GOOD FAITH IN CHAPTER 13: A NEW WILD CARD FOR BANKRUPTCY

The Bankruptcy Reform Act of 1978 significantly changed the law of bankruptcy in the United States. These revisions are now the subject of considerable attention. Although great care went into the alteration of the bankruptcy statutes, unexpected results appeared once the Bankruptcy Code began to be applied to actual disputes. One interesting development concerns “Chapter 13—Adjustment of Debts of an Individual with Regular Income,” and its requirement of good faith in confirming the debtor's plan. This “good faith” element is contained in §1325 of Title 11 of the United States Code.

5. 11 U.S.C. §1325. Confirmation of plan
   (a) The court shall confirm a plan if—
   (1) the plan complies with the provisions of this chapter and with other applicable provisions of this title;
   (2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;
   (3) the plan has been proposed in good faith and not by any means forbidden by law;
   (4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under Chapter 7 of this title on such date;
   (5) with respect to each allowed secured claim provided for by the plan—
      (A) the holder of such claim has accepted the plan;
      (B) (i) the plan provides that the holder of such claim retain the lien securing such claim; and
      (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or
      (C) the debtor surrenders the property securing such claim to such holder; and
   (6) the debtor will be able to make all payments under the plan and to comply with the plan.
   (b) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee. (emphasis added).
A good understanding of §1325 depends upon a basic knowledge of the new Chapter 13 under the Code. The purpose of the new law is to facilitate adjustments of the debts of individuals with regular income through extension and composition plans funded out of future income, under the protection of the court. Creditor interests are promoted through ratable recoveries from future income not available to creditors in liquidation bankruptcy proceedings. Chapter 13 maximizes debtor relief by preserving to the debtor existing assets, as well as employment or going-concern value, pending completion of a repayment plan under the supervision of the chapter 13 trustee.

The new Chapter 13 is much broader in scope than the old wage earner format, although its use is limited. The debtor must be an individual, rather than a corporation or partnership; must have regular income, and must have unsecured debts of less than $100,000 and fixed secured debts of less than $350,000.

Chapter 13 requires the debtor to file a plan that explains how to repay obligations to various creditors. The plan is then submitted to the bankruptcy court for a confirmation hearing. The old Chapter XIII required the consent of those creditors affected by the plan. Where there was less than unanimous consent, a majority of unsecured creditors affected by the plan had to accept it, provided that number represented a majority of those claims addressed by the plan. The requirement of consenting creditors does not exist under the new law. Under the Code, confirmation of the debtor's plan depends upon satisfying the provisions contained in §1325. A party in interest may object to the plan at the hearing, but unsecured creditors do not have the influence over the debtor's plan that they once did.

This change reflects the efforts of Congress to make Chapter 13 an attractive alternative to the popular liquidation proceedings outlined in Chapter 7. The drafters of the Bankruptcy Code found that many deb-

6. 5 W Collier on Bankruptcy ¶ 1300.02, at 1300-20 (15th ed. 1980) (hereinafter cited as 5 Collier).
10. Id. §1321.
11. Id. §1322.
12. Id. §1324.
13. Id. §§1051, 1056 (repealed 1979).
16. H.R. Rep. No. 595, 95th Cong., 1st Sess. 118 (1977). Congress drafted the Bankruptcy Code under the assumption that the use of bankruptcy law should be a last resort. But, where consumer debtors had to seek the help of the Bankruptcy Code, Chapter
tors would prefer paying back their debts under a court-supervised plan rather than for liquidation. They would prefer paying back their debts under a court-supervised plan rather than for liquidation. Congress also discovered that many debtors, fearing that a fair offer of less than full payment would be rejected by the unsecured creditors, refrained from using Chapter XIII. To protect the creditors' interests, yet provide the debtor with a viable repayment opportunity, Congress drafted §1325. This statute states that the court shall confirm a plan if six separate subsections are satisfied. A good faith requirement is contained in §1325(a)(3). This section provides that a plan shall be confirmed if "the plan has been proposed in good faith and not by any means forbidden by law." This particular subsection has been frequently used as the turning point to resolve disputes over confirmation.

Before one can fully appreciate the confusion surrounding §1325(a)(3), discussion of the differences in the discharge provision is required. A discharge under Chapter 13 is much broader than that granted under Chapter 7. When all payments under the Chapter 13 plan are completed, the debtor will receive a discharge for all his debts except long-term debts whose maturities exceed the term of the plan and for which the plan provided only for during defaults and keeping payments current while the case was pending and non-dischargeable debts for alimony, maintenance, and support.

Chapter 7 excepts many debts from discharge, thus holding the debtor responsible for them after liquidation. In many cases the difference between the discharges can be enormous, enabling the Chapter 13 debtor to avoid debts that would continue under Chapter 7. Attention has been given to the relationship between the discharge provisions of Chapter 13 and the matter of good faith.

13 should be the first choice if the debtor is able to use it. One of the basic principles of bankruptcy law is the notion that a debtor must have a fresh start in order to reap the greatest benefits from his use of bankruptcy law. Although this policy is embodied in both Chapter 7 and Chapter 13, one could argue that thirteen best achieves the goal of a fresh start because of its more favorable discharge provisions. See notes 23-26 and accompanying text infra.

18. Id. at 123. Biery argues that the requirement for creditor acceptance was usually not the factor that prevented confirmation of Chapter XIII plans. She contends that most of the time unsecured creditors accepted the debtor's plan, although the debts were usually reduced or extended in order to achieve this result. Biery, supra note 7, at 489. On the other hand, Congress clearly believed that debtors often chose Chapter 7 over Chapter XIII, because they were reluctant to propose a plan that would probably be rejected. Id.
21. Id. §1325(a)(3).
22. See, e.g., In re Seman, 4 B.R. 568 (1980).
24. Lake, supra note 2, at 368-69.
26. Lake, supra note 2, at 369. Lake realized that the attractive discharge provisions of Chapter 13 would probably force bankruptcy courts to take a long hard look at the proposed
The purpose of this comment is to focus on the use of "good faith" in §1325, as one of the requirements for confirming the debtor's plan. An analysis of the decisions construing this factor and a review of the relevant legislative and case history will result in a proposal of what "good faith" really should mean in Chapter 13.

For many reasons, the problem facing bankruptcy judges in construing the good faith element is unique. An understanding of this dilemma hinges upon how §1325 is used in the Code and how its use differs from the confirmation provisions of the old Chapter XIII.

A careful examination of the repealed Bankruptcy Act will reveal that the term "good faith" was used in two relevant sections regarding the confirmation of the debtor's plan.27 One of the provisions, §651, concerned the plan consented to by all affected creditors.28 Specifically, the court had to be satisfied "that the plan and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by this title."29 This section applied to those plans unanimously accepted by the affected creditors.30

The second section which used "good faith" as a requirement for confirmation of the debtor's Chapter XIII plan was §656.31 This provision supplied a list of those prerequisites that a plan had to meet. Section 656(a)(4) contained language virtually identical to that in §651. Under §656, the court was required to confirm the plan if it was satisfied that "the proposal and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by this title."32

The importance of understanding §§651 and 656 is obvious. Although the Bankruptcy Code has a new procedure for confirming a plan,33 the policy underlying §1325 is not that different from the old law, except for the fact that creditors can no longer vote on the plan.34 In both instances, the respective courts applied the confirmation sections to determine whether the plan was one which would give the debtor a fresh start while enabling him to pay off his creditors under a lighter repayment schedule.35 In each case, part of this test included the notion that a debtor...
must not use the statute to avoid the purposes, spirit, and objectives of the law. Unfortunately, the term "good faith" was not defined in the Act, nor is it defined in the Code.

