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John S. Schuchman
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CHAPTER XIII OF THE BANKRUPTCY ACT, WAGE EARNER PLANS, AND THE DEAF DEBTOR

JOHN S. SCHUCHMAN, Ph.D.

After reading Joanne Greenberg's recent book, *In This Sign*, one cannot help but be disturbed by the portrayal of the credit and legal difficulties encountered by the deaf couple, Janice and Abel Ryder.[1] Although many of my deaf friends have told me that Greenberg's portrayal is exaggerated, my personal experience in the deaf community and at Gallaudet College indicates she is closer to the true situation than many would admit.[2]

Until statistical information from the National Census of the Deaf indicates otherwise, this writer will assume that credit and the attendant legal complications are a major problem for a significant number of deaf people. Certainly, such factors as undereducation, underemployment, and communication difficulties which characterize the deaf population are common to another segment of the general population, the urban poor, for whom it has been demonstrated that credit is a major problem. To date, there is no reason to assume that deaf people are any different or that they do not also become mired down in the installment debt trap.[3]

Dr. Schuchman is Dean of Gallaudet College, Washington, D.C.

[1] *Joanne Greenberg, In This Sign (1970), 3-12*

[2] *Although statistical data on the use of credit by deaf people is not available, a personal message from Willis Ethridge, Director of a NASHA project involving community service centers for deaf people in twelve cities, indicates that credit difficulties are one of the major problems handled by their centers . . . Clients lack of understanding of credit and creditors' unscrupulous practices are sources of the problems. My personal experience with Gallaudet College undergraduate students confirms Ethridge's findings.*

[3] *See David Caplowitz, The Poor Pay More (1963); Caplowitz, "Consumer Problems," The Extension of Legal Services to the Poor, 16-62. HEW Welfare Administration Conference Proceedings, November 12-14, 1964; Note, "Installment Sales: Plight of the Low-Income Buyer," 2 Columbia L.J. and Soc. Probs. 1 (June, 1966).*

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On the basis of the above assumptions about credit, deaf people and professionals who work with deaf clients should consider a legal credit device, the wage-earner plan, as a rehabilitative device. One prominent law commentator feels that wage-earner plans are an area of law "where the impact of social conditions is as important as the economic problems," and are a "challenge to the alerted attorney to broaden his services as a social engineer to the material and spiritual benefit of his fellow beings."[4]

This social engineering device, Chapter XIII of the Bankruptcy Act, is a product of the "Forgotten Man" program promised by Franklin Delano Roosevelt in his bid for the Presidency in 1932.[5] However, like much of the New Deal legislation, it was not designed to protect the poor but was geared for the protection of the middle-class consumer debtors who happened to be poor due to the circumstances of the economic catastrophe following the 1929 stock market crash. Its goal was to help alleviate the condition of middle-class Americans; the fact that in subsequent years the maximum income eligibility requirement has been revised upward corroborates its middle-class predilection.[6]

The "Forgotten Man" of the 1970's is not necessarily a member of middle-class America; his origins are of the "other America," the poor, minorities, and the handicapped. The purpose of this paper is not to re-emphasize the original purpose of the Chapter XIII device as a protective mechanism for the "Forgotten Man" but to apply it to an often overlooked and important community of forgotten men – the deaf community.

Straight Bankruptcy is No Solution

In order to evaluate the wage earner plan mechanism as a protective device for the deaf debtor, it must be compared with the older and better known device of straight bankruptcy. If a deaf debtor is in a financial crisis and finds himself unable to pay his debts as they mature, he is a possible candidate for some form of bankruptcy. In nearly all cases, low-income debtors are wage earners and eligible to file a petition in straight bankruptcy or for a wage earner plan under Chapter XIII of the Bankruptcy Act. Since a person must be insolvent (more liabilities than assets) to qualify for straight

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[4] *Charles Nadler, "Quo Vadis, O Ye Insolvent Wage Earner: Nine Out of Ten Bankrupts are Wage Earners," 7 N.Y.L.F. 353 (Nov. 1961).*

[5] *Harry Haden, "Chapter XIII Wage Earner Plans – Forgotten Man Bankruptcy," 55 Ky. L.J. 564 (1967).*

[6] *Although Congress originally limited the use of Chapter XIII proceedings to persons whose wages did not exceed $3,600 (see 53 STAT. s_s 930 (1938), 11 USC s_s 1006 (8), (1940), it raised the wage ceiling until it finally removed all income limitations so that all persons, whose principal source of income was from wages and salary, could use wage-earner plans. See 73 STAT. s_s 24 (1959), 11 USC s_s 1006 (8).*

bankruptcy, it will be assumed that our low-income deaf debtor is both insolvent and unable to pay his debts as they mature and therefore is eligible for both types of bankruptcy proceedings. At this point, it must be emphasized that a straight bankruptcy is the more common and better known device.[7] Therefore, it is quite possible that a professional rehabilitation counselor or the deaf client might be in a position wherein they would initiate a discussion of the feasibility of such a plan with an attorney and/or the bankruptcy referee.[8] It is also true that some bankruptcy referees oppose wage earner plans because they feel that an eligible consumer debtor is entitled to a straight bankruptcy discharge and that the wage earner plan is a form of wage slavery.

