcy Act of 1898, chapter 13 of the Federal Bankruptcy Code has never worked out as well as Congress hoped. Intended to be a superior vehicle to liquidation that allows a debtor to retain her nonexempt property and some measure of self-respect, debtors have instead overwhelmingly chosen to eschew chapter 13 in favor of obtaining a chapter 7 discharge and moving along with their fresh start. This Article adopts the position that the concept of individual debt adjustment has merit; it has just not been constructed properly and, in recent years, Congress's efforts in the field have been a step in the wrong direction. This Article maintains that by employing the conceptual model of settlement, with its entailments of cooperation and reasonable accommodation, many of the current issues plaguing chapter 13 can be resolved. Furthermore, future reform can produce a vibrant and useful facility for individual debt adjustment that redounds to the benefit of not only system participants, but also the aggregate social good.*

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\* Dean and Professor of Law, Michigan State University College of Law.

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*“Some debts are fun when you are acquiring them, but none are fun when you set about retiring them.”\*\**

### INTRODUCTION

From the start, Congress has had an almost unnatural affinity for repayment under chapter 13 of the Federal Bankruptcy Code<sup>1</sup> over liquidation under chapter 7 for individual-consumer debtors. Frustrated, however, by the failure of most consumer debtors to appreciate what Congress had considered to be the advantages for them in chapter 13 compared with chapter 7, Congress slowly began to replace the honey with vinegar to assure that debtors would make the “right” choice. This trend reached a crescendo in 2005,<sup>2</sup> but by then, Congress seemed far more preoccupied with controlling what it perceived to be abuse of chapter 7 than with providing debtors a superior alternative to straight bankruptcy.<sup>3</sup>

In any case, chapter 13, as currently constituted, is deeply debilitated. Empirically, an overwhelming majority of chapter 13 cases never achieve plan

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\*\* *Ogden Nash Quote*, IZ QUOTES, <http://izquotes.com/quote/133992> (last visited Jan. 11, 2017).

1. The current law of bankruptcy is found in title 11 of the United States Code. 11 U.S.C. §§ 101–1532 (2012) *amended by* Pub. L. No. 114-254, 130 Stat. 1005. It was enacted on November 6, 1978 as the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, and governs all cases filed on or after October 1, 1979 (the “1978 Act”). In the text of this Article, except where otherwise indicated, all references herein to the “Code” or the “Bankruptcy Code” are to title 11 of the U.S. Code as amended through December 10, 2016.

2. Two thousand and five saw the enactment of the most sweeping set of amendments to the Code with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.). Moreover, while the personal bankruptcy provisions of the bill received the bulk of the attention in this respect, the limitations extended to business cases as well. *See generally* George H. Singer, *The New Rules of Bankruptcy for Chapter 11 Business Reorganizations Under B.A.P.C.P.A.*, 28 CAL. BANKR. J. 194 (2006).

3. BAPCPA was largely a response to the perception that individual debtors were engaging in widespread misuse of the bankruptcy system and the belief that bankruptcy judges were not sufficiently vigilant in policing such abuses. *See generally* Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. ILL. L. REV. 93, 94 (observing that the subtext of BAPCPA “was the view that bankruptcy judges and consumer debtors’ lawyers needed to be reined in to keep them from facilitating abuse by consumer debtors”); Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 485–93 (2005). The original antecedent to the legislation emanated from the dissent to the 1997 Report of the National Bankruptcy Review Commission. Jensen, *supra*; *see also* NAT’L BANKR. REVIEW COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS, 1029 (1997), <http://govinfo.library.unt.edu/nbrcreport/01title.pdf> [hereinafter NBRC REPORT] (“Chapter 5 Individual Commissioner Views”).

completion and discharge,<sup>4</sup> and chapter 13 has come under heavy criticism in the academic community.<sup>5</sup> In addition, chapter 13 cases have always been subject to an enormous amount of local and regional variation,<sup>6</sup> although recently efforts

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4. See NBRC REPORT, *supra* note 3, at 90 (reporting completion rate of 32% in chapter 13); Charles M. Foster & Stephen L. Poe, *Consumer Bankruptcy: A Proposal to Reform Chapters 7 and 13 of the U.S. Bankruptcy Code*, 104 DICK. L. REV. 579, 589 (2000) (noting only one-third of chapter 13 filers were able to complete repayment plans, and many were only able to make minimal repayment); Scott F. Norberg & Andrew J. Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 CREIGHTON L. REV. 473, 476 (2006) (finding a 33% completion rate in a seven-district study for plans of chapter 13 debtors who filed in 1994); William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 410–11 (1994) (reporting 31% average completion rate across the country). It would be an exaggeration, however, to label all such cases as “failures.” A chapter 13 case that stops an imminent foreclosure or provides some other temporary relief is not necessarily a failure just because plan payments are never completed or a discharge is never granted. See, e.g., *Branigan v. Bateman (In re Bateman)*, 515 F.3d 272, 283 (4th Cir. 2008) (noting the protections or benefits available under chapter 13, other than discharge, that might be incentive for a debtor to file for relief even when discharge is not available).

5. See, e.g., Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 AM. U. L. REV. 1295, 1320–21 (2006) (predicting that the net result of BAPCPA would be even lower rates of usage, even less plan completion, and even less unsecured debt repayment than under prior law); Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 113 (2011). (“Chapter 13 is a social program that does not work as intended but is not critiqued or reformed because its flaws are hidden. The consumer bankruptcy system fits this description, as the data show. . . . [T]he systemic failure of [c]hapter 13 has existed for decades.”). Calls to repeal chapter 13 can be found early on after the enactment of the Code. See William C. Whitford, *Has the Time Come to Repeal Chapter 13?*, 65 IND. L.J. 85 (1989) (discussing the low completion rate, the significant difference in practices from district to district, the lack of explanation for the frequency of use of chapter 13 as opposed to chapter 7, and the phenomenon of debtors’ lawyers steering debtors into chapter 13 because of pressure from judges and trustees); see also Karen Gross, *The Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 NOTRE DAME L. REV. 165, 166 (1990) (criticizing required repayment as a condition to discharge); c.f. Timothy W. Dixon & David G. Epstein, *Where Did Chapter 13 Come From and Where Should It Go?* 10 AM. BANKR. INST. L. REV. 741, 747–63 (2002) (expressing ambivalence about the future of chapter 13).

6. In its Final Report, the Commission was established by Congress in 1970 to “study, evaluate and recommend changes to [the existing bankruptcy law].” 14 Act of July 24, 1970, Pub. L. No. 91-354, 86 Stat. 468, noted the surprisingly wide variation in rates of usage of former chapter XIII from district to district. See COMM’N ON THE BANKR. LAWS OF THE U.S., REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, 93d Cong., 1st Sess., at 156–57 (1973). With respect to the diversity of the practice under the Code, see Daniel A. Austin, *Bankruptcy and the Myth of “Uniform Law,”* 42 SETON HALL L. REV. 1081 (2012); Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501 (1993); and Scott F. Norberg & Nadja Schreiber Compo, *Report on an Empirical Study of District Variations, and the Role of Judges, Trustees and Debtors’ Attorneys in Chapter 13 Bankruptcy Cases*, 81 AM. BANKR. L.J. 431 (2007). There have also been some recent

have been made to mitigate the highly customized, and thus disparate, nature of the practice.<sup>7</sup> Finally, the law governing modification of a confirmed chapter 13 plan is in a state of near chaos.<sup>8</sup>

In short, the complex array of carrots and sticks that Congress has put in place over the last nearly 40 years to make chapter 13 the chapter of choice for “can-pay” debtors is simply not working. The timing is propitious, therefore, to theorize about the exact role chapter 13 should play in our contemporary bankruptcy system, so that its current features, as well as subsequent proposals for reform, can be evaluated for consistency with an idealized understanding of a workable system of individual debt adjustment.

In an article written several years ago, Professor David Carlson used a bargain metaphor to offer a “unifying theory” of chapter 13.<sup>9</sup> Specifically, he analogized the chapter 13 plan to a purchase and sale transaction where the debtor essentially buys back the nonexempt assets of the estate with future income; something that is, of course, excluded from the bankruptcy estate in chapter 7 cases.<sup>10</sup> He thus conceptualized the estate assets as “principal” that, pursuant to the chapter 13 bargain, goes to the debtor, and disposable post-confirmation income as “interest” belonging to creditors. From this ideation of chapter 13, he concluded that any subsequent modification of the plan must honor the original bargain; creditors may not invade principal by forcing the liquidation of assets,<sup>11</sup> and

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studies suggesting a kind of subconscious racism that accounts for a greater proportion of black debtors placed in chapter 13 than white debtors. *See, e.g.*, Jean Braucher et al., *Race Disparity in Bankruptcy Chapter Choice and the Role of Debtors’ Attorneys*, 20 AM. BANKR. INST. L. REV. 611 (2012); Mechele Dickerson, *Racial Steering in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 623 (2012).

7. The Advisory Committee on Bankruptcy Rules to the Judicial Conference of the United States has led this effort by proposing uniform procedures over areas that previously were subject to considerable variation from district to district, such as FED R. BANKR. P. 3001(c)(2) and 3002.1, which became effective on December 1, 2011 (resolving the prior discord in the case law over whether postpetition charges imposed by mortgage lenders in “cure and maintain” plans required prior notice and court approval). In addition, the Committee is currently working on a national chapter 13 plan form. *See* COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PROPOSED AMENDMENTS TO THE FEDERAL RULES BANKRUPTCY PROCEDURE 11–16 (July 2016), [http://www.uscourts.gov/sites/default/files/preliminary\\_draft\\_2016-07-01.pdf](http://www.uscourts.gov/sites/default/files/preliminary_draft_2016-07-01.pdf); *see also* Sara S. Greene et al., *Countering Culture: An Empirical Analysis of Consumer Bankruptcy Success*, 101 MINN. L. REV. (2017) (draft on file with the author) (arguing that the data show that the supposed impact of “local legal culture” as an excuse to forego national reform of chapter 13 is misguided).

8. *See infra* Section III.E.

9. David Gray Carlson, *Modified Plans of Reorganization and the Basic Chapter 13 Bargain*, 83 AM. BANKR. L.J. 585 (2009).

10. *Id.* at 588–89. This is of course the reverse of the bargain in chapter 7 where, in return for surrender of her nonexempt assets, the debtor receives a discharge.

11. This understanding leads Carlson to conclude that recalculation of the best interests test under § 1325(a)(4) should never be revisited because the effect may force the debtor to liquidate assets in violation of the chapter 13 bargain in order to avoid dismissal or conversion. *Id.* at 599–605.

debtors may not appropriate interest by forcing the re-bifurcation of a secured claim.<sup>12</sup>

Professor Carlson's chapter 13 bargain model has considerable explanatory power and does offer a practical benchmark for evaluating issues that arise during the course of a chapter 13 case. Ultimately, however, it lacks a normative axis. That is to say, it provides a descriptive version of what chapter 13 is and how it operates but offers no particular view of what the major constituent elements of the chapter 13 bargain ought to be—an undertaking that, in fairness, Carlson did not set out to provide. This Article supplies an alternative bargain metaphor that will measure not only the correctness of the opposing positions taken on key chapter 13 issues in the decisional law, but also the adequacy and efficacy of the law's current features.

This Article's basic premise envisions chapter 13 not as a sale of estate assets to the debtor in return for access to future income, but rather as the "settlement" of a cluster of disputed claims. Thus, this Article's conceptual point of origin likewise finds its ontological origins in contract law. Of course, it is not the apotheosis of the consensual agreement imagined under classical contract-law principles.<sup>13</sup> Among other differences, the chapter 13 settlement is involuntary; creditors do not have the right to vote and cannot force a debtor who complies with chapter 13's confirmation requirements out of bankruptcy or into another debtor-relief chapter of the Code. Chapter 13 also implicates inter-creditor issues in a manner that does not exist under the conventional model of assent.<sup>14</sup> Nonetheless, the "bargain" concept has persisted in efforts to explicate and understand the bankruptcy system, going back to Tom Jackson's legendary "creditor's bargain" model,<sup>15</sup> an approach that Carlson himself found considerably less than satisfying.<sup>16</sup>

The entailments of a settlement analogy also differ from those of a traditional transaction of purchase and sale. Most prominently, they require examination of the value of the claim being compromised in order to evaluate the

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12. *Id.* at 649–52. This occurs when the debtor seeks modification for purposes of surrendering collateral that the plan had originally contemplated would be retained. *See infra* notes 176–85 and accompanying text.

13. The traditional model of assent is premised on bargains of relatively short duration, characterized by voluntariness, infrequency, simplicity, and directness. *See, e.g.*, Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 *Nw. U. L. REV.* 862–65 (1978).

14. This point is reflected in a variety of places, but quite noticeably in the ability of a chapter 13 debtor to classify among unsecured claimants under 11 U.S.C. § 1322(b)(1) (2012).

15. THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* (1986) (setting forth basic principles of bankruptcy law and presenting bankruptcy as a system of contracts between creditors); Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 *YALE L.J.* 857 (1982).

16. *See* David Gray Carlson, *Philosophy in Bankruptcy*, 85 *MICH. L. REV.* 1341, 1388 (1987) (reviewing THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* (1986)). Carlson described Jackson's book as "unremittingly dreadful." *Id.*

terms of the settlement to be imposed on debtors and creditors, as well as consideration of the additional costs associated with pursuing (and defending) the claim to final adjudication.<sup>17</sup> “Value,” however, has a different meaning in the bankruptcy context than it does under state law. While creditors mostly do bring their state law rights, entitlements, and priorities into the chapter 13 case,<sup>18</sup> they are not necessarily treated in the same manner as they would be under state law.<sup>19</sup> Thus, the “merits” of a claim need to be assessed not in the orthodox sense of the claim’s validity or dollar value, but rather through the lens of the unique bankruptcy policy aims, including fresh start, rehabilitation, and equality. Also, in this sense, the bargain does not need to be the one that the parties *would have* agreed upon if given the opportunity to negotiate in advance. Rather, the settlement analogy is an imaginative construct to be used in developing a framework that, once imposed on the interested parties to a chapter 13 case, serves social policy objectives and maintains systemic integrity.<sup>20</sup> It is this fact that permits an appraisal of chapter 13 in its current embodiment—not necessarily to provide more or less debtor protection or creditor relief, but rather with an eye toward fashioning a useful and equitable system of rehabilitation for individual debtors.

To achieve these ends, this Article begins in Part I with an overview of the purposes and policies behind including a procedure for individual debt adjustment within our system of bankruptcy laws. Part II explains the basics of the settlement model and then imports the concept into the chapter 13 realm by discussing how the debtor and creditors are properly correlated with the parties to

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17. The complicated process of risk-and-cost analysis, modeling, and management has become an industry unto itself. *See generally* Marc B. Victor, *The Proper Use of Decision Analysis to Assist Litigation Strategy*, 40 BUS. LAW. 617 (1985); Kris Steckman, Note and Comment, *Market-Based Prediction Models as an Aid to Litigation Strategy and Settlement Negotiations*, 2 J. BUS. ENTREPRENEURSHIP & L. 244 (2008). Companies have sprung up whose sole *raison d’etre* is assessment of settlement valuations. *See, e.g.*, LITIGATION RISK MANAGEMENT INSTITUTE, <http://litigationriskmanagement.com/> (last visited Jan. 4, 2017).

18. This proposition is often referred to as the *Butner* principle, in homage to the Supreme Court’s decision in *Butner v. United States*, 440 U.S. 48, 55 (1979) (holding that, unless some federal interest requires a different result, property interests should be analyzed no differently in bankruptcy than under state law).

19. *Butner* is often accorded a much more sweeping interpretation than it warrants. In fact, the holding in that case does no more than negatively express the basic truism that when a state-property-law definition interferes with federal bankruptcy policy, the state-law rule is preempted under the Supremacy Clause of the Federal Constitution. For example, in *Kanter v. Moneymaker (In re Kanter)*, 502 F.2d 228 (9th Cir. 1974), the Ninth Circuit invalidated a state statute that purported to defease the bankruptcy trustee of any interest in a prepetition-personal-injury lawsuit. The court found that enforcement of that provision directly conflicted with the provisions of the former Bankruptcy Act’s definition of estate property, as well as with the overall distributional priority scheme the Act established. *Id.* at 230–31; *see also In re Pruitt*, 401 B.R. 546, 564 (Bankr. D. Conn. 2009) (suggesting that many courts read *Butner* too broadly).

20. *See infra* note 52 and accompanying text (exploring the normative role of bankruptcy law in society).

a conventional civil lawsuit. Next, building on the discussion in Part II, Part III takes each of the critical components of a chapter 13 case and maps them against how the statute might look if recrafted along the lines of the settlement analogy, producing what this Article refers to as a “new chapter 13.” This Part also addresses how some of the most controversial issues under chapter 13 would be resolved by employing the settlement analogy. Finally, recognizing the limitations and artificialities inherent in any attempt at a holistic theory, Part IV offers a realistic assessment of certain aspects of the process that are eclipsed or unduly diminished by employment of this approach.

### I. CHAPTER 13

The precursor to chapter 13 was chapter XIII of the Bankruptcy Act of 1898 (“1898 Act”).<sup>21</sup> At the time it was added to the law by the Chandler Act of 1938,<sup>22</sup> Congress believed that debtors would be eager to use this less-stigmatizing alternative to liquidation.<sup>23</sup> They were wrong. By the time serious discussion of bankruptcy reform began in the 1970s, it was clear that chapter XIII was not working well.<sup>24</sup> A number of features of the law were identified as responsible for this failing, but the most nettlesome included the following: (1) the requirement of creditor approval (voting) for plan confirmation;<sup>25</sup> (2) the limitation of eligibility

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21. See Act of July 1, 1898, ch. 541, 30 Stat. 544, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549; see also David G. Epstein, *New Chapter 13 of the Bankruptcy Code, New Lundin on BAPCPA Chapter 13 Bankruptcy: An Essay Disguised as a Book Review About a Treatise Disguised as a Supplement*, 1 CHARLESTON L. REV. 37, 37 (2006) (“Chapter XIII was ‘invented’ by Valentine J. Nesbit, a South Carolinian who had moved to Birmingham.”)