Cases construing good faith under the Act bear out the fact that neither good faith clause was a popular point of litigation between debtors and their creditors. Few decisions ever turned on the good faith provisions in §§651 and 656. This suggests that either the statute was so clear the parties could never successfully dispute the definition of good faith, or there were other provisions in the Act that adequately protected the debtor and creditor. The second alternative best explains the situation since good faith has often been qualified as a concept that requires case by case application.

Digressing for a moment, the lack of case law concerning §§651 and 656 and their requirements of good faith probably reflects the fact that under Chapter XIII's scheme of allowing creditors to vote on the plan, good faith was present when the unsecured creditors were satisfied with the debtor's proposal. The voting requirement allowed the creditors to scrutinize the plan and any plan that was accepted implicitly contained the element of good faith, while those rejected did not. While a debtor could claim that a plan was not accepted in good faith, the more likely occurrence was a creditor's claim that the plan was not offered in good faith. Consequently, the issue of good faith was disputed and resolved before the plan ever went to court. The Bankruptcy Code has again

36. 10 W Collier on Bankruptcy ¶ 29.06(6), at 339 (14th ed. 1974).
37. 5 Collier, supra note 6 ¶ 1325.01(2)(C), at 1325-8. Collier does not discuss §656 or the good faith clause in it. The author's research found no case construing §656(a)(4), the good faith element, as a condition for confirmation.
38. See, e.g., In Re Anderson, 3 B.R. 160 (1980).
39. Biery, supra note 7. Bankruptcy courts construing §1325(a)(3) of the Code have generally been unable to cite cases under the repealed Bankruptcy Act to support their interpretation of good faith. There are no cases litigating the issue. See note 37 supra. The conclusion that good faith was resolved outside of the courts has a number of implications. First, the debtor was usually in the situation of having to appease his creditors. It is highly unlikely that a desperate wage-earner would be able to extract the same degree of compromise from his creditors as they would be able to from him. The creditors knew they could fall back on liquidation proceedings if they were dissatisfied with the proposed plan. The argument that this was not a good alternative for creditors is rebutted by the fact that Chapter XIII was not used as frequently as Chapter VII. See, e.g., Copenhaver, Ways and Means to Encourage Use of Chapter XIII as an Alternative to Straight Bankruptcy, 24 Bus. Law 321, 323 (1968). Thus it appears, that good faith more often meant what the creditors would accept instead of what the debtor offered. Supporting this thought is the fact that many Chapter XIII plans were not confirmed because creditors would submit unconscionable claims to the debtor. See Countryman, Chapter XIII Wage Earners' Plans: Past, Present and Future, 18 Cath. U.L. Rev. 275, 284-85 (1968). Another implication of this development is that if Congress' work has brought good faith into court where an objective determination can be made, the results of those cases decided under the Code should be different than those plans confirmed under Chapter XIII. Nominal payment plans have been hotly litigated in the bankruptcy courts because they were non-existent under the Act. This does not mean, however, there should not have been such a plan under old Chapter XIII. This discussion does not suggest that
declared that good faith shall be a requirement of confirmation, how-
never, by denying the creditors the right to vote on the plan, the issue
must be litigated in court. Perhaps this is the better of the two options
because the debtor has the court making an objective determination in-
stead of equating good faith with whatever will appease the creditors.
Ultimately, the debtor will be responsible for meeting some measure of
performance in proposing his plan.

Because good faith was a matter impliedly left to the creditors, it
rarely turned up in case law. In actions by creditors against their debt-
ors the use of the concept in Chapter XIII was often discussed, regard-
ing a debtor's good behavior, as a factor warranting special considera-
tion. There are few, if any, cases turning on good faith alone. Typical of
those cases construing Chapter XIII's good faith sections are In re Gar-
cia, and Thompson v. Ford Motor Credit Co. In both of these cases the
court held that good faith on the part of the debtor would be a factor sup-
porting denial of a secured party's motion for reclamation of its collat-
eral. In each case the dispute arose after the confirmation of the
debtor's plan. Neither case defined good faith, nor did the courts
specifically refer to either §651 or §656. The term was used as a prin-

ciple of equity.

These cases indicate that good faith was seldom addressed by courts
construing the statutes, and where it was discussed, it was not used as a
requirement for confirmation. An analogy to Chapter 13 cases is attenu-
ated at best. Thus, a bankruptcy judge who rests the analysis of the
Code's good faith provision on that of Chapter XIII may be correct, but
will have a hard time proving so.

The immediate question raised is: how can such a little-used concept
suddenly explode into one of the most litigated subjects in bankruptcy
law today? At first glance, it would seem that such a development must
have been intended by the drafters of the Code. To a certain degree this
may be true. Recent decisions of the bankruptcy courts have reached

nominal payment plans are always a good faith proposal. The suggestion is that such plans
can be a good faith proposal.

41. See note 37 supra.
42. Thompson v. Ford Motor Credit Co., 475 F.2d 1217 (5th Cir. 1973); In re Garcia,
43. See note 37 supra.
45. 475 F.2d 1217 (5th Cir. 1973).
46. Id. at 1219; Garcia, 396 F. Supp. at 523.
47. Thompson, 475 F.2d at 1218; Garcia, 396 F. Supp. at 519.
48. Thompson, 475 F.2d at 1217; Garcia, 396 F. Supp. at 518.
49. H.R. Rep. No. 595, 95th Cong., 1st Sess. 118 (1977). Good faith disputes were an antici-
pated occurrence to the point that Congress realized the determination would now be
made by an objective court. See note 39 supra. Because the debtor's creditors are no longer
allowed to vote on the plan, approval becomes a matter before the court instead of an issue
resolved at a meeting of the creditors.
completely different results on almost identical facts. If good faith was intended to be a new major point of contention, there is little legislative history to guide the bench in its application of the principle. A probable answer to the question raised above is that good faith has acquired substantial importance in Chapter 13 cases because debtors have been able to formulate nominal or zero payment plans that have cleared all statutory hurdles except §1325(a)(3).

Nominal or zero payment plans have emerged because the only explicit provision of §1325 that addresses amount in reference to a debtor's plan is §1325(a)(4). This subsection states that a plan shall be confirmed providing

the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date.

The creditor must receive at least as much a recovery under the plan as he would had the debtor liquidated. Where the debtor has few assets, many of which are exempt, liquidation would offer little help. Commentators have suggested that there is almost no reason to liquidate if the debtor can use Chapter 13, because the discharge provisions in Chapter 13 are so much better than those in Chapter 7. The increase in the number of Chapter 13 cases suggests that the bankruptcy bar does not have the best policy concerning furthering the policy of the new Code.

