"GOOD FAITH" ANALYSIS UNDER CHAPTER 13 —
THE TOTALITY OF CIRCUMSTANCES APPROACH:

HANDEEN V. LEMAIRE

INTRODUCTION

A primary goal of the Bankruptcy Reform Act of 19781 was to promote greater and more widespread use of debt reorganization under Chapter 13 as an alternative to asset liquidation under 11 U.S.C. §§ 701-728 (Chapter 7).2 One method designed to effectuate this goal was expanding the potential for debt discharge under 11 U.S.C. §§ 1301-1330 (Chapter 13).3 Unfortunately, the liberal discharge provisions of Chapter 13 often result in situations in which individuals can discharge debts under Chapter 13 which would not be dischargeable under either Chapters 7 or 11.4 A particular concern involves situations when the Chapter 13 debtor seeks to discharge a debt that arose from a tort action.5 These situations become more disturbing when the tortious conduct creating the debt stemmed from the debtor's intentional and criminal infliction of physical harm to the tort creditor.6

Section 1325(a)(3) of the Bankruptcy Code was intended to alleviate some of the problems associated with the aforementioned situations by requiring that a debtor "propose a plan in good faith."7 Idealistically, it is hoped that proper interpretation of section 1325(a)(3) will deny the expansive discharge provisions of Chapter 13 to those debtors whose conduct and motivation controvert the "provisions, purposes, and spirit of Chapter 13."8 It is urged that such an interpretation of section 1325(a)(3) will properly preserve Chapter 13

4. Id.
5. See generally 3 W. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE § 75.06, at 12 (1987).
7. See 5 COLLIER ON BANKRUPTCY ¶ 1325.04, at 1325-14 (15th ed. 1989) [hereinafter COLLIER]. Section 1325(a)(3) states that: "(a) Except as provided in subsection (b), the court shall confirm a plan if . . . (3) the plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1325(a)(3) (1988).
8. 5 COLLIER, supra note 6, ¶ 1325.04(2) at 1325-11-12.
for those debtors seeking discharge of debts whose conduct and motivation reflect the basic purpose of Chapter 13.9

In Handeen v. LeMaire,10 the United States Court of Appeals for the Eighth Circuit was presented with a situation in which a Chapter 13 debtor sought to discharge a debt arising from his “willful and intentional” physical assault of an individual.11 The issue in LeMaire was whether section 1325(a)(3) prohibited a debtor from discharging in Chapter 13 a tort debt that could not be discharged in Chapter 7.12 The Eighth Circuit utilized a relatively detailed and flexible method for determining good faith known as the “totality of circumstances” test.13

Using LeMaire as a focal point, this Note examines generally the development of good faith in the individual reorganization context.14 The scope of this inquiry ranges from the origins of good faith under the now repealed Bankruptcy Act of 1898,15 to the enactment of the present Chapter 13 in 1978,16 and the impact of the Bankruptcy Act and Federal Judgeship Act of 1984 (BAFJA).17 Specifically, this Note highlights the two primary types of Chapter 13 cases which either produced or continue to produce much of the litigation over the good faith issue.18 The first line of cases is of largely historical significance, involving situations in which the Chapter 13 debtor sought to provide zero or minimal payments to unsecured creditors.19 The second line of cases concerns current disputes, similar to LeMaire, in which the Chapter 13 debtor attempts to discharge debts that would be nondischargeable in Chapter 7.20 This Note also examines the totality of circumstances test21 and its less often used alternative, the “honest intentions” test.22 Finally, this Note discusses

9. In re Chase, 43 Bankr. 739, 744-45 (D. Md. 1984) (finding that a plan proposing to reorganize debt arising from sexual assault was not made in good faith).
10. 883 F.2d 1373 (8th Cir. 1989).
11. Id. at 1374, 1376.
12. Id. at 1376. Had the debtor, LeMaire, filed a Chapter 7 petition, section 523(a)(6) would have prohibited discharge of any debt “for willful and malicious injury by the debtor to another entity or to the property of another entity.” Id. See infra note 83 and accompanying text.
13. LeMaire, 883 F.2d at 1378.
14. See infra note 75 and accompanying text.
16. See infra notes 85-86 and accompanying text.
18. See infra notes 100, 155 and accompanying text.
19. See infra note 100 and accompanying text.
20. See infra note 157 and accompanying text.
21. See infra notes 111-40 and accompanying text.
22. See infra note 143 and accompanying text.
whether the totality of circumstances test is the proper method for analyzing good faith and whether the test was correctly applied by the Eighth Circuit in LeMaire.

FACTS AND HOLDING

On July 9, 1978, Gregory LeMaire shot at Paul Handeen with a rifle nine times, hitting him five times, and causing Handeen serious injury. LeMaire admitted that he had intended to kill Handeen. After pleading guilty to aggravated assault, LeMaire received a sentence of one to ten years imprisonment. LeMaire was released in 1981 after serving twenty-seven months of his sentence.

Shortly after his release, LeMaire returned to graduate school at the University of Minnesota where he received his Ph.D. in January, 1985. Following graduation, LeMaire began a three-year appointment at the University of Minnesota as a research fellow. The salary received by LeMaire during this period averaged $16,000 per year. Additionally, LeMaire was offered a post-fellowship research position with the University at an annual salary of $18,500.


In addition to Handeen, LeMaire’s debt schedules included two additional creditors, the University and LeMaire’s parents. LeMaire’s schedules originally listed his parents as holders of a $900.00

23. See infra notes 249-53 and accompanying text.
24. See infra notes 263-76 and accompanying text.
27. Id.
28. Id.
29. LeMaire, 883 F.2d at 1375. It is unclear as to the exact field of study in which LeMaire received his Ph.D. One court indicated that his degree was in experimental behavior pharmacology. Id. However, in the order confirming the plan, the bankruptcy court indicated that LeMaire received his Ph.D. in behavioral psychology. LeMaire, No. 48-87-164, slip op. at 1.
30. LeMaire, 883 F.2d at 1375.
31. Id. at 1381.
32. Id.
33. LeMaire, No. 48-87-164, slip op. at 2.
34. Id.
35. Id.
36. LeMaire, 883 F.2d at 1375. Essentially only Handeen and LeMaire’s parents remained creditors of LeMaire because LeMaire entered into a reaffirmation agreement with the University whereby LeMaire agreed to provide for his $800 student loan debt outside the Chapter 13 plan. Id. at 1375 n.3.
secured claim and an $11,822.00 unsecured claim. After Handeen objected to the scheduled debt owed to LeMaire's parents, the United States Bankruptcy Court for the District of Minnesota reduced LeMaire's parents' claim to a single unsecured claim of $8,772.00.

LeMaire's first submitted plan of reorganization proposed a payment of $265.00 per month for a thirty-six month period. Under this plan, creditors would have received a dividend of approximately 13.75%. Handeen objected to confirmation of the plan contending that LeMaire's plan was not proposed in good faith and that LeMaire did not commit all of his disposable income to the plan. In addition, Handeen moved to dismiss the case on the basis that LeMaire was not an individual with regular income and therefore was not entitled to relief under Chapter 13. In denying confirmation, the bankruptcy court concluded that LeMaire was not applying all of his disposable income to the plan. Further, the court expressed concern regarding LeMaire's failure to propose a plan for the maximum statutory period of sixty months. However, the court also denied Handeen's motion to dismiss.

LeMaire filed a new plan on September 29, 1987, increasing the monthly payment to $500.00 and extending the payment period to sixty months. Under this plan, the dividend to creditors would increase to forty-two percent. Again, Handeen objected, claiming an absence of good faith and a failure to commit all disposable income to the plan. The bankruptcy court rejected Handeen's objections and

37. Id. The $900.00 debt was a result of an automobile loan made by LeMaire's parents who claimed to retain a security interest in the automobile. The $11,822 unsecured claim was allegedly comprised of loans made by LeMaire's parents for LeMaire's living expenses from 1971-1981, legal fees, educational expenses, and the purchase of a computer. Id. at 1375 n.4.