22. Chandler Act of 1938, ch. 575, 52 Stat. 840, *repealed by* Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549.

23. DAVID A. SKEEL, JR., *DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 133 (2001).

24. This view was reflected in the Senate Report accompanying the Bankruptcy Reform Act of 1978:

In theory, the basic purpose of Chapter XIII has been to permit an individual to pay his debts and avoid bankruptcy by making periodic payments to a trustee under bankruptcy court protection, with the trustee fairly distributing the funds deposited to creditors until all debts have been paid. The hearings record and the bankruptcy literature show uniform support for this principle. In practice, however, the results have been less than satisfactory, [even] though chapter XIII has been available since 1938.

S. REP. NO. 95-989, at 12 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5798.

25. Chandler Act § 651, 52 Stat. at 934 (requiring acceptance by all affected creditors); *Id.* at § 652, 52 Stat. at 934 (requiring confirmation by a majority of the creditors for plans not accepted unanimously).

to wage earners;<sup>26</sup> (3) the full applicability of the discharge exceptions; and (4) the lack of a maximum plan duration.<sup>27</sup>

Congress's solution was chapter 13, featuring statutorily prescribed confirmation standards in lieu of creditor voting,<sup>28</sup> eligibility for any individual with regular income,<sup>29</sup> the promise of the "superdischarge" upon plan completion,<sup>30</sup> and a three-year fixed term as the norm.<sup>31</sup> In an article written contemporaneously with chapter 13's enactment, Judge Joe Lee opined, "Chapter 13 is a more attractive alternative to straight bankruptcy for consumer debtors than was [c]hapter XIII."<sup>32</sup> The basic structure of the old chapter XIII, however, remained intact. The debtor would retain possession of her property and enjoy the exclusive right to propose a plan,<sup>33</sup> with the amounts to be paid to secured and unsecured creditors determined under principles of composition and extension, aided by authority to cure prepetition defaults and deaccelerate claims.<sup>34</sup> Moreover, large business debtors would be precluded from obtaining relief under chapter 13.<sup>35</sup>

26. *Id.* at § 606(8), 52 Stat. at 931 (defining "wage earner" as "an individual whose primary income is derived from wages, salary, or commissions.").

27. *See* S. REP. NO. 95-989, at 12-13 (1977) (identifying some of the problems with chapter XIII). Under chapter XIII, a court, however, could grant a discharge at the end of three years even if the plan was not completed owing to circumstances for which the court determined that the debtor ought not be held accountable. *Id.* at § 661, 52 Stat. at 936. Some argued that as a practical matter, this provision imposed a limitation of three years for the duration of a plan. *See, e.g.,* William K. Adam, *Should Chapter XIII Bankruptcy Be Involuntary?*, 44 TEX. L. REV. 533, 540 n.72 (1966). For a concise overview of chapter XIII, see Susan Jensen-Conklin, *Nondischargeable Debts in Chapter 13: "Fresh Start" or "Haven for Criminals"?*, 7 BANKR. DEV. J. 517, 520-23 (1990).

28. *See* 11 U.S.C. § 1325 (2012).

29. *See id.* §§ 109(e); 101(30).

30. In its original form, § 1328(a) only excepted two types of debt from the full-payment discharge: (1) debts on which the last scheduled payment was due after the end of the plan; and (2) debts for domestic support obligations falling under § 523(a)(5). 11 U.S.C. § 1328(a) (1978), amended by Act of Apr. 20, 2005.

31. *See infra* note 45.

32. Joe Lee, *Chapter 13 nee Chapter XIII*, 53 AM. BANKR. L.J. 303, 326 (1979). However, Judge Lee's prediction that "[t]he objectives of the draftsmen of chapter 13, to promote greater use of the chapter and in turn obtain a greater return for creditors in consumer bankruptcy cases, may very well be realized," turned out to be overly optimistic. *Id.* The legislative history also painted an overly rosy view of things: "The premises of the bill with respect to consumer bankruptcy are that the use of the bankruptcy law should be a last resort; that if it is used, *debtors should attempt repayment* under chapter 13, Adjustment of Debts of an Individual with Regular Income; and finally, whether the debtor uses chapter 7, Liquidation, or chapter 13, Adjustment of Debts of an Individual, bankruptcy relief should be effective, and should provide the debtor with a fresh start." *See* H. R. REP. NO. 95-595, ch. 3, at 118 (1977) as reprinted in 1978 U.S.C.C.A.N. 5963, 6078 (emphasis added) [hereinafter HOUSE REPORT].

33. *See* 11 U.S.C. §§ 1306(b) (1986); 1321 (1978).

34. *See id.* § 1322(b)(5); *infra* note 183.

35. *See infra* note 72 and accompanying text.



To Congress's chagrin, however, many debtors still chose chapter 7, even when they might have had sufficient wherewithal and potential to successfully complete a chapter 13 plan.<sup>36</sup> The response was antonymous as Congress simultaneously began restricting access to chapter 7 as a way of indirectly steering debtors into chapter 13<sup>37</sup> and diminishing the attractiveness of chapter 13 as an alternative to liquidation.<sup>38</sup> The first effort came in two waves. Initially, in 1984, Congress added § 707(b) to the Code, providing that dismissal of an individual-consumer case might occur not only upon a showing of "cause" under § 707(a), but also if the court were to determine that the filing constituted a "substantial abuse" of chapter 7.<sup>39</sup> In 2005, Congress completely overhauled § 707(b) by replacing judicial discretion over the determination of substantial abuse with a formulaic ("means") test in § 707(b)(2) for ascertaining when a "presumption of abuse" would arise, warranting dismissal under § 707(b)(1).<sup>40</sup> However, BAPCPA preserved the courts' discretion to dismiss an individual-consumer debtor's case, even when the debtor "passed" the means test, in the event of either bad faith or when, under the totality of the circumstances, the debtor's situation demonstrated abuse.<sup>41</sup>

The denuding of chapter 13 baubles occurred more gradually, beginning with the addition of the projected disposable income test in 1984,<sup>42</sup> continuing through the dismantling of the superdischarge beginning in 1990,<sup>43</sup> and culminating in BAPCPA's myriad of amendments that made chapter 13 more restrictive and less inviting.<sup>44</sup> This included extending the duration of many

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36. See generally Robert M. Thompson, *Consumer Bankruptcy: Substantial Abuse and Section 707(b) of the Code*, 55 MO. L. REV. 247, 249–51 (1990) (discussing a study conducted by the Credit Research Center at the Purdue University Krannert Graduate School of Management).

37. Debtors may not be directly placed in chapter 13. See 11 U.S.C. § 303(a) (2012); see also Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 35 (1995) (highlighting futility and potential constitutional concerns as explaining Congress's rejection of a compulsory chapter 13).

38. See *infra* notes 42–45, 133–38 and accompanying text.

39. Unquestionably, § 707(b) was aimed at debtors who had the future ability to pay their debts, a factor that Congress did not intend to fall within the definition of "cause" under § 707(a). See S. REP. NO. 95-989, at 94 (1978).

40. See generally Eugene R. Wedoff, *Means Testing in the New §707(B)*, 79 AM. BANKR. L.J. 231, 231 (2005).

41. See 11 U.S.C. § 707(b)(3) (2005).

42. See *infra* notes 104–05 and accompanying text.

43. Sections 3102–03 of the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990), added §§ 1328(a)(2)–(3) to the Code, which included criminal restitution obligations and criminal fines and debts for personal injury resulting from driving under the influence among the types of debt that would be excluded from the superdischarge.

44. See generally Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"* 79 AM. BANKR. L.J. 191, 221 (2005) ("The fact that [c]hapter 13 is made much less attractive reveals much about the true agenda of the bill's proponents, who proclaimed their desire for more debtors to file under that chapter. The real goal of the

chapter 13 plans.<sup>45</sup> Perhaps it should come as no surprise that neither approach has had much effect. While the means test made chapter 7 more costly and cumbersome,<sup>46</sup> most debtors (and even debtors of means) manage to pass it.<sup>47</sup> Moreover, the prospect of living for up to five years on a near subsistence budget is not very appealing except in extraordinary circumstances and, even when undertaken, is usually unsuccessful; five years is a long time to count on clear skies and calm winds. Finally, as discussed more fully below,<sup>48</sup> BAPCPA also tilted the table in favor of protecting the sanctity of security. This certainly had the effect of making chapter 13 less feasible for debtors.<sup>49</sup> Moreover, because chapter 13 is a zero-sum game, increasing the payout on secured claims necessarily had an erosive impact on the amounts available for other claimants.<sup>50</sup>

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creditor lobby was to make bankruptcy of all types more difficult for debtors who need it. In fact, it seems quite likely that [c]hapter 13 cases will go down, rather than up, as a percentage of bankruptcy filings.”); *see also supra* text accompanying notes 36–38.

45. As originally enacted in 1978, § 1322(d) limited the period of repayment under a plan to three years, unless, for cause, the court approved a longer period of up to but not exceeding five years. After BAPCPA, that rule was retained for debtors whose current monthly income times 12 is less than the state’s median for a family of the same size as the debtor’s family. *See* 11 U.S.C. § 1322(d)(2) (2012). For above-median debtors, however, the plan may provide for payments over a period of up to five years. *See id.* § 1322(d)(1). While these rules appear to contemplate the possibility of a plan duration of less than three or five years, respectively, by virtue of § 1325(b)(4)(B), such a reduction is only permitted if the plan provides for payment in full on all allowed unsecured claims over such shorter period.

46. *See* Lois R. Lupica, *The Consumer Bankruptcy Fee Study: The Final Report*, 20 AM. BANKR. INST. L. REV. 17, 30 (2012) (finding significant post-BAPCPA increase in the cost of access to the chapter 7 and chapter 13 consumer bankruptcy systems).

47. *See* Braucher *supra* note 5, at 1322 n.124. One study showed that in the 18 months following the effective date of BAPCPA, 90% of above-median debtors (themselves only a small percentage of total filers) passed the means test. Clifford J. White III, *Making Bankruptcy Reform Work: A Progress Report in Year 2*, 26 AM. BANKR. INST. J. 16, 16 (June 2007) (finding that of chapter 7 filings by above-median debtors between October 2005 and March 2007, only 9.5% were presumed abusive); *see also* David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 228 (2007) (asserting that the means test has failed in its effort to force debtors with debt-paying ability into chapter 13); Jerry D. Truitt, *The State of Bankruptcy 18 Months After BAPCPA*, AM. BANKR. INST. J. 52, 52 (2007) (recognizing that 94% of cases filed were by debtors below the applicable state’s median income). Indeed, one commentator has suggested that the credit industry’s real objective in connection with BAPCPA was not to obtain greater payouts in bankruptcy, but rather to delay bankruptcy filings, thereby reaping continued payments and fees during the period of this deferral. Ronald J. Mann, *Bankruptcy Reform and the “Sweat Box” of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 385–90 (explaining that credit-card lenders actually profit once a borrower becomes financially distressed, and continue to profit so long as the debtor remains in that state).

48. *See infra* Section III.D.

49. *See supra* note 45; *infra* note 141 and accompanying text.

50. As discussed *infra* note 104 and accompanying text, one of the ways in which unsecured creditors are protected in chapter 13 is for all of the debtor’s income over and above necessary expenses, including payments on account of secured debt, to be

And so, in the face of low rates of use, high rates of noncompletion when employed, and low amounts of unsecured debt repayment, the question becomes what is to be done. The initial inquiry might be whether chapter 13 is worth preserving at all.<sup>51</sup> The author of this Article believes the answer is indubitably affirmative. The basic policies that animate the decision to provide a facility for individual reorganization are sound and salutary. While the scope of bankruptcy purposes may be the subject of some disagreement,<sup>52</sup> no one questions that a primary aim of the system is to facilitate a fresh start for debtors and serve as a superior alternative to state law for satisfying creditors' claims.<sup>53</sup> That being the case, having a debt-relief alternative that simultaneously permits debtors to retain their property along with some measure of their dignity and includes a repayment requirement (a feature absent from chapter 7), which offers creditors an opportunity to receive greater payout on their claims than they would pocket in a liquidation, makes eminent sense. Put another way, the problem has not been with the idea—the problem has been with the execution.

The question then becomes how to reform chapter 13 to make it attractive to more can-pay filers and maximize the likelihood of reaching a successful

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committed to payment of unsecured claims. Therefore, the greater the amount of monthly payments that must be made to secured claimholders in order to retain possession of the collateral, the less the surplus income that will be left for unsecured creditors. *See generally* 11 U.S.C. § 707(b)(2)(A)(iii) (2012).

51. *See supra* note 5.

52. For the sake of convenience, Professor Baird divides legal scholars into two camps. The first group is what he terms the “proceduralists,” who regard bankruptcy as more of a minimalist procedural structure and shun the notion that substantive policies and rules should inhere in the bankruptcy system separate and apart from state law, except to the very limited extent necessary to accommodate a collective proceeding. The other group, the “traditionalists,” regards bankruptcy law as playing a special role in our legal system with its own substantive bankruptcy goals distinct from state law. Thus, the traditionalists view bankruptcy as harboring its own unique distributional policy objectives that are both important and distinctive. *See* Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 *YALE L.J.* 573, 576, 589–90 (1998) (articulating the divide in terms of whether bankruptcy is seen as an open or a closed system). These differences are most pronounced in their views on business rehabilitation. *See* Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 *ARIZ. L. REV.* 559, 566 (2001) (“Broadly speaking, the two camps split along two axes. The first division is normative, over whether Congress or bankruptcy judges should pursue redistributive goals in the name of ‘bankruptcy policy.’ The proceduralists view the sole goal of bankruptcy as generating the highest return for creditors, while traditionalists see a role in bankruptcy for protecting groups harmed by failure . . .”).

53. That is to say, both traditionalists and proceduralists recognize the role of the bankruptcy system as providing a more efficient and equitable system of debt collection. It is the role of bankruptcy beyond these core functions where the two camps begin to push in different directions, and specifically over the question of preserving *ex ante* rights and effects. *See generally* Richard M. Hynes, *Non-Procrustean Bankruptcy*, 2004 *U. ILL. L. REV.* 301, 350–59 (explaining debt relief as a form of social insurance and comparing bankruptcy to other social-insurance programs); Elizabeth Warren, *Bankruptcy Policy*, 54 *U. CHI. L. REV.* 775, 790–93 (1987).

conclusion in a higher percentage of filed cases. That will ultimately require legislative judgment or, even better, perhaps the judgment of a special commission or agency that might be both more knowledgeable about bankruptcy and less prone to bend to the special-interest pressures that have hobbled bankruptcy reform efforts in the past.<sup>54</sup> In any case, the key is to get off on the right foot; this requires that we employ the most advantageous and pragmatic overall conceptualization of individual debt adjustment, lest a faulty blueprint lead to construction of yet another rickety structure. What follows is one such approach that decision-makers might find valuable. It is neither a specific nor a complete proposal for reform. Rather, drawing on chapter 13's intended goals, and bearing in mind the lessons from its lackluster performance to date, it is a suggestion for a different way of evaluating what is wrong with chapter 13 as it is currently structured and what might be helpful in fixing it, assuming the political will to do so exists.

## II. THE SETTLEMENT PARADIGM

Even after formal proceedings are initiated, most private lawsuits are resolved by a voluntary agreement of the parties. In fact, aided by interventions such as mandatory, court-ordered mediation, cases settle in such large numbers that, in recent years, a fulsome discussion has sprung about the so-called “vanishing trial.”<sup>55</sup> Settlements, of course, are nothing more than a compact between the parties as to how their dispute will finally be resolved. However, they are motivated by a complex set of interacting factors that differ from the motivations typically accompanying other kinds of consensual bargains, and they occur under the threat of a winner-take-all adjudication if settlement negotiations fail.<sup>56</sup> In addition, if involving a course of performance, they also require mechanisms to deal with noncompletion that are more nuanced than the conventional remedies for breach of contract.<sup>57</sup> What settlements do not entail is an

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54. See Lawrence Ponoroff, *Bankruptcy Preferences: Recalcitrant Passengers Aboard the Flight from Creditor Equality*, 90 AM. BANKR. L.J. 329, 330–34 (2016) (discussing the largely polarized and highly politicized nature of bankruptcy reform since enactment of the Code).

55. The moniker was coined by Professor Marc Galanter. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); see also Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years of War*, 57 STAN. L. REV. 1255 (2005); Marc Galanter, *A World Without Trials*, 2006 J. DISP. RESOL. 7, 23.

56. In conventional contract negotiations, either party may walk away without liability up until the moment that mutual assent is achieved. In settlement negotiations, there is the specter (not to mention the cost and risk) of having the underlying dispute resolved by a judge or jury. Logically, this should put more pressure on the parties to find a middle ground in settlement negotiations than in other forms of contract negotiation.

57. It is important for the party compromising a claim not to inadvertently have that claim merged in the settlement agreement such that, if there is a failure to perform, that party's only claim is for the unpaid settlement amount rather than based on the full amount of the original claim. This can be accomplished in several ways, including by stipulation to judgment for the full claim amount and a covenant not to execute so long as the other party performs its obligations under the settlement agreement. See generally Justin A. Harris, Note, *Judicial Approaches to Stipulated Judgments, Assignments of Rights, and Covenants*

opportunity for readjustment in the face of changing circumstances, nor could they—absent fraud or duress—without wholly undermining the strong public policy favoring the private settlement of disputes.<sup>58</sup>

Settlements are thus a special species of bargain that, if pressed into service as an archetype for structuring reform, could provide greater insight and direction than the orthodox apothegm of chapter 13, which postulates a simple agreement by the debtor to repay her debts from future income in return for retaining her nonexempt property. Of course, in neither case is there a real bargain, nor does this Article suggest that chapter 13 be modeled to emulate some hypothetical bargain that we imagine the parties would have agreed upon if the opportunity for such a negotiation had existed.<sup>59</sup> Rather, this Article proposes that decision-makers use settlement as the psychological construct to craft a workable and effective new chapter 13.<sup>60</sup>

For example, consider surplus income—i.e., the result of applying the projected disposable income test.<sup>61</sup> Is it realistic to assume that a rational defendant in a civil suit of plausible, but far-from-certain, merit would be prepared to agree to commit all of her future income over and above bare expenses to funding a settlement of that lawsuit? Presumably not.<sup>62</sup> And yet, that is exactly what the

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*Not to Execute in Insurance Litigation*, 47 *DRAKE L. REV.* 853, 857–60 (1999). Other alternatives might include a dismissal without prejudice, or suspension of the underlying suit, so that the right to resume the litigation in the event of the defendant's failure to perform its obligations under the settlement is preserved.

58. See generally Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 *HASTINGS L.J.* 9, 35–41 (1996) (supporting the notion that public policy favors private settlement); see also *infra* note 196 and accompanying text.