The easiest way to appreciate the controversy involving good faith is to review those cases directly addressing the point. A distinct classification of the interpretations offered by the courts does not exist and an attempt to create one would be misinformative. There are, however, a number of approaches that bankruptcy courts have used in their decisions dealing with the good faith in Chapter 13.

One group of decisions, construing §1325(a)(3) in nominal or zero payment plans, has used the concept of good faith to deny debtors the opportunity to restructure contracts with secured creditors. Where the debtor has few nonexempt assets, a liquidation proceeding would offer unsecured creditors only a fraction of what is owed them. Under Chapter 7

50. See, e.g., In re Thebeau, 3 B.R. 537 (1980); In re Seman, 4 B.R. 568 (1980).
52. Id.
54. Where attorneys have proposed plans that clearly do not further the principle of debt repayment, the bankruptcy bar has acted in a manner contrary to the purposes of the Code. A nominal payment plan may indeed achieve the goals of the Code but zero payment plans do not reflect the spirit of Chapter 13.
the secured creditor will generally have no problem protecting a property right by repossessing collateral. 66 By using Chapter 13, the debtor will frequently be able to retain possession of the collateral subject to the security interest, restructure the contract with the secured creditor so that smaller payments may be made over a longer period of time and offer the unsecured creditors just a bit more than they would receive if he had liquidated. 57 If approved by the bankruptcy judge, this is an attractive alternative. A good example of this behavior is illustrated in In re Anderson. 58

In Anderson, the debtors filed a joint petition for relief under Chapter 13. 69 Following a meeting of the creditors, a confirmation hearing was held. 60 The plan was clearly a nominal payment scheme in that it only offered to pay unsecured creditors one percent on the debtor's obligations. 61 The unsecured debts totaled $10,022 and thus the amount to be paid on these obligations was approximately $100. 62 A plan like this could possibly be confirmed. 63 The court rejected the plan because the debtors and their attorney stated that the sole purpose for filing the Chapter 13 petition was to restructure a number of contracts that the Andersons had with secured creditors. 64 This use of the chapter was found to be lacking good faith and the plan was properly denied confirmation. 65

It is true that under §1325(b)(2) of the Code, a debtor is allowed to "rewrite" the terms of a contract when he holds property subject to a security interest. 66 In the instant case, the debtors owed $2,805 in secured debts. 67 The security interests were in a 1975 Chevrolet Vega, a 1974 Datsun stationwagon, and various television and stereo equipment. 68 Had the Andersons' plan been confirmed, they would have been able to cut their payments to secured creditors in half, while having a longer period of time to complete payment. 69

The debtors' attorney in this case might argue that there was no lack of good faith because although the secured contracts were rewritten, depending on which the state allows, a debtor may use those exemptions listed in §522, or those allowed by the legislature of his state. A poor debtor may be able to exempt much of his property from liability for his debts, thus leaving little to liquidate.

68. 3 B.R. 160 (1980).
69. Id. at 161.
70. Id.
51. Id. at 162.
62. Id.
63. This would be the case if the bankruptcy court did not attach any amount requirement to §1325(a)(3). See, e.g., In re Sadler, 3 B.R. 536 (1980).
64. 3 B.R. at 162.
65. Id. at 164-65.
68. Id. at 162.
69. Id.
they were still being paid in full. This reasoning is flawed in several ways. First, even when considered alone, a one percent dividend to unsecured creditors raises good faith questions. The only reason the attorney proposed a one percent payment was to meet the requirements of §1325(a)(4).70

Secondly, Congress enacted Chapter 13 for a number of different reasons.71 Yet, a plan filed just to restructure secured contracts is not one of them. Bankruptcy Judge Pyle noted that where, “a Chapter 13 plan rewrites a secured creditor’s contract incidental to the carrying out of a plan, some alteration of contractual obligations is permissible.”72 Where the only objective of the debtor’s plan is to take advantage of this option, the plan has been offered in bad faith.73

In cases like Anderson, courts should attempt to determine whether the debtor is using Chapter 13 to adjust his debts to be able to repay his creditors. Where repayment is not the main purpose for filing the plan it is probable that the debtor is using the chapter to achieve results that were not intended to be approved by the court.

Judge Pyle’s use of the word “incidental” is very appropriate. It reflects the notion that as long as the debtor’s acts further the purpose of the plan, he will be allowed to take advantage of those incentives in the chapter; otherwise good faith does not exist.74

The holding of Anderson is supported by policy considerations. In Anderson, the court stated that confirmation of a plan like that offered by the Andersons would be a misinterpretation of the Code.75 Calling upon Kokoszka v. Belford,76 Judge Pyle held that the interpretation of any

70. 11 U.S.C §1325 (1976). Confirmation of plan
(a) The court shall confirm a plan if—
(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date.
72. 3 B.R. at 162 (emphasis in the original).
73. Id.
74. This idea has been a consistent thought throughout American bankruptcy law. It is a healthy attitude that acknowledges the debtor will be excused for his debts as long as the law was used as it was intended to be used. See, e.g., In re Cosgrave, 10 F. Supp. 672 (S.D. Cal. 1935). This case involved a debtor who tried to acquire an equity in property for a nominal amount to claim the benefits of §74 of the Bankruptcy Act. The issue came down to whether the debtor was using the Act as the drafters had intended it to be. The court said that good faith means that: The proceeding is brought by a person within the contemplation of the act, and under circumstances which warrant the assumption that some form of fair compromise may be worked out with creditor interests. Id. at 673. Of course the analogy can only be taken so far. The proceeding in Cosgrave was not Chapter XIII but the general principle would still seem to be sound.
75. 3 B.R. at 164.
76. 417 U.S. 642 (1974). Kokoszka dealt with the dispute surrounding the interpretations of §70(a)(5) of the Bankruptcy Act and the Consumer Credit Protection Act. The court
statute should be read so as to promote the internal consistency of the law.\textsuperscript{77} Within the parameters of the Bankruptcy Code, this theory would advance the idea that Chapter 13 has a particular purpose.

The same is true for Chapter 7.\textsuperscript{78} Where a debtor files for relief under Chapter 13 and offers his creditors the same deal as would be provided by liquidation, the courts should preserve the integrity of the Code by rejecting the plan. A review of the differences in the discharges under the two chapters emphasizes the fact that the courts should strive to keep the use of the Code consistent with the policies that created it.\textsuperscript{79}

An added policy consideration is that Chapter 13 is quite accurately titled, "Adjustments of Debts for an Individual with Regular Income."\textsuperscript{80} The adjustment of debts should not be synonymous with the dismissal of debts. The intended purpose of this chapter is to provide a method whereby the individual can reorganize debts, avoid the social stigma of bankruptcy, and then benefit from the advantages of the statute.\textsuperscript{81} Anderson represents those cases that have rightly held that the use of Chapter 13 for the sole purpose of restructuring secured contracts lacks the requisite degree of good faith to justify confirmation. A similar line of reasoning would also call for denying confirmation of those plans that were proposed only to avoid or readjust tax obligations.\textsuperscript{82}

The legislative history of Chapter 13 clearly illustrates that this chapter shall be for debtors who choose to pay back obligations that require adjustment.\textsuperscript{83} Although there is strong evidence suggesting that Congress knew that not all plans would return a dividend of 100 percent, the reports from the legislature assume that the debtor's plan would be used as a vehicle to repay debts and not evade them.\textsuperscript{84}

The discussion above should not be understood to mean that the view taken in Anderson is the last word on the subject. There appear to be no

\textsuperscript{77}Anderson, 3 B.R. at 164.

