



Fed. Tax Collect. Liens & Levies ¶ 20.08

*1 Federal Tax Collections, Liens & Levies
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Part VIII. Bankruptcy and Insolvency
Chapter 20. Tax Collection in Bankruptcy

¶ 20.08 TREATMENT OF TAXES

¶ 20.08[1] Order of Distribution in Chapter 7 Liquidation Proceedings

Once the trustee reduces the property to money in a Chapter 7 liquidation proceeding, Section 726 of Title 11 dictates how the funds are distributed. Tax claims secured by a federal tax claim are subordinated to administrative claims and other claims having a higher priority to unsecured tax claims. Distribution to general unsecured creditors follows payment to priority creditors. ²³¹

The distribution in a Chapter 7 bankruptcy proceeding is accomplished through the following six-level hierarchy of claims (the first level of the hierarchy has eight categories).

1. *Priority claims* The first set of allowed claims listed in [Bankruptcy Code Section 726\(a\)\(1\)](#) requires payment of the [Bankruptcy Code Section 507\(a\)](#) priority claims in the eight-tiered order specified in that section. The next section in this chapter discusses unsecured priority claims in detail. ²³²

The first priority is given to administrative expenses, allowed under [11 USC § 503\(b\)](#), ²³³ and the eighth priority goes to unsecured government tax claims. ²³⁴ To the extent of available assets in the estate, distribution is made on claims in each priority tier. Thus, priority two claims will only be paid if the priority one claims are paid in full. If the priority tier cannot be paid in full, distribution is made pro rata among creditors within such tier. ²³⁵ If the estate had enough assets to pay all of the priority claims in full, distribution will be made pro rata among the general unsecured creditors. ²³⁶

To share in a distribution of estate assets, a creditor must file a proof of claim, and the claim must be allowed. ²³⁷ If a creditor does not file a proof of claim or such proof of claim is filed but disallowed, the creditor receives no distribution of estate assets. ²³⁸

Usually in a Chapter 7 liquidation case, an unsecured creditor's claim will be discharged to the extent that such claim remains unsatisfied after the distribution of estate assets. ²³⁹ A government unsecured tax claim under [11 USC § 507\(a\)\(8\)](#), however, is not discharged. ²⁴⁰ The debtor remains liable after the bankruptcy proceeding for whatever amount of the tax claim remains unsatisfied after distribution of estate assets.

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The concepts of distribution, together with the provisions for allowance of claims and dischargeability of claims, lead to tension between the interests of the debtor, the Service, other priority creditors (claimants), and other unsecured creditors. If the Service claim is an eighth priority claim within [11 USC § 507\(a\)\(8\)](#), the debt is non-dischargeable by the bankruptcy proceedings.²⁴¹ If the Service claim is a first priority claim, the debt would appear to be dischargeable, because non-dischargeability is hinged on the claim having [Bankruptcy Code Section 507\(a\)\(8\)](#) status.²⁴²

***2** *2. Timely filed unsecured claims* The second level of distributions in a Chapter 7 proceeding is for timely filed unsecured claims.²⁴³ If a claim for an unsecured creditor is not timely filed, then such a claim comes within this second level of distribution if (1) the creditor claims that it did not have notice or actual knowledge of the case in time for timely filing and (2) a proof of claim is filed within the time required to permit payment of the claim.²⁴⁴

3. Untimely filed unsecured claims The third level of distribution pertains to all other untimely unsecured claims, except for the untimely claims contained within the second distribution level.²⁴⁵

4. Fine, penalty, forfeiture, or damages The fourth level of distribution in Chapter 7 proceedings is for (1) any fine, penalty, or forfeiture, or (2) damages arising at a time before either the order for relief or the appointment of a trustee if the fine, penalty, forfeiture, or damage is nonpecuniary.²⁴⁶

5. Interest The fifth level of distribution is for interest on the claim at a legal rate measured from the filing date of the petition. Interest will be paid on any claim paid under [11 USC § 726\(a\)](#).²⁴⁷

6. To debtor The final level of distribution of assets in Chapter 7 proceedings is to the debtor.²⁴⁸

In Chapter 11 proceedings, the plan of reorganization must provide that the first priority of administrative expenses and gap-period claims receive cash equal to the allowed amount of the claim.²⁴⁹ Gap-period claims refer to claims arising in the ordinary course of the business or financial affairs of the debtor after the commencement of an involuntary case and before the earlier of the appointment of the trustee or the order of relief.²⁵⁰