38. Id. at 1376. The court disallowed the $900 secured claim finding that LeMaire's parents had retained title to the car. Additionally, the court found that the money spent in providing for LeMaire's living and educational expenses was a gift. Id. at 1375 n.4.

39. Id. at 1375. Prior to the original confirmation hearing, LeMaire amended his original plan increasing the payments from $175.00 per month to $265.00 per month. Id.

40. Id.
41. LeMaire, No. 48-87-164, slip op. at 3.
42. Id. See infra note 56 and accompanying text.
43. LeMaire, 883 F.2d at 1375.
44. Id. See 11 U.S.C. 1322(c) (1988). Section 1322(c) provides that "the plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years." Id.

45. LeMaire, 883 F.2d at 1375.
46. LeMaire, No. 48-87-164, slip op. at 3.
47. LeMaire, 883 F.2d at 1375.
48. Id.
confirmed LeMaire's amended plan on November 12, 1987. 49

Handeen appealed the bankruptcy court's allowance of LeMaire's parents' unsecured claim as well as the bankruptcy court's confirmation of LeMaire's amended plan to the United States District Court for the District of Minnesota. 50 Handeen argued that: (1) the plan violated section 1325(a)(3); (2) LeMaire did not commit all of his disposable income to the plan; (3) LeMaire's salary did not constitute income for purposes of section 101(29); and (4) LeMaire's indebtedness to his parents constituted a gift, or (5) was precluded by the statute of limitations or statute of frauds. 51 The district court affirmed the decision of the bankruptcy court. 52

Handeen then appealed to the United States Court of Appeals for the Eighth Circuit. 53 In upholding the district court's ruling, the Eighth Circuit addressed the good faith issue as well as the peripheral issues raised by Handeen. 54 Thus, the court found that LeMaire had committed all of his projected disposable income for the duration of the plan pursuant to section 1325(b). 55 In addition, the court found that LeMaire's research stipend constituted "regular income" under section 101(29) and that the claim of LeMaire's parents was a loan, not a gift, and was neither barred by the statute of limitations nor the statute of frauds. 56

The issue of good faith as required by section 1325(a)(3) remained the crux of Handeen's appeal. 57 Specifically, Handeen asserted that a person who filed Chapter 13 attempting to discharge a debt resulting from criminal conduct could never do so in good

49. Id. Although LeMaire's actual disposable income of $424.00 per month fell short of LeMaire's $500.00 proposed monthly payments, the court recognized that LeMaire would make up the difference by "sacrifices in other places or by continued financial support from his parents." LeMaire, No. 48-87-164, slip op. at 7.
50. LeMaire, 883 F.2d at 1376.
51. LeMaire, No. 48-87-164, slip op. at 7.
52. Id.
53. Id.
54. See infra notes 55-56 and accompanying text.
55. LeMaire, 883 F.2d at 1380. Section § 1325(b)(1)(B) provides that:
If the trust or holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless . . . .
(B) the plan provides that all of the debtor's projected disposable income to be received . . . . will be applied to make payments under the plan.
11 U.S.C. § 1325(b)(1)(B) (1988). In addition, section 1325(b)(2) defines "disposable income" as "income which is received by the debtor and which is not reasonably necessary to be expended: (A) for the maintenance or support of the debtor or a dependent of the debtor." 11 U.S.C. § 1325(b)(2) (1988).
57. LeMaire, 883 F.2d at 1374, 1375.
faith. In rejecting Handeen's assertion, the Eighth Circuit refused to adopt a "bright line rule" in which a debtor could never satisfy the requirement of section 1325(a)(3) by attempting to discharge a debt arising out of criminal conduct. Noting that a "comprehensive definition of good faith is not practical," the court chose to consider the circumstances underlying the debt as only one factor in determining a debtor's good faith for purpose of section 1325(a)(3). This is commonly known as the "totality of circumstances test" and was initially set forth by the Eighth Circuit in In re Estus.

Recognizing the inherent difficulty in defining "good faith," the Estus court promulgated a test in which a bankruptcy court could utilize its fact-finding expertise and reach a decision after considering all the circumstances of a case. As a result, the court in Estus detailed eleven factors to be considered when determining good faith under section 1325(a)(3). Thus, the practical effect of the totality of circumstances test in LeMaire afforded substantial deference to the bankruptcy court's findings of fact.

The Eighth Circuit, in LeMaire, followed the same approach as the Estus court. In LeMaire, the court deferred to the bankruptcy court's determination that LeMaire had proposed his plan in good faith. In affirming the bankruptcy court's finding, the Eighth Circuit placed special emphasis on the "fresh start" concept supporting the Bankruptcy Code. In addition, while the substantiality of a

58. Id. at 1377.
59. Id. at 1374. Judge Magill's majority opinion was joined by Judges McMillan and Gibson. Id.
60. Id. at 1378.
61. Id. at 1377.
62. 695 F.2d 311, 317 (8th Cir. 1982).
63. Id. at 316.
64. Id. at 317. See infra note 124 and accompanying text (listing the factors).
65. See LeMaire, 883 F.2d at 1379. The standard of appellate review applied in section 1325(a)(3) cases is the "clearly erroneous" standard. In re Caldwell, 851 F.2d 852, 858 (6th Cir. 1988). Thus, an appellate court must affirm a bankruptcy court's finding of good faith provided the findings are "reasonable in light of the evidence and are supported by law." LeMaire, 883 F.2d at 1379.
66. See LeMaire, 883 F.2d at 1379-80.
67. Id.
68. Id. at 1380. In reaching their decision, the Eighth Circuit quoted the bankruptcy court by stating that:

"I can certainly understand Handeen's feelings, he has been grievously wronged, seriously injured, and now may receive only part of the agreed on compensation for that injury. However, it is the very essence of bankruptcy to provide a debtor with a fresh start. The debtor pled guilty to the crime that he committed and has paid his debt to society but, unfortunately, has not been able to pay his debt to his victim. It appears that he has made every attempt to reorder his life and obtain the fresh start that bankruptcy promises."

Id. (quoting LeMaire, No. 48-87-164, slip op. at 13).
debtor's repayments is no longer to be emphasized after BAFJA, the Eighth Circuit took particular notice of LeMaire's proposal to “repay a significant portion” of Handeen's judgment.

In dissent, Judge Gibson argued that the majority failed to place sufficient emphasis on the circumstances underlying LeMaire's debt to Handeen. The dissent's specific criticism of the totality of circumstances test was the test's inherent restriction against relying solely on the circumstances giving rise to a debt. Instead, the dissent asserted that applying the totality of circumstances test essentially allowed the bankruptcy court to ignore the facts surrounding LeMaire's debt. As a result, the dissent contended that the finding of the bankruptcy court that LeMaire proposed his plan in good faith was "clearly erroneous."

BACKGROUND

DEVELOPMENT OF GOOD FAITH UNDER CHAPTER 13

Origins of Section 1325(a)(3)

Perhaps no provision of Chapter 13 has been as extensively litigated as the good faith requirement of section 1325(a)(3) relative to confirmation of a bankruptcy plan. However, the current litigation as to what constitutes good faith under Chapter 13 is not without historical significance. The good faith requirement of section 1325(a)(3) can be traced to Chapter XIII of the now repealed Bankruptcy Act of 1898 (1898 Act). Specifically, section 651 of Chapter XIII expressly provided for a judicial determination of a debtor's good faith prior to confirmation. Unfortunately, “good faith,” like its Chapter 13 counterpart, was not explicitly defined by Chapter
The absence of any reported case law providing a judicial definition of good faith under section 651 added to the uncertainty.