\textsuperscript{78}See, e.g., H.R. Rep. No. 595, 95th Cong., 1st Sess. 118 (1977). This fact is born out by Congressional recognition that Chapter 13 is to be encouraged over Chapter 7 because it will pay off creditors while allowing the debtor to retain his property. Where the debtor does not choose this option liquidation provides a totally different route to follow.

\textsuperscript{79}Lee, supra note 15, at 324-25.


\textsuperscript{82}See, e.g., In re Goeb, 4 B.R. 735 (1980). In this case the debtors conceded that the primary purpose of their proposed plan was to restructure their tax obligations. The plan only offered a 1 percent dividend to unsecured creditors. The court held that the plan was not offered in good faith because it did not forward the basic purpose of the Bankruptcy Code, that is, the repayment of creditors through a fair and equitable plan. \textit{Id}. at 736.


\textsuperscript{84} \textit{Id}.
other cases construing §1325(a)(3) that support a decision contrary to Anderson. Bankruptcy Judge Keller, however, spoke of the issue raised in Anderson in the In re Cloutier decision. In this case, the court confirmed a plan that proposed no payment at all to unsecured creditors. In rebutting the arguments of the creditors that the debtor’s plan was merely taking advantage of Chapter 13’s discharge provisions, the court identified several benefits in that chapter that did not exist in Chapter 7. One such advantage was that a debtor could restructure his debts with secured creditors. Judge Keller implied that a person who uses Chapter 13 to benefit from this distinction should not be criticized for lacking good faith. Noting that there are several incentives to file under Chapter 13, the court noted that they were intentional on the part of the drafters of the Code and a debtor’s use of them only furthers the policy of awarding him a fresh start. The tone of the decision in Cloutier indicates the belief of the court that the bankruptcy statutes should be applied as they exist and not as an individual judge might like them to be applied.

A survey of the provisions in Chapter 13 reveals that there is no other statute other than §1325(a)(3) that could defeat a nominal or zero payment plan designed to adjust a secured contract while ignoring the legitimate claims of unsecured creditors. As long as the debtor satisfies §1325(a)(5) and §1325(a)(4), the only remaining barrier to confirmation is the invocation of §1325(a)(3). In cases such as Anderson, the courts should apply good faith as a yardstick to determine whether the chapter is being used as a method to repay the debtor’s obligations.

There is no denying that a debtor could avoid a great amount in unsecured debts while realigning his contracts with secured creditors. A careful distinction, however, must be drawn. Debtors filing a plan similar to that proposed in Anderson should not be denied confirmation because they are providing little or no payment to unsecured creditors. The most direct attack that can be made upon these plans is to realize that Chapter 13 is for the adjustment of debts. The plan, therefore, should reflect the spirit and purpose of the law. A good plan should be centered around the debtor’s efforts to earn those advantages contained in Chapter 13. Where

85. 3 B.R. 584 (1980).
86. Id. at 587.
87. Id. at 586-87.
88. Id.
89. Id.
90. Id.
91. Id. The court in In re Cloutier, 3 B.R. 584 (1980), criticized other decisions of bankruptcy courts that it saw as attempts to ignore the plain meaning of §1325. Judge Keller stated that this judicial behavior was a reaction to what some courts viewed as a pro-debtor Chapter 13. He noted that: “Much of the concern stems from the perceived probability of debtor abuse of Chapter 13’s liberal discharge provisions. See 11 U.S.C. §1328(a). The courts should, however, avoid substituting their view of what the law should be for the constitutional legislative expression.” 3 B.R. at 587.
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this effort is obvious, the courts should not hesitate in confirming the plan.93

Other cases construing §1325(a)(3) have dealt with circumstances where a debtor has filed a minimal or zero payment plan to take advantage of the attractive discharge provisions in Chapter 13. In re Murallo94 is representative of these decisions.

In Murallo, the debtor admitted that the only reason he filed under Chapter 13 was because his educational debt would be excepted from discharge under Chapter 7.95 The educational loan was an unsecured obligation. The debtor's plan allowed only a ten percent payment to unsecured creditors.96 Bankruptcy Judge Krechevsky held that such a plan could not be confirmed because a ten percent payment to unsecured creditors failed to satisfy §1325(a)(3) where the admitted purpose of the plan was to take advantage of the discharge provisions.97 The court was careful to point out that this was not to say a ten percent payment plan could never be confirmed.98 Murallo turned on the fact that the debtor was not using Chapter 13 to adjust his debts, but rather to avoid them. This convinced the court that good faith was lacking on the part of the debtor.99

The decision reached in Murallo is a good one. The bankruptcy court properly used §1325(a)(3) to deny confirmation where it was clear the debtor was not respecting the purposes, objectives, and spirit of Chapter 13. The history of the Code clearly illustrates that, "the purpose of Chapter 13 is to enable an individual, under court supervision and protection, to develop and perform under a plan for the repayment of his debts over an extended period."100 Although Chapter 13 has many inducements to persuade a debtor to choose it over Chapter 7, the understanding was that the debtor would use Chapter 13 to achieve the goals of the Code and not abuse it for personal gain.101 Where a debtor attempts to use Chapter 13

93. Frequently, a consumer debtor with few if any assets will apply for relief under Chapter 13. Had he liquidated, creditors would not receive much of a recovery. Consequently, even though a plan may not propose total repayment it will probably give creditors substantially more than they would have received under Chapter 7. Where a debtor is trying to pay back his creditors through a plan that is realistic and promotes the spirit of Chapter 13, confirmation should be granted for two reasons. First, the creditors are losing nothing. Secondly, this will promote the principle that repayment of debts is better than liquidation. If the bankruptcy courts reject those plans that attempt to achieve the goals of Chapter 13, debtors and their attorneys will soon be ignoring the chapter as was the case under Chapter XIII. See note 39 supra.
94. 4 B.R. 666 (1980).
95. Id.
96. Id. at 666-67.
97. Id. at 669.
98. Id. at 667.
99. Id. at 669.
100. H.R. REP. No. 595, 95th Cong., 1st Sess., at 118.
101. Where the debtor uses Chapter 13 for his own personal gain, as a business device or as a personal financial tool, the plan has been filed in bad faith.
for personal gain, § 1325(a)(3) is the appropriate section of the Code to use to deny the confirmation requested.

