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"Good Faith" and Confirmation of Chapter 13 Composition Plans: Analysis and a Proposal

I. INTRODUCTION

Chapter 13 of the new Bankruptcy Code has been touted as offering "instant solutions" that can stop "repossessions[,] law suits[,] foreclosure[,] shut offs[,] harrassment[,]" and "judgements" faced by insolvent debtors. The liberalized access to Chapter 13 and its substantial advantages over straight bankruptcy have indeed produced a significant increase in


2. Minneapolis Tribune, Oct. 13, 1980, § A, at 9, col. 2. Although individual debtors can also discharge personal debts under either Chapter 7, 11 U.S.C. §§ 701-766 (Supp. III 1979), or Chapter 11, id. at §§ 1101-1174, Chapter 13 is the best option for most individual debtors. A Chapter 11 reorganization is more expensive and complicated than a Chapter 13 wage earner plan. See Merrick, supra note 1, at 620. Chapter 13 offers benefits not available to debtors under Chapter 7. See note 4 infra.

3. Any individual with regular income is eligible for Chapter 13 relief, provided that his debts do not exceed the statutory limits. See note 25 infra.

4. Under Chapter 13, a debtor, in appropriate circumstances, can obtain an extension of the period of repayment of his secured creditors while retaining possession of the collateral securing the loan and "cramming down" the secured portion of the creditor's claim to the actual value of the property. 11
filings of wage earner plans. More importantly, courts now face two types of Chapter 13 plans that never arose under former Chapter XIII: plans that propose zero or nominal repayment of the claims of unsecured creditors and plans that propose discharge of debts that would not be dischargeable in straight bankruptcy.

To rule on such plans, courts have turned to the Code's requirement that debtor plans be "proposed in good faith"—a vague requirement that is not clarified by legislative history or prior case law. It is thus not surprising that courts have often

U.S.C. § 1325(a)(5)(A)-(B) (Supp. III 1979). Under this "cram down" provision, the debtor, with his creditor's approval, may reduce the creditor's secured interest in collateral to its present value, provided the creditor retains a lien on the property. A debtor may thus keep the property while redeeming it under the plan. If a secured creditor refuses to accept the plan, the debtor can discharge the debt by surrendering the collateral. Id. at § 1325(a)(5)(C).

Furthermore, the Chapter 13 debtor can discharge his or her obligations to unsecured creditors by paying little or nothing on these creditors' claims. Section 1325(a)(4) provides that unsecured creditors must receive at least as much as they would under a Chapter 7 liquidation. In a case in which all the debtor's assets are exempt, unsecured creditors would receive nothing in straight bankruptcy. Thus, no payments to these creditors would be required under this test—also referred to as the "best interest of the creditors" test.

In addition, Chapter 13 enables the debtor to avoid the stigma of straight bankruptcy. See H. Jacob, Debtors in Court: The Consumption of Government Services 114 (1969) (29% of the debtors in straight bankruptcy felt stigmatized by the experience).

Finally, when compared to Chapter 7, the discharge obtained in Chapter 13 is much broader, providing relief from all debts except alimony and child support. Compare 11 U.S.C. § 1328(a)(2) (Supp. III 1979) with id. at § 523(a). In addition, a debtor is barred from refileing in Chapter 7 after six years after a liquidation. Id. at § 727(a)(8). The six year bar does not apply to Chapter 13 plans that both represent the debtor's "best effort" and repay 70% on allowed claims. Id. at § 727(a)(9)(B)(i)-(ii).

5. Compare Table F2, Admin. Office of the U.S. Courts (1979) (indicating that for the 12 month period ending June 30, 1979, 39,442 wage earner plans, out of a total of 226,476 bankruptcy cases, were filed) with Table F2 BC, Admin. Office of the U.S. Courts (1980) (indicating that for the 9 month period ending June 30, 1980, 47,458 wage earner plans, out of a total of 209,399 bankruptcy cases, were filed).

6. Although creditors dissatisfied with the proposed dividend previously could block a debtor's access to old Chapter XIII, creditors have no such veto power under the new Code. See note 26 infra. In addition, the new Code provides that a debtor's plan may schedule debts for discharge that previously were not dischargeable in old Chapter XIII, see note 27 infra, and currently are barred from discharge in Chapter 7. See note 4 supra.

7. See, e.g., In re Iacovoni, 2 B.R. 256, 258-59 (Bkrtcy. D. Utah 1980).


10. Id. at § 1325(a)(3).

11. See 5 W. Collier, COLIER ON BANKRUPTCY § 1325.01(C) (15th ed. 1979). Some courts have endeavored to interpret the new good faith requirement by
differed over the application of the good faith standard—many courts hold that “good faith” requires some minimal percentage of repayment, while others focus on either the debtor’s ability to repay or subjective intent as measures of “good faith.” Because of this unpredictability with respect to a given plan’s chance for confirmation, some debtors may be compelled to liquidate their assets in straight bankruptcy. Of course, the same result usually occurs when a court denies confirmation of a Chapter 13 plan as not in “good faith.” Ironically, creditors may be the ultimate losers in this process because Chapter 13 plans may offer more total debt repayment than could be achieved through liquidation. Therefore, both creditors and debtors would be better served by a clear, properly balanced, and consistently applied standard of “good faith” in Chapter 13 proceedings.

This Note will briefly outline the history of Chapter 13 plans in order to demonstrate the significance of the good faith requirement. It will then analyze the judicial treatment of “good faith,” exploring how the various “good faith” formulations affect debtors, creditors, the policies underlying bankruptcy reform, and the economics of the bankruptcy system. Finally, this Note proposes that “good faith” should be interpreted to require only that a debtor’s plan represents his or her “best effort” to repay unsecured creditors, regardless of the actual quantum of repayment under the plan—confirmation analogizing it to the requirements of the superseded Bankruptcy Act. See In re Cloutier, 3 B.R. 584, 587 (Bkrtcy. D. Colo. 1980) (holding that “good faith” had not been interpreted as requiring any minimum of payments under old Chapter XII, Chandler Act of 1938, ch. 575 § 467, 52 Stat. 923, and thus confirmation under the new Code should be denied “only in those cases in which there has been an abuse of the provisions, purposes, or spirit” of the Bankruptcy Code). But see In re Terry, 3 B.R. 63, 64-65 (Bkrtcy. W.D. Ark.) (old Chapter X good faith definition, Chandler Act of 1938, ch. 575, § 146, 52 Stat. 887, inapplicable to § 1325(a)(3)), rev’d on other grounds, 630 F.2d 634 (8th Cir. 1980) (analysis should focus on extent of payments). Congress has recently indicated that the good faith requirement was intended to retain its historical meaning as a measure of the debtor’s purpose in seeking Chapter 13 relief. See note 109 infra.

12. See notes 49-78 infra.
13. See notes 101-11 infra.
14. See notes 91-100 infra.
15. See text accompanying note 123 infra.
16. See 11 U.S.C. § 1325(a)(4) (Supp. III 1979) (requiring that a Chapter 13 plan must provide at least as much as unsecured creditors would receive in a Chapter 7 liquidation). Presumably, a debtor will desire to repay his or her unsecured creditors in an amount consistent with his or her budget and income. Thus, a Chapter 13 plan will often provide payments in excess of the minimum prescribed by § 1325(a)(4). See Craven, The Role of the Debtor's Attorney in Chapter 13 (1980) (presented as a paper to the annual meeting of the National Association of Chapter 13 Trustees at Williamsburg, Virginia on July 14, 1980).
should be denied only if a plan is less than the debtor's best effort.

II. CHAPTER 13 AND THE REQUIREMENT OF "GOOD FAITH"

A. CHAPTER XIII AND BANKRUPTCY REFORM

Wage earner plans that allow insolvent debtors to repay creditors from future income were first developed by Special Bankruptcy Referee Valentine Nesbitt in the early 1930s. Nesbitt's experiments with wage earner plans formed the model upon which Congress relied in adopting Chapter XIII in the Chandler Act of 1938. Despite the congressional vision of Chapter XIII as a desirable alternative to straight bankruptcy, wage earner plans received a mixed reception from debtors and the courts, being extensively utilized in some districts and virtually ignored in others. One commentator has suggested that the uneven utilization of wage earner plans may have been a result of the failure of the bankruptcy bar to achieve a "functional consensus . . . as to whether Chapter XIII was designed and intended by Congress to serve as a vehicle for debtor relief and rehabilitation or as a collection device for creditors."