Without an express or implied definition of good faith under Chapter XIII, certain recent authorities have traced the development of good faith in cases decided under other chapters of the 1898 Act. In general, cases finding a lack of good faith under chapters unrelated to Chapter XIII involved debtor misconduct. Additionally, non-Chapter XIII interpretations of good faith were found to prohibit the improper solicitation of creditor consent in Chapter XI cases and the use of Chapter XII to avoid child support payments.

The 1898 Act was repealed and immediately replaced by the Bankruptcy Reform Act of 1978 (Code) because the 1898 Act was inadequate. The "wage earners" provisions of Chapter XIII in the 1898 Act were replaced by the more expansive provisions of the Code's Chapter 13. The general good faith requirement of section 651 relative to plan confirmation was retained in modified form by section 1325(a)(3). Unfortunately, the Code, like the 1898 Act, failed to provide an express definition of good faith. Further, the legislative history of section 1325(a)(3) is of little value in defining the scope or intent of good faith. Instead, many bankruptcy courts acting under the Code chose to retain the historical interpretations of good faith developed under the 1898 Act. Thus, it has been contended that section 1325(a)(3) should simply require that a plan con-

79. 10 COLLIER ON BANKRUPTCY ¶ 29.06(6), at 339 (14th ed. 1978).
80. 5 COLLIER, supra note 76, ¶ 1325.04, at 1325-10. However, the 1898 Act's allowance of a majority of unsecured creditors to block confirmation of a debtor's plan made good faith-based objections largely unnecessary. Barnes v. Whelan, 689 F.2d 193, 199 (D.C. Cir. 1982).
81. 5 COLLIER, supra note 79, ¶ 1325.04(1), at 1325-10.
82. Id. For example, the failure of a "financial agent" employed by a municipal debtor to disclose its conflicting financial interests was found to have violated the good faith requirement of Chapter IX of the 1898 Act. American United Mut. Life Ins. Co. v. Avon Park, 311 U.S. 138, 143-45 (1940).
83. In re Village Men's Shops Inc., 186 F. Supp. 125, 128 (S.D. Ind. 1960) (deciding that based on findings of fact the provision of Chapter XI requiring that creditor approval be solicited in good faith was not violated).
84. Gonzalez Hernandez v. Borgos, 343 F.2d 802, 804-07 (1st Cir. 1965) (holding that debtor's plan was properly denied confirmation because it failed to comply with state court order requiring payment of support and maintenance for debtor's children).
86. 3 W. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE, § 66.06, at 17 (1987) [hereinafter W. NORTON, JR.].
87. Id. at 14, 17.
88. 5 COLLIER ON BANKRUPTCY ¶ 1325-04 at 1325-10 (15th ed. 1989).
90. See 5 COLLIER, supra note 79, ¶ 1325.04, at 1325-10.
91. See, e.g., Deans v. O'Donnell, 692 F.2d 968, 972 (4th Cir. 1982); infra notes 134-40 and accompanying text; In re Estus, 695 F.2d 311, 316 (8th Cir. 1982); infra notes
form with the "provisions, purposes, and spirit of Chapter 13."92

Despite judicial acceptance of the historical underpinnings of good faith,93 interpretative problems remained.94 In particular, the courts were confronted by two primary problems in interpreting good faith.95 The first problem concerned whether good faith required a debtor to propose a minimum amount of repayment to unsecured creditors.96 The second problem concerned whether a debtor's attempt to discharge in Chapter 13 a debt which was nondischargeable in Chapter 7 constituted a lack of good faith.97 Discussion of both problems is relevant despite legislative resolution of the zero or minimum payment issue.98 This is because the same method of good faith analysis used in the payment cases is presently used in the "dischargeability" cases.99

Zero or Minimum Payment Cases

One of the most controversial interpretations of good faith in a Chapter 13 context concerned the requirement that a debtor's plan provide for meaningful payment to creditors.100 Simply stated, "meaningful payment" was nothing more than a judicial gloss imposed upon section 1325(a)(3).101 As a result, early decisions addressing the good faith issue included a specific requirement that the plan represent the debtor's best effort.102 These courts treated best effort as synonymous with minimum payment to unsecured creditors.103 The term best effort is used in section 727(a)(9) in which a debtor filing Chapter 7 within six years after receiving a Chapter 13 discharge is denied the Chapter 7 discharge absent payment of seventy percent

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114-24 and accompanying text; see In re Terry, 630 F.2d 634, 635 n.3 (8th Cir. 1980) (recognizing that there is no explicit definition of good faith in the Code).

92. 5 COLLIER, ¶ 1325.04(2), at 1325-11.
93. See supra note 91 and accompanying text.
94. See infra notes 95-97 and accompanying text.
95. 1 GINSBERG, BANKRUPTCY ¶ 14,404, at 14,042.1 (1988) [hereinafter GINSBERG].
96. Id.
97. Id.
98. See infra note 152 and accompanying text.
99. See infra note 161 and accompanying text.
101. 5 COLLIER, supra note 76, ¶ 1325.04(2), at 1325-11-12.
102. 3 W. NORTON, JR., supra note 84, § 75.06, at 11 (1987).
103. Id. See also In re Raburn, 4 Bankr. 624, 625 (Bankr. M.D. Ga. 1980) (holding that best effort required 70% minimum payment to unsecured creditors); In re Burrell, 2 Bankr. 650, 635 (Bankr. N.D. Cal.) rev'd., 6 Bankr. 360 (N.D. Cal. 1980) (agreeing with the bankruptcy court that a debtor's best effort required minimum payments to unsecured creditors, but reversing because a fixed standard of 70% was excessive).
of the allowed unsecured claims in Chapter 13. Thus, courts using section 727(a)(9) in their good faith analysis concluded that seventy percent repayment was "meaningful." Conversely, other courts requiring meaningful payments to satisfy section 1325(a)(3) rejected a fixed percentage repayment requirement. The United States Bankruptcy Court for the District of Utah in In re Iacovoni, despite requiring "meaningful payments," rejected any attempts to impose a rigid, fixed minimum payment standard. Instead, the Iacovoni court chose to define meaningful payment by considering various economic factors unique to the individual debtor.

In sharp contrast to the "meaningful payment equals good faith" cases, a line of federal circuit court decisions interpreting section 1325(a)(3) rejected reliance on any one criterion. These courts opted for a case-by-case analysis in which a totality of factors, including the substantiality of proposed repayments, would be considered. The "totality of circumstances" test relies on the premise that no simple method exists for determining whether a Chapter 13 plan is proposed in good faith. These courts further recognized that "good faith" in any context did not lend itself to an easy or all-inclusive definition.

Within the United States Court of Appeals for the Eighth Circuit, the case of In re Estus remains the seminal pre-BAFJA case concerning whether a proposal of zero or minimum payment violates section 1325(a)(3). The Estus case involved a husband and wife fil-

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(a) The court shall grant the debtor a discharge, unless—(9) the debtor has been granted a discharge under section 1228 or 1328 of this title . . . . within six years before the date of the filing of the petition . . . . unless payments [total]: (B)(i) 70 percent of such claims; and (ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort.

105. 3 W. NORTON, JR., supra note 84, § 75.06, at 11. See Raburn, 4 Bankr. at 625.
107. 2 Bankr. 256 (Bankr. D. Utah 1980). The Iacovoni case involved eight separate Chapter 13 cases consolidated due to their common facts and objectives. In each case, the debtor proposed little or no payment to unsecured creditors. Id. at 258-59.
108. Id. at 267.
109. Id. The factors considered in Iacovoni included the budget of the debtor, the debtor's future income and payment prospects, and the dollar amount of the outstanding debts. Id.
111. Id.
112. 1 GINSBERG, supra note 93, at ¶ 14,404.
113. Id.
114. 695 F.2d 311 (8th Cir. 1982).
115. See generally Culhane, 16 CREIGHTON L.R. 841.
ing a joint petition for relief under Chapter 13. The debtors' listed $10,994.20 in debts to thirty unsecured creditors. The debtors' petition and plan also listed two secured debts as well as a mortgage on rental property. The debtors additionally stated monthly income of $745.00, leaving a surplus of $253.00. From this surplus, the debtors proposed to pay $250.00 over a fifteen-month period to only their secured creditors. The plan provided for no payments to unsecured creditors.