Wages claims coming within the third priority of [11 USC § 507](#) may be dealt with differently in the plan. If the class of claimants for this class of claims (i.e., employees owed money within the amounts specified) has accepted the plan of reorganization, deferred cash payments of a value equal to the allowed amount of the claim may be made. Such payments are measured as of the plan's effective date. If the class has not accepted the plan, however, the plan must provide that they will be paid cash equal to the allowed amount of their claims on the effective date of the plan.²⁵¹

With respect to eighth priority claims (i.e., all taxes assessed within the three-year period preceding the filing of the bankruptcy petition), the plan can provide that payments for claims coming within this priority can be deferred for over a period not exceeding six years after the date of assessment. The present value of the deferred payments (measured as of the effective date of the plan) must equal the allowed amount of the claim.²⁵²

***3** [Section 1129\(a\)\(9\)\(C\) of the Bankruptcy Code](#) provides that holders of priority tax claims may receive payments on a deferred basis over a period of six years. One of the first cases to concern interest on deferred tax payments in a Chapter 11 proceeding was *In re Burgess Wholesale Manufacturing Opticians, Inc.*²⁵³ In *Burgess*, the proposed plan of reorganization provided that the United States was to receive 100 percent of its claim over a five-year period. The government protested

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that the plan did not include interest on the deferred payments at the interest rate specified by the Internal Revenue Code for underpayments of tax. The Bankruptcy Court held that no interest was required by 11 USC § 1129(a)(9)(C). The court, which was influenced by [Bankruptcy Code Section 502\(b\)\(2\)](#), reasoned that there was no need for post-petition interest, since the corporate tax debt was discharged.²⁵⁴ The district court affirmed the Bankruptcy Court, but the Seventh Circuit reversed. The court of appeals concluded that interest on the deferred payments was required.

Subsequent cases have also rejected the Bankruptcy Court view in *Burgess*. Thus, in *In re Moore*,²⁵⁵ the Bankruptcy Court permitted interest on the deferred IRS payments. In this case, the Service protested a plan of reorganization under which the tax liability was to be paid out over six years without interest. Relying on the legislative history of 11 USC § 1129(a)(9)(C), (as did the Seventh Circuit in *Burgess*) the court found that [Bankruptcy Code Section 502\(b\)\(2\)](#) did not absolutely prohibit post-petition interest.

The court also felt that the prohibition of post-petition interest differs substantially from the concept of allowing interest on pre-petition tax liabilities that are paid to the Service over a period not exceeding six years. Since 11 USC § 502(b)(2) is general and 11 USC § 1129(b)(9)(C) is specific, the Service argued that the later provision should control. The court agreed and allowed interest on the tax payments under the six-year stretch provision.²⁵⁶

Thus, interest is required on the six-year stretched payments, but the focus in the cases is the computation of the interest. The relevant questions are (1) which interest rate is proper and (2) how to calculate the interest rate used. The government has argued with some success that the proper interest rate for deferred taxes is determined by the interest rate specified by [IRC Section 6621](#) (the interest rate for tax underpayments).²⁵⁷ The method of computing the interest rate under Section 6621 has changed several times since 1980. In 1980, the interest rate was set every two years at 90 percent of the prime rate charged by commercial lenders.²⁵⁸ In 1982, [Section 6621](#) was amended to provide for annual adjustments based on 100 percent of the prime rate charge in September of the previous year.²⁵⁹ In 1983, the rate was changed to provide for adjustments twice a year based on 100 percent of the average adjusted prime rate during the six-month period ending September 30 and March 31.²⁶⁰ Criticism continued, however, since the rate could still lag behind market conditions by three and one-half to nine and one-half months before a plan of reorganization is confirmed.²⁶¹ In 1984, [IRC Section 6621](#) was amended again to provide for monthly adjustments. However, some courts have refused to adopt this position on the grounds that the [IRC Section 6621](#) interest rate (1) lags behind the true market interest rate; (2) does not consider risk, present use, or security; and (3) differs from bankruptcy policy for interest on deferred tax payments.²⁶² In *In re Southern State Motor Inns, Inc.*,²⁶³ for example, the Eleventh Circuit held that the interest rate used for the deferred payments should be the current market rate for a loan of comparable term and risk. The government presented evidence that the current market rate for loans of this type was 14 percent, but the court accepted 12 percent, which the lower court used to compute the deferred payment amounts.