59. That is the thrust of the standard law and economics account of bankruptcy contained in Tom Jackson's creditors' bargain model. See Jackson, *supra* note 15, at 868, 871 (positing that in an *ex ante* bargain creditors would negotiate a system that respects the efficiencies of nonbankruptcy rights, such as security). For a more contemporary critique of the creditors' bargain model in the context of reorganization, see generally Anthony Casey, *The Creditors' Bargain and Option-Preservation Priority in Chapter 11*, 78 *U. CHI. L. REV.* 759, 763 (2011) (arguing that the inherent conflict between senior and junior creditors impedes the prospect of maximizing a bankrupt firm's value).

60. From this perspective, BAPCPA, with its emphasis on controlling abuse of chapter 7 and eroding many of the advantages for debtors in chapter 13, was a step in the wrong direction. See *supra* text accompanying notes 5, 47–51. The mindset behind BAPCPA was not to reach an accommodation between debtor and creditor interests that would be palatable to both groups, but to actually *decide* in favor of one. Moreover, the need to means test debtors to avoid misuse by can-pay debtors could arguably be greatly reduced, if not outright avoided, by focusing on an invigorated chapter 13 that might simultaneously attract eligible debtors and protect critical creditor interests.

61. The phrase is intended to refer to the amount of income over and above what a debtor requires for expenses. Under the current chapter 13, the debtor is required to devote all of her surplus income to plan payments to unsecured creditors. See 11 U.S.C. § 1325(b) (2012).

62. Of course, there are any number of hypothetical situations where a defendant might agree to such an arrangement when settling a claim. But the settlement model envisioned in this treatment assumes each party has roughly the same ability of prevailing

projected disposable income test in current chapter 13 cases requires.<sup>63</sup> Arguably, this is a major reason why chapter 13 is so unpopular with debtors, and why plans confirmed under its auspices are so often doomed never to reach completion even when utilized, voluntarily or involuntarily.<sup>64</sup> How the allocation of surplus income might be more profitably handled will be discussed later in more detail.<sup>65</sup> For now, the point is to appreciate the benefits that might flow from examining this and related questions from the vantage point of how a debtor would or should likely respond if the subject were to be proffered as part of a settlement proposal.

The situation is more complicated when shifting from the debtor's perspective to that of the debtor's creditors. As plaintiffs in civil suits, creditors rationally would want to see their interests preferred over the interests of other plaintiffs. That is effectively the manner in which the state law of creditor remedies operates—first come, first served.<sup>66</sup> However, the architects of the new chapter 13 will have to pay homage to the central bankruptcy policy of equality of distribution,<sup>67</sup> considering the special in rem rights enjoyed by the holder of nonavoidable secured claims in much the same fashion that the current chapter 13 separately addresses the treatment of secured and unsecured claims.<sup>68</sup> This indicates that the framework for evaluating the interests of creditors under the settlement paradigm should be the distributional norms that underlie chapter 7, rather than state debt-collection law.<sup>69</sup> That is to say, the terms of settlement must

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on the merits and the financial wherewithal to have the claim formally adjudicated if necessary. Thus, neither party has a substantive nor a leverage advantage over the other, a state of affairs that rarely exists.

63. Technically, of course, a debtor cannot be brought into chapter 13 involuntarily. *See supra* note 37. However, one of the consequences of BAPCPA is the possibility of a de facto involuntary chapter 13. *See infra* note 64.

64. Although there is formally no ability to place a debtor in an involuntary chapter 13 under § 303(a), one of the practical consequences of the means test in § 707(b)(2) is to do precisely that, inasmuch as a debtor who fails the means test will have no other feasible bankruptcy alternative. *See generally* Margaret Howard, *Bankruptcy Bondage*, 2009 U ILL. L. REV. 191, 193–200 (analyzing the 13th Amendment implications of BAPCPA in relation to both chapter 13 and, in particular, chapter 11).

65. *Infra* text accompanying notes 110–13.

66. Ponoroff, *supra* note 54, at 383.

67. Equality of distribution is central to bankruptcy policy and summed up in the frequently invoked maxim that “equality is equity.” *See* *Bailey v. Glover*, 88 U.S. 342, 346 (1874) (“It is obviously one of the purposes of the Bankruptcy law, that there should be a speedy disposition of the bankrupt’s assets. This is only second in importance to securing equality of distribution.”); Frank R. Kennedy, *Statutory Liens in Bankruptcy*, 39 MINN. L. REV. 697, 699–700 (1954) (noting that American bankruptcy law has moved in the direction of increasing distributions to unsecured creditors by decreasing the portions that secured and priority claimants receive); *see also* *Howard Delivery Serv. v. Zurich Am. Ins.*, 547 U.S. 651, 667 (identifying the deep roots of the equality of distribution objective in the Bankruptcy Code).

68. *See* 11 U.S.C. §§ 1325(a)(4)–(5), (b)(1) (2012) regarding confirmation requirements with respect to secured and unsecured claims.

69. This is currently reflected in the best interests test of § 1325(a)(4), which this Article proposes to modify, as detailed below, in connection with the reconceptualization of

be evaluated from the point of view of a collectivized debt-collection proceeding. Again, however, the exercise should proceed from the premise of what legislative decision-makers determine to be a reasonable accommodation of those collective interests and not simply implementation of an agreement mirroring what one imagines creditors would form among themselves in a hypothetical *ex ante* negotiation.<sup>70</sup> Bearing that baseline parameter in mind, attention can be turned to a discussion and analysis of what the contours of a new chapter 13 might look like.

### III. NEW CHAPTER 13

In this Part, several key aspects of individual debt adjustment proceedings will be examined. This examination is undertaken to identify the possible statutory revisions that might be called for, and the positions that should prevail with respect to key conflicts in the case law, in order to revitalize chapter 13. The topics to be sequentially addressed are eligibility, property of the estate, unsecured debt, secured debt, modification, discharge, and (the ever popular) miscellany.

#### A. Eligibility

While Congress saw fit to expand eligibility for chapter 13 beyond “wage earners,”<sup>71</sup> its antecedence in chapter XIII of the 1898 Act was nonetheless evident in the decision to restrict the availability of chapter 13 to debtors with limited amounts of both secured and unsecured debt.<sup>72</sup> Until 2005, debtors whose

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chapter 13 as a settlement between a debtor and that debtor’s creditors as a group. *See infra* Section III.C.

70. For authorities setting out the economics-based contractarian account of bankruptcy, see *supra* note 15. A major problem with the creditor’s bargain model, focused narrowly on the problem of debt collection as the sole aim of the bankruptcy law, is that it takes into account only the interests of prepetition creditors. An alternative contractarian account, focused on the principles of inclusion and rational planning has been offered by Professor Korobkin. *See* Donald R. Korobkin, *Contractarianism and the Normative Foundations of Bankruptcy Law*, 71 TEX. L. REV. 541, 544–45 (1991) (setting forth what the author describes as the “Bankruptcy Choice Model”). This Article’s approach differs from either of these approaches because it is not based on what the interested parties, however broadly defined, would have agreed to in an *ex ante* bargain, but what they should agree to in order to resolve their conflicting interests. Thus, this Article is not suggesting a new contractarian model, but rather a way for decision-makers to think about bankruptcy rules. This is because strict contractarian theory, with its emphasis on the good of the individual over the good of the community, will never provide real unanimity, even under Jackson’s very narrow account of bankruptcy. *See* Carlson, *supra* note 16, at 1343–44 (criticizing the economic account on this basis).

71. *See supra* text accompanying note 26; *see also* 11 U.S.C. §§ 109(e), 101(30) (2012).

72. As originally enacted, the debt limits for chapter 13 eligibility were \$100,000 in noncontingent, liquidated, unsecured debts and \$350,000 in noncontingent, liquidated, secured debts. These ceilings were expanded by § 108(a) of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4111-12, to \$250,000 and \$750,000, respectively. In addition, the 1994 amendments added § 104 to the Code under which the amounts in this and other sections would be adjusted for inflation without the need for later legislation. The Judicial Conference of the United States is empowered to make the adjustment every three

obligations exceeded one or both of these thresholds were left with the choice of chapter 7 or chapter 11.<sup>73</sup> After 2005, some non-chapter-13-eligible debtors may be barred from relief under chapter 7 by the “means test” of § 707(b)(2), relegating them to chapter 11. At the same time, however, BAPCPA contained a series of amendments applying to individual debtors in chapter 11, the cumulative effect of which was to eliminate most of the advantages of chapter 11 over chapter 13 for such debtors,<sup>74</sup> as well as the advantages that non-individual debtors continue to enjoy in chapter 11. As a result, chapter 11 is now a rather inhospitable venue for individual debtors due to its more cumbersome, costly, and exacting provisions.<sup>75</sup>

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years based on the Consumer Price Index. 11 U.S.C. § 104(a)(i) (2008). As of the most recent adjustment, April 1, 2016, the amounts were \$383,175 and \$1,149,525, respectively. Revision of Certain Dollar Amounts in the Bankruptcy Code, 81 Fed. Reg. 8748, 8748 (Feb. 22, 2016). Even with these increases, the existence of these debt ceilings reflects a mindset that chapter 13 is only appropriate in relatively small cases, *see infra* note 74, as well as a belief that the absolute priority rule and the creditor franchise are essential protections for creditors in business cases. *See, e.g.*, Kenneth Klee, *A Brief Rejoinder to Professor LoPucki*, 69 AM. BANKR. L.J. 583, 584 (1995) (questioning the appropriateness of a proposed small business chapter that did not have these features).

73. The Supreme Court eliminated the prior uncertainty over the eligibility of nonbusiness individuals under chapter 11 in *Toibb v. Radloff*, 501 U.S. 157 (1991). Continued increases in the § 109(e) debt ceilings will ameliorate the frequency with which this occurs to some extent. *See infra* note 74.

74. Most of these changes were designed to make chapter 11 operate like chapter 13 in the case of individual debtors. Thus, among other changes: (1) discharge is now delayed until plan completion rather than on confirmation, 11 U.S.C. § 1141(d)(5)(A) (2010); (2) an individual-debtor discharge is subject to all of the § 523(a) exceptions, *id.* § 1141(d)(2)–(3) modification may be sought by the trustee or an unsecured creditor, *id.* § 1127(e)(4) (2010) postpetition earnings and property become part of the chapter 11 estate, *id.* § 1115(a)(5) (2005), an individual debtor must devote all of her projected disposable income to plan payments, *id.* § 1129(a)(15)(B) (2010). BAPCPA also added an exception to the absolute priority rule for property included in the estate under § 1115. *See id.* § 1129(B)(2)(b)(ii). This created a split in the case law over the question of whether BAPCPA abrogated absolute priority in individual debtor cases. The emerging consensus in the courts of appeal, however, is to conclude that the absolute priority rule applies in individual cases, including, most recently, the Ninth Circuit. *See Zachary v. Cal. Bank & Trust Co.*, 811 F.3d 1191, 1199 (9th Cir. 2016). The court in *Zachary* reached this view in spite of its recognition of the “double whammy” it creates for debtors who now must devote disposable income to plan payments, as in chapter 13, but also satisfy absolute priority, a requirement absent from chapter 13. *Id.*

75. Along with absolute priority, an individual chapter 11 debtor faces numerous other procedures that render chapter 11 more costly and cumbersome than chapter 13, including committees of creditors, creditor franchise (and the associated disclosure requirements), the requirement of paying all priority claims in full on confirmation, and loss of the exclusive right to file a plan. Although in some individual chapter 11 cases, economies of scale might well cause creditors to forego or abandon some or even all of these rights and protections. *See infra* text accompanying note 82. *See generally* Anne Lawton, *The Individual Chapter 11 Debtor Pre- and Post-BAPCPA*, 89 AM. BANKR. L.J. 455, 482–88 (2015) (demonstrating a sharp drop in the percentage of individual chapter 11 cases in which a plan was confirmed and completed after BAPCPA).



For all intents and purposes, therefore, many of these debtors are left without access to any effective form of bankruptcy relief.<sup>76</sup>

The debt ceilings on eligibility for chapter 13 reflect a congressional judgment that the uncomplicated and straightforward procedures of chapter 13, in comparison to chapter 11, should only be available in relatively small-dollar cases.<sup>77</sup> But why should any individual debtor with regular income be excluded from chapter 13? If we think about fashioning a new chapter 13 through the lens of a global settlement of extant claims against the debtor, no compelling explanation emerges.<sup>78</sup> Debtors unquestionably should appreciate the economy and autonomy of chapter 13 over a chapter 11 alternative.<sup>79</sup> Creditors, while nominally enjoying more protections in chapter 11,<sup>80</sup> nonetheless should prize the expedition of and oversight involved in a chapter 13 case.<sup>81</sup> Furthermore, the expanded rights afforded to creditors in chapter 11 are unlikely to be invoked in most individual cases, except perhaps in the situation where an operating business of some

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76. The 2007 Consumer Bankruptcy Project found that in 2007, an estimated 800,000 families that otherwise would have filed prior to BAPCPA did not seek bankruptcy protection. *See generally* Robert M. Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 351, 375–83 (2008) (exploring the implications of the 2007 report). Although the study’s conclusion focused on the ineffectiveness of the means test to force high-income debtors to pay a portion of their debts, undoubtedly BAPCPA has made bankruptcy a less inviting option, perhaps just as intended. *Id.* at 353; *see also* James J. White, *Abuse Prevention 2005*, 71 MO. L. REV. 863, 874 (2006) (speculating that the goal of BAPCPA was to “degrade the machinery of bankruptcy” across the entire income spectrum).

77. *See* Lee, *supra* note 32, at 304.

78. Indeed, the decision in BAPCPA to make individual chapter 11 a kind of new “Big” chapter 13 supports this view. *See supra* note 74; *see also* Robert J. Landry, III, *Individual Chapter 11 Reorganizations: Big Problems with the New “Big” Chapter 13*, 29 U. ARK. LITTLE ROCK L. REV. 251, 252 (2007). On the other hand, some exclusions may in fact be justified because of the existence of alternative regulatory schemes, such as the current prohibition on joint chapter 13 cases where the spouse is a stockbroker or commodity broker. *See* 11 U.S.C. § 109(e) (2012).

79. Originally, chapter 11 permitted modification of residential home mortgages. 11 U.S.C. § 1123(b)(5) (1978). That ability was eliminated with the revision of § 1123(b)(5) as part of the Bankruptcy Reform Act of 1994. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394 sec. 206(2), (3) (1994); *see also* Janet Flaccus, *A Potpourri of Bankruptcy Changes: 1994 Bankruptcy Amendments*, 47 ARK. L. REV. 817, 827–28 (1994).

80. *See supra* note 75. The 2005 amendments relating to individual chapter 11 cases have likely also operated to reduce a bias on the part of creditors in favor of chapter 13 over chapter 11. *See supra* note 74.

81. Unlike chapter 11, which can drag out for months or even years, a chapter 13 debtor must file her plan either with the petition or within 14 days thereof, FED. R. BANKR. P. 3015(b), and must begin making payments under the plan even prior to confirmation. *See* 11 U.S.C. § 1326(a)(1) (2012). Moreover, while appointment of a trustee in chapter 11 is relatively rare, § 1302(a) ensures that a trustee will be appointed in every chapter 13 case, and charged with performing the statutory duties enumerated in § 1302(b). *Id.* § 1302 (a)–(b) (2010).

magnitude is involved.<sup>82</sup> To deal with those relatively rare instances, § 1304 could be amended to provide for the appointment of a creditors' committee on a showing of cause<sup>83</sup> and possibly to limit to a certain extent the debtor's exclusive right to propose a plan. Otherwise, however, the first crucial step in crafting a new chapter 13 might be to eliminate the debt limitations in § 109(e) as a vestigial remnant of mid-twentieth-century ways of thinking about individual-debt adjustment in general, and business bankruptcy in particular.<sup>84</sup>

### *B. Property of the Estate*

The "estate" in a bankruptcy case is governed, by and large, by § 541(a) of the Code. It is composed of all property of the debtor as of the commencement of the case, along with certain property rights that are acquired by the debtor, or the estate itself, after the commencement of the case.<sup>85</sup> In addition to this property, the estate in a chapter 13 case also includes earnings from services performed by the debtor postpetition, but before the case is closed, dismissed, or converted to another chapter.<sup>86</sup>

Inclusion in the "estate" of earnings or other property acquired by a debtor postpetition, however, is not absolute. Upon confirmation, not only is the debtor entitled to possess property of the estate under § 1306(b),<sup>87</sup> but, pursuant to § 1327(b), the property of the estate is also deemed to vest in the debtor.<sup>88</sup> This will be the case except where the plan or the order confirming the plan expressly calls for a different result.<sup>89</sup> Accordingly, unless a provision is made to the

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82. For example, appointment of a creditors committee may be dispensed with, *id.* § 1102(a)(3) (2015), in the case of a small business debtor, which could include an individual debtor, *id.* § 101(51)(D) (2012), and creditors might well determine that economies of scale hardly warrant exercising other rights, such as filing a plan once the debtor's exclusivity has expired, *id.* § 1121 (2012).

83. Of course, the standing trustee in such cases is already charged with performing the duties specified in § 1106(a)(3)–(4). *See id.* § 1302(c) (2010). Thus, in most cases there would be no need for a committee, even when the debtor is operating a business.

84. *See Klee, supra* note 72, at 584 (questioning the appropriateness even in small business cases of depriving creditors of the right to vote and of replacing the protection of the absolute priority rule with a disposable income test). This approach to chapter 13 would also open up the possibility of eliminating nonbusiness, individual cases from chapter 11 entirely, as that chapter was never a very good fit for such filings, just as new chapter 13 might eliminate the need to means test debtors in chapter 7, an undertaking that cannot be described as a success under almost any reasonable standard of evaluation. *See Lawless et al., supra* note 76, at 352 (observing that the means test did not succeed in its avowed goal of only pushing high-income abusers out of the system); *see also supra* note 46.

85. *See* 11 U.S.C. § 1306(a)(1) (2012).

86. *See id.* § 1306(a)(2).

87. The debtor remains in possession of all property of the estate, except as provided in the debtor's plan or the order confirming the plan. *Id.* § 1306(b).

88. *Id.* § 1327(b) (2012).

89. *See id.* ("Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all property of the estate in the debtor.").

contrary, upon confirmation of a chapter 13 plan, both ownership and control of property of the estate, including postpetition wages, belong to the debtor.