In responding to an unsecured creditor's good faith objection to confirmation of the debtor's plan, the court refused to adopt a "per se minimum payment" requirement when interpreting section 1325(a)(3). Instead, the court viewed the amount of proposed payment as only one relevant factor in determining good faith. Other factors considered by the court in Estus included:

1) The debtor's employment history, ability to earn and likelihood of future increases in income;
2) The expected or probable duration of the plan;
3) The accuracy of the plan's statements of expenses, debts, and percentage repayment of unsecured debts and whether any inaccuracies were an attempt to mislead the court;
4) The extent of preferential treatment between classes of creditors;
5) The extent to which secured claims were modified;
6) The type of debt sought to be discharged and whether any such debt was nondischargeable in Chapter 7;
7) The existence of special circumstances, such as inordinate medical expenses;
8) The frequency with which the debtor had sought relief under the Bankruptcy Reform Act;
9) The sincerity and motivation of the debtor in seeking relief under Chapter 13; and
10) The burden the plan's administration would place upon the trustee.

A totality of circumstances analysis similar to that used in Estus has been adopted by the United States Courts of Appeals for the

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116. Estus, 695 F.2d at 312.
117. Id. at 312-13.
118. Id. at 313.
119. Id.
120. Id.
121. Id.
122. Id. at 316.
123. Id. at 317.
124. Id.
Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits.\textsuperscript{125} While the factors set forth in \textit{Estus} remain the cornerstone of good faith analysis, they are not intended to be exhaustive.\textsuperscript{126} The court in \textit{Estus} also emphasized the importance of the historical meaning of good faith.\textsuperscript{127} Drawing upon the 1898 Act's definition of good faith under former Chapter XI of the 1898 Act, the Eighth Circuit found that the threshold question was “whether . . . there ha[d] been an abuse of the provisions, purpose, or spirit” of Chapter 13.\textsuperscript{128} Following a similar approach, the Eleventh Circuit in \textit{In re Kitchens}\textsuperscript{129} also considered the traditional meaning of good faith as a starting point from which factors similar to those used in \textit{Estus} could be developed.\textsuperscript{130}

It has been further argued, regarding the zero or minimum payment cases, that failing to consider the totality of the circumstances would defeat Congress' intent to keep Chapter 13 available to all debtors.\textsuperscript{131} It is clear that Congress intended Chapter 13 to be available to persons of all income levels.\textsuperscript{132} It is equally apparent that Congress did not intend the source of a debtor's income to impede his access to Chapter 13.\textsuperscript{133} Thus, it was argued in \textit{Deans v. O'Donnell}\textsuperscript{134} that a per se minimum payment requirement under section 1325(a)(3) would thwart congressional intent.\textsuperscript{135} The specific issue before the United States Court of Appeals for the Fourth Circuit was whether Margaret Ann Deans could successfully effectuate a Chapter

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\item[125.] Deans, 692 F.2d at 972. See \textit{In re Caldwell}, 851 F.2d 852, 859 (6th Cir. 1988) (concluding that “the list provided in \textit{Estus} [was] a particularly succinct and clear statement of some of the factors that a court may find meaningful in making its determination of good faith”); Neufeld v. Freeman, 794 F.2d 149, 152 (4th Cir. 1986) (holding that totality of circumstances test may also include consideration of debtor’s pre-petition conduct); Public Fin. Corp. v. Freeman, 712 F.2d 219, 221 (5th Cir. 1983) (upholding finding of bankruptcy court that plan proposing no payments to unsecured creditors was proposed in good faith); Flygare v. Boulden, 709 F.2d 1344, 1347 (10th Cir. 1983) (adopting the factors set forth in \textit{Estus}); \textit{In re Kitchens}, 702 F.2d 885, 888 (11th Cir. 1983) (holding that determination of good faith required consideration of factors similar to those used in \textit{Estus}); \textit{In re Goeb}, 675 F.2d 1386, 1390 (9th Cir. 1982) (holding that good faith analysis involving consideration of various factors may also include the substantiability of the proposed repayment); \textit{In re Rimgale}, 669 F.2d 426, 431-32 (7th Cir. 1982) (holding that a fixed 70% repayment requirement was unnecessary to establish good faith).

\item[126.] \textit{Kitchens}, 702 F.2d 888. See also \textit{Estus}, 695 F.2d at 317.

\item[127.] \textit{Estus}, 695 F.2d at 316.

\item[128.] \textit{Id.}

\item[129.] 702 F.2d 885 (11th Cir. 1983).

\item[130.] \textit{Id.} at 888.

\item[131.] 5 COLLIER, supra note 76, ¶ 1325.04, at 1325-16.


\item[133.] \textit{Id.} at 6080.

\item[134.] 692 F.2d 968 (4th Cir. 1982).

\item[135.] \textit{Id.} at 971.
13 plan which proposed no payments to her six unsecured creditors holding claims totalling $4013.00. The primary concern in Deans was that adoption of a minimum payment requirement would deny Chapter 13 relief to low income debtors such as welfare recipients. As implied by Deans, a minimum payment requirement posed an unreasonable barrier to such debtors that was unintended by Congress. Instead, the Fourth Circuit directed the bankruptcy court upon remand to analyze good faith using the totality of circumstances test. Once again, the dollar amount of the debtor's proposed payments would only be one consideration in the analysis.

As courts construed section 1325(a)(3), the totality of circumstances test represented the prevailing method of analyzing good faith in zero or minimum payment cases. However, two circuit courts rejected the totality of circumstances test, favoring instead a more subjective analysis. Under this analysis, good faith pursuant to section 1325(a)(3) was defined by the United States Court of Appeals for the District of Columbia Circuit in Barnes v. Whelan as a plan proposed with "honesty of intention ...." The Barnes case involved the consolidation of two separate Chapter 13 cases in which both debtor's sought to provide full payment to secured creditors and only nominal payments to unsecured creditors. Essentially, the crux of the honest intentions analysis is whether the debtor is utilizing Chapter 13 with the intent to controvert the general proposition that only honest debtors are entitled to the expansive discharge of Chapter 13.

The honest intentions analysis was further developed in In re Johnson in which the United States Court of Appeals for the Second Circuit limited its good faith inquiry to "whether the debtor ha[d] misrepresented facts in his plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed his Chapter 13 plan in an

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136. Id. at 969.
137. Id.
138. Id.
139. Id. at 972.
140. Id.
141. See supra note 125 and accompanying text.
142. See infra notes 143, 147 and accompanying text.
143. 689 F.2d 193 (D.C. Cir. 1982).
144. Id. at 200.
145. Id. at 196. Wavalene Barnes proposed to commit her $91.00 per month disposable income to provide 100% payment to secured creditors but only one percent payment to unsecured creditors. Id. Similarly, Abel Montano's plan provided for $200.00 monthly payments which were intended to repay secured creditors in full while only satisfying one percent of the claims of his unsecured creditors. Id.
146. 3 W. NORTON, JR., supra note 84, § 75.06, at 10.
147. 708 F.2d 865 (2d Cir. 1983).
The honest intentions analysis, unlike the totality of circumstances test, emphasizes the debtor's subjective intent. Instead of considering a veritable laundry list of objective factors, the honest intentions approach "contemplates a broad judicial inquiry into the debtor's conduct and state of mind."