It must be readily conceded that a wage earner plan is a form of "wage slavery." Under most plans, the debtor is required to pay his creditors over a period of approximately three years. But it must be remembered that the debtor is caught in a form of "wage slavery" before he files his petition in bankruptcy: his goods are repossessed, his wages are garnisheed, and his job is threatened. "Wage slavery" is a fact of life for many consumers. The problem for the professional (by the term of "professional", I mean those individuals – vocational rehabilitation counselors, ministers, teachers – who work with deaf clients) is to discover some way to remove the deaf debtor from the evils of the consumer credit system which operates to create "wage slavery." A proceeding in straight bankruptcy is an illusory solution. After he obtains a discharge in bankruptcy, the bankrupt and more particularly, the deaf debtor, will probably still be caught in a form of "wage slavery."

A proceeding in straight bankruptcy requires a debtor to place his non-exempt assets in the hands of a disinterested party (trustee) for the benefit of his creditors and enables the debtor to apply for a discharge from his debts. Although his non-exempt assets are probably minimal, the exempt assets are not necessarily given adequate protection. The exemptions are those permitted by the state in which the bankruptcy court is located and most state exemptions are notoriously low.[9] For example, a bankrupt in

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[7] *It is my intent that the subtance of this paper should be addressed to a mixed audience: (a) deaf people, (b) professionals with deaf clients, (c) attorneys, and (d) bankruptcy referees. As a result, parts of the paper may appear to be overly-technical, but if deaf people are to benefit from wage earner plans, it is imperative that these different groups work together.*

[8] *Since it is quite possible to graduate from many law schools without a course in bankruptcy, it is possible that some attorneys might not be familiar with Chapter XIII plans. Although there is an attempt to convince bankruptcy referees to use wage earner plans more extensively, most of its application has been in relatively few states. See: Reginald McDuffee, "The Wage Earner's Plan in Practice," 15 Vanderbilt L. Rev. 179 (December, 1961) and Harry Haden, "Chapter XIII Plans, "55 Ky. L.J. 564-617 (1967).*

[9] *Vern Countryman, "For a New Exemption Policy in Bankruptcy," 14 Rutgers L. Rev. 681-683 (1960).*

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South Carolina is only permitted a $1,000 homestead exemption. Because of its dependence upon State exemption schemes, straight bankruptcy in most jurisdictions is prejudicial to the few exempt assets possessed by most salaried debtors.

After the bankrupt turns over his non-exempt assets, secures relief for his exempt assets, and obtains his discharge, he may or may not be free of his creditors. There are certain kinds of debts which cannot be discharged by bankruptcy. Section 17 of the Bankruptcy Act (USC s_S 35) provides that certain debts are not affected by a discharge: (a) taxes owed to the United States, any state, or subdivision of a state within the three year period prior to bankruptcy, (b) debts which are incurred on the basis of false pretenses or false representations by the bankrupt, (c) willful and malicious injuries to the person or property of another, (d) alimony, (e) maintainance and support of wife or child, and (f) debts not scheduled by the bankrupt owed to creditors who had no notice of the bankruptcy proceedings. This incomplete list of debts unaffected by the discharge must be paid and the creditors may use the same collection procedures which probably drove the debtor to bankruptcy in the first place.

A discharged debt need not be a deterrent to a persistent or perhaps unscrupulous creditor. A discharge is only an affirmative defense, and if it is not pleaded in an action on the debt, it is waived and a judgment on that debt is *res judicata* upon a federal court.[10] The debtor has the burden of proving that he scheduled the debt in the bankruptcy proceedings, and that he received a discharge. After such proof, the burden shifts to the creditor to show that the debt was not dischargeable.[11] There are some writers who have indicated that suits to enforce the collection of discharged debts are the basis for a suit by the debtor for malicious prosecution and punitive damages,[12] but the courts are divided on this point.[13] In any case, a discharge does not mean that the debtor will not be subject to lawsuits upon his old debts and undereducated deaf debtors are those debtors most likely to deal with unscrupulous creditors who would take advantage of such lawsuits.