Despite this uncertainty regarding the goals of wage earner

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18. Id. at 116.
19. See Brookings Report, supra note 1, at 74. That study indicated that, although 79% of all debtors filing for bankruptcy relief in the Northern District of Alabama chose Chapter XIII, only 17% of all bankruptcies nationwide were filed under that Chapter. The low percentage of Chapter XIII filings nationwide is attributable in part to the inclusion in the survey sample of business debtors who could not file wage earner plans. Nevertheless, another bankruptcy study noted, "There are . . . districts . . . in which the records do not disclose any, or more than a handful of, Chapter XIII petitions filed in any year since 1938." Commission Report, supra note 1, at 157, reprinted in 2 app. W. Collier, supra note 1, at I-157.
20. Cyr, supra note 17, at 117 (footnotes omitted). Judge Cyr noted that, [t]he Chandler Act of 1938 failed badly in its attempt to identify, select and order the priority of the public policy objectives of Chapter XIII. Critical provisions affecting Chapter XIII were hastily put together in the waning hours prior to its enactment, with the result that they were modeled on the inapposite provisions of the arrangement and reorganization sections of Chapters X and XI.

Id.

Many bankruptcy attorneys and referees counseled debtors against the use of Chapter XIII in the belief that the administration of the debtor's plan would prove to be unduly burdensome. See Brookings Report, supra note 1, at 75-76; Commission Report, supra note 1, at 187-58, reprinted in 2 app. W. Collier, supra note 1, at I-157 to -158.
plans, Chapter XIII in practice resulted in substantial repayment of creditors' claims: under completed plans, creditors received, on the average, over 90% of their allowed claims, and in cases that were dismissed prior to completion, secured creditors recovered 39% and unsecured creditors recovered 19% of their allowed claims. The emphasis on substantial repayment, however, influenced many debtors to undertake a higher percentage of repayment than was practicable—over half of all Chapter XIII plans were dismissed prior to completion—leaving Chapter XIII's potential for debtor rehabilitation largely unfulfilled. The rehabilitative value of old Chapter XIII also seems doubtful given the significant number of debtors who resorted to it more than once.

Acknowledging these shortcomings, Congress substantially revised Chapter XIII in 1978 to encourage more debtors to attempt repayment rather than liquidation. Congress liberalized the Chapter 13 eligibility criteria, eliminated the

21. See BROOKINGS REPORT, supra note 1, at 102. See also Boren & Ralston, Chapter XIII Wage Earner Plans: An Analysis of Their Effectiveness, 15 AM. BUS. L.J. 293, 304 (1977). Although Chapter XIII, like present Chapter 13, allowed both extension and composition of debts, "[i]t is . . . probable that referees, Chapter XIII trustees, and attorneys . . . discouraged debtors from seeking relief by way of composition unless at least 50% or more of the petitioner's debts [could] be paid within the customary three-year period and without an undue burden on the debtor." COMMISSION REPORT, supra note 1, at 161, reprinted in 2 app. W. COLLIER, supra note 1, at I-161. This observation accounts for the substantial repayment of creditors' claims under Chapter XIII and suggests that if a debtor could not substantially repay his creditors, Chapter XIII was regarded as inappropriate.

22. See BROOKINGS REPORT, supra note 1, at 101; Boren & Ralston, supra note 21, at 300.

23. See BROOKINGS REPORT, supra note 1, at 104-05. Overall, 23% of Chapter XIII debtors had previous experiences in bankruptcy. Id.

24. The "proposed Chapter 13 encourages more debtors to repay their debts over an extended period rather than to opt for straight bankruptcy liquidation and discharge." H.R. REP. No. 595, 95th Cong., 1st Sess. 5, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 5966 (footnote omitted). See also BROOKINGS REPORT, supra note 1, at 5, 210-12; COMMISSION REPORT, supra note 1, at 13-14, reprinted in 2 app. W. COLLIER, supra note 1, at 1-13 to -14; S. ENZER, supra note 1, at 10, 71.

25. Under the old Act, Chapter XIII was available only to individuals whose "principal income" was "derived from wages, salary, or commissions." Chandler Act, ch. 525, § 606(8), 52 Stat. 930 (1938). In contrast, Chapter 13 eligibility is limited to individuals with "noncontingent, liquidated, unsecured debts of less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000." 11 U.S.C. § 109(e) (Supp. III 1979).

Any "individual with regular income" is eligible to file a Chapter 13 plan. See 11 U.S.C. §§ 101(24), 109(e) (Supp. III 1979). This definition of eligibility embraces not only wage earners, but also pensioners, social security recipients, and the self-employed. See Lee, Chapter 13 see Chapter XIII, 53 AM. BANKR. L.J. 303, 304 (1979). See also In re Iacovoni, 2 B.R. 256, 259-60 (Bkrtcy. D. Utah
requirement that creditors vote their approval of each plan, and expanded the scope of the Chapter 13 discharge. Because the new Code does not require any minimum percentage of repayment, these modifications make it possible for debtors to submit wage earner plans that would discharge obligations with little or no payment of unsecured claims. In addition, debtors can now seek to discharge debts not dischargeable in straight bankruptcy by proposing nominal or zero payment to unsecured creditors.

Neither the statute nor its legislative history expressly addresses the propriety of this unprecedented use of Chapter 13. Section 1325(a) of the Code provides that “[t]he court shall confirm a plan” if six tests are satisfied, the most important of which require that the plan be proposed in “good faith,” that it be in the best interest of unsecured creditors, and that the debtor have sufficient resources to make all the

1980) (welfare recipients qualify for Chapter 13 relief). Because the new Code is not concerned with the source of income, but instead with the debtor's ability to repay creditors, Chapter 13 eligibility seems likely to include individuals receiving alimony or whose income is derived from property. See H.R. REP. No. 595, supra note 24, at 118, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 6079-80. Not all sole proprietors and self-employed professionals, however, may file under Chapter 13. See 11 U.S.C. § 101(24) (Supp. III 1979) (denying eligibility to stock and commodity brokers).

26. Under old Chapter XIII, all secured creditors and a majority of unsecured creditors were required to have accepted the plan before a debtor could apply for confirmation. Chandler Act, ch. 575, § 652(1), 52 Stat. 934 (1938). Under new Chapter 13, unsecured creditors are given no opportunity to vote on the plan; their interests are protected by the “best interest of the creditors” test. See note 4 supra.

27. Former Chapter XIII excepted from discharge back taxes, debts obtained by means of fraud or embezzlement, debts not scheduled under the plan, debts for intentional torts, student loans, back wages, alimony, and child support. See Bankruptcy Act of 1898, ch. 541, § 17, 30 Stat. 550, as amended by Chandler Act, ch. 575, § 690, 52 Stat. 935 (1938). The new Code provides a discharge from all debts scheduled under the plan except alimony, child support, and long term obligations "on which the last payment is due after the final payment of the plan is due." 11 U.S.C. §§ 1325(a)(2), 523(a)(5) (Supp. III 1979).

28. There appears to be a trend toward zero or nominal payment Chapter 13 plans that would not have arisen under the former Act because of the creditor approval requirement. See, e.g., In re Hurd, 4 B.R. 551, 559 (Bkrtcy. W.D. Mich. 1980) (statistics indicating that the number of nominal payment Chapter 13 plans filed had increased markedly since the enactment of the new Code).


30. See note 11 supra.
32. Id. at § 1325(a)(3).
33. The so-called "best interest of the creditors" test is derived from § 1325(a)(4). That section provides that unsecured creditors must receive at least as much as they would realize from a Chapter 7 liquidation. See note 4 supra.
payments required under the plan.\textsuperscript{34} Because nominal payment plans can often comply with these requirements, courts have found it difficult to develop principled criteria for confirming or denying confirmation to these plans. In an apparent attempt to force nominal payment plans into the mold of the substantial repayment that was typical under former Chapter XIII, some courts have seized upon the good faith requirement, interpreting it to require rejection of nominal payment plans.\textsuperscript{35} A clear, consistent standard of "good faith," however, has yet to emerge.