**IMPACT OF SECTION 1325(B)**

Enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA) essentially resolved the debate over whether meaningful payment to unsecured creditors, standing alone, was a component of good faith. The specific provision of BAFJA addressing the issue is section 1325(b). Section 1325(b) imposes upon the debtor the requirement that on proper objection, a holder of an allowed unsecured claim must be paid in full. Alternatively, the plan must commit all of the debtor's "projected disposable income" to funding the plan for a three-year period. As a result, it has been argued that fundamental canons of statutory construction would be violated by imposing a meaningful payment standard under section 1325(a)(3) when a separate statutory requirement addressing the point exists in section 1325(b)(1)(B).
Courts have experienced particular difficulty assessing the good faith of a Chapter 13 plan which proposes to compromise debts that would be nondischargeable in Chapter 7.\textsuperscript{157} The issue arises because the dischargeability provisions in Chapter 13 are more expansive than those available in Chapter 7.\textsuperscript{158} Given the potential for a broader discharge under section 1328(a), it becomes possible for a debtor to discharge, without full or partial payment, claims that could not be discharged in Chapter 7.\textsuperscript{159} In addressing this issue, bankruptcy courts have utilized methods of determining good faith similar to those used in the pre-BAFJA zero or minimum payment cases.\textsuperscript{160}

As in the pre-BAFJA payment cases, courts analyzing good faith in dischargeability cases generally favor the totality of circumstances test.\textsuperscript{161} Again, the test as applied in dischargeability cases recognizes that no one circumstance should be controlling.\textsuperscript{162} Therefore, just as a debtor’s proposal of minimal or no payments \textit{by itself} does not negate good faith,\textsuperscript{163} neither does a debtor’s use of Chapter 13 to discharge debts not dischargeable in Chapter 7.\textsuperscript{164} Instead, the more factors present which negatively reflect upon the debtor’s conduct and intentions the more likely a court will find a lack of good faith.\textsuperscript{165}

\textsuperscript{157} See infra notes 164-72, 178-87 and accompanying text.
\textsuperscript{158} See infra notes 164-72, 178-87 and accompanying text.
\textsuperscript{159} Id. See infra notes 164-72, 178-87 and accompanying text.
\textsuperscript{160} Id. See supra note 93, § 14,404, at 14,042.1. See infra notes 164-72, 178-87.
\textsuperscript{161} GINSBERG, supra note 93, § 14,404, at 14,042.1. See infra notes 164-72, 178-87.
\textsuperscript{162} GINSBERG, supra note 93, § 14,404, at 14,042.1. See infra notes 164-72, 178-87.
\textsuperscript{163} See supra notes 110-11 and accompanying text.
\textsuperscript{164} In re Owens, 82 Bankr. 960, 966 (N.D. Ill. 1988).
\textsuperscript{165} GINSBERG, supra note 93, § 14,404, at 14,042.1. See also, In re Canda, 33 Bankr. 75, 76 (Bankr. D. Or. 1983) (finding that debtor who proposed to reorganize $7,569.33 in student loan debts with $40.00 per month payments over 36 month period violated § 1325(a)(3) because debtor was willing to work only a part-time job as opposed to a full-time job); In re Easley, 72 Bankr. 948 (Bankr. N.D. Tenn. 1987) (holding that debtor’s attempt to discharge debt arising from criminal assault is important factor to consider when determining good faith); In re Kazzaz, 62 Bankr. 308, 312 (Bankr. E.D. Va. 1986) (holding that while debtor’s attempt to discharge debt arising from insurance fraud should not be determinative, it did prove substantial indicia of plan proposed in bad faith).
The Eighth Circuit's handling of dischargeability cases is illustrated by *Education Assistance Corp. v. Zellner*. In Zellner, a debtor attempted to discharge a student loan in Chapter 13 that would otherwise be nondischargeable in Chapter 7. At the time of filing Chapter 13, the debtor's outstanding debt to his student loan creditor totalled $10,679.55. Under the debtor's proposed plan, the student loan creditor would receive payments totalling approximately eighty-one percent of its allowed claim. Further, seventy-one percent of the debtor's total payments under the plan would be directed toward the student loan creditor. The student loan creditor objected to confirmation of the debtor's plan, contending that it was not proposed in good faith as required by section 1325(a)(3). The bankruptcy court rejected the creditor's objection, concluding that the inquiry into good faith ended with a determination that the debtor had committed all of his disposable income to the plan pursuant to section 1325(b)(1)(B).

In affirming the bankruptcy court decision, the Eighth Circuit recognized the impact section 1325(b) had upon the totality of circumstances test set forth in *Estus*. The court stated that:

This section's "ability to pay" criteria subsumes most of the *Estus* factors and allows the court to confirm a plan in which the debtor uses all of his disposable income for three years to make payments to his creditors. Thus, our inquiry into whether the plan "constitutes an abuse of the provisions, purpose or spirit of Chapter 13 . . . has a more narrow focus. However, the Eighth Circuit strongly implied that section 1325(b) should not preclude consideration of those *Estus* factors not specifically addressed by Congress. As a result, a court may still consider such factors as whether the debtor has accurately stated his debts and expenses or whether the debtor has made any fraudulent misrepresentations to the court.

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166. 827 F.2d 1222 (8th Cir. 1987).
167. *Id.* at 1223. See 11 U.S.C. 523(a)(8)(B) (1988). Section 523(c)(8)(B) provides that: "(a) A discharge under section 727 . . . does not discharge an individual debtor from any debt — (8) for an educational loan made, insured, or guaranteed by a governmental unit . . . unless — (B) excepting hardship on the debtor . . . " *Id.*
168. *Zellner*, 827 F.2d at 1223.
169. *Id.* at 1224.
170. *Id.*
171. *Id.*
172. *Id.* at 1227.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
Following logic similar to that in Zellner, the United States Court of Appeals for the Seventh Circuit also took the position that section 1325(b) should not inhibit use of the totality of circumstances test. In Matter of Smith, a Chapter 13 debtor sought to discharge a $48,748.00 debt owed to the state of Indiana. The debt arose from a civil penalty resulting from the debtor's unlawful "fleecing" of senior citizens by making home repairs which the debtor knew were unnecessary. The debtor conceded that had he opted to file for Chapter 7, the debt would have been nondischargeable. After determining his disposable income, the debtor proposed a plan in which five unsecured creditors, including the state, would share pro rata in monthly distributions of $10.45 over a five-year period. In confirming the debtor's plan, the bankruptcy court refused to accept evidence offered by the state concerning the circumstances giving rise to the debt.

In reversing the bankruptcy court decision, the Seventh Circuit emphasized the value of the totality of circumstances test. As in Zellner, the Smith court instructed that consideration of those Estus factors not addressed by Congress was strongly encouraged. As a result, factors such as the "debtor's motive in seeking Chapter 13 relief" and the "circumstances under which the debts were incurred" became integral components of good faith analysis. However, in following the purpose behind the totality of circumstances test, the Seventh Circuit refused to limit its inquiry solely to such factors.