There are several reasons why a creditor would bring a lawsuit on a debt which theoretically was discharged. Low income debtors often take default

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[10] *Personal Industrial Loan Corp. v. Forgay, 240 F. 2d 18 (10 Cir. 1956).*

[11] *Peerson v. Mitchell, 205 Okla. 530, 239 P. 2d 1028 (1950), cert. denied 342 U.S. 866 (1952).*

[12] *Joseph Rifkind, "Discharge of Debts in Bankruptcy and some Problems Relating Thereto," 7 N.Y.L.F. 364-368 (Nov. 1961).*

[13] *Gore v. Goreman's, Inc. 143 F. Supp. 9 (W.D. Mo. 1956) where the court granted a $1,000 punitive damage award in such a malicious prosecution case but see Standley v. Western Auto Supply Co. 319 S. W. 2d 924 (Mo. App. 1959) and Elliott v. Warwick Stores, Inc. 329 Mass. 406, 108 N.E. 2d 681 (1959) where the courts held that mere attempts to collect discharged debts are not malicious prosecutions per se.*

judgments.[14] It is well known that unscrupulous creditors, collection agencies, and small loan companies will harass discharged debtors because they know that the low-income debtors are financially unable to obtain a lawyer to defend a suit. Further, they can threaten to attach the bankrupt's wages in the hope that the debtor will consent to a judgment rather than risk losing his job. Sometimes the bankrupt does not defend the action because he thinks that he does not have to appear since he already has his discharge.[15]

If our bankrupt has been properly advised that he can only block the debt action by raising his discharge as an affirmative defense, he still may lose the action on the debt. Section 17 of the Bankruptcy Act provides that debts incurred as a result of the debtor's false representations are not discharged. When most debtors apply for retail merchandise credit or for a loan from a finance company, they fill out a credit application. In answer to inquiry about necessary information on the application, the salesman often advises the debtor to put down a "few debts as a formality." When the creditor later brings an action (after the debtor supposedly has been discharged from this particular debt), the creditor simply introduces the debtor's statement of his outstanding debts on the credit application, compares it with the debtor's schedule of debts in the bankruptcy case, and has a *prima facie* case of false representation which means that the discharge in bankruptcy has no effect upon the debt owed to this creditor. Although this example involves an unscrupulous creditor, the same result could occur with an honest creditor and a deaf client who did not communicate well during the credit application process. Some courts have held that this proof can be overcome by showing that the debtor and the creditor have had dealings over a long period of time.[16] Writers also have argued that finance companies that deal with the urban poor know that statements of debt listed upon credit applications are not completely true and therefore, do not rely upon the application.[17]

In many cases, a creditor need not even resort to court. The creditors have something that the debtor wants—retail merchandise on credit. It is not too difficult for retail merchants to get a bankrupt back into debt by offering new merchandise on credit in exchange for a "reaffirmation" of the

[14] *c.f. 2, Columbia L. J. and Soc. Probs. 9 citing Schiffer, Default Judgments in the New York County Civil Court (1965) where a 1964 study of the legal department of CORE showed that 97 percent of cases brought by several Harlem merchants ended in default judgments.*

[15] *More to the point is the following dialogue in In This Sign where the Judge questions Abel Ryder: "Why didn't you answer the letters that were sent to you?" "They were about the car, too, but I sold the car—the car was gone, then. How can it help to read about it?" "Weren't you aware that you had made only partial payment?" "What?"*

[16] *Excel Finance Treme, Inc. v. Noel, 138 So. 2d 654 (La. 1962)*

[17] *c.f. Ralph Brendes and Lawrence Schwartz, "Schlockmeister's Jubilee: Bankruptcy for the Poor," 40 Ref. J. 73-75 (July 1966). Again, this same argument could be made in behalf of a deaf client.*

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old debt which was previously discharged in bankruptcy.[18] The bankrupt needs this credit. If the debtor had any difficulty obtaining credit prior to bankruptcy, it will be even more difficult afterwards and more costly because virtually all credit applications inquire whether the applicant has ever been adjudged bankrupt.[19]

Probably the worst feature of the discharge is the fact that another one may not be obtained for six years.[20] The bankrupt, who has demonstrated his inability to handle creditors by being adjudged a bankrupt, will now be prey to his creditors for the next six years.

It must be conceded that a proceeding in straight bankruptcy will stay garnishments, executions, and attachments, and thereby grant the debtor some desired relief from his creditors. But after the bankrupt receives his discharge, he will be subject to these collection techniques for the next six years and as previously illustrated, he may be subjected to them for his old debts. The poor, the handicapped, and the undereducated deaf citizens are those members of society who are most likely to have contact with unscrupulous creditors, who are least likely to secure a lawyer, who are most likely to have a default judgment rendered against them, who continue to need credit to purchase the things they desire, and who are most prone to high pressure creditors. If they have gone through the experience of bankruptcy, what have they learned? The bankruptcy proceeding has nothing to do with their basic problem—the inability to deal with consumer credit. Without any training or educational experience, they are likely to become credit recidivists caught in the "debtor's jail of consumer purchases, small-loan refinancing, and inadequate budgeting."[21] And this is why it is imperative that professional workers with the deaf community be familiar with various legal remedies for their clients caught in financial crises. In particular, the professional should avoid the temptation to help the client to get out of the debts but rather should strive to help his client learn to deal with credit; however, the attorney, working with the professional worker, should attack all unscrupulous or fraudulent claims against the deaf client.