B. Judicial Treatment of the Good Faith Requirement

\textit{In re Iacovoni}\textsuperscript{36} is the leading case construing "good faith" to deny confirmation of Chapter 13 plans that propose zero or nominal repayment of unsecured claims. In \textit{Iacovoni}, the bankruptcy court ruled on eight wage earner plans that proposed to pay little or nothing to unsecured creditors whose claims ranged in total amount from $3,233 to over $17,000.\textsuperscript{37} All of the debtors apparently were capable of making some repayment to unsecured creditors in excess of the proposed amounts.\textsuperscript{38} The court refused to confirm any of the eight plans, holding that "good faith" means that debtors must "make meaningful payment to holders of unsecured claims."\textsuperscript{39}

Relying on the express terms, the legislative history, and the overall structure of the new Code,\textsuperscript{40} the court reasoned that Chapter 13 was intended to serve "as a vehicle for the voluntary repayment of debts,"\textsuperscript{41} and thus, that "the plan must propose a legitimate or substantial repayment of unsecured claims."\textsuperscript{42} Recognizing that interpreting "good faith" to require

\begin{itemize}
  \item \textsuperscript{34} \textit{Id.} at § 1325(a)(6).
  \item \textsuperscript{35} See, e.g., \textit{In re Burrell}, 6 B.R. 360, 363-64 (Bkrtcy. N.D. Cal. 1980).
  \item \textsuperscript{36} 2 B.R. 256, 258-59 (Bkrtcy. D. Utah 1980).
  \item \textsuperscript{37} See \textit{id}.
  \item \textsuperscript{38} One debtor's monthly budget indicated an excess of gross income over expenses of $76.16, but he proposed payments of only $11.96, to be distributed between one secured creditor and the trustee. The budget of another debtor showed $101.16 in surplus monthly income, but he proposed to pay a total of only $21.52 under the plan. \textit{Id}.
  \item \textsuperscript{39} \textit{Id.} at 267. One might argue that this remark is dictum and that the narrow holding of \textit{Iacovoni} was simply that under the facts, debtors' zero payment plans were not proposed in "good faith." Such an argument ignores the intellectual thrust of the opinion, however, which converges with the court's conclusion that "good faith" requires "meaningful payment." \textit{Accord, In re Hurd}, 4 B.R. 551, 558 (Bkrtcy. W.D. Mich. 1980).
  \item \textsuperscript{40} See 2 B.R. at 262-65.
  \item \textsuperscript{41} \textit{Id.} at 263 (emphasis omitted).
  \item \textsuperscript{42} \textit{Id.} at 267.
\end{itemize}
“meaningful payment” provides little guidance to debtors, the court promulgated a four-point test that makes the question of whether the proposed payment is “meaningful” contingent upon:

1. The budget of the debtor, i.e., how much the debtor feasibly can pay.
2. The future income and payment prospects of the debtor.
3. The dollar amount of debts outstanding, and the proposed percentage of repayment.
4. The nature of the debts sought to be discharged; specifically, to what extent the debtor is invoking the advantage of the broader Chapter 13 discharge which may carry with it concomitant obligations of [greater] repayment effort.43

The court emphasized that evaluation of the debtors’ plans must be made “equitably and flexibly.”44

Considered in conjunction with the facts in Iacovoni, these four factors suggest several alternative formulations of the good faith standard. First, the Iacovoni court’s conclusion that Chapter 13 was intended as a vehicle for voluntary repayment of unsecured creditors and its holding that “meaningful payment” is required, imply that “good faith” mandates some minimum repayment to unsecured creditors. In short, zero or nominal payment to such creditors would not be in “good faith.” The second possible formulation of “good faith” is similar to the first, but would demand greater repayment when a debtor proposes to discharge debts in Chapter 13 that are not dischargeable in straight bankruptcy.45 A third formulation would focus on the debtor’s subjective intent or motivation.46 A final variation of the good faith standard would depend on whether the debtor’s plan represents his or her best effort to repay unsecured creditors.47

These four alternative formulations of the good faith standard also appear to varying degrees in the opinions of other courts ruling on zero or nominal payment Chapter 13 plans.48

43. Id. (footnotes omitted).
44. Id.
45. This formulation is suggested by the court’s criticism of one debtor who attempted to discharge otherwise nondischargeable student loans, and the court’s warning that “the broader Chapter 13 discharge may carry with it concomitant obligations of repayment effort.” Id.
46. This formulation is implied by the court’s admonishment of debtors who file “only for the broader discharge.” Id. at 263.
47. Although the Iacovoni court specifically mentioned the debtor’s ability to repay creditors and the percentage of proposed repayment in light of that ability as factors to be considered in evaluating the “good faith” of the debtor’s plan, it rejected the “best effort” test, arguing that it was contrary to congressional intent. Id. at 267. See note 108 infra and accompanying text.
48. See notes 49, 80, 83, 91, 96-99, 101-05 infra.
These courts have had difficulty reaching a consistent, unambiguous construction of the good faith requirement, however, and the precise holding of many cases is thus difficult to discern. Because of this difficulty, it is most useful to consider the cases within the framework of the four "good faith" formulations implicit in Iacovoni.

1. The Requirement of Minimum Repayment to Unsecured Creditors

The interpretation of "good faith" that requires minimum repayment to unsecured creditors is derived in part from the legislative history of Chapter 13. Courts adopting this standard emphasize that Congress envisioned that debtors would utilize wage earner plans as a means of repaying creditors. Indeed, the Senate Report accompanying the Bankruptcy Reform Act of 1978 provides:

The new chapter 13 will permit almost any individual with regular income to propose and have approved a reasonable plan for debt repayment based on that individual's exact circumstances. As in current law, 100 percent payment plans will be encouraged. . . . It is also necessary to prevent chapter 13 plans from turning into mere offers of composition plans under which payments would equal only the non-exempt assets of the debtor.

The House Report contains similar language, noting that "[t]he purpose of chapter 13 is to enable an individual . . . to develop and perform under a plan for the repayment of his debts."

Although this legislative history clearly shows that creditor repayment is to be encouraged under Chapter 13, it does not indicate whether payments are required in all cases, nor does it indicate what percentage should be deemed adequate. It also

49. See, e.g., In re Terry, 630 F.2d 634, 635 (8th Cir. 1980); In re Burrell, 6 B.R. 360, 363-64 (Bkrtcy. N.D. Cal. 1980); In re Hobday, 4 B.R. 417, 419-21 (Bkrtcy. N.D. Ohio 1980).


52. Id.

53. The Senate Report does state that "[i]t is . . . necessary to prevent Chapter 13 plans from turning into mere offers of composition," S. REP. No. 989, 95th Cong., 2d Sess. 13 (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5787, 5799. See text accompanying note 50 supra. It is clear from the context, however, that the Senate was referring to the requirement that 70% repayment be made under Chapter 13 to qualify within six years for relief in straight bank-
fails to address the role "good faith" will play in evaluating a debtor's proposed payments to unsecured creditors. The absence of legislative expression on these questions is significant because the Code itself imposes no minimum percentage of repayment. Some courts nevertheless maintain that the available legislative history, and the repeated references to "payment" in the Code itself, imply that a plan must provide some non-nominal payment on all allowed claims.54

Courts requiring minimum repayment also assert that the structure of the new Code demands some compulsory level of payment to unsecured creditors under Chapter 13. As the Iacovoni court argued, Congress's decision to eliminate the creditor payment demand left Chapter 13 "out of balance."55 Similarly, the court in In re Burrell contended that

[h]aving eliminated the creditor's veto right . . ., Congress cannot lightly be held to have removed the major remaining protection accorded to these creditors, that is, the requirement of full or substantial payment. If Congress had intended to abolish the substantiality requirement, it could have done so unambiguously. Because it did not, this Court must conclude that no change was intended.56

This structural argument includes the observation that the Chapter 13 hardship discharge provision would be rendered superfluous if zero payment plans were allowed—such plans would be "completed" before they were begun.57

ruptcy, see 11 U.S.C. § 727(a)(9)(B) (Supp. III 1979), and was not implying that a good faith requirement is an appropriate means of discouraging nominal payment Chapter 13 plans.