The case of In re McMinn\textsuperscript{102} involved husband and wife debtors who filed a Chapter 13 plan providing for full payment to a secured creditor outside of the plan and full payment to an unsecured creditor within the plan.\textsuperscript{103} The plan proposed only a one percent dividend to the other unsecured creditors within the plan.\textsuperscript{104} One of these unsecured creditors was Lyon County State Bank. The bank objected to the plan at the confirmation hearing, arguing that the plan failed to satisfy §1325(a)(3) and §1325(a)(4).\textsuperscript{105} The McMinns were indebted to the bank on a judgment of $44,000.\textsuperscript{106} There was no denying the fact that the judgment was one which would have been excepted from discharge had the debtors filed, pursuant to §523(a)(2)(B) of the Code, for liquidation under Chapter 7.\textsuperscript{107} This section would only apply to the debtors under Chapter 7 or in the future if the debtors required a hardship discharge under Chapter 13.\textsuperscript{108} The statute controlling the issue of dischargeability under a successfully completed plan, under Chapter 13, would grant the debtors a complete discharge for the remainder of the obligation.\textsuperscript{109} In other words, had the court confirmed the plan, the bank would only recover $440 of its judgment of $44,000.

In his opinion, Judge Pusateri examined both §1325(a)(3) and §1325(a)(4) of the Code. Considering the good faith issue first, he stated that the concept of good faith had the same meaning under the Code that it had under the old Bankruptcy Act.\textsuperscript{110} The court did not cite or mention any cases construing the good faith clauses of the Act. Judge Pusateri noted that other bankruptcy courts had equated good faith with the idea that the debtor must make his best effort in paying off his creditors, however, he declined to follow these decisions.\textsuperscript{111} Convinced that the debtor had not abused the spirit or purposes of the Code, the judge found for the debtor.\textsuperscript{112} The proposed plan was not confirmed, because the bankruptcy judge rule that §1325(a)(4) was not satisfied.\textsuperscript{113} The court contended

\textsuperscript{102} 4 B.R. 150 (1980).
\textsuperscript{103} Id. at 151.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id. Section 523(a)(2)(B) of the Bankruptcy Code specifically deals with false financial statements. Where a debtor has filed such a statement with one of his creditors, and the creditor reasonably relied on the statement, a discharge under Chapter 7 does not also discharge the individual's liability for a debt obtained because of the statement. 11 U.S.C. §523(a)(2). If a Chapter 13 debtor does not receive a hardship discharge under §1328, he will not be liable for a debt procured by a false financial statement. Id. at §523.
\textsuperscript{108} Id.
\textsuperscript{109} Id. §1328.
\textsuperscript{110} 4 B.R. at 152.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at 152-53. This conclusion is difficult to reconcile with the facts of the case.
\textsuperscript{113} Id. at 153.
that if the debtor had liquidated the creditor would have received more than the $440 offered under the proposed plan.\textsuperscript{114} A literal interpretation of subsection (a)(4) could conceivably lead to this result, although this would seem to be a rather unusual application of the statute.\textsuperscript{115} Judge Pusateri should have denied the plan on good faith grounds instead of applying §1325(a)(4). The facts of the case clearly led to the conclusion that the debtor was using Chapter 13 as a device to avoid his debts and not offer sincere repayment. Simply stated, the case was decided correctly, but for the wrong reason. \textit{McMinn} has hampered efforts to arrive at a common understanding of good faith in Chapter 13 proceedings.\textsuperscript{116}

The debate concerning dischargeability and good faith was continued in \textit{In re Jenkins}.\textsuperscript{117} In this case the debtor's plan proposed to pay Gateway Federal Employees Credit Union, an unsecured creditor, one dollar.\textsuperscript{118} Gateway objected to the plan at the confirmation hearing, arguing that the debtor had failed to satisfy the requirements of §1325(a)(4).\textsuperscript{119} The unsecured creditor claimed that the debt owed it was one which would be excepted from discharge by §523(a)(2)(B) if the debtor had filed for liquidation under Chapter 7.\textsuperscript{120} Thus, Gateway contended that it would have received more under Chapter 7 than it would under Chapter 13. Bankruptcy Judge Moore was not persuaded by this reasoning and confirmed the plan. The court held that where “an affected creditor holds a debt which \textit{may} be excepted from discharge [this fact] is neither consequential to the outcome of the case nor a bar to confirmation.”\textsuperscript{121} The decision of

\textsuperscript{114} \textit{Id.}  
\textsuperscript{115} Such an application of the statute seems uncommon. Even though the debt would not be discharged under Chapter 7, there is no evidence suggesting the creditor would be able to achieve satisfaction by levying against the debtor. The very nature of liquidation would imply that the debtor would have little property left on which to levy and thus the judgment would probably become dormant before it could be enforced.  
\textsuperscript{116} The court in \textit{McMinn} should have found for the creditor on the good faith issue. In this case, the debtor was clearly filing for relief under Chapter 13 because he was trying to take advantage of the discharge provisions. This behavior reflects the debtor's attitude of attempting to get all he can from Chapter 13 while giving little in return. This does not further the purpose of Chapter 13 and the court erred by holding for the debtor. Such a result will be a bad precedent and will undoubtedly lead to a sharp conflict in interpreting §1325(a)(3) in a case with similar facts.  
\textsuperscript{117} 4 B.R. 278 (1980).  
\textsuperscript{118} \textit{Id.} at 279.  
\textsuperscript{119} \textit{Id.}  
\textsuperscript{120} \textit{Id.}  
\textsuperscript{121} \textit{Id.} at 280-81. Judge Moore came to this conclusion by interpreting §1325(a)(4) strictly and literally. He saw his position as one that required objective application of the Code. He noted that:  
Congress has stated that if a debtor pays an unsecured creditor as much as that creditor would receive through a chapter 7 liquidation, the debtor obtains a discharge freeing him of debts that would otherwise be excepted from relief. Whether that law is wise, desirable, or equitable should be, and is, of no concern to me in the performance of my duty to apply the law to the facts of the cases before me. Therefore, I will make no search for a way to avoid this law since its content
the court implies that good faith was not in issue. Judge Moore avoided denying confirmation because there had been no judicial determination of whether the debt was indeed one that would be excepted from discharge under Chapter 7. This contingency did not outweigh the debtor's compliance with the rest of §1325. A close reading of the case suggests that good faith was an issue that should have been addressed. The court refrained from mentioning the actual amount of the debt, although it is hard to imagine one dollar being anything other than a nominal payment.

There is no doubt that the creditor could have constructed a good faith argument in litigating the dispute. The question concerning the dischargeability of the debt owed Gateway was never resolved in court. This factor alone should not be a conclusive determination of good faith. Where a nominal payment is offered to an unsecured creditor and the debt is one which, if the debtor has liquidated, may be entirely excepted from discharge, good faith should be considered carefully. If the plan was proposed with the intention of avoiding the consequences of §523(a)(2)(B), while offering the creditor one dollar, good faith was clearly not evident in the plan. Assuming for a moment this was the case, the plan should have been rejected because the debtor was using Chapter 13 as an instrument to avoid debt repayment. The court defended its decision by declaring that §1325 was clearly written and should be applied objectively without any interest in the outcome. Another principle that should not be ignored would call for an application of Chapter 13 so that the debtor does not avoid those responsibilities that Congress intended him to assume. The ultimate inquiry regarding good faith should attempt to determine whether the debtor is furthering the policies that led to the enactment of Chapter 13. Where the debtor's attention is on how to avoid his obligations and not on how to offer a sincere repayment plan, he should not be allowed to use Chapter 13. Congress did intend to give the

and application are quite clear.