Advantages and Disadvantages of Wage Earner Plans

The other form of debtor relief provided by the Bankruptcy Act is the wage earner plan as outlined in Chapter XIII of the Act. There are several

[18] *Ibid., 69.*

[19] *Benjamin Hilliard, Jr., and Willson Hurt, "Wage Earner Plans Under Chapter XIII of the Bankruptcy Act," 19 Bus. L. 274 (1963). I have not found any studies of the effect of Ch. XIII upon wage earners' future credit. Since a wage earner is neither adjudged bankrupt nor given a discharge of his debts, creditors should not complain.*

[20] *Bankruptcy Act, Section 14c (5).*

[21] *Theodore Meth, "Ethical and Economic Considerations in Chapter XIII Proceedings," 36 Ref. J. 44 (April, 1962).*

advantages in the use of wage earner plans. The debtor, if he successfully completes the plan, will pay off his debts and thereby avoid the incomplete remedy of a discharge in straight bankruptcy. The honest creditors will receive complete though late payments in contrast to minimal or non-payment under straight bankruptcy.[22] The debtor will be secure from the evils of the collection process for approximately three years. The debtor and his property will be under the protection and supervision of the court for three years and, ideally, his experience will include an opportunity to learn something about retail credit.

From another point of view, the three year supervision of the wage earner by the trustee could be thought of as the primary disadvantage. During that period of time, the wage earner will have to continue making payments for the benefit of his creditors even though he feels they treated him unfairly because of prior garnishments and attachments. The wage earner will not be able to make any large purchases or incur new debts without the trustee's approval and he will have to learn to live within his income even though television advertisements encourage him to do otherwise.

Mechanics of Plans

After it is clear that the debtor's attorney will not be able to work out some satisfactory arrangement with the creditors, he can turn to Chapter XIII for a solution to his client's financial woes. Often the client will know only that he cannot pay his bills but he must supply the attorney with complete financial data so that a work sheet can be prepared. This analysis is necessary in order to decide whether the wage earner plan will involve a composition, extension, or a combination of both.[23] The attorney must insure that his client neither omits debts nor overestimates income because of the possibility of penal sanctions in the form of a $5000 fine or five years imprisonment for false oaths during a bankruptcy proceeding.[24] The debtor should be admonished to discuss any doubts as to whether property or debts should or should not be listed, rather than risk possible penal sanctions. The attorney should emphasize that these penal sanctions could be invoked at any point during the plan.

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[22] *Recent figures for straight bankruptcy indicate that secured creditors average a recovery of 62.6¢ on the dollar and general creditors average a recovery of 7¢ on the dollar. c.f. Reisenfeld, Creditor's Rights, 391. Yet creditors under wage earner plans receive approximately 95 percent payment. c.f. Vern Countryman, "The Bankruptcy Boom," 77 Harvard L. Rev. 1452 (1964).*

[23] *Bankruptcy Act, Section 607 (7). Although the attorney and professional worker will need to work together as a team, it is the attorney's responsibility to negotiate all credit arrangements.*

[24] *18 USC, section 152.*

Once the financial situation is clear, the attorney must prepare a plan. It must be a workable mechanism through which the debtor can make an honest effort to pay off his debts or a percentage thereof. In addition, the plan must be one which will be accepted by the creditors and the referee in the bankruptcy. Commentators knowledgeable in the use of wage earner plans have observed that plans are not successful if they call for payments over twenty-five percent of the debtor's income and which extend for more than thirty-six months.[25] The twenty-five percent figure is also a guide to whether the plan should be an extension or a composition.[26]

Although each plan must be designed to meet the needs of the indiviudal debtor, all plans must conform to the general outline sketched in section 646 of the Bankruptcy Act. There are only a few mandatory provisions. A plan must contain a provision dealing with unsecured creditors generally and upon any terms,[27] a provision submitting the debtor's future earnings to the supervision and control of the court in order to enforce the plan,[28] and a provision that the court may modify payments under the plan after a hearing and if the circumstances warrant.[29] The other provisions in the outline are permissive and deal with the secured creditors.[30] Basically, these permit a plan to include provisions dealing with secured creditors severally,[31] and that if there are terms dealing with secured creditors, the plan may provide for priority payments.[32] The outline also provides that the plan may permit the debtor to reject executory contracts,[33] and finally, the plan may have any term consistent with the chapter.[34]

After the plan is prepared, counsel must prepare and file a petition under Chapter XIII. The petition may be filed during a pending bankruptcy proceeding or independently.[35] Once a petition has been filed, the debtor

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[25] *Hilliard and Hurt, "Wage Earner Plans," 19 Bus. L. 276.*

