

Curing Chapter 13 Plan Defaults, and Modifications to Cure Postpetition Mortgage Defaults

**A. The CARES Act, and the COVID-19 Bankruptcy Relief Extension Act of 2021, Pub. L. No. 117-5, 135 Stat. 249 (2021).**

Certain provisions of the CARES Act lapsed on December 27, 2021, including the bankruptcy status of COVID stimulus payments and the filing of supplemental proofs of claim for mortgage loan forbearances, among other provisions.

However, other important bankruptcy provisions have been extended to March 27, 2022, including authorization for chapter 13 debtors to seek plan modification if the plan was confirmed before March 27, 2021, and the debtor is experiencing a COVID-related hardship.

See *In re Albert*, No. 16-15128 TBM, 2021 WL 4994413, at \*1 (Bankr. D. Colo. Oct. 27, 2021) (McNamara) for a thorough discussion of a debtor's plan payment default in the final month of a chapter 13 plan and the modification permitted under § 1329 and the CARES Act for completion of the debtor's plan. This case also contains a relevant discussion of the *Kinney* decision (10th Circuit) and the *Klaas* decision (3rd Circuit) in relation to discharge after the 5-year limit.

**B. Plan Modification to Cure Postpetition Mortgage Defaults.**

*In re Smith*, 631 B.R. 374 (Bankr. D.N.J. 2021) (Poslusny).

Facts: The debtor lost his job due to COVID-19, his only source of income became unemployment benefits, and he defaulted on his postpetition mortgage payments for the third time. The mortgagee moved for stay relief, and the debtors moved to modify their chapter 13 plan under the CARES Act to extend the plan to 73 months and to cure the postpetition mortgage default through the trustee. The mortgagee objected.

Issue: Whether the debtors can include postpetition mortgage arrears in a modified chapter 13 plan.

Holding: Yes, the debtors are eligible for relief under the CARES Act, the modification is allowed under § 1329, and it does not violate the anti-modification provision of § 1322(b)(2).

Rationale: The court was persuaded by the reasoning of *Hogle* (11th Cir. 1994) and *Mendoza* (5th Cir. 1997) which found that debtors could cure postpetition mortgage arrears by chapter 13 plan modification. The court followed the “plain meaning” of § 1322 and applied the underlying principles of chapter 13 to provide for flexible payment plans and to provide homeowners continuing rights to cure defaults and preserve their primary assets.

### **C. Plan Modification with a Postpetition Personal Injury Settlement**

*In re Taylor*, 631 B.R. 346 (Bankr. D. Kan. 2021) (Somers).

Facts: Based on the debtor's receipt of a \$295,000 settlement for her postpetition injury, the chapter 13 trustee moved for turnover of the settlement proceeds and to modify the confirmed plan for payment in full of all unsecured creditors.

Issue: Whether the proceeds of a postpetition, postconfirmation, personal injury claim are included in the estate when considering a plan modification under § 1329(a).

Holding: No. The settlement was not property of the estate under the "best interests of creditors" test of § 1325(a)(4) and the Court denied the chapter 13 trustee's motion.

Rationale: After a discussion of property of the estate under §§ 541 and 1306, the court followed *Barbosa* (1st Cir. 2000) and the decisions of two retired bankruptcy judges in Kansas by concluding that the effective date of the plan for purposes of applying the "best interests" test was the date of the modified plan instead of the date of the original plan or the filing date of the chapter 13 petition. The court found that § 348(f), not § 1306, determined property of the estate for a hypothetical chapter 7 liquidation, and that the personal injury settlement would not be property of the hypothetical chapter 7 estate.

### **D. Plan Modification with Vehicle Surrender**

*Meredith v. BMW Financial Servs. NA, LLC (In re Burnsed)*, No. 19-41654-EJC, 2021 WL 3013300 (Bankr. S.D. Ga. July 15, 2021) (Coleman).

Facts: Debtor modified the confirmed plan to provide for surrender of a 910 vehicle and no party objected. Three months later, the trustee objected to the creditor's deficiency claim on the basis that surrender under the modified plan was in full satisfaction of the 910 claim.

Issue: Whether, after postconfirmation surrender of a 910 vehicle pursuant to a modified chapter 13 plan, the creditor's deficiency claim should be disallowed.

Holding: No. The trustee's objection to claim was overruled and the creditor's deficiency claim was allowed. Although the language of the modified plan may have been ambiguous, the court was not willing to interpret the form plan or the order confirming the modified plan in violation of the Bankruptcy Code or Circuit Court precedent.

Rationale: The modified plan provided for surrender of the vehicle to satisfy the creditor's secured claim and it approved a deficiency claim after disposition of the collateral. This was consistent with the holding of *DaimlerChrysler Fin. Serv. Am. LLC v. Barrett (In re Barrett)*, 543 F.3d 1239 (11th Cir. 2008) and every other circuit decision addressing this issue. When a debtor surrenders a 910 vehicle, the hanging paragraph knocks out § 506 and leaves the parties to their contractual entitlements, with no effect on their contract rights under state law.