Due to the inherent ambiguity between §§ 1306(a)(2) and 1327(b), courts diverge widely regarding what constitutes the “estate” at various points of time in the chapter 13 process.<sup>90</sup> The Eleventh and Seventh Circuits follow what has been dubbed the “estate transformation” rule. Under this approach, while the “estate” from the petition date to the date of plan confirmation includes postpetition earnings under § 1306(a)(2), at confirmation only the property that is necessary for the execution of the plan remains property of the estate.<sup>91</sup>

Other courts have adopted the so-called “estate preservation” approach, by which all property of the estate postpetition remains property of the estate postconfirmation, notwithstanding § 1327(b).<sup>92</sup> At the other end of the spectrum, other courts have adopted the “estate termination” approach, which, taking a textualist approach to § 1327(b), holds that the estate ceases to exist upon confirmation, except to the extent the plan or order confirming the plan expressly provides otherwise.<sup>93</sup>

The import of whether and to what extent property of the estate vests in the debtor at confirmation can have significant consequences for both pre- and postpetition creditors. For example, if the estate ceases to exist upon confirmation, then the automatic stay does not protect postconfirmation earnings because that property is no longer property of the estate. This means that postpetition creditors may pursue those assets. This situation operates to the prejudice of prepetition creditors, whose only rights are to be paid according to the plan,<sup>94</sup> by potentially depriving the debtor, and thus the chapter 13 trustee, of the wherewithal from which to carry out the terms of the plan.

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90. See generally David Gray Carlson, *The Chapter 13 Estate and its Discontents*, 17 AM. BANKR. INST. L. REV. 233, 233 (2009) (reviewing competing theories and defending the “estate transformation” as the most cogent theory); Peter Carpio & Jeffrey L. Cohen, *Note: Modified Estate Transformation: When Does a Chapter 13 Estate Terminate?* 7 AM. BANKR. INST. L. REV. 213, 213 (1999) (explaining three interpretations of “property of the estate” and arguing for the most consistent with the spirit of the Code).

91. See *Telfair v. First Union Mortg. Corp.*, 216 F.3d 1333, 1339–40 (11th Cir. 2000); *Black v. U.S. Postal Svc. (In re Heath)*, 115 F.3d 521, 524 (7th Cir. 1997); see also *Waldron v. Brown (In re Waldron)*, 536 F.3d 1239, 1242–43 (11th Cir. 2008) (distinguishing *Telfair* and holding that “[n]ew assets that a debtor acquires unexpectedly after confirmation by definition do not exist at confirmation and cannot be returned to him then.”).

92. See, e.g., *Aimese v. Kolenda (In re Kolenda)*, 212 B.R. 851, 853 (Bankr. W.D. Mich. 1997). Some districts, such as the Western District of Texas, have gone so far as to adopt a standing order to this effect. See *In re Scott-Hood*, 473 B.R. 133, 135 (Bankr. W.D. Tex. 2012).

93. See, e.g., *Cal. Franchise Tax Bd. v. Jones (In re Jones)*, 420 B.R. 506, 514–17 (B.A.P. 9th Cir. 2009); see also Austin, *supra* note 6, at 1102–03 (identifying at least five different approaches to differentiating between property of the estate and property of the debtor after confirmation).

94. See 11 U.S.C. § 1327(a) (2012).

Correspondingly, postconfirmation creditors are treated unfairly if it is determined that property of the estate continues to exist after confirmation, since they will be barred from collecting on their claims unless and until they are successful in obtaining relief from the automatic stay. This is attributable to the fact that, while a debt arising after the chapter 13 plan is confirmed can be collected against the debtor personally or against the debtor's property,<sup>95</sup> the automatic stay prevents action against property of the estate to enforce or collect both postpetition and prepetition claims.<sup>96</sup> Therefore, the status of property of the estate after plan confirmation dramatically affects a postconfirmation creditor's ability to enforce and collect on its claim. Finally, until the promulgation of Rule 3002.1 of the Federal Rules of Bankruptcy Procedure in 2011 mooted the issue,<sup>97</sup> whether or not the estate reverted in the debtor upon confirmation had an enormous impact on lenders seeking to collect postconfirmation fees and costs from mortgagors who had confirmed a cure-and-maintenance plan under § 1322(b)(5)<sup>98</sup>—a fact that ultimately led to profuse litigation, including multiple class action lawsuits against mortgage lenders and servicers.<sup>99</sup>

Proceeding from the outlook of chapter 13 as a global settlement of claims against the debtor, a resolution of this disagreement over what constitutes property of the estate quickly becomes apparent. If all of the debtor's postconfirmation property remains property of the estate, the debtor is not free to alienate assets without court permission; a trip to the gas station must be preceded by a trip to the courthouse. On the other hand, if the estate ceases to exist at confirmation, it puts prepetition creditors' prospects of being paid in accordance with the plan in jeopardy. This also puts at risk the likelihood of the debtor eventually receiving a discharge. Thus, neither the estate-preservation nor estate-

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95. Such collection activity is barred only when it is based on a claim against the debtor arising prior to the commencement of the case. *See* 11 U.S.C. § 362(a) (2010).

96. *See id.* §§ 362(a)(2)–(3). The stay remains in effect against property of the estate until such property is no longer property of the estate. *Id.* § 362(c)(1).

97. At the heart of the dispute was the assertion that a lender seeking to collect postconfirmation fees or costs from its mortgagee was required to file an application for such amounts and obtain court approval under the Federal Rules of Bankruptcy Procedure. *Compare* Padilla v. GMAC Mortg. Corp., 389 B.R. 409, 442–43 (Bankr. E.D. Pa. 2008) (holding that Rule 2016 only applies to a creditor seeking to collect legal fees from the estate), *with* Padilla v. Wells Fargo, 379 B.R. 643, 654–55 (Bankr. S.D. Tex. 2007) (holding that Rule 2016 is not limited to entities seeking compensation for expenses incurred on behalf of the estate, but also applies to oversecured mortgage lenders).

98. Section 506(b) is inapplicable to plans utilizing Code § 1322(b)(5) because § 1322(e), adopted in 1994, states that “[n]otwithstanding . . . section[ ] 506(b) . . . of this title, if it is proposed in a plan to cure a default, the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.” (emphasis added). 11 U.S.C. § 1322(e) (2012); *see, e.g.*, Patterson v. Homecomings Fin., LLC (*In re* Patterson), 444 B.R. 564, 569 (Bankr. E.D. Wis. 2011).

99. *See, e.g.*, Rodriguez v. Countrywide Home Loans, Inc., 695 F.3d 360 (5th Cir. 2012). *See generally* S. Andrew Jurs, *What Banks Need to Know About Attorney's Fees in Chapter 13 Proofs of Claim*, 120 BANKING L.J. 623, 623 (2003) (noting that, as of the time of publication, at least five class actions had been filed in the bankruptcy court for the Western District of North Carolina alone).

termination approach is a palatable alternative from the vantage point of the affected parties. The logical middle ground—which is, after all, the idealized norm of any settlement—is estate transformation.<sup>100</sup> Moreover, to the extent we expand the bargaining table to include postpetition creditors, the case for estate transformation becomes even more compelling. Specifically, the self-interested bias of that cohort would naturally be in favor of estate termination—a position irreconcilably at odds with the preferences of the debtor and prepetition creditors. Viewed, however, from the mindset of the settlement construct, postpetition creditors not entitled to distributions under the plan and facing the risk that estate preservation could prevail should rationally settle for estate transformation as a reasonable *modus vivendi*.

### C. Unsecured Debt

Originally, the interests of unsecured creditors in chapter 13 were protected solely by the best interests test of § 1325(a)(4). That test requires that, as a condition to confirmation of a plan, unsecured creditors receive, in present-value terms, at least as much as they would have received in a hypothetical liquidation of the debtor under chapter 7.<sup>101</sup> While the protections for unsecured creditors were, on paper, much more robust in chapter 11, as a practical matter these added protections provided little succor in the typical individual-consumer case.<sup>102</sup> The situation, however, where unsecured creditors felt exploited was when the debtor had few unencumbered, nonexempt assets as of the time of filing—meaning a very minimal or even zero payment plan would satisfy the best interests test—but had significant prospective income.<sup>103</sup>

Congress listened and responded by adding a second confirmation standard relating to unsecured debt: the projected disposable income test in § 1325(b). Under this test, the debtor must apply all surplus income—i.e., gross income over reasonably necessary living expenses—during the life of a plan to the

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100. See Carlson, *supra* note 90, at 235–37 (presenting a doctrinal justification for the estate transformation approach, which he dubs the “Divestment Theory,” based on the view that the Code, properly read, calls for termination of the chapter 13 estate in favor of the debtor).

101. 11 U.S.C. § 1325(a)(4) (2012). Of course, a debtor might often have to pay more than this floor in order to accomplish what the debtor wants to accomplish in the plan. This could be due to the need to cure prepetition defaults in order to retain property that the debtor wants to retain, the necessity of paying priority claims in full; or perhaps to pay a nonpriority nondischargeable debt (such as student loans) in order to avoid facing collection actions upon the end of the chapter 13 case. See *id.* § 1322(b)(2)–(5) (2012) (permitting separate classification of like claims subject to the “unfair discrimination” standard).

102. See *supra* note 75 and accompanying text.

103. Initially, creditors also raised charges of foul play in circumstances where the debtor was discharging debt in chapter 13 that would be nondischargeable in chapter 7. There is, however, not much left to the superdischarge. See *supra* note 36 and accompanying text; *infra* Section III.F. In both instances, good faith served as something of a limitation, but its application was inconsistent and, thus, certainly not predictable.

payment of unsecured claims.<sup>104</sup> The best interests and projected disposable income tests purport to work in tandem because the former reels in a debtor with significant assets but meager prospective income, while the latter covers the opposite scenario.<sup>105</sup> In fact, however, what these tests really do is make chapter 13 so onerous as to discourage its use and assure low rates of completion, a situation that benefits no one.

In designing chapter 13 in the 1970s, Congress sought to lure debtors to its environs by dangling delectable carrots.<sup>106</sup> As discussed earlier,<sup>107</sup> the effort did not achieve its desired effect, but not because the concept was faulty. Congress had the right idea; there were just some flaws in the application. Notably, however, just six years after enactment of the Code, Congress began drifting off-script insofar as chapter 13 was concerned, making it *less* attractive to prospective filers. That pattern continued over the next 20 years, culminating in BAPCPA.<sup>108</sup> By gradually abandoning the promising idea of inducing debtors to elect chapter 13 and, instead, heading in the direction of forcing them into chapter 13 by making other alternatives less palatable or simply unavailable,<sup>109</sup> Congress has converted chapter 13 from a kind of Eden to a chaotic purgatory. Not surprisingly, therefore, it has neither met with any meaningful success in invigorating repayment over liquidation nor has it advanced particularly well the interests of any of the parties involved in a bankruptcy case.<sup>110</sup>

This suggests that there is little to be lost by reforming chapter 13 using the settlement analogy as a guiding or structuring principle. Insofar as unsecured creditors are concerned, while the best interests test alone may not represent a fair treatment consistent with the Code's objectives of value-maximization and equality, adoption of the projected disposable income test tilts the table way too far in the other direction. Moreover, the amendments to the projected disposable

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104. Technically, imposition of the projected disposable income test is not triggered unless the chapter 13 trustee or an unsecured creditor with an allowed claim objects to confirmation. *See* 11 U.S.C. § 1325(b)(1) (2012). As a practical matter, however, such an objection is invariably forthcoming if the plan does not propose to pay unsecured claims in full.

105. Thus, in terms of prototype situations, the projected disposable income test snags the soon-to-be professional-school graduate with few assets but a high-paying job in the wings, while the best interests test ensures that the imminent retiree with considerable assets cannot confirm a plan applying only future income to plan payments. In fact, however, because projected income for purposes of the disposable income test is, since 2005, governed by the definition of "current monthly income," *id.* § 101(10A), projected and actual income could diverge significantly. *See infra* note 112. Prior to BAPCPA, disposable income was defined as "income which is received by the debtor and which is not reasonably necessary to be expended" for the debtor's support, maintenance, charitable contributions, and business expenses. 11 U.S.C. § 1325(b)(2)(A) (2003).

106. *See supra* text accompanying notes 25–35.

107. *See supra* text accompanying notes 37–39.

108. *See supra* notes 2–3 and accompanying text; *see also infra* notes 135–41 and accompanying text.

109. *Supra* notes 37–40.

110. *See supra* note 5.

income test for above-median debtors under BAPCPA have only exacerbated the situation.<sup>111</sup> Is it any wonder that debtors do not brighten at the prospect of living for three or five years in a condition of involuntary financial servitude? If, however, the settlement model is brought to bear, a middle ground might be found that could be acceptable to both camps.

To begin the discussion, serious attention should be given to jettisoning the projected disposable income test in its entirety. A collateral but immediate benefit of doing so would be to put an end to the uncertainty, and consequent litigation, surrounding its proper interpretation and application.<sup>112</sup> More to the point, however, it would make chapter 13 far less grueling for debtors and, along with the recommendations concerning plan modification discussed below,<sup>113</sup> would eliminate the disincentives that the current chapter 13 imposes on debtors working to improve their post-bankruptcy financial lot.<sup>114</sup> But, undoubtedly,

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111. To begin with, in the case of above-median income debtors, BAPCPA not only extended the “commitment period” to five years, but it also provided that reasonably necessary expenses would be determined in accordance with subparagraphs (A) and (B) of § 707(b)(2). *See* 11 U.S.C. § 707(b)(A)–(B) (2012). That is to say, they would be determined according to the means test formula with all of the arbitrariness and uncertainties associated with calculation of the statutorily permitted deductions.

112. The question of whether the debtor’s projected income must be determined based on the debtor’s income over the six months prior to filing—per § 101(10A)—even when actual income during the plan period was known with virtual certainty to differ considerably from the formulaic projection, was settled by the Supreme Court. *See* *Hamilton v. Lanning*, 560 U.S. 505, 524 (2010). However, a myriad of other unresolved interpretative questions remain in situations where the above-median debtor’s actual expenses are different than the means test expenses. For instance, in *Ransom v. FIA Card Servs., N.A.*, the Court held that a debtor who owned his car free and clear could not claim the vehicle ownership expense deduction in § 707(b)(2)(A)(ii), which incorporates the IRS Collection Standards. 562 U.S. 61, 80 (2011). However, it is not clear that *Ransom* precludes a debtor who actually has monthly ownership deductions from claiming the full IRS-recognized deduction amount, regardless of her actual ownership expense. *Id.* at 84 (Scalia, J., dissenting). Similarly, it is not clear whether a debtor who incurs the actual monthly expense, but has no legal liability, can claim the deduction. *See In re Demonica*, 345 B.R. 895, 901 (Bankr. N.D. Ill. 2006) (holding that a deduction is permitted based on equating “applicable” with “actual” for purposes of § 707(b)(2)(A)(ii)). Finally, there is a lack of clarity as to whether a debtor can deduct payments on secured debts under § 707(b)(2)(A)(iii) if the debtor intends to surrender the collateral. *Compare* *Morese v. Rudler (In re Rudler)*, 576 F.3d 37, 45–50 (1st Cir. 2009) (noting that the thrust of the means test is to take a snapshot of the debtor’s expenses and apply the formula objectively), *with* *Darrohn v. Hildebrand (In re Darrohn)*, 615 F.3d 470, 476 (6th Cir. 2010) (applying the reasoning of *Lanning* to conclude that an adjustment to permitted expenses should be made where it is known that the debtor plans to surrender the collateral).

113. *See infra* Section III.E.

114. A major flaw in the current system is that debtors are not given a positive incentive to improve their financial situation when the fruit of their labors goes solely (or primarily) to payment of prepetition debt. *See generally* John E. Matejkovic & Keith Rucinski, *Bankruptcy “Reform”: The 21st Century’s Debtors’ Prison*, 12 AM. BANKR. INST. L. REV. 473, 484 (2004) (noting that chapter 13 requires debtors to commit all disposable income to creditors for at least three to five years).

unsecured creditors would balk at this settlement. And well they should, both for some of the reasons that accounted for adoption of a projected disposable income test to begin with, and also because chapter 13 would offer them greater risk with virtually no promise of a better outcome than in chapter 7. For this reason, a proper settlement would include, along with elimination of the projected disposable income test, modification of the best interests test to require that unsecured creditors be assured of receiving not just as much under the plan as they would have received in a liquidation, but more—up to, but not beyond a 100% payout. How much more? This is a decision for Congress, hopefully informed by data and the view of interested constituents. However, it seems that anything less than 110% is too little, and anything more than 125% is too much, but again, in either case, capped by the total amount of the debt.<sup>115</sup>

There are surely other means to achieve this same end, including leaving the best interests test as is and modifying the projected disposable income test so that there is a ratable sharing of surplus income between the debtor and her unsecured creditors.<sup>116</sup> Alternatively, the obligation to share surplus income might only be triggered for debtors above a certain income level in much the same fashion that the method for determining allowable expenses for purposes of the projected disposable income test is tied to applicable annual median income.<sup>117</sup> Again, how that allocation should be struck is an open question for legislative decision-makers. There is a myriad of possibilities; the point is to reach consensus on a fair arrangement that lessens the burden (and the consequent crippling impact) of the projected disposable income test while still providing creditors protection against misuse of the system by debtors with significant prospective income and relatively modest distributable assets.

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115. Thus, if the plan calls for payment of 90% of unsecured claims and the new best interests standard is 115%, allowed unsecured claims would be entitled to 100 cents on the dollar, and not 103.5 cents. However, consideration might even be given to providing postpetition interest in the event payout reaches 100% prior to reaching the enhanced best interests threshold.

116. See Braucher, *supra* note 5, at 1324–27 (discussing the approaches in Canada and Australia, both of which provide for the debtor to keep a portion of income in excess of reasonable expenses). For additional explanation of the Canadian experience, see Jacob Ziegel, *What Can the United States Learn from the Canadian Means Testing System?*, 2007 U. ILL. L. REV. 195, a general discussion of the differences between the U.S., Canadian, Australian, and English systems can be found in Nathalie Martin, *Common-Law Bankruptcy Systems: Similarities and Differences*, 11 AM. BANKR. INST. L. REV. 367 (2003).

117. See *supra* note 112. Nonetheless, without rejecting any such hybrid approach out-of-hand, the author of this Article believes the cleaner approach—at least in terms of administrative ease—would be the single, beefed-up best interests test, which simultaneously promises unsecured creditors the likelihood of a larger payout than under chapter 7 and creates positive incentives for debtors to choose chapter 13 and be successful when they did so.



