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**PRACTICING UNDER THE NEW
BANKRUPTCY CODE:
A NUTS & BOLTS WORKSHOP**

**The Bankruptcy Abuse Prevention
and Consumer Protection Act of 2005**

September 2005



PRACTICING UNDER THE NEW BANKRUPTCY CODE: A NUTS & BOLTS WORKSHOP

**The Bankruptcy Abuse Prevention
and Consumer Protection Act of 2005**

September 2005

**Presented by
OFFICE OF CONTINUING LEGAL EDUCATION
UNIVERSITY OF KENTUCKY COLLEGE OF LAW**

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PRACTICING UNDER THE NEW BANKRUPTCY CODE

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BEVERLY M. BURDEN has served as a Chapter 13 Bankruptcy Trustee for the Eastern District of Kentucky since 1999. From 1987 to 1999, she served as law clerk to Bankruptcy Court Judge Joe Lee. She received her undergraduate degree from Morehead State University and her law degree from the University of Kentucky College of Law (1983). After graduation she served four years as Assistant Attorney General for the Commonwealth of Kentucky working in their Consumer Protection Division. Ms. Burden was the 1997 recipient of the KBA's Justice Thomas B. Spain Award for Outstanding Service in Continuing Legal Education. She is widely published and has had recent articles published in the *Journal of Bankruptcy Law and Practice*; *Norton Bankruptcy Law Advisor*; and the *Kentucky Bench & Bar*.

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CHRISTOPHER W. FROST is Frost Brown Todd Professor of Law with the University of Kentucky College of Law. Prior to joining the College of Law Faculty in 1998, he was on the faculty of the Saint Louis University School of Law from 1990 until 1998, where he taught in the areas of contracts, bankruptcy, commercial law and corporate finance. Professor Frost received a B.B.A. from the University of Kentucky and was awarded his J.D. degree from the University of Kentucky College of Law, where he served as Articles Editor for the *Kentucky Law Journal* and was elected to *Order of the Coif*. Following law school he practiced bankruptcy and commercial law with the firm of Sidley & Austin in Chicago, Illinois, until joining the law faculty of Saint Louis University. His articles on corporate reorganizations have been published in journals including the *Hastings Law Journal*, the *North Carolina Law Review*, the *Arizona Law Review* and the *Tulane Law Review*.

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ANNA C. JOHNSON received her law degree from Chase College of Law in 1994 and her B.A. from the University of Charleston. Prior to attending law school she was an elementary and secondary school teacher in West Virginia. After completing her legal education, she focused her practice on domestic relations, real estate, and creditor work. In 1998 she was appointed as a Chapter 7 Bankruptcy Trustee for the Eastern District of Kentucky and currently concentrates her practice in bankruptcy. Ms. Johnson practices with her son Charles M. Johnson at Johnson Law Office, P.S.C. in Paris, Kentucky. She is a member and past President of the Bourbon County Bar, and a member of the Fayette County Bar Association, the Kentucky Bar Association, the West Virginia Bar Association and is licensed to practice in Kentucky, West Virginia, and the Eastern District of Kentucky.

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THE NEW BANKRUPTCY RULES & THE NEW KENTUCKY EXEMPTION LAWS

The New Bankruptcy Rules

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SECTION A

**SELECTED INTERIM RULES AND FORMS
POST-BANKRUPTCY REFORM**

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SECTION A(a)

Selected Interim Rules and Forms Post-Bankruptcy Reform

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On August 5, 2005, the Advisory Committee on Bankruptcy Rules published Interim Rules and Forms to implement the provisions of the Bankruptcy Reform Legislation. The rules and forms are proposed for adoption by District Courts under general or standing orders until final rules and forms can be promulgated under the Rules Enabling Act. The committee expects that final rules and forms will be available for comment by August of 2006.

Of course, the 2005 Act made substantial changes to the Code, necessitating numerous technical changes to the Rules. A redlined version of the full text of the Interim Rules and a complete set of the forms are available at <http://www.uscourts.gov/rules/interim.html>. This material will highlight some of the more substantive rule changes.

September 6, 2005

SELECTED INTERIM RULES AND FORMS POST-BANKRUPTCY REFORM

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SECTION A(a)

INTERIM RULES

Rule 1006 -- Changes to Implement Filing Fee Waivers. Rule 1006 has been amended to accommodate the reform provisions that permit filing fee waivers. One consequence of the change is that the provisions now permit the court to allow installment payments when the debtor has paid an attorney in connection with the case.

Rule 1006. Filing Fee

(a) GENERAL REQUIREMENT. Every petition shall be accompanied by the filing fee except as provided in subdivisions (b) and (c) of this rule. For the purpose of this rule, "filing fee" means the filing fee prescribed by 28 U.S.C. § 1930(a)(1)-(a)(5) and any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code.

(b) PAYMENT OF FILING FEE IN INSTALLMENTS.

(1) *Application ~~for Permission~~ to Pay Filing Fee in Installments.* A voluntary petition by an individual shall be accepted for filing if accompanied by the debtor's signed application, prepared as prescribed by the appropriate Official Form, stating that the debtor is unable to pay the filing fee except in installments. ~~The application shall state the proposed terms of the installment payments and that the applicant has neither paid any money nor transferred any property to an attorney for services in connection with the case.~~

* * * * *

(3) *Postponement of Attorney's Fees.* ~~The filing fee~~ All installments of the filing fee must be paid in full before the debtor or chapter 13 trustee may make further payments ~~pay an~~ to an attorney or any other person who renders services to the debtor in connection with the case.

(c) **WAIVER OF FILING FEE.** A voluntary chapter 7 petition filed by an individual shall be accepted for filing if accompanied by the debtor's application requesting a waiver under 28 U.S.C. § 1930(f), prepared as prescribed by the appropriate Official Form.

Rule 1007 – Changes to Debtor’s Duties. Rule 1007 was expanded to add additional debtor’s duties under the Reform Act. The changes include the additional filing responsibilities of debtors under the Act.

Rule 1007(b) SCHEDULES, AND STATEMENTS, AND OTHER DOCUMENTS REQUIRED.

(b)(1) Except in a chapter 9 municipality case, the debtor, unless the court orders otherwise, shall file the following schedules, statements, and other documents, prepared as prescribed by the appropriate Official Forms, if any:

- (A) schedules of assets and liabilities;
- (B) a schedule of current income and expenditures;
- (C) a schedule of executory contracts and unexpired leases, and;
- (D) a statement of financial affairs, prepared as prescribed by the appropriate Official Forms ;
- (E) copies of all payment advices or other evidence of payment, if any, with all but the last four digits of the debtor’s social security number redacted, received by the debtor from an employer within 60 days before the filing of the petition; and
- (F) a record of any interest that the debtor has in an account or program of the type specified in § 521(c) of the Code.

(2) An individual debtor in a chapter 7 case shall file a statement of intention as required by § 521(a) 521(2) of the Code, prepared as prescribed by the appropriate Official Form. A copy of the statement of intention shall be served on the trustee and the creditors named in the statement on or before the filing of the statement.

(3) Unless the United States trustee has determined that the credit counseling requirement of § 109 does not apply in the district, an individual debtor must file the certificate and debt repayment plan, if any, required by § 521(b), a certification under § 109(h)(3), or a request for a determination by the court under § 109(h)(4).

(4) Unless § 707(b)(2)(D) applies, an individual debtor in a chapter 7 case with primarily consumer debts shall file a statement of current monthly income prepared as prescribed by the appropriate Official Form, and, if the debtor has current monthly income greater than the applicable median family income for the applicable state and household size, the calculations in accordance with § 707(b), prepared as prescribed by the appropriate Official Form.

(5) An individual debtor in a chapter 11 case shall file a statement of current monthly income, prepared as prescribed by the appropriate Official Form.

(6) A debtor in a chapter 13 case shall file a statement of current monthly income, prepared as prescribed by the appropriate Official Form, and, if the debtor has current monthly income greater than the median family income for the applicable state and family size, a calculation of disposable income in accordance with § 1325(b)(3), prepared as prescribed by the appropriate Official Form.

(7) An individual debtor in a chapter 7 or chapter 13 case shall file a statement regarding completion of a course in personal financial management, prepared as prescribed by the appropriate Official Form.

(c) TIME LIMITS.* In a voluntary case, the schedules, ~~and statements, and other documents required by subdivision (b)(1), (4), (5), and (6); other than the statement of intention,~~ shall be filed with the petition, ~~or~~ within 15 days thereafter, except as otherwise provided in subdivisions (d), (e), (f), and (h) of this rule. In an involuntary case, the list in subdivision (a)(2), and the schedules, ~~and statements, and other documents required by subdivision (b)(1) other than the statement of intention,~~ shall be filed by the debtor within 15 days of the entry of the order for relief. The documents required by subdivision (b)(3) shall be filed with the petition in a voluntary case. The statement required by subdivision (b)(7) shall be filed by the debtor within 45 days after the first date set for the meeting of creditors under § 341 of the Code in a chapter 7 case, and no later than the last payment made by the debtor as required by the plan or the filing of a motion for entry of a discharge under § 1328(b) in a chapter 13 case. Lists, schedules, ~~and statements, and other documents~~ filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case unless the court directs otherwise. Except as provided in § 1116(3) of the Code, any ~~Any~~ extension of time for the filing of the schedules, ~~and statements, and other documents~~ may be granted only on motion for cause shown and on notice to the United States trustee and to any committee elected under § 705 or appointed under § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

*Includes amendments that take effect on December 1, 2005.

Rule 1017 – Standards and Time Limits on Motions to Dismiss for

Abuse. Rule 1017 has been amended to add time limits for motions to dismiss a case for abuse under Section 707(b). Except for motions under Section 704(b)(2), such motion must be brought within 60 days after the first meeting of creditors. The amendments also require that motions to dismiss under 707(b)(1) and (3) (non-means test motions) must state the circumstances constituting abuse with particularity.

Rule 1017. Dismissal or Conversion of Case; Suspension

(e) DISMISSAL OF AN INDIVIDUAL DEBTOR'S CHAPTER 7 CASE OR CONVERSION TO A CASE UNDER CHAPTER 11 or 13 FOR SUBSTANTIAL ABUSE. The court may dismiss or, with the debtor's consent, convert an individual debtor's case for ~~substantial~~ abuse under § 707(b) only on ~~motion by the United States trustee or on the court's own motion~~ and after a hearing on notice to the debtor, the trustee, the United States trustee, and any other entities as the court directs.

(1) Except as otherwise provided in § 704(b)(2), a ~~A~~-motion to dismiss a case for ~~substantial~~ abuse under § 707(b) or (c) may be filed ~~by the United States trustee~~ only within 60 days after the first date set for the meeting of creditors under § 341(a), unless, on request filed ~~by the United States trustee~~ before the time has expired, the court for cause extends the time for filing the motion to dismiss. The United States trustee party filing the motion shall set forth in the motion all matters to be considered submitted to the court for its consideration at the hearing. A motion to dismiss under § 707(b)(1) and (3) shall state with particularity the circumstances alleged to constitute abuse.

Rule 1019 – Time Periods for Filing Motions and Complaints. This amendment provides 60 days from conversion to a Chapter 7 for the parties to file a motion under 707(b) or (c).

Rule 1019. Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to a Chapter 7 Liquidation Case

(2) NEW FILING PERIODS. A new time period for filing ~~claims, a motion~~ under § 707(b) or (c), a claim, a complaint objecting to discharge, or a complaint to obtain a determination of dischargeability of any debt shall commence under ~~pursuant to~~ Rules 1017, 3002, 4004, or 4007, provided that a new time period shall not commence if a chapter 7 case had been converted to a chapter 11, 12, or 13 case and thereafter reconverted to a chapter 7 case and the time for filing ~~claims, a motion under § 707(b) or (c), a claim, a complaint objecting to discharge, or a complaint to obtain a determination of the dischargeability of any debt, or any extension thereof, expired in the original chapter 7 case.~~

Rule 4002 – Additional Debtor’s Obligations. Rule 4002 has been amended to conform to the provisions of the Act that require debtors to provide additional documents and information.

Rule 4002. Duties of Debtor

(b) INDIVIDUAL DEBTOR’S DUTY TO PROVIDE DOCUMENTATION.

(1) Personal Identification. Every individual debtor shall bring to the meeting of creditors under § 341:

(A) a picture identification issued by a governmental unit, or other personal identifying information that establishes the debtor’s identity; and

(B) evidence of social security number(s), or a written statement that such documentation does not exist.

(2) Financial Information. Every individual debtor shall bring to the meeting of creditors under § 341 and make available to the trustee the following documents or copies of them, or provide a written statement that the documentation does not exist or is not in the debtor’s possession:

(A) evidence of current income such as the most recent payment advice;

(B) unless the trustee or the United States trustee instructs otherwise, statements for each of the debtor’s depository and investment accounts, including checking, savings, and money market accounts, mutual funds and brokerage accounts for the time period that includes the date of the filing of the petition; and

(C) documentation of monthly expenses claimed by the debtor when required by § 707(b)(2)(A) or (B).

(3) Tax Return. At least 7 days before the first date set for the meeting of creditors under § 341, the debtor shall provide to the trustee a copy of the debtor’s Federal income tax return for the most recent tax year ending immediately before the commencement of the case and for which a return was filed, including any attachments, or a transcript of the tax return, or provide a written statement that the documentation does not exist.

(4) Tax Returns Provided to Creditors. If a creditor, at least 15 days before the first date set for the meeting of creditors under § 341, requests a copy of the debtor’s tax return that is to be provided to the trustee under subdivision (b)(3), the debtor shall provide to the requesting creditor a copy of the return, including any attachments, or a transcript of the tax return, or provide a written statement

that the documentation does not exist at least 7 days before the first date set for the meeting of creditors under § 341.

(5) The debtor's obligation to provide tax returns under Rule 4002(b)(3) and (b)(4) is subject to procedures for safeguarding the confidentiality of tax information established by the Director of the Administrative Office of the United States Courts.

Rule 4007 – Time Limits on Filing Exceptions to Discharge. The elimination of most of the “super discharge” under Section 1328(a) gave rise to a need to establish time limits for filing of exceptions to discharge in Chapter 13 cases. Rule 4007 has been amended to require 523(c) exceptions to discharge be filed in Chapter 13 cases within 60 days after the first meeting of creditors. This conforms discharge litigation under Chapter 13 to the time limits imposed under Chapter 7. The hardship discharge under Section 1328(b) requires a separate timing mechanism for the Section 523(a)(6) exception to discharge.

Rule 4007. Determination of Dischargeability of a Debt

* * * * *

(c) TIME FOR FILING COMPLAINT UNDER § 523(c) IN A CHAPTER 7 LIQUIDATION, CHAPTER 11 REORGANIZATION, ~~OR~~ CHAPTER 12 FAMILY FARMER’S DEBT ADJUSTMENT CASE, OR CHAPTER 13 INDIVIDUAL’S DEBT ADJUSTMENT CASE; NOTICE OF TIME FIXED. Except as provided in subdivision (d), a complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). The court shall give all creditors no less than 30 days’ notice of the time so fixed in the manner provided in Rule 2002. On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

(d) TIME FOR FILING COMPLAINT UNDER ~~§ 523(e)~~ 523(a)(6) IN CHAPTER 13 INDIVIDUAL’S DEBT ADJUSTMENT CASE; NOTICE OF TIME FIXED. On motion by a debtor for a discharge under § 1328(b), the court shall enter an order fixing the time to file a complaint to determine the dischargeability of any debt under ~~§ 523(e)~~ 523(a)(6) and shall give no less than 30 days’ notice of the time fixed to all creditors in the manner provided in Rule 2002. On motion of any party in interest after hearing on notice the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

Rule 4008 – Information Requirements for Reaffirmation Agreements.

Section 524 has been substantially revised to control reaffirmation agreements. Among the many new requirements is a requirement that the debtor sign a statement that the reaffirmation will not be an undue hardship. If the debtor's monthly expenses plus payments on post-bankruptcy debts plus other reaffirmation payments exceed the debtor's monthly income, the debtor must explain how he or she can afford to make the payments on the reaffirmed debt. Rule 4008 requires the debtor to explain any discrepancy between the 524 statement and Schedules I and J.

Rule 4008. Discharge and Reaffirmation Hearing

Not more than 30 days following the entry of an order granting or denying a discharge, or confirming a plan in a chapter 11 reorganization case concerning an individual debtor and on not less than 10 days notice to the debtor and the trustee, the court may hold a hearing as provided in § 524(d) of the Code. A motion by the debtor for approval of a reaffirmation agreement shall be filed before or at the hearing. The debtor's statement required under § 524(k) shall be accompanied by a statement of the total income and total expense amounts stated on schedules I and J. If there is a difference between the income and expense amounts stated on schedules I and J and the statement required under § 524(k), the accompanying statement shall include an explanation of any difference.

Rule 1020 – Small Business Debtor. Rule 1020 sets out a mechanism to inform parties whether the debtor is a “small business debtor” under 101(51D) and procedures under which disputes over whether a debtor meets the definition can be resolved.

Rule 1020. Election to be Considered a Small Business in a Chapter 11 Reorganization Case

~~In a chapter 11 reorganization case, a debtor that is a small business may elect to be considered a small business by filing a written statement of election not later than 60 days after the date of the order for relief.~~

(a) SMALL BUSINESS DEBTOR DESIGNATION. In a voluntary chapter 11 case, the debtor shall state in the petition whether the debtor is a small business debtor. In an involuntary chapter 11 case, the debtor shall file within 15 days after entry of the order for relief a statement as to whether the debtor is a small business debtor. Except as provided in subdivision (c), the status of the case with respect to whether it is a small business case shall be in accordance with the debtor’s statement under this subdivision, unless and until the court enters an order finding that the debtor’s statement is incorrect.

(b) OBJECTING TO DESIGNATION. Except as provided in subdivision (c), the United States trustee or a party in interest may file an objection to the debtor’s statement under subdivision (a) not later than 30 days after the conclusion of the meeting of creditors held under § 341(a) of the Code, or within 30 days after any amendment to the statement, whichever is later.

(c) APPOINTMENT OF COMMITTEE OF UNSECURED CREDITORS. If the United States trustee has appointed a committee of unsecured creditors under § 1102(a)(1), the case shall proceed as a small business case only if, and from the time when, the court enters an order determining that the committee has not been sufficiently active and representative to provide effective oversight of the debtor and that the debtor satisfies all the other requirements for being a small business. A request for a determination under this subdivision may be filed by the United States trustee or a party in interest only within a reasonable time after the failure of the committee to be sufficiently active and representative. The debtor may file a request for a determination at any time as to whether the committee has been sufficiently active and representative.

(d) PROCEDURE FOR OBJECTION OR DETERMINATION. Any objection or request for a determination under this rule shall be governed by Rule 9014 and served on the debtor, the debtor’s attorney, the United States trustee, the trustee, any committee appointed under § 1102 or its authorized agent, or, if no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list filed under Rule 1007(d), and on such other entities as the court may direct.

Rule 1021 Health Care Business. Rule 1021 provides for the designation in the petition that the debtor is a “health care business” under Section 101(27A) and provides a procedure for resolving disputes over the designation.

Rule 1021. Health Care Business Case

(a) HEALTH CARE BUSINESS DESIGNATION. Unless the court orders otherwise, if a petition in a case under chapter 7, chapter 9, or chapter 11 states that the debtor is a health care business, the case shall proceed as a case in which the debtor is a health care business.

(b) MOTION. The United States trustee or a party in interest may file a motion for a determination as to whether the debtor is a health care business. The motion shall be transmitted to the United States trustee and served on the debtor, the trustee, any committee elected under § 705 or appointed under § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list filed under Rule 1007(d), and such other entities as the court may direct. The motion shall be governed by Rule 9014.

Rule 8001 and 8003 – Direct Appeal. Amendments to Rules 8001 and 8003 implement the direct appeal provisions added by the Reform Act.

Rule 8001. Manner of Taking Appeal; Voluntary Dismissal; Certification to Court of Appeals

* * * * *

(f) CERTIFICATION FOR DIRECT APPEAL TO COURT OF APPEALS

(1) Timely Appeal Required. A certification of a judgment, order, or decree of a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2) shall not be treated as a certification entered on the docket within the meaning of § 1233(b)(4)(A) of Public Law No. 109-8 until a timely appeal has been taken in the manner required by subdivisions (a) or (b) of this rule and the notice of appeal has become effective under Rule 8002.

(2) Court Where Made. A certification that a circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists shall be filed in the court in which a matter is pending for purposes of 28 U.S.C. § 158(d)(2) and this rule. A matter is pending in a bankruptcy court until the docketing of the appeal of a final judgment, order, or decree in accordance with Rule 8007(b) or the grant of leave to appeal an interlocutory judgment, order, or decree under 28 U.S.C. § 158(a). A matter is pending in a district court or bankruptcy appellate panel after an appeal of an interlocutory judgment, order, or decree has been docketed in accordance with Rule 8007(b) or leave to appeal has been granted under 28 U.S.C. § 158(a).

(A) Certification by Court on Request or Court's Own Initiative.

(i) Before Docketing or Grant of Leave to Appeal. Only a bankruptcy court may make a certification on request or on its own initiative while the matter is pending in the bankruptcy court.

(ii) After Docketing or Grant of Leave to Appeal. Only the district court or bankruptcy appellate panel involved may make a certification on request of the parties or on its own initiative while the matter is pending in the district court or bankruptcy appellate panel.

(B) Certification by All Appellants and Appellees Acting Jointly. A certification by all the appellants and appellees, if any, acting jointly may be made by filing the appropriate Official Form with the clerk of the court in which the matter is pending. The certification may be accompanied by a short statement of the basis for the certification, which may include the information listed in subdivision (f)(3)(C) of this rule.

(3) Request for Certification; Filing; Service; Contents.

(A) A request for certification shall be filed, within the time specified by 28 U.S.C. § 158(d)(2), with the clerk of the court in which the matter is pending.

(B) Notice of the filing of a request for certification shall be served in the manner required for service of a notice of appeal under Rule 8004.

(C) A request for certification shall include the following:

- (i) the facts necessary to understand the question presented;
- (ii) the question itself;
- (iii) the relief sought;
- (iv) the reasons why the appeal should be allowed and is authorized by statute or rule, including why a circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists; and
- (v) an attached copy of the judgment, order, or decree complained of and any related opinion or memorandum.

(D) A party may file a response to a request for certification or a cross-request within 10 days after the notice of the request is served, or another time fixed by the court.

(E) The request, cross request, and any response shall not be governed by Rule 9014 and shall be submitted without oral argument unless the court otherwise directs.

(F) A certification of an appeal under 28 U.S.C. § 158(d)(2) shall be made in a separate document served on the parties.

(4) Certification on Court's Own Initiative.

(A) A certification of an appeal on the court's own initiative under 28 U.S.C. § 158(d)(2) shall be made in a separate document served on the parties in the manner required for service of a notice of appeal under Rule 8004. The certification shall be accompanied by an opinion or memorandum that contains the information required by subdivision (f)(3)(C)(i)-(iv) of this rule.

(B) A party may file a supplementary short statement of the basis for certification within 10 days after the certification.

Rule 8003. Leave to Appeal

* * * * *

(d) If leave to appeal is required by 28 U.S.C. § 158(a) and has not earlier been granted, the authorization of a direct appeal by a court of appeals under 28 U.S.C. § 158(d)(2) shall be deemed to satisfy the requirement for leave to appeal.

Selected Forms

In re: _____
Debtor(s)

Case No. _____
(if known)

**APPLICATION FOR WAIVER OF THE CHAPTER 7 FILING FEE
FOR INDIVIDUALS WHO CANNOT PAY THE FILING FEE IN FULL OR IN INSTALLMENTS**

Part A. Family Size and Income

1. Including yourself, your spouse, and dependents you have listed or will list on Schedule I (Current Income of Individual Debtors(s)), how many people are in your family? (Do not include your spouse if you are separated AND are not filing a joint petition.) _____

2. Restate the following information that you provided, or will provide, on Line 16 of Schedule I. Attach a completed copy of Schedule I, if it is available.

Total Combined Monthly Income (Line 16 of Schedule I): \$ _____

3. State the monthly net income, if any, of dependents included in Question 1 above. Do not include any income already reported in Item 2. If none, enter \$0.

\$ _____

4. Add the "Total Combined Monthly Income" reported in Question 2 to your dependents' monthly net income from Question 3.

\$ _____

5. Do you expect the amount in Question 4 to increase or decrease by more than 10% during the next 6 months? Yes ___ No ___

If yes, explain.

Part B: Monthly Expenses

6. EITHER (a) attach a completed copy of Schedule J (Schedule of Monthly Expenses), and state your total monthly expenses reported on Line 18 of that Schedule, OR (b) if you have not yet completed Schedule J, provide an estimate of your total monthly expenses.

\$ _____

7. Do you expect the amount in Question 6 to increase or decrease by more than 10% during the next 6 months? Yes ___ No ___

If yes, explain.

Part C. Real and Personal Property

EITHER (1) attach completed copies of Schedules A (Real Property) and Schedule B (Personal Property), OR (2) if you have not yet completed those schedules, answer the following questions.

8. State the amount of cash you have on hand: \$ _____

9. State below any money you have in savings, checking, or other accounts in a bank or other financial institution.

Bank or Other Financial Institution:	Type of Account such as savings, checking, CD:	Amount:
_____	_____	\$ _____
_____	_____	\$ _____

10. State below the assets owned by you. **Do not list ordinary household furnishings and clothing.**

Home	Address: _____ _____	Value: \$ _____ Amount owed on mortgages and liens: \$ _____
Other real estate	Address: _____ _____	Value: \$ _____ Amount owed on mortgages and liens: \$ _____
Motor vehicle	Model/Year: _____ _____	Value: \$ _____ Amount owed: \$ _____
Motor vehicle	Model/Year: _____ _____	Value: \$ _____ Amount owed: \$ _____
Other	Description _____ _____	Value: \$ _____ Amount owed: \$ _____

11. State below any person, business, organization, or governmental unit that owes you money and the amount that is owed.

Name of Person, Business, or Organization that Owes You Money	Amount Owed
_____	\$ _____
_____	\$ _____

Part D. Additional Information.

