

THE NUTS AND BOLTS OF CHAPTER 13

OR THE 50 (fifty) MOST COMMON CHAPTER 13 PLAN AND OCP DRAFTING AND CONFIRMATION ISSUES AS SEEN THROUGH THE EYES OF THE CHAPTER 13 TRUSTEE

(The common errors discussed below are issues that will likely draw an objection to confirmation by the Trustee. Most of the errors are simple and should be corrected before the plan is filed with the court. Filing a plan that includes these problems will cause unnecessary work for both the debtors' counsel, the Trustee's office, and in many cases, creditors. Failure to correct by the initial confirmation hearing will likely result in an adjourned setting for the plan. Adjourning the confirmation hearings slows the payment for creditors and attorney fees. Eliminating these common errors will result in speedier disbursements, including attorney fees)

Revised: September 21, 2021

CHAPTER 13 PLAN

1. Use the correct plan form:

- a. For cases filed after 6/1/14, use 1300.14 (12/1/16)
- b. For cases filed after 12/1/17, use 1300.17 (12/1/18)

If you are filing a modified plan you must use the same plan form with which you started.

2. Be sure to date the plan. Sometimes a debtor will file several plans, some pre and some post confirmation. Calendar dates have been and will continue to be used for all plans. Docket numbers will be used with the new plan on the OCP. The plan date or docket number is simply an identifier so that when you are talking about a plan, there is no confusion about which plan you are talking. Make sure each succeeding plan has a new & different date or docket number. The date or docket number of the plan you wish to have confirmed, must be found in ¶ 1 of the Order Confirming Plan.

REMEMBER: For the new plan 1300.17, docket numbers will be used in place of the old calendar date system on the OCPs

3. Issues concerning feasibility and liquidation. There are programs available to check for feasibility and liquidation (paragraph 4(h) best interest number). These programs are essential for proper drafting of Chapter 13 plans. Obtain copies by contacting Hung at hungn@portland13.com.

4. Use the Suggested Language Paragraphs when an appropriate version is available. They are offered to facilitate consistency, commonality and ease of administration by the Trustee. While they should be tailored to meet your specific facts, they should retain as much of the original language as possible. Do not chop it to the point that it becomes useless or unrecognizable. The Suggested Language Paragraphs are available at the Trustee's web site: www.portland13.com. And, please do not attach a separate unrelated idea at the end of a Standard Language Paragraph. For that, use an additional paragraph number. If nonstandard provisions won't fit on the plan form, you can reference an attached ("See Para. 12-15 on Attachment A") and each attachment page should include the names of the debtors and case number (e.g. "In re Lotta Debts, Case No. 12-34567").

Plan Paragraph 1

5. Four boxes in the caption: Always check the appropriate box. If the box is not checked, the relief sought will not be granted and an amended plan will likely be required. Checking a box when it is not warranted will require correction, i.e., do not mark “**motion to value collateral**” unless you are actually cramming down the value of collateral.

Plan Paragraph 2

6. Paragraph 2 sets the “**applicable commitment period**” If the plan is under median and will exceed 36 months, state the reason after “as follows”. If the plan is over median and will extend to the full 60 months, insert “applicable commitment period”

Plan Paragraph 3(a)

7. Do not write confusing plan payments: It often is difficult to predict the exact time a plan will be completed. Consequently, leave plan payments open ended. For example, instead of \$500 x 60, simply add \$500; instead of \$500 x 24, \$600 x 36, simply add \$500 x 24, \$600 thereafter. If an expense found on 106J will be extinguished during the life of the plan, a step up (increase of plan payment) of the amount of that no longer needed expense should be included. (See # 32 below)

8. Do not include **pennies** in any of the payments, both plan and creditors. Use whole dollar amounts only. The software cannot split pennies.

9. Paragraph 3(a) plan payment must include sufficient funds to pay the monthly scheduled payment of ¶ 4(b). The total *per month (permo)* payments in any given month cannot exceed the amount being paid into ¶3(a) for that month - Remember you must first deduct the Trustee's statutory commission from ¶3(a) before you begin. We see this error often when there is a change in either the plan payment or *permo* in ¶4(b), but it is not followed by balancing the plan payment and the *permo* together so they match up.

10. With a below median case, paragraph 3(a) plan payment must match at least the Schedule 106J (line 23c) disposable income. (If not, be ready to explain) Be careful of what are called “trickle down” permo cases where all obligation under the plan have been met EXCEPT for a set permo claim which will carry on well past any other plan requirement. This will cause the plan length to extend longer that would otherwise be necessary.