It is widely accepted that a Chapter 13 debtor's attempt to discharge an otherwise nondischargeable debt will not by itself lead to a finding of bad faith. However, such a factor will likely result in heightened judicial scrutiny of the plan. It has been argued that judicial scrutiny is most acute when the debtor's actions resulting in

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177. See infra notes 178-87 and accompanying text.
178. 848 F.2d 813 (7th Cir. 1988).
179. Id. at 814.
180. Id.
182. Smith, 848 F.2d at 814-15.
183. Id. at 815.
184. Id. at 821.
185. Id. at 820.
186. Id. at 821.
187. Id. at 818-19.
188. Ginsberg, supra note 93, ¶ 14,404, at 14,042.1. See supra notes 110-11 and accompanying text.
189. Ginsberg, supra note 93, ¶ 14,404, at 14,042.1.
the otherwise nondischargeable claim are particularly egregious.\textsuperscript{190} This was the approach taken by the United States Bankruptcy Court for the District of Colorado in \textit{In re Chura}.\textsuperscript{191} In \textit{Chura}, a Chapter 13 debtor, prior to filing bankruptcy, accepted a role as a fiduciary to her mentally disabled cousin.\textsuperscript{192} Specifically, the debtor was asked by her cousin to manage the cousin’s checking account.\textsuperscript{193} Subsequently, the debtor began to use her cousin’s money for personal use.\textsuperscript{194} Once the debtor’s conduct was discovered, her cousin initiated a civil suit for willful conversion and obtained a state court judgment of $28,808.25.\textsuperscript{195} The debtor responded by filing for relief under Chapter 13 eight days after the state court judgment was entered.\textsuperscript{196} In the debtor’s proposed plan of repayment, unsecured claimants such as the debtor’s cousin would have received monthly payments of $1.00 per month.\textsuperscript{197}

In sustaining an objection to confirmation, the court recognized the general proposition that a debtor’s use of Chapter 13 to discharge otherwise nondischargeable debts is not dispositive of bad faith.\textsuperscript{198} However, in applying the totality of circumstances test, the court could not avoid emphasizing the insidious nature of the debtor’s conduct.\textsuperscript{199} The court stated that:

\begin{quote}
[it could] conclude that Congress either intended or, by inadvertence, overlooked the possibility that debtors could incur debts through the perpetration of willful conduct and fraud, absolving themselves of responsibility for such debts through Chapter 13 plans that offer token repayment, or no repayment at all. This Circuit . . . empowers the Court to carefully scrutinize such conduct, along with a multitude of other factors, in determining the good faith motives and efforts of the debtor in each case.\textsuperscript{200}
\end{quote}

In \textit{Matter of Swan},\textsuperscript{201} the United States Bankruptcy Court for the District of Nebraska expressed a similar heightened concern regarding a Chapter 13 debtor’s attempt to discharge a debt stemming from the debtor’s physical assault of an individual.\textsuperscript{202} Mary Hayford

\begin{footnotes}
\footnotetext[190]{190. Id. at ¶ 14,404 at 14,042.2.}
\footnotetext[191]{191. 33 Bankr. 558 (Bankr. D. Colo: 1983).}
\footnotetext[192]{192. Id.}
\footnotetext[193]{193. Id.}
\footnotetext[194]{194. Id. at 558-59.}
\footnotetext[195]{195. Id.}
\footnotetext[196]{196. Id. at 559.}
\footnotetext[197]{197. Id.}
\footnotetext[198]{198. Id.}
\footnotetext[199]{199. Id. at 559-60.}
\footnotetext[200]{200. Id.}
\footnotetext[201]{201. 98 Bankr. 502 (Bankr. D. Neb. 1989).}
\footnotetext[202]{202. Id. at 505.}
\end{footnotes}
obtained a $9,109.88 tort judgment against Michael Swan as a result of Swan's assault and battery of Hayford. Subsequent to the tort judgment, Swan filed bankruptcy under Chapter 7. After Hayford filed an objection to discharge of the debt owed her, Swan converted his case to Chapter 13. Swan's schedules of debts listed no secured debts. However, Swan did list unsecured debts, including Hayford's claim, totalling $13,884.10. Swan's submitted plan of reorganization proposed payments to Hayford of $20.00 per month for a three-year period. At the confirmation hearing, Hayford raised an objection claiming that the plan was not proposed in good faith pursuant to section 1325(a)(3). Upon completion of this plan, Hayford would have received a total of $720.00.

In addressing Hayford's objection, the court looked to the totality of circumstances test as set forth in Estus. Among the factors emphasized by the Swan court was the type of debt sought to be discharged. Initially, the court accepted the proposition that a debtor's attempt to discharge a debt not dischargeable in Chapter 7 was not by itself dispositive as to the issue of good faith. However, the court recognized that a debt arising from criminal conduct that would be nondischargeable under Chapter 7 was a relevant factor in determining good faith. As a result, the court found that both the size of Swan's debt to Hayford in proportion to Swan's remaining unsecured debts and his conversion to Chapter 13 following Hayford's discharge objection constituted indicia of bad faith.

ANALYSIS

The issue presented in Handeen v. LeMaire concerned whether a debt for willful and malicious injury, that would obviously be nondischargeable under Chapter 7, could be discharged under

\[\text{203. Id. at 503.}\]
\[\text{204. Id.}\]
\[\text{205. Id.}\]
\[\text{206. Id.}\]
\[\text{207. Id. at 504.}\]
\[\text{208. Id. at 505.}\]
\[\text{209. Id. at 503.}\]
\[\text{210. Id.}\]
\[\text{211. Id. at 504.}\]
\[\text{212. Id.}\]
\[\text{213. Id.}\]
\[\text{214. Id.}\]
\[\text{215. Id. at 505. In denying confirmation of Swan's plan, the court also emphasized Swan's failure to prepare a five-year plan of repayment. The court additionally found Swan lacking in "sincerity and motivation" in seeking Chapter 13 relief because four of his five unsecured debts were related to his state court assault and battery action. Id.}\]
\[\text{216. 883 F.2d 1373 (8th Cir. 1989).}\]
Chapter 13. Specifically, the *LeMaire* court addressed whether a debtor proposing to discharge such a debt had acted in good faith pursuant to section 1325(a)(3). In reaching its decision, the United States Court of Appeals for the Eighth Circuit concluded that (1) the totality of circumstances test initially set forth in *In re Estus*, and followed in *Education Assistance Corp. v. Zellner*, was the proper method of analyzing good faith; and (2) upon the bankruptcy court's application of the test, it became clear that LeMaire had proposed his plan in good faith.

**THE TOTALITY OF CIRCUMSTANCES TEST AS THE PROPER METHOD FOR ANALYZING GOOD FAITH**

Prior to enactment of the Code, judicial attempts at defining "good faith" in a Chapter XIII context were significant for their lack of uniformity. This was due largely to the fact that good faith, regardless of the context, did not engender simple definition. However, with the Code came a new and improved Chapter 13. It was the express intent of Congress that the new Chapter 13 would provide individual debtors with an attractive alternative to straight liquidation.

Among the features designed to attract debtors to Chapter 13 was the abolition of Chapter XIII's requirement that no court could confirm a plan absent a majority of unsecured creditor's approval. This consent requirement essentially chilled effective use of Chapter XIII, forcing many debtors to opt for liquidation. After Chapter 13 eliminated the consent requirement, plan confirmation was left to the court pursuant to the six criteria, including good faith, enumerated in section 1325(a). Unfortunately, good faith under Chapter

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217. *Id.* at 1376.
218. *Id.* at 1377.
219. 695 F.2d 311 (8th Cir. 1982).
220. 827 F.2d 1222 (8th Cir. 1987).
221. *LeMaire*, 883 F.2d at 1379.
222. *Id.* at 1379.
223. *See supra* notes 79-84 and accompanying text.
224. 1 GINSBERG, BANKRUPTCY ¶ 14,404 at 14,042.1 (1988) [hereinafter GINSBERG].
225. *See supra* notes 1-2 and accompanying text.
228. H.R. REP. NO. 595, supra note 222, at 6084.
(a) The court . . . shall confirm a plan if—
(1) the plan complies with the provisions of this chapter . . . ;
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13 was no more easily definable than in Chapter XIII.230 Thus, without a uniform method of determining good faith, the possibility existed that section 1325(a)(3) could produce the same obstacle to confirmation that the creditor's consent requirement posed under Chapter XIII.231

The "honest intentions" test represents one possible uniform approach courts could use in determining good faith.232 The seminal case of Barnes v. Whelan233 supports this approach.234 The specific issue in Barnes concerned whether a plan proposing nominal payments was proposed in good faith pursuant to section 1325(a)(3).235 In confirming the plan, the United States Court of Appeals for the District of Columbia Circuit treated "the traditional meaning of good faith as honesty of intention."236 Application of this definition in Barnes required an inquiry into whether the debtor's motivations or intentions in seeking Chapter 13 relief were improper.237

There exists two primary problems in using an "honest intentions" approach to analyze good faith.238 The first problem concerns the inconsistent approach taken by certain appellate courts when interpreting good faith.239 At the time the LeMaire case was decided, seven federal circuit courts had settled upon the totality of circumstances test as the preferred method of analyzing good faith.240 In contrast, only two circuits have accepted the "honest intentions"

(2) any fee, charge, or amount required . . . 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 . . . of property to be distributed under the plan . . . is not less than the amount that would be paid . . . under Chapter 7 . . .;
(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 . . . is not less than the allowed amount of such claim; or
   (C) the debtor surrenders the property . . . to such holder; and
   (6) the debtor will be able to make all payments under the plan and to comply with the plan.