[26] *There are no percentage limits upon composition or any required special showings by the debtor to justify a composition. However, section 656 provides that the Court "shall confirm a plan if satisfied" that it is for the "best interests" of the creditor and is feasible and in good faith. In addition, section 656a(4) provides that a plan (including a composition) cannot be rejected solely because it preserves the interests of the debtor. Aside from the confirmation, the primary difficulty with a composition is creditor acceptance. Because of the difficulty in procuring creditor acceptances, most plans are extensions rather than compositions but this will depend upon the individual debtor and the persuasive skills of his attorney.*

[27] *Bankruptcy Act, section 646 (1).*

[28] *Ibid., 646 (4).*

[29] *Ibid., 646 (5).*

[30] *Ibid., 646 (2, 3, 6).*

[31] *Ibid., 646 (2).*

[32] *Ibid., 646 (3).*

[33] *Ibid., 646 (6).*

[34] *Ibid., 646 (7).*

[35] *Ibid., 621 and 622.*

can secure relief from garnishments and executions.[36] At the time the petition is filed, the debtor must file a $15 fee[37] in lieu of the $50 fee normally required in bankruptcy proceedings. The fee may be paid in installments.[38] If possible, it would be psychologically advantageous to the debtor to deposit the first payment called for under the plan when the petition is filed or in the alternative to provide that the first payment commence with the debtor's next paycheck. Such a payment is evidence of the good faith of the debtor and is a part of the total presentation that the debtor's attorney must make to the bankruptcy court. The details of the petition are simple and only require that the debtor state that he is insolvent or unable to pay his debts as they mature and that he desires to effect a composition and/or extension out of his future earnings.[39]

Technically, the debtor need not submit his plan until the first creditiors' meeting but it is advisable to submit his plan along with the initial petition so that the referee can examine it. Along with the peititon, the debtor will also submit various schedules listing the debtor's property and creditors.[40]

If the debtor is married and his wife signed notes as his co-maker, a plan should be submitted for both which will require an additional $15 filing fee.[41] If the wife does not qualify as a wage earner, she may be liable as co-maker.[42]

After the petition has been filed and relief from garnishments and executions obtained, counsel must send a circular letter to all of the creditors. The letter should include claim and acceptance forms along with a copy of the plan or a statement of the substance of the plan. The claim form should include an averment by the creditor that the claim is free from usury as defined by the law of the place where the debt was contracted.[43] The letter should explain the wage earner proceeding and the creditor should be advised to execute the claim form and return it to the debtor's attorney or the referee. It is the attorney's task to secure acceptances. It should not be

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[36] *Ibid., 613 and 614. Under section 611, the Court has "exclusive jurisdiction of the debtor and his property, wherever located, and of his earnings and wages during the priod of consumation of the plan."*

[37] *Ibid., 624 (2).*

[38] *Ibid.*

[39] *Ibid., 623; Form 58, Original Petition in Proceedings Under Chapter XIII.*

[40] *Ibid., 624 (1); the same schedules which are required for straight bankruptcy, forms 1 and 2, are required in Chapter XIII proceedings.*

[41] *The wife can only file if she is a wage earner too.*

[42] *c.f. Heckman v. National Bank of Washington, 201 A. 2d 688, 1964 (D. C. Ct. of App.) where a wife was liable as a co-maker on a note which provided for payment in full if any party became bankrupt even though the wife defended upon the ground that the husband has cut off the bank's right to recover through his use of a wage earner plan. The court held that a wage earner plan does not touch the right of a creditor to pursue its remedy against a guarantor or co-debtor of the bankrupt.*

[43] *Bankruptcy Act, section 656 (6).*

left to the debtor. If the deaf debtor had been successful in negotiations with his creditors, he would not be in his current financial predicament. The pattern of response to the letter will indicate whether personal interviews or telephone calls are necessary. Commentators have observed that an attorney should not spend too much time with non-assenting creditors because while they are vocal, they often do not file a claim nor attend the initial creditors' meeting.[44]

After the referee has given ten days notice to the debtor and the creditors, the referee conducts the first creditors' meeting.[45] The debtor formally submits his plan, accompanied by another $15 fee ($30 if for husband and wife) at this meeting.[46] The referee will receive all claims at this time and will allow or disallow them. The debtor must be prepared to defend the plan because he will be subjected to an examination. In addition to his own testimony, the debtor may present supporting witnesses.[47] At this point in the proceeding, the attorney and the professional worker must convince the referee and the creditors that the plan is in their best interest as well as that of the deaf debtor. It would be well to emphasize a *bona fide* attempt to pay all honest debts and a plan to upgrade the debtor's credit sophistication through an educational plan.