#### D. Secured Claims

No single constituency in chapter 13 has fared quite as well in post-1978 statutory reforms as the holders of secured claims.<sup>118</sup> As originally enacted, chapter 13 provided debtors with three options for dealing with secured debt in their plans. Under § 1325(a)(5)(A), they could (1) do whatever they please if the secured creditor agreed; (2) surrender the collateral to the creditor in satisfaction of the secured claim;<sup>119</sup> or, the most commonly chosen option, (3) retain the collateral subject to the lien and provide for payment in the plan to the secured creditor of an amount that is not less than the present value, as of the effective date of the plan, of the allowed amount of the secured claim.<sup>120</sup> The third option—cram down—was (and remains) an attractive one for debtors. It effectively allows the debtor to do an installment redemption of the collateral,<sup>121</sup> and to do so under terms that might be more favorable than the terms of the original debt obligation insofar as the interest rate and maturity of the obligation are concerned.<sup>122</sup> The one major exception to the debtor's ability to cram down a secured claim that has always existed relates to residential real property mortgages. Under § 1322(b)(2), the debtor may not modify the rights of the holder of a claim secured only by a security interest on the debtor's principal residence.<sup>123</sup> Even as to these claims, however, the debtor can reinstate a loan that had been accelerated due to a pre-bankruptcy default by proposing to cure the default under the plan.<sup>124</sup>

Due to the fact that chapter 13 effectively permits the debtor to re-write the original prepetition obligation forming the basis of the secured claim, two questions arise: 1) how the principal amount of this new obligation is to be determined; and 2) what rate of interest it should bear to make it equivalent to a lump-sum payment. The Supreme Court has addressed both issues. In *Associates*

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118. See *infra* notes 140–45 and accompanying text.

119. A partially secured creditor would of course retain its unsecured claim in the case of surrender. See 11 U.S.C. § 506(a)(1) (2005).

120. See *id.* § 1325(a)(5)(A)–(C) (2012).

121. Under chapter 7, redemption requires an immediate, lump-sum cash payment. See *id.* § 722 (2005). Under chapter 13, repayment can extend for the entire term of the plan; up to five years. See *id.* § 1322(a)(4) (2012).

122. This includes paying only for the value of the collateral, possibly at a lower interest rate than called for by the instrument creating the original obligation, and over a term that might exceed the original term of the debt. See *infra* notes 133–35 and accompanying text.

123. Supposedly, the reasoning for this favored treatment of residential mortgages is to encourage the flow of capital into the home-lending market and to protect the integrity of the capital markets for home mortgage loans. See *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 332 (1993) (Stevens, J., concurring); see also *infra* note 152.

124. See 11 U.S.C. § 1325(b)(5) (2012). Courts have consistently construed § 1325 (b)(5) as not limited by the ban in § 1322(b)(2) against modifying home mortgages. See, e.g., *Di Pierro v. Taddeo (In re Taddeo)*, 685 F.2d 24, 28 (2d Cir. 1982); see also *infra* note 183. Note that an exception to the anti-modification rule in § 1322(b)(2) applies in the relatively rare situation where final payment under the terms of the mortgage is due prior to the end of the term of the plan. See 11 U.S.C. § 1322(c)(2) (2012).

*Commercial Corp. v. Rash*,<sup>125</sup> the Court held that a “replacement value” standard, not a “foreclosure sale” standard,<sup>126</sup> was the correct way to value personal property collateral retained by a chapter 13 debtor. However, the Court left to the bankruptcy courts the issue of how to measure replacement value, noting that if retail value were used as the starting point it would be appropriate to deduct “the value of items the debtor does not receive when he retains” collateral, “items such as warranties, inventory storage and reconditioning.”<sup>127</sup> The latitude to take account of such factors was largely eliminated in 2005 by the addition of § 506(a)(2), which directs the court in individual chapter 7 and 13 cases to use retail value with respect to personal property collateral, taking into account the age and condition of the property, but without deduction of the retailer’s profit or costs from retail price.<sup>128</sup>

As for determination of the interest rate—i.e., the discount rate for present value purposes—to be applied to plan payments, a deeply divided Supreme Court in *Till v. SCS Credit Corp.*<sup>129</sup> adopted the formula method (also called “prime plus”).<sup>130</sup> This requires the bankruptcy court to start with prime rate of interest—what banks charge their most reliable, creditworthy customers—and then add a suitable premium to take account of the added risk associated with the debtor’s situation.<sup>131</sup> The *Till* approach, although commanding the approval of only four Justices, remains the governing standard, and, far more often than not, it will be more favorable than the “presumptive contract” rate approach advocated by the four dissenting Justices in *Till*.<sup>132</sup>

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125. 520 U.S. 953 (1997).

126. Foreclosure sale value—what the creditor would realize upon foreclosure and sale of the collateral—is also referred to as “wholesale value.” This was the standard the court of appeals adopted in *In re Rash* 90 F.3d 1036, 1061 (5th Cir. 1996) (en banc), *rev’d sub nom. Assoc. Commercial Corp. v. Rash*, 520 U.S. 953 (1997).

127. This language comes from the famous footnote six in *Rash*. See 520 U.S. at 965 n.6. It opened the door for the bankruptcy courts, while starting with replacement value, to back into wholesale value. See David Gray Carlson, *Cars and Homes in Chapter 13 After the 2005 Amendments to the Bankruptcy Code*, 14 AM. BANKR. INST. L. REV. 301, 359 (2006) (positing that this “loophole” largely left the bankruptcy courts to ignore *Rash* entirely and just do what they had always done insofar as valuation was concerned).

128. See generally *In re Morales*, 387 B.R. 36, 41–42 (Bankr. C.D. Cal. 2008) (discussing the change accomplished under BAPCPA with respect to the determination of replacement value in individual consumer cases in chapters 7 and 13).

129. 541 U.S. 465 (2004).

130. Justice Stevens’s opinion, which carried the day, was a plurality opinion. As Professor Tabb has pointed out, when one considers the various voting alliances, a majority of the Justices rejected every one of the approaches that had been proposed for determining the applicable interest rate. See CHARLES JORDAN TABB, *LAW OF BANKRUPTCY* 1252 (3d ed. 2013). Because Justice Thomas believed that the prime rate alone was appropriate, he concurred with the Stevens opinion because prime plus would sufficiently compensate the lender in the case. See *Till*, 541 U.S. at 486–88 (Thomas, J., concurring).

131. See *Till*, 541 U.S. at 471, 479–80.

132. See *id.* at 491 (Scalia, J., dissenting). The presumptive contract rate, which had been adopted in the Seventh Circuit majority opinion, *In re Till* 301 F.3d 583, 592–93

Although not addressing the discount rate to be employed in chapter 13 cases, BAPCPA has otherwise accelerated the lopsided leaning toward preserving the contractual rights of secured creditors in chapter 13,<sup>133</sup> as evinced by the above-mentioned valuation rules in § 506(a)(2). In addition, the 2005 amendments to chapter 13 prohibited stripping down most vehicle (and some other) purchase money loans;<sup>134</sup> provided for recovery of costs, charges, and fees in favor of over-secured-statutory lienors;<sup>135</sup> eliminated chapter 13 property valuations on conversion to chapter 7;<sup>136</sup> and required that, in the cram-down scenario, chapter 13 plan payments not only be at least equal to the present value of allowed secured claims, but also be made in equal installments and in an amount sufficient to provide adequate protection to the holders of such claims.<sup>137</sup> The cumulative effect of these changes has been to make it more difficult to confirm and complete a chapter 13 plan. Moreover, even when a debtor is able to do so, these new advantages flowing to secured creditors largely come at the expense of their unsecured counterparts.<sup>138</sup>

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(7th Cir. 2002), is essentially the original contract rate, but open to adjustment upon proof by the debtor or the creditor that either a higher or a lower rate is warranted. *Id.* at 472.

133. By definition, an insolvency situation is a zero-sum game. *See supra* note 50. Thus, provisions in BAPCPA that provide greater protection for secured claims must come at the expense of unsecured creditors. *Id.* An exception to this statement might have been the provision that disables bifurcation under § 506(a)(1) as to certain secured claims in chapter 13, *see* 11 U.S.C. § 1325(a)(5)(C); (a)(9) (2012); *infra* note 137, where the debtor elects to surrender the collateral. However, now that the weight of authority in the appellate courts is that the unsecured claim persists where the debtor surrenders, rather than retains the collateral, even that small exception has been desiccated. *See, e.g., In re Wright*, 492 F.3d 829, 832 (2007) (holding bifurcation may still occur under state law when the collateral is surrendered to the secured creditor).

134. This prohibition against strip down of certain (mostly motor vehicle) liens in chapter 13 is contained in what is famously referred to as the “hanging paragraph” following § 1325(a)(5). *See* 11 U.S.C. § 1325(a). For an excellent treatment of secured claims after the 2005 amendments, see Jean Braucher, *Rash and Ride-Through Redux: The Terms for Holding on to Cars, Homes and Other Collateral Under the 2005 Act*, 13 AM. BANKR. INST. L. REV. 457 (2005).

135. This was accomplished by adding the language “or State statute under which such claim arose” to the end of 11 U.S.C. § 506(b) (2005), and, in so doing, partially overruling the Supreme Court’s decision in *Ron Pair Enters., Inc. v. United States*. *See* 489 U.S. 225, 248–449 (1989) (denying a chapter 11 plan on the ground that it did not contain provisions for payment postpetition interest on an over-secured tax lien).

136. Codified as 11 U.S.C. § 348(f)(1)(C) (2010).

137. Codified as 11 U.S.C. § 1325(a)(5)(B)(iii)(II) (2012); *see infra* text accompanying notes 158–62.

138. Payments on secured debt are generally reductions from current monthly income, *see, e.g.,* 11 U.S.C. § 707(b)(2)(A)(iii) (2012), and thus reduce disposable income available for distribution to unsecured claimants. *See supra* note 52. This becomes less of a concern, of course, if the projected disposable-income-requirement for plan confirmation is eliminated as suggested above. *See supra* text accompanying notes 115–118. If, however, the determination is made to allocate disposable income between the debtor and unsecured creditors, *see supra* text accompanying note 116, then it remains an issue.

A settlement-model-driven approach would require rethinking the treatment of secured claims under chapter 13. As a threshold matter, it is necessary to reach a shared understanding of what it means to be “secured” in a bankruptcy case, and unfortunately, that seemingly simple topic is one that has generated sharp disagreement.<sup>139</sup> We should, however, revert to the traditional bankruptcy conception of the term as codified in § 506(a)(1); namely that secured creditors with allowed claims are entitled to the value of their collateral and nothing more.<sup>140</sup> However, as amply demonstrated by the amount of litigation it generates, as well as Code provisions, such as § 1111(b),<sup>141</sup> valuation is not an exact science, to say the least, and concern over the accuracy of valuations is perhaps the principal concern of secured creditors in bankruptcy cases.<sup>142</sup> Therefore, in light of the concessions that the new chapter 13 will require of the holders of secured claims, this Article proposes that § 506(a)(2) be retained, even though it clearly results in an overvaluation of consumer collateral in most situations, because the debtor does not receive the benefit of the marketing and sales costs that can no longer be deducted.<sup>143</sup> The thought, however, is to err on the side of caution insofar

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139. See generally Daniel Keating, *Radlax Revisited: A Routine Case of Statutory Interpretation or a Sub Rosa Preservation of Bankruptcy Law's Great Compromise*, 20 AM. BANKR. INST. L. REV. 465, 468–69 (2012) (discussing the Supreme Court's reluctance to impinge upon a secured creditor's state-law rights and remedies except when necessary to accomplish a compelling bankruptcy purpose); Lawrence Ponoroff & F. Stephen Knippenberg, *The Immovable Object Versus the Irresistible Force: Rethinking the Relationship Between Secured Credit and Bankruptcy Policy*, 95 MICH. L. REV. 2234, 2263–73 (1997) (criticizing the so-called “conveyancing model” of security).

140. This is clearly the view that drove the Supreme Court's decisions in *Johnson v. Home State Bank*, 501 U.S. 78, 88 (1991) (upholding the ability to modify a secured creditor's claim in Chapter 20) and *United Savings Ass'n v. Timbers of Inwood Forest Assocs., Inc. (In re Timbers of Inwood Forest Associates)*, 484 U.S. 365, 382 (1988) (denying a secured lender adequate protection for its lost opportunity costs). However, not long afterwards, beginning with *Dewsnup v. Timm*, 502 U.S. 410, 410 (1992) (holding that chapter 7 debtor could not “strip down” creditors' liens on real property to a judicially determined value of collateral), the Court began demonstrating ambivalence on the issue and a greater solicitude for the state-law-contractual rights of secured creditors.

141. The right of a secured creditor to have its claim treated as fully secured (forego any unsecured claim under § 506(a)(1)) is a product of secured lenders' concerns about artificially low judicial valuations. Indeed, the provision has its origins in a notorious case under the 1898 Act, *In re Pine Gate Assocs., Ltd.*, 2 BANKR. CT. DEC. (CRR) 1478 (Bankr. N.D. Ga. 1976), in which a dissenting nonrecourse-secured creditor was cashed out at what was regarded as an unrealistically low price. See generally Theodore Eisenberg, *The Undersecured Creditor in Reorganizations and the Nature of Security*, 38 VAND. L. REV. 931, 955–57 (1985).

142. Eisenberg, *supra* note 141, at 948.

143. See TABB, *supra* note 130, at 738 (asserting that to describe the value produced by § 506(a)(2) as anything “other than a windfall to the creditor would be disingenuous.”); see also Braucher, *supra* note 134, at 467 (pointing out that while former § 506(a) could flexibly make use of any available proof, new paragraph § 506(a)(2) inflexibly seems to call for a retail merchant's price that, as a practical matter, is nonexistent). There is less risk of overcompensation with real estate, although there are certainly issues like selling costs and taxes. Thus, while § 506(a)(2) does not cover real-property collateral, the logic is

as assuring secured creditors that their legitimate property interests will be protected. Conceptually, it is in the nature of a settlement for each side to make some concessions. Moreover, a reasonable balance between creditor rights and debtor protection and rehabilitation is necessary if new chapter 13 is to have any realistic chance of enactment, and, once enacted, is to remain free from constant backsliding.<sup>144</sup>

With regard to the discount rate to be utilized in chapter 13, what is good for the goose must also be good for the gander. Thus, this Article proposes that the *Till* test be left in place (or codified) even though it probably does systematically undercompensate creditors as Justice Scalia stated in his *Till* dissent.<sup>145</sup> The justification for doing so, beyond just tit-for-tat, is that it nominally provides a risk-adjusted market return to the secured creditor during the life of the plan, even if the reality is that the cost of proving the proper adjustment in any given case makes it hardly worth the effort.<sup>146</sup> On the other hand, as the plurality opinion in *Till* noted, the justification for starting low and working upward is that it is invariably creditors who have greater access to market information.<sup>147</sup>

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probably to apply it analogically as, again, erring on the side of the protection of the value of the creditor's interest in property.

144. See Ponoroff, *supra* note 54, at 331–32 (opining that much of the history of bankruptcy reform legislation since 1978 is explicable in terms of efforts by the financial services industry and credit providers to claw back what they regarded as the undeserved and disproportionate advantages conferred on debtors).

145. *Till v. SCS Credit Corp.*, 541 U.S. 465 491–92 (2004) (Scalia, J., dissenting); see also Jon W. Jordan, Note, *No More Russian Roulette: Chapter 13 “Cram Down” Creditors Take a Bullet*, 70 MO. L. REV. 1385, 1398–1406 (agreeing with Scalia's dissent).

146. Under the plurality opinion, in every case where the creditor disagrees with the prime rate as the cram-down rate and the parties cannot agree on a risk premium, a hearing will be necessary at which the debtor and any creditors may present evidence about the appropriate risk adjustment. *Till*, 541 U.S. at 466. This is hardly cost-effective in most cases, meaning that, as the party with the burden of proof, there will be some pressure on creditors to simply agree to a “standard” bump. See Robert K. Rasmussen, *Creating a Calamity*, 68 OHIO ST. L.J. 319, 331 (2007) (“The rate endorsed by Justice Stevens would imply that the average [c]hapter 13 debtor presents the same risk as does the Ford Motor Company . . . [and that] . . . [a] bump of one to three percent over the prime rate falls woefully short of compensating this risk. Justice Stevens's opinion simply cannot be squared with commercial reality.”); cf. April E. Knight, *Balancing the Till: Finding the Appropriate Cram Down Rate in Bankruptcy Reorganizations after Till v. SCS Credit Corporation*, 83 N.C. L. REV. 1015, 1029 (2005) (pointing out that the necessity of a hearing also places a burden on a debtor whose funds would be better used for the plan).

147. The plurality opinion in *Till* noted this factor in justifying “starting from a concededly *low* estimate and adjusting *upward*” in order to place the evidentiary burden squarely on the creditors. 541 U.S. at 479. In point of fact, the plurality noted that the prime-plus and presumptive contract rate should produce the same final interest rate, so that the real question was over who has the burden of proof. *Id.* at 484. The dissent recognized that this assertion was a bit of hyperbole, observing the 1.5% plus over prime (8%) that the bankruptcy court had applied could not plausibly be viewed as “anything other than a smallish number picked out of a hat.” *Id.* at 501. Given that the contract was 21%, it is hard

In addition, the secured creditor is typically better situated in terms of resources to make its case if it so chooses, while placing the burden on the debtor would just further deplete assets available for distribution to unsecured claimants. Further, an approach that most often will produce a lower rate of interest than the presumptive contract rate favored by the *Till* dissent increases the odds that a debtor will be able to confirm her plan.<sup>148</sup> The fact that a new chapter 13 assures the secured creditor the full value—retail cost—of its secured claim, and more than the dollar value on its unsecured claim (if any), should be enough to make the settlement model acceptable, even if the risk premium on the new secured claim ends up being somewhat less than what might have been charged outside bankruptcy.<sup>149</sup>

Beyond preserving the *Rash* and *Till* rules, a certain number of the BAPCPA amendments to chapter 13—hardly drafted to begin with in the spirit of compromise and even-handedness<sup>150</sup>—would likely need to be eliminated, including, principally, the hanging paragraph and the added restrictions on cram down.<sup>151</sup> At least some thought ought also be given to permitting modification of residential-home-mortgage loans to the extent the property is underwater, a phenomenon that we all learned in 2008 is not as uncommon as had earlier been thought.<sup>152</sup> Keeping one's house and car are the most common reasons debtors

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to argue that point, although some haircut in order to enhance the prospects of plan completion, is not an unreasonable trade-off.