54. See, e.g., In re Barnes, 5 B.R. 376, 378 (Bkrtcy. D.D.C. 1980); In re Iacovoni, 2 B.R. at 262 (citing 11 U.S.C. §§ 101(24), 109(c), 1325(a)(6), 1325(b), 1326 (Supp. III 1979)). Sections 101(24) and 109(e) set forth the qualifications for and definition of a Chapter 13 debtor. Because the qualifying debtor must be an individual with "regular income," the Iacovoni court concluded that this requirement is intended only to allow debtors to make payments. 2 B.R. at 262. Similarly, § 1325(a)(6) requires that the debtor be able to make "all payments under the plan." Therefore, the court argued, the Code implies that payments are required. Id. This conclusion is reinforced by the provision in § 1325(b) that debtors distribute "all or any part" of their income under the plan. Finally, the court reasoned that the title of § 1325—"Payments"—implies that some payment is required. Id. For a contrary analysis, see text accompanying notes 61-76 infra.

55. 2 B.R. at 265.

56. 6 B.R. 360 (N.D. Cal. 1980).

57. Id. at 364.


59. See In re Iacovoni, 2 B.R. at 262-63. Although the hardship discharge is indeed not needed by debtors proposing zero payment plans, the hardship discharge is necessary to those debtors who can and do propose repayment of unsecured claims. The inclusion of the hardship discharge suggests that Congress did not wish to penalize debtors for attempting to repay unsecured
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Other courts have not read the legislative history of Chapter 13 to require payments to unsecured creditors in all cases.\textsuperscript{60} In \textit{In re Cloutier},\textsuperscript{61} for example, the court acknowledged that "Congress contemplated that payments to creditors would be made under Chapter 13," but observed that this payment objective could be satisfied by payments to secured creditors.\textsuperscript{62} Emphasizing that reduced payments to secured creditors are allowed by the Chapter 13 "cram down" provision,\textsuperscript{63} and that debtors are able to schedule attorneys’ fees and priority claims under their plans,\textsuperscript{64} the court stated that "payments allowed by the statute are obviously not limited to payments to unsecured creditors."\textsuperscript{65} The court concluded that there was no reason to infer from language favoring payment generally that Congress must have intended unsecured creditors always to be included.\textsuperscript{66} Moreover, the \textit{Cloutier} court noted that a debtor might desire to take full advantage of the broad Chapter 13 discharge while scheduling no payments to unsecured creditors, and to the extent the plan pursued legitimate ends under the Code, it would not be per se in bad faith.\textsuperscript{67}

Another reason some courts have refused to require a "good faith" minimum payment to unsecured creditors is that section 1325(a) of the Code already requires that every plan be found to be in the "best interest" of unsecured creditors.\textsuperscript{68} In practice, this means that unsecured creditors must be paid at least as much as they would receive in a straight bankruptcy.\textsuperscript{69}

\textsuperscript{60} See notes 61, 67, 70-72 infra.
\textsuperscript{61} 3 B.R. 584 (Bkrtcy. D. Colo. 1980).
\textsuperscript{62} \textit{Id.} at 585-86.
\textsuperscript{63} \textit{Id.} at 586.
\textsuperscript{64} See id. (citing 11 U.S.C. § 1322(a)(2) (Supp. III 1979)).
\textsuperscript{65} \textit{Id.} at 586.
\textsuperscript{66} \textit{Id.}
\textsuperscript{67} \textit{Id.} at 587. The court cited the desire to pay attorneys' fees under the plan, cure a default on a home mortgage, or "cram down" secured creditors, as examples of the legitimate ends in pursuance of which Chapter 13 may, in "good faith," be invoked. "All of these activities further the 'fresh start' envisioned by Congress. . . ." \textit{Id.} See also \textit{In re Johnson}, 6 B.R. 34, 35 (Bkrtcy. N.D. Ill. 1980); \textit{In re Moss}, 5 B.R. 123, 125-26 (Bkrtcy. M.D. Tenn. 1980). See Note, \textit{Protection of a Debtor's "Fresh Start" Under the New Bankruptcy Code}, 29 CATH. U. L. REV. 843, 846-50 (1980) (development of the "fresh start" doctrine).
\textsuperscript{68} See note 4 supra.
\textsuperscript{69} Unsecured creditors, of course, would be paid nothing if the debtor's assets are exempt.
Some courts thus argue that the "best interest of the creditors" test establishes the only standard for evaluating the quantum of proposed repayments to unsecured creditors. These courts emphasize that the use of "good faith" to impose a higher standard for repayment is contrary to the principles of sound statutory construction and represents an improper exercise of judicial prerogatives.\textsuperscript{70} As one court remarked, although many judges may consider zero payment plans to be unjust, "[a] finding of ‘good faith’ should not be based exclusively on the court’s gastronomic reactions to the quantum received by [unsecured] creditors, if the ‘best interest’ test has been met."\textsuperscript{71}

A final consideration is that the use of “good faith” to require meaningful repayment to unsecured creditors “presages nonuniform application of Chapter 13 because of differing judicial attitudes as to what constitutes a ‘good faith’ proposal.”\textsuperscript{72} In other words, the inherently subjective evaluation of the debtor's proposed percentage of repayment will lead to inconsistent and inequitable results. Two recent cases illustrate this concern. A plan under which the debtor sought to cure a default on her home mortgage by proposing zero repayment was confirmed in \textit{In re Bellgraph},\textsuperscript{73} while a debtor's one percent repayment plan was denied confirmation in \textit{In re Barnes}\textsuperscript{74} despite the debtor's desire to use Chapter 13 to avoid eviction from her home. Under both plans virtually all of the debtor's resources were exhausted in payment of the claims of secured creditors. In granting confirmation in \textit{Bellgraph}, the court noted that this was “an exceptional case” because the plan represented “a super effort by the debtor to pay her debts and maintain her home.”\textsuperscript{75} In \textit{Barnes}, however, despite the court's


\textsuperscript{71} \textit{In re Berry}, 2 C.B.C.2d 663, 666 (Bkrtcy. S.D. Ohio 1980).


\textsuperscript{73} 4 B.R. 421 (Bkrtcy. W.D.N.Y. 1980). In \textit{Bellgraph}, the debtor, a 56 year old divorced mother supporting one minor child, was disabled and living on a limited income. Her property taxes were in arrears and a tax foreclosure proceeding had been instituted against her home. The debtor proposed a five year plan under which the secured creditors would be paid in full. \textit{See also In re Johnson}, 6 B.R. 34, 35 (Bkrtcy. N.D. Ill. 1980).

\textsuperscript{74} 5 B.R. 376 (Bkrtcy. D.D.C. 1980). The debtor in \textit{Barnes}, a working mother, supported two dependent children. The court noted that the debtor faced “the risks of eviction and of repossession of her automobile if she [did] not obtain relief under Chapter 13.” \textit{Id.} at 377.

\textsuperscript{75} 4 B.R. at 423-24. \textit{See also In re Curtis}, 2 B.R. 43, 45 (Bkrtcy. W.D. Mo. 1979) (nominal payment plan confirmed under what the court termed “exceptional circumstances”).
characterization of the debtor’s circumstances as “compelling,” the court refused to confirm because “a plan, in order to meet the test of ‘good faith,’ must propose payments to unsecured creditors.” The court’s own conflict notwithstanding, both decisions leave unresolved the disposition of zero or nominal payment plans in less than “exceptional” or “compelling” circumstances.

On balance, an interpretation of “good faith” that requires some minimum repayment is unsound and unwarranted. Nothing in Chapter 13 or its legislative history mandates this result. Furthermore, such a rule substitutes the subjective, unpredictable judgment of courts for the objective “best interest of the creditors” test already provided for unsecured creditors under section 1325(a)(4) of the Code. The gloss of “meaningful” or “substantial” repayment that some courts have added to “good faith” is vague and ambiguous and thus undermines uniform administration of a good faith standard.