12. Have you paid an **attorney** any money for services in connection with this case, including the completion of this form, the bankruptcy petition, or schedules? Yes ___ No ___
If yes, how much have you paid? \$ _____
13. Have you promised to pay or do you anticipate paying an **attorney** in connection with your bankruptcy case? Yes ___ No ___
If yes, how much have you promised to pay or do you anticipate paying? \$ _____
14. Have you paid **anyone other than an attorney** (such as a bankruptcy petition preparer, paralegal, typing service, or another person) any money for services in connection with this case, including the completion of this form, the bankruptcy petition, or schedules? Yes ___ No ___
If yes, how much have you paid? \$ _____
15. Have you promised to pay or do you anticipate paying **anyone other than an attorney** (such as a bankruptcy petition preparer, paralegal, typing service, or another person) any money for services in connection with this case, including the completion of this form, the bankruptcy petition, or schedules? Yes ___ No ___
If yes, how much have you promised to pay or do you anticipate paying? \$ _____
16. Has anyone paid an attorney or other person or service in connection with this case, on your behalf? Yes ___ No ___
If yes, explain.

Form B3B Cont.

(10/05)

17. Have you previously filed for bankruptcy relief during the past eight years? Yes ____ No ____

Case Number (if known)	Year filed	Location of filing	Did you obtain a discharge? (if known)		
_____	_____	_____	Yes ____	No ____	Don't know ____
_____	_____	_____	Yes ____	No ____	Don't know ____

18. Please provide any other information that helps to explain why you are unable to pay the filing fee in installments.

19. I (we) declare under penalty of perjury that I (we) cannot currently afford to pay the filing fee in full or in installments and that the foregoing information is true and correct.

Executed on: _____	_____
Date	Signature of Debtor
_____	_____
Date	Signature of Co-debtor

DECLARATION AND SIGNATURE OF BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required under that section.

Printed or Typed Name and Title, if any, of Bankruptcy Petition Preparer

Social Security No. (Required by
11 U.S.C. §110.)

If the bankruptcy petition preparer is not an individual, state the name, title (if any), address, and social security number of the officer, principal, responsible person, or partner who signs the document.

Address

x _____
Signature of Bankruptcy Petition Preparer

Date

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document, unless the bankruptcy petition preparer is not an individual:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

United State Bankruptcy Court
District of _____

In re: _____
Debtor(s)

Case No. _____

ORDER ON DEBTOR'S APPLICATION FOR WAIVER OF THE CHAPTER 7 FILING FEE

Upon consideration of the debtor's "Application for Waiver of the Chapter 7 Filing Fee," the court orders that the application be:

☐ GRANTED.

This order is subject to being vacated at a later time if developments in the administration of the bankruptcy case demonstrate that the waiver was unwarranted.

☐ DENIED.

The debtor shall pay the chapter 7 filing fee according to the following terms:

\$ _____ on or before _____

\$ _____ on or before _____

\$ _____ on or before _____

\$ _____ on or before _____

Until the filing fee is paid in full, the debtor shall not make any additional payment or transfer any additional property to an attorney or any other person for services in connection with this case.

IF THE DEBTOR FAILS TO TIMELY PAY THE FILING FEE IN FULL OR TO TIMELY MAKE INSTALLMENT PAYMENTS, THE COURT MAY DISMISS THE DEBTOR'S CHAPTER 7 CASE.

☐ SCHEDULED FOR HEARING.

A hearing to consider the debtor's "Application for Waiver of the Chapter 7 Filing Fee" shall be held on _____ at _____ am/pm at _____
(address of courthouse)

IF THE DEBTOR FAILS TO APPEAR AT THE SCHEDULED HEARING, THE COURT MAY DEEM SUCH FAILURE TO BE THE DEBTOR'S CONSENT TO THE ENTRY OF AN ORDER DENYING THE FEE WAIVER APPLICATION BY DEFAULT.

BY THE COURT:

DATE: _____

United States Bankruptcy Judge

Form B22A (Chapter 7) (10/05)

In re _____
Debtor(s)

Case Number: _____
(If known)

Check the box as directed in Parts I, III, and VI of this statement.

- ☐ **Presumption arises**
☐ **Presumption does not arise**

STATEMENT OF CURRENT MONTHLY INCOME AND MEANS TEST CALCULATION
FOR USE IN CHAPTER 7

In addition to Schedules I and J, this statement must be completed by every individual Chapter 7 debtor, whether or not filing jointly, whose debts are primarily consumer debts. Joint debtors may complete one statement only.

Part I. EXCLUSION FOR DISABLED VETERANS

1	<p>If you are a disabled veteran described in the Veteran's Declaration in this Part I, (1) check the box at the beginning of the Veteran's Declaration, (2) check the "Presumption does not arise" box at the top of this statement, and (3) complete the verification in Part VIII. Do not complete any of the remaining parts of this statement.</p> <p><input type="checkbox"/> Veteran's Declaration. By checking this box, I declare under penalty of perjury that I am a disabled veteran (as defined in 38 U.S.C. § 3741(1)) whose indebtedness occurred primarily during a period in which I was on active duty (as defined in 10 U.S.C. § 101(d)(1)) or while I was performing a homeland defense activity (as defined in 32 U.S.C. § 901(1)).</p>
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Part II. CALCULATION OF MONTHLY INCOME FOR § 707(b)(7) EXCLUSION

2	<p>Marital/filing status. Check the box that applies and complete the balance of this part of this statement as directed.</p> <p>a. <input type="checkbox"/> Unmarried. Complete only Column A ("Debtor's Income") for Lines 3-11.</p> <p>b. <input type="checkbox"/> Married, not filing jointly, with declaration of separate households. By checking this box, debtor declares under penalty of perjury: "My spouse and I are legally separated under applicable non-bankruptcy law or my spouse and I are living apart other than for the purpose of evading the requirements of § 707(b)(2)(A) of the Bankruptcy Code." Complete only Column A ("Debtor's Income") for Lines 3-11.</p> <p>c. <input type="checkbox"/> Married, not filing jointly, without the declaration of separate households set out in Line 2.b above. Complete both Column A ("Debtor's Income") and Column B (Spouse's Income) for Lines 3-11.</p> <p>d. <input type="checkbox"/> Married, filing jointly. Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 3-11.</p>												
	<p>All figures must reflect average monthly income for the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If you received different amounts of income during these six months, you must total the amounts received during the six months, divide this total by six, and enter the result on the appropriate line.</p>			Column A Debtor's Income	Column B Spouse's Income								
	3	Gross wages, salary, tips, bonuses, overtime, commissions.		\$	\$								
	4	<p>Income from the operation of a business, profession, or farm. Subtract Line b from Line a and enter the difference on Line 4. Do not enter a number less than zero. Do not include any part of the business expenses entered on Line b as a deduction in Part V.</p> <table border="1"> <tr> <td>a.</td> <td>Gross receipts</td> <td>\$</td> </tr> <tr> <td>b.</td> <td>Ordinary and necessary business expenses</td> <td>\$</td> </tr> <tr> <td>c.</td> <td>Business income</td> <td>Subtract Line b from Line a</td> </tr> </table>		a.	Gross receipts	\$	b.	Ordinary and necessary business expenses	\$	c.	Business income	Subtract Line b from Line a	\$
a.	Gross receipts	\$											
b.	Ordinary and necessary business expenses	\$											
c.	Business income	Subtract Line b from Line a											
5	<p>Rent and other real property income. Subtract Line b from Line a and enter the difference on Line 5. Do not enter a number less than zero. Do not include any part of the operating expenses entered on Line b as a deduction in Part V.</p> <table border="1"> <tr> <td>a.</td> <td>Gross receipts</td> <td>\$</td> </tr> <tr> <td>b.</td> <td>Ordinary and necessary operating expenses</td> <td>\$</td> </tr> <tr> <td>c.</td> <td>Rental income</td> <td>Subtract Line b from Line a</td> </tr> </table>		a.	Gross receipts	\$	b.	Ordinary and necessary operating expenses	\$	c.	Rental income	Subtract Line b from Line a	\$	\$
a.	Gross receipts	\$											
b.	Ordinary and necessary operating expenses	\$											
c.	Rental income	Subtract Line b from Line a											
6	Interest, dividends, and royalties.		\$	\$									
7	Pension and retirement income.		\$	\$									
8	<p>Regular contributions to the household expenses of the debtor or the debtor's dependents, including child or spousal support. Do not include contributions from the debtor's spouse if Column B is completed.</p>		\$	\$									

9	Unemployment compensation. Enter the amount in Column A and, if applicable, Column B. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below:			
	Unemployment compensation claimed to be a benefit under the Social Security Act	Debtor \$ _____	Spouse \$ _____	
				\$
10	Income from all other sources. If necessary, list additional sources on a separate page. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. Specify source and amount.			
	a.		\$	
	b.		\$	
	Total and enter on Line 10			\$
11	Subtotal of Current Monthly Income for § 707(b)(7). Add Lines 3 thru 10 in Column A, and, if Column B is completed, add Lines 3 through 10 in Column B. Enter the total(s).			\$
12	Total Current Monthly Income for § 707(b)(7). If Column B has been completed, add Line 11, Column A to Line 11, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 11, Column A.			\$

Part III. APPLICATION OF § 707(b)(7) EXCLUSION

13	Annualized Current Monthly Income for § 707(b)(7). Multiply the amount from Line 12 by the number 12 and enter the result.	\$
14	Applicable median family income. Enter the median family income for the applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: _____ b. Enter debtor's household size: _____	\$
15	Application of Section 707(b)(7). Check the applicable box and proceed as directed. <input type="checkbox"/> The amount on Line 13 is less than or equal to the amount on Line 14. Check the "Presumption does not arise" box at the top of page 1 of this statement, and complete Part VIII; do not complete Parts IV, V, VI, or VII. <input type="checkbox"/> The amount on Line 13 is more than the amount on Line 14. Complete the remaining parts of this statement.	

Complete Parts IV, V, VI, and VII of this statement only if required. (See Line 15.)

Part IV. CALCULATION OF CURRENT MONTHLY INCOME FOR § 707(b)(2)

16	Enter the amount from Line 12.	\$
17	Marital adjustment. If you checked the box at Line 2.c, enter the amount of the income listed in Line 11, Column B that was NOT regularly contributed to the household expenses of the debtor or the debtor's dependents. If you did not check box at Line 2.c, enter zero.	\$
18	Current monthly income for § 707(b)(2). Subtract Line 17 from Line 16 and enter the result.	\$

Part V. CALCULATION OF DEDUCTIONS ALLOWED UNDER § 707(b)(2)

Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)

19	National Standards: food, clothing, household supplies, personal care, and miscellaneous. Enter "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable family size and income level. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	\$
----	---	----

20	Local Standards: housing and utilities. Enter the amount of the IRS Housing and Utilities Standards allowance for your county and family size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court), adjusted to deduct any portion of the allowance that includes payments on debts secured by your home, listed in Line 41. (Under revision)		\$									
21	Local Standards: transportation; vehicle operation/public transportation expense. You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation. Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 8. <input type="checkbox"/> 0 <input type="checkbox"/> 1 <input type="checkbox"/> 2 or more. Enter the amount from IRS Transportation Standards, Operating Costs & Public Transportation Costs for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)		\$									
22	Local Standards: transportation ownership/lease expense; Vehicle 1. Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.) <input type="checkbox"/> 1 <input type="checkbox"/> 2 or more. Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, First Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 41; subtract Line b from Line a and enter the result in Line 22. Do not enter an amount less than zero. <table border="1" style="width: 100%;"> <tr> <td>a.</td> <td>IRS Transportation Standards, Ownership Costs, First Car</td> <td>\$</td> </tr> <tr> <td>b.</td> <td>Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 41</td> <td>\$</td> </tr> <tr> <td>c.</td> <td>Net ownership/lease expense for Vehicle 1</td> <td>Subtract Line b from Line a.</td> </tr> </table>		a.	IRS Transportation Standards, Ownership Costs, First Car	\$	b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 41	\$	c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a.	\$
a.	IRS Transportation Standards, Ownership Costs, First Car	\$										
b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 41	\$										
c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a.										
23	Local Standards: transportation ownership/lease expense; Vehicle 2. Complete this Line only if you checked the "2 or more" Box in Line 23. Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, Second Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 41; subtract Line b from Line a and enter the result in Line 23. Do not enter an amount less than zero. <table border="1" style="width: 100%;"> <tr> <td>a.</td> <td>IRS Transportation Standards, Ownership Costs, Second Car</td> <td>\$</td> </tr> <tr> <td>b.</td> <td>Average Monthly Payments for debts secured by Vehicle 2, if any, as stated in Line 41</td> <td>\$</td> </tr> <tr> <td>c.</td> <td>Net ownership/lease expense for Vehicle 2</td> <td>Subtract Line b from Line a.</td> </tr> </table>		a.	IRS Transportation Standards, Ownership Costs, Second Car	\$	b.	Average Monthly Payments for debts secured by Vehicle 2, if any, as stated in Line 41	\$	c.	Net ownership/lease expense for Vehicle 2	Subtract Line b from Line a.	\$
a.	IRS Transportation Standards, Ownership Costs, Second Car	\$										
b.	Average Monthly Payments for debts secured by Vehicle 2, if any, as stated in Line 41	\$										
c.	Net ownership/lease expense for Vehicle 2	Subtract Line b from Line a.										
24	Other Necessary Expenses: taxes. Enter the total average monthly expense that you actually incur for all federal, state, and local taxes, other than real estate and sales taxes, such as income taxes, self employment taxes, social security taxes, and Medicare taxes. Do not include real estate or sales taxes.											
25	Other Necessary Expenses: mandatory payroll deductions. Enter the total average monthly payroll deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. Do not include discretionary amounts, such as non-mandatory 401(k) contributions.		\$									
26	Other Necessary Expenses: life insurance. Enter average monthly premiums that you actually pay for term life insurance for yourself. Do not include premiums for insurance on your dependents, for whole life, or for any other form of insurance.		\$									
27	Other Necessary Expenses: court-ordered payments. Enter the total monthly amount that you are required to pay pursuant to court order, such as spousal or child support payments. Do not include payments on past due support obligations included in Line 43.		\$									
28	Other Necessary Expenses: education for employment or for a physically or mentally challenged child. Enter the total monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.		\$									
29	Other Necessary Expenses: childcare. Enter the average monthly amount that you actually expend on childcare. Do not include payments made for children's education.		\$									
30	Other Necessary Expenses: health care. Enter the average monthly amount that you actually expend on health care expenses that are not reimbursed by insurance or paid by a health savings account. Do not include payments for health insurance listed in Line 33.		\$									

31	Other Necessary Expenses: telecommunication services. Enter the average monthly expenses that you actually pay for cell phones, pagers, call waiting, caller identification, special long distance, or internet services necessary for the health and welfare of you or your dependents. Do not include any amount previously deducted.	\$																				
32	Total Expenses Allowed under IRS Standards. Enter the total of Lines 19 through 31	\$																				
Subpart B: Additional Expense Deductions under § 707(b) Note: Do not include any expenses that you have listed in Lines 19-31																						
33	Health Insurance, Disability Insurance, and Health Savings Account Expenses. List the average monthly amounts that you actually expend in each of the following categories and enter the total.	\$																				
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 5%; text-align: center;">a.</td> <td style="width: 75%;">Health Insurance</td> <td style="width: 20%; text-align: center;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td>Disability Insurance</td> <td style="text-align: center;">\$</td> </tr> <tr> <td style="text-align: center;">c.</td> <td>Health Savings Account</td> <td style="text-align: center;">\$</td> </tr> <tr> <td colspan="2"></td> <td style="text-align: center;">Total: Add Lines a, b and c</td> </tr> </table>		a.	Health Insurance	\$	b.	Disability Insurance	\$	c.	Health Savings Account	\$			Total: Add Lines a, b and c	\$								
a.	Health Insurance	\$																				
b.	Disability Insurance	\$																				
c.	Health Savings Account	\$																				
		Total: Add Lines a, b and c																				
34	Continued contributions to the care of household or family members. Enter the actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses.	\$																				
35	Protection against family violence. Enter any average monthly expenses that you actually incurred to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law.	\$																				
36	Home energy costs in excess of the allowance specified by the IRS Local Standards. Enter the average monthly amount by which your home energy costs exceed the allowance in the IRS Local Standards for Housing and Utilities. You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.	\$																				
37	Education expenses for dependent children less than 18. Enter the average monthly expenses that you actually incur, not to exceed \$125 per child, in providing elementary and secondary education for your dependent children less than 18 years of age. You must provide your case trustee with documentation demonstrating that the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.	\$																				
38	Additional food and clothing expense. Enter the average monthly amount by which your food and clothing expenses exceed the combined allowances for food and apparel in the IRS National Standards, not to exceed five percent of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.	\$																				
39	Continued charitable contributions. Enter the amount that you will continue to contribute in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2).	\$																				
40	Total Additional Expense Deductions under § 707(b). Enter the total of Lines 33 through 39	\$																				
Subpart C: Deductions for Debt Payment																						
41	Future payments on secured claims. For each of your debts that is secured by an interest in property that you own, list the name of creditor, identify the property securing the debt, and state the Average Monthly Payment. The Average Monthly Payment is the total of all amounts contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. Do not include items you have previously deducted, such as insurance and taxes.	\$																				
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <th style="width: 5%;"></th> <th style="width: 30%;">Name of Creditor</th> <th style="width: 35%;">Property Securing the Debt</th> <th style="width: 30%;">60-month Average Payment</th> </tr> <tr> <td style="text-align: center;">a.</td> <td></td> <td></td> <td style="text-align: center;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td></td> <td></td> <td style="text-align: center;">\$</td> </tr> <tr> <td style="text-align: center;">c.</td> <td></td> <td></td> <td style="text-align: center;">\$</td> </tr> <tr> <td colspan="3"></td> <td style="text-align: center;">Total: Add Lines a, b and c</td> </tr> </table>			Name of Creditor	Property Securing the Debt	60-month Average Payment	a.			\$	b.			\$	c.			\$				Total: Add Lines a, b and c	\$
	Name of Creditor	Property Securing the Debt	60-month Average Payment																			
a.			\$																			
b.			\$																			
c.			\$																			
			Total: Add Lines a, b and c																			

42	Past due payments on secured claims. If any of the debts listed in Line 41 are in default, and the property securing the debt is necessary for your support or the support of your dependents, you may include in your deductions 1/60th of the amount that you must pay the creditor as a result of the default (the "cure amount") in order to maintain possession of the property. List any such amounts in the following chart and enter the total. If necessary, list additional entries on a separate page.																					
	<table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 5%;"></th> <th style="width: 35%;">Name of Creditor</th> <th style="width: 35%;">Property Securing the Debt in Default</th> <th style="width: 25%;">1/60th of the Cure Amount</th> </tr> </thead> <tbody> <tr> <td style="text-align: center;">a.</td> <td></td> <td></td> <td style="text-align: center;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td></td> <td></td> <td style="text-align: center;">\$</td> </tr> <tr> <td style="text-align: center;">c.</td> <td></td> <td></td> <td style="text-align: center;">\$</td> </tr> <tr> <td colspan="3"></td> <td style="text-align: center;">Total: Add Lines a, b and c</td> </tr> </tbody> </table>		Name of Creditor	Property Securing the Debt in Default	1/60th of the Cure Amount	a.			\$	b.			\$	c.			\$				Total: Add Lines a, b and c	\$
	Name of Creditor	Property Securing the Debt in Default	1/60th of the Cure Amount																			
a.			\$																			
b.			\$																			
c.			\$																			
			Total: Add Lines a, b and c																			
43	Payments on priority claims. Enter the total amount of all priority claims (including priority child support and alimony claims), divided by 60.	\$																				
44	Chapter 13 administrative expenses. If you are eligible to file a case under Chapter 13, complete the following chart, multiply the amount in Line a by the amount in Line b, and enter the resulting administrative expense.	\$																				
	<table border="1" style="width: 100%; border-collapse: collapse;"> <tbody> <tr> <td style="width: 5%; text-align: center;">a.</td> <td style="width: 55%;">Projected average monthly Chapter 13 plan payment.</td> <td style="width: 40%; text-align: center;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td>Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)</td> <td style="text-align: center;">x</td> </tr> <tr> <td style="text-align: center;">c.</td> <td>Average monthly administrative expense of Chapter 13 case</td> <td style="text-align: center;">Total: Multiply Lines a and b</td> </tr> </tbody> </table>	a.	Projected average monthly Chapter 13 plan payment.	\$	b.	Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	x	c.	Average monthly administrative expense of Chapter 13 case	Total: Multiply Lines a and b	\$											
a.	Projected average monthly Chapter 13 plan payment.	\$																				
b.	Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	x																				
c.	Average monthly administrative expense of Chapter 13 case	Total: Multiply Lines a and b																				
45	Total Deductions for Debt Payment. Enter the total of Lines 41 through 44.	\$																				
Subpart D: Total Deductions Allowed under § 707(b)(2)																						
46	Total of all deductions allowed under § 707(b)(2). Enter the total of Lines 32, 40, and 45.	\$																				

Part VI. DETERMINATION OF § 707(b)(2) PRESUMPTION		
47	Enter the amount from Line 18 (Current monthly income for § 707(b)(2))	\$
48	Enter the amount from Line 46 (Total of all deductions allowed under § 707(b)(2))	\$
49	Monthly disposable income under § 707(b)(2). Subtract Line 48 from Line 47 and enter the result	\$
50	60-month disposable income under § 707(b)(2). Multiply the amount in Line 49 by the number 60 and enter the result.	\$
51	Initial presumption determination. Check the applicable box and proceed as directed. <div style="margin-top: 5px;"> <input type="checkbox"/> The amount on Line 50 is less than \$6,000. Check the "Presumption does not arise" box at the top of page 1 of this statement, and complete the verification in Part VII. Do not complete the remainder of Part VI. </div> <div style="margin-top: 5px;"> <input type="checkbox"/> The amount set forth on Line 50 is more than \$10,000. Check the "Presumption arises" box at the top of page 1 of this statement, and complete the verification in Part VII. Do not complete the remainder of Part VI. </div> <div style="margin-top: 5px;"> <input type="checkbox"/> The amount on Line 50 is at least \$6,000, but not more than \$10,000. Complete the remainder of Part VI (Lines 52 through 54). </div>	
52	Enter the amount of your total non-priority unsecured debt	\$
53	Threshold debt payment amount. Multiply the amount in Line 52 by the number 0.25 and enter the result.	\$
54	Secondary presumption determination. Check the applicable box and proceed as directed. <div style="margin-top: 5px;"> <input type="checkbox"/> The amount on Line 50 is less than the amount on Line 53. Check the "Presumption does not arise" box at the top of page 1 of this statement, and complete the verification in Part VIII. </div> <div style="margin-top: 5px;"> <input type="checkbox"/> The amount on Line 50 is equal to or greater than the amount on Line 53. Check the "Presumption arises" box at the top of page 1 of this statement, and complete the verification in Part VIII. You may also complete Part VII. </div>	

Part VII: ADDITIONAL EXPENSE CLAIMS

55

Other Expenses. List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.

	Expense Description	Monthly Amount
a.		\$
b.		\$
c.		\$
	Total: Add Lines a, b, and c	\$

Part VIII: VERIFICATION

56

I declare under penalty of perjury that the information provided in this statement is true and correct. *(If this a joint case, both debtors must sign.)*

Date: _____

Signature: _____
(Debtor)

Date: _____

Signature: _____
(Joint Debtor, if any)

In re _____
Debtor(s)Case Number: _____
(If known)

Check the box as directed in Part II, Line 14 of this statement.

- ☐ Disposable income determined under § 1325(b)(3)
- ☐ Disposable income not determined under § 1325(b)(3)

STATEMENT OF CURRENT MONTHLY INCOME AND DISPOSABLE INCOME CALCULATION

FOR USE IN CHAPTER 13

In addition to Schedules I and J, this statement must be completed by every individual Chapter 13 debtor, whether or not filing jointly. Joint debtors may complete one statement only.

Part I. CALCULATION OF CURRENT MONTHLY INCOME

1	Marital/filing status. Check the box that applies and complete the balance of this part of this statement as directed. a. <input type="checkbox"/> Unmarried. Complete only Column A ("Debtor's Income") for Lines 2-10. b. <input type="checkbox"/> Married, not filing jointly. Complete only Column A ("Debtor's Income") for Lines 2-10. (Under Revision) c. <input type="checkbox"/> Married, filing jointly. Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 2-10. All figures must reflect average monthly income for the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If you received different amounts of income during these six months, you must total the amounts received during the six months, divide this total by six, and enter the result on the appropriate line.			Column A Debtor's Income	Column B Spouse's Income									
2	Gross wages, salary, tips, bonuses, overtime, commissions.			\$	\$									
3	Income from the operation of a business, profession, or farm. Subtract Line b from Line a and enter the difference on Line 3. Do not enter a number less than zero. Do not include any part of the business expenses entered on Line b as a deduction in Part III. <table border="1" style="width: 100%; border-collapse: collapse; margin-top: 5px;"> <tr> <td style="width: 5%; text-align: center;">a.</td> <td style="width: 45%;">Gross receipts</td> <td style="width: 50%;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td>Ordinary and necessary business expenses</td> <td>\$</td> </tr> <tr> <td style="text-align: center;">c.</td> <td>Business income</td> <td>Subtract Line b from Line a</td> </tr> </table>			a.	Gross receipts	\$	b.	Ordinary and necessary business expenses	\$	c.	Business income	Subtract Line b from Line a	\$	\$
a.	Gross receipts	\$												
b.	Ordinary and necessary business expenses	\$												
c.	Business income	Subtract Line b from Line a												
4	Rent and other real property income. Subtract Line b from Line a and enter the difference on Line 4. Do not enter a number less than zero. Do not include any part of the operating expenses entered on Line b as a deduction in Part III. <table border="1" style="width: 100%; border-collapse: collapse; margin-top: 5px;"> <tr> <td style="width: 5%; text-align: center;">a.</td> <td style="width: 45%;">Gross receipts</td> <td style="width: 50%;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td>Ordinary and necessary operating expenses</td> <td>\$</td> </tr> <tr> <td style="text-align: center;">c.</td> <td>Rental income</td> <td>Subtract Line b from Line a</td> </tr> </table>			a.	Gross receipts	\$	b.	Ordinary and necessary operating expenses	\$	c.	Rental income	Subtract Line b from Line a	\$	\$
a.	Gross receipts	\$												
b.	Ordinary and necessary operating expenses	\$												
c.	Rental income	Subtract Line b from Line a												
5	Interest, dividends, and royalties.			\$	\$									
6	Pension and retirement income.			\$	\$									
7	Regular contributions to the household expenses of the debtor or the debtor's dependents, including child or spousal support. Do not include contributions from the debtor's spouse if Column B is completed.			\$	\$									
8	Unemployment compensation. Enter the amount in Column A and, if applicable, Column B. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: <table border="1" style="width: 100%; border-collapse: collapse; margin-top: 5px;"> <tr> <td style="width: 40%;">Unemployment compensation claimed to be a benefit under the Social Security Act</td> <td style="width: 30%;">Debtor \$ _____</td> <td style="width: 30%;">Spouse \$ _____</td> </tr> </table>			Unemployment compensation claimed to be a benefit under the Social Security Act	Debtor \$ _____	Spouse \$ _____	\$	\$						
Unemployment compensation claimed to be a benefit under the Social Security Act	Debtor \$ _____	Spouse \$ _____												
9	Income from all other sources. Specify source and amount. If necessary, list additional sources on a separate page. Total and enter on Line 9. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. <table border="1" style="width: 100%; border-collapse: collapse; margin-top: 5px;"> <tr> <td style="width: 5%; text-align: center;">a.</td> <td style="width: 45%;"></td> <td style="width: 50%;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td></td> <td>\$</td> </tr> </table>			a.		\$	b.		\$	\$	\$			
a.		\$												
b.		\$												
10	Subtotal of current monthly income. Add Lines 2 thru 9 in Column A, and, if Column B is completed, add Lines 2 through 9 in Column B. Enter the total(s).			\$	\$									

11	Total current monthly income. If Column B has been completed, add Line 10, Column A to Line 10, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 10, Column A.	\$
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Part II. APPLICATION OF § 1325(b)(3)		
12	Annualized current monthly income. Multiply the amount from Line 11 by the number 12 and enter the result.	\$
13	Applicable median family income. Enter the median family income for applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: _____ b. Enter debtor's household size: _____	\$
14	Application of § 1325(b)(3). Check the applicable box and proceed as directed. <input type="checkbox"/> The amount on Line 12 is less than or equal to the amount on Line 13. Check the box at the top of page 1 of this statement that states "Disposable income not determined under § 1325(b)(3)" and complete Part VI of this statement; do not complete Parts III, IV, or V. <input type="checkbox"/> The amount on Line 12 is more than the amount on Line 13. Check the box at the top of page 1 of this statement that states "Disposable income determined under § 1325(b)(3)" and complete the remaining parts of this statement.	

