

Plan Development and Drafting Considerations

The most important thing to keep in mind when drafting a plan is that **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. 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.

Calculating E 3 Fixed payments

In the good old days you could pay all the secured creditors pro rata, this would guarantee that the secured creditors were all paid in full before any money went to the unsecured creditors and debtor attorneys didn't have to do as much math. An easy way to simulate this is to calculate what the pro rata payments would be if all the E 3 and E 5 creditors were to paid at the same level and use those numbers to determine the E 3 fixed payments. If you want to pay the car off faster and reduce your client's interest expense just increase the fixed payment. Increasing the E 3 fixed payment won't cause administrative problems like reducing the fixed payment will.

Don't make the mistake of calculating a 60 month payoff for the E 3 creditor and using that amount for the fixed payment. Your client will pay more interest and money will flow to the GUC's before the secured are paid off; it can result in the case staying open longer than required if the plan could otherwise complete in fewer than 60 months.

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

It is very important that the attorney be paid; you may be required to do a little math to make this happen. Because there is no fixed payment feature in E 4 the attorney fees will be paid in full before any money is paid toward mortgage arrears or any lower level claims. If there are no E 3 creditors you don't have to do any gymnastics at all. If E 3 fixed payments aren't large relative to the plan payment you can hit the easy button again. If E 3 fixed payments are large you have to do some more work to get paid early in the case. It is generally accepted that adequate protection payments can be less than the post confirmation fixed payments. You can use sections E 3 and G together to provide for a low initial adequate

protection payment, followed by a higher fixed monthly payment beginning at some future date certain. The higher fixed payment can be effective upon confirmation or some specific future date.

Another method is to use Section G to change the priority level assigned to attorney fees. Calculate the set payments for E 3 creditors as discussed above and use Section G to specify the priority level (E 2 or E 3) for attorney fees. You may also provide for payment of attorney fees in a fixed monthly amount in Section G.

Other Plan Drafting Considerations

Section C

Section C is for mortgages only. All other debts that will be paid directly by the debtor are to be provided for in Section G and or Schedule J. Don't forget to include the monthly payment amount. Current homeowner's association dues don't belong in the plan, only in Schedule J.

Section D 1

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.

Sections E 8 and G should be 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 E 2

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

The creditor name in E 2 should match the creditor name in Schedule D.

Section E 3

Considerations not addressed above include: The infamous §1325(a)(9) "hanging paragraph"; PMSI v. non-PMSI and delinquent property taxes.

§1325(a)(9) "hanging" 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. For motor vehicle loans, Till still controls as to the interest rate paid on these claims, prime rate plus a risk factor of up to 3%.

Unless an E 3 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. Some creditors, notably Best Buy and Home Depot, that may well have financed the purchase of the property do not file secured claims, they usually file as unsecured.

If there is no escrow there is likely to be delinquent property taxes. Be sure to give the county notice by listing them on Schedule D, they will hold the property taxes out of sale if they have notice of the Chapter 13. You can quickly and easily check the amount owed via the county's web site.

Section E 6

Of course the most common priority creditor is IRS. §1322(a)(2) requires that the plan must provide for full payment of all claims entitle to priority under section 507 unless the creditor agrees to a different treatment. In my experience the IRS will not agree to any other treatment. The IRS generally files claims before the original confirmation hearing so getting the number correct should not be a problem.

The most common error here is the misclassification of student loan debt as a priority debt. Student loans are non dischargeable but they are not entitled to priority under section 507.

Section E 8

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

If §1325(a)(4) requires that all unsecured creditors be paid n full then they must be provided interest on their claims.

Section G

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 are hereby disallowed and shall not be paid by the Trustee.

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 redemption of 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 set payments after attorney fees have been paid

Beginning with the Month, Year disbursement, the set payment to Creditor Name E3(a) in Section E 3 (a) shall increase to \$xxx per month and the set payment to Creditor Name E3(b) in Section E 3 (b) shall increase to \$xxx per month.

Changing the priority level of payment of attorney fees through the plan

Debtor attorney fees allowed by court order shall be paid at a priority level equal to creditors provided for in section E X in fixed monthly payments of \$XXX.

Regarding surrender of personal property that secures a debt

Debtor hereby surrenders Description of Asset to Creditor Name.

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, 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.

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.