*4 In contrast, in *In re Moore*,²⁶⁴ the District Court held that although the Service was entitled to interest on its priority claim for a pre-petition tax liability, the rate specified in [IRC Section 6621](#) was not correct. It was determined that a discount factor of 12 percent would provide the Service with an equivalent value. Another court allowed the prime rate plus an inflation factor of 10 percent to arrive at the correct present value.²⁶⁵ Yet another court arrived at the appropriate rate of interest by adding a 1 percent factor to the Treasury Bill rate.²⁶⁶

The result of these various cases seems to be an attempt by part of the courts to arrive at an estimate of a market rate of interest. There is no one single basis for arriving at the interest rate, but the courts have consistently refused to adopt the tax law rate for tax deficiencies.

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The courts of appeal that have considered the interest rates applicable to Chapter 11 and Chapter 13 claims agree that a court has a duty to ensure that a creditor receive the present value of his or her claim.²⁶⁷ Although these courts generally hold that the interest rate applied should reflect the prevailing market rate, no preferred method of computing the rate was suggested. Accordingly, there are a wide variety of interest rates in the bankruptcy and district courts.²⁶⁸

The vast majority of cases considering the appropriate rate of interest have rejected a strict application of a statutory rate of interest in favor of a case-by-case basis determination. For example, in *United States v. Neal Pharmacal Co.*,²⁶⁹ the Eighth Circuit expressly considered which rate of interest to apply to the deferred payments of delinquent federal taxes to provide the government with the present value of its [Bankruptcy Code Section 1129\(a\)\(9\)\(C\)](#) claim. The reorganization plan provided for the payment of interest at a rate determined by [28 USC § 1961\(a\)](#). The Service argued for an [IRC Section 6621](#) rate.

The court rejected the IRC Section 1961 rate proposed by the debtor because it relied only on the debtor's borrowing cost. The [IRC Section 6621](#) rate urged by the Service was also rejected on the grounds that this statutory rate (1) lagged behind the market and (2) ignored variations in the length of payment periods and the quality of the creditor's security. Finally, the court refused to apply the floating rate adopted by the bankruptcy court. Rather, the court adopted a case-by-case approach at which debtors and the government could present evidence of market value.²⁷⁰

The debtor's plan in a Chapter 12 or Chapter 13 proceeding must satisfy either [Section 1222](#) or [Section 1322 of the Bankruptcy Code](#). These sections generally set forth the various conditions necessary for confirmation of the plan, much in the nature of [Bankruptcy Code Section 1129\(a\)](#). Unless otherwise agreed, there must be full payment (in deferred cash payments) of all priority claims within the meaning of [Section 507](#).²⁷¹ Therefore, even though payment may be deferred, the Service must agree to any payment less than full payment of its claim. The debtor is discharged from tax claims once full payment has been made under the plan.²⁷²

***5** Only priority tax claims need be covered in the plan. All other tax claims will be discharged in the Chapter 12 or Chapter 13 proceeding. In contrast, in a Chapter 7 liquidation proceeding, some nonpriority tax claims are non-dischargeable (e.g., filing a fraudulent or late return or failing to file a return).²⁷³

In *United States v. Barbier*,²⁷⁴ the Ninth Circuit held that a tax claim that was secured by a lien on property exempt from levy under [IRC Section 6334\(a\)](#) had priority status in a Chapter 13 proceeding. Likewise, in *In re Beard*,²⁷⁵ the court held that attachment of the tax lien was not limited to non-exempt property (i.e., property outside the scope of [IRC Section 6334\(a\)](#)). [IRC Section 6334\(a\)](#) shields the exempt property only from enforcement of the tax lien through involuntary seizure or levy.

The court further held that confirmation of a Chapter 13 plan does not invalidate a tax lien. An adversary proceeding in the Bankruptcy Court is required to challenge the validity or existence of a lien, its extent or scope, or its priority in relation to other interests. Disputes of this type are not resolved through the confirmation process.