Complete Parts III, IV, and V of this statement only if required. (See Line 14.)

Part III. CALCULATION OF DEDUCTIONS ALLOWED UNDER § 707(b)(2)				
Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)				
15	National Standards: food, clothing, household supplies, personal care, and miscellaneous. Enter the "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable family size and income level. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	\$		
16	Local Standards: housing and utilities. Enter the amount of the IRS Housing and Utilities Standards allowance for your county and family size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court), adjusted to deduct any portion of the allowance that includes payments on debts secured by your home, listed in Line 37. (Under revision)	\$		
17	Local Standards: transportation; vehicle operation/public transportation expense. You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation. Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 7. <input type="checkbox"/> 0 <input type="checkbox"/> 1 <input type="checkbox"/> 2 or more. Enter the amount from IRS Transportation Standards, Operating Costs & Public Transportation Costs for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	\$		
18	Local Standards: transportation ownership/lease expense; Vehicle 1. Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.) <input type="checkbox"/> 1 <input type="checkbox"/> 2 or more. Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, First Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 37; subtract Line b from Line a and enter the result in Line 18. Do not enter an amount less than zero.		\$	
		a.	IRS Transportation Standards, Ownership Costs, First Car	\$
		b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 37	\$
		c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a.

19		<p>Local Standards: transportation ownership/lease expense; Vehicle 2. Complete this Line only if you checked the "2 or more" Box in Line 18.</p> <p>Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, Second Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 37; subtract Line b from Line a and enter the result in Line 19. Do not enter an amount less than zero.</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 5%; text-align: center;">a.</td> <td style="width: 55%;">IRS Transportation Standards, Ownership Costs, Second Car</td> <td style="width: 40%;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td>Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 37</td> <td>\$</td> </tr> <tr> <td style="text-align: center;">c.</td> <td>Net ownership/lease expense for Vehicle 2</td> <td>Subtract Line b from Line a.</td> </tr> </table>	a.	IRS Transportation Standards, Ownership Costs, Second Car	\$	b.	Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 37	\$	c.	Net ownership/lease expense for Vehicle 2	Subtract Line b from Line a.	\$			
a.	IRS Transportation Standards, Ownership Costs, Second Car	\$													
b.	Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 37	\$													
c.	Net ownership/lease expense for Vehicle 2	Subtract Line b from Line a.													
20		<p>Other Necessary Expenses: taxes. Enter the total average monthly expense that you actually incur for all federal, state and local taxes, other than real estate and sales taxes, such as income taxes, self employment taxes, social security taxes, and Medicare taxes. Do not include real estate or sales taxes.</p>	\$												
21		<p>Other Necessary Expenses: mandatory payroll deductions. Enter the total average monthly payroll deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. Do not include discretionary amounts, such as non-mandatory 401(k) contributions.</p>	\$												
22		<p>Other Necessary Expenses: life insurance. Enter average monthly premiums that you actually pay for term life insurance for yourself. Do not include premiums for insurance on your dependents, for whole life, or for any other form of insurance.</p>	\$												
23		<p>Other Necessary Expenses: court-ordered payments. Enter the total monthly amount that you are required to pay pursuant to court order, such as spousal or child support payments. Do not include payments on past due support obligations included in Line 39.</p>	\$												
24		<p>Other Necessary Expenses: education for employment or for a physically or mentally challenged child. Enter the total monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.</p>													
25		<p>Other Necessary Expenses: childcare. Enter the average monthly amount that you actually expend on childcare. Do not include payments made for children's education.</p>	\$												
26		<p>Other Necessary Expenses: health care. Enter the average monthly amount that you actually expend on health care expenses that are not reimbursed by insurance or paid by a health savings account. Do not include payments for health insurance listed in Line 29.</p>	\$												
27		<p>Other Necessary Expenses: telecommunication services. Enter the average monthly expenses that you actually pay for cell phones, pagers, call waiting, caller identification, special long distance, or internet services necessary for the health and welfare of you or your dependents. Do not include any amount previously deducted.</p>	\$												
28		<p>Total Expenses Allowed under IRS Standards. Enter the total of Lines 15 through 27</p>	\$												
<p>Subpart B: Additional Expense Deductions under § 707(b)</p> <p>Note: Do not include any expenses that you have listed in Lines 15-27</p>															
29		<p>Health Insurance, Disability Insurance, and Health Savings Account Expenses. List the average monthly amounts that you actually expend in each of the following categories and enter the total.</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 5%; text-align: center;">a.</td> <td style="width: 55%;">Health Insurance</td> <td style="width: 40%;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td>Disability Insurance</td> <td>\$</td> </tr> <tr> <td style="text-align: center;">c.</td> <td>Health Savings Account</td> <td>\$</td> </tr> <tr> <td colspan="2"></td> <td>Total: Add Lines a, b, and c</td> </tr> </table>	a.	Health Insurance	\$	b.	Disability Insurance	\$	c.	Health Savings Account	\$			Total: Add Lines a, b, and c	\$
a.	Health Insurance	\$													
b.	Disability Insurance	\$													
c.	Health Savings Account	\$													
		Total: Add Lines a, b, and c													
30		<p>Continued contributions to the care of household or family members. Enter the actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. Do not include payments listed in Line 24.</p>	\$												
31		<p>Protection against family violence. Enter any average monthly expenses that you actually incurred to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law.</p>	\$												
32		<p>Home energy costs in excess of the allowance specified by the IRS Local Standards. Enter the average monthly amount by which your home energy costs exceed the allowance in the IRS Local Standards for Housing and Utilities. You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.</p>	\$												

33	Education expenses for dependent children under 18. Enter the average monthly expenses that you actually incur, not to exceed \$125 per child, in providing elementary and secondary education for your dependent children less than 18 years of age. You must provide your case trustee with documentation demonstrating that the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.	\$																				
34	Additional food and clothing expense. Enter the average monthly amount by which your food and clothing expenses exceed the combined allowances for food and apparel in the IRS National Standards, not to exceed five percent of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.	\$																				
35	Continued charitable contributions. Enter the amount that you will continue to contribute in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2).	\$																				
36	Total Additional Expense Deductions under § 707(b). Enter the total of Lines 29 through 35.	\$																				
Subpart C: Deductions for Debt Payment																						
37	Future payments on secured claims. For each of your debts that is secured by an interest in property that you own, list the name of creditor, identify the property securing the debt, and state the Average Monthly Payment. The Average Monthly Payment is the total of all amounts contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. Do not include items you have previously deducted, such as insurance and real estate taxes.	\$																				
<table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 5%;"></th> <th style="width: 35%;">Name of Creditor</th> <th style="width: 35%;">Property Securing the Debt</th> <th style="width: 25%;">60-month Average Payment</th> </tr> </thead> <tbody> <tr> <td style="text-align: center;">a.</td> <td></td> <td></td> <td style="text-align: center;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td></td> <td></td> <td style="text-align: center;">\$</td> </tr> <tr> <td style="text-align: center;">c.</td> <td></td> <td></td> <td style="text-align: center;">\$</td> </tr> <tr> <td colspan="3"></td> <td style="text-align: center;">Total: Add Lines a, b, and c</td> </tr> </tbody> </table>				Name of Creditor	Property Securing the Debt	60-month Average Payment	a.			\$	b.			\$	c.			\$				Total: Add Lines a, b, and c
	Name of Creditor	Property Securing the Debt	60-month Average Payment																			
a.			\$																			
b.			\$																			
c.			\$																			
			Total: Add Lines a, b, and c																			
38	Past due payments on secured claims. If any of the debts listed in Line 37 are in default, and the property securing the debt is necessary for your support or the support of your dependents, you may include in your deductions 1/60th of the amount that you must pay the creditor as a result of the default (the "cure amount") in order to maintain possession of the property. List any such amounts in the following chart and enter the total. If necessary, list additional entries on a separate page.	\$																				
<table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 5%;"></th> <th style="width: 35%;">Name of Creditor</th> <th style="width: 35%;">Property Securing the Debt in Default</th> <th style="width: 25%;">1/60th of the Cure Amount</th> </tr> </thead> <tbody> <tr> <td style="text-align: center;">a.</td> <td></td> <td></td> <td style="text-align: center;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td></td> <td></td> <td style="text-align: center;">\$</td> </tr> <tr> <td style="text-align: center;">c.</td> <td></td> <td></td> <td style="text-align: center;">\$</td> </tr> <tr> <td colspan="3"></td> <td style="text-align: center;">Total: Add Lines a, b, and c</td> </tr> </tbody> </table>				Name of Creditor	Property Securing the Debt in Default	1/60th of the Cure Amount	a.			\$	b.			\$	c.			\$				Total: Add Lines a, b, and c
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a.			\$																			
b.			\$																			
c.			\$																			
			Total: Add Lines a, b, and c																			
39	Payments on priority claims. Enter the total amount of all priority claims (including priority child support and alimony claims), divided by 60.	\$																				
40	Chapter 13 administrative expenses. Multiply the amount in Line a by the amount in Line b, and enter the resulting administrative expense.	\$																				
<table border="1" style="width: 100%; border-collapse: collapse;"> <tbody> <tr> <td style="width: 5%; text-align: center;">a.</td> <td style="width: 60%;">Projected average monthly Chapter 13 plan payment.</td> <td style="width: 35%; text-align: center;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td>Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)</td> <td style="text-align: center;">x</td> </tr> <tr> <td style="text-align: center;">c.</td> <td>Average monthly administrative expense of Chapter 13 case</td> <td style="text-align: center;">Total: Multiply Lines a and b</td> </tr> </tbody> </table>			a.	Projected average monthly Chapter 13 plan payment.	\$	b.	Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	x	c.	Average monthly administrative expense of Chapter 13 case	Total: Multiply Lines a and b											
a.	Projected average monthly Chapter 13 plan payment.	\$																				
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c.	Average monthly administrative expense of Chapter 13 case	Total: Multiply Lines a and b																				
41	Total Deductions for Debt Payment. Enter the total of Lines 37 through 40.	\$																				
Subpart D: Total Deductions Allowed under § 707(b)(2)																						
42	Total of all deductions allowed under § 707(b)(2). Enter the total of Lines 28, 36, and 41.	\$																				

Part IV. DETERMINATION OF DISPOSABLE INCOME UNDER § 1325(b)(2)

43	Total current monthly income. Enter the amount from Line 11.	\$
44	Support income. Enter the monthly average of any child support payments, foster care payments, or disability payments for a dependent child, included in Line 7, that you received in accordance with applicable nonbankruptcy law, to the extent reasonably necessary to be expended for such child.	\$
45	Qualified retirement deductions. Enter the monthly average of (a) all contributions or wage deductions made to qualified retirement plans, as specified in § 541(b)(7) and (b) all repayments of loans from retirement plans, as specified in § 362(b)(19).	\$
46	Total of all deductions allowed under § 707(b)(2). Enter the amount from Line 42.	\$
47	Total adjustments to determine disposable income. Add the amounts on Lines 44, 45, and 46 and enter the result.	\$
48	Monthly Disposable Income Under § 1325(b)(2). Subtract Line 47 from Line 43 and enter the result.	\$

Part V: ADDITIONAL EXPENSE CLAIMS

49	Other Expenses. List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.	
	Expense Description	Monthly Amount
	a.	\$
	b.	\$
	c.	\$
	Total: Add Lines a, b, and c	\$

Part VI: VERIFICATION

50	I declare under penalty of perjury that the information provided in this statement is true and correct. <i>(If this a joint case, both debtors must sign.)</i>	
	Date: _____	Signature: _____ (Debtor)
	Date: _____	Signature: _____ (Joint Debtor, if any)

United States Bankruptcy Court
_____ District Of _____

In re _____,
Debtor

Case No. _____

Chapter _____

**DEBTOR'S CERTIFICATION OF COMPLETION OF INSTRUCTIONAL COURSE
CONCERNING PERSONAL FINANCIAL MANAGEMENT**

[Complete one of the following statements.]

☐ I/We, _____, the debtor(s) in the above-
(Printed Name(s) of Debtor and Joint Debtor, if any)
styled case hereby certify that on _____ I/we completed an instructional
(Date)
course in personal financial management provided by _____,
(Name of Provider)
an approved personal financial management instruction provider. If the provider furnished a
document attesting to the completion of the personal financial management instructional
course, a copy of that document is attached.

☐ I/We, _____, the debtor(s) in the above-styled
(Printed Names of Debtor and Joint Debtor, if any)
case, hereby certify that no personal financial management course is required because:
[Check the appropriate box.]

- ☐ I am/We are incapacitated or disabled, as defined in 11 U.S.C. § 109(h);
- ☐ I am/We are on active military duty in a military combat zone; or
- ☐ I/We reside in a district in which the United States trustee (or bankruptcy administrator) has
determined that the approved instructional courses are not adequate at this time to serve the
additional individuals who would otherwise be required to complete such courses.

Signature of Debtor: _____

Date: _____

Signature of Joint Debtor: _____

Date: _____

[Caption as described in Fed. R. Bankr. P. 7010 or 9004(b), as applicable.]

**CERTIFICATION TO COURT OF APPEALS
BY ALL PARTIES**

A notice of appeal having been filed in the above-styled matter on _____ [Date],
_____, _____, and _____, [Names
of all the appellants and all the appellees, if any], who are all the appellants [and all the
appellees] hereby certify to the court under 28 U.S.C. § 158(d)(2)(A) that a circumstance
specified in 28 U.S.C. § 158(d)(2) exists as stated below.

Leave to appeal in this matter ☐ is ☐ is not required under 28 U.S.C. § 158(a).

[If from a final judgment, order, or decree] This certification arises in an appeal from a
final judgment, order, or decree of the United States Bankruptcy Court for the _____
District of _____ entered on _____ [Date].

[If from an interlocutory order or decree] This certification arises in an appeal from an
interlocutory order or decree, and the parties hereby request leave to appeal as required by 28
U.S.C. § 158(a).

*[The certification shall contain one or more of the following statements, as is appropriate
to the circumstances.]*

The judgment, order, or decree involves a question of law as to which there is no
controlling decision of the court of appeals for this circuit or of the Supreme Court of the United
States, or involves a matter of public importance.

Or

The judgment, order, or decree involves a question of law requiring resolution of
conflicting decisions.

Or

An immediate appeal from the judgment, order, or decree may materially advance the
progress of the case or proceeding in which the appeal is taken.

[The parties may include or attach the information specified in Rule 8001(f)(3)(C).]

Signed: *[If there are more than two signatories, all must sign and provide the information requested below. Attach additional signed sheets if needed.]*

Attorney for Appellant (or Appellant,
if not represented by an attorney)

Printed Name of Signer

Address

Telephone No.

Date

Attorney for Appellant (or Appellant
if not represented by an attorney)

Printed Name of Signer

Address

Telephone No.

Date

USE OF FEDERAL EXEMPTIONS IN BANKRUPTCY

*Michael L. Baker
Ziegler & Schneider, P.S.C.
Covington, Kentucky*

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SECTION A(b)

Use of Federal Exemptions in Bankruptcy

by

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Facsimile: (859) 426-0222
mbaker@zslaw.com

USE OF FEDERAL EXEMPTIONS IN BANKRUPTCY

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FEDERAL EXEMPTIONS A(b)-2

LIEN AVOIDANCE A(b)-5

THE MILLION DOLLAR EXCEPTION A(b)-6

COMPARISON TO KENTUCKY REVISED CHAPTER 427 A(b)-6

CONCLUSION A(b)-7

INTRODUCTION:

On March 18, 2005, after the unanimous adoption by both the Kentucky House of Representatives and the Kentucky Senate, the Governor signed into law House Bill 248. The enactment of this Bill recites one sentence. That sentence is, "An individual debtor domiciled in this state is authorized to exempt from property of said debtor's estate the property specified in 11 U.S.C. § 522(d)."

With that simple sentence, Kentucky becomes the first state in the Sixth Circuit Court of Appeals to formally adopt the use of Federal Exemptions as set forth in 11 U.S.C. § 522. These exemptions can be used by Debtors who file bankruptcy under any of the operative chapters. With one rare exception, this practitioner believes that the use of the Federal Exemptions in bankruptcy by Kentucky residents (or those who can use Kentucky Exemptions under the new venue statute enacted in the Bankruptcy Reform Act) are far more generous than the exemptions set forth in KRS 427.010, et seq. For those who have been active in bankruptcy practice for several years, the adoption of the Federal Exemptions is tantamount to a gift from the Almighty. A closer examination of these Exemptions will reveal why.

This presentation does not intend to cover every Federal Exemption. Several Federal exemptions have been applicable to Kentucky residents for many years. These include, for example, the exemption of Social Security proceeds, military pension benefits, proceeds received under the Jones Act, welfare benefits, and a few others that Kentucky eventually enacted legislation to mirror, such as wages, unemployment, and other similar benefits. This examination will concentrate on those set forth in 11 U.S.C. § 522. A quick comparison of that statute versus KRS 427 et seq., will show the differences of 25 years of neglect.

FEDERAL EXEMPTIONS:

This presentation will quickly review those Exemptions set forth in 11 U.S.C. § 522, including the statute as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. A copy of the Statute is attached hereto as an Exhibit. Those practitioners who use software systems, such as Best Case and others, will find that the Exemptions are already included in the software package. This presenter assumes that anyone who is going to file a bankruptcy petition on behalf of a Kentucky resident is using a software package. While not required, I cannot imagine filing one the old fashioned way, particularly using the CMCEF system that the Court requires.

To begin the examination, I refer you to 11 U.S.C. § 522(a)(2), which retains the definition of value that has been extant in this statute since its inception in 1978. This definition differs from the values that one must place on the petition as set forth in 11 U.S.C. § 506(a)(2), which mandates that a debtor in a Chapter 7 or 13 use value, or personal property, which is secured by an allowed claim shall be determined based on the "replacement value of such property as of the date of the filing of the petition, without deduction for cost of sale or marketing." Section 522(a)(2) defines value as the "fair market value as of the date of the filing of the petition or the date that the property becomes property of the estate." This value also differs from that as required to be used in Chapter 13 as set forth in 11 U.S.C. § 1325(a)(9), as amended, if the personal property was purchased within 910 days of the date of the filing of the petition. Counsel is also urged to review 11 U.S.C. § 522(b)(3) with regard to the discussion of what is the debtors domicile for purposes of claiming exemptions. There is a 730 reach-back period, and if there are multiple jurisdictions involved, ultimately the Federal Exemptions may also be used. I also would refer, if there is a conflict in a

joint filing between the use of State Exemptions and Federal Exemptions, the Federal Exemptions apply.

Retirement funds, including IRAs, 401 funds, 403 funds, 408 funds, 408(a) funds, and virtually any other fund that is a deferred compensation fund as defined in the Internal Revenue Code, are also exempt, and any rollover of those funds, as long as it is rolled over, and not distributed, shall also be exempt, subject to maintenance and child support claims, of course. The position was codified when the Supreme Court ruled that IRA assets are exempt in the Rousey v. Jacoway, 125 U.S. 1561 (2005), case. Certain exceptions exist to the exemptions, but other than child support, tax liens will still take precedence over a claimed exemption.

Section 522(d) sets forth the majority of the Exemptions in this Title. Some of these Exemptions are adjusted for inflation, as are other areas of the Code, including jurisdiction limits in Chapter 13, wages claims as core priority in § 507, and in other places. The numbers given here are effective as of the presentation rendered today. All of these Exemptions became applicable on June 20, 2005, and continue, notwithstanding the onset and enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

These Exemptions include:

(1) a homestead exemption not to exceed \$18,450.00 in real property or personal property that the debtor or a dependent of the debtor uses as a residence (this includes mobile homes). I always find it curious that a burial plot qualifies for a homestead exemption;

(2) the exemption in an automobile is raised from the Kentucky Exemption of \$2,500.00 to \$2,950.00;

(3) any one item of personalty in household furnishings, household goods, wearing apparel, appliance, books, animals, crops or musical instruments that are held primarily for personal, family or household use by the debtor, or a dependent of the debtor. Each one item is limited to \$475.00 in value, with an overall maximum of \$9,850.00. Note that the animals, crops, or musical instruments must be held primarily for personal, family or household use, and not professional use;

(4) a maximum value of \$1,225.00 in jewelry held for personal use;

(5) the wildcard is reduced by \$25.00, to \$975.00; however, to the extent the homestead exemption is not be used, and a debtor may utilize up to one-half (1/2), or the amount of \$9,250.00, under this section. Thus, a debtor could have as much as \$10,500.00 in a wildcard exemption;

(6) the exemption in work tools, implements, and professional books goes from \$300.00 to \$1,850.00 in value;

(7) any un-matured life insurance contract owned by the debtor, other than a credit life insurance contract. I have never seen a cash value to a credit life insurance contract;

(8) the debtors aggregate interest not to exceed \$9,850.00 in the cash value of un-matured life insurance. I would also add that if the cash value has never been taken, I do not believe it can be invaded by the Trustee. If it has been invaded by the debtor, then the Trustee may have a claim for any amount above the \$9,850.00;

(9) professionally prescribed health aides;

(10) the debtors right to receive Social Security, unemployment or a local public assistance benefit, a veterans benefit, a disability, illness or unemployment benefit, alimony, child support, maintenance, a payment under a stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of illness, disability, death, age or length of service;

(11) the debtors right to receive or property that is traceable to an award under a crime victims reparation law, wrongful death recovery, life insurance benefit, if the debtor was a dependent on the date of the decedent's death, recovery on account of personal bodily injury, not including pain and suffering or compensation for actual punitive loss in the amount of \$15,000.00 and future earnings recovered by the debtor; and

(12) retirement funds to the extent that those funds are in a fund or an account that is exempt from taxation under the Internal Revenue Code.

LIEN AVOIDANCE:

Lien avoidance is not permitted for judicial lien that secures a debt for alimony, child support or maintenance under the new legislation. Congress further defined the term household good to include clothing; furniture; appliances; one radio; one television (plasma); one VCR; linens; china; crockery; kitchenware; educational material for minors; medical equipment and supplies, thank god for diabetics; furniture exclusively used for minor children or elderly, disabled dependents; personal effects, including toys and hobby equipment of minor children; one personal computer and related equipment. Included in this definition is wedding rings of minor dependents. What is not included under the term household good are works of art, unless the debtor did it; electronic entertainment equipment with a fair market value of more than \$500.00, except for the one television, one radio and VCR (note: no DVD); antiques with a market value of more than \$500; jewelry, except wedding rings, with a fair market value greater than \$500; and a computer, except as otherwise set forth; motor vehicles, including a tractor or lawn tractor, boat or motorized recreational device, conveyance vehicle, water craft or aircraft.

THE MILLION DOLLAR EXCEPTION:

KRS 427.150 does not have a monetary limit on the protection of deferred compensation funds, although it does have the limitation of the amounts reasonably necessary for the support of the debtor and the debtor's dependents. However, 11 U.S.C. § 522(n) limits the amounts that can be exempt in IRAs, 403s, 401(k)s and other similar funds to \$1,000,000.00. Therefore, if one should represent a debtor who (1) is a Kentucky resident; (2) has deferred compensation funds in excess of \$1,000,000.00; and (3) cannot wait 1215 days to establish residency in another state, such as Florida or Texas, counsel may want to look at the Kentucky Exemptions, rather than Federal.

Counsel is also urged to review 11 U.S.C. § 522(p) and (q). This limits the amount of the homestead exemption that can be claimed, including a burial plot, if it exceeds \$125,000.00, if the debtor has moved in the 1215-day period prior to filing the bankruptcy petition. The principle exception is if the debtor is a family farmer. Then, there is no limitation, and I am looking forward to see how many "tin millionaires" declare themselves family farmers. The homestead exemption may also be limited if the Court determines after notice and a hearing that the debtor has been convicted of a felony, which under the circumstances demonstrate that the filing of the bankruptcy is an abuse of the provision of Title 11.