The referee now will receive all the written acceptances of the proposed plan by the creditors.[48] If all the creditors affected by the plan accept it,[49] the referee shall confirm the plan if he is satisfied that it is in good faith.[50] If the plan is not accepted, the debtor still can get his proposed plan confirmed by securing the acceptance of a majority in number and amount of the unsecured creditors whose claims are allowed and proved at the creditors' meeting and the acceptance of secured creditors whose interests are dealt with by the plan.[51] The majority acceptance feature of section 652 does not require approval by a majority of all the unsecured creditors scheduled by the debtor but only a majority of those creditors attending the meeting whose claims are proved and allowed by the referee. Hence, a minority of unsecured creditors could bind all of the other creditors who were not present at the meeting.

After the plan is confirmed, the debtor begins making weekly or monthly payments to the trustee in bankruptcy. During the period of extension, the court retains jurisdiction over the debtor and may issue such

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[44] *Hilliard and Hurt, "Wage Earner Plans," 19 Bus. L. 275-283.*
[45] *Bankruptcy Act, section 632.*
[46] *Ibid., 633 (2).*
[47] *Ibid., 633 (1).*
[48] *Ibid., 633 (3).*
[49] *Ibid., 607 defines a creditor as "affected" if his interest is materially and adversely affected thereby.*
[50] *Ibid.. 651.*
[51] *Ibid., 652 (1).*

orders as are necessary to carry out the plan.[52] Upon completion of payments under the plan, the debtor is discharged from all debts under the plan.[53] If the debtor is unable to complete the payments within three years due to circumstances for which he cannot be held accountable (e.g., laid off from his job or illness), the court may still discharge the debtor from all debts under the plan.[54]

One of the requirements for the plan is a provision that the plan may be modified if the circumstances warrant a change; therefore, a debtor must be reminded that he is under court supervision and that he is to make no different arrangement with creditors unless approved by the court.[55] In this vein, counsel and professional worker must take pains to impress upon the debtor that the trustee is not just another creditor but an officer of a court of equity.

The debtor's attorney is entitled to payment, after the referee and costs of administration but prior to the creditors.[56] Counsel should petition the referee for a reasonable fee. Bankruptcy courts which are active in the use of wage earner plans usually award a $50 fee from the first funds and five percent of the balance, up to a $200 maximum fee, actually paid by the wage earner into the plan and the attorney is usually paid in installments as the wage-earner pays into the court.[57] Overall, it has been estimated that the use of the plan will cost the debtor approximately fifteen percent of the amount paid to the creditors.[58]

Secured Creditors

The most difficult problem for the debtor's attorney is the secured creditor because a secured creditor whose interest is affected may veto the plan. Secured creditors *per se* are not as much a problem as the particular genre of secured creditor with whom most undereducated citizens–hearing and deaf–have credit contacts, retail merchants and financing agencies. Under the Uniform Commercial Code the type of security interests that these creditors obtain are "purchase money" security interests. A "purchase

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[52] *Ibid., 658 (1, 2). This section would permit the court to enjoin any subsequent creditor attempting to garnishee the wage earner's salary.*

[53] *Ibid., 660. This is not a discharge "in Bankruptcy." Even though the term "discharge" is used, the debts actually have been paid and therefore a discharge is not involved.*

[54] *Ibid., 661.*

[55] *Ibid., 646 (b). One way to insure control over the debtor is to include a proviso in the plan that he cannot incur debts in excess of $100 without court approval. Needless to say, the professional worker would be expected to maintain close contact with the deaf client during this period of time.*

[56] *Ibid., 659 (4).*

[57] *Haden, "Chapter XIII Plans," 55 Ky. L. J. 617.*

[58] *Nadler, "Quo Vadis," 7 N.Y.L.F. 337.*

money" security interest is one taken by a seller to secure all or part of the price of the item sold, or where a financing agency advances money to a seller and takes an assignment of chattel paper in return.[59]

Under the Code, a creditor with a "purchase money" security interest in consumer goods which he has sold or financed has the highest priority. This type of secured creditor does not need to record a financing statement to perfect his security.[60] He merely needs a security agreement signed by the debtor (usually a conditional sales contract) plus some payment by the debtor for the security interest to attach and thereby be perfected.[61] Even though the courts have held that a trustee appointed under Chapter XIII has the rights of a lien creditor under section 70 (c) of the Bankruptcy Act,[62] such a trustee could not cut off the security interest of a retail merchant or financing agency which had sold or financed consumer goods to a debtor through a conditional sales contract.[63] Under the U.C.C., which has been adopted in most jurisdictions, the secured creditor's interest in any consumer goods is well protected and will be immune to any direct attack by the trustee in bankruptcy or under a wage earner plan.