Once the Service agrees to a plan providing for full payment of its tax claim, it is bound by that agreement. It cannot take steps to bootstrap its position. For example, the Service was fined for contempt for violating the automatic stay when it attempted to offset a pre-petition tax refund against the debtor's pre-petition tax liability.²⁷⁶

The government has successfully sought to obtain interest on the tax claims under Chapter 13 proceedings. In *In re Bushman*,²⁷⁷ the government argued for either post-petition interest or a future value factor on its valid tax lien. The lien exceeded the amount of the claim. The interest was awarded on the basis of [IRC Section 6621](#).

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In *In re Christian*,²⁷⁸ the government argued for interest under the authority of 11 USC § 1322(a)(2), which provides that a plan of reorganization under Chapter 13 proceedings shall “provide for full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless a holder of a particular claim agrees to a different treatment of such claim...” The government also sought a future value factor under Section 1325 of the Bankruptcy Code, which allows a court to confirm a plan of reorganization if

1. The value of the property to be distributed under the plan for each allowed unsecured claim equals or exceeds the amount that would be paid on such claim if the estate of the debtor were liquidated under Chapter 7 and
2. Each allowed secured claim of the plan of reorganization provides that (a) the claim continues to be secured and (b) the value of property to be distributed under the plan to satisfy such claim is not less than the allowed amount of such claim.

*6 Following the reasoning in *In re Burgess Wholesale Manufacturing Opticians, Inc.*,²⁷⁹ the court held that the government was not entitled to interest or a present value factor under Section 1325, because that section applies only to nonpriority unsecured claims.

Many courts have concluded that the government should not be able to earn interest on tax claims on deferred cash payments. These decisions have been influenced by a comparison of the language of Bankruptcy Code Section 1322(a)(2) with that of Bankruptcy Code Section 1129(a)(9)(C).

Section 1129(a)(9)(C): Holders of claims under Section 507(a)(7) [507(a)(8)] will receive on account of such claim deferred cash payments... of a value, as of the effective date of the plan, equal to the allowed amount of such claim.

Section 1322(a)(2) The plan shall provide for the full payment, in deferred cash payments of all claims entitled to priority under section 507..., unless the holder of a particular claim agrees to a different treatment of such claim.

The absence in Bankruptcy Code Section 1322(a)(2) of the words “value, as of the effective date of the plan, equal to the allowed amount of such claim” has been held as an intentional omission.²⁸⁰ Therefore, a Chapter 13 plan need not provide its priority claims with interest in order to pay the full value of the claim.²⁸¹

Footnotes

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231 11 USC § 726(a)(2).

232 See ¶ 20.05.

233 11 USC § 505(a)(1).

234 11 USC § 507(a)(8).

235 11 USC § 726(b).

236 11 USC § 726(b).

237 11 USC §§ 502(a), 502(b).