COMPARISON TO KENTUCKY REVISED CHAPTER 427:

A simple review of KRS 427.010, et seq., reveals how much more generous the Federal Exemptions are. Of course, the Kentucky homestead exemption is \$5,000.00 under KRS 427.060. The maximum amount of furniture, clothing and jewelry that a debtor can exempt is \$3,000.00 under KRS 427.010. Automobiles are limited to \$2,500.00. The wildcard exemption is \$1,000.00 and

cannot be expanded by the non-use of the homestead exemption. Work tools and professional prescribed aides are limited to \$300.00. Personal injury recoveries are limited to \$7,500.00. However, the Federal and Kentucky Exemptions mirror each other with respect to future earnings. Kentucky law also has a 120-day look back period for contributions to pensions, annuities and the like. There is no monetary limitation on IRAs, as there is under the Federal Exemptions. However, a side-by-side comparison leaves little doubt that the Federal Exemptions should be applied and used in virtually every case filed in a Kentucky bankruptcy court.

CONCLUSION:

In preparing for this presentation, I spoke with a member of the Kentucky General Assembly about the enactment of this amendment that adopts the Federal Exemptions. I queried as to how this provision passed both houses unanimously and was signed by the Governor with little or no fanfare. His astonishment matched my own. Attempts have been made in the last four to five general assemblies to revise the low levels that exist in the exemptions as they have not changed since 1979. What is particularly astonishing is the recent history of the legislature and its divisiveness and, of course, the fact that the Governor is from a party that has not been in power in the Governor's mansion for more than 30 years. Despite all of these obstacles, the use of Federal Exemptions perhaps represents the greatest reform for Kentucky residents and Kentucky practitioners, notwithstanding the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The use of these exemptions offered genuine relief for debtors. And, if one looks at the collection activities of most creditors, the adoption of these exemptions does not unfairly or unjustly impede their collection activities. The automatic inflation adjustments will raise these exemptions

over time. Counsel is cautioned to review the exemptions periodically to make sure what the appropriate amount of coverage is. If your software provider does not have the Federal exemptions contained in its program, there are many who do, and I urge you to contact those providers immediately. To not use the Federal Exemptions will be a breach of your duty to your client.

The impact of the use of Federal Exemptions will mean the demise of small asset bankruptcy cases. Chapter 7 Trustees will have to rely on errors made by creditors and assets with real value in order to make a distribution to creditors.

CONFLICT OF INTEREST AFTER THE 2005 LEGISLATION AND OTHER ETHICAL ISSUES

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CONFLICT OF INTEREST AFTER THE 2005 LEGISLATION AND OTHER ETHICAL ISSUES

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SECTION B

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CONFLICT OF INTEREST AFTER THE 2005 LEGISLATION AND OTHER ETHICAL ISSUES

I. The 2005 Bankruptcy Bill Changes to the Ethical Landscape

A. Are You a Debt Relief Agency?: 11 U.S.C. §§ 101(3), (4A) (12A) 526-528

1. Definitions:

- a. Debt Relief Agency ("DRA"): 11 U.S.C. § 101(12A)
 - provides "Bankruptcy assistance" to an "Assisted Person"
- b. Assisted Person: 11 U.S.C. § 101(3)
- c. Bankruptcy Assistance: 11 U.S.C. § 101(4A)

2. 11 U.S.C. § 526: Restrictions on Debt Relief Agencies

- 526(a)(1) DRA cannot fail to perform promised services
- 526(a)(2) DRA cannot advise clients to make statements which are untrue or misleading
- 526(a)(4) DRA cannot advise an assisted person to incur "more debt in contemplation of such person filing a case" (includes debt to pay legal fees)
- 526(b) DRA duties cannot be waived by Assisted Persons
- 526(c) If DRA violates §§ 526, 527 or 528 of the Code ("DRA Provisions"), contract is void as to enforcement against Assisted Person, but the assisted person can enforce it against the DRA. Further if DRA intentionally or negligently violates DRA Provisions, then DRA will be liable for 1) all amounts charged to Assisted Person; 2) actual damages; 3) reasonable attorney fees. DRA is also liable for these amounts if Assisted Person's case is dismissed or converted or DRA intentionally or negligently violates Code or Rules.
- 526(c)(3) State agencies may enforce DRA Provisions
- 526(d)(2) DRA Provisions do not limit state practice of law rules

3. 11 U.S.C. § 527: Disclosures for Debt Relief Agencies

- 527(a) Sets specific notice and information requirements

- 527(b) provides an exact notice DRA's must provide to assisted persons.
- 527(c) requires DRA's to provide information to Assisted Persons to have them properly complete schedules (See 707(b)).
- 527(d) requires that DRA's maintain copies of all notices given for two years after date they are given.

4. 11 U.S.C. § 528: Requirements for Debt Relief Agencies

- 528(a)(1) requires contract with Assisted Person to be executed within 5 days from first day bankruptcy services are provided.
- 528(a)(3), (4) and (b) provides advertising requirements for DRA.

- a. Important Note: Advertising - Remember the phrase "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code."

B. Bankruptcy Planning: The Identifying Marks of a Hog

1. Prior to the Bankruptcy Bill of 2005, numerous courts attempted to delineate what constitutes permissible bankruptcy planning. The best description of the numerous, often conflicting tests, is the simple "pig to hog" transformation analogy of In re Zouhar, 10 B.R. 154 (Bkrcty. D. N.M. 1981) ("there is a principle of too much; phrased colloquially when a pig becomes a hog it is slaughtered.")

2. Cases Discussing Pre-Bankruptcy Planning:

- a. In re Bowyer, 916 F.2d 1056 (5th Cir. 1990) (Ruled denial of discharge was appropriate for conversion of less than \$100,000 into homestead. Debtor's income was \$240,000 but debtors claimed to live "modestly".) However, see In re Bowyer 932 F.2d 1100 (5th Cir. 1991) (On re-hearing circuit court reversed previous decision and upheld bankruptcy court ruling that debtor should receive discharge.)
- b. In re Tamecki, 229 F.3d 205 (3rd Cir. 2000) (Discussing dismissal of Chapter 7 case because of exemption planning.)

- c. Matter of Smiley, 864 F.2d 562 (7th Cir. 1989) (debtors purchase of \$380,000 home and move to new jurisdiction results in loss of exemption and denial of discharge.)
 - d. In re Carey, 938 F.2d 1073 (10th Cir. 1991) (Discussing denial of discharge from pre-bankruptcy planning.)
 - e. Norwest Bank v. Tveten, 848 F.2d 871 (8th Cir. 1988) (doctors are bad)
 - f. Hanson v. First National Bank, 848 F.2d 866 (farmers are good)
 - g. Matter of Reed, 700 F.2d 986 (5th Cir. 1983) (conversion of non-exempt assets of approximately \$40,000 into homestead results in denial of discharge)
 - h. In re Johnson 80 B.R. 953 (Bkrcty. D. Minn. 1987) (Doctors are good); aff'd, 101 B.R. 997 (D. Minn. 1988) (Ditto), remanded for further hearings, 880 F.2d 78 (8th Cir. 1989) (Don't know). on remand, In re Johnson, 124 B.R. 290 (Bkrcty. D. Minn. 1991) (Whoops, doctors are bad after all.)
 - i. In re Covino, 187 B.R. 773 (Bkrcty. S.D. Fla. 1995) (Discussing general test of what is permissible exemption planning.)
 - j. In re Harker, 181 B.R. 326 (Bkrcty. E.D. Tenn. 1995) (Refusing to permit dismissal of case to allow exemption planning.)
 - k. In re Beckman, 104 B.R. 866 (Bkrcty. S.D. Ohio 1989) (J. Guy Cole) (Discussing fraudulent conveyance issues related to exemption planning.)
3. Under the Bankruptcy Bill of 2005 Numerous Additional Restrictions Have Been Placed on Pre-Bankruptcy Planning
- a. 11 U.S.C. §§ 522(b)(3) (o) and (p): Limitations on Claiming Homestead Exemptions
 - b. 11 U.S.C. § 523(a)(19): Non-Dischargeable Debts for Certain Security Law Violations: Sarbanes – Oxley expands again
 - c. 11 U.S.C. § 548(a)(1) and (e): Anti KERP Payments and Attack on Self Settled Trusts
- C. Individual Debtors in Chapter 11: Has Toibb v. Radloff, 501 U.S. 157 (1991) Been Effectively Repealed?

1. 11 U.S.C. § 1115 The new property of the estate: post petition earnings
 2. 11 U.S.C. §§ 1127 and 1141 Modification of an individual's Chapter 11 Plan post confirmation
 3. 11 U.S.C. § 1129 Confirmation Requirements
- D. New Fun and Games in Attempting to Convert Chapter 11 Cases to Chapter 7 or Appointing a Trustee:
1. 11 U.S.C. §§ 1104 and 1112
- E. Committee Changes and the Committee Counsel's Information Duties: Mandating Waiver of the Attorney Client Privilege?
1. 11 U.S.C. § 1102
- F. Chapter 7 Consumer Debt or Representation Conflicts: Investigation of Client.
1. 11 U.S.C. § 707(b)
 - 707(b)(3) Bad faith filing of petition and rejection of personal services contract are issues for determining whether Chapter 7 filing would be an abuse.
 - 707(b)(4) Court may order sanctions to trustee for 707(b) motion if Rule 9011 violated.
 - 707(b)(4)(C) Signature of attorney on pleading and petitions certifies that DRA/attorney has: 1) performed a reasonable investigation into circumstances of pleading or petition; 2) the pleading or petition is well grounded in fact; and 3) is warranted in existing law or by a good faith argument for change of existing law.
 - 707(b)(4)(D) Signature constitutes certification that DRA/attorney has no knowledge after inquiry that information in schedules is incorrect.
 - 707(b)(5) Debtors may have opportunity for sanctions against creditors in very limited circumstances.
- G. Jurisdiction over Your Employment and Malpractice

1. 28 U.S.C. § 1334(e): Exclusive Jurisdiction over lawsuits involving 11 U.S.C. § 327 and related rule controversies.

II. Getting Started by Surprise: Ethical issues facing counsel for potential debtors facing involuntary bankruptcy petitions

Exhibit A

Bowles, Involuntary Fee Slaughter: The Perils of Professional Fees for Representing a Debtor During the GAP Period, 21 Am. Bankr. Inst. J. 24 (2002).

III. Who Do You Work For? Duty to clients in Chapter 11 Proceedings

Exhibit B

Rapoport and Bowles, Has the DIP's Counsel Become the Ultimate Creditors Lawyer in Bankruptcy Reorganization Cases?, 5 Am. Bank. Inst. L. Rev. 47 (1997).

Recent Ethical Issues

IV. Who is the Client: New Cases, New Problems

- A. Service to Two Masters, Not a Good Idea: In re R&R Associates of Hampton, 402 F.3d 257 (1st Cir. 2005)

R&R Associates ("R&R") was a general partnership with two general partners, Choate and Gaudette. R&R's only asset was a single piece of commercial real estate.

In 1990, Gaudette retained a law firm ("Law Firm") to transfer \$700,000 of his property to several family limited partnerships ("FIP"). The Law Firm later helped Choate transfer a significant amount of assets to other FIP's. Under applicable law, assets and interests in FIPs are extremely difficult to attach by creditors.

Later, in 1991, R&R was forced to file a Chapter 11 proceeding. The Law Firm, in its application to be employed as R&R's chapter 11 counsel, failed to disclose their prior and ongoing representation of Gaudette and Choate.

During the course of the R&R chapter 11, the Law Firm stated to the Bankruptcy Court that Gaudette and Choate had sufficient assets to cover any shortfall in R&R's assets. Unfortunately, the Chapter 11 was a total failure and was converted to a Chapter 7. Further, Gaudette and Choate, due in part to their transfers to the FIP's, were in fact unable to cover the asset shortfall in the R&R estate.

The Chapter 7 Trustee requested the general partner's financial records and the Law Firm provided the Trustee with these records without disclosing the FLPs existence or the Law Firm's part in setting up the FLPs.

Ultimately, the Chapter 7 Trustee sued the Law Firm for negligent representation of R&R during the Chapter 11 and breach of their fiduciary duties and sought disgorgement of the Law Firm's \$18,887.00 in legal fees paid by R&R to the Law Firm and \$412,000.00 in other damages representing the unpaid claims in the case.

After two Bankruptcy Court opinions and two appeals to the U.S. District Court, (which ultimately affirmed the Bankruptcy Court's dismissal of the Trustee's lawsuit) the Trustee appealed the case to the First Circuit.

The First Circuit reversed the District Court decision finding:

1. The Law Firm had a duty of "care, candor and unswerving loyalty" to the Debtor;
2. The Law Firm breached these duties to R&R by:
 - a. Making uninvestigated representations as to the general partners net worth;
 - b. Assisting the general partners in shielding their assets from creditors;
 - c. Failing to advise the Bankruptcy Court of their conflicts of interest
3. Entry of judgment was appropriate against the Law Firm in the amount of all unpaid claims of the R&R Estate (\$412,000) was appropriate

Throughout the First Circuit's opinion, the Court notes that the Law Firm "affirmatively violated" its fiduciary duty to the Debtor by continuing post-petition to shield personal assets of the General Partners in the FLPs. Given the serious nature of the sanction this case should serve as a warning to all attorneys not to shield the assets of potential debtors of a chapter 11 debtor.

- B. Bad Mushrooms, Man! In re Mushroom Transportation Company, Inc., 382 F.3d 325 (3rd Cir. 2004)

Third Circuit held that Debtor's law firm owes a fiduciary duty to a chapter 11 debtor in determining summary judgment motions related to a law firm and bank concerning an attorney's embezzlement of funds from a debtor.

- C. Disclose, Disclose . . . In re Big Rivers Electric Corporation, 355 F.3d 415 (6th Cir. 2004)

A cautionary tale about why examiners and trustees should not attempt to obtain undisclosed agreements from creditors in the middle of a case concerning their compensation. Court found that the examiners undisclosed efforts to obtain a fee enhancement violated the examiner's duties of loyalty, disclosure and to remain disinterested and ordered disallowance and disgorgement of all fees even though Examiner brought to the estate an additional \$145,000,000.00 to estate from his efforts.

- D. A Case to Remember In re V&M Management, Inc., 321 F.3d 6 (1st Cir. 2003)

In V&M, the sole shareholder and former director of the debtor subchapter s corporation filed a state court lawsuit against chapter 11 debtor's law firm and bankruptcy trustee. Case was removed to Federal Court and was dismissed due to Bankruptcy Court's determination in the Chapter 11 case that there was no value to Debtor's equity interest.

- E. And Again, Who is Your Client? Bergin v. Eerie World Entertainment, LLC, 2003 WL 22861948 (S.D.N.Y. Dec. 2, 2003)

Law firm disqualified as counsel for a chapter 11 debtor for (1) either representing the debtor's principal [or at least being severely confused as to who his client was]; (2) accepting payments of professional fees from the debtor's principal; and (3) ignoring causes of actions against associates of the principal.

- F. Mutiney II: Mutineers Continue to Win. In re The Phoenix Group Corporation, 305 B.R. 447 (Bkrtcy N.D.Tx 2003).

Chapter 11 Debtors' counsel represented the Debtors in a hotly contested Chapter 11 proceeding. Counsel for the Debtors moved twice to be permitted to withdraw for ethical reasons. In one of the motions the Debtors' counsel noted that the Debtors' principal was demanding that Debtors' counsel take actions and pursues strategies that Debtors' counsel found to be "legally and ethically improper. The second motion to withdraw was granted.

The Debtors' counsel ultimately filed a final fee application and the principals of their former client, allegedly on behalf of the Debtors, objected arguing (1) the Debtors' counsel failed to properly object to the plan of another related Chapter 11 debtor ("Related Case"); and (2) the Debtors' counsel failed to pursue the appointment of a trustee in the Related Case.

The court overruled the Objection after finding that:

1. The Debtors could not get along with any attorney, as six of its 20 largest creditors were law firms;
2. The Debtors did in fact attempt to require their counsel take improper actions; and
3. The Debtors' counsel properly exercised its professional judgment in deciding not to pursue the actions which were the basis of objection to the fee application.

- G. Obey Your Master! In re Texasoil Enterprises, Inc., 296 B.R. 431 (Bkrtcy. N.D.Tx 2003)

Debtors' counsel ordered to disgorge \$6,500 of \$15,000.00 retainer for failing to have the Debtors comply with the Court's 11 U.S.C. § 1107 Order which limited the Debtors authority to operate post petition.

- H. Make (and Disclose) Waivers: In re Jore Corporation, 298 B.R. 703 (Bkrtcy. D. Mont. 2003)

Chapter 11 debtor's law firm's fee application was denied and law firm was ordered to disgorge all fees and expenses previously paid (except for expenses relating to service of pleadings under case management order) due to Debtors' counsel's failure to fully disclose material limitations in a conflict waiver which Debtors' counsel had with the Debtors primary secured lender. The improper disclosure and conflicts of interest included conflicts with the secured lender on the details of professional fee carve outs for debtor's counsel.

- I. Paint Your Wagoner as an Adverse Interest: In re Hampton Hotel Investors, L.P., 289 B.R. 563 (Bkrtcy S.D.N.Y. 2003)

After a chapter 11 case was converted to chapter 7, trustee brought suit against the chapter 11 Debtor's counsel ("Law Firm") for, among other things, assisting the Debtor's principals in violating the Debtor's fiduciary duties, including: (1) assisting the Debtor after the filing of its chapter 11 in retaining and compensating professionals without court order; (2) failing to recover assets of the estate; (3) assisting the Debtor in borrowing money, without court approval, to pay insiders; (4) paying pre-petition debts without court authorization; and (5) refusing to collect receivables from insiders.

The Law Firm moved to dismiss the complaint under the doctrine of Shearson Lehman Hutten, Inc. v. Wagoner, 944 F.2d 114 (2nd Cir. 1991) which greatly limits the ability of debtors to bring suits against parties that assisted the debtor's employees in harming the debtor under the doctrine of in pari delicto.

The Bankruptcy Court overruled the dismissal motion finding that the lawsuit against the Law Firm could proceed under the "Adverse Interest Exception" of Wagoner. The court further stated that the direct fiduciary duty the Law Firm had to the debtor's bankruptcy estate could also provide an exception to Wagoner.

J. A Single Screen: In re Angelika Films 57th, Inc., 227 B.R. 29 (Bkrtcy. S.D. N.Y. 1998).

In this case, the debtor's Chapter 11 counsel also represented the debtor's owner in numerous matters, including his divorce and a related replevin action with his former spouse and a major creditor of the debtor. The Chapter 11 attorneys were employed over the objection of the U.S. Trustee and the debtor's former spouse. During the Chapter 11 case, the debtor entered into an agreement to use its "good faith" efforts to market a valuable lease by a certain date, and if a motion to assume or assign the lease was not filed by that date, the debtor agreed to the appointment of a Trustee. After the debtor failed to get an extension of time to market the lease, the debtor's owner offered to "purchase" the lease for \$100,000.00, 20% of its appraisal value of \$500,000.00. The motion to assume had numerous other provisions favorable to the debtor's owner. The Bankruptcy Court rejected the motion to assume or assign the lease, finding it was filed in bad faith, and appointed a Chapter 11 Trustee. The District Court affirmed this decision.

Ultimately, the estate, through the Chapter 11 Trustee, was able to sell the lease for \$1,000,000.00, ten times what the debtor's principal offered to purchase the lease for in the assumption and assignment motion. After the sale, the Chapter 11 counsel moved for approximately \$491,000.00 in fees and ultimately entered into a settlement agreement for a reduced amount of fees with the other parties in the case. The Court, exercising its powers to review professional fees, denied all fees of the debtor's Chapter 11 counsel in this case, finding that the Chapter 11 counsel had abandoned its fiduciary duty to the debtor by its actions in this

case. The Court specifically found that the attorneys had failed to fully inform the Court about the assumption motion and had represented primarily the debtor's owner's interests throughout the bankruptcy. This is an important case, because the Court even denied fees that were for services beneficial to the debtor.

K. Mutiny or Heroism? In re JLM, Inc., 210 B.R. 19 (BAP 2d Cir. 1997).

Counsel for the Chapter 11 debtor, JLM, Inc., was faced with an objection to its fees by the debtor's owner for their alleged refusal to obey the orders of the debtor's owners. The facts of this case are unusual, to say the least. At the commencement of the Chapter 11 case, the debtor was owned by two individuals who had also filed individual Chapter 11 petitions. The debtor's stock was pledged by the individuals to the primary secured lender of JLM. Through the individuals' Chapter 11 plans, the secured lender obtained direct ownership of all of the stock of JLM. In January of 1996, the secured creditors, some three months after JLM's bankruptcy and after the secured lender had discovered its security interest in JLM's personal property had lapsed, ordered the debtor's Chapter 11 counsel to dismiss the JLM Chapter 11 case, so it could perfect its lapsed security interest. The Chapter 11 counsel refused the direction and vigorously opposed the secured creditors'/owner's actions to dismiss the case or obtain stay relief to replace the debtor's management. Ultimately, the Bankruptcy Court ruled the secured creditors had the authority to operate the debtor, but found its actions in attempting to dismiss the Chapter 11 violated its fiduciary duty to all the estate creditors and appointed a Trustee. When debtor's counsel filed its final fee application, despite almost universal support, the Bankruptcy Court denied counsel's fees, ruling the Chapter 11 counsel was not entitled to any fees, as it represented the individuals who previously owned the debtor in opposing the secured creditors' actions and not JLM. The BAP reversed, finding that JLM's Chapter 11 counsel had apparently

acted properly in opposing the actions of the secured creditor/owner, and remanded for a determination of whether the counsel's actions benefited the estate.

- L. The Bad, the Sequel: Hansen, Jones & Leta, PC v. Segal, 220 B.R. 434 (D. Utah 1998).

In the main article, Dean Rapoport and I discussed the case of In re Bonneville Pacific Corporation, 196 B.R. 868 (Bkrcty. D. Utah 1996) ("Bonnieville"). Approximately a year after our article was published, the District Court, accepting most of the same facts as set forth in Bonnieville, reversed the denial of fees under an abuse of discretion standard.

The principal grounds for the District Court's reversal of the Bonnieville decision were its explicit determination that Chapter 11 debtor's counsel does not owe a fiduciary duty to a Chapter 11 bankruptcy estate and its implicit determination that the debtor's counsel was not as responsible for the debtor's misconduct, as the Bankruptcy Court had found debtor's counsel to be in its opinion.

On the legal issue, the Hansen court determined that a Chapter 11 debtor's counsel's client is not the bankruptcy estate, because no such entity exists. The Hansen court reviewed in detail the massive amount of case law and scholarly works on whether the bankruptcy estate exists and, based on the U.S. Supreme Court's decision in National Labor Relations Board v. Bildisco & Bildisco, 465 U.S. (1984), held that no entity known as the "bankruptcy estate" was created when a Chapter 11 was filed and that therefore a Chapter 11 debtor's counsel must owe its duties to the debtor-in-possession.

Based on this decision, the Hansen court ruled that the Chapter 11 debtor's counsel had fulfilled its duties to its clients, the debtor-in-possession. The Hansen court rejected the massive amount of case law which imposes fiduciary duties on counsel for the debtor-in-possession as "unhelpful and unnecessary to insure the counsel is independent and aware of his/her duty under

the Bankruptcy Code and Model rules to represent and assist the debtor-in-possession in the performance of its duties.” 220 B.R. at 460.

The Hansen case’s legal reasoning produces some unintended problems, as it indicates that counsel for the estate may have some duty to the people who make up the debtor-in-possession, as opposed to the bankruptcy estate. This may give some unscrupulous debtors-in-possession the leverage they need to force Chapter 11 counsel to be their “willing” dupes in their actions to defraud debtors or harm the bankruptcy estate.

The Hansen court’s decision may be more explainable on its implicit factual reasoning. The District Court did not overrule the factual findings of the Bankruptcy Court, but made additional and more detailed findings which cost counsel for the DIP in a far more sympathetic light than did the Bankruptcy Court. As an example, the District Court, in footnote 57 to its opinion, emphasized the fact that the debtor’s Chapter 11 counsel was not guilty of assisting in the debtor’s fraud.

In summary, the Hansen decision provides at least a well-reasoned decision which questions the validity of the theoretical underpinning of the majority line of attorney fiduciary duty cases. However, the authors of the attached article disagree with the Hansen court’s decision and still believe that except for the ruling on the unsecured creditors committee’s fees, Bonnieville is the more persuasive opinion.

V. The Sum of our Damages

A number of recent cases have addressed issues related to lawsuits against Chapter 11 debtors’ counsel for breaches of their fiduciary duty. Under amended 28 U.S.C. § 1334(e) nearly all of these cases will have to be heard in Federal Court as the Federal Court has exclusive jurisdiction over all claims involving 11 U.S.C. § 327 and rules related thereto.

A. Kittay v. Kornstein, 230 F.3d 531 (2nd Cir. 2000). (Court permitted breach of fiduciary duty suit to go forward on complaint that special counsel to the debtor harmed debtor's bankruptcy estate by actions related to simultaneous representation of creditor claiming estate assets. Court also held that representing multiple adverse clients is not a cause of action in and of itself.)

B. First Interstate Bank of Az v. Murphy, Weir & Butler, 210 F. 983 (9th Cir. 2000). (Law firm was sued because it hired a judge's law clerk and the clerk continued to work on its future employer cases in violation of several portions of the Code of Judicial Conduct and Code of Conduct for Law Clerks. After discovery of this problem, the judge reclused himself from the case and the new judge ordered a new trial, after which the hiring law firm's client received a less favorable ruling. The Ninth Circuit held that it was the judge's and law clerk's duty to take proper ethical action, and that law firm had no independent duty to disclose or take steps to ensure judicial Codes of Conduct are followed. Good case to read if you are hiring a judge's law clerk.)

C. In re Verit Industries, Inc., 172 F.3d 61 (9th Cir. 1999) (unpublished decision available on WestLaw). (Discussing whether settlement agreement released debtor's pre-petition attorney from actions for legal malpractice and breach of fiduciary duty cases of action).

D. ICM Notes, Ltd. v. Andrews & Kurth, LLP, 278 B.R. 117 (S.D. TX. 2002), aff'd w/o opinion, 324 F.3d 768 (5th Cir. 2003). (Recent case which reaffirms the doctrine that Chapter 11 professionals do not owe a fiduciary duty to specific creditors. Court dismissed claim against debtor's counsel for breach of fiduciary duty by creditor which was attempting to acquire the debtor through a plan of reorganization.)