2. Debts Not Dischargeable in Straight Bankruptcy and the Good Faith Requirement

Some courts have found “good faith” lacking when debtors seek to discharge obligations under a zero or nominal payment plan that would not be dischargeable in straight bankruptcy. One court, for example, denied confirmation of such a plan, stating that “[w]here otherwise nondischargeable debts are provided for by the plan and will be discharged, a more significant percentage should be required.” Predicating this higher

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76. 5 B.R. at 378.
78. In In re Garcia, 6 B.R. 35, 38 (Bkrtcy. D. Kan. 1980) the court remarked that it could think of nothing more disheartening and frustrating to a debtor in this type of proceeding than to be told that he or she has met the standards expressly set forth in § 1325, has met an imputed requirement of best effort but has failed an imputed and engrafted substantial or meaningful payment requirement. That person is then told to file a Chapter 7 proceeding or in some instances has had a plan converted to a Chapter 7 proceeding where nothing is paid to creditors. All the debtor wished to do was his or her best. Would that all debtors appearing before this Court did.
79. See notes 4, 29 supra.
80. In In re Cook, 3 B.R. 480, 486 (Bkrtcy. S.D. W. Va. 1980). In Cook, the debtor was barred from filing in Chapter 7 by 11 U.S.C. § 727(a)(8) (Supp. III 1979), which establishes a six year bar for debtors filing in straight bankruptcy after a prior Chapter 7 discharge. The court suggested that a “sliding scale” should be employed in assessing the “good faith” of a Chapter 13 plan seeking
repayment requirement on “good faith,” the court observed that “[a] ‘good faith’ plan is the price exacted by Chapter 13 for its more generous relief.”81 Other courts have echoed this concern, holding that zero or nominal payment Chapter 13 plans may not be employed in “good faith” to discharge tort debts82 or other debts excepted from Chapter 7.83 Courts that have refused to confirm these plans have generally relied on the interpretation of Chapter 13 employed in the other minimum repayment cases, arguing that a minimum percentage of repayment to unsecured creditors should be required in all cases.84

Other courts have rejected this approach, declining to impose any extraordinary repayment requirement for Chapter 13 plans that propose discharge of otherwise nondischargeable debts.85 Courts that refuse to treat these plans differently from plans in which no Chapter 7 dischargeability problems are evident emphasize that Congress expressly provided for the broader Chapter 13 discharge. This “plain meaning” approach stresses that “Congress surely was aware that Chapter 13 would make certain persons eligible for discharge of certain debts that would be nondischargeable debts under Chapter 7.”86 Thus “it is not bad faith to utilize the liberal discharge provisions of Chapter 13.”87 These courts conclude that a sound construction of the Chapter 13 discharge provisions is a literal one that should not include the use of “good faith” to require higher repayment standards for debts not dischargeable in Chapter 7.88

to discharge debts barred from discharge by the six year rule. Thus, “when the time since a prior discharge is relatively short, the percentage proposed for creditors should be higher.” 3 B.R. at 496.

81. 3 B.R. at 494.
82. See, e.g., In re Cole, 3 B.R. 346 (Bkrtcy. S.D. W. Va. 1980) (debtor proposed to pay in full a creditor holding a fully secured lien on the debtor’s truck but offered nothing to unsecured creditors, one of whom held a tort judgment against the debtor).
83. See generally In re Bloom, 3 B.R. 467, 467 (Bkrtcy. C.D. Cal. 1980) (“substantial question of dischargeability of some of the major debts” scheduled for discharge under the three plans that were consolidated for consideration at a confirmation hearing). 84. See, e.g., In re Cook, 3 B.R. 480, 482-84 (Bkrtcy. S.D. W. Va. 1980).
88. See, e.g., In re Koeperich, 5 B.R. 752, 755 (Bkrtcy. D. Neb. 1980) (“Section 1326(a) specifically allows a debtor to discharge debts which could not be discharged in a Chapter 7 proceeding; the more general good faith requirement
Those decisions that have imposed a higher repayment standard in nondischargeability cases seem flawed because they confuse the determination of "good faith" with the legal status of the debts scheduled for discharge. This construction of "good faith" is inconsistent with the plain meaning of the statute and is unsupported by any legislative history. Moreover, framing the "good faith" issue in terms of the debtor's attempt to obtain the broad Chapter 13 discharge obscures other aspects of the case that more reasonably bear on the presence or absence of the debtor's "good faith." 89

Any prospective remedy of the discharge disparity should be left to Congress. In response to the judiciary's concerns, Congress might amend the Code to eliminate the disparity in the discharge under Chapters 7 and 13. Other incentives to the use of Chapter 13, such as the "cram down" provision and the ability to cure defaults under the plan, would remain to encourage the continued use of Chapter 13. Until such amendments are enacted, however, the courts should refrain from the use of "good faith" to impose higher repayment standards in nondischargeability cases. 90

89. See In re Marlow, 3 B.R. 305, 307 (Bkrtcy. N.D. Ill. 1980) ("[T]he ultimate question is not whether the debt is non-dischargeable, but whether the plan is filed in good faith.").

90. Persuasive arguments can be made in support of the retention of the present discharge scheme. Commenting on the need to eliminate the overly restrictive exceptions to discharge under the old Act, the Brookings Report suggested:

Where the intent of such exceptions is to punish the debtor for his conduct (as to fraud or sexual irregularities), there are more appropriate sanctions and penalties available elsewhere in the laws. Where the intent is to prefer certain types of claims (as for taxes and wages), we submit that such provisions negate the purposes of bankruptcy proceedings. If an arrangement was feasible, these debts would be paid along with others. If the debtor's situation required a . . . bankruptcy discharge, his "fresh start" would be impeded by the existence of such claims.

3. The Debtor's Subjective Intent or Motivation as the Measure of "Good Faith"

A number of courts have suggested that an important factor in determining whether a plan is in "good faith" is the debtor's subjective intent or motivation in seeking Chapter 13 relief.91 Evaluation of subjective intent has been of particular concern in the nondischargeability cases. As one court has observed,

[i]f its real motive and purpose is to obtain a discharge of the debts . . . and if the true purpose of attaching the label "Chapter 13" to the case is to evade the discharge limitations in a Chapter 7 case, the court should recognize the case for what it is, an illusion.92

The same court noted that under prior Chapter XIII, the "dishonest" debtor was barred from participation in a wage earner plan,93 and that the congressional revisions to Chapter XIII, particularly the elimination of the creditors' vote, altered Chapter 13 so that "the dishonest debtor . . . is now eligible for Chapter 13" relief.94 The court therefore invoked "good faith" as a hedge against the use of Chapter 13 for "dishonest" purposes.95

Other courts have forthrightly asserted that the debtor's subjective intent in utilizing Chapter 13 is the measure of the "good faith" of the plan.96 Unfortunately this characterization adds little specificity to the good faith standard. Moreover, the inherent difficulty in assessing a debtor's subjective intent may lead courts to reach contrary results in cases involving substan-

93. Id. at 469. See also In re Hurd, 4 B.R. 551, 555 (Bkrtcy. W.D. Mich. 1980).
95. Id. at 470-71. See also In re Cole, 3 B.R. 346, 350 (Bkrtcy. S.D. W. Va. 1980); In re Cook, 3 B.R. 480, 48 1 (Bkrtcy S.D. W.Va. 1980) (debtors admitted that their reason for filing Chapter 13 was to discharge debts not dischargeable under Chapter 7 and confirmation was denied).
96. See In re Seely, 6 B.R. 309, 312, 313 (Bkrtcy. E.D. Va. 1980) ("good faith" is a "subjective thing"); In re Cole, 3 B.R. 346, 351 (Bkrtcy. S.D. W. Va. 1980) ("[i]n the instant case, 'good faith' is subjectively lacking"). After reviewing the treatment of "good faith" under the old Bankruptcy Act, the Seely Court declared that it appears the Courts are concerned with maintaining the integrity of the system vis-a-vis the unscrupulous debtor. So long as the petition is filed with the intent to utilize the Act to obtain relief in a legitimate fashion, good faith will exist. It is lacking when a debtor attempts to manipulate the statutory scheme for his own benefit at the expense of his creditors.
6 B.R. at 313. The court concluded that the definition of "good faith" under the Act retained viability under the Code. Id.
tially similar fact patterns. Nevertheless, those unusual cases involving particularly egregious examples of debtor abuse of Chapter 13 might properly be decided under the subjective definition of "good faith." In one case, for example, the debtor defrauded his creditors and attempted to discharge the tainted debts in Chapter 13;97 in another, debtors filed in Chapter 13 with no apparent desire to attempt creditor repayment.98 In these cases some courts have identified impermissible subjective intent as abuse of the "provisions, purposes, or spirit of Chapter 13."99 Although less sharply defined abuses of Chapter 13 will inevitably present courts with difficult decisions, subjective intent is nonetheless a plausible definition of the good faith standard and recent developments in Congress suggest that courts should continue to employ this formulation, at least when its application can be clear and consistent."100