238 See 11 USC §§ 726(a), 502(a), 507(a).

239 See 11 USC § 524.

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- 240 11 USC § 523(a)(1)(A).
- 241 11 USC § 523(a)(1)(A).
- 242 See 11 USC § 523(a)(1)(A).
- 243 11 USC § 726(a)(2).
- 244 11 USC § 726(a)(2)(C).
- 245 11 USC § 726(a)(3).
- 246 11 USC § 726(a)(4).
- 247 11 USC § 726(a)(5).
- 248 11 USC § 726(a)(6). *Barstow v. United States (In re Markair, Inc.)*, 308 F3d 1038 (9th Cir. 2002), cert. denied, 123 S. Ct. 2575, 156 L. Ed. 2d 603 (2003) (the phrase “tax lien”, within 11 USC § 724(b), a provision that partially subordinates tax liens to the claims of a number of other parties, including some priority unsecured claimants, means statutory liens and not judicial liens; case includes extensive analysis of legislative history, cases, and Congressional policy; Service granted by court order “first judicial lien position” over certain cash collateral, but had not filed notice of federal tax lien; thus, Service held judicial lien, not statutory federal tax lien).
- 249 11 USC § 1129(a)(9)(A).
- 250 11 USC § 502(f).
- 251 11 USC § 1129(a)(9)(B).
- 252 11 USC § 1129(a)(9)(C). *In re Mason & Dixon Lines, Inc.*, 71 BR 300, 302 (Bankr. MDNC 1987) (11 USC § 1129(a)(9)(C) requires cash payments of principal—not interest-only payments followed by a balloon payment of the principal—in installments over a six-year period).
- 253 *In re Burgess Wholesale Mfg. Opticians, Inc.*, 16 BR 733, 737, 82-1 USTC ¶ 9165, 50 AFTR2d 82-5730 (Bankr. ND Ill. 1982), aff’d, 24 BR 554, 82-2 USTC ¶ 9629, 50 AFTR2d 82-5733 (ND Ill. 1982), rev’d, 721 F2d 1146, 83-2 USTC ¶ 9727, 53 AFTR2d 84-399 (7th Cir. 1983).
- 254 The court was persuaded that a Chapter 11 debtor in possession is similar to a trustee. Since the Supreme Court had held that a trustee was not liable for post-petition interest, in *New York v. Saper*, 336 US 328, 69 S. Ct. 554, 93 L. Ed. 710, 49-1 USTC ¶ 9198, 38 AFTR 491 (1949), the debtor in the instant case should not be liable either. Therefore, the court held that interest on unsecured priority claims is not allowable when other unsecured creditors are not paid in full.
- 255 *In re Moore*, 25 BR 131, 133, 83-1 USTC ¶ 9205, 51 AFTR2d 83-540 (Bankr. ND Tex. 1982).
- 256 The pertinent legislative history indicates that when a court confirms a plan of reorganization, “[t]he property is to be valued as of the effective date of the plan, thus recognizing the time value of money.” HR Rep. No. 595, 95th Cong., 1st Sess. 413 (1977). See also 124 Cong. Rec. H11,105 (remarks of Rep. Edwards); 134 Cong. Rec. S17,422 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini).
- 257 *In re Architectural Design, Inc.*, 59 BR 1019, 1022, 86-1 USTC ¶ 9409, 57 AFTR2d 86-1427 (WD Va. 1986).
- 258 *In re Fisher*, 29 BR 542, 547, 83-1 USTC ¶ 9351, 52 AFTR2d 83-5400 (Bankr. D. Kan. 1983).
- 259 *In re Fisher*, 29 BR 542, 547, 83-1 USTC ¶ 9351, 52 AFTR2d 83-5400 (Bankr. D. Kan. 1983). See also *In re Tacoma Recycling, Inc.*, 23 BR 547, 550 (WD Wash. 1982) (IRC Section 6621 arbitrarily set 20 percent interest rate based on highest prime rates over an eighteen-month period, thereby creating artificial rate that was static during period of significant fluctuations in average prime rate).
- 260 *In re Fisher*, 29 BR at 547.
- 261 See *In re Southern States Motor Inns, Inc.*, 709 F2d 647, 652 (11th Cir. 1983), cert. denied, 465 US 1022, 104 S. Ct. 1275, 79 L. Ed. 2d 680 (1984).
- 262 *United States v. Camino Real Landscape Maintenance Contractors (In re Camino Real Landscape Maintenance Contractors)*, 818 F2d 1503, 1506–1507, 88-1 USTC ¶ 9225, 61 AFTR2d 88-496 (9th Cir. 1987); *United States v. Neal Pharmacal Co.*, 789 F2d 1283, 1288–1289, 86-1 USTC ¶ 9427, 57 AFTR2d 86-1125 (8th Cir. 1986)); *In re Southern States Motor Inns, Inc.*, 709 F2d 647, 651 (11th Cir. 1983), cert. denied, 465 US 1022, 104 S. Ct. 1275, 79 L. Ed. 2d 680 (1984).
- 263 See *In re Monnier Bros.*, 755 F2d 1336, 1339 (8th Cir. 1985). In *Monnier Brothers*, the Eighth Circuit affirmed the district court’s decision to apply the interest rate identified in the contract between the debtor and the creditor. The court observed that the contract rate presumably was the rate agreed upon in an arm’s-length bargain and reflected the prevailing cost of money. *In re Monnier Bros.*, 755 F2d at 1339.
- 264 *In re Moore*, 25 BR 131, 83-1 USTC ¶ 9205, 51 AFTR2d 83-540 (ND Tex. 1982).
- 265 *In re Bay Area Servs.*, 26 BR 811, 814 (MD Fla. 1982).
- 266 *In re Fisher*, 29 BR 542, 550–551, 83-1 USTC ¶ 9351, 52 AFTR2d 83-5400 (D. Kan. 1983).