Id. at 280.

122. Judge Moore only addressed §1325(a)(4). He saw the debtor's behavior as only regulated by this particular section. The facts of the case strongly suggest that the debtor used the Chapter to take advantage of its favorable discharge provisions. Such an interference should have been acknowledged by the court in its decision.

123. 4 B.R. at 279.

124. See note 122 supra.

125. Generally speaking, the creditor's attorney should make a good faith argument whenever a debtor's plan offers a nominal amount in repayment.

126. 4 B.R. at 279.

127. The reason for this contention is that there is a difference between a finding of good faith and a finding that the debt would have been excepted from discharge under Chapter 7. Granted, they could be the same thing in some cases, but this is only a possibility.

128. See text accompanying note 101 supra.

129. 4 B.R. at 279-80.


debtor a fresh start, but is also assumed that debtors would offer a plan that made a serious effort at repayment.132

A number of cases, construing the good faith element of §1325, focus on specific terms that are flexible in nature, yet supposedly describe what good faith really means under Chapter 13. These are the decisions declaring that good faith requires payments to unsecured creditors that are "substantial and meaningful,"133 "fundamentally fair in dealing with creditors,"134 "legitimate or substantial,"135 or simply "substantial."136 An analysis of these cases best illustrates how good faith has come to mean many different things under the Code's Chapter 13.

A good example of these decisions is rendered in In re Burrell.137 In this case, Bankruptcy Judge Hughes held that even though the debtor's plan met all other requirements, a fifteen percent dividend to unsecured creditors was not "substantial" and, therefore, lacked good faith.138 Consequently, confirmation was denied.139 The Court in Burrell correctly noted that Congress anticipated that most plans filed by debtors would offer full repayment or at least partial payment in fulfilling the objectives of Chapter 13.140 Judge Hughes was unable to find any evidence that would define "substantial" as requiring a specific percentage so he made up his own definition to meet the needs of the case.141 He stated that:

There is no express, statutory requirement that plans propose substantial payments on unsecured claims, nor any provision of Chapter 13 that defines substantial as being as least 70% of such claims. I have concluded that it is necessary to read such a requirement into 11 U.S.C. §1325(a) on the basis that failure to do so will frustrate the objectives of Congress and lead to absurd results considering Chapter 13 within the Bankruptcy Code as a whole.142

This statement does not exemplify judicial restraint, and, in fact, suggests that the court has neglected the principle of appropriate statutory construction.143 To support his decision, Judge Hughes identified three significant changes made in the new Chapter 13 that would require the

132. Id.
137. Id. at 650.
138. Id. at 651.
139. Id. at 653.
141. 2 B.R. at 651.
142. Id.
143. See, e.g., discussion of statutory construction in In re Jenkins, 4 B.R. 278, 279 (1980).
concept of good faith to mean "substantial" repayment of unsecured claims.\textsuperscript{144}

First, the court noted that unlike Chapter XIII, the new Bankruptcy Code had no provision for unsecured creditors that would enable them to accept or reject the plan.\textsuperscript{145} Secondly, under the new Chapter 13, the plan may be confirmed despite the fact that the debtor may have committed an act that would bar a discharge under the liquidation provisions of Chapter 7.\textsuperscript{146} Thirdly, completion of the debtor's plan discharges almost all debts, including fraud judgments, criminal fines, embezzlement and theft liabilities, and other debts excepted from discharge under Chapter 7.\textsuperscript{147}

Highlighting these incentives to the Chapter 13 debtor, the court concluded that they should only be invoked where an individual has made a seventy percent repayment on his obligations to unsecured creditors.\textsuperscript{148} Thus, in this case the debtor's plan lacked the required degree of good faith. Supporting this analysis of the Code, Judge Hughes drew upon §727(a)(9) to emphasize that Congress must have indeed intended Chapter 13 plans to offer substantial repayment.\textsuperscript{149} Essentially, §727(a)(9) provides that a discharge under Chapter 7 will only be granted to an individual who had previously used Chapter 13, if the debtor had either paid off in full "the allowed unsecured claims in such case"\textsuperscript{150} or had paid off seventy percent of these claims and had proposed the plan in good faith while making his best effort.\textsuperscript{151} Thus, the court reasoned that Congress had implied what it expected as a good faith repayment.\textsuperscript{152} Although the court's opinion is well written, the logic justifying the holding is flawed.

The court's contention overlooks the fact that §727(a)(9)(B) requires that the plan must have been filed in good faith and the debtor must have succeeded in repaying seventy percent of those unsecured claims addressed by the plan.\textsuperscript{153} Congress required that the plan had to be filed in good faith and then required that it had to have provided a seventy percent dividend. These two factors are not the same. Where a debtor did file his plan in good faith, he still must show a seventy percent repayment to receive his discharge under Chapter 7.\textsuperscript{154} This alone should defeat the notion that good faith means "substantial" repayment, and "substantial" repayment means seventy percent repayment.

\textsuperscript{144} 2 B.R. at 651-52.
\textsuperscript{145} Id. at 651.
\textsuperscript{146} Id. at 651-52.
\textsuperscript{147} Id. at 652.
\textsuperscript{148} Id.
\textsuperscript{149} Id. at 652.
\textsuperscript{151} Id. §727(a)(9)(B).
\textsuperscript{152} 2 B.R. at 652.
\textsuperscript{154} Id.
GOOD FAITH IN CHAPTER 13

The court's analysis again falls apart because it assumes that because a discharge under Chapter 7 is limited to those debtors who have paid at least a seventy percent dividend under a Chapter 13 plan, the Chapter 13 discharge must be limited in the same manner. As the court admitted, there is no language in Chapter 13 requiring this result, nor is there any suggestion in the legislative history implying that good faith requires a seventy percent dividend. The court has made an erroneous assumption when it believes that a discharge under Chapter 13 should depend on the same performance as that required of the individual who has used Chapter 13 and then seeks a subsequent discharge under Chapter 7. There is a good reason for requiring a debtor who has used Chapter 13 to show a certain degree of success in carrying out his plan when he later seeks a discharge under liquidation. The policy of protecting creditors of the debtor requires debtors to satisfy their past obligations before discharging their more recent ones. Thus, §727(a)(9) is appropriately in Chapter 7 declaring the rules for an exception to discharge under liquidation proceedings. Judge Hughes' attempt to draw a parallel between what the requirements for discharge are under Chapter 7 and what they should be under Chapter 13 displays an improper interpretation of the purposes of these respective chapters. The court's mention of the three new advantages that a debtor has under the new Chapter 13 also should be examined. The changes made by Congress favor the debtor. These alterations were meant to encourage debtors to choose Chapter 13 over Chapter 7. Where the legislature has made changes in the law of bankruptcy, courts should not apply their own standards of fairness where the statutes are unambiguous. There is considerable evidence illustrating why Congress made these changes.