Plan Paragraph 4 (b)

12. Define AAFAAF What does it mean? – Creditors don’t know. Spell it out with an asterisk: (**All available funds after attorney fees*)

13. If you are curing an arrearage, you must put the amount of the arrears in the “**Estimated Arrearage if Curing**” column. If you are cramming down collateral, it must be in the “**Collateral Value if Not Paying in Full**” column. Do not put a collateral value in that column unless you are actually cramming it down. Use the correct column, i.e., don’t put a cram down in column labeled “**Estimated Secured Claim if paying Secured Claim In Full**” because you will be required to pay the full amount of the secured claim...AND you must include an interest rate. If it is zero, then add “0”AND you must include a Monthly Plan Payment.

14. Portland Only: Do not use a “*permo*” and “all available” or “all available after attorney fees” as one “periodic payment” in ¶4(b) (Use the **split claim** example, # 9 in the Suggested Languages)

15. You cannot have a zero *permo* payment for collateral that has an interest rate. Each month’s *permo* must include enough to at least pay the interest due for that month. (Using the feasibility program will greatly assist you with this issue)

16. Impaired collateral (more is owed than its value - except principal residences *) must be paid through the plan in ¶4(b)(1). Paragraph 7 of the plan is for *fully secured* collateral paid outside the plan.

17. If there is negative equity in a ¶ 4(b)(2), 910 vehicle, be sure to account for it and use the formula set out in the Suggested Languages #10.

18. “Paragraphs 4 (g) (h) & (i) should be completed. All blanks in the plan must be filled in, even if only with n/a.

19. If you decide to surrender collateral after it has been noticed out as being retained on the original plan, you must give notice to the creditor by adding it to ¶4(b)(4) and add 21 days to further object in ¶5 of the Confirmation Order.

Plan Paragraph 4(c)

20. Amount of fees and expenses remaining unpaid in the plan must match the attorney fee disclosure - LBF 1306..... and any fee agreement with the debtors must be attached.

Be sure to check one of the boxes concerning supplemental compensation. Always check one of the other 2 boxes on how fees are to be paid. If you check the “other” box, it signifies you are requesting a monthly permo payment. In that event, you must disclose the amount you wish to be paid monthly.

21. Improper Service. Service upon certain creditors found in Paragraphs 4(b)(1) (under the “Collateral Value if Not Paying in Full” column) and 4(b)(2) (under the “Amount of Claim as Modified” column), and Paragraphs 5 and 6 must conform to FRBP 3012, 4003(d), 9014, and LBR 6006-1(b). For insured depository institutions, see FRBP 7004(b) & (h). Follow the instructions found at the bottom of the form plan under CERTIFICATE OF SERVICE

Schedule 106A/B

Part 1:

22. If a debtor owns a percentage of realty, include the full value under the “Current value of the entire property” and the value attributable to the debtor under “Current value of the portion you own?” **Mark the boxes.**

Part 2:

23. Always provide descriptive and accurate information, i.e., if an account receivable has no value, state the amount actually owed but say it is uncollectible and why. Make sure you list all bank accounts under 17 and their account numbers so the Trustee can match up the amounts with the provided bank statements. (Some listings call for assets that will be supported by documents – i.e., if there is an annuity, the Trustee will be obliged to investigate that asset) If you have an item listed under one of those numbers, bring the documents to the 341.

Schedule 106C

24. Use the full amount of all of your exemptions even if the value appears to be less than the exemption allowed. Be sure to note the recent changes in exemptions. You now may use either State or Federal exemptions. If you do not list an exemption, you cannot claim it. If you don't possess the item to be exempted you can't claim it. You cannot mix and match Federal and State exemptions. If using State, be sure to check the 2 year residency rule to find the correct exemptions. Some states require that the person using their exemptions actually be residents of the state when using. In such a case, the exemptions default to Federal Exemptions found in §522 of the Code.

Schedule 106D

25. The treatment of all secured creditors listed on Schedule 106D must be found somewhere in the plan. They should be somewhere in paragraphs 4b, 6, 7 or an added paragraph of the plan. Values of collateral should be consistent throughout Schedules 106A/B, 106D and the plan.

Schedule 106E/F

Part 1:

26. Be sure to list the entities and amounts entitled to priority and be sure to list the IRS and ODR to insure that they get service even if you think there is no claim.

Part 2:

27. Be sure to list all unsecured claims in alphabetical order and identify it in a way that it can later be matched with the claim that will be filed by that creditor.

Schedule 106I

28. There must be complete occupation information, including the complete address for any employer, and data concerning all wage earning members of the household and household dependents on Schedule 106J. If a debtor is self-employed, be sure to describe the occupation in the employment section.

29. Information regarding line 4 monthly gross income must closely match the pay stubs provided. Line 5 payroll deductions should closely match the pay stubs. If a debtor is self-employed, state whether the income is net or gross if there is no Exhibit D-2.

