

PLAN DEVELOPMENT AND DRAFTING CONSIDERATIONS

The most important thing to keep in mind when drafting a plan is **it's all about the money**. The real function of the plan is to dictate how the money flows. It is the job of the attorney to manage the flow of money to (1) keep the auto creditors happy (or at least avoid their objections); (2) make sure their own fees get paid; (3) try not to let any money flow to the GUC's until the secured creditors have been paid.

The trustee disburses once a month, the dates are posted on their web sites. Before confirmation, adequate protection payments are made to secured creditors with PMSI claims provided for in Section E 3.1 Adequate protection payments are made to all E 3.1 creditors that are not specifically identified as Non-PMSI. If no monthly payment is provided the creditor is paid pro-rata.

After confirmation, at the disbursement date all money on hand is used to satisfy each level in order. If money is left over after satisfying the first level the remainder is applied to the next level. If that level is satisfied the remainder is applied to the next level, and so on.

You don't have any control over the amount of the monthly payment to E 2 (continuing mortgage payments) creditors but you do have control over the fixed payments to secured creditors provided for in Section E 3. It is important to use that control to manage how much money is available each month to pay attorney fees and, after attorney fees are paid, mortgage arrears.

Section A Budget items

The entries in Section A 1 regarding household size must be consistent with Form B22C and Schedule I. The entries in A 1 and A 2 regarding total household monthly income and expenses and charitable contributions must be consistent with Schedules I and J.

Section C Direct payment of mortgage claims by debtor

Section C is for mortgages only. The creditor name must be correct as must the monthly payment amount. The payment amount must also be consistent with Schedule J. Be sure to check the POC for the correct creditor name and payment amount and amend the plan if necessary.

All other debts that will be paid directly by the debtor are to be provided for in Section G and or Schedule J. Current ongoing homeowner's association dues don't belong in the plan, only in Schedule J.

Automobile lease payments do not belong in Section C either. Leases are listed on Schedule G and payment is provided for in Schedule J. Leases are rejected at confirmation by operation of Section B 1 unless listed as assumed in Section G.

Section D 1 Initial Plan Term

The initial plan term should be 36 months for debtors with below median income and 60 months for debtors with above median income. The term of a plan can never be less than 36 months unless all creditors are paid in full within the initial plan term.

If the initial plan term in D 1 is less than 36 months Section E 8 must specify unsecured creditors are paid in full or not less than 100%.

Sections E 8 and G are used to provide minimum percent or dollar amount dividends to unsecured creditors for below median income debtors.

Keep in mind that no matter what happens after confirmation the minimum amount that must be paid into the plan is the amount in the last field in section D 1.

If the plan payment will change more than one time during the term of the plan then the plan term must be detailed in Section G. The amount to be paid during the initial plan term is entered in D 1 and H 1; the terms are set out in Section G using the format set out in D 1.

Section D 2 Adjustments to initial term

For below median debtors D 2 incorporates E 8 and E 9 to extend the term of the plan until the minimum dividend specified in E 8 is reached. The plan term will only exceed 60 months if administrative, secured and priority debts are not paid within 60 months. The result will generally be a 0% dividend to general unsecured creditors regardless of the entry in E 8.

Section D 3 Plan completion

The first box provides that plans can only complete before the end of the initial term if all claims are paid in full. My office generally allows debtors to check the second box but we reserve the right to require the first box to be checked in order to recommend confirmation. **If the initial plan term is less than the applicable commitment period the first box must be checked.**

Section E Disbursements by the trustee

Section E 1 Trustee's fees

This is an estimate only and plays a part in determining the plan's feasibility in Section H. Trustee fees are determined through the budgeting process between the Chapter 13 Trustee and the United States Trustee. Trustee fees do change from time to time and may increase. The best practice is to use a rate between the number used on Line 50 in Form B22C and the statutory maximum of 10.00%

Section E 2 Current mortgage payments

The school of thought that supports including current mortgage payments in E 2 is generally based on: (1) Payroll Order entered on day one; (2) Debtor has at least a half a plan payment to mail to the Trustee on day one; (3) All the debtor has to do for the plan to succeed is stay employed; (4) Trustee keeps perfect records regarding post-petition payments; (5) Fewer Motions to Lift Stay; (6) Trustee fees on current payments are ultimately paid by unsecured creditors and are probably less than late charges and creditor attorney fees on stay lift motions.

The school of thought that opposes paying current mortgage payments in E 2 is generally based on: (1) The debtor says they're really going to make the payments this time; (2) It is fun defending Motions to Modify the Stay every six months.