148. See 541 U.S. at 480 (expressing the view that the interest rate calculation should be set high enough to compensate the creditor, “but not so high as to doom the plan.”).

149. Of course, there really is no market to consider, because very little used consumer collateral is sold by retail merchants. See Braucher, *supra* note 134, at 467.

150. No one seriously disputes that BAPCPA was anything other than a credit-industry-driven effort to restrict bankruptcy relief for consumer debtors. See generally Jensen, *supra* note 3, at 485–93 (detailing the legislation's history going back to its original antecedents in the dissent to the NBRC Report). In their multi-volume treatise, former Judges Lundin and Brown note, “A handful of lobbyists working for a coalition of consumer lenders wrote BAPCPA in the dark of smoke-filled rooms and back alleyways.” KEITH M. LUNDIN & WILLIAM H. BROWN, CHAPTER 13 BANKRUPTCY §360.1 (4th ed. 2007), [www.Ch13online.com](http://www.Ch13online.com).

151. See *supra* notes 133–34 and accompanying text.

152. In the wake of the real estate meltdown beginning in 2008, both houses of Congress introduced legislation to permit modification of home mortgages, but ultimately nothing came of these efforts. See Helping Families Save Their Homes Act, H.R. 1106, 111th Cong. (2009); see also S. 895, 111th Cong. (2009); S. Amend. 1014 to S. 896, 111th Cong. (2009), reprinted in 155 CONG. REC. S4980–84 (daily ed. Apr. 30, 2009) (setting out text of Senator Durbin's amendment to Senate Bill 896, for himself and for Senators Dodd, Reid, Schumer, Whitehouse, and Harkin). Ultimately, the Durbin amendment was withdrawn after failing to achieve the required votes. An intellectual justification for permitting home mortgage modifications can be found in Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy*, 2009 WISC. L. REV. 565, 575–76 (arguing that “empirical evidence from mortgage origination, insurance, and resale markets to show that mortgage markets are indifferent to bankruptcy-modification risk.”).

consider chapter 13. The current system, which makes the cost of doing so prohibitive for many debtors, needs to be shaken up.

One palliative for those lenders absorbing the reduction in the amount needed for the debtor to retain possession of a house or car is that the bifurcated unsecured portions of their claims would enjoy the bonus that the new chapter 13 would add to the best interests test.<sup>153</sup> Of course, elimination of the projected disposable income test would mean that, prospectively, the savings resulting from bifurcation would flow to the debtor rather than to unsecured claimants. However, it is not entirely clear that, as a practical matter, this has not always been the case to some extent.<sup>154</sup> If so, the pumped-up best interests test is, in all likelihood, of greater value to partially secured creditors than the arguable loss of future income that would have been enjoyed under the disposable income requirement. Alternatively, this situation might suggest that some form of allocation of disposable income between the debtor and her unsecured creditors is the more prudent approach.<sup>155</sup> In any case, the point is that these changes would make chapter 13 more attractive to prospective debtors, as well as more effective. Further, they would do so, while not only assuring creditors of protection of their property interests, but also of a larger payout than they would have received in the event of liquidation. This strikes the kind of reasonable settlement worth thinking about.

Finally, serious deliberation ought to be given to the elimination of § 1325(a)(5)(B)(iii), which, as a condition to the other requirements for cramming down a secured claim, dictates that if the plan calls for deferred payments (as they invariably do), they must be made in equal installments, and, in the case of personal-property collateral, that the payments be sufficient to provide the claimholder adequate protection during the duration of the plan.<sup>156</sup> The first stipulation is of lesser significance than the latter, but it does hamper the prospects for confirmation in a case involving a debtor who: (a) experiences seasonal adjustments in income; (b) needs or wants to pay off certain obligations quicker than others; or, for some other benign reason, (c) wishes to make unequal payments.<sup>157</sup>

The requirement that plan payments assure adequate protection on car and other personal property loans is more problematic. To begin with, it is arguably in

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153. See *supra* text accompanying note 17–20.

154. Given the inherent flexibility in the phrase “reasonably necessary” under § 1325(b)(2), it is inevitable that income freed up from lien stripping would incline the bankruptcy court to accept somewhat larger deductions for “necessaries” and perhaps even a broader definition of the categories of expenses that represent necessities for purposes of the projected disposable income test. Cf. *In re Woodman*, 287 B.R. 589, 592–93 (Bankr. D. Me. 2003) (“There are fundamental problems with branding one kind of expenditure or another as ‘never’ reasonably necessary. . . . Better to consult each case’s unique facts and circumstances, to consider each [c]hapter 13 plan on its individual merits, than to attempt a generalized declaration.”).

155. See *supra* notes 117, 141 and accompanying text.

156. 11 U.S.C. § 1325(a)(5)(B)(iii) (2012).

157. See LUNDIN & BROWN, *supra* note 150, § 448.1.

conflict with the simultaneously adopted requirement that plan payments be made in equal installments.<sup>158</sup> It also subverts the principal advantage of chapter 13 for most debtors; namely, the ability to strip down secured loans to the collateral's value, or at least to do so in those remaining situations where strip down is not prohibited by statute.<sup>159</sup> The combination of those restrictions operates to rob chapter 13 of its appeal to many soon-to-be debtors. The obvious concern behind the adequate-protection requirement was to ensure that payments keep pace with asset depreciation.<sup>160</sup> That concern, however, would be ameliorated to a considerable extent by eliminating modification to surrender, as described immediately below.<sup>161</sup> Thus, on balance, the cost of the adequate-protection stipulation to the system may reflect too high of a price to pay in those remaining situations where it might quiet a secured claimant's reasonable insecurity over receiving the value of its collateral.<sup>162</sup>

### *E. Modification*

Due to the strong policy favoring finality in chapter 13 and in bankruptcy cases in general,<sup>163</sup> entry of an order of confirmation is widely understood as

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158. *Id.* One line of cases deals with this conflict by concluding that the requirement for equal installments applies only to actual cram-down payments (payments on the amortized debt) and not adequate-protection payments. *See, e.g., In re DeSardi*, 340 B.R. 790, 805–08 (Bankr. S.D. Tex. 2006). Other courts have disagreed with that creative reading of the statute, concluding instead that the reference in § 1325(a)(5)(B)(iii)(I) that “such payments shall be in equal monthly amounts” means that *all* regularly recurring post-confirmation payments on an allowed secured claim must be in equal monthly amounts. *See, e.g., Royals v. Massey (In re Denton)*, 370 B.R. 441, 445–46 (Bankr. S.D. Ga. 2007).

159. *See* 11 U.S.C. §§ 1322(b)(2), 1325(a)(5) (2012).

160. *In re Nichols*, 440 F.3d 850, 857 n.6 (6th Cir. 2006) (“[T]he new language seems to require that payments made after confirmation be in equal amounts and keep pace with depreciation during the term of the plan.”).

161. *See infra* Section III.E.

162. Moreover, since 2005, it is clear that if the case is converted, valuations made in the chapter 13 case no longer apply and the lender retains its lien until the full amount owed on the debt (not just the value of the collateral) has been fully paid. *See* 11 U.S.C. §§ 348(f)(1)(B)–(C) (2010).

163. *See generally* *Taylor v. Freeland & Kronz*, 503 U.S. 638, 644 (1992) (relying on the importance of the policy of finality in bankruptcy cases to support the holding that the failure of a chapter 7 trustee to object to the validity of a debtor's claimed exemption within 30 days of the initial creditors' meeting renders the property exempt, regardless of whether the debtor had a colorable basis for claiming the exemption). The policy is also expressed when the equitable mootness doctrine is used to consider appeals of an order confirming chapter 11 plans. *E.g., Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 143–44 (2d Cir. 2005). And in the statutory mootness provision that applies to bankruptcy sales. *E.g., Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC)*, 391 B.R. 25, 33–34 (B.A.P. 9th Cir. 2008) (pointing to § 363(m) and principles of equitable mootness as precluding appeal of sale of debtor's assets).



affording preclusive effect with respect to all preconfirmation claims.<sup>164</sup> The confirmation order, however, does not denote the end of the chapter 13 case—not by a long shot. Under § 1329(a), a confirmed plan may be modified for any one or more of four reasons, including increasing or decreasing payments to be made under the plan.<sup>165</sup> Unlike in the case of a preconfirmation modification,<sup>166</sup> the debtor is not the only one who can seek approval of a proposed modification after confirmation. The chapter 13 trustee or any unsecured creditor may also petition the court for postconfirmation plan modification.<sup>167</sup> When the debtor seeks modification, most often it is because she has encountered difficulties in making or keeping up with plan payments; indeed, a debtor who seeks a hardship discharge without first making an effort to modify the plan will be required under § 1328(b)(3) to demonstrate that modification was not practicable.<sup>168</sup> When the chapter 13 trustee or an unsecured creditor requests modification, the reason will usually be to seek an increase in payout due to an improvement in the debtor's financial fortunes.

There is a wealth of issues surrounding modification in chapter 13 that, in spite of extensive litigation, remain unresolved. For example, as illustrated below, courts have clashed over what showing is sufficient to warrant granting the relief sought. This is a product of the fact that the statute does not supply a “cause” requirement or, for that matter, any other standard for modification.<sup>169</sup> Nevertheless, courts seem to exhibit more deference to debtor-initiated requests than they do to requests coming from an unsecured creditor or the trustee.<sup>170</sup> In a

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164. 11 U.S.C. § 1327(a) (2012) (“The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan.”); *see also* *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 261 (2010) (unanimously affirming that a creditor with adequate notice cannot collaterally attack the confirmation order in a chapter 13 case, once entered, despite procedural errors committed by the bankruptcy court).

165. Modification may also be sought to: (1) extend or reduce the payment period to a particular class; (2) alter the distribution to a creditor to take account of sums received from other sources; and (3) reduce amount to be paid by the amount spent by the debtor to purchase health insurance for herself and dependents. 11 U.S.C. § 1329(a)(2)–(4) (2012).

166. Only the debtor can modify a filed plan prior to confirmation. *See id.* § 1323(a).

167. This was accomplished by an amendment to § 1329(a) in connection with the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 357.

168. *See, e.g., In re Harrison*, No. 96-36511-T, 1999 WL 33114273, at \*2 (Bankr. E.D. Va. Aug. 3, 1999) (holding that a hardship discharge cannot be granted under any approach where the debtor fails to offer any evidence to show that plan modification is not possible).

169. 11 U.S.C. § 1329(a).

170. *See, e.g., United States v. Evans (In re Evans)*, 77 B.R. 457, 459–60 (Bankr. E.D. Pa. 1987) (holding that a debtor is permitted to modify the plan after confirmation notwithstanding absence of extraordinary postconfirmation circumstances); *In re Gronski*, 86 B.R. 432, 432 (Bankr. E.D. Pa. 1988) (observing that “power of a debtor to request postconfirmation amendments is much broader than that of a creditor”). *But see In re Palmer*, 419 B.R. 162, 165–66 (Bankr. N.D.N.Y. 2009) (denying debtor's request for

nondebtor-initiated modification situation, traditionally, most courts have agreed that the movant must demonstrate changed circumstances.<sup>171</sup> This makes sense in light of the *res judicata* effect on the order of confirmation.<sup>172</sup> Nonetheless, there is no consensus among these courts as to whether the change in circumstances must have been just substantial, or both substantial and unanticipated.<sup>173</sup> Further complicating the picture, yet another view, and one that has been gaining traction, is that no proof of change of circumstances is required at all for a nondebtor modification.<sup>174</sup>

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modification absent a showing of a material change in circumstances not reasonably anticipated at the time of confirmation); *In re Bereolos*, 126 B.R. 313, 325 (Bankr. N.D. Ind. 1990) (“*Res Judicata* is a two-edged sword, and to the extent the confirmation order is binding on both the Debtor and the creditors it is *res judicata* as to both.”).

171. See *Storey v. Pees (In re Storey)*, 392 B.R. 266, 272 (B.A.P. 6th Cir. 2008) (observing that even though there is no changed circumstances precondition to modification, § 1327(a) can be read to preclude modification of a confirmed plan for purposes of addressing issues that were or could have been decided at the time the plan was originally confirmed). The practical impact of this conclusion is that modification under § 1329(a) would be limited to matters that arise postconfirmation.

172. See *supra* note 164.

173. See, e.g., *Murphy v. O'Donnell (In re Murphy)*, 474 F.3d 143, 149 (4th Cir. 2007) (“[T]he doctrine of *res judicata* prevents modification of a confirmed plan pursuant to §§ 1329(a)(1) or (a)(2) unless the party seeking modification demonstrates that the debtor experienced a ‘substantial’ and ‘unanticipated’ post-confirmation change in his financial condition.” (citing *Arnold v. Weast (In re Arnold)*, 869 F.2d 240, 243 (4th Cir. 1989)); *Arnold*, 869 F.2d at 241 (“[I]t is well settled that a substantial change in the debtor’s financial condition after confirmation may warrant a change in the level of payments.”); *In re Savilonis*, No. 3:12-bk-5762-JAF, 2014 WL 3361986, at \*3 (Bankr. M.D. Fla. July 9, 2014) (holding that the debtor must demonstrate substantial, unanticipated change in circumstances in order to modify plan payments); *In re Brice*, No. 11-36393-KRH, 2013 WL 5701050 (Bankr. E.D. Va. Oct. 18, 2013); *In re White*, 411 B.R. 268, 275 (Bankr. W.D.N.C. 2008) (“[T]he debtor must have experienced a substantial and unanticipated change in his post-confirmation financial condition in order to avoid the preclusive effect of the doctrine of *res judicata*.”); *In re Furgeson*, 263 B.R. 28, 36 (Bankr. N.D.N.Y. 2001) (“A trustee’s application for plan modification should be limited to situations in which there has been a substantial change in the debtor’s income or expenses that was not anticipated at the time of the confirmation hearing.”) (internal citations omitted).

174. See, e.g., *Barbosa v. Solomon*, 235 F.3d 31, 41 (1st Cir. 2000) (relying on legislative history to support the argument that substantial change is not a requirement for modification and that *res judicata* does not apply); *In re Witkowski*, 16 F.3d 739, 743 (7th Cir. 1994) (“[N]either § 1329 nor the doctrine of *res judicata* impose [*sic*] any threshold change in circumstances standard.”); *In re Scarver*, 555 B.R. 822, 828–32 (Bankr. M.D. Ala. 2016) (agreeing with line of authorities holding that demonstration of an unforeseen substantial change in debtor’s circumstances is not a prerequisite for modification of a confirmed chapter 13 plan); *In re Salpietro*, 492 B.R. 630, 636 (Bankr. E.D.N.Y. 2013) (holding that a substantial, unanticipated change in circumstances is not required to support modification of a confirmed plan); *In re Davis*, 404 B.R. 183, 187–88 (Bankr. S.D. Tex. 2009) (holding that under *Meza v. Truman (In re Meza)*, 467 F.3d 874 (5th Cir. 2006), neither unanticipated nor substantial changes in circumstances are a necessary prerequisite to modification of a confirmed plan).

Modification has also spurred what one court has described as “one of the great debates in [c]hapter 13 law,”<sup>175</sup> and a sharp divide in the decisional law. The question is whether a debtor may modify her plan in order to surrender collateral that the plan had originally contemplated would be retained by the debtor under § 1325(a)(5)(B). As noted earlier, surrender is an explicit option for the debtor in connection with confirmation.<sup>176</sup> However, modification to surrender—as opposed to increase or decrease payments—is not an option under § 1329(a). Therefore, some courts hold that modification is simply not available for the purpose of surrendering the collateral in satisfaction of the secured claim.<sup>177</sup> The leading decision—and only circuit court authority—comes from the Sixth Circuit,<sup>178</sup> which observed that § 1329(a) by its terms is limited to modification of only the amount or timing of payment.<sup>179</sup> In addition, as a matter of policy, the court reasoned that it would be fundamentally unfair to allow a debtor who had promised to pay for the value of a vehicle in a chapter 13 plan to subsequently return that vehicle to the lender in a situation where the decline in value due to depreciation exceeded the amount by which the secured claim had been amortized thus far under the plan.<sup>180</sup>

Other courts, certainly representing a majority, hold that there is no per se bar against a modification to permit surrender of collateral, although most require that the modified plan treat any resulting deficiency as an unsecured claim; in effect, bifurcating the claim a second time.<sup>181</sup> It is of no small import that, by far,

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175. *In re Jones*, 538 B.R. 844, 847 (Bankr. W.D. Okla. 2015).

176. *See supra* note 122 and accompanying text.

177. *See, e.g., In re Royal*, No. 14-07134-5, 2016 WL 2568861, at \*2 (Bankr. E.D. N. C. 2016) (holding that § 1329(a) does not permit a modification that would allow a debtor to surrender collateral and convert the remaining deficiency to an unsecured claim); *In re Arguin*, 345 B.R. 876 (Bankr. N.D. Ill. 2006); *In re Coffman*, 271 B.R. 492 (Bankr. N.D. Tex. 2002); *In re Jackson*, 280 B.R. 703 (Bankr. S.D. Ala. 2001). The court in *Jones* rejected a per se prohibition on modifications to surrender, but denied the debtor’s motion nonetheless based on the lack of a showing of a change in circumstances. *Jones*, 538 B.R. at 852–53. In so doing, the court distinguished an earlier decision in the same district, *In re Wilcox*, 295 B.R. 155 (Bankr. W.D. Okla. 2003), on the basis that the debtor in *Wilcox* proposed to surrender in full satisfaction of the secured claim; i.e., the creditor did not propose to treat the deficiency as an unsecured claim. *Jones*, 538 B.R. at 848.

178. *Chrysler Fin. Corp. v. Nolan*, 232 F.3d 528 (6th Cir. 2000).

179. *Id.* at 533.

180. *Id.* (noting that the proposed modification also contravened § 1327(a)).