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- 267 *In re Monnier Bros.*, 755 F2d 1336 (8th Cir. 1985); *In re Southern States Motor Inns, Inc.*, 709 F2d 647 (11th Cir. 1983), cert. denied, 465 US 1022, 104 S. Ct. 1275, 79 L. Ed. 2d 680 (1984).
- 268 Compare *In re Connecticut Aerosols, Inc.*, 42 BR 706, 711, 83-2 USTC ¶ 9521 (Bankr. D. Conn. 1984) (applying IRC Section 1961 rate to Bankruptcy Code Section 1129(a)(9)(C) claim), with *In re Architectural Design*, 59 BR 1019, 86-1 USTC ¶ 9409, 57 AFTR2d 86-1427 (WD Va. 1986) (applying IRC Section 6621 rate to Bankruptcy Code Section 1129(a)(9)(C) claim); *In re FiHi Pizza, Inc.*, 40 BR 258, 271 (Bankr. D. Mass. 1984) (applying interest rate 2.5 percent above IRC Section 6621 rate of Bankruptcy Code Section 1129(a)(9)(C) claim).
- 269 *United States v. Neal Pharmacal Co.*, 789 F2d 1283, 1286 (8th Cir. 1986).
- 270 Accord *In re Milspec, Inc.*, 82 BR 811, 88-1 USTC ¶ 9263, 61 AFTR2d 88-615 (ED Va. 1988).
- 271 11 USC §§ 1222(a)(2), 1322(a)(2). *In re Carter*, 74 BR 613, 615 (Bankr. ED Pa. 1987). Cf. *In re Youngcourt*, 86 BR 715 (Bankr. MD Fla. 1988), rev'd, 117 BR 689, 90-1 USTC ¶ 50,210, 71A AFTR2d 93-3566 (MD Fla. 1990).
- 272 11 USC § 1328(a).
- 273 11 USC §§ 523(a)(1)(A), 523(a)(1)(B).
- 274 *United States v. Barbier*, 896 F2d 377, Bankr. L. Rep. (CCH) ¶ 73,257, 90-1 USTC ¶ 50,107, 71A AFTR2d 93-3443 (9th Cir. 1990), rev'g 84 BR 190 (D. Nev. 1988).
- 275 *In re Beard*, 112 BR 951 (Bankr. ND Ind. 1990).
- 276 *In re Hackney*, 20 BR 158, 159, 82-2 USTC ¶ 9421, 50 AFTR2d 82-5492 (D. Idaho 1982). See also *In re Mealey*, 16 BR 800, 802, 82-1 USTC ¶ 9173 (ED Pa. 1982) (unsuccessful freeze of refund held to be a setoff in violation of the automatic stay; Service in contempt).
- 277 *In re Bushman*, 5 BR 332, 341 (Bankr. EDNY 1980).
- 278 *In re Christian*, 25 BR 438, 439 (Bankr. DNM 1982).
- 279 *In re Burgess Wholesale Mfg. Opticians, Inc.*, 16 BR 733, 82-1 USTC ¶ 9165, 50 AFTR2d 82-5730 (Bankr. ND Ill. 1982), aff'd, 24 BR 554, 82-2 USTC ¶ 9629, 50 AFTR2d 82-5733 (ND Ill. 1982), rev'd, 721 F2d 1146, 83-2 USTC ¶ 9727, 53 AFTR2d 84-399 (7th Cir. 1983).
- 280 *In re Ridgley*, 81 BR 65, 70 (Bankr. D. Or. 1987).
- 281 *In re Kingsley*, 86 BR 17, 20 (Bankr. D. Conn. 1988); *In re Rogers*, 57 BR 170, 173 n.3 (Bankr. ED Tenn. 1986); *In re Brown*, 51 BR 284, 285 (Bankr. DDC 1985); *In re Herr*, 80 BR 135 (Bankr. SD Iowa 1987) (reaching same conclusion under Section 1122(a)(2), which is identical to 11 USC § 1322(a)(2)).

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