If the debtor elects to have the trustee disburse current mortgage payments, the creditor name in E 2 must match the creditor name in Schedule D (amended to match the POC if the POC is different than scheduled); the monthly payment amount must be correct, use the amount on the most recent statement from the lender amending before confirmation to match the amount on the proof of claim or notice of payment change. It is important from a feasibility standpoint that the monthly payment amount is correct. The trustee will change the amount paid in line with notice of payment changes filed with the court.

The best day of the month to file a case with the mortgage in E 2 is the second day of the month so that the plan payment due date is approximately the same as the first post-petition mortgage payment due date.

The trustee disburses on or about the second Friday of each month. When paying current mortgage payments we pay ahead, for example on the January 10 disbursement the February 1 mortgage payment is made.

Section E 3.1 Other claims secured by value in collateral

Verify that the name of the creditor in E 3.1 matches the name on the proof of claim before plan confirmation.

§1325(a)(9) “the hanging paragraph” requires that a creditor with a PMSI claim secured by a motor vehicle purchased within the 910 days pre-petition, or a creditor with a PMSI claim secured by other personal property purchased within one year pre-petition be paid the full balance owed them at the petition date.

The amount a creditor will be paid as secured is determined by the amount provided in Section E 3.1 but is subject to reduction with the consent of the creditor.

Secured claims filed for amounts greater than the amount provided for in Section E 3.1 will be bifurcated.

Secured claims filed for amounts less than the amount provided for in the plan will be paid the lower amount.

Claims filed as unsecured will be paid as unsecured even if provided for as secured in the plan.

The plan must provide interest on automobile loans as required under Till (Supreme Court, May 17, 2004). Till controls as to interest rate for all such claims.

Fixed payments must adequately protect the creditor after confirmation to satisfy §1325(a)(5)(B)(iii)(II).

Section E 3.1 and pre confirmation adequate protection payments

Unless an E 3.1 creditor is specifically identified as “non-PMSI” they will receive pre confirmation adequate protection payments. Not all secured creditors are entitled to adequate protection, if the lender did not finance the purchase of the property they aren’t entitled to pre-confirmation adequate protection payments.

The trustee will make pre confirmation payments unless the non-PMSI box is checked.

If the monthly payment amount is blank the creditor will be paid pro rata.

Section E 3.1 Fixed payments on secured claims

The default in case filing software seems to be to pay E 3.1 creditors over 60 months. The result is increased interest expense for the debtor and complicated administration

near the end of the case. Too low a fixed payment can result in unsecured creditors receiving their minimum dividend well before the secured claim is paid in full unnecessarily extending the term of the plan.

Section E3.2 Secured claims treated as unsecured

Any creditor, typically a junior mortgage, that is to be paid as unsecured because they are secured by collateral that either has no value or that is fully encumbered by liens with higher priority must be provided for in Plan Section E 3.2.

Provide the name of the creditor (verify that it matches the POC if one is filed) and provide the address of the collateral.

To the extent their claim (filed as secured or unsecured) is allowed, the claim will be paid as unsecured pursuant to Paragraphs E 6 and E 8.

Making sure money is available for E 4 (attorney fees)

We all agree it is very important that the attorney be paid; you may be required to do a little math to make this happen.

Attorney fees are paid pro rata at level E 4 so they will always be paid in full before any money is paid toward mortgage arrears or any lower level claims.

If there are no E 3.1 creditors no special provisions are required.

If E 3.1 fixed payments aren't large relative to the plan payment (example, large mortgage arrears) no special provisions are required.

If E 3.1 fixed payments are large relative to the plan payment special provisions may be required to get paid early in the case.

Pre confirmation adequate protection payments can be less than the post confirmation fixed payments. Sections E 3.1 and G may provide a lower initial adequate protection payment, followed by a higher fixed monthly payment beginning at confirmation or some future date certain. Remember, fixed payments must adequately protect the creditor after confirmation to satisfy §1325(a)(5)(B)(iii)(II).

Section G may change the priority level assigned to attorney fees. If the priority level for payment of attorney fees is changed from E 4 to E 2 or E 3.1 the plan must provide a fixed payment for attorney fees and the payment must be low enough to allow the E 3.1 creditors to be adequately protected as required by §1325(a)(5)(B)(iii)(II).

Section E 5 Mortgage Arrears

The amount a creditor will be paid for pre-petition arrears is controlled by the amount listed as arrears in Section E 5, subject to reduction consented to by the mortgagee for example by filing a claim for a lesser amount.

Arrears are only paid interest if the mortgage originated on or before October 22, 1994.

Verify that the creditor name in Section E 5 is correct before confirmation and amend if necessary.