181. *See Jones*, 538 B.R. at 849 (citing cases that contemplate this type of modification); *see also In re Scarver*, 555 B.R. 822, 828–32 (Bankr. M.D. Ala. 2016) (accepting what the court describes as the “majority view” permitting modification and bifurcation). *See generally* Stacia M. Stokes, Comment, *Fighting Finality and Debtor Waste in Chapter 13 Postconfirmation Collateral Surrender*, 27 EMORY BANKR. DEV. J. 169, 192 (2010) (proposing modification to surrender collateral be permitted unless the depreciation in the value of the collateral is due to debtor waste). A number of cases have circumvented the requirements of § 1329(a) by looking to § 502(j), which provides that “[a] claim that has been allowed or disallowed may be reconsidered for cause.” 11 U.S.C. § 502(j) (2012). According to the reasoning in these decisions, when collateral is surrendered after confirmation, the debtor may use § 502(j) to reduce a secured creditor’s previously allowed secured claim to equal the amount of the surrendered collateral and reclassify the remainder

most of these cases involve motor vehicles. When other types of collateral are involved, the situation becomes more complicated. The point, and the depth of the complexity, is ably illustrated by Judge Jernigan's decision in *In re Ramos*.<sup>182</sup> That case was unusual in two respects: first, the collateral at issue was the debtors' principal residence, and second, the debtors had made all of the payments to the chapter 13 trustee contemplated under the 60-month plan prior to seeking modification, but they had not made all of the direct payments to the mortgagee that were to be made outside of the plan.<sup>183</sup> Initially, the court rejected the debtors' argument that they were entitled to a discharge under § 1328(a) based on having completed "all payments under the plan."<sup>184</sup> Anticipating that determination, the debtors then urged that modification, for the purpose of surrendering the collateral, was still permissible because, under § 1329(a), modification must occur before completion of payments under the plan.<sup>185</sup>

While acknowledging that such an end-of-case modification might be allowed, so long as it does not involve extending payments beyond five years after the first payment made under a confirmed plan,<sup>186</sup> the court ultimately followed the line of cases holding that modification for the purposes of surrender is not authorized by § 1329(a).<sup>187</sup> Judge Jernigan admitted that the fact that the collateral was a residence rather than a vehicle gave the case greater "equitable appeal" than the usual modification to surrender case, but decided that the fact that this form of collateral is far less likely to depreciate during the case than an automobile should not matter if the issue is decided solely based on the language of the Code.<sup>188</sup> Notably, however, the court narrowly limited the precedential scope of its holding to the unusual facts of the case; in dicta, it explained that the outcome could well be different in the much more common situation where the lender takes affirmative action by moving for relief from the stay and beginning foreclosure, and the debtor

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of the claim as an unsecured deficiency under § 506(a). *See, e.g., In re Boykin*, 428 B.R. 662, 667 (Bankr. D.S.C. 2009); *In re Sellers*, 409 B.R. 820, 824 (Bankr. W.D. La. 2009).

182. 540 B.R. 580 (Bankr. N.D. Tex. 2015).

183. *Id.* at 582. The debtor had confirmed a "cure-and-maintain" plan under § 1322(b)(5) with respect to the mortgage. Typically, this entails the curing of a prepetition default through payments under the plan and the maintenance of regular payments to the mortgagee while the case is pending outside of the plan. *See generally In re Thompson*, 520 B.R. 731, 735–36 (Bankr. E.D. Wisc. 2014).

184. *Ramos* 540 B.R. at 588 (concluding that direct payments to a mortgage lender during the case constitute "payments under the plan" for purposes of § 1328(a)).

185. *Id.* at 584 (referring to the determination that the debtors had not completed the plan payments as representing a "good news/bad news" scenario).

186. *Id.* at 590 (finding that because the debtors' proposed modification was simply to surrender collateral and not to extend the commitment period, the modification would not have violated the limitation in § 1329(c)).

187. *Id.* at 590–91.

188. *Id.* at 584. Adding to the equities in the case was the fact that the mortgagor never complained nor took any action in response to the debtors' postconfirmation default in the mortgage payments. *Id.*

is also not at the end of the plan such that there is no way to deal with the lender's anticipated deficiency as an unsecured claim.<sup>189</sup>

When those two conditions are present, the court mused that the surrender could be justified under § 1329(a)(3), because the “modification” would really just be taking account of the lender's receipt of consideration other than under the plan.<sup>190</sup> In addition, when, as in *Ramos*, the collateral consists of the debtor's homestead, the court observed that it is necessary to take into account §§ 1322(b)(2) and (b)(5), which prohibit modification of the rights of a home mortgage lender in a chapter 13 plan. Thus, the court cautioned that, even when modification to surrender might be permitted under § 1329(a)(3), the mortgage lender must not be prevented from protecting its unsecured deficiency claim after stay relief and foreclosure, lest its rights have been altered in contravention of the Code's anti-modification provisions.<sup>191</sup> This statement seems to imply that, in a case where the collateral is not the debtor's homestead, surrender in full satisfaction of the amount of the original secured claim might be permitted, although one cannot be entirely clear based on the language of the decision.

In any event, the court's thoughtful opinion in *Ramos* makes it quite apparent that the modification cases are a mess, and, in the modification to surrender situation, the solution is not as simple as choosing one of two opposing views.<sup>192</sup> Employing his bargain model of chapter 13,<sup>193</sup> which regards postconfirmation disposable income as belonging to creditors for the duration of the plan, Professor Carlson concluded that re-bifurcation of a secured claim upon surrender of collateral violates the bargain and should be disallowed.<sup>194</sup> Thus, he concurs with the *Nolan* view, although he points out the irony of the fact that the same practical result might result when the obligation is being paid outside the plan.<sup>195</sup>

Looking at modification through the settlement conceptualization of chapter 13, a somewhat broader conclusion might well be reached. That is to say, not only would modification to surrender not be permitted, but modification for *any reason*, other than to take account of payments received by a creditor not

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189. *Id.* at 585.

190. *Id.* at 595–96 (contrasting this situation from the situation where the debtor is forcing a change on the creditor midway through the plan.).

191. *Id.* at 585–86.

192. The positions taken in the cases seem to range from a per se ban on modifications to surrender; to modification in complete satisfaction of the secured claim; to modification with re-classification of the deficiency; to modification based on a balancing of the unfairness to the debtor, the secured creditor, and unsecured creditors of permitting modification *vel non*.

193. *See supra* notes 9–12 and accompanying text.

194. Carlson, *supra* note 9 at 649–51 (arguing that modification should be limited to lowering or raising payments to the chapter 13 trustee as disposable income rises or falls, and should not be used to change the amount of the secured claim or the unsecured deficit).

195. *Id.* at 652–54 (observing that when the debtor is paying the lender outside the plan the debtor can simply stop making payments even if modification to surrender is denied).

under the plan would be eliminated as well. The logic follows from the criticality of the concept of finality to the private settlement of disputes. Settlement brings closure to the uncertainty, as well as the cost, of the ongoing litigation of a dispute. Invariably, time will bring greater clarity to that uncertainty, but it would be an unmitigated disaster if we were to permit either the party who subsequent developments reveal paid too much, or the party who received too little, to re-open negotiations.<sup>196</sup> Moreover, occasionally a party will settle a claim for less than what it believes to be its appraised worth because of the defendant's financial condition or its own cash needs. A subsequent, unexpected change in either party's financial fortunes do not make that settlement any less final than one where the discovery or development of new facts reveal that the claim was better or worse than how the parties assayed it at the time of settlement.

The articulated rationale supporting modification in chapter 13 is that circumstances may change during the life of the plan and the parties ought to be able to seek adjustment based on such changes.<sup>197</sup> That explanation is not compelling. First, the same could certainly be true in chapter 11, but the Code prohibits modification once the plan has been substantially consummated.<sup>198</sup> Second, the ability to obtain modification based on changed circumstances imaginatively treats chapter 13 like an alimony or child-support order.<sup>199</sup> But importing the policies and considerations that animate domestic-relations proceedings into the commercial realm makes little sense and is wholly inconsistent with the finality and certainty objectives that underlie the bankruptcy system. That rationale does, however, indirectly reveal another problem with current chapter 13 cases: they last too long.<sup>200</sup> Thus, a return to a default three-year term, with possible extension to no more than five years only for cause shown, would be a healthy step as well in revitalizing chapter 13.<sup>201</sup>

The point is that, if the debtor purchases the winning Powerball ticket two weeks after plan confirmation, then fortuity ought to make no difference in terms of the rights of prepetition creditors, assuming the plan met all of the requirements

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196. This is basically the logic behind recognizing the good faith relinquishment of a claim as consideration for the settlement payment, even if it is later determined that the claim was specious. See RESTATEMENT (SECOND) OF CONTRACTS § 74 (1981).

197. *Meza v. Truman (In re Meza)*, 467 F.3d 874, 877 (5th Cir. 2006) (“Modification is based on the premise that, during the life of the plan, circumstances may change, and parties should have the ability to modify the plan accordingly.”) (citing *In re Taylor*, 215 B.R. 882, 883 (Bankr. S.D. Cal. 1997)).

198. See 11 U.S.C. § 1127(b) (2010).

199. It is quite common, of course, for alimony and support orders to be modified based on a change of circumstances. This makes perfect sense where the purpose of the original order was to repair any unfair economic effects caused by a divorce and to assure that a child's expenses are shared equitably between the custodial and noncustodial parent. Thus, these orders implicate important social and personal issues that simply do not arise in connection with marketplace transactions, where considerations such as certainty and finality loom large.

200. This was recognized in the 1970s as being a factor accounting for the relative unpopularity of chapter XIII. See *supra* text accompanying note 27.

201. See *supra* note 45.

for confirmation.<sup>202</sup> Under current chapter 13, it is projected disposable income that is to be applied to plan payments, not actual disposable income. Thus, even if new chapter 13 provided for some type of sharing of surplus income, that fact alone would not conceptually insist that any portion of that this newfound wealth be applied to prepetition debts. Moreover, improvement in the debtor's financial condition is far more often to likely be the result of the debtor's own efforts than it is to be due to an unanticipated windfall. As noted earlier,<sup>203</sup> ideally, new chapter 13 would more closely align economic incentives with socially desirable behavior, and surely a debtor is far more likely to put forth the effort to improve her financial fortunes and well-being if she knows she will not have to wait several years to be the beneficiary, at least in part, of the fruits of that effort.

By the same token, the fact that the debtor experiences a financial setback should not serve as grounds to excuse a breach under the plan—other than perhaps for a very limited period of time.<sup>204</sup> This may seem harsh, but the debtor must be expected to maintain her end of the deal no less than her creditors. So it is if a defendant in a civil suit is unable to meet the terms of a well-constructed settlement agreement that calls for installment payments of the stipulated sum: the original claim is reinstated and the proceedings continue, or judgment execution proceeds.<sup>205</sup> Undoubtedly, such an unforgiving response to misfortune not of the debtor's own making could have a chilling impact on the goal of encouraging the use of chapter 13 over chapter 7. Thus, in designing the new chapter 13, consideration should be given not only to reducing the maximum plan duration, but also to liberalizing the rules for a hardship discharge, as discussed in the Section that follows.<sup>206</sup> This is far easier to rationalize, not to mention more equitable, when it is borne in mind that the new chapter 13 also requires unsecured creditors to come out better than they would have had the debtor chosen to liquidate instead.<sup>207</sup>

There are a couple of caveats and limitations regarding this recommendation for a sharp reduction in the scope of postconfirmation modification. First, an exception should exist in the event of fraud, and, in fact, one already does so in the form of § 330.<sup>208</sup> Second, the grounds for revocation in § 330 might be amended to include noncompliance with the good-faith requirement of § 1325(a)(3) based on facts not coming to light until after

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202. This treatment is consistent with 11 U.S.C. §§ 348(f)(1)(A), (2) (2010), which, upon conversion, exclude postpetition property, except where the conversion was undertaken by the debtor in bad faith.

203. See *supra* text accompanying note 116.

204. To discourage a debtor who cannot make the required plan payments from dismissing the case prematurely, it might make sense to soften the rule to allow a grace period and right to cure for some number of months.

205. This assumes of course the settlement was structured properly so that the original claim would not be merged into the settlement agreements. See *supra* note 57.

206. See *infra* Section III.F.2. A limited right to cure and reinstate a plan would also lessen the harshness and ill effects of this rule. See *supra* note 183.

207. See *supra* text accompanying note 115.

208. 11 U.S.C. § 330 (2012).

confirmation.<sup>209</sup> This would respond to concerns over gamesmanship, not rising to the level of fraud, by debtors seeking to take advantage of their right to retain income in excess of what would be required to make plan payments. For example, a debtor who, with knowledge that she is likely soon to be the beneficiary of a favorable adjustment in income, files solely in order to protect such income from creditors might be vulnerable to revocation of the confirmation order.<sup>210</sup> Third, a perhaps less draconian solution would be to follow the pattern in the chapter 11 realm and permit modification, but only up until some designated point in time after confirmation.<sup>211</sup> While not outright rejecting such an approach, however, it is important to note that elimination of the disorder and dysfunction surrounding application of the current rules governing modification makes a strong case for simply taking the “no modification” route. Finally, it bears reiterating that an ability to modify when a creditor receives payment from another source would need to be retained under any circumstances.<sup>212</sup>

## F. Discharge

### 1. Full-Payment Discharge

As originally designed, the discharge granted to a chapter 13 debtor at the completion of plan payments included several categories of debt that are nondischargeable in a chapter 7 case.<sup>213</sup> This so-called “superdischarge” was one of the key components in Congress’s plan to cajole debtors to elect repayment under chapter 13 in lieu of liquidation under chapter 7. There is no question that this decision was controversial and held the potential to produce some unsavory results.<sup>214</sup> On the other hand, as the adage goes, it is hard to whip up an omelet without breaking a few eggs.

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209. See *id.* §1325(a)(3) (2012).

210. This is the same concern discussed in the adoption of the projected disposable income. See *supra* note 105 and accompanying text. If the manipulation is discovered prior to confirmation, an adequate remedy already exists in both the good-faith-filing requirement (§ 1325(a)(7)) and the requirement that the plan be proposed in good faith (§ 1325(a)(3)).

211. *Supra* note 204. If such an approach were to be adopted, the cutoff would need to be imposed somewhat earlier than “substantial completion.”

212. The surrender of collateral is effectively an asset payment, rather than truly a modification, that needs to be deducted from the value of the secured claim. See *In re Ramos*, 540 B.R. 580, 595–96 (Bankr. N.D. Tex. 2015); *supra* text accompanying notes 194–95.

213. See *supra* note 30 and accompanying text.

214. The most notorious of these was *Handeen v. LeMaire (In Re LeMaire)*, 883 F.2d 1373, 1375 (8th Cir. 1989), a case in which the debt arose out of a civil judgment against the debtor who had shot Handeen five times—a fairly clear instance of a debt that would be excepted from discharge under § 523(a)(6). In an en banc decision, the majority of the Eighth Circuit concluded that the debtor’s plan could not be confirmed based on bad faith, although there was a dissenting opinion that, in essence, lamented the majority opinion as another example of the Holemsian adage that “hard cases make bad law.” *Id.* at 1382 (questioning how it could be “bad faith” to do precisely what the statute



Initially, in situations where the facts of the case were particularly egregious, or the debtor was proposing a zero- or nominal-payment plan, opponents urged courts,<sup>215</sup> with some modicum of success, to circumvent the superdischarge by denying confirmation based on the good faith requirement of § 1325(a)(3).<sup>216</sup> Next, Congress began nibbling away at the scope of the superdischarge in 1990<sup>217</sup> and finished the job in 2005, so that now there is no longer any material difference between the full-payment discharge in chapter 13 and the chapter 7 discharge, although a couple of carve outs remain.<sup>218</sup> In addition, BAPCPA added § 1328(f) to the Code, which denies discharge if the debtor received a discharge in a prior chapter 7, 11, or 12 case within four years of filing the current chapter 13 case, even when all of the other conditions in chapter 13 are satisfied.<sup>219</sup> Finally, consistent with its emphasis on, and faith in, financial education, BAPCPA also included a provision denying discharge to a debtor who fails to comply with the requirement to complete a personal-financial-management course.<sup>220</sup>

The bottom line is that the discharge no longer plays an important role in connection with chapter choice. Whether it should or not is a difficult question as some of the cases where a more robust discharge would apply can be unsettling.<sup>221</sup>

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unambiguously permitted). The case that really accounted for the demise of the superdischarge was *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 563 (1980) (holding that a criminal restitution obligation was, in fact, a debt and, as such, dischargeable in chapter 13).

215. Adoption of the projected disposable income test largely eliminated challenges based on zero- or minimal payment plans because it ensured that unsecured creditors were wringing every cent out of the debtor beyond what the debtor needed to survive. *See supra* text accompanying note 105. If the projected disposable income test is modified as proposed herein, and certainly were it to be eliminated entirely, good faith challenges on this basis might be resurrected.

216. Prior to 1984, some courts took the view that a zero-payment plan was a per se violation of the good faith requirement. At the other end of the spectrum, some courts have rejected the amount to be paid under the plan as a relevant factor at all in the good faith analysis. Not surprisingly, many courts take the middle ground. *See generally* John T. Kelly, “Good Faith” Analysis Under Chapter 13—The Totality of the Circumstances Approach: *Handeen v. Lemaire*, 23 CREIGHTON L. REV. 573 (1990).

217. *See supra* note 37 and accompanying text.

218. The only debts not dischargeable in chapter 7 that may still be discharged in chapter 13 are as follows: (1) certain tax debts under 11 U.S.C. § 523(a)(1)(A) (2012); (2) noncriminal fines and penalties covered by § 523(a)(7); and (3) debts arising out of property settlements in connection with domestic relation cases, § 523(a)(15).

219. The prohibition is two years if the discharge in the earlier case was a chapter 13 discharge. *See* 11 U.S.C. § 1328(f)(2) (2005). If the second filing is a chapter 7 case, § 727(a)(9) controls, which allows for denial of discharge if a chapter 13 case was commenced within six years of the new case—subject to exception if certain payout benchmarks were achieved in the earlier case.

220. *See* § 1328(g)(1). Probably not an unreasonable requirement, assuming an adequate number of reputable and high-quality courses are available. The instructional course must be approved under 11 U.S.C. § 111(a)(2) (2010).

221. *See supra* note 202 and accompanying text.

It is also not clear what the rationale is for making just particular creditors—those whose claims would be discharged in a chapter 13 but not under chapter 7—bear the burden of a public policy favoring chapter 13. Thus, under the guise of a settlement model—bearing in mind that it must be approached from the perspective of proceeding in which all claims have been aggregated for adjudication—a more felicitous middle ground is needed. Perhaps the kinds of debt typically owing to governmental authorities, most notably taxes, ought to remain fully dischargeable, as this spreads the cost of Congress’s choice to favor chapter 13 broadly across society. As for private debt, as in any equitable settlement, an answer might be to allocate the loss resulting from the portion of the debt not paid under the revised best interests test between the debtor and the creditor holding the § 523(a) nondischargeable claim. This scheme should also include the three categories of private debt that currently remain fully dischargeable in chapter 13,<sup>222</sup> because, as a general proposition, the distinctions historically drawn between the § 523(a) debts that would be part of the superdischarge and those that would not have always been somewhat arbitrary.