E. Matter of RDM Sports Group, Inc., 260 B.R. 915 (Bkrcty. N.D. GA. 2001). (Chapter 11 Trustee has right to jury trial in Bankruptcy Court on suit against debtor's professionals for breach of fiduciary duty).

F. In re C Power Products, 230 B.R. 800 (Bkrcty. N.D. TX. 1998). (Discussing issues related to standing to bring legal malpractice and breach of fiduciary duty claims).

G. Borden v. Clement, 261 B.R. 275 (Bkrcty. N.D. Ala. 2001). (Dismissal of lawsuit against Chapter 11 debtor's counsel by owner of Chapter 11 debtor, alleging that attorney breached fiduciary duties to owner and was guilty of malpractice. Important discussion on how to withdraw from case.)

VI. Bankruptcy Ethics Cases Are Like a Box of Chocolates: You Never Know What You Might Find

A. In re Bame, 251 B.R. 367 (Bkrcty. D. Minn. 2000). (Discussing Fifth Amendment privilege as it relates to documents produced to an individual debtor's Chapter 11 counsel).

B. In re Mushroom Transportation Company, Inc., 247 B.R. 395 (E.D. Pa. 2000). (In an interesting twist, discussing whether a Chapter 11 debtor-in-possession could be liable for breach of fiduciary duty by debtor's counsel).

C. In re Vebeliunas, 231 B.R. 181 (Bkrcty. S.D. N.Y. 1999). (Unusual case disqualifying counsel for Trustee, where Trustee's counsel thought the debtor was a crook).

D. In re Entertainment, Inc., 225 B.R. 412 (Bkrcty. N.D. Ill. 1998). (Case which discusses why it is a bad idea to file a bankruptcy where the owners of the debtor are at war).

VII. Getting Out with Your "Professional Life": Options if the People Running Your Client Go Bad

Exhibit C

Bowles, Noisy Withdrawals: Urban Bankruptcy Legend or Invaluable Ethical Tool?, 20 Am. Bankr. Inst. J. 26 (2001).

VIII. The Tort of Deepening Insolvency: Repackaged Lender Liability, or a Revolutionary New Theory?

A. Introduction

Deepening Insolvency is a broad and general term which covers a number of different actions against primarily: (1) secured lenders of a debtor, see Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., 267 F.3d 340 (3rd Cir. 2001); (2) officers and directors of a debtor, see In re Investors Funding Corp. of New York Sec. Litigation, 523 F.Supp. 533 (S.D.N.Y. 1980); (3) accountants and financial advisors of the debtor, see Allard v. Arthur Anderson & Co., 924 F.Supp. 488 (S.D.N.Y. 1996); (4) attorneys, see Chem-Age Industries, Inc., 652 N.W. 2d 756 (S.D. 2002); and (5) most recently "controlling customers". See In re Del-Met Corp., 322 B.R. 781 (Bkrtcy M.D.Tenn. 2005).

B. What are Deepening Insolvency Claims

At the present time there is no unified theory of what conduct would give rise to a claim of Deepening Insolvency. However, several theories have arisen.

1. Lender Deepening Insolvency

In cases involving lenders, one commentator has identified four (4) factors which must be established by plaintiffs in a Deepening Insolvency case:

- a. fraudulent or wrongful prolongation of an insolvent entities life by concealing its true financial condition
- b. increased insolvency of the entity by the incurrence of additional liabilities or dissipation of assets during this period;
- c. loss of otherwise realizable value by the improper prolongation of the business; and
- d. harm was suffered by the business entity which was distinct by the creditors of the entities

See Rubin, New Liability Under "Deepening Insolvency": A Search for Deep Pockets, 23 ABIJ 50 (2004). See also In re American Lumber Company, 5 B.R. 470 (D. Minn. 1980).

2. Officer and Director Deepening Insolvency

In actions for Deepening Insolvency against the managers, officers, directors and other control persons of a legal entity, court are split on the nature of Deepening Insolvency causes of action.

- a. Some courts have held that Deepening Insolvency is a separate cause of action for the "fraudulent promulgation of a corporation's life beyond insolvency." See In re Investors Funding Corp., 523 F.Supp. 533 (S.D.N.Y. 1980). In a recent decision limiting the theory of Deepening Insolvency, the Bankruptcy Court for the Southern District of New York added the requirement that the Plaintiff must also show that "the defendant prolonged the company is life in breach of a separate duty, or committed an actionable tort that contributed to the continued operation of a corporation and its increased debt. See In re Global Services LLC, 316 B.R. 451 (Bkrcty. S.D.N.Y. 2004).
 - b. Other courts in D&O cases have held that Deepening Insolvency is not a separate cause of action but instead a measure of damages. See generally Bates and McCutchen, Deepening Insolvency: Into the Void, 24 ABI LJ 1 (March 2005)(Discussing _____).
3. Accountant and Other Debtor Financial Professional's Liability for Deepening Insolvency
- a. Courts have generally held that Deepening Insolvency is a measure of damages where a debtor has obtained additional debts due to improper financial analysis or audits of a debtor. See generally, Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., 267 F.3d 340 (3rd Cir. 2001); Schract v. Braun, 711 F.2d 1343 97th Cir. 1983); In re Latin Invest. Corp., 168 B.R.1 (Bkrcty. D. Col. 1993).
 - b. Other Courts have held that Deepening Insolvency is a separate tort and held that demonstrating that an accountants negligence in discovering a misappropriation of funds led to an improper prolongation of a corporation's existence to the detriment of both its creditors and shareholders would be a viable cause of action. See Allard v. Arthur Andersen, 924 F.Supp 488 (S.D.N.Y 1996).

4. Deepening Insolvency for Attorney. A New Name for Malpractice and Breach of Fiduciary Duties

a. In an article written years before Deepening Insolvency became a popular cause of action, Bruce Marshall (now a Bankruptcy Judge for the District of Nevada) stated that several causes of action could be asserted against a debtor entities counsel could result in Deepening Insolvency damages including:

- (i) Liability for handling funds contrary to the interest of a beneficiary
- (ii) Breach of fiduciary duty to client entity
- (iii) Conflicts of interest
- (iv) Aiding and abetting a breach of fiduciary by a legal entities controlling parties

See Markell, The Folly of Representing Insolvent Corporations: Examining Lawyer Liability and Ethical Issues Involved in Extending Fiduciary Duties to Creditors, 6JBKRLP403 (199&). See also Willner's Fuel Distributors, Inc. v. Noreen, 882 P.2d 399 (Ak. 1994).

5. Controlling Customers: New Defendant For the New Economy?

In March of 2005 the United States Bankruptcy Court for the Middle District of Tennessee, in In re Del-Met Corp., 322 B.R. 781 (Bkrtcy M.D. Tenn. 2005) held that customers who allegedly controlled a supplier/debtors operations could be liable for the tort of Deepening Insolvency. This opinion provides an excellent discussion of the history of "Deepening Discovery".

C. How to Defend Against the Unknown?

1. Duty? What Duty to Prevent Deepening Insolvency?

In re Sharp International Corp., 403 F.3d 43 (2nd Cir. 2005) (No duty on Lender to publicly disclose debtors false financial records).

In re Global Services Group LLC, 316 B.R. 451 (Bkrtcy. S.D.N.Y. 2004) (No duty not to lend funds to insolvent company or to immediately liquidate an insolvent business).

In re Hechinger Inv. Co., 2004 WL 724960 (D. Del. March 28, 2004) (Secured Lender did not owe a duty to unsecured creditors).

Matter of Clark Pipe and Supply Co., Inc., 893 F.2d 693 (5th Cir. 1990) (Secured Lender acting pursuant to loan agreement owed no duty to unsecured vendors of Debtor).

2. Claim, What Claim?

In re Ben Franklin Retail Stores Inc., 255 B.R. 646 (Bkrtcy. N.D. Ill. 1998)

3. Proximate Cause: Back to Basics

Citizen's State Bank v. Timm Schmitt & Co., 335 N.W.2d 361 (Wis. 1983) (Proximate cause issues in Deepening Insolvency cases include, (1) injury is too remote to negligence; (2) injury is out of proportion to culpability of negligent party; (3) highly extraordinary that negligence would have caused harm; recovery would be unreasonable burden on defendant; and (5) recovery could lead to other fraudulent and unreasonable claims).

4. I've Got Protection!

Production Resources Group LLC v. NCT Group Inc., 2004 WL 2647593 (Del. Chanc. 2000) (Directors protected from Deepening Insolvency causes of action under Delaware's business _____ rule and corporation indemnification provisions that insulate Directors from personal liability for breaches of duty of care).

5. In Pari delicta. No it doesn't involve bedroom photos.

See Shearsen Lehman Hutten Inc. v. Wagener, 944 F.2d 114 (2nd Cir. 1991) (In Pari delicta doctrine precludes legal entity for suing parties for improper conduct it engaged in through its officers, directors, managers or other controlling parties) contra Scholes v. Lehmann, 56 F.3d 750 (7th Cir. 1995).

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**Column
Straight & Narrow**

***24 INVOLUNTARY FEE SLAUGHTER: THE PERILS OF PROFESSIONAL FEES FOR
REPRESENTING A DEBTOR DURING THE GAP PERIOD**

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There appears to be a recent trend of creditors using involuntary bankruptcies to resolve their disputes with debtors. This increase in involuntary bankruptcies has given rise to a large number of problems for both debtor and creditor attorneys. In the first of what hopefully will be a three-part series discussing the ethics of representing parties in involuntary bankruptcy proceedings, this article addresses fee problems faced by professionals representing parties faced with an involuntary bankruptcy petition between the involuntary petition's filing and the adjudication or consent to the entry of the Order of Relief (gap period). [FN1] These fee issues related to representing parties subject to involuntary bankruptcy proceedings (potential debtors) arise from the lack of certainty as to how professional fees accrued and/or paid during the gap period are treated in the subsequent bankruptcy.

Can Anyone Tell Me What the Ordinary Course of Business Is?

In a voluntary bankruptcy proceeding, the Bankruptcy Code offers a clear, if not particularly precise, statutory framework as to how and when the debtor's professional can be hired to represent the bankruptcy estate. [FN2] In involuntary bankruptcies, 11 U.S.C. §327 does not govern professionals' employment during the gap period. [FN3] Instead, the process for being paid while representing an alleged debtor in an involuntary bankruptcy petition is indirectly governed by four separate statutes: 11 U.S.C. §§303(f), 502(f), 507(a)(2) and 549.

The primary Bankruptcy Code section addressing how a debtor may hire and pay professionals during the gap period is 11 U.S.C. §303(f), which authorizes an alleged debtor to operate its business and use, acquire and dispose of its property as if an involuntary case had not been commenced, unless a court orders otherwise. [FN4] This provision generally permits a debtor to continue to operate in the ordinary course of its business under the restrictions of 11 U.S.C. §363, which requires court authorization for the sale, use or lease of property of the debtor other than in the ordinary course of its business. [FN5]

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However, a debtor's ability to operate its business and pay its gap period creditors is also limited by 11 U.S.C. §§ 502(f) and 507(a)(2), which govern the allowance of claims during the gap period. [FN6] Section 502(f) allows claims "arising out of the ordinary course of the debtor's business or financial affairs" during the gap period to be allowed as a pre-petition claim in a bankruptcy case. 11 U.S.C. §507(a)(2) grants claims allowed under §502(f) a second priority status, behind administrative expenses. Read together, §§502(f) and 507(a)(2) mean that unsecured claims that arise in the ordinary course of the debtors' business during the gap period are entitled to a second priority status. Unsecured claims, which do not arise in the ordinary course of the debtor's business during the gap period, if allowed at all, will be treated only as general unsecured claims. [FN7]

Finally, 11 U.S.C. §549 provides a final limitation on paying professional fees during the gap period. [FN8] It also provides that the trustee may avoid the property transfers that occur after the commencement of a bankruptcy case, including an involuntary proceeding if the transfer is only authorized under §303(f), unless said transfer is (1) made after the commencement of the involuntary case, (2) before the entry of an Order of Relief and (3) made to the extent of any value of goods or services rendered to a debtor after the commencement of the case. [FN9] The "safe harbor" provisions of 11 U.S.C. §549(b) do not include providing security or paying any debt that arose before the commencement of the case.

Based on this patchwork quilt of statutes, it appears that if a potential debtor ultimately files bankruptcy, any professional fees earned or paid during the gap period are at risk. Unless a court is willing to approve the application of a chapter 11 debtor's professionals on a nunc pro tunc basis, then that professional will be entitled to at best a second-level priority claim under 11 U.S.C. §507(a)(2) for any services rendered "in the ordinary course of the debtor's business." However, even entitlement to that secondtier priority claim is uncertain as courts are generally split as to whether these gap period professional fees arise "in the ordinary course" of a debtor's business.

Since When Is an Involuntary Bankruptcy Ordinary?

Although there is little direct case law on the subject, courts have still managed to split on the issue of whether payments or accrual of gap period professional fees arise in the ordinary course of a potential debtor's business for purposes of 11 U.S.C. §§303(f) and 507(a)(2).

One line of bankruptcy cases, a minority view, holds that generally the professional fees accrued or paid by a debtor during the gap period do not arise in the ordinary course of business and are not entitled to priority under 11 U.S.C. §507(a)(2).

The leading case in this line of authority is *In re Hanson Industries Inc.* [FN10] In *Hanson*, counsel for the alleged debtor applied in the potential debtor's bankruptcy for an award of attorney's fees, both as an administrative expense under 11 U.S.C. §507(a)(1) or as a second priority administrative expense under 11 U.S.C. §507(a)(2). The services for which the attorney sought reimbursement primarily were related to "virtually every possible defense for filing an involuntary *46 petition." [FN11] In reviewing the fee application, the court ultimately found that the debtor's counsel actions were at best of extremely doubtful value to the bankruptcy estate, and at worst, an obstruction to the bankruptcy trustee's efforts to administer the estate. The bankruptcy court ultimately determined that most of the debtor's counsel's work was not beneficial to the estate and denied \$48,000 of the \$60,000 fee application. The court noted that "creditors would not ordinarily and reasonably expect a company with virtually no assets and no business to expend more than \$60,000 over a period of 11 weeks in litigation of any sort. Thus, while some reasonable amount of attorney's fees might be expected to minimally keep certain of the claims of the company alive, sums in the amount and of the nature involved, and efforts as zealous and determined as these, are not reasonably justified." [FN12] The court went on to find that where a debtor failed to convert its involuntary to a voluntary chapter 11, or agree to an adjudication of bankruptcy and ultimately had an order of relief entered against

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it, that the gap period professional fees and expenses did not arise in the ordinary course of the debtor's business. [FN13]

Perhaps the most troubling portion of the Hanson decision is its discussion of why Hanson was distinguishable from the case of *In re Sun Spec Industries*, [FN14] which found professional fees earned during the gap period arose in the debtor's ordinary course of business and were entitled to priority status. The Hanson court distinguished *Sun Spec* by noting that "the debtor chose to voluntarily convert to a chapter 11, an option this debtor rejected." This dicta is problematic as it seems to indicate that professionals are more likely to get paid if a potential debtor voluntarily enters bankruptcy than if it fights the petition.

Hanson was based on a group of somewhat similar rulings, including *In re Rocanville Marketing Corp.* [FN15] and *In re JV Knitting Service Inc.*, [FN16] both of which held that professionals working for potential debtors that opposed an involuntary petition would not be awarded either an administrative expense under 11 U.S.C. §507(a)(1) or an administrative expense under 11 U.S.C. §507(a)(2) for their work during the gap period. Hanson based its decision on the cases of *Kallen v. Litas* [FN17] and *In re Peninsula Roofing & Sheet Metal Inc.* [FN18] The court also ruled against professionals on preference actions for fees paid prior to a bankruptcy filing that were found not to have been paid in the ordinary course of a debtor's business.

The rationale behind the Hanson line of cases is that payments made to professionals during the gap period, especially payments made to contest an involuntary bankruptcy petition, rarely arise in the ordinary course of business and that such services are not valuable to the debtor's bankruptcy estate. These cases take a rather strict approach as to the concept of the ordinary course of business and make it difficult for an attorney representing a potential debtor to be assured of being paid or even having a priority claim for fees earned during the gap period, unless the potential debtor agrees to convert to a chapter 11 or is successful in opposing the involuntary bankruptcy petition.

Since When Is It Not Ordinary to Hire an Attorney to Fight a Lawsuit?

Other bankruptcy courts have rejected the reasoning of Hanson and have allowed professionals to be paid, or at least be awarded a priority claim, for their services during the gap period. Perhaps the most liberal position on this matter is taken by the court in *In re Rundlett*. [FN19] In *Rundlett*, the law firm was paid \$50,000 during the gap period to represent the potential debtor in the involuntary chapter 7 petition filed against her. Approximately three weeks after they were retained, the debtor converted her case to a chapter 11 proceeding and moved to employ the law firm as her chapter 11 counsel. The proposed employment application permitted the law firm to retain the \$50,000 retainer paid to them during the gap period.

Shortly after the employment application was filed, the involuntary chapter 11 was converted to a chapter 7 proceeding, and the debtor's estate was liquidated. The chapter 11 employment application was never ruled upon by the bankruptcy court before the case was converted back to a chapter 7 proceeding. Certain bank creditors objected to the \$50,000 retainer and moved that it be returned to the bankruptcy estate for distribution to creditors. The bankruptcy court rejected this motion, holding that the retainer was authorized under 11 U.S.C. §§303(f) and 329 and was subject only to a review for the reasonableness of the retainer, and any fees charged by debtor's counsel during the gap period under the provisions of 11 U.S.C. §329(b). The court held that it had no other duty or authority to regulate the payment to professionals during the gap period. The *Rundlett* court ultimately ruled against the creditors, finding that they had not proven that either the retainer or the fees were excessive or improper under the provisions of 11 U.S.C. §329(b). [FN20] The court did not discuss the fees' priority under 11 U.S.C. § 507(a)(2) nor the possibility of having any of the retainer avoided under the provisions of 11 U.S.C. §549.

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The Rundlett standard has not been fully adopted by other courts. Instead, a majority finding that gap period professional fees should be entitled to priority treatment have adopted a "flexible standard" [FN21] for determining whether gap period fees are entitled to priority treatment under 11 U.S.C. §507(a)(2). The cases of *In re May Lumber Co.*, [FN22] *In re Shah International Inc.* [FN23] and *In re McNair Inc.* [FN24] held that professionals were entitled to retain compensation earned and/or retainers received [FN25] from the alleged debtors during the gap period. These courts, however, held that all fees billed and paid during the gap period were subject to review by the bankruptcy court in the event a debtor "wound up" in bankruptcy. [FN26] These courts recognize the importance of an alleged debtor being allowed to hire competent counsel to either defend itself against an involuntary petition or, ultimately, to guide it through a chapter 11 proceeding. As noted by the Shah International court:

For a debtor to be successful in chapter 11, it is imperative that the debtor have skilled legal counsel. As was stated in *In re Martin*, 817 F.2d 175, 181, "It will sometimes be difficult to obtain competent counsel in anticipation of a bankruptcy proceeding unless the lawyer's financial well-being can be assured to some extent." Equitable principles govern the exercise of bankruptcy jurisdiction (*47 *Bank of Marin v. England*, 385 U.S. 99, 103, 87 S.Ct. 274, 277, 17 L.Ed.2d 197 (1966)), and legal counsel have rights, as do other persons in the case. One right is a reasonable opportunity to be paid in a bona fide case, whether commenced by a voluntary or an involuntary petition. A putative debtor should not be prevented from obtaining skilled counsel solely because the debtor is in bankruptcy only because creditors succeeded in filing an involuntary petition prior to the time the debtor filed a voluntary petition. [FN27]

The May Lumber line of cases represents the middle ground between the strict limitations on employment of counsel in *Hanson* and the virtually unfettered discretion of potential debtors enjoyed under the Rundlett case. May Lumber places reasonable limits on a potential debtor's ability to direct professionals to guard against the overzealous advocacy decried in *Hanson*, yet still permits the potential debtor the right to seek competent counsel to defend itself or guide it through a bankruptcy in the event it must enter a chapter 11.

Conclusion: What's a Poor Debtor's Attorney to Do?

Given the wide divergence of case law, professionals for an alleged debtor must carefully weigh their options before accepting the representation. The best of all worlds would be to receive a fair retainer from the alleged debtor and apply that retainer against all fees earned during the gap period before entering bankruptcy. Even the *Hanson* line of cases does not discuss requiring the return of professional fees or a retainer, except in the context of preference litigation. However, this course of action does have the drawback of possibly presenting an alleged debtor's bankruptcy counsel with an adverse interest to the debtor should the case ultimately be converted to a chapter 11, unless counsel seeks specific approval of payments as part of the employment application. However, this risk is not very different from the risk all chapter 11 attorneys run every day by accepting any fee payment in the 90 days prior to the bankruptcy filing, which could be challenged in any chapter 11 proceeding that bankruptcy attorneys routinely defend as being made in the ordinary course of business.

Second, in a hotly contested case, the alleged debtor's counsel could move for approval of their fees under the provisions of §363 of the Bankruptcy Code. Under 11 U.S.C. §303(f), in unadjudicated involuntary cases 11 U.S.C. §363 still prohibits the sale, use or transfer of a debtor's assets outside the ordinary course of business without court approval. If there is a question about paying a retainer or fees during the gap period, a bankruptcy court could authorize the payment to the debtor's counsel under 11 U.S.C. §363 during this gap period, thereby giving some assurance of being paid for its work during the gap period. Unfortunately, this is a rather cumbersome and untried procedure that, given the nature of a hotly contested involuntary proceeding, may get lost in the shuffle and become just another bargaining chip concerning the fate of the entire involuntary case.

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Finally, in the event that the involuntary case ultimately becomes a chapter 11 proceeding, debtor's counsel can petition the bankruptcy court for approval of employment nunc pro tunc to the date the involuntary petition was actually filed, thereby converting the gap period fees to ordinary professional fees under 11 U.S.C. §§330 and 331. Alternatively, professionals could also seek implicit approval of all payments made during the gap period by full disclosure in their employment application. This final option is apparently one of the most often used by counsel in involuntary cases, and offers a fair degree of protection. The bankruptcy court will be apprised of all payments of gap period fees when the application is made for employment, thereby fulfilling a professional disclosure requirement. The bankruptcy court and all creditors-in-interest can object to those payments as part of the employment application, and if they fail to do so, they could be estopped from contesting the payment at a later date. However, absent a specific finding in a bankruptcy court's order employing counsel that the payments made during the gap period were made in the ordinary course of a debtor's business and are entitled to priority under 11 U.S.C. §507(a)(2), the issue of any gap period retainer or payments will still remain in doubt despite the implied approval.

In short, the travails of a potential debtor's professionals in an involuntary bankruptcy case are in many instances far worse than those of professionals in a voluntary case. Indeed, given the uncertainty surrounding the payment of gap period fees, 11 U.S.C. §327 may appear to be an "easy" and reasonable standard for debtor's counsel to meet as opposed to the rather threadbare patchwork quilt of statutes governing employing and paying of counsel in gap period cases.

[FN1]. See 11 U.S.C. §§303 and 502(f).

[FN2]. See 11 U.S.C. §327.

[FN3]. See 11 U.S.C. §327; *In re McNair Inc.*, 116 B.R. 746 (Bankr. S.D. Cal. 1990) (order approving employment of counsel for potential debtor not required under either 11 U.S.C. §327 or 329).

[FN4]. See 11 U.S.C. §303(f), which provides: "Notwithstanding §363 of this title, except to the extent that the court orders otherwise, and until an order for relief in the case, any business of the debtor may continue to operate, and the debtor may continue to use, acquire or dispose of property as if an involuntary case concerning the debtor had not been commenced."

[FN5]. See 11 U.S.C. §363.

[FN6]. See 11 U.S.C. §502(f), which provides that in an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b) or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

[FN7]. See *In re Manufacturer's Supply Co.*, 132 B.R. 127 (Bankr. N.D. Ohio 1991) (claims that arise in the gap period that do not arise in the ordinary course of a debtor's business are general unsecured claims).

[FN8]. See 11 U.S.C. §549(a)(b), which provides: "Except as provided in subsections (b) or (c) of this section, the trustee may avoid a transfer of property of the estate (1) made after the commencement of the case and (2)(a) that is authorized only under §303(f) or 542(c) of this title; or (b) that is not authorized under this title or by the court. In an involuntary case, the trustee may not avoid under subsection (a) of this section a transfer made after the commencement of such case but before the order for relief to the extent any value, including services, but not

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including satisfaction or securing of a debt that arose before the commencement of the case, is given after the commencement of the case in exchange for such transfer, notwithstanding any notice or knowledge of the case that transferee has."

[FN9]. Id.

[FN10]. 90 B.R. 405 (Bankr. D. Minn. 1988).

[FN11]. Id. at 408.

[FN12]. Id. at 408 n.2.

[FN13]. Id. at 414.

[FN14]. 3 B.R. 703 (Bankr. S.D.N.Y. 1980).

[FN15]. 84 B.R. 32 (Bankr. E.D. Pa. 1988).

[FN16]. 22 B.R. 543 (Bankr. S.D. Fla. 1982).

[FN17]. 47 B.R. 977 (N.D. Ill. 1985), rev'd. on other grounds, 790 F.2d 574 (7th Cir. 1986).

[FN18]. 9 B.R. 257 (Bankr. W.D. Mich. 1981).

[FN19]. 137 B.R. 144 (Bankr. S.D.N.Y. 1992).

[FN20]. Id. at 148.

[FN21]. See *In re May Lumber Co.*, 135 B.R. 368 (Bankr. W.D. Mo. 1992); *In re Shah International Inc.*, 94 B.R. 136 (Bankr. E.D. Wis. 1988).

[FN22]. 135 B.R. at 368.

[FN23]. 94 B.R. at 136.

[FN24]. 116 B.R. 746 (Bankr. S.D. Cal. 1990). See, also, *In re Matter of Sun Spec Industries*, 3 B.R. 703 (Bankr. S.D.N.Y. 1980); *In re Labrum & Doals LLP*, 1998 WL 34 1933 (Bankr. E.D. Pa. June 25, 1998).

[FN25]. In *Shah International*, the debtor's counsel were permitted to retain mortgages as a retainer for their fee, although the court held that the mortgages secured all administrative claims in the chapter 11 cases, not just the attorney fees of the debtor's counsel. 94 B.R. at 138-139.