4. "Good Faith" Requires the Debtor's "Best Effort" to Repay Unsecured Creditors

Many of the opinions ruling on zero or nominal payment Chapter 13 plans have alluded to a "best effort" test for evaluating the debtor's "good faith."101 Under this formulation of the

97. In re Tanke, 4 B.R. 339, 340 (Bkrtcy. D. Colo. 1980) ("to confirm this plan would, in effect, make the bankruptcy court the Debtor's instrument for perpetrating fraud").
98. In re Burns, 6 B.R. 286 (Bkrtcy. D. Colo. 1980) (debtor's duplicity, inferred from their failure to schedule some creditors under an old Chapter XIII plan while making full payment to other creditors, was grounds for not confirming Chapter 13 plan).
100. See note 109 infra. As a corollary to the formulation of subjective "good faith," courts have also found "good faith" lacking when a debtor's plan would serve no rehabilitative purpose. In In re Lockwood, 5 B.R. 294 (Bkrtcy. S.D. Fla. 1980), the Lockwoods filed in Chapter 13 in order to avoid a deficiency judgment on their home mortgage. As of the date of the filing of the petition, the house had been sold to their attorney. The court observed:

The plan fails to comply with the good faith requirement of § 1325(a)(3) in that the plan does not provide any rehabilitation of the debtors. They, in effect, had lost their real property prior to the filing of these proceedings and are not being reinstated in ownership or possession, since, as part of the plan, they have agreed to transfer their interest in the real property to their attorney. Their consumer debts have not been dealt with in any manner whatsoever under the plan, leaving them absolutely no better off than they were before the jurisdiction of this court was invoked. The debtors have been persuaded to opt for an illusory benefit, while the only real benefit goes to the new purchaser.

Id. at 297.

101. As one court stated, "[i]n determining whether a debtor's Chapter 13 plan has been proposed in good faith it must necessarily be of paramount importance whether the payments, periodic and total, represent the best effort
good faith standard, a plan must provide for payment of a substantial amount of the excess of a debtor's net monthly income over reasonable, budgeted expenses. *In re Anderson*\(^2\) perhaps best illustrates the application of the best effort standard. The *Anderson* court denied confirmation of a plan scheduled to run fifteen months that would have repaid unsecured creditors one percent of their allowed claims. The court noted that the debtors "admitted that they could afford to make the monthly payments... for a period longer than fifteen months, but did not intend to do so."\(^3\) The court elaborated:

[If... a debtor is to avoid bankruptcy and gain the benefits of Chapter 13, the quid pro quo is that he should pay according to his ability and circumstances, thereby providing fairly and responsibly for his creditors within the spirit of Chapter 13. That is what the “good faith” requirement demands. That element is one which the Court must consider on a case by case basis since the circumstances and abilities of each debtor will differ.\(^4\)]

Thus, in the court’s estimation, the debtors’ plan failed to satisfy the good faith requirement, not because the plan proposed only nominal payments to unsecured creditors, but because the debtors could afford to make larger payments and chose not to do so.\(^5\)

Although courts have consistently refused to confirm plans which the debtor can apply against the scheduled indebtedness.” *In re Marlow*, 3 B.R. 305, 308 (Bkrtcy. N.D. Ill. 1980) (emphasis added). In *In re Cook*, 3 B.R. 480 (Bkrtcy. S.D. W. Va. 1980), the court implicitly raised the best effort test, noting that the Chapter 13 repayment standard to be employed by courts should encourage debtors to repay unsecured creditors as much as their budgets will allow. *Id.* at 485-86. *See also In re White*, 4 B.R. 349, 350 (Bkrtcy. E.D. Va. 1980).

102. 3 B.R. 160 (Bkrtcy. S.D. Cal. 1980).
103. *Id.* at 162.
104. *Id.* at 163.
105. *Accord, In re Henry*, 4 B.R. 220 (Bkrtcy. M.D. Tenn. 1980) (debtor's 10% repayment plan not confirmed because the debtor failed to demonstrate why payments could not continue after four months); *In re Schongalla*, 4 B.R. 360 (Bkrtcy. D. Mo. 1980) (budget surplus after monthly payment to creditors along with impending legal career indicated plan did not deal fairly with creditors). The *Anderson* line of cases seems to suggest that a debtor's bad faith might be remedied by increasing either the duration or the dollar amount of repayments under the plan. Although one court has suggested this tactic as a means of establishing a debtor's "good faith", another court has unequivocally rejected a proposed extension of the scheduled payment period. *Compare In re Blackwell*, 5 B.R. 748, 752 (Bkrtcy. W.D. Mich. 1980) (suggesting that a 36 month plan be extended to 60 months) *with In re Moss*, 5 B.R. 123, 125 (Bkrtcy. M.D. Tenn. 1980) (stating that "[t]his court cannot conclude that a plan otherwise non-confirmable under § 1325 can be made confirmable by an extension from 3 to 5 years"). Neither *Moss* nor *Blackwell*, however, involved plans in which the payments were scheduled for a period less than three years. In a case in which payments were scheduled for significantly less than three years, additional payments might very well satisfy the *Anderson* definition of "good faith."
that represent less than the debtor's best effort, the cases have been divided regarding confirmation of nominal payment plans that do satisfy the best effort test. One court declined to confirm the debtor's one percent plan despite its acknowledgment that the plan was the debtor's best effort, but noted that "such a commitment . . . should be given great weight in favor of the debtor's proposal."\(^{106}\) On the other hand, courts have confirmed one percent plans where "the debtor is paying all available funds to the plan," reasoning that "the debtor cannot be required to pay more money than he has into a Chapter 13 plan."\(^{107}\)

Recognizing the validity of the best effort test as a factor in assessing the debtor's "good faith," other courts have nonetheless refused to equate "good faith" with "best effort" because section 1325(a) of the Code does not expressly incorporate a best effort criterion.\(^{108}\) Because Congress could have included the best effort requirement in section 1325(a) but did not do so, courts using this approach conclude that "good faith" must mean something other than "best effort." This argument overlooks, however, the attempt of the Ninety-Sixth Congress to amend section 1325(a) to require some form of the best effort test.\(^{109}\) Although this legislation has not yet been enacted, the

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106. *In re Beaver*, 2 B.R. 337, 341 n.2 (Bkrtcy. S.D. Cal. 1980). The debtor's sole income in *Beaver* was $580 in monthly unemployment compensation. Out of that amount she supported two young children and proposed to repay unsecured creditors a total of $32.06 with an additional $223.00 scheduled to be paid to her attorney and the Chapter 13 trustee over a course of five months. The court observed that this amount was "the best effort that could be expected of someone in Miss Beaver's circumstances." *Id.* at 341. *See also In re Barnes*, 5 B.R. 376, 378 (Bkrtcy. D.D.C. 1980).

107. *In re Moss*, 5 B.R. 123, 125 (Bkrtcy. M.D. Tenn. 1980). *See also In re Belgraph*, 4 B.R. 421, 423-24 (Bkrtcy. W.D.N.Y. 1980) (confirmed one percent plan was a "super effort"). Another court, while declining to require the debtor's best effort, confirmed a debtor's zero percent plan noting that the payments were indeed the debtor's best effort. *In re Roy*, 5 B.R. 611, 613 (Bkrtcy. M.D. Ala. 1980).

108. *See, e.g., In re Iacovoni*, 2 B.R. at 267. *See also In re Ward*, 6 B.R. 93, 96 (Bkrtcy. M.D. Fla. 1980) ("contrary to some beliefs 'good faith' was not designed by Congress to be synonymous or a substitute for the term 'best effort'").