Legislators would need to sort out the precise portion of § 523(a) debts provided for in the plan that should remain nondischargeable. However, bearing in mind that the revised best interests test assures such claimholders of a better payout than they would have received in a hypothetical liquidation, it occurs to me that at least 50% of the unpaid balance should be nondischargeable if and when the debtor completes the plan. It is of course possible that Congress might decide that, as a matter of public policy, one or more categories of § 523(a) are simply too important to include within this new superdischarge. The caution to be sounded about permitting such carveouts is that this can quickly become a slippery slope, as the history of bankruptcy reform since 1978 has witnessed in the expansion over time in the number of exceptions to several Code rules,<sup>223</sup> including the § 523(a) categories themselves.<sup>224</sup> At some point, even if no single exception is itself objectionable, the sum total of exceptions takes a toll on the effectiveness of that rule, and the bankruptcy purpose it is intended to serve, which exceeds the weight of the individual components.

Lastly, the decision to control serial filings with the blanket prohibitions on discharge in § 1328(f) also swung the pendulum too far off center.<sup>225</sup> If there truly are no changes in the debtor’s personal or financial circumstances warranting

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222. *Supra* note 30.

223. Just to cite a couple of examples, the number of exceptions to the stay in § 362(b) has grown from nine to twenty-eight. *Compare* 11 U.S.C. § 362(b) (Supp. III 1979), *with* 11 U.S.C. § 362(b) (2012). And the number of exceptions to preference recovery has expanded from seven to ten. *Compare* § 547(c) (Supp. III 1979), *with* § 547(c) (2012).

224. The number of exceptions to discharge in § 523(a) has nearly doubled since the original enactment of the Code. *Compare* 11 U.S.C. § 523(a) (Supp. III 1979), *with* 11 U.S.C. § 523(a) (2012).

225. *See supra* note 223 and accompanying text; *cf.* *Branigan v. Bateman* (*In re Bateman*), 515 F.3d 272, 283 (4th Cir. 2008) (noting the protections or benefits available under Chapter 13, other than discharge, that might be an incentive for a debtor to file for relief even when § 1328(f) applies).

the chapter 13 filing in the two or four years, as the case may be, because of the earlier bankruptcy filing, the court has the authority to deny plan confirmation under § 1322(a)(3).<sup>226</sup> Generally speaking, good faith offers a far more sensitive instrument for detecting cases undertaken with improper ulterior intent than a prophylactic rule that sweeps up the innocent with the guilty.

## 2. Hardship Discharge

Under the current chapter 13, a debtor who cannot complete her plan due to circumstances not of her own making will seek modification and, if that is not practicable, a hardship discharge under § 1328(b). The additional condition that must be satisfied in order for the court to grant a hardship discharge, beyond the debtor not being accountable for the circumstances causing her inability to complete the plan, and no practical ability to modify, is that the debtor must have paid out at least 70% of what they would have received in a chapter 7 liquidation to unsecured creditors. The hardship discharge is of course subject to all of the § 523(a) exceptions, a fact that was more meaningful in the past than it is today.

Bearing in mind that the plan for the new chapter 13 calls for the near-total elimination of modification,<sup>227</sup> some expansion in the scope of the hardship discharge would be a pivotal part of the settlement between the debtor and her creditors, lest debtors otherwise be discouraged from using chapter 13 at all. Of necessity, the requirement in § 1328(b)(3), that the debtor show modification is impractical, would have to be discarded.<sup>228</sup> Secondly, the stipulation that the debtor have paid out 70% of the amount that unsecured creditors would have received in a chapter 7 liquidation should probably be lowered to a level that is perhaps in the neighborhood of 50% of the amount produced by the enhanced best interests test, but certainly lower than the current standard. While creditors would of course risk coming out worse under this standard than under the current rule, that peril would appear to be a fair tradeoff for the possibility of also coming out better than they would have in a hypothesized chapter 7 liquidation should the debtor complete, or nearly complete, the plan.<sup>229</sup>

With regard to secured debts, creditors would, as they do currently, retain their lien, along with the allied right to foreclose upon default. However, it should be clear that, under § 1325(a)(5)(B)(i)(I)(bb), it is only the secured portion of the debt, as determined under §§ 502 and 506(a)(1), that remains subject to the lien if the debtor completes the plan. That is, the lien would be, as is currently true,

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226. Several courts have made the same point in rejecting the argument that § 1328(f), when applicable, should be construed to bar the stripping of underwater liens consistent with BAPCPA's goal of rebalancing the scales in creditors' favor. *See, e.g.*, *HSBC Bank v. Blendheim (In re Blendheim)*, 803 F.3d 477, 492–94 (9th Cir. 2015); *In re Scantling*, 754 F.3d 1323, 1329–30 (11th Cir. 2014); *Branigan v. Davis (In re Branigan)*, 716 F.3d 331, 337–38 (4th Cir. 2013).

227. *See supra* Section III.E.

228. 11 U.S.C. § 1328(b)(3) (2005).

229. *Supra* text accompanying note 115.

relinquished upon the granting of either a full or a hardship discharge.<sup>230</sup> The continuation of exclusion of all classes of nondischargeable debts from the hardship discharge also seems appropriate, as does the exclusion for long-term debts under § 1322(b)(5).<sup>231</sup>

### G. Miscellany

The foregoing represents a canvass painted with a broad brush; it overlooks a lot of the detail of chapter 13, and we all know where the devil resides. On the other hand, as this undertaking is intended to stimulate thought and further discussion regarding future chapter 13 reform, it is not clear that there is much more to be gained by drilling further into the minutiae, other than to make a few remarks relating to the subject. First, it seems a forgone conclusion that the new chapter 13 should include a good-faith requirement. It is not clear, however, that good faith needs to be tested both at filing and again at confirmation.<sup>232</sup> Thus, either § 1322(a)(3) or 1322(a)(7) could be eliminated without much loss. Second, retention of the co-debtor stay is also desirable because it serves to promote creditor equality.<sup>233</sup> Third, as noted earlier,<sup>234</sup> shortening the commitment period is critical to increasing the attractiveness and success rate of chapter 13, even though it would likely mean fewer debtors could meet the confirmation standards.<sup>235</sup> Nonetheless, those that would be excluded were neither likely to have chosen chapter 13 in the first place nor, in the few cases where they would, to have successfully completed their plans. Fourth, the new chapter 13 would determine the appropriate extent of judicial supervision to be exercised over postpetition events and circumstances in order to enhance the prospects for the debtor's successful rehabilitation.<sup>236</sup> Finally, there may also be some benefit to liberalizing

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230. See 11 U.S.C. § 1325(5)(B)(I)(bb) (2012).

231. See 11 U.S.C. § 1328(a)(1) (2012).

232. Bearing in mind that Code § 1324(b) requires that the court must hold a confirmation hearing within 45 days of the § 341(a) meeting of creditors, which itself must occur between 21 and 50 days of the filing of the petition (FED. R. BANKR. P. 2003(a)), in most chapter 13 cases, the plan will be confirmed, and the trustee will begin disbursing payments to creditors, within four to six months after the case is commenced.

233. See 11 U.S.C. § 1301(a) (2012). The legislative history of the Code indicates that creditors would use the threat of collection against a co-debtor in order to secure favored treatment in the case. See HOUSE REPORT, *supra* note 32, at 121–22. With that pressure off, the debtor is free to deal with that creditor on the same basis as all other similarly situated creditors.

234. See *supra* text accompanying note 186.

235. This would occur in cases where the debtor had inadequate income to meet the enhanced best interests test within 36 months, unless grounds existed for an extension.

236. Compare *In re Fields*, 551 B.R. 424, 426–27 (Bankr. D. Minn. 2016) (ruling that unless a debtor is engaged in business, court approval is not required in order to incur postpetition debt or obtain postpetition credit), with *In re Ward*, 546 B.R. 667, 678–79 (Bankr. N.D. Tex. 2016) (finding that bankruptcy court approval is necessary whenever significant postpetition debt is incurred by chapter 13 debtor because of the possible impact that such debt may have on debtor's plan).

the rules on classification of claims in the case of business debtors when it can be shown that the favored class is essential to the business's prospects for survival.<sup>237</sup>

Probably the most impactful reform in terms of the success of new chapter 13, however, has nothing at all to do with chapter 13. Rather, whether through amendment of the Fair Credit Reporting Act<sup>238</sup> or other legislation, it entails taking steps to assure that chapter 13 debtors are rewarded insofar as their credit reports are concerned for electing to choose repayment over liquidation.<sup>239</sup> Indeed, until relatively recently, chapter 13 filers were actually penalized for choosing repayment, since creditors would continue to report a debt as past-due throughout the duration of the plan.<sup>240</sup> Anecdotally, in some number of cases, they still do, which means not only ensuring fairer reporting rules, but also beefing up mechanisms for detecting noncompliance and the penalties for violations.<sup>241</sup> If there is an honest desire to create positive incentive for debtors to opt for chapter 13, no enticement will loom as large as the promise of good credit.<sup>242</sup>

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237. Currently, classification is permitted under § 1322(b)(1) provided that there is no “unfair discrimination” against a class so designated. However, under the same provision, the standard for classification of a consumer debt on which another individual is jointly liable with the debtor is more liberal, and it is here that reference to business debts essential to the continuation of the business might be included.

238. 15 U.S.C. § 1681 (2015). There is also limited case law suggesting that inaccurate credit reporting may be a violation of the discharge injunction of Code § 524(a). See *In re Luedtke*, No. 02-35082-svk, 2008 WL 2952530, at \*2 (Bankr. E.D. Wisc. July 31, 2008).

239. This was actually one of the recommendations of the National Bankruptcy Review Commission in order to encourage debt repayment. See NBRC REPORT, *supra* note 3, at 291 (recommendation 1.5.8).

240. See Paul Toscano, *Reflections on Poverty, Bankruptcy, and Heresy*, 18-DEC UTAH B.J. 20, 23 (2005) (explaining this phenomenon as a product of the fact that “[t]he credit industry does not recognize a confirmed [c]hapter 13 Plan as a contract novation; therefore, a [c]hapter 13 debtor’s credit scores are docked throughout the term of the [c]hapter 13 plan because the trustee’s payments to creditors continue to be treated as delinquent and inadequate.”). In 2009, the credit bureaus finally issued guidelines on how credit was to be reported once a chapter 13 plan is confirmed. See CREDIT REPORTING RESOURCE GUIDE, FAQ 28 (Consumer Data Industry Assoc., Rev. Dec. 2009); see also Jean Braucher, *Counseling Consumer Debtors to Make Their Own Informed Choices--A Question of Professional Responsibility*, 5 AM. BANKR. INST. L. REV. 165, 168 (1997) (“[T]here are many indications that chapter 13 does not bring better credit access, and that chapter 7 may even be preferred by creditors”). See generally Julapa Jagtiani & Wenli Li, *Credit Access After Consumer Bankruptcy Filing: New Evidence*, 89 AM. BANKR. L.J. 327 (2015) (noting that while a chapter 13 file remains on a debtor’s credit file for less time than a chapter 7 filing, empirical evidence suggests new lenders do not treat chapter 13 debtors more favorably than their chapter 7 counterparts).

241. Cf. Kara J. Bruce, *Vindicating Bankruptcy Rights*, 75 MD. L. REV. 443, 445 n.5 (2016) (citing media reports about large national lenders who allegedly failed to accurately report debt that had been removed through bankruptcy).

242. See Elizabeth Doyle O’Brien, *Minimizing the Risk of the Undeserved Scarlet Letter: An Urgent Call to Amend § 1681E(B) of the Fair Credit Reporting Act*, 57 CATH. U. L. REV. 1217, 1217 (2008) (“A poor credit history is the ‘Scarlet Letter’ of 20th century

#### IV. LIMITATIONS OF THE SETTLEMENT MODEL

Understanding, and thus redesigning, chapter 13 in terms of a settlement highlights certain attributes that we tend to think about when we reflect on private-dispute settlements. These concepts, such as reasonableness, compromise, and collaboration, can be useful in ultimately producing a facility that is ideal to none but, hopefully, acceptable to all. However, while positive and helpful conceptual extensions are a byproduct of metaphoric reasoning, the picture is never completely accurate. As noted,<sup>243</sup> there are key ways in which chapter 13 is *not* like a settlement, and those asymmetries are, if not lost to view, at least thrust to the background when we imagine chapter 13 purely as a settlement. This is a natural consequence of metaphoric reasoning, highlighting similarities that concepts share, but also eclipsing differences between the source and target concepts.<sup>244</sup>

Thus, it is worth pausing before drawing this effort to a close to emphasize the limitations entailed in modeling the target concept, new chapter 13, on the source concept of settlement. First, this settlement is not voluntary; it is being imposed by positive law.<sup>245</sup> Second, its terms are being driven based not on what the parties would have agreed to if given the opportunity to bargain, but what, as a matter of policy, we believe they should have agreed to take into account—broader social and economic policy considerations that simply do not animate private-settlement negotiations.<sup>246</sup> Third, in the context of private debtor–creditor workouts, the impact of the agreement on the debtor’s other creditors is not a significant factor. In bankruptcy, however, it is a hugely important factor, as considerations of ratable distribution and creditor equality loom as large as the justifications that underlie the policy in favor of providing a debtor with a fresh start.<sup>247</sup> This is why it is necessary to evaluate the treatment of creditors in new chapter 13 from the vantage point of the distributional norms of federal bankruptcy law and not state debt collection law.<sup>248</sup> In sum, then, the new chapter 13 will demand more of both debtors and creditors than they likely would be willing to concede in a private negotiation. Nevertheless, the key to remaining as true as

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America”) (citing the testimony of Anthony Rodriguez, Staff Attorney for the National Consumer Law Center, before *Fair Credit Reporting Act: How it Functions for Consumers and the Economy: Hearing Before the Subcomm. on Fin. Inst. and Consumer Credit of the H. Comm. on Fin. Servs.*, 108th Cong. (2003)).

243. See *supra* Part II.

244. This is the hiding power of metaphor, a phenomenon of which we are often unaware because pervasive metaphoric reasoning is in cognitive processing. See Ponoroff & Knippenberg, *supra* note 139, at 2286 (citing GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 184 (1980)).

245. Creditors no longer vote on confirmation as they did under chapter XIII. See *supra* note 26. Rather, their protection is limited to objecting to confirmation. But, of course, if all of the requirements therefor have been satisfied, there is no ability for a creditor to “walk away from the deal.”

246. See *supra* text accompanying note 52.

247. See *supra* note 54.

248. See *supra* text accompanying note 69.

practicable to what a person in the position of each of the players with an interest in a chapter 13 case should reasonably agree to in such a negotiation produces not only a workable system, but one that also has more staying power than a system that clashes violently with the desires of the parties actually involved in the case.<sup>249</sup>

At the same time, it is for these reasons that the notion of settlement cannot be granted a conceptual monopoly over the design and implementation of new chapter 13. Ideally, it can be a useful starting place and a guiding star, but it can only aid, and not be permitted to tyrannize, analysis. This frees us, when necessary to achieve countervailing policy objectives, to divert attention away from the entailments of the settlement metaphor to larger considerations of public policy. It is in this important sense that the present approach parts company with strict contractarian analysis.<sup>250</sup>

### CONCLUSION

Ever since rehabilitation for individual debtors arrived on the bankruptcy scene it has been a disappointment. Some positive steps were taken in 1978, but the decades that followed witnessed mostly backsliding in the development of a viable procedure for individual-debt adjustment. In part, this may be due to the contentious nature of bankruptcy reform since 1978.<sup>251</sup> But, likely, it is also partly a product of the fact that we have never settled on a consistent ideation of chapter 13. In recent years we have gradually repositioned chapter 13 from a haven for the virtuous to a desolate landscape for the villainous. Moreover, so long as we envision the contours of chapter 13 from the perspective of a battle between debtors and creditors, it is unlikely that an optimum balance will ever be struck.

Thus, in this treatment, this Article has proposed that we proceed from the mindset of chapter 13 being the product of a reasonable accommodation between parties with adverse interests, rather than a contest in which there must be a distinct winner and loser. New chapter 13, as dubbed in this Article, would mediate between debtor protection and creditor rights. The aim would be to produce a result that, while not to anyone's liking completely, should present an option to many debtors that is more advantageous than chapter 7. At the same

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249. This is arguably the mistake that Congress has made since the original enactment of chapter 13 in 1978, and it is certainly the mistake made in post-1978 amendments to the statute. *See supra* notes 102–05 and accompanying text.

250. There are simply too many stakeholders without cognizable legal claims, and overriding social policy considerations at stake, to accept the assumption that contractually arranged rights are always the optimal solution. *See* Lawrence Ponoroff, *Enlarging the Bargaining Table: Some Implications of the Corporate Stakeholder Model for Federal Bankruptcy Proceedings*, 23 *CAP. U. L. REV.* 441 (1994). Thus, chapter 13 must ultimately entail a noncontractual private ordering of rights. Sometimes a party must be made to incur a cost so that someone else benefits. Otherwise, for example, fresh-start policy has no utility at all. The point is simply that in shaping that regime it could be enormously valuable to start with consideration of what *ought* to be a reasonable accommodation to all concerned; i.e., a regime that endorses the premise of individual debt adjustment proceedings as involving a *compromise* rather than a *contest*.

251. *See* Ponoroff, *supra* note 54, at 331–32.

time, creditors would be accorded the meaningful promise of a better outcome than chapter 7 and provided sufficient protection against debtor abuse so as to warrant their support. Not only would such a settlement work to the benefit of both groups, but it could also eliminate the need to means test debtors in chapter 7, an exercise that has proved burdensome and costly, but not particularly effective.

As stated earlier, this proposal is not intended to be a blueprint for specific legislative action, but rather an illustration of how such an approach might be used to spur a constructive discussion about the future of chapter 13. The idea of individual debtor rehabilitation is a salutary one, and, in the right circumstances, should be providential to all concerned. The fact that, thus far, history proves that it cannot be achieved either with a bludgeon or as a sinecure does not mean it cannot be achieved at all, and, surely, the social and economic payoffs are worth another effort to get it right.