[FN26]. The *May Lumber* court explained the "flexible standard" as follows:

1. A gap debtor may engage counsel of choice;
2. A gap debtor may pay counsel of choice what is mutually agreeable between debtor and counsel;
3. The aforesaid payment is subject to the test of reasonableness under the circumstances, if the debtor winds up in bankruptcy; and
4. The bankruptcy judge is (hopefully) an expert in the area of reasonableness and thus, all fees are subject to his

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[FN27]. 94 B.R. at 137-38.

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EXHIBIT B

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Bankruptcy Ethics

***47 HAS THE DIP'S ATTORNEY BECOME THE ULTIMATE CREDITORS' LAWYER IN
BANKRUPTCY REORGANIZATION CASES? [FN1]**

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Nancy B. Rapoport

Once upon a time, a hard-working Debtor's lawyer dropped dead from a heart attack on the eighteenth green of his [FN1] favorite golf course. When he regained his senses, he was sitting at a huge gold desk in a beautiful office. A white-winged being told him that he had died and that his services were needed in the afterlife. The lawyer, somewhat surprised at his "final reward" and puzzled that people in heaven could go broke, protested that he was tired of the law and asked that he be assigned to some other task. The winged being said that he understood and that the lawyer only had to represent one debtor, in full compliance with all ethical rules and decisions, and then he could rest for all eternity. The winged being then told him that he had 200 interesting prospective clients waiting in his office. The lawyer, hoping that he could remember his legal ethics course, agreed and went to work. Two weeks later, the winged being returned to the office and found the totally exhausted lawyer collapsed over his desk. The lawyer jumped up and screamed that he couldn't represent any of the 200 or so "clients" who had come through his door because of massive case conflicts, the unethical behavior of the person seeking to file bankruptcy, or conflicts with one or more of the lawyer's prior clients. The lawyer protested that this wasn't a very fair way to run heaven. The *48 winged being turned away, revealing a set of well-concealed horns and a long, red, pointed tail, and sneered as he left: "Who told you this was heaven?" [FN2]

INTRODUCTION

Bankruptcy ethics problems have confronted attorneys since the time of the earliest English Bankruptcy laws. [FN3] Numerous commentators have observed that the duties that the Bankruptcy Code imposes on Debtors are

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complex and demanding. [FN4] Although the duties of the Debtor in Possession [FN5] are somewhat well-defined, [FN6] recently courts have *49 begun to reexamine the extent and scope of the duties owed by the court-appointed attorneys [FN7] for the Bankruptcy Estate (hereinafter "Estate Counsel") and the Creditors' Committee (hereinafter "Committee Counsel"). [FN8]

In this Article, we'll discuss the emerging case law concerning the nature and scope of Counsel's duties to the Bankruptcy Estate. Part I begins this task with a brief overview of the duties of Debtors in Possession in chapter 11 and Debtors in chapter 13 cases. Part II reviews the case law concerning the duties of Estate Counsel and Committee Counsel, concentrating primarily on the duties of Estate Counsel, and it concludes that there are no clear answers to the questions about the nature and scope of Estate Counsel's duties. [FN9] Part III discusses the tension between the fiduciary duties of Estate Counsel in a reorganization and the traditional rules governing attorney ethics. Part IV creates, from the hazy misconceptions proffered in judicial opinions discussing this issue, a workable standard for Estate Counsel. That standard starts with the proposition that Estate Counsel represents the Estate--not its principals, not any of its creditors, but the Estate. [FN10] Keeping that proposition in mind, we can then recast *50 questions of alleged Estate Counsel misconduct. We can ask whether Estate Counsel was acting to benefit the Estate (or, at least, whether Estate Counsel intended to benefit the Estate). We can ask whether, instead, Estate Counsel had an impermissible conflict of interest (by acting to benefit, e.g., officers, directors, shareholders, or individual creditors). We can ask whether Estate Counsel's conflict of interest caused it to violate Bankruptcy Rule 9011. And we might even get some answers.

As a final introductory note, we wish to point out that, even though we disagree with the law that some of the courts used in certain opinions discussing the duties of Debtors in Possession and/or Estate Counsel, few, if any, of those cases were "wrong" [FN11] on the facts. The judges writing in this area have attempted to uphold high standards of conduct, both in an effort to address issues in the cases before them and to provide some guidance on ethical issues for Estate Counsel to follow. Still, the question arises as to whether these individual opinions, when read together, have built a stairway to a heaven of ethical practice or paved a road to that region of hell where endless ethical quandaries and impossible conflicting duties torment lawyers as in the story at the beginning of this Article. [FN12]

I. VOLUNTARY SERVITUDE: THE FIDUCIARY DUTIES OF A DEBTOR IN POSSESSION IN A REORGANIZATION CASE

But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty? [FN13]

In this oft-cited [FN14] discussion of fiduciary law, Justice Felix Frankfurter set forth the three primary issues in any discussion of fiduciary duty:

(1) To whom does the fiduciary owe duties?

*51 (2) Does a fiduciary owe fiduciary duties to additional parties besides the beneficiary?

(3) What is the scope of those duties? With Justice Frankfurter's road map in mind, we'll briefly review the duties that Debtors and/or DIPs owe in bankruptcy cases.

A. An Extremely Brief Overview of Bankruptcy

Under the current Bankruptcy Code, there are five different forms, or chapters, of relief available [FN15] to entities seeking the protection of bankruptcy law: chapter 7 (Liquidation), [FN16] chapter 9 (Adjustment of Debts of a Municipality), [FN17] chapter 11 (Reorganization), [FN18] chapter 12 (Adjustment of Debts of a Family Farmer), [FN19] and chapter 13 (Adjustment of Debts of an Individual with Regular Income). [FN20]

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Let's talk first about what we won't be discussing. Chapter 7 cases, which comprise the bulk of bankruptcy filings, [FN21] don't require the debtor to assume any fiduciary duties, [FN22] and so any further discussion of the chapter 7 debtor's duties is beyond the scope of this Article. [FN23] Chapter 9 municipal filings are exceedingly rare, and due to the very nature of the Debtor and DIP, are subject to fiduciary issues and concerns that are unique and that will likewise not be addressed here. [FN24] Chapter 12 bankruptcies are a *52 hybrid form of reorganization, with characteristics of both chapter 11 and chapter 13 cases. [FN25] For purposes of this Article, however, the fiduciary duties of a chapter 12 DIP are sufficiently similar to the duties of a chapter 11 DIP [FN26] that they will be subsumed in the section discussing the chapter 11 DIP's fiduciary duties. [FN27]

B. Duty of DIPs in Chapter 11

It is beyond all speculation that DIPs managing the affairs of a Bankruptcy Estate are fiduciaries. [FN28] Nonetheless, courts are divided as to (1) the parties to whom the fiduciary duties are owed, [FN29] and (2) the nature of those duties. [FN30]

1. "I am the Master!" [FN31]

The question as to whom Debtors in Possession owe their fiduciary duties has produced essentially two lines of case authority. [FN32] The older (minority) line of cases [FN33] holds that a Debtor in Possession has a fiduciary obligation to the creditors of the Bankruptcy Estate to "protect and conserve the property in his possession for the benefit *53 of creditors." [FN34] Under these decisions, DIPs don't owe any fiduciary duties to parties other than the secured [FN35] and unsecured creditors of the estate. [FN36] These duties, however, don't run to any specific creditor but rather to the body of secured and unsecured creditors as a whole. [FN37] This line of cases has been the subject of significant criticism. [FN38]

The majority line of cases takes a far broader view of the parties to whom Debtors in Possession owe fiduciary duties. [FN39] According to these cases, DIPs are "officers of the court" [FN40] who have a fiduciary duty to act in the best interests of the Bankruptcy Estate qua Estate, including its creditors, equity interest holders, and possibly even other parties in interest. [FN41] Even though--prior to insolvency--officers and directors of a corporation, [FN42] partners in a partnership, and individuals [FN43] have little or no duty to their *54 creditors, other than any duties set forth in a creditor's debt instrument, [FN44] the entity's insolvency or its filing of a bankruptcy petition creates a fiduciary duty in favor of the Bankruptcy Estate's creditors. [FN45] But the creation of a fiduciary duty to creditors does not exclude a concomitant duty to equity interest holders, or--in the case of an individual chapter 11 or 12 case--to the Debtor who filed the case. [FN46] Indeed, the Supreme Court, in *Commodity Futures Trading Commission v. Weintraub*, [FN47] held that the fiduciary duty of a DIP runs to the equity holders as well as to the creditors. [FN48] The Supreme Court noted the limited nature of that duty, stating: [T]he fiduciary duty of the trustee runs to shareholders as well as to creditors.

[R]espondents do not explain why, out of all management powers, control over the attorney-client privilege should remain with those elected by the corporation's shareholders. Perhaps most importantly, respondents' position ignores the fact that bankruptcy causes fundamental changes in the nature of corporate relationships. One of the painful facts of bankruptcy is that the interests of shareholders become subordinated to the interests of creditors. In cases in which it is clear that the estate is not large enough to cover any shareholder claims, the trustee's exercise of the corporation's attorney-client privilege will benefit only creditors, but there is nothing anomalous in this result; rather, it is in keeping with the hierarchy of interests created by the bankruptcy laws. [FN49]

The language of *Weintraub*, in some respects, harmonizes the older "creditor duty only" cases by indicating that a DIP's duty to equity holders ends in cases where "the *55 estate is not large enough to cover any shareholder claims." [FN50] In most of the "creditor duty only" cases, the Bankruptcy Estate was already clearly insolvent. Given the significant amount of case law [FN51] restricting the state law rights of shareholders where the Debtors are insolvent or the existence of equity is highly questionable, a finding of "creditor duty only" is understandable. [FN52]

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2. "What is Thy Bidding, My Master?" [FN53]

It is bad enough that the DIP may not know which interests must be served. But the problem gets worse: the exact nature and extent of those duties is also open to serious debate. [FN54] Courts considering the question of whether a chapter 11 DIP has met its fiduciary duties to the Bankruptcy Estate have applied two different standards: [FN55] the "corporate fiduciary" standard [FN56] and the "common-law trustee" standard. [FN57]

The majority line of cases holds that the fiduciary duties that DIPs owe to the Bankruptcy Estate is similar to the duties that officers and directors of a solvent corporation owe their shareholders outside bankruptcy. [FN58] Under this standard, DIPs are *56 prohibited from any form of self-dealing, including taking a corporate opportunity at the expense of the estate. [FN59] Further, DIPs must exercise reasonable care in making decisions but, once those decisions have been made, they are protected by the business judgment rule. [FN60] DIPs simply have to act in the best interests of the Bankruptcy Estate. [FN61]

The standard of care under the "common-law trustee" line of cases isn't that much different from the standard of care under the "corporate fiduciary" standard—it's just more stringent. The primary differences between the two standards are: 1) common-law trustees may be liable for ordinary negligence in the performance of their duties, but more than mere negligence is required under the "corporate fiduciary" standard, [FN62] and 2) common-law trustees may have a higher duty to reveal information surrounding a proposed transaction. [FN63]

The author of one Note on this issue has argued that the "corporate fiduciary" standard is too lenient, advocating instead the adoption of the "common-law trustee" standard in order to more completely prevent the DIP from placing its own self-interest ahead of the interests of the Estate. [FN64] As creative as that suggestion is, we believe that, in practice, these two different standards are actually applied as if they were the same standard, and they impose similar duties on the DIP. [FN65]

In one of the leading series of cases under the "corporate fiduciary" line, *Fulton State Bank v. Schipper* (In re *Schipper*), [FN66] the bankruptcy court, [FN67] district court [FN68] and court of appeals [FN69] all noted that they would have come to the same result in ruling on *57 a section 363 sale using either the "corporate fiduciary" or "common-law trustee" standard. Further, the Bankruptcy Code's extreme concern over insider dealing [FN70] reduces even further any meaningful differences between the two standards. [FN71]

We conclude, then, that the duty of a DIP, like that of a chapter 11 trustee, [FN72] is a strictly enforced version of the "corporate fiduciary" standard. Although this standard isn't the highest available, it clearly requires DIPs to place the interests of the Bankruptcy Estate above their own interests, [FN73] and the Code has sufficient protective mechanisms to ensure compliance. [FN74]

C. Duty of Debtors in Chapter 13

The conduct of a Debtor [FN75] in chapter 13 cases is governed by a fairly comprehensive [FN76] set of statutory guidelines instead of the somewhat more strict and yet more nebulous concept of "fiduciary duty." In a chapter 13, the Debtor has no separate affirmative duty to the Bankruptcy Estate (such as recovering preferences, etc.) other than the general duties required of all Debtors under section 521. [FN77] But chapter 13 Debtors still have some obligation to creditors. [FN78] In a chapter 13 case, the Debtor can put her interests ahead of the interests of the creditors and other parties in interest so long as she complies with the provisions of chapter 13 in formulating a plan [FN79] and acts in "good faith." [FN80]

Chapter 13's good faith standard is really chapter 13's substitute for the DIP's fiduciary duties in chapter 11. [FN81] Put simply, good faith requires that, under the facts and *58 circumstances of a given chapter 13 case, the court can find that the Debtor's proposed treatment of her creditors is fair and equitable. [FN82] Indeed, given the mass of litigation surrounding the issue of good faith in chapter 13, it's impossible to devise a more meaningful definition. [FN83] For purposes of our discussion, however, it's clear that the chapter 13 Debtor's good faith hurdle is far lower than the chapter 11 DIP's fiduciary "high-jump bar." [FN84]

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II. THE FIDUCIARY DUTIES OF ESTATE COUNSEL [FN85]

It is not easy for a debtor in possession, corporate or individual, to serve two masters--juggling the personal needs and desires of the debtor itself, with its clear fiduciary responsibilities to unsecured creditors, other parties in interest and the court.

Nor is the role any easier for the attorney who represents the debtor in possession. [FN86]

The above quotation, although an understatement of classic proportions, aptly illustrates the difficulties faced by Estate Counsel in all chapter 11 and 12 cases and, to a greatly reduced extent, by the Debtor's counsel in chapter 13 cases. [FN87] This difficulty *59 arises primarily from the unusual nature of bankruptcy cases.

In the vast majority of American civil litigation, there are generally only two sides to a dispute. Bankruptcy reorganizations, especially large business chapter 11s, can involve dozens, if not hundreds, of different players, all with different interests. [FN88] But most of the rules governing the ethical conduct of attorneys are still based on the "advocacy model," [FN89] which is itself premised on the "two-sided" aspects of litigation. [FN90] As Professor John Ayer has observed, "an oddity about bankruptcy is that it doesn't fit... the litigation model very well." [FN91] Although civil litigation has been (accurately) described as "warfare without guns and bombs," bankruptcy--with its lengthy negotiations, ever-shifting alliances among various parties, [FN92] and numerous administrative requirements--can best be described as "diplomacy without embassies or spies." [FN93] It is the sad lot of the Estate Counsel to attempt to represent the Bankruptcy Estate without either going too far and stepping into active control of the Estate's business operations [FN94] or doing too little and behaving as a "mere mouthpiece" of the DIP's management--the actual humans controlling the business operations. [FN95]

A. The Fiduciary Duty to the Bankruptcy Estate in Chapter 11 Cases

Estate Counsel is supposed to owe its allegiance to the Bankruptcy Estate [FN96] and not to the principals of the Estate. [FN97] In acting in this capacity, Estate Counsel's duties are "equivalent" to those of the DIP. [FN98] In particular, Estate Counsel can't close his eyes to *60 matters having legal consequences to the Estate, [FN99] especially when the DIP may not be acting in the Estate's best interests. [FN100]

This fiduciary duty means that Estate Counsel may not act as a hired gun [FN101] for the DIP but instead must consider the instructions that he receives from his client to ensure "that he or she is receiving valid instructions from a competent fiduciary acting within the scope of the fiduciary's trust." [FN102] This charge to "double-check" the DIP's bona fides poses a number of practical problems, given that the interests of the DIP controlling the Estate are different from the interests of the Estate itself. Therefore, it's nearly impossible to draw the line as to the propriety of instructions. [FN103] It is possible, though, to review the existing case law and give some guidance as to what courts have required Estate Counsel, as fiduciaries, to do in certain discrete areas.

B. Special Issues

1. Duty of Estate Counsel to Investigate the DIP/Bankruptcy Estate

One of the first problems that Estate Counsel must address is how thoroughly it must investigate the Debtor in Possession's own affairs. [FN104] Although one court has held that "since ... a debtor in possession has no duty to investigate his own financial affairs, it follows that his professionals have no such duty either," [FN105] this view is clearly in the minority. The better reasoned majority view holds that Bankruptcy Rule of Procedure ("BRP") 9011 provides a baseline for an attorney's behavior. [FN106] BRP 9011 requires that the signature of an attorney on every "petition, pleading, motion, or other paper served or filed in a case under the Code" [FN107] constitutes a certification that the attorney has *61 reviewed the document and: that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is

well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. [FN108]

What constitutes "reasonable inquiry" is determined under the facts and circumstances of each case. [FN109] There is a split of authority as to whether reasonable inquiry should be judged from the point of view of a reasonable bankruptcy practitioner [FN110] or from a reasonable attorney who doesn't specialize in bankruptcy practice. [FN111]

2. Duty of Estate Counsel as to Fees, Retainers, and Applications for Employment

All counsel appointed by the bankruptcy court, both Committee Counsel and Estate Counsel, [FN112] need first to get hired and, later, get paid. [FN113] The duties associated with motions to appoint counsel and with fee applications arise from ancient [FN114] concerns that attorneys and other court professionals might loot Estates for their own benefit and the benefit of insiders. [FN115]

Under the provisions of 11 U.S.C. § 327 and BRP 2014, an attorney, before being employed as Estate Counsel or Committee Counsel, must file an application for employment [FN116] that makes full disclosure of that attorney's connections with the Debtor, ^{*62} creditors, and other parties in interest. [FN117] The application, in the case of Estate Counsel, must also make full disclosure of any "compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the sources of such compensation." [FN118] Even a brief review of the disinterestedness standard and fee awards is beyond the scope of this Article, but we feel compelled to remind all Estate and Committee Counsel that they have a fiduciary duty [FN119] to make those full and complete disclosures required under 11 U.S.C. § 327 [FN120] and 11 U.S.C. § 329 . [FN121] If there is any question as to whether certain information is pertinent, attorneys should take the conservative approach and disclose. [FN122] Although later in this Article we discuss the various forms of sanctions that courts have imposed on Estate Counsel for violations of their fiduciary duties, [FN123] one mention here is particularly apt: two courts of appeal have held recently that the appropriate remedy for an attorney failing to disclose the source of his retainer is the denial of all requested fees. [FN124]

The attorney also has a duty not to require the Debtor to pay a retainer so large as to endanger ongoing operations. [FN125] In the infamous Bankruptcy Act case of *In re Arlan's Department Stores, Inc.*, [FN126] Estate Counsel demanded and received a retainer of \$125,000. This fee was paid in cash by Arlan's officials, who collected the receipts of several Arlan's stores in the Detroit area and flew the money to Estate Counsel's office in New York City, [FN127] where a partner of the firm acting as Estate Counsel "counted out five, ten and twenty dollar bills and apparently quarters, dimes, nickels and pennies as well." [FN128] This retainer represented a significant amount of the Debtor's available cash and was not disclosed to the bankruptcy court until six months after the bankruptcy petition was filed. For a number of reasons, [FN129] including the nature of the retainer, the ^{*63} Estate Counsel was denied all compensation. [FN130] Overall, Arlan's stands for the principle that counsel, especially Estate Counsel, owes two duties in every case: one to the client, and one to the court. [FN131]

3. Duty to Address Motions Filed By Creditors

A related issue arises when the DIP instructs Estate Counsel to oppose a motion to convert, a motion for the appointment of a trustee, [FN132] or a plan of reorganization proposed by a party other than the Debtor. [FN133] Estate Counsel must take care, in opposing such motions, not to elevate the interests of the DIP (and its management) over the interests of the Estate. [FN134] Estate Counsel can't be compensated "for representing the interests of the debtor or the debtor's directors, officers and/or shareholders in a manner which is adverse to, or does not benefit, the estate or the creditors." [FN135]

On the other hand, *In re Office Products of America, Inc.* [FN136] addresses the flip side of this restriction: whether Estate Counsel could be compensated for proposing and attempting to obtain confirmation of a plan that could succeed only through the "cramdown" provisions of section 1129 [FN137] but that was opposed by most of

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the creditors. In refusing to disallow all fees (under a theory that such actions were a breach of Estate Counsel's fiduciary duty), the court held:

There are serious policy ramifications to such a holding, however, which argue against deciding the case on that basis. The cramdown provisions of the Code are an expression of congressional intent regarding the importance of reorganization values even in the face of considerable *64 creditor opposition, provided those creditors' interests are appropriately protected. Were we to hold here that pursuing those goals over the objections of creditors in and of itself created a conflict of interest, lawyers would be discouraged from even representing debtors in the face of creditor opposition (even if the plan could pass muster under § 1129(b)), for fear of not being paid.

Such a result is so antithetical to the structure of the reorganization chapters that we must retreat from such a harsh ruling. If there is a basis for the trustee's objections to the fees requested, this is not it (at least not under the facts of this case). [FN138]

The Office Products court, however, went on to disallow Estate Counsel's requested fees for time spent opposing conversion of the case to Chapter 7.

Although no court has articulated a comprehensive test of when Estate Counsel should follow the instructions of the DIP in these situations, one court has suggested:

Counsel is charged with a "duty of diligence" and should be expected in every reorganization to make a "seasoned determination" whether the debtor is capable of achieving successful reorganization. Attorneys will not be compensated for vain attempts to resuscitate the debtor long after they should have given up the ghost. [FN139]

This test doesn't offer any bright lines, but it does suggest the absolute reaches of permissible conduct. When it becomes clear that Estate Counsel's efforts can't reasonably benefit the Estate, those efforts must be abandoned.

4. The Duty to "Rat"

One of the most troubling fiduciary duties that Estate Counsel has in a bankruptcy case is the duty to report improper conduct by the DIP to the Bankruptcy Court or other authorities. [FN140] In one of the earliest articles on Estate Counsel ethics under the *65 Bankruptcy Code, Professor Ayer suggested that Estate Counsel might have a duty to report wrongdoing by the DIP even though, at the time Ayer's article, there was no clear case law on the issue. [FN141] Ayer's prescient statement of the law has been adopted by all courts that have considered this position. [FN142]

Perhaps the first case to discuss Estate Counsel's duty to report wrongdoing on the part of the DIP was *In re Rusty Jones, Inc.*, [FN143] where the court denied 60% of the requested fees of Estate Counsel due to numerous violations of Counsel's fiduciary duty, [FN144] including Counsel's failure to inform the court of clear insider misconduct relating to the postpetition operation of the Estate's business. [FN145] This is scary stuff. Courts want Estate Counsel to "rat" on the very people who are running the DIP. [FN146]

Since *Rusty Jones*, numerous opinions have considered this question and have held that Estate Counsel has breached, or would breach, the fiduciary duty by failure to disclose [FN147] misconduct by the DIP in a number of situations, including:

1. Undisclosed conflict of interest of another professional approved by the court; [FN148]
2. Unauthorized use of Estate funds by the DIP; [FN149]
- *66 3. Undisclosed insider relationship between the DIP and a prospective purchaser of the DIP's assets; [FN150]
4. Failure to disclose that the DIP was refusing to pursue claims against insiders; [FN151]
5. Failure to disclose that the DIP was putting its interests ahead of the interests of the Estate; [FN152]
6. Failure to disclose that the DIP was "incompetent"; [FN153]
7. Failure to disclose conversion of Estate property by the DIP; [FN154] and
8. Failure to disclose concealment of Estate assets. [FN155]

But what acts by a DIP should Estate Counsel disclose? Ayer expressed frustration with that dilemma:

Suppose the client is not engaged in active concealment but has nonetheless engaged in conduct that may be grounds for creditor action under the Bankruptcy Code: suppose, for example, he has made preferential

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transfers, or that he is running an insolvent administration. By definition here, creditors could act, but it may be that they are not acting. Does counsel, in her role as counsel for the DIP, have some obligation to mobilize them to action? I know of no case that so holds, and it may be that we simply expect less of a DIP in the exercise of his fiduciary obligation than we do of a trustee. But unless and until we define the status of the DIP in this situation, counsel's position is, at least, doubtful. [FN156]

*67 Bankruptcy attorneys' problems with the duty to disclose arise not from a fear of losing fees, [FN157] but rather from a misperception as to the identity of their client. [FN158] But even federal courts have difficulty with this issue. [FN159]

Practitioners and courts should focus on the fact that the Bankruptcy Estate, not the prepetition debtor (either the business entity [FN160] or an individual [FN161]) is the Estate Counsel's client. [FN162] Although this advice is an excellent abstract concept, it's difficult to follow in practice. As the Bankruptcy Court for New Jersey noted in *In re Brennan*: [FN163]

Therefore, whether related parties controlled by the same individuals have the same professionals or different professionals, the positions asserted by such parties will tend to be the same. In such circumstances, requiring related parties to have different professionals is often nothing more than insisting on a deceiving appearance of separateness at great added expense. [FN164]

*68 5. Duty to Police the DIP

Recently, several courts have begun to impose yet another fiduciary duty on Estate Counsel--that of actively overseeing or policing the conduct of the Debtor during the pendency of a chapter 11 case. [FN165] Even though there is both scholarly authority [FN166] and case law [FN167] rejecting this duty as being both unfair and unwise, the majority of courts that have considered this issue have found such a duty.