109. The 96th Congress sought to clarify and correct oversights and ambiguities in the new Code as part of a Technical Amendments Bill to the Bankruptcy Reform Act of 1978. Both the House and Senate versions of the bill passed their respective chambers in December of 1980, 126 CONG. REC. S15,176 (daily ed. Dec. 1, 1980); 126 CONG. REC. H16,140 (daily ed. Dec. 3, 1980), but the legislation was ultimately not enacted. The final versions of both the House and the Senate bills, however, contained the same proposed amendments to the section 1325(a) confirmation standards. The bills would have amended section 1325(a)(4) to include a requirement that a Chapter 13 plan "represents the debtor's bona fide effort." S. 658, 96th Cong., 2d Sess. § 128(b), 126 CONG. REC.
congressional attempt to incorporate a best effort standard sug-


In addition to proposing the bona fide effort requirement, both versions of the bill addressed the good faith requirement of section 1325(a) (3). The original version of S. 658 would have amended section 1325(a)(3) by adding a requirement that the plan be "the debtor's best effort." S. 658, 96th Cong., 1st Sess. § 188, 125 CONG. REc. S12,178 (daily ed. Sept. 7, 1979). The bill was sent to the House, which changed the "best effort" language to a requirement that the plan "represents the debtor's good faith effort." H. 779, 96th Cong., 2d Sess. § 128(b), 126 CONG. REc. H9,299 (daily ed. Sept. 22, 1980). When the House returned the bill to the Senate, the Senate deleted all amendments to section 1325(a)(3) and added the bona fide effort requirement to section 1325(a)(4). S.658, 96th Cong., 2d Sess. § 128(b), 126 CONG. REc. S15,170 (daily ed. Dec. 1, 1980). This final version of the Senate bill was returned to the House, where it was passed with the changes to section 1325(a) proposed by the Senate, H.779, 96th Cong., 2d Sess. § 127(b), 126 CONG. REc. H11,735 (daily ed. Dec. 3, 1980). Despite other differences, the final versions of both bills contained the same requirements for the confirmation of Chapter 13 plans.

The two chambers differed, however, on what was meant by "bona fide effort." The report of the floor debate in the Senate indicates that "a significant percentage, if not all" of a debtor's unsecured obligations must be repaid under the plan in order to establish the bona fides of the debtor's repayment effort. 126 CONG. REc. S15,175 (daily ed. Dec. 1, 1980) (remarks of Sen. DeConcini). Although the proponents in the Senate suggested that the "'bona fide effort' test is intended to require that the plan proposed by the debtor is a real effort . . . to repay his creditors," they conclude that "[n]o arbitrary repayment levels should be required by judges." Id. On the question of the validity of zero or nominal payment plans, the Senate record states that Chapter 7, rather than Chapter 13, is the appropriate remedy for "the debtor who simply [has] no present or foreseeable prospects of paying his debts at all." Id.

The Report of the House Judiciary Committee presents a very different characterization of the repayment levels required by Chapter 13. See H.R. REP. No. 1195, 96th Cong., 2d Sess. 24-25 (1980). The House Report stated that "a chapter 13 debtor . . . should present a plan which demonstrates his willingness to satisfy the just claims of creditors through bona fide efforts to make payments reasonably commensurate with his ability to do so in the circumstances." Id. at 25. Agreeing with the Senate that "subsection 1325(a)(3), as amended, neither prescribes nor authorizes the imposition by the court of a requirement that a chapter 13 plan propose any arbitrary minimum percentage" of repayment to unsecured creditors, the report continued, "the circumstances of a given case may require that the court confirm a chapter 13 plan which proposes no dividend whatever to holders of allowed unsecured claims or that the court deny confirmation of a plan proposing a 95% dividend." Id. (emphasis added).

The House Judiciary Committee Report was issued in reference to the first version of H. 779, see 126 CONG. REc. H9,299 (daily ed. Sept. 22, 1980), which proposed the amendment of § 1325(a)(3) to include the "good faith effort" test. The Senate debate, however, addressed the version of the bill in which the "bona fide effort" amendment to § 1325(a)(4) had been substituted for the § 1325(a)(3) "good faith effort" test. See 126 CONG. REc. S15,170 (daily ed. Dec. 3, 1980). Further confusing the issue of congressional intent, is language in the floor debate accompanying the passage of the final version of H. 779. Congressman Edwards stated that despite "slight differences between the language" in the Sept. 22 and Dec. 3 versions of the bill, H.779, 96th Cong., 2d Sess., 126 CONG. REc. H9,290-304 (daily ed. Sept. 22, 1980); H.779, 96th Cong., 2d Sess., 126 CONG. REc. H11,725-40 (daily ed. Dec. 3, 1980), the Judiciary Committee Report
gests that the best effort test was contemplated by Congress as part of the Chapter 13 confirmation criteria.\textsuperscript{110}

Despite the uncertainty of some courts over the validity of a best effort standard, this characterization of the good faith requirement offers several advantages. First, the best effort standard can be consistently applied—whenever the debtor's plan represents his or her best effort to repay unsecured creditors, regardless of the proposed percentage of repayment, the plan would be confirmed. Courts need not resort to divining subjective intent or to applying an ill-defined, variable requirement of minimum repayment. Second, the best effort test is an objective measure of “good faith.” The debtor, the creditors, and the court can assess the “good faith” of a plan by simple arithmetic once evidence is adduced detailing the debtor's monthly income and expenses. Third, the best effort standard encourages payments to creditors, as contemplated by Congress, to the greatest extent practicable. Finally, a best effort formulation of “good faith” can be more equitably administered. Under this standard, financially distressed debtors will not be denied Chapter 13 relief because they are unable to offer “meaningful” payments to unsecured creditors.\textsuperscript{111}

\textsuperscript{110} Had the Technical Amendments Bill been enacted, “good faith” would indeed assume a meaning distinct from “best” or “bona fide” effort. Because Congress has indicated that a debtor's best effort should be required in Chapter 13 cases, courts should endeavor to enforce the legislative will by construing “good faith” to include a best effort standard.

\textsuperscript{111} Although the courts may differ on the relative austerity of the debtor's budget necessary to demonstrate a reasonable repayment effort, this evaluation is certainly no more arbitrary than the courts' current attempts to define “good faith.” In addition, the best effort standard can be applied in a more equitable manner, because the reasonableness of the debtor's budget will only be at issue in cases in which the debtor's expenses appear to be excessive, as when the debtor has budgeted extravagant amounts for entertainment or transportation. Debtors budgeting reasonable outlays for food, clothing, shelter, and med-
III. A PROPOSED DEFINITION OF "GOOD FAITH"

The best effort standard presented above should be uniformly adopted as the primary criterion of "good faith" in Chapter 13 proceedings. Such a standard is preferable both on its merits and relative to the other formulations of "good faith" that have been employed.

The best effort standard is capable of largely objective application. A debtor's income and necessary expenses are easily demonstrable and the determination of "good faith" requires only an examination of whether the excess of income over expenses is scheduled as fully as possible for repayment. In the vast majority of Chapter 13 cases, there would be no need to attempt evaluation of the debtor's subjective "good faith." An assessment of the debtor's subjective intent may be necessary only in extraordinary cases in which the debtor's plan, albeit his or her best effort, abuses the "provisions, the purposes, or the spirit of Chapter 13"—such as when the debtor does not intend to perform under an otherwise confirmable plan. Subjective intent as a measure of "good faith" thus would retain only an ancillary role in Chapter 13 confirmation proceedings.

In addition to this ease of application, the best effort test promotes the policies underlying Chapter 13 relief, including equality of distribution among creditors, economical administra-

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In determining whether a plan is the debtor's "best effort" prior to confirmation of a plan the court will evaluate several factors. Different facts and circumstances in cases under Chapter 13 operate to make any rule of thumb of limited usefulness. The court should balance the debtor's assets, including family income, health insurance, retirement benefits, and other wealth, a sum which is generally determinable, against the foreseeable necessary living expenses, which unfortunately is rarely quantifiable. In determining the expenses of the debtor and the debtor's dependents, the court should consider the stability of the debtor's employment, if any, the age of the debtor, the number of the debtor's dependents and their ages, the condition of equipment and tools necessary to the debtor's employment or to the operation of his business, and other foreseeable expenses that the debtor will be required to pay during the period of the plan, other than payments to be made to creditors under the plan.