Section E 6 Allowed priority claims other than those of the debtor's attorney

The most common priority creditor is IRS. §1322(a)(2) requires that the plan must provide for full payment of all claims entitled to priority under section 507 unless the creditor agrees to a different treatment. In my experience the IRS has never agreed to any other treatment. The IRS generally files claims before the original confirmation hearing so getting the number correct should not be a problem. Student loans are not priority debt.

Note that the E 6 entry is an estimate. If a non priority debt is included in E 6 and the claim is filed as unsecured it is paid as unsecured.

Section E 7 Specially classified unsecured claim

Special class treatment may be provided for co-signed debt. You must name the creditor and state the reason for the special class. Student loans are not entitled to special class treatment by virtue of their non-dischargeable status.

Section E 8 General unsecured claims

A percentage dividend in E 8 is a **minimum**, if the initial term in section D 1 is less than 60 months, sections D2 and E 8 work together to extend the term of the plan until the minimum dividend is reached, or up to 60 months.

Section E 9 Interest

If §1325(a)(4) requires that all unsecured creditors be paid in full then they must be provided interest on their claims. Calculate the amount of interest to be paid to

unsecured creditors from the date of confirmation. There is no requirement that interest be paid to unsecured creditors when the means test alone requires payment in full.

Section G Special terms

The box at the top of page one must be checked if special provisions are to be made.

None of the text anywhere in the model plan can be altered, but special, non standard provisions may be made using plan Section G. Common section G provisions and suggested language include the following:

Regarding late filed claims

Unsecured claims filed after the bar date shall not be paid by the Trustee. You may include this language in Section G unless you enjoy filing objections to late filed claims.

Regarding direct payment of loans secured by personal property

The debtor will make current monthly payments, as listed in debtor's Schedule J directly to the following creditors holding claims secured by a perfected lien on debtor's personal property:

Creditor: _____

Collateral: _____

Final payment due date: _____

Fixed monthly payment: _____

Regarding direct payment of student loans

The debtor will make current monthly payments, as listed in debtor's Schedule J directly to the following creditors for student loans that mature after 60 months from the date of filing:

Creditor: _____

Final payment due date: _____

Fixed monthly payment: _____

Regarding direct payment of sold or delinquent Property Taxes

The debtor will redeem sold real estate taxes by reserving the amount listed in debtor’s Schedule J each month for the plans first _____ months. Debtor’s plan payment increases as shown in section D 1 upon redemption.

Redemption amount: _____

The debtor will pay past due real estate taxes directly by reserving the amount listed in debtor’s Schedule J each month for the plans first _____ months. Debtor’s plan payment increases as shown in section D 1 upon payment.

Past due amount: _____

Increasing E 3.1 set payments after attorney fees have been paid

Beginning with the Month, Year disbursement, the set payment to Creditor Name in Section E 3.1 (a) shall increase to \$xxx per month and the set payment to Creditor Name in Section E 3.1 (b) shall increase to \$xxx per month.

Paying attorney fees at level E 2 or E 3.

Allowed Debtor’s attorney fees will be paid at an E__ disbursement level; after confirmation upon entry of an order awarding fees, \$_____ monthly until paid in full. The payment must allow enough money to flow to E3.1 creditors to adequately protect them as required by §1325(a)(5)(B)(iii)(II). If there are no E3.1 creditors it is best to leave attorney fees at level E4 pro rata.

Regarding surrender of personal property that secures a debt

Debtor hereby surrenders Description of Asset to Creditor Name. The trustee shall make no payment on any secured claim filed by Creditor Name secured by Description of Asset. **You must identify the asset and name the creditor.**

Regarding multiple step payments, increasing the plan payments when 401(k) and (or) other direct pay obligations complete

1. *Initial plan term.* The debtor will pay to the trustee \$_____ monthly for ___ months and \$_____ monthly for an additional _____ months, and \$_____ monthly for an additional _____ months, for total payments, during the initial plan term, of \$_____.
[Enter this amount on Line 1 of Section H.]

Section H

Section H is used to verify that the plan is mathematically feasible. All the lines must be completed.

If the initial term is less than 60 months the number in H(5)(c) must equal or exceed the number in H(4)(g).

If the initial term is 60 the number in H(4)(g) must be zero or negative.

If interest is provided for in Section E 9 you must calculate interest to be paid and enter the amount in Line H(4)(d).

Section I

A check in this box indicates that the debtor consents to entry of a payroll deduction order and the Trustee will immediately prepare an order, forward it to Chambers for entry and send it to the employer for execution. The attorney need not prepare a payroll order if Section I is used.

General Statement about Secured Creditors

All secured creditors must be provided for in the plan. This may mean they are paid through the plan, paid direct or the property is surrendered, but they all must be provided for.