One of the first cases recognizing this duty was *In re Davison*. [FN168] In *Davison*, the Bankruptcy Court denied Estate Counsel all requested fees as a result of Counsel's failure to prevent the Estate from incurring nearly \$800,000 in unpaid postpetition debt. [FN169] The court held "the manipulation of chapter 11 proceedings so as to dissipate assets which may otherwise be available to creditors is recognized as a species of misconduct which may justify the denial of attorneys' fees or other professional fees." [FN170] As harsh as this language was, at least the *Davison* court didn't expressly hold that there was an affirmative duty to police the DIP. [FN171]

The first case that found an affirmative duty to police was *In re Sky Valley, Inc.* [FN172] In *Sky Valley*, the DIP hired a consultant prepetition to manage the Estate's business, a ski and golf resort. [FN173] There was insufficient cash flow to pay the consultant, so the DIP decided to compensate the consultant [FN174] by hiring a real estate firm in which the consultant had an ownership interest to sell certain real estate that the Debtor owned. [FN175] Neither the DIP, nor its Estate Counsel, disclosed to the court that the "consultant" owned an interest in the real estate firm, and the court approved the employment of the firm. [FN176] Subsequently, the real estate firm sold some real estate and received sales commissions without making proper application to the court for compensation. To add *69 insult to injury, the DIP distributed the proceeds of the sale of real estate without the required court approval. [FN177]

The court reduced Estate Counsel's attorneys' fees by approximately \$40,000, citing Counsel's failure to properly "supervise" the DIP: "In the instant case, Debtor's attorney failed in his responsibility to supervise the auction process. Funds were expended for improvement of the property. Those expenditures were clearly outside the ordinary course of business." [FN178] The court reasoned that Estate Counsel failed to supervise the auction process and, as a result, funds left the Estate without the requisite court approval. [FN179] Since *Sky Valley* was decided, other cases have reached similar results. In those cases, DIPs were committing outrageous violations of the Bankruptcy Code and of their fiduciary duties with, at the very least, the quiet acquiescence of the Estate Counsel. [FN180] Though it would be tempting to dismiss these cases as precedent for sanctioning the attorneys for malpractice or incompetence, the cases unequivocally held that Counsel has a duty, not merely to advise, but to police the DIP.

So where does Estate Counsel cross the unmarked line between conceptual control of a reorganization case and

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actually "taking over" the Debtor? There's no case law directly on point, but *In re DeVlieg* [FN181] illustrates the strange course of action that Estate Counsel may be forced to take in fulfilling any duty to police the DIP. The *DeVlieg* case arose in the unusual context of the chapter 11 Trustee seeking to employ former Estate Counsel to act as special counsel in a lawsuit against various insiders of the Debtor (including the corporate officers and shareholders who hired the Estate Counsel). [FN182] The lawsuit involved allegations of fraudulent conveyances and breaches of fiduciary duty by insiders of the DIP (including the officer who had operated the Estate's business before the appointment of the Trustee). [FN183] This lawsuit was filed by Estate Counsel, without the authorization of the DIP. [FN184] Not surprisingly, the DIP and other insiders didn't like being sued, and they fired the Estate Counsel. [FN185] The U.S. Trustee's Office, upon learning of the reasons for the firing, moved to have a chapter 11 Trustee appointed to administer the Bankruptcy Estate. [FN186] The bankruptcy court granted that motion, and it also granted a later motion by the chapter 11 Trustee to employ the *70 very same Estate Counsel as special counsel to prosecute the lawsuit. [FN187] The defendants in the lawsuit appealed. [FN188] The district court, in a careful and detailed opinion, affirmed the bankruptcy court's holding that there was no conflict of interest between the Estate Counsel and the DIP who operated the Estate's business. [FN189] But the district court voiced its discomfort with the entire situation:

Indeed, the purpose behind the no-adverse-interest requirements of §§ 327(a) & (e) is to ensure objective advising of the bankruptcy trustee. The concern with former counsel for the debtor is that they will not be in a position to provide such advice. . . . In the present case, this concern does not appear to be implicated; as evidenced by the timing and apparent circumstances of the filing of the LBO Litigation, RS & W may actually have begun acting in the interest of the estate (and, in doing so, not necessarily following the direction of its then-client, the debtor) even before a chapter 11 trustee had been appointed. Thus, the usual concern with employment of former counsel for the debtor, residual loyalty to that client, would not appear to be a problem here. . . . In so noting, however, the Court does not pass on whether such behavior would comply with applicable standards of professional responsibility. [FN190]

This case is distressing because it seems to indicate that, under some situations, Estate Counsel may be permitted (or even required) to "take over" the operations of a Debtor from those individuals who are acting as the DIP. We doubt that Estate Counsel's malpractice insurance covers the actual running of the client's affairs, and we think that it's bad policy in general. [FN191]

6. Special Issues in Individual Chapter 11 Cases

Representing a corporation can present numerous problems for Estate Counsel, [FN192] but representing individual Debtors in chapter 11 is even trickier: "The complex fiduciary duties of a chapter 11 debtor-in-possession and its counsel can become even more confused when the debtor(s)-in-possession are individuals." [FN193] Obviously, there is the metaphysical challenge of realizing that the human who hired you to file his *71 chapter 11 petition is not your client in the bankruptcy case. [FN194] Even though it's fairly easy, at least in theory, to understand that the president of a corporation or the managing partner of a partnership is not your client when you are representing the business entity itself, it stretches the bounds of legal fiction to comprehend the difference between the Bankruptcy Estate of an individual (your client) and the individual himself (not your client). [FN195]

A second issue is whether counsel for the pre-Debtor can perform extensive "prebankruptcy planning" to enable the Debtor to shelter most of its assets from the Estate. Prebankruptcy planning is clearly at odds with the Estate Counsel's fiduciary duty to the Estate. At some point in the prebankruptcy planning process, the pre-Debtor's lawyer must fulfill his duty of zealousness to his client. On the other hand, once Estate Counsel is Estate Counsel, the "pre" in "pre-bankruptcy planning" is over, and hiding (sheltering?) assets is a no-no. There's no clear-cut, easy balance. NBR teaches the hoary old saw as a guiding principle: "pigs can be greedy, but hogs get slaughtered." (Not an original turn of phrase, by any means.) We do want to point out one case that gave Estate Counsel plenty of leeway on the prebankruptcy planning front. [FN196] Brennan permitted the lawyers to act as Estate Counsel even though, as part of the pre-Bankruptcy "probate" estate planning, the pre-Debtor, on the advice of counsel,

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placed millions of dollars out of the easy reach of creditors.

7. Fiduciary Duties of Counsel in "Global Settlement" Situations

An increasingly popular activity in bankruptcy cases in recent years has been participating in negotiations that will result in a global settlement of all issues among the Debtor, its creditors and shareholders, and other related parties. [FN197] Estate Counsel *72 must remember that the same fiduciary duties applicable to chapter 11 litigation extend to settlement negotiations. [FN198] Whenever Estate Counsel is striking a bargain on behalf of the Estate, Counsel mustn't "cave" on the Estate's interests simply out of an exhausted need to seal the deal. [FN199] This is especially true when Estate Counsel attempts to negotiate payments to parties other than the Bankruptcy Estate.

C. Sanctions Against Estate Counsel for Breaching His Fiduciary Duties

As a general rule, the sanctioning of an attorney lies within the sound discretion of the trial court. [FN200] Therefore, a wide range of possible penalties can be imposed on Estate Counsel. [FN201] We can't even begin to catalogue all of the types of punishment that a court can devise for a counsel who has failed to fulfill his fiduciary duties. We've noted, though, four broad categories of sanctions (three formal and one informal) that courts have imposed in these cases.

1. Disqualification

The first and most drastic [FN202] of the sanctions available to a court for abuses of an attorney's fiduciary duty is disqualification. [FN203] Courts will refrain from disqualifying Estate or Committee Counsel in certain limited situations where disqualification would work an undue hardship on the Estate, [FN204] but in most cases where disqualification was appropriate, courts haven't hesitated to impose that sanction. [FN205]

*73 2. Sanctions Under BRP 9011 and/or 28 U.S.C. § 1927

Both 28 U.S.C. § 1927 [FN206] and BRP 9011 [FN207] are designed to penalize attorneys who file either groundless or bad faith pleadings. Courts sometimes use these rules as a vehicle for punishing attorneys who violate their fiduciary obligations in bankruptcy cases. Because the standard of conduct for violating either 28 U.S.C. § 1927 or BRP 9011 is much lower than that required for breaching an Estate Counsel's fiduciary duty, though, neither of these rules is used with great frequency. [FN208]

3. Reduction or Denial of Fees

A long-forgotten comic once cynically remarked that "shooting an attorney in the heart wouldn't do much damage, because that organ in attorneys is usually made of stone. If you want to hurt a lawyer, shoot him in his hip pocket and get his wallet." This joke is in bad taste, [FN209] but it does reveal a long realized truth--taking someone's money does hurt. [FN210] In bankruptcy cases, it is also an easily applied sanction because all fees of Committee Counsel and Estate Counsel must be reviewed and approved before they're paid. [FN211] Courts have imposed a wide range of monetary sanctions, ranging from minor tweaking of fees [FN212] to outright denials of all requested compensation against Estate Counsel and Committee Counsel who have failed to meet their fiduciary obligations. [FN213] The exact deductions are generally fact-driven determinations.

The Sixth Circuit in *In re Downs*, [FN214] however, recently added a new twist to this issue. In *Downs*, under rather unusual facts, the bankruptcy court found that counsel for a chapter 7 Debtor had violated section 329 by failing to fully disclose the source of his \$46,000 retainer. [FN215] The bankruptcy court originally denied all of the Counsel's *74 fees, but upon reconsideration, sanctioned the attorney \$20,000 and permitted him to file a fee application for any fees under 11 U.S.C. § 330. [FN216] The district court affirmed, but the Sixth Circuit reversed, ruling that all fees had to be denied to an attorney "who exhibits a willful disregard of his fiduciary obligations under § 329." [FN217] Although this ruling was made in a case involving disclosure of fees under section 329,

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there is a possibility that it could be applied in all cases involving breaches of Estate (or Debtor's) Counsel's fiduciary duty, [FN218] which would make representing Bankruptcy Estates essentially an "all or nothing" venture. [FN219]

4. Judicial Distrust

Finally, there's one more form of punishment that deserves mention: the problem of judicial distrust. In bankruptcy cases, the reputation of an attorney, especially an attorney who regularly represents Debtors, is perhaps the most valuable asset that the lawyer owns. If a court believes that an attorney has failed to act properly in regard to his fiduciary duties as Estate Counsel, that belief will make the attorney's future bankruptcy practice that much more difficult. [FN220] We aren't saying that bankruptcy judges have favorite counsel or that they'll only work well with the "regular" bankruptcy practitioners, but we are saying that bankruptcy judges, like anyone else, will view an individual or firm with a good (or even unknown) reputation in a better light than they'll view someone who has previously committed serious fiduciary and/or ethical breaches. [FN221]

*75 D. Duty of Counsel for Chapter 13 Debtors

As we've already observed, [FN222] the Debtor in a chapter 13 case owes a duty of good faith that is much less onerous than the duties imposed on a chapter 11 or chapter 12 DIP. [FN223] It's no surprise, then, that the duties of Counsel for the chapter 13 Estate are also less exacting than those required of Counsel for a chapter 11 or chapter 12 Bankruptcy Estate. Indeed, Judge Keith Lundin has observed [FN224] that a chapter 13 attorney's primary obligation, other than properly practicing the law, is to advise the chapter 13 Debtor of her rights and responsibilities. [FN225] If chapter 13 Counsel totally ignores this duty, he may lose his fees, just as he would by committing any other type of malpractice. [FN226]

E. Duty as an Officer of the Court

Of all the fiduciary duties that we've discussed, perhaps the oldest and least explored duty is that which all attorneys owe in their role as "officers of the court." [FN227] *76 The leading description of that duty is found in the Supreme Court case of *Baker v. Humphrey*: [FN228]

The legal profession is found wherever ... civilization exists. Without it society could not well go on. But, like all other great instrumentalities, it may be potent for evil as well as good. Hence the importance of keeping it on the high plane it ought to occupy. Its character depends upon the conduct of its members. They are the officers of the law, as well as the agents of those by whom they are employed. Their fidelity is guaranteed by the highest considerations of honor and good faith, and to these is superadded the sanction of an oath. [FN229]

Although there is no clear or precise definition of this duty, the case law discussing it uses "duty" as almost a judicial "smell" test, under which-- apparently--any honorable lawyer would be able to determine if his actions in a case were appropriate or not. [FN230] Ah, if only all lawyers had the same olfactory ability.

In what has to be the leading discussion of this fiduciary duty, *In re Ward*, [FN231] the Fifth Circuit indicated that, at a minimum, the duty as an officer of the court would require an attorney in a bankruptcy case to disclose to the court the existence of any concealed assets [FN232] and probably any criminal activity that the attorney knew might have taken place. [FN233] Although this duty is similar to the duty to "rat" discussed above, [FN234] it is different because the lawyer owes it based on his status as an attorney at law, rather than based on any court-approved appointment in a bankruptcy case. Further, this duty is owed directly to the court qua court, not indirectly through an Estate Counsel's fiduciary duties vis-a-vis the Bankruptcy Estate. [FN235]

*77 F. Duty to the People: Bankruptcy Crimes and the Bankruptcy Attorney [FN236]

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The ultimate "rules" of bankruptcy ethics can be found at 18 U.S.C. §§ 152 through 157, [FN237] which are the federal statutes directly relating to bankruptcy crimes. For example, section 157 deals explicitly with bankruptcy fraud and is a recent addition to the federal criminal statutes. [FN238] Understanding what constitutes a bankruptcy crime is a fairly simple task. It's also an important task--we've seen an increased emphasis in reviewing attorney conduct in bankruptcy cases for evidence of possible criminal activity. [FN239]

The problem of "criminal" bankruptcy attorneys [FN240] isn't a new issue. [FN241] Nor is it confined to inexperienced or "poor" practitioners. [FN242] Although there are few reported cases involving attorneys who have been convicted of "bankruptcy crimes," several instructive appellate court cases address this topic. [FN243]

By far the largest class of "bankruptcy crimes" for which attorneys have been convicted involve concealing assets of the Bankruptcy Estate. [FN244] In *United States v. Smithson* [FN245], *United States v. Center*, [FN246] *United States v. Knoll*, [FN247] and *United States v. Parkhill*, [FN248] attorneys were convicted of assisting their clients in concealing assets from the Bankruptcy Estate in a plethora of ways. A brief review of these cases shows that the attorneys in question were actively involved in the fraud, so their convictions were not unexpected.

*78 Far more troubling is the case of *United States v. Zimmerman*. [FN249] This case is one chapter of a trilogy of cases [FN250] involving the ill-fated bankruptcies of Gary and Maree Levine and their furniture business, *Sofa Gallery, Inc.* In *Zimmerman*, an attorney was charged, along with his law firm, [FN251] his law partner, one of his associate attorneys, [FN252] and certain clients of his law firm--with conspiracy to commit criminal fraud in connection with the hiding of a client's assets from its creditors via the law firm's trust account. The attorney in this case apparently had only minimal connections with the Debtor or the Debtor's counsel but was nevertheless indicted and ultimately convicted on the strength of two Bankruptcy Court opinions that found that the attorney's law firm was probably conspiring with the Debtor to hide assets. [FN253] The attorney's conviction was overturned, and the case was remanded for a new trial. But the case still emphasizes the danger in this area even for lawyers who don't directly oversee bankruptcy cases for their firm. [FN254]

G. The Good, the Bad and the Ugly: [FN255] Three Bankruptcy Cases That Shook the World [FN256]

So far, our review of the case law on duties toward the Estate has convinced us of two things. First, in the universe of permissible Estate Counsel conduct, courts have been able to isolate individual examples of good and bad behavior, but they haven't been able to articulate a coherent, overall standard for attorneys to follow. Second, the *79 semantic gymnastics that courts have used to justify the imposition of a fiduciary duty going beyond the Estate to individual creditors have been based on the following false syllogism: It is simply not true that

Major premise 1 (correct): The DIP owes fiduciary duties to the Estate.

Major premise 2 (correct): The Estate Counsel owes fiduciary duties to his/her/its client, the Estate.

Minor premise (questionable at best): If the Estate is insolvent, it's "owned" by its creditors because there is no value left in the Estate for its shareholders or other equity owners.

Conclusion (false): Therefore, the Estate Counsel owes fiduciary duties directly to each creditor.

We think that the best way to separate the correct assumptions from the unfounded ones requires a review of three cases: our "good," our "bad," and our "ugly."

1. The Good: *Louisiana Bank & Trust v. Anderson*. [FN257]

Every so often, bankruptcy issues wander into the "real world" of law. In this case, the issue of whether Estate Counsel was liable for alleged violations of its fiduciary duty to the creditors of the Bankruptcy Estate managed to come before the Louisiana Court of Appeals. The facts of the case were fairly straightforward. In May 1982, *Underwater Completion Team, Inc. ("UCT")* granted *Louisiana Bank & Trust* a security interest [FN258] in its

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accounts receivables. On November 1, 1982, UCT filed a Chapter 11 case. [FN259] In approving the firm of Anderson Anderson Hausey Rainack & Stakelum as Estate Counsel, the Bankruptcy Court ordered the law firm to: (1) "exercise general supervision" of the operation of the Estate's business by the DIP; (2) take responsibility for the DIP's "strict compliance with the terms of the Court's orders authorizing" the DIP to operate the Estate's business and the provisions of the Bankruptcy Code; and (3) "take all steps necessary to prevent any depletion of the assets of the Estate . . . and . . . notify the Court of any actual or threatened depletion" [FN260] Further, the Court ordered the DIP not to use cash collateral [FN261] without prior Court approval. [FN262] *80 Unfortunately for the bank, the law firm advised UCT that the accounts receivable were not cash collateral because the bank's security interest was unperfected under Louisiana law. Acting on that advice, UCT used \$400,000 of these receivables for daily operating expenses without first seeking the bank's permission or the court's approval. [FN263] Unfortunately for the law firm, the Louisiana Supreme Court changed the law on perfection during the chapter 11 case, which rendered the law firm's previous advice absolutely wrong. [FN264] The bank then sued the law firm and others to recover the improperly used receivables. [FN265]

The basis of the suit against the law firm was that it breached the duties (imposed upon it by the bankruptcy court) to the bank by advising the DIP that it could use funds collected from UCT receivables without court approval. After reviewing the pleadings, the trial court granted the law firm's motion for summary judgment, ruling that the DIP's law firm didn't owe the bank any fiduciary duty at all. [FN266] Like the trial court before it, the Louisiana Court of Appeals found, as a matter of law, that the law firm didn't owe a fiduciary duty directly to the bank:

We are convinced that should we adopt the construction advocated by Louisiana Bank & Trust, it would turn the established concept of an attorney obligation to his client on its head. Most particularly, as we appreciate Louisiana Bank & Trust's argument, should we find that defendants owed an extended duty to it, we would be allowing Louisiana Bank & Trust to seek damages from an attorney, not its attorney, for the attorney's giving of correct advice to UCT, at least correct at the time the advice was given. We agree with the findings of the trial judge that the Bankruptcy Court order did not deviate to this extent from the concept of duty established in the Rules of Professional Conduct for the relationship between an attorney and his client. Therefore, we conclude that the trial court's dismissal of Louisiana Bank & Trust's claim on a motion for summary judgement was properly entered since there was no duty on defendants' part which extended to the protection of its client's creditor. [FN267]

This case and another one, *In re Derringer*, [FN268] together stand for the proposition that Estate Counsel generally owes no duties directly to third-party creditors. [FN269] Although the *81 fiduciary duty to creditors generally is still an open question, [FN270] there shouldn't be any duty to a particular creditor. But we also must point out that the law firm in this case ran a real risk by advising its client that the collateral in question was definitely not cash collateral.

2. The Bad: *In re Bonneville Pacific Corp.* [FN271]

A frequent nightmare for attorneys who represent Estates is discovering that the client for whom they have worked so hard is being run by a bunch of crooks. The *Bonneville* [FN272] case is the ultimate example of that nightmare: the prepetition debtor was not only operated by a group of criminals, [FN273] but these same criminals were assisted in some respects by the Debtor's prebankruptcy counsel, [FN274] and some of the same questionable practices may have occurred not just before, but during, the case. [FN275] The court roundly criticized both Estate Counsel and Committee Counsel for their failure to properly investigate the activities of the Debtor and bring that information to the court. [FN276]

The prebankruptcy Debtor in *Bonneville* seems to have been simply playing a large con game, which created most of its value by engaging in creative trades of either exaggerated or nonexistent assets. [FN277] On December 5, 1991, it filed a voluntary chapter 11 petition. The Estate at first attempted to hire its prebankruptcy attorneys as primary Estate Counsel, but that application was refused by the bankruptcy and district courts and by the court of appeals, [FN278] although those attorneys were ultimately employed as special counsel. The Debtor's local bankruptcy counsel was given the task of acting as Estate Counsel. The case then proceeded normally until a series

of hearings started *82 to paint the picture of a very troubled Debtor. [FN279] The court believed that all of these events, taken together, should have signaled Estate and Committee Counsel that something was amiss. [FN280]

In spite of these "warnings," the Estate and Committee Counsel still took no action to investigate, even in a minimal way, the actions of the Debtor. [FN281] On May 14, 1992, the unsecured Creditors' Committee and the Estate filed a joint motion for extension of the exclusivity period. [FN282] Relying in part on information obtained from the examiner [FN283] that there was no great problem with current management, the committee and the Estate urged the extension in the hope that a plan could be proposed to "meet everyone's needs." [FN284] No one opposed the proposed extension, yet the court refused to grant it and warned Estate Counsel about filing an incomplete or unconfirmable plan just to preserve exclusivity. [FN285] Four days after this hearing, the Debtor did file an incomplete and unconfirmable plan. [FN286] Shortly thereafter, what can politely be described as "the poop hitting the air circulation device" [FN287] occurred.

On June 10, 1992, Committee Counsel filed an application to withdraw as counsel, which the bankruptcy court granted that same day. [FN288] The reason for withdrawal was the discovery that an attorney who was "of counsel" with the Committee's Counsel was married to an insider of Bonneville's numerous subsidiaries, who in turn had participated in a few of Bonneville's questionable transactions. [FN289] On June 11, 1992, after fully reviewing the examiner's report, the court sua sponte ordered the appointment of a trustee. At that point, all of the Debtor's problems came to light.

This appointment might have ended matters except that the Estate Counsel then filed an application for fees. In an earlier opinion in the case, [FN290] the court had denied Estate Counsel all fees due to its failure to investigate the Debtor, its misrepresentation *83 of facts to the court, and its "dereliction of duty." [FN291] Some four years later, this matter came before the court on a motion for reconsideration filed by former Committee Counsel. [FN292] The result was a twenty-one page opinion that reaffirmed and expanded upon the court's previous ruling. [FN293]

What is unusual about the last Bonneville opinion is that the court was critical of the Committee Counsel for its failure to disclose the DIP's fraud and its "vigorous [] participation in and support of many of the efforts to protect the insiders" [FN294] in violation of the Committee Counsel's duty to its own client, the unsecured creditors. [FN295]

We admit that we're not experts on the facts underlying this case. Nonetheless, we believe that, from a review of other case law in this area, the court's criticism of Committee Counsel was undeservedly harsh. It appears that any comfort given by Committee Counsel to the Bonneville insiders was part of an effort to gain confirmation of a plan that would have given the unsecured creditors some distribution, and that the Debtor's collapse would result in a negligible return to the unsecured creditors. Unless Committee Counsel had known that its clients' interests were being harmed by the insiders or unless its knowledge of the fraud was so substantial and direct that it had a duty, as an officer of the court, to report the fraud, the court's comments concerning Committee Counsel are probably unwarranted. [FN296]

3. The Ugly: In re Perez [FN297]

In re Perez involved a chapter 11 case filed by an individual, Gary Ronald Perez. In reversing the confirmation of his third amended plan of reorganization, which had been confirmed by the bankruptcy court and affirmed by the BAP, the majority opinion of the Ninth Circuit demonstrated a basic misunderstanding of the absolute priority rule and dabbled in just enough bankruptcy theory to be dangerous.

*84 Along the meandering road to its conclusion reversing confirmation, the Perez majority tarried at what can best be termed a mirage. The court, after a rather short discussion, held that the Debtor in Possession owed a fiduciary duty, not to the Estate, or even to the creditors as a whole, but to "a creditor." [FN298] The majority opinion, betraying a surprising naivete regarding the workings of bankruptcy cases, expressed shock at the idea that the payment of a creditor's prepetition claim might be delayed during the pendency of the case. [FN299] Making a cognitive leap backwards, the court then implied that the delay wasn't due to the regular progression of reorganizations. Instead, the court attributed the delay to the tendency of many Debtors to capitalize on the fact that

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creditors have to expend funds on their own counsel to protect their interests in the case, thereby "prolonging and complicating bankruptcy proceedings" and running up the creditors' costs. [FN300]

After this grandstanding, the court set forth its normative vision of how counsel for the Debtor in Possession should behave:

Counsel for the estate must keep firmly in mind that his client is the estate and not the debtor individually. Counsel has an independent responsibility to determine whether a proposed course of action is likely to benefit the estate or will merely cause delay or produce some other procedural advantage to the debtor. While he must always take his directions from his client, where counsel for the estate develops material doubts about whether a proposed course of action in fact serves the estate's interests, he must seek to persuade his client to take a different course or, failing that, resign. Under no circumstances, however, may the lawyer for a bankruptcy estate pursue a course of action, unless he has determined in good faith and as an exercise of his professional judgment that the course complies with the Bankruptcy Code and serves the best interests of the estate.

We make no finding of wrongdoing here. [!!!] We simply remind counsel that his responsibility is to help lead the estate on a just, speedy, inexpensive and lawful path out of bankruptcy. Failure to live up to this responsibility may result in a reduction in allowable fees and other sanctions. [FN301]

*85 Because the majority opinion never reached the much more important issue of what "duty to the Estate" means, [FN302] Perez manages to achieve the impossible. It is both a tautology (counsel representing the DIP must make sure that the DIP fulfills its duty to the Estate) [FN303] and a fiction (the court isn't making a finding of wrongdoing, but it is excoriating counsel for the DIP anyway). Moreover, Perez leaves unresolved the question of whether it should be read to overrule the rather more sensible, if more cynical, holding in *In re Sidco, Inc.* [FN304] In a variety of respects, Perez certainly is the "ugly" in our trilogy of cases.