The revisions in Chapter 13 reflect the belief that under the Act, creditor voting on the plan added time and expense, and detracted from the parties' ability to predict what plans would be confirmed. Because of the fear that the creditors would vote it down, Congress found that the consent requirement frequently prevented the debtor from making a fair

155. The legislative history does not explicitly say that this provision was enacted for the reason suggested by the author, although it seems very probable that this was the purpose for requiring debtors to make substantial repayment before granting them a discharge under Chapter 7.
156. See, e.g., In re Bloom, 3 B.R. 467, 469 (1980).
157. Chapter 7 has this particular exception to discharge because after liquidation, the debtor is not obligated to take any further action on his debts unless they are excepted from discharge. Thus, if the debtor does not have sufficient assets to cover the debt, the creditor is protected. On the other hand, Chapter 13 does not contain this exception, for the debtor who has completed his plan, because the plan should have included most of his obligations. Under Chapter 13, a creditor knows that his claim will be paid by the debtor's future income and does not need the added protection of an exception to discharge.
159. 4 B.R. at 279.
161. Id. at 118.
offer of less than full payment. Creditors were also denied the right to vote in the Code's Chapter 13 because the Bankruptcy Commission found the provision to be useless and unnecessary.

*Burrell* is an interesting case for several reasons. The court was certainly correct in addressing the good faith issue as the proposed dividend was only fifteen percent and this alone should have caused the bankruptcy court to carefully scrutinize the plan. The big drawback of the decision was the court's equating the concept of good faith with a seventy percent repayment to unsecured creditors. A rigid application of such a fluid notion as good faith is inappropriate. The court did not deny the fact that the debtor had offered a plan that would require his best effort. Assuming that the debtor had complied with the other provisions contained in §1325, and was offering his plan with the honest intention of using it to repay his creditors, why should the fact that he can only afford to repay fifteen percent of his debts call for a finding of bad faith? The creditors would have to recover more through the plan than through liquidation if §1325(a)(4) was satisfied. Thus, where the creditors' interests are protected and the integrity of the Code is not attacked, good faith would seem to exist. The inequity of attaching a fixed percentage to good faith is most apparent when one realizes that good faith is a concept that, depending upon the circumstances, will often require different action or inaction from different debtors. The treatment of debtors should be consistent under Chapter 13 and, therefore confirmation is now the responsibility of the bankruptcy courts.

Consistency, however, does not mean that the courts should ignore the distinctions that will make one case different from another.

Good faith will inevitably be defined by an appellate court or by the Congress. Certainty of law will be a hollow victory, however, if good

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162. *Id* at 123.
164. The concept of good faith has probably been most confused by attaching a figure or percentage to it. In *Burrell* good faith equaled a seventy percent dividend to unsecured creditors. 2 B.R. 650, 653. Good faith has also been held to require a ten percent dividend to these creditors. *See, e.g., In re Curtis*, 2 B.R. 43 (1979). *Curtis* did involve exceptional circumstances, although the court's recognition of a specific percentage as equaling good faith is not the way to define the concept. Ultimately, good faith should not depend on any percentage of dividends. It should be a term that simply requires the debtor to file a plan that furthers the spirit of debt repayment through a judicially approved plan.
165. 2 B.R. at 653. Here, the court admitted that, "Although debtor's plan meets the best effort test, it falls considerably short of meeting the substantial payment requirement." *Id*.
166. If a debtor's plan offers a repayment schedule that will take his best effort and the creditors are protected by §1325(a)(4), there is no other reason to deny confirmation. When these two factors are present, a bankruptcy court's rejection of the debtor's plan will only discourage the use of Chapter 13.
167. COMM'N REP. I, note 159 supra.
168. At the present time Congress is considering making amendments to the
faith is tied down to a particular percentage or equation when dealing with payments to unsecured creditors under the plan. Section 1325(a)(4) addresses the problem of how much the creditor will recover and it should not be eclipsed until the drafters themselves have decided to do so. If Congress wanted creditors to receive a minimal amount or percentage, they could have easily inserted a provision to achieve that effect. To date, Congress has taken no action to achieve tighter control over the substance of the debtor's plan. A strong argument can be made claiming that good faith does not apply to the issue of amount or percentage as the Code has other provisions to protect the creditors' interests.

Some cases have used good faith to deny a plan confirmation where the court believed the proposal was unrealistic. An example of this approach is *In re Beaver.* In *Beaver,* the debtor was an unemployed cashier who supported herself and her two children with unemployment compensation. The debtor's unemployment benefits were scheduled to end within five months after the decision was rendered by the court. The proposed plan offered the debtor's unsecured creditors a one percent dividend on her obligations. The issues addressed by the court were the proper construction of §1325(a)(3) and §1325(a)(6). Considering all the circumstances, Bankruptcy Judge Meyers observed that there was room to doubt whether the debtor would be able to continue providing for herself and her children while trying to meet the payments called for under the plan. Thus, the plan was rejected because it failed to meet the requirements of §1325(a)(6) which states that the debtor must be able "to make all payments under the plan." This factor alone would be adequate to support a holding denying the debtor's plan confirmation. Unfortunately, the court included discussion of the issue of good faith in its decision and held that a one percent dividend to unsecured creditors did not meet the requirement of good faith needed to support confirmation. The court acknowledged that the debtor had proposed a plan which would require her best effort.

There was no discussion in the case of any factor that suggested that Ms. Beaver's plan was filed without an effort to achieve the objectives of Chapter 13. Although the plan satisfied §1325(a)(4), it lacked good faith.
because the payments to unsecured creditors would be inadequate. Such circular reasoning is the cause of the confusion surrounding the good faith dilemma. As noted above, Congress took precautions to ensure that creditors would receive at least as much of a recovery under Chapter 13 as they would under Chapter 7. Bankruptcy courts should not avoid the obvious interpretation of the statutes when the result is an unsatisfactory conclusion by the court.

To be fair, the courts do not have much with which to work. Good faith comes to them with little explicit legislative history and few cases on point decided prior to the enactment of the Code. The courts might have an easier task if they applied good faith to determine whether the debtor is using Chapter 13 as a means to avoid his obligations. Where the debtor has shown that it is his intention to use Chapter 13 to evade responsibility for debts, he should not be allowed to have his plan confirmed. But, in those cases where a nominal payment plan is indeed the best the debtor can do under the circumstances, compliance with the remaining subsections of §1325 should not be neglected.

Other bankruptcy courts have examined several sections of Chapter 13 to discern what the Congress meant by good faith. Deducing an overall purpose of the chapter, the courts have applied this understanding to the nominal or zero payment plans. Illustrative of these decisions is *In re Iacovoni.* This case involved many debtors who were joined when it became apparent that all were contesting the same issues. The court's opinion gave a well-reasoned analysis of what good faith really means under Chapter 13.