There are several ways to approach the problem. In many ways, the best method of handling secured creditors is to draft a plan which provides only for general creditors and makes no mention of the secured creditors. A secured creditor is affected by such a plan only if his interest is materially and adversely affected. If there is a controversy whether a secured creditor is affected, the issue will be decided by the referee.[64] Since the case law indicates that a secured creditor is materially and adversely affected only if his payments under the security agreement are reduced, the attorney must insure that the debtor will be able to make his payments.[65] As long as the debtor may make his payments under the security agreement, the secured creditor has no voice in the acceptance or rejection of the plan because theoretically, he can recover his collateral. Once the plan has been

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[59] *Uniform Commercial Code, section 9-107 (a, b, comment ∝1).*

[60] *Ibid., 9-302 (1d).*

[61] *Ibid., 9-204 (1).*

[62] *City National Bank v. Oliver, 230 F. 2d 686 (10 cir. 1956) held that a wage earner trustee did have the rights of a 70 (c) bankruptcy trustee and cut off a bank's security interest in a television set purchased on a conditional sales contract where the bank had failed to record. This decision would no longer be good law because Kansas has not adopted the Uniform Commerical Code which no longer requires "purchase money" security interests in consumer goods to be recorded.*

[63] *U.C.C. 9-301 (1, 2) but 9-302 (1d) requires filing for fixtures (e.g. an air-conditioner) and for automobiles even though they are consumer goods. A wage earner trustee would be able to defeat the security interest of this type of consumer goods if not recorded within ten days as required by 9-301 (2).*

[64] *Bankruptcy Act, section 607.*

[65] *In re O'Dell, 198 F. Supp. 389 (D. Kan. 1961) held that a secured creditor can successfully oppose confirmation of a wage earner plan where the plan provided for installment payments less than the terms of the original security agreement.*

confirmed, the trustee has jurisdiction over all the debtor's property. This includes the property in which secured creditors have an interest[66] and the referee now may enjoin the secured creditor from repossession.[67]

Another possible solution is priority payment. Under section 646 (3), the plan may provide for priority payments during the period of extension as between the secured and unsecured debts. In other words, the secured creditors would receive all of their money before any of the general creditors received payment. The primary difficulty here is that such a plan provides for secured creditors, and one secured creditor might veto the plan. Therefore, the wage earner's attorney must sell the plan to the secured creditors. If the secured creditors refuse to accept the plan, the attorney should argue to the referee that a secured creditor has no right of veto unless his claim is materially and adversely affected by the plan.[68]

The most drastic solution is the rejection of executory contracts. Bankruptcy Act sections 646 (6) and 613 permit the wage earner to reject his executory contracts and reduce the secured creditors to the status of unsecured creditors for any resulting damages.[69] This authorizes the rejection of all forms of installment purchases of automobiles, television sets, radios, and other consumer goods.[70] This provision has a tremendous disadvantage and advantage which the wage earner must weigh. The rejection of such a contract means that the debtor necessarily will give up possession of the chattels involved and may be required to pay a deficiency claim.[71] Of course, if the attorney's evaluation of the client's financial situation shows

[66] *Bankruptcy Act, section 611.*

[67] *Ibid., 614. In re Clevenger, 282 f. 2d 756 (7th cir. 1960) held that a referee has a duty to protect the debtor's equity even though the debtor's wage earner plan made no provision for secured creditors. As long as the debtor could handle his payments, the holder of a conditional sales contract would not be allowed to reclaim the property. Hollenbeck v. Penn Mutual Life Ins. Co. 323 F. 2d 566 (4th cir. 1963) upheld an injunction necessary to preserve debtor's estate or to carry out the plan (e.g. a car to travel to work) where the injunction would not impair the secuity of the lien. c.f. Nadler, "Quo Vadis," 7 N.Y.L.F. 353; Note, 34 Fordham L. Rev. 535-538 (March, 1966).*

[68] *Ibid., 607. In re Wilder, 225 F. Supp. 67 (D. C. Ga. 1963), the court upheld a referee's order confirming a wage earner plan over a secured creditor's objection. The plan provided for full contract payments to the secured creditor but did not provide for past due installments even though the debtor was two months in arrears when he filed the petition. The court held that the secured creditor was not materially and adversely affected since a two month extension of the twenty-four month contract was de minimus.*

[69] *Ibid., 642.*

[70] *Ibid., 606 (5) also provides for the rejection of unexpired leases of real property. c. f. Nadler, "Quo Vadis," 7 N.Y.L.F. 337.*

[71] *Vern Countryman believes that wage earners are unfairly subjected to inflated deficiency claims because the rejectees (especially banks and financing agencies, ill-equipped for sales) sell the repossessed goods at prices much lower than the "blue book" prices. Countryman reports that the National Bankruptcy Conference favors an amendment which would permit the referee to determine the value of the repossessed*

that the client cannot possibly make his payments under the security agreement, the wage earner will have no choice but to reject all or some of his executory contracts. The primary advantage of rejection is that the previously secured creditor will now be compelled to submit a general claim (for the deficiency) which is required to be free from usury.[72]