Id. 230. 5 COLLIER ON BANKRUPTCY ¶ 1325.04, at 1325-12 (15 ed. 1989).
231. See supra note 80 and accompanying text.
232. 3 W. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE ¶ 75.06 at 10 (1987) [hereinafter W. NORTON, JR.].
233. 689 F.2d 193 (D.C. Cir. 1982).
234. LeMaire, 883 F.2d at 1377 n.9.
235. Barnes, 689 F.2d at 195.
236. Id. at 200.
237. Id.
238. See supra notes 238, 245 and accompanying text.
239. 3 W. NORTON, JR., supra note 228, ¶ 75.06, at 10.
240. See supra note 125 and accompanying text.
Thus, if good faith under Chapter 13 is to avoid the same uncertainty in meaning and application that was present under Chapter XIII, it could be argued that courts should address the issue from a common perspective. As such, it will be urged that the perspective providing the most objective and complete approach to analyzing good faith is the totality of circumstances test.

The second problem with the "honest intentions" test concerns its method of analyzing good faith as distinguished from that used in the totality of circumstances test. The focus of an "honest intentions" inquiry is to determine whether the debtor has acted in a manner traditionally associated with bad faith. Standing alone, this inquiry mirrors the historical meaning of good faith which is frequently cited by courts adhering to a totality of circumstances test. However, a distinction arises in the treatment of this historical meaning in both tests.

The totality of circumstances test treats the historical meaning of good faith as a foundation from which to create a set of factors used to analyze section 1325(a)(3) problems. In contrast, the honest intentions test essentially uses the historical meaning of good faith as its analysis. The honest intentions test limits its inquiry to whether the debtor has evidenced an intent to controvert the provisions, purposes, and spirit of Chapter 13. The honest intentions test does not contemplate the range of factors used in a totality of circumstances approach. As a result, the narrow focus of the honest intentions test contravenes the proposition that good faith should be determined on a case-by-case basis examining the totality of circumstances regarding a particular case.

Finally, the duty imposed by the totality of circumstances test to consider factors beyond the debtor's subjective intent may also provide the best protection against abusing the liberal discharge avail-

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241. See supra notes 143-50 and accompanying text.
242. See supra notes 79-84 and accompanying text.
243. In re Easley, 72 Bankr. 948, 950 (Bankr. N.D. Tenn. 1987) (stating that "reported decisions demonstrate that 'good faith' is an illusive statutory description of the limits of Chapter 13 relief").
244. See Ginsberg, supra note 220, ¶ 14,404, at 14,042.
245. See 3 W. Norton, Jr., supra note 228, § 75.06, at 10.
246. Barnes, 689 F.2d at 200.
247. See Deans v. O'Donnell, 692 F.2d 968, 972 (4th Cir. 1982) (recognizing that historical meaning requires inquiry into whether there has been an "abuse of the provisions, purpose, or spirit of [Chapter 13]").
248. See 3 W. Norton, Jr., supra note 228, § 75.06, at 10.
249. See In re Kitchens, 702 F.2d 885, 888-89 (11th Cir. 1983).
250. See Barnes, 689 F.2d at 200.
251. Id.
252. See In re Johnson, 708 F.2d 865, 868 (2d Cir. 1983).
253. Ginsberg, supra note 220, at ¶ 14,404, at 14,042.
able in Chapter 13.254 The United States Court of Appeals for the Fourth Circuit in Neufield v. Freeman255 noted that the totality of circumstances test did not conflict with the liberal discharge provisions of Chapter 13.256 Rather, the court found that the broad scope of the totality of circumstances test best protected against the improper manipulation of the discharge provisions of Chapter 13.257 The United States Bankruptcy Court for the Northern District of California in In re Burrell258 further reasoned that unless courts have the discretion to consider all circumstances the danger exists that Chapter 13 plans "would emasculate the safeguards that Congress has included in Chapter 7 to prevent debtor abuse of the bankruptcy laws."259 The court in Burrell stated that bankruptcy courts were provided substantial discretion so as to prevent such abuse.260 Instead, the court stated that the totality of circumstances test best enabled a court to expand its judicial inquiry into the motivation of the debtor at the time of plan confirmation.261 Thus, whether a debtor is attempting to unfairly manipulate the liberal discharge provisions of Chapter 13 is a factor to be properly considered by a court.262

THE TOTALITY OF CIRCUMSTANCES TEST WAS CORRECTLY APPLIED IN LeMaire

The finding of good faith by a bankruptcy court pursuant to section 1325(a)(3) will generally be affirmed unless such a finding is "clearly erroneous" in light of the evidence and the law.263 Indeed, in cases in which the totality of circumstances test is used, appellate courts typically defer to the fact-finding expertise of the bankruptcy court.264 Additionally, it is expected that the bankruptcy court will be uniquely qualified to consider all of the circumstances of a given case.265 Thus, the focus of the inquiry by the Eighth Circuit in LeMaire concerned whether the bankruptcy court correctly applied the totality of circumstances test.266

254. See infra notes 256-62 and accompanying text.
255. 794 F.2d 149 (4th Cir. 1986).
256. Id. at 153.
257. Id.
258. 6 Bankr. 360 (N.D. Cal. 1980).
259. Id. at 366.
260. Id.
261. Id.
262. Id.
263. LeMaire, 883 F.2d at 1379.
264. Id. See also Zellner, 827 F.2d at 1224.
265. LeMaire, 883 F.2d at 1379.
266. Id. at 1380.
Within the Eighth Circuit, the components to the totality of circumstances test include the factors listed in *Estus*.\(^{267}\) In confirming LeMaire's plan of reorganization, the bankruptcy court applied all eleven *Estus* factors to LeMaire's case.\(^{268}\) Among the more relevant factors discussed by the bankruptcy court were LeMaire's employment history and ability to earn income, the duration of LeMaire's plan, LeMaire's proposed payments and surplus, dischargeability, and LeMaire's motivation and sincerity in seeking Chapter 13 relief.\(^{269}\)

In addressing the issue of LeMaire's employment history and ability to earn income, the bankruptcy court correctly took note of LeMaire's post-fellowship job offer with the University of Minnesota.\(^{270}\) The importance of this consideration was made clear in *Estus* when the Eighth Circuit remanded the case with specific instructions directing the bankruptcy court to examine the debtor's future income.\(^{271}\) This factor was also emphasized by the Eighth Circuit in *LeMaire* because any potential increases in LeMaire's future income would enable Handeen to seek modification of LeMaire's plan to provide increased payments.\(^{272}\)

The bankruptcy court also properly considered LeMaire's proposal to provide payments for a five-year period as opposed to the statutory minimum three-year period as one indicia of good faith.\(^{273}\) The United States Bankruptcy Court for the District of Nebraska in *Matter of Swan*\(^ {274}\) also found the length of the debtor's plan of repayment to be an important component in determining good faith.\(^ {275}\) Specifically, the court in *Swan* held that the debtor's failure to propose payments beyond the three-year minimum was strong evidence of bad faith.\(^ {276}\)

Perhaps the most controversial factor considered by the bankruptcy court concerned LeMaire's proposed payments.\(^ {277}\) It has been

\(^{267}\) *Id.* at 1378. See supra note 124 and accompanying text.