Schedule 106J & D-2

30. An Exhibit D-2 or detailed business statement attached to Schedule 106J is required if the debtor is self-employed or has income not reported on Schedule 106I. Filing one prior to the “first meeting” is very helpful. (Remember you are required to attach the most recent IRS 1040, Schedule C, to the D-2 or attach an explanation why it is not there and if you list a business expense on Schedule 106J, you must “attach a detailed list”)

31. If more income than is shown on pay stubs is discovered during the Trustee’s initial review, do not file an amended Schedule 106I with the added income and a Schedule 106J with the newly discovered expenses and the exact same bottom line unless instructed to do so. (That is viewed by the trustee as *prima facie* expense and plan payment manipulation)

32. DSO, auto, 401K loan repayments or other payments that might complete before the applicable commitment period should be identified with the balance and number of months remaining to completion. The Trustee will be looking for a stepped up ¶3(a) payment or explanation why not. Come to the 341 prepared with this information.

33. Do not list an auto payment or other collateral on both Schedule 106J and in ¶4(b). You cannot pay both inside and outside the plan on the same collateral. That would constitute “double dipping” from the disposable income.

34. If collateral is being paid outside in paragraph 7 of the Plan, the payment must appear on Schedule 106J.

35. Large charitable contributions must be accompanied by #14 of the Standard Languages. If there is any question about whether the added language is required, it will be discussed at the 341 meeting.

Form 107 SOFA

36. Information regarding closed accounts, potential avoidable transfers and fraudulent transfers, i.e., must be specific. If there is a potential preference, come to the 341 prepared with the proof of the garnishment, the actual dates and the name and address of the transferee along with any relevant pay stubs.

Form 122C-2

37. Use the current Means Test numbers. They can be found at:
<http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm>

ORDER CONFIRMING PLAN

38. Use LBF 1350.17 (12/1/17)

39. Plan Docket # in paragraph 1 must match the docket number on the plan you wish to have confirmed.

40. The numbers in paragraph 3 - attorney fees - must match the Debtor's Attorney's Disclosure of Compensation - LBF 1306 (12/1/17)

41. Paragraph 2 must include the name and service address of any creditors whose liens are being avoided in paragraph 6 of the plan.

42. Send the OCP as a fillable PDF file to precon@portland13.com. **New LBR 3015-3 (c)(2) requires the OCP to be submitted to the Trustee no later than 21 days after the 341 is concluded.** REMEMBER: We now have a "fast track" option to eliminate the need for counsel to appear in court.

If you are sending OCPs with an "/s/" you are representing to the court that you possess an image of the signature or an electronic signature (see LBR 9011-4(b)).

Other Issues

43. Tax certificates: If the Oregon Department of Revenue (ODR) has filed an objection to confirmation and no withdrawal has been filed, a tax certificate may be filed in lieu of a withdrawal IF the attorney signing the certificate has seen the returns, can verify that the returns have been filed and can state the amount of any liabilities. Be sure to identify both the priority and non- priority amounts.

44. Do not email, call, fax or send documents shortly before the 341 meeting. If they haven't been sent at least one week before the meeting, bring them to the meeting for inspection. In addition, if you have not sent us the required documents before the 341, wait until after you get our objection before you send anything additional.

45. Do not forward anything but \$ to: Box 420, Memphis, Tennessee 38101-0420. All the \$ goes to Memphis and everything else comes to the Portland office.

46. Do not send documents directly to the Trustee or one of the Trustee's staff unless specifically requested to do so. For pre confirmation matters, use precon@portland13.com and for post confirmation matters, use postcon@portland13.com Any 341 reset requests must be in writing and sent to the Precon email address only.

47. Read any materials before you send them to the Trustee's office. Too often materials (pay stubs, bank statements and tax returns) are sent when it is obvious that they have not been previously reviewed by debtor attorneys. And be mindful that the Trustee's mail server will not accept emails that exceed 5MB in total w/attachments. And separate each category, i.e., tax returns; bank statements; paystubs into individual PDFs.

48. Communicate with your client. Too many debtors arrive at the 341 having no idea when the first plan payment is due or what questions will be asked. This process is stressful enough. Your clients will be far more at ease if they have an understanding of what is about to occur. Coach them before they appear. You will relieve stress and the 341 will be much smoother for everyone. If you are using a "substitute attorney" be sure that substitute understands the case and can answer any questions that might arise. If the substitute cannot effectively answer questions, the meeting will be reset causing needless issues with your debtors and the trustee's office.

The Trustee will present a booklet to each debtor called: ***Get Answers to the 13 most frequently asked questions***” It can be found on page two of my web site. You need to encourage your clients to read through it a keep it close to their bankruptcy papers as the case progresses.

49. Use the feasibility and liquidation programs! Those attorneys who do are far more successful than those who do not. And they are free....just ask. Obtain copies by contacting Hung at hungn@portland13.com.

50. Don't send documents or anything requested by the trustee's office late Wednesday or Thursday mornings before Thursday morning initial confirmation hearings. When they are received that late, they may not be reviewed in time for court and the case likely will require a set over.

USE MY WEB SITE: www.portland13.com