Along this same line of attack, counsel could subject claims by unscrupulous urban creditors who cater to the poor to the good faith requirements of U.C.C. sections 2-302 and 1-203, respectively.[73] Although no court has applied U.C.C. 2-302 to wage earner plans, one federal district court has upheld a bankruptcy referee's order nullifying security agreements because they were unconscionable. The referee held that U.C.C. 2-302 was not merely limited to sales contracts but also applied to nullify security agreements.[74] It would seem that an even stronger case for application of U.C.C. 2-302 requirement to claims–secured and unsecured–under Chapter XIII proceedings could be made when the debtor is deaf and undereducated. This writer would advocate an argument that would try to place a burden on the creditor to demonstrate that the deaf client understood the financial arrangements. Aside from the argument that could be made to the referee, the basic issue in the rejection alternative is whether the wage earner is willing to give up his goods.[75]

CONCLUSION

A wage earner's willingness to give up the possession of some of his goods reflects the crux of the matter involved in Chapter XIII plans. As stated previously, the plan is a form of wage slavery and demands a great deal of sacrifice and discipline from the debtor. The debtor's attitude is of immense importance. If the debtor is seeking to escape from his debts, the plan will fail. This is why congressional proposals to make wage earner plans mandatory or discretionary with the referee in all consumer bankrupticies are inappropriate. Once wage earner plans become involuntary, they have lost their essential ingredient.[76]

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collateral and only permit deficiency claims which are in excess of the determined value. c.f. Countryman, "Proposed Amendments for Chapter XIII," 22 Bus. L. 1151 (July, 1966).

[72] *Bankruptcy Act, section 656 (6)*

[73] *The National Bankruptcy Conference recommends the adoption of an unconscionability test similar to U.C.C. 2-302 for claims under Ch. XIII. c.f. Countryman, "Proposed Amendments," 22 Bus. L. 1151.*

[74] *c.f. the companion cases: In re Elkins-Dell Mfg. Co. 253 F. Supp. 864 (D.C. Pa. 1966) and In re Dorset Steel Equip. Co., Inc. 253 F. Supp. 864 (E.D. Pa. 1966).*

[75] *This may not be such a difficult choice when it is recalled that consumers often receive shoddy goods.*

[76] *c.f. Countryman, "Proposed Amendments," 22 Bus. L. 1152-1153 and William Adam, "Should Cahpter XIII Bankruptcy Be Involuntary?" 44 Tex. L. Rev. 533 (Feb., 1966)*

If the deaf client is not willing to accept the burdens of a plan, the attorney and professional workers should not waste their time making extra efforts. The client must have the desire to pay his debts and to put his finances in order. However, the professional worker should emphasize through proper orientation and counseling that the only way to get out of debt and credit harassment is to pay all *honest* debts.[77]

The deaf client should not be convinced merely of the value of a wage earner plan over a straight bankruptcy proceeding. Aside from the experience of being forced to live within his budget, the deaf debtor needs additional rehabilitative services. The wage earner mechanism must be an educative and rehabilitative device as well as a financial one. The professional worker should encourage the wage earner to seek the services of community agencies and schools which provide consumer credit and personal finance counseling.[78] Ideally, the trustee should compel wage earners to seek these educational services. Many communities require drivers who are involved in automobile accidents to attend traffic school. This same principle should be applied to all deaf debtors who come within the bankruptcy court's supervision.[79]

It is apparent that wage earner plans are not panaceas for the evils of consumer credit. However, it is probably the best method to date for protecting the wage earner who wants to pay his honest debts without creditor harassment. To be successful, wage earner plans require cooperation by the wage earner, attorney, bankruptcy court, creditors, and community service agencies. For the deaf client, all of these activities must be co-ordinated by the attorney and the professional worker; this will require more time than is required in a straight bankruptcy proceeding but if the deaf wage earner successfully completes the plan, the attorney and professional worker will have provided an important service to the community, the creditors, and the "Forgotten Man" of the 1970's – the deaf citizen.

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[77] *The emphasis is on the word "honest" to make it clear that this writer does not expect an earner to pay any and all debts. The attorney still will attach all spurious secured interests, holders in due course, unconscionable contracts at the just creditors' meeting.*

[78] *By the fall of 1966, there were 49 non-profit credit counseling agencies in 27 states. c.f. Comment, "Commercial Debt Adjustment: An Alternative to Consumer Bankruptcies?" 9 Boston Coll. Indus and Com. L. Rev. 119 (Fall, 1967). Perhaps the Gallaudet College Division of Continuing Education will be able to assist communities on educational programs such as these in the future.*

[79] *Reginald McDuffee, Referee for the southern district of Georgia and former president of the National Association of Referees in Bankruptcy, recommends that the referees encourage and sponsor workshops and seminars on consumer credit problems. c.f. McDuffee, "Wage Earner Plans," 15 Vanderbilt L. Rev. 193.*

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