\(^{268}\) *In re LeMaire*, No. 48-87-164, slip op. at 9-14 (Bankr. D. Minn. Nov. 12, 1987).

\(^{269}\) *Id.* at 10-13.

\(^{270}\) *Id.* at 11.

\(^{271}\) *Estus*, 695 F.2d at 317.

\(^{272}\) *LeMaire*, 883 F.2d 1380. See 11 U.S.C. § 1329 (1988). Section 1329 provides that: "[a]t any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of . . . the holder of an allowed unsecured claim, to — (1) increase . . . the amount of payments on claims . . . provided for by the plan . . ." *Id.*

\(^{273}\) *LeMaire*, 883 F.2d at 1375.


\(^{275}\) *Id.* at 504-05.

\(^{276}\) *Id.* See also *Estus*, 695 F.2d at 317; see 11 U.S.C. § 1322(c) (1988). Section 1322(c) provides that "[t]he plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years." *Id.*

\(^{277}\) See infra notes 278-83 and accompanying text.
argued that the “disposable income test” of section 1325(b)(1)(B) sub-
sumes consideration concerning the amount of proposed monthly
payments to be paid by the debtor.278 This argument further states
that when the sole basis of an unsecured creditors objection is the
amount of the debtors proposed monthly payments, section 1325(b),
rather than section 1325(a)(3), should control.279 However, the pri-
mary purpose behind creation of the disposable income test was to
proscribe a finding of bad faith based solely on the amount of the
debtor’s payments.280 Thus, courts have treated the amount of pro-
posed monthly payments as a relevant, although not determinative,
component of good faith in dischargeability cases.281 Such treatment
is further supported by the proposition that a court should not be
precluded from considering a debtor’s proposed repayments in cases
in which good faith is challenged on other grounds.282 Therefore,
since the thrust of Handeen’s good faith objection concerned the vi-
olent circumstances giving rise to LeMaire’s debt, the consideration
by the bankruptcy court of LeMaire’s proposed monthly payments was
proper.283

The circumstances surrounding LeMaire’s debt and its dis-
chargeability represents another factor correctly considered by the
bankruptcy court.284 Unfortunately, the bankruptcy court did not de-
tail the degree of influence such a consideration would hold when de-
termining good faith.285 In contrast, the dissent in LeMaire was
rather explicit in its assertion that the circumstances surrounding
LeMaire’s debt should be dispositive of bad faith.286

However, the dissent’s approach would contravene the sound
legal principles supporting the totality of circumstances approach to
analyzing good faith.287 Admittedly, a more detailed discussion con-
cerning the weight to be given the circumstances surrounding Le-
Maire’s debt is necessary.288 However, in comparison to the position
taken by the dissent to treat the circumstances surrounding a partic-
ular debt as solely determinative of the issue of good faith, the broad, albeit slightly underdeveloped inquiry undertaken by the bankruptcy court represents the better choice.289

Finally, the bankruptcy court considered LeMaire's motivation and sincerity in seeking Chapter 13 relief.290 On its face, this inquiry seems to resemble the inquiry into a debtor's subjective intent used in the honest intentions test.291 However, as applied in LeMaire, this consideration represents a repository in which a bankruptcy court compares and analyzes the totality of circumstances surrounding a case.292 The bankruptcy court properly noted that LeMaire's significant payments extending beyond the three-year minimum period and the potential for payment modification in the event LeMaire's financial condition improved were convincing as to LeMaire's motivation and sincerity.293

Given the standard of appellate review used in section 1325(a)(3) cases, the findings of a bankruptcy court are not reversible unless such findings are "clearly erroneous" in light of the evidence and the law.294 By utilizing the totality of circumstances test, the bankruptcy court correctly applied the law.295 Further, in considering all eleven factors enumerated by Estus, the bankruptcy court protected itself from any evidentiary challenge based on lack of scope and inquiry.296 In light of these findings, the Eighth Circuit correctly held that the determination by the bankruptcy court that LeMaire proposed his plan in good faith was not clearly erroneous.297

CONCLUSION

It is indeed a troubling thought to imagine that an individual who has intentionally inflicted physical injury upon another could use Chapter 13 to discharge a tort debt resulting from such conduct. However, it would be equally disturbing to deprive an individual who has experienced financial difficulty of the opportunity to obtain the "fresh start" afforded by the federal bankruptcy laws.

The requirement of section 1325(a)(3) that a plan is not confirmable unless "proposed in good faith" attempts to bridge the gap be-

290. LeMaire, No. 48-87-164, slip op. at 12-13.
291. See Barnes, 689 F.2d at 200.
292. LeMaire, 883 F.2d at 1380.
293. Id. at 1380 (quoting LeMaire, No. 48-87-164, slip op. at 13).
294. LeMaire, 883 F.2d at 1379.
295. See LeMaire, No. 48-87-164, slip op. at 9-14.
296. Id.
297. LeMaire, 883 F.2d at 1380.
between the fresh start concept and the concern over Chapter 13 becoming a haven for criminal debtors to discharge their otherwise nondischargeable debts. Unfortunately, no statutory definition of good faith exists in section 1325(a)(3). Instead, most courts engage in an inquiry as to whether there has been an abuse of the "provisions, purpose, or spirit" of Chapter 13.\textsuperscript{298} The approach which best effectuates this inquiry is the totality of circumstances test. By rejecting reliance on any one factor, the totality of circumstances test provides the most \textit{objective} analysis of an inherently \textit{subjective} term. Thus, instead of focusing solely on such a narrow issue as the debtor’s subjective state of mind, the totality of circumstances test equitably considers all of the circumstances surrounding the debtor’s proposed plan of reorganization.

Without the totality of circumstances approach to analyzing good faith, debtors such as LeMaire could never avail themselves of Chapter 13. Instead, the mere fact that a debtor seeks to discharge a debt nondischargeable in Chapter 7 would be treated as disposing of the good faith issue. Thus, a court could never consider such factors as whether the debtor’s plan proposed significant repayment of the debt for a period longer than the three-year minimum or whether the debtor’s financial condition was likely to change. As the United States Court of Appeals for the Eighth Circuit properly found in \textit{Handeen v. LeMaire},\textsuperscript{299} consideration of these factors are as equally important as the circumstances giving rise to the debt or the debtor’s subjective intent in seeking Chapter 13 relief.\textsuperscript{300}

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\textsuperscript{298} See \textit{supra} note 125 and accompanying text.

\textsuperscript{299} 883 F.2d 1373 (8th Cir. 1989).

\textsuperscript{300} On March 26, 1990, the United States Court of Appeals for the Eighth Circuit, sitting en banc, reversed the aforementioned decision. In reaching this decision, the en banc panel supported the method of analyzing good faith in Chapter 13 cases as used by both the bankruptcy court and the majority of the three-judge panel. However, in contrast to the bankruptcy court and the three-judge panel decisions, the en banc panel strongly emphasized the public policy implications of allowing a Chapter 13 debtor to discharge a criminal debt that would not be discharged in Chapter 7. In particular, the en banc panel focused upon the specific facts surrounding LeMaire’s shooting of Handeen. The en banc panel found these facts to be dispositive as to LeMaire’s failure to meet the requisite “motivation and sincerity” in proposing his Chapter 13 plan. As a result, the en banc panel found the original decision of the bankruptcy court that LeMaire had proposed his plan in good faith to be clearly erroneous.

In a dissenting opinion, Judge Magill rejected the reliance on public policy considerations in determining good faith under Chapter 13. Discussing many of the reasons previously set forth in this Note, the dissent also noted that the majority’s decision was contrary to the analysis set forth in \textit{Estus} and used by many other circuits. \textit{Handeen v. LeMaire}, — F.2d —, 1990 U.S. App. LEXIS 4374 (1990).