The court, in *Iacovoni,* noted that §1325(a)(6) required the debtor to be able to make all payments proposed by the plan. This section also demands that the debtor must show an ability to comply with the plan. The import of this particular statute plainly implies that the debtor's plan exists so that creditors might be paid off. Then, the court examined §101(24) of the Code, which defines an "individual with regular income," as a condition the debtor must meet in order to file under Chapter 13. This section requires the debtor to have an income that is "sufficiently stable and regular to enable such an individual to make payments." As the court noted, this provision also assumes that the debtor will be one

183. 2 B.R. 256 (1980).
184. *Id.* at 258-59. Here all of the debtors were contesting three basic issues. The third was the matter of whether, and under what conditions, the court may require payment to unsecured creditors as a prerequisite to confirmation of the debtors' plan.
185. *Id.* at 262.
186. *Id.*
188. *Id.*
who has the means to effect a plan. The only reason the Code would contain this requirement is to provide the debtor with the ability to carry out the payments called for under the plan. The court's reasoning leads to the conclusion that if nominal and zero payment plans were anticipated by the drafters there would be no necessity for the existence of §101(24). Another factor addressed by the court was the matter of the hardship discharge provisions under §1328(b) and (c). These statutes reflect the notion that not all debtors will be able to complete their plans and thus a safety valve must be present for those debtors who require it. Such a provision would also be unnecessary where most plans offered were either nominal or zero payment in nature. Judge Mabey also noted that the hardship discharge under §1328(b), where the debtor is unable to make payments, is no broader than the discharge granted under Chapter 7. The court stated that, "it seems unlikely that Congress intended to grant the Chapter 13 debtor who does not attempt to repay his debts a more generous discharge than the debtor who tries, but fails." This conclusion is unusually reasonable when compared with the other reasons offered to reject nominal payment plans. Thus, the general tone of Chapter 13 anticipates plans that would offer meaningful payments to unsecured creditors. The question remained open as to how a bankruptcy court could determine when payments were being proposed in good faith. The court suggested that a reviewing bankruptcy judge might look at the following factors:

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 repayment.

The court, in Iacovoni, was careful to state that these were only possible considerations. Depending upon the circumstances, other facts may be just as significant and revealing.

The rationale supporting the holding in Iacovoni is clear and sensible. The provisions of Chapter 13 do anticipate, as is pointed out above, that the debtor will be an individual who will be making payments to satisfy his obligation to his creditors. Congress was even careful to provide for

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189. 2 B.R. at 262.
190. Id.
191. Id.
192. Id. at 262-63.
193. Id. at 262.
194. Id. at 262.
195. Id. at 267.
196. Id.
those debtors who were unable to fully complete their plans. Judge Mabey's analysis strongly implies that zero and nominal payment plans were an incorrect use of Chapter 13. Here, good faith does not mean that a certain percentage of dividends must be repaid to creditors. Good faith simply requires the debtor to use Chapter 13 as a vehicle to pay back the debts he has incurred. Undoubtedly, there will be plans submitted for confirmation that only offer a small percentage of the total debt owed to unsecured creditors. Where the plan is one that meets the requirements of §1325(a) and attempts to further the goals of the chapter, rejection should not be ordered because the creditor is receiving only a fraction of what is owned. This would almost always be the case under Chapter 7.

In conclusion, the discussion above has attempted to inform the reader of the many different ways that good faith has been used in addressing the problem of nominal or zero payment plans. Any suggestion as to a best interpretation must first recognize the fact that there is little to guide the bankruptcy courts in their decisions other than the Code itself. Thus, the analysis must ultimately turn on the facts of each case.

Chapter 13's good faith requirement is one the debtor must meet to earn confirmation. It is the most flexible provision in §1325(a). It is not uncommon, therefore, that the bankruptcy courts have used §1325(a)(3) to reject plans that have satisfied the other conditions of §1325(a).

The question is, when should good faith be used to reject a debtor's plan? The author contends that good faith should not be used to reject a nominal payment plan simply because it is a nominal payment plan. Congress specifically dealt with the issue of how much unsecured creditors should receive when it drafted §1325(a)(4). When a debtor is able to satisfy §1325(a)(4) by offering his affected creditors a certain amount, the court should not exact a higher sum from the debtor because the payment proposed is, allegedly, not in good faith. Section 1325(a)(4) was drafted for a particular reason and it should not be forced into obsolescence by bankruptcy courts.

Good faith should be used to deny confirmation to those plans that are offered with the primary intention of taking advantage of Chapter 13's discharge provisions. The reason for this is that the basic goal of any debtor using Chapter 13 should be to repay his debts. Where this is not evident from the facts of the case, the debtor's plan should be rejected.

If the main reason behind a debtor's filing a Chapter 13 plan is to take advantage of the opportunity to restructure contracts with secured creditors, the plan should be denied confirmation because the repayment of debts is the most important goal of the chapter. The debtor's plan should reflect this principle.

197. 11 U.S.C. §1328(b) and (c) (1976).
198. 2 B.R. 256.
Obviously the problem will be a factual one for the bankruptcy courts. Those factors listed in *Iacovoni*¹⁹⁹ may provide a good reference point for a reviewing court. Each case will contain some unique circumstance and often a court may have to give special attention to a fact that has previously been regarded as insignificant. Where this is the case, the bankruptcy judge should not hesitate to give good faith the flexibility it requires. As noted above, good faith will demand different behavior from different debtors. Each debtor must show that the overall purpose of his plan is to repay his creditors. If the debtor is able to propose only a one percent dividend the plan should be confirmed if it satisfies §1325(a)(4) and is an honest attempt to offer repayment. Denying the poorest debtors the opportunity to use Chapter 13 because they can only pay a small fraction of their debts would seem to be discriminatory.

Good faith should not be restricted to a certain percentage of repayment. This is the worst possible application of the concept. This approach completely ignores §1325(a)(4) and makes no inquiry at all to the motives of the debtor. It is entirely possible for a debtor to offer a plan that may meet the percentage required by a particular court, while not furthering the policies of Chapter 13. If a minimal percentage is the goal of creditors, the consumer credit industry should suggest a revision of §1325(a)(4). Otherwise, §1325(a)(3) should only be used to determine if the debtor's plan will reflect the principle of debt repayment. Where this is not the case, the debtor should be referred to Chapter 7. Chapter 13's success will be in doubt, unless good faith is used to assure all concerned parties that the debtor is proposing his plan as a vehicle to pay off his obligations to unsecured creditors. It seems obvious that a plan that does not propose to pay an unsecured creditor any amount must be rejected because it cannot, by definition, further the principle of debt repayment. Zero payment plans are the only offers that should be rejected because they provide insufficient recovery for the creditor or the Code. The integrity of Chapter 13 will be ridiculed if the principle of paying back one's creditors is allowed to be synonymous with paying nothing. Good faith may mean many things, but is should at least reflect a realistic attitude toward what the Bankruptcy Code requires when the debtor and creditor resolve their disputes.

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¹⁹⁹. See text accompanying note 195 supra. It lays out those factors considered important in *Iacovoni.*