Accord, id. at S17,415 (Oct. 6, 1978).

112. See notes 97-98 supra and accompanying text.

113. It can be expected that in cases in which the debtor's plan reveals an impermissible subjective intent, the plan will also fail to satisfy the best effort test. See, e.g., In re Tanke, 4 B.R. 339, 340-41 (Bkrtcy. D. Colo. 1980). Courts will thus be able to deny confirmation to these plans without reaching the requirement of subjective "good faith."
CHAPTER 13

Denial of Chapter 13 confirmation under an unnecessarily restrictive good faith standard forces debtors to refile under Chapter 7, a result that circumvents the policies underlying bankruptcy reform. Because the same priorities for distribution of the debtor's assets apply to both Chapters 7 and 13, equality of distribution is accomplished under either chapter. The costs of bankruptcy administration, however, are increased by denying confirmation of nominal payment plans. Historically, administrative expenses as a percentage of the debtor's assets were higher under Chapter VII than under Chapter XIII, and in light of the reforms incorporated into Chapter 13, this trend is likely to continue. Moreover, the conversion of the debtor's Chapter 13 case to a Chapter 7 proceeding introduces additional administrative steps and thus further undermines this reform goal. Finally, the debtor's "fresh start" is promoted by the broader discharge and redemption provisions of Chapter 13 relative to Chapter 7. This fresh start is not limited to discharge of debts and redemption of personal property; the broader goal of the fresh start "is to rehabilitate debtors for continued and more value-productive participation in the economy." The Chapter 13 plan, by requiring debtors to live within a highly structured budget, is more likely to accomplish the debtor's rehabilitation than is a liquidation under Chapter 7. The fresh start available under Chapter 13 also avoids the stigma of bankruptcy. Thus, the goals of Chapter 13 relief are better served by allowing nominal payment plans when they are debtors' best ef-

114. COMMISSION REPORT, supra note 1, at 75, reprinted in 2 app. W. COLLIER, supra note 1, at I-75. See also S. ENZER, supra note 1, at 32.

115. Assuming that the debtor is not barred from obtaining Chapter 7 relief by 11 U.S.C. §§ 523, 727(a)(9)(B) (Supp. III 1979), an insolvent debtor will naturally seek relief in straight bankruptcy.


117. BROOKINGS REPORT, supra note 1, at 178.

118. See notes 25-27 supra and accompanying text.

119. In addition, the debtor will probably incur additional attorney's fees associated with the conversion of the case. A hard-pressed debtor can ill afford to assume any added demands on an already overstrained budget.

120. COMMISSION REPORT, supra note 1, at 71, reprinted in 2 app. W. COLLIER, supra note 1, at I-71.

121. It should be remembered that even in a case proposing zero payment to unsecured creditors, the debtor will generally make payments to secured creditors and thus subject himself to the discipline of a plan. But see BROOKINGS REPORT, supra note 1, at 64-65 (noting that although a majority of straight bankrupts had poor payment records on post-discharge debts, Chapter XIII debtors did even worse).

122. See note 4 supra.
fort than by disallowing such plans under a more restrictive
good faith standard.

The more consistent and predictable outcomes available
under the best effort test also resolve the current problem arising
from the "substantial" or "meaningful" payment standards.
Because the latter approaches are inherently subject to vari-
ation between judges, debtors cannot predict whether their pro-
posed payments will be deemed sufficient. In reaction to this
uncertainty, many debtors can be expected to opt for the as-
sured resolution of their financial difficulties through a Chapter
7 liquidation. Chapter 7 deprives at least some unsecured cred-
itors of the dividend they would realize under a Chapter 13
plan, and offers no commensurate benefit.123

The best effort standard also maximizes repayment of cred-
itors: by definition, it requires that every reasonably available
dollar be applied to repayment and could never offer less re-
payment than would be realized from liquidation.

Finally, the economics of bankruptcy suggest that there is
no need to invoke a more restrictive definition of "good faith"
to protect the interests of unsecured creditors by requiring a
minimum repayment. Courts that require a minimum repay-
ment misapprehend the impact of nominal payment plans on
the credit community. Unsecured creditors do not need judicial
protection from perceived abuses of Chapter 13 because credi-
tors generally do not bear the burden of debts discharged in
bankruptcy. One scholar has noted that "[t]he evidence and
economic theory strongly support the proposition that any in-
crease . . . in lending costs brought about by changes in the
bankruptcy law will in the long run be passed along to borrow-
ers or potential borrowers."124 It has also been argued that
creditors can more effectively evaluate the risks and returns as-
associated with a proposed transaction than the courts sup-
pose.125 Indeed, the risk that credit will go bad is present in all

123. Although as the percentage of repayment of unsecured claims ap-
proaches zero the benefit to unsecured creditors is correspondingly diminished,
no creditor will be worse off under Chapter 13 than under Chapter 7. See 11
dischargeable in straight bankruptcy is the exception to this rule. The schedul-
ing of otherwise nondischargeable debts is not sufficient grounds, however, to
deny confirmation to a debtor's Chapter 13 plan. See notes 79-99 supra and ac-
companying text.

124. Meckling, Financial Markets, Default and Bankruptcy: The Role of the

125. Weston, Some Economic Fundamentals for an Analysis of Bankruptcy,
41 L. & CONTEMP. PROB. 47, 60 (Autumn 1977). Another commentator has sug-
gested, however, that the economic costs of zero or nominal payment plans will
credit transactions; lenders anticipate bad debts and pass on these costs to borrowers in the form of higher interest rates. All of this suggests that there are no compelling equitable or economic reasons to deny confirmation of nominal payment plans in the name of creditor justice. Moreover, whether bad debts are discharged under Chapter 7 or Chapter 13 ultimately should have little effect on the profitability of the credit business because even under a nominal payment plan, unsecured creditors cannot receive less than they would in straight bankruptcy.

Thus, the best effort standard of "good faith" should be adopted, requiring only that debtors make every reasonable effort to repay unsecured creditors within the constraints of their income and expenses. If a debtor with limited income proposes to make only nominal or even zero repayments to unsecured creditors and these payments represent the debtor's best effort, the plan should be confirmed regardless of the quantum of repayment proposed or the presence of debts that would not be dischargeable in straight bankruptcy. Conversely, the courts should deem a plan not in "good faith" when the debtor proposes to repay unsecured creditors in an amount significantly less than the debtor's budget can accommodate.

IV. CONCLUSION

Chapter 13 of the new Bankruptcy Code is an attractive alternative to straight bankruptcy. In contrast to repealed Chapter XIII, insolvent debtors can readily propose an extension and composition of debts under the new Code. The relative ease with which debts can be discharged under Chapter 13 has prompted some debtors to propose plans that offer little or nothing to unsecured creditors. These plans have run afoul of many courts that consider zero or nominal repayment of unsecured creditors to be not in "good faith." Neither the Code nor its legislative history mandates this conclusion and, in light of the policies and economics of bankruptcy reform, courts are not be evenly distributed among credit users, but "will be allocated to less affluent groups." Weistart, The Costs of Bankruptcy, 41 L. & CONTEMP. PROB. 107, 118 (Autumn 1977). Charges that the confirmation of zero or nominal payment plans will have an adverse and disproportionate impact on low income borrowers overlook debtors' ability to avoid consumer debts under Chapters 7 and 11 as well as under Chapter 13. Debts discharged under any chapter of the Code are losses to creditors that potentially will be passed on to borrowers in the form of higher interest rates or restrictive lending practices. The bankruptcy system as a whole, and not simply the Chapter 13 good faith requirement, is implicated by this argument.
mistaken in holding that "good faith" requires "substantial" or "meaningful" payment of unsecured claims. Because of the Code's other provisions to protect creditors and because of the legislative history and policy behind the reforms of Chapter 13, "good faith" should be interpreted to require only that the debtor's plan represent his or her best efforts to satisfy the claims of unsecured creditors. Plans conforming to this standard, regardless of the amount of the proposed repayment, would satisfy the good faith requirement and should be confirmed if they otherwise comply with Chapter 13 rules.