III. THE TENSION BETWEEN THE "NEW" BURDENS OF FIDUCIARY DUTIES FOR ESTATE COUNSEL AND THE ETHICS RULES

One of us (NBR) has already gone on record in claiming that the duty of counsel to "official entities" [FN305] includes a duty to determine whether the adversary system *86 protects everyone with an interest in the bankruptcy case. [FN306] There's a tension between a lawyer's duty of zealotry and the duty as an officer of the court. When the duty of zealotry would require the lawyer to mislead the court, NBR argues that the lawyer's duty as an officer of the court should be paramount. [FN307]

The adversary system presumes that each interested party is represented by competent, zealous counsel. When that presumption is true, then the "official entities" can feel free to represent their clients without worrying that they may be compromising their concomitant duty as officers of the court. When, however, the presumption fails--e.g., someone's interest isn't being represented by counsel, or the counsel isn't competent--NBR has suggested that lawyers have a duty to compensate for the presumption's failure and, thus, have a duty to consider the interests of those whom the adversary model doesn't protect. [FN308]

What complicates matters in bankruptcy cases is that counsel for the DIP is said to represent the "Estate," and there's no consensus on exactly what representing the Estate means. The Estate wants to reorganize, but for whose benefit? The managers? The shareholders? The creditors? Depending on which case or article you read, you get different answers. [FN309] Moreover, the interests of the Estate's constituents [FN310] will vary during the case, making the determination of appropriate interests a moving target. [FN311]

As our Parts I and II have shown, several cases have mentioned, without developing the concept, the DIP's "obligation to the court." [FN312] Other cases have spent time *87 discussing the DIP's duty to the Estate, without ever defining exactly what that means. [FN313] Still others have focused on the DIP's duty to the unsecured creditors. [FN314] And some *88 courts (the most well-reasoned ones) reject a unitary definition of a DIP's duty to the Estate as being amorphous. [FN315] But until we know what the DIP's duty to the Estate is, it's difficult to

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relate the DIP's duty to the duty of Estate Counsel. [FN316]

We're not surprised by the reluctance to spell out exactly what the "Estate" is--such hesitance is natural. Defining the Estate as any of the possibilities mentioned brings with it serious consequences:

DEFINITION OPTIONS	CONSEQUENCES
1. "Estate" encompasses the interests of the creditors and the equity owners.	Estate Counsel has to reconcile vastly differing interests without being accused of conflicts of interest.
2. "Estate" encompasses the interests of creditors and shareholders if it's solvent but only the interests of creditors if it's insolvent.	How do we determine solvency--and as of what point? Solvency becomes a factor that leaves Estate Counsel liable based on 20/20 hindsight. [FN317]
3. "Estate" encompasses only the interests of creditors.	Ignores Weintraub; still creates unavoidable conflicts between secured and unsecured creditors.
4. "Estate" encompasses only the interests of unsecured creditors.	Ignores Weintraub; still creates conflicts based on (1) differing interests among unsecured creditors and (2) valuation declines that make unsecured creditors out of secured creditors.
5. "Estate" is too vague a	What guidance is that? Is that really a

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concept to be defined.

viable construct?

FN317. See Folly, supra note 44. If we really wanted to complicate things, we'd throw in all of the different ways to determine "solvency," ranging from the

balance-sheet test to the "generally not paying debts as they become due"

standard. Let's face it: solvency is one of the most fluid concepts around.

*89 All of these options pose problems. But until we figure out just what the "Estate" is, courts are going to be confused about the duties of Estate Counsel. Consequently, any increased risk that Estate Counsel will be held liable in some courts but not in others will tend to make attorneys squeamish about taking on Estate representation. [FN318]

We've therefore decided to adopt a combination of Options #1 and #5. We believe that, at least until facts clearly establish otherwise, the Estate has to include the interests of creditors and owners. Lynn LoPucki and William Whitford have made a good case for the proposition that the interests of the Estate are not limited to the interests of its creditors. [FN319] After several groundbreaking studies in this area, they "conclude d that the *90 better view is that management 'owes' fiduciary duties to both the creditors and the shareholders of an insolvent company, until their claims or interests are extinguished as part of the reorganization case." [FN320]

Using Option #1 increases the risk that the Estate Counsel will be pulled in several directions at once. Insolvency (or even borderline solvency) tends to create more risk-tolerance for junior interests than for senior interests. If the only possibility of gain for the junior interests stems from having the management go to the racetrack and gamble the company's cash, then the junior interests will be the ones handing management the *91 racing forms and the senior interests will be the ones blocking management's access to the betting window. [FN321]

But Option #1, by itself, may be too cumbersome for Estate Counsel to use on a daily basis. Estate Counsel can't each ask each day, "Is my client still arguably solvent, or have my duties switched over to creditors?" Option #5 provides us with a nice finesse. It's not as good as spelling out the Estate's exact interests, but as long as we can be clear that the DIP's duty is to the Estate, period, we can start to resolve the problem of fiduciaries that don't behave as fiduciaries.

We've experimented with other solutions. One of these involved applying Geoffrey Hazard's analysis of "triangular lawyer relationships" to the duties of Estate Counsel vis-a-vis the DIP and other parties in interest. [FN322] Hazard drew a distinction between the relationship that ensues when a lawyer represents a client who owes a fiduciary duty to a third party (the "lawyer--> guardian-->ward" relationship) and the relationship that ensues when both a third party and the lawyer owe fiduciary duties to the lawyer's *92 client, but the lawyer deals primarily with the third party (the "lawyer--> corporation <--officer" relationship). [FN323] As Hazard explains,

The difference in the vectors of obligation in these two triangular relationships is important. In the lawyer-->guardian-->ward triangular relationship, the ward is the dependent person and the obligee of the guardian, but the guardian is the dependent person and the primary obligee of the lawyer. In the lawyer-->corporation<--officer relationship, the corporation is the dependent entity and the obligee of both the lawyer and the corporate officer. This structural difference in obligations can help identify and define the lawyer's role in the two triangular relationships. [FN324]

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Hazard fleshes out his innovative theory by contrasting it with the traditional way in which a lawyer's relationships with others are characterized. He characterizes the three traditional relationships that a lawyer may have as: (1) the lawyer's relationship to the client (the client as "friend"); (2) the lawyer's relationship to the court (the court as "father"); and (3) the lawyer's relationship to a third party (the third party as "foe"). [FN325] Deconstructing these characterizations, [FN326] Hazard rejects these "simplistic normative premises" [FN327] in favor of a "normal"- "antagonistic" dichotomy:

The difference between a "normal" triangular relationship and one contaminated by antagonism does not lie in the structure of the relationship. Until finally resolved or dissolved, the structure is ambiguously triangular, with the nonlawyer parties being fellow clients, or antipodal, with the nonlawyer parties being antagonists. The proper interpretation depends not on structure but on process--what has happened within the relationship. The relevant set of happenings include, above all, what the lawyer has done in the relationship.

* * *

The critical problem the lawyer faces in triangular relationships is that his or her professional responsibilities depend unavoidably on what the other two parties do for and to each other. The lawyer's duty cannot adequately be defined, as it normally is, by specifying *ex ante* the identity of "the client." Neither of the "relevant others" is a legally freestanding person in the standard conceptual sense of "client." . . . The corporation is not an individual at all, but exists only in law and through personification by others who act *ex officio*. If *93 the other parties to the relationship conduct themselves as the law contemplates they should, then all the "relevant others" collectively can be considered "the client." That principle is already well established for corporations, and there seems to be no reason not to think of guardianships and other triangular relationships in the same way. On the other hand, if the dominant party is guilty of misconduct toward the dependent one and if the lawyer behaves as though everything were still normal, the lawyer would then have at least an ethical problem and quite possibly legal liability. [FN328]

So how could we use Hazard's triangular relationship approach in analyzing the duties of counsel to the DIP or trustee? In some sense, the courts that have struggled to find a fiduciary duty to creditors have instinctively applied Hazard's analysis, which changes the lawyer's duty depending on "whether the dominant party [the DIP] is guilty of misconduct toward the dependent one [the Estate]." [FN329] But those courts have just made the same cognitive leap that we've been discussing: equating the Estate's interests with those of the Estate's constituents. Even if we wanted to use Hazard's theory, we'd have to form more than a triangle. We'd have to form some sort of a pentagon. [FN330]

IV. BACK TO BASICS: DECONSTRUCTING THE MYTH OF THE ESTATE COUNSEL'S FIDUCIARY DUTIES TO CREDITORS

Remember the false syllogism that some courts have created:

Major premise 1 (correct): The DIP owes fiduciary duties to the Estate.

Major premise 2 (correct): The Estate Counsel owes fiduciary duties to his/her/its client, the Estate.

Minor premise (questionable at best): If the Estate is insolvent, it's "owned" by its creditors because there's no value left in the Estate for its shareholders (or other equity owners).

*94 Conclusion (false): Therefore, the Estate Counsel owes fiduciary duties directly to each creditor. [FN331]

A correct (if still incomplete) syllogism might be:

Major premise (correct): The Estate's decisions are made by the DIP or, if a trustee is appointed, by the trustee.

Minor premise (correct): Estate Counsel represents the Estate.

Conclusion (correct): Estate Counsel owes a fiduciary duty to the Estate directly, and not to any particular constituents of the Estate.

If we're right--that the concept of "Estate" includes a multitude of interests and that we need to finesse the concept

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of "Estate" as being a single entity for purposes of functioning on a daily basis--then our syllogism makes the right choices.

1. How "Specifying" and "Finessing" May Break the Transitive Relationship That Courts Are Establishing Among the Estate, Constituent Interests of the Estate, and Estate Counsel.

Think of this possible restatement of the DIP's role: the DIP is the inchoate embodiment of the Estate, in much the same way that corporate management is the inchoate embodiment of the fictional corporation. We acknowledge that we're already getting a bit fuzzy here, since we're finessing what that definition will mean on a day-to-day basis. [FN332] If the DIP is the embodiment of the Estate, then Estate Counsel must actually represent the Estate and not just the "ordinary" conception of the DIP. [FN333]

Defining Estate Counsel's client as the Estate itself, and not just the management of the Estate, solves some thorny problems. [FN334] For one thing, Estate Counsel can apply ethics rules relating to the "organization as client" to deal with recalcitrant or downright dishonest management. [FN335] For another thing, thanks to Weintraub, [FN336] Estate Counsel can *95 argue that the attorney-client privilege runs to the Estate and not to its managers. That way, in those relatively few instances in which a bankruptcy court supplants the DIP with a trustee, Estate Counsel can fulfill the fiduciary duty to the client (remember: the client is the Estate) by revealing to the trustee the communications that Counsel has had with the management of the DIP. Those communications are still privileged because the Estate, and not the DIP's management, holds the privilege. Acknowledging that the Estate holds the privilege allows the newly appointed trustee to root out mismanagement and fraud without requiring Estate Counsel to "rat" on its client directly to the court in every circumstance. [FN337]

And what of the Estate Counsel's duty to "rat"? Ratting on misbehaving management isn't ratting on the client when the Estate itself is the client. Estate Counsel could follow the normal procedure for cajoling corporate management to toe the line. [FN338] *96 If no one's listening at the Estate level, then Estate Counsel could attempt to persuade the court to appoint a trustee or could try for a "noisy withdrawal" if the attempt to appoint a trustee is met with deaf ears. [FN339] At the least, freeing up Estate Counsel from its intimate ties with management will more easily reconcile Estate Counsel's duty to the client [FN340] with the attorney's duty as an officer of the court.

We have a couple of tools to help us monitor Estate Counsel. For one thing, we could assume that most of the Estate constituents' interests are being represented, for the most part, by somebody. [FN341] Committee Counsel is supposed to be looking out for the interests of the unsecured creditors. [FN342] If there's an Equity Security Holders' Committee, [FN343] counsel for that Committee can look after those interests. Secured creditors with large claims are likely to have their own counsel. What we need to do is to treat Estate Counsel as a conductor, blending all of the different melodies (interests) in the best interests of the entire opus. If Estate Counsel isn't blending those melodies, bankruptcy courts have ways of making their displeasure known. [FN344]

*97 For truly recalcitrant Estate Counsel, we also have BRP 9011 [FN345] as a possible sanction. [FN346] If Estate Counsel is behaving badly, chances are that Counsel is lying on some of the pleadings. BRP 9011 gives the bankruptcy court the ability to punish counsel for those lies. [FN347]

2. How "Specifying" and "Finessing" Improve on a Bad Lot But Don't Fix It Entirely

Our solution isn't perfect. Far from from it. By finessing the concept of the "Estate," we're avoiding the hard questions that still must be resolved. By specifying the concept of the "Estate," we're making the management of the DIP very nervous about communicating with counsel, given that the Estate, and not the management, owns the privilege. [FN348]

*98 Courts and academics have struggled with the concept of "specifying" and "finessing" the Estate. [FN349] Jay Westbrook has already published one of the best analyses of this struggle. [FN350] He's divided cases that review the behavior of Estate Counsel into two groups of standards: the "benefit" standard and the "adverse interest" standard. [FN351] Under the "benefit" standard, courts analyze Estate Counsel's conduct by asking whether Estate Counsel's actions provided a benefit to the Estate, rather than to factions with a personal interest in the outcome of the action. Under the "adverse interest" standard, courts review Estate Counsel's behavior to see if

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choices made during the case favored the Estate or an interested party to whom the Counsel might also owe some loyalty. If Estate Counsel's actions betray a conflict of interest, then Counsel runs the risk of total disqualification. [FN352]

We're sympathetic with Westbrook's distrust of per se rules as being both too facile and downright threatening to successful chapter 11 cases. Certainly his "benefit" approach makes sense. Of all of the alternatives out there, it's by far the best option. The problem, however, lies in the infinite loop that the "benefit" test creates. Until we pin down how to measure the benefit to the Estate, which still requires us to pinpoint *99 exactly whose interests comprise the Estate, we haven't finished the analysis. We admit that. But we've come closer than most.

CONCLUSION

We're not claiming to have found the perfect solution to the problem of exactly what duties Estate Counsel owes to individual Estate constituents. But we think that we've found a better one than the hodgepodge of answers currently out there. To get talented Estate Counsel, we can't greet each potential attorney with:

Hi, there. We want you to represent the Estate, because we think that you have the talent to turn this company around. We need your expertise to preserve jobs and the general economy of the community. But we need you to agree to serve the interests of each and every constituent of this bankruptcy case, and somehow we need you to overcome the overwhelming conflicts of interest that ensue from considering all of these individual interests. Sign here.

We doubt that many Estate Counsel would want to "sign there." Furthermore, we doubt that many of them realize that they already have. If the goal of reorganization is, in fact, to turn an ailing business into a healthy one, [FN353] we need the best brains in the business. Let's let them do their job.

[FNal]. (c)C.R. Bowles, Jr. and Nancy B. Rapoport 1997. All Rights Reserved.

[FNaa1]. Law Clerk to the Honorable Henry H. Dickinson, Chief Judge of the United States Bankruptcy Court for the Western District of Kentucky. Chip wishes to thank Judge Dickinson and most of the Bankruptcy Bar of the Western District of Kentucky for their help and insights. Chip also wants to thank NBR for agreeing to work with him on this project, for without her insight and writing skill, none of this would be possible. Finally, he would like to thank his wife, Linda Bowles, and their son Charles, who allowed him to vanish for large periods of time to work on this piece.

[FNaaa1]. Associate Professor of Law and Associate Dean for Student Affairs, The Ohio State University College of Law. NBR wishes to acknowledge the able research assistance of Dan Hercl and Lucia Villari, the multifaceted talents of master librarian Chris Noble, the superb secretarial skills of Michele Whetzel-Newton, who uncomplainingly worked above and beyond the call of duty to make this article a reality, and the unflagging energy of Carol Peirano, who sent overnight package after overnight package. She also wishes to thank the following people who, through e/mail, snail mail, telephone, or, in one case, a trip to the grocery store, helped her to sharpen her thoughts on this topic: Jack Ayer, the Honorable William T. Bodoh, Randy Barnett, Chip Bowles, Stephen H. Case, Ted Janger, Charles W. Kettlewell, George W. Kuney, Ronald J. Mann, Catherine E. Vance, Jeffrey D. Van Niel, and G. Ray Warner. She particularly wants to thank her husband, her parents, and Dean Gregory H. Williams for being extremely patient as she finished yet another article that she had originally vowed "could darn well wait until summer."

[FN1]. Although it's tempting to refer to attorneys in a gender-neutral fashion (i.e., as "it"), such references would make the reading of this Article difficult. Therefore, we've arbitrarily chosen to deem the attorneys for Debtors, Debtors in Possession, and Creditors' Committees to be males and to deem all other attorneys to be females.

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[FN2]. One of us (Chip) created this version of the dilemma posed by representing the DIP. Lynn LoPucki created another wonderful description of the dilemma in his Teacher's Manual for the Debtor Creditor Game 71 (West 1984), called *The Debtor's Lawyer as Trojan Horse*, reprinted in ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS* 780 (3d ed. 1996). We'd love to reprint the entire thing, but in the interests of space, we'll just give you a bit of the flavor:

Shares [the sole shareholder of the troubled company, talking to Lawyer] interrupts. "This is ridiculous," he fumes. "I read in a newspaper article that about 90 percent of all corporations that file under chapter 11 are owned and managed by a single owner or a family, and that in about 90 percent of the cases the cause of the debtor's problems is that the businesses have bad managers. What you are telling me is that your code of Professional Responsibility requires that their lawyers work in the interests of the corporations even if it means working against the men or women who hired them. Why that means that in at least 81 percent of all chapter 11 proceedings in this country the attorney for the debtor-in-possession has an 'ethical' duty to work to oust his own client from control."

"Almost correct," says Lawyer, but that guy he's ousting isn't his client.

Id. at 782-83.

[FN3]. For an excellent discussion of American bankruptcy laws and their English antecedents, see Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995); CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* (1935). In their earliest form, English Bankruptcy laws were quasi-criminal statutes to protect creditors from debtors.

[FN4]. See, e.g., Robin Phelan & John Penn, *Professional Responsibility and the Bankruptcy Lawyer*, 32 BULL. BUS. L. SEC. ST. B. TEX. 1 (1995) [hereinafter *Professional Responsibility*]; Jay Lawrence Westbrook, *Fees and Inherent Conflicts of Interest*, 1 AM. BANKR. INST. L. REV. 287, 287 (1993) [hereinafter *Inherent Conflicts*] (noting inherent conflicts exist in representation of DIP under Bankruptcy Code); Martin J. Bienenstock, *Conflicts Between Management and the Debtor in Possession's Fiduciary Duties*, 61 U. CIN. L. REV. 543, 543 (1992) (discussing management's conflict of interest in chapter 11) [hereinafter *Fiduciary Duties*]; John D. Ayer, *How to Think About Bankruptcy Ethics*, 60 AM. BANKR. L. J. 355 (1986) [hereinafter *Bankruptcy Ethics*]; Arnold M. Quittner, *Employment and Compensation of Appointed Professionals*, 737 PLI/COM 297 (April-May 1996); Marcia L. Goldstein, et. al., *Ethical Considerations for Bankruptcy Professionals: Disinterestedness, Conflicts of Interest, and Retainers*, C995 ALI-ABA 397 (1995); Adrienne O'Connell McNamara & Carl A. Eklund, *Ethical Quandaries of a Debtor's Lawyer*, 389 PLI/REAL 243 (1994); Lillian E. Kraemer, *Ethical Issues Involving Case Professionals and Other Court-Appointed Parties in Chapter 11 Proceedings*, C946 ALI-ABA 1 (Sept. 29, 1994).

[FN5]. For purposes of this Article, we'll use the term "Debtor" to refer to the individual and/or entity that filed a reorganization bankruptcy (essentially, the management and/or owners of the Debtor). We'll use "Debtor in Possession" or "DIP" to refer to the entity charged with directing the operations of the Bankruptcy Estate. The term "Bankruptcy Estate" (or "Estate") will denote the entity that owns all of the assets included in the definition of "estate" in 11 U.S.C. § 541 (or, where appropriate, § 1306) (1994). And, of course, the "Bankruptcy Code" is found in title 11 of the United States Code.

[FN6]. See Part I of this Article for a brief description of the extent and nature of the Debtor in Possession's fiduciary duty. See also *Fiduciary Duties*, supra note 4, at 543 (noting Supreme Court's observation that officers and managing employees of DIP can be depended on to carry out fiduciary responsibilities); John T. Roache, Note, *The Fiduciary Obligations of a Debtor in Possession*, 1993 U. ILL. L. REV. 133, 133 (1993) (noting Debtor in Possession owes fiduciary obligation to all parties who own interest in Estate) [hereinafter *Fiduciary Obligations*].

[FN7]. Although the bulk of this Article will deal with the duties of counsel for a DIP in a reorganization case or counsel for a bankruptcy trustee, Committee Counsel have also been found to owe fiduciary duties to the

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Bankruptcy Estate in some recent cases. See *In re Bonneville Pacific Corp.*, 196 B.R. 868, 883 (Bankr. D. Utah 1996); *infra* Part II.G.2. We'll discuss the special ethical concerns of Committee Counsel as part of our general discussion of Estate Counsel's fiduciary duties. See *infra* Part II.

[FN8]. In fact, it is with some trepidation that we try to resolve this complicated issue. If Jay Westbrook decided to defer such a discussion to another day, see *Inherent Conflicts*, *supra* note 4, at 290, who are we to broach this subject? (On the other hand, those who know us well also know that we have more than a modicum ofchutzpah.)

[FN9]. See *infra* notes Part II. It's not surprising that bankruptcy scholars can't agree on the nature and scope of these duties. We can't even agree on the purpose(s) of bankruptcy law. See John D. Ayer, *Through Chapter 11 With Gun or Camera, But Probably Not Both*, 72 WASH. U. L.Q. 883 (1994); David A. Lander, *Musings During a Symposium Afternoon*, 72 WASH. U. L.Q. 905 (1994); James W. Bowers, *Rehabilitation, Redistribution or Dissipation: The Evidence for Choosing Among Bankruptcy Hypotheses*, 72 WASH. U. L.Q. 955 (1994).

[FN10]. Bruce Markell and Ronald Mann have both pointed out that what we're suggesting is akin to Justice Brandeis's famous conceptualization of "lawyer for the situation." See E/mail correspondence from Bruce A. Markell to Nancy B. Rapoport 2 (March 28, 1997) [hereinafter Markell Mail] (on file with author); telephone conversation with Ronald J. Mann, March 31, 1997 (notes on file with author). Our solution does have its roots in Brandeis's own finesse. There is a rich literature on "lawyer for the situation." See, e.g., Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445, 1504 (1996); Daniel J. Bussel, *Coalition-Building Through Bankruptcy Creditors' Committees*, 43 UCLA L. REV. 1547, 1619 (1996); Anthony T. Kronman, *The Fault in Legal Ethics*, 100 DICK. L. REV. 489, 498 (1996); Bill Ong Hing, *In the Interest of Racial Harmony: Revisiting the Lawyer's Duty to Work for the Common Good*, 47 STAN. L. REV. 901, 904 (1995); Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 309 (1995); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 801, 862 n.280 (1992); John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741, 743; Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 266 n.48 (1990); David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 721 (1988); Kenneth L. Penegar, *The Five Pillars of Professionalism*, 49 U. PITT. L. REV. 307, 330 (1988); Robert L. Nelson, *Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 506 n.14 (1985); GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 58-68 (1978); Morgan Shipman, *The Need for SEC Rules to Govern the Duties and Civil Liabilities of Attorneys Under the Federal Securities Statute*, 34 OHIO ST. L.J. 231, 237 (1973); John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683, 698-703 (1965).

[FN11]. We all know that the concepts of right and wrong are extremely fluid (especially for lawyers), but in this particular context, we mean that courts have, in these cases, removed dishonest DIPs, sanctioned attorneys who did not faithfully represent the Bankruptcy Estate, and overruled objections where the facts indicated that the DIP and/or the Estate Counsel were not guilty of improper conduct. But see *In re Perez*, 30 F.3d 1209 (9th Cir. 1994), discussed more fully in *infra* notes 297-303 and accompanying text.

[FN12]. Although we share full responsibility for most of the opinions and conclusions in this Article, sometimes we'll want to draw attention to something written by just one of us. We're doing this primarily because one of us (NBR) was so tickled by the other one's (Chip's) story at the beginning of this Article that she wanted to make sure that Chip got full credit for writing that part.

In terms of the stairway (up or down) that these cases have created, we wanted to remind our readers of one of Karl Llewellyn's most famous quotes: "Within the law, I say, therefore, rules guide, but they do not control decision. There is no precedent the judge may not, at his heed, either file down to razor thinness or expand into a

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bludgeon. Why should you expect the ethics of the game to be different from the game itself?" KARL LLEWELLYN, *THE BRAMBLE BUSH* 180 (1930).

[FN13]. *SEC v. Chenery Corp.*, 318 U.S. 80, 85-86 (1943) (Frankfurter, J.).

[FN14]. See, e.g., *Fiduciary Duties*, *supra* note 4, at 543; *Fiduciary Obligations*, *supra* note 6, at 144.

[FN15]. See 11 U.S.C. § 109 (1994) (governing what entities may be Debtors under various chapters of Bankruptcy Code).

[FN16]. See *id.* §§ 701-766.

[FN17]. See *id.* §§ 901-946.

[FN18]. See *id.* §§ 1101-1174.

[FN19]. See *id.* §§ 1201-1231. Chapter 12 is scheduled for repeal on October 1, 1998. See *id.* § 1221.

[FN20]. See 11 U.S.C. §§ 1301-1330.

[FN21]. 1,042,110 petitions were filed in the United States for the fiscal year ending on June 30, 1996. Of these petitions, 712,129 were chapter 7 cases, and 12,859 were chapter 11 cases. The remaining petitions were filed under chapters 9, 12, or 13. ADMIN. OFFICE OF THE U.S. COURTS, reprinted in 29 BCD WEEKLY NEWS & COMMENT A1 (September 10, 1996).

[FN22]. See 11 U.S.C. § 521 (1997); see also *In re Doors and More, Inc.*, 126 B.R. 43 (Bankr. E.D. Mich. 1991) (noting neither Debtor nor Debtor's attorney have any fiduciary obligation to Bankruptcy Estate). There are, however, some fiduciary duties for chapter 7 Debtors' counsel. See *Mapother & Mapother v. Cooper* (*In re Downs*), 103 F.3d 472, 478-79 (6th Cir. 1996) (denying fees to attorney due to intentional concealment of fee arrangement with Debtor and dual representations that were not disclosed to court); *In re Freedom Solar Ctr., Inc.*, 776 F.2d 14, 17 (1st Cir. 1985) (finding only continuing duty of Debtor to be cooperation with trustee); *In re Pine Valley Mach. Inc.*, 172 B.R. 481, 486 (Bankr. D. Mass. 1994) (noting duty of Debtor); *In re Damon*, 40 B.R. 367, 376 (Bankr. S.D.N.Y. 1984) (noting forfeiture of attorney fees is mandated if attorney violates duty as officer of court). These duties generally don't arise in connection with duties to the Bankruptcy Estate, but rather are fiduciary duties owed to the court under 11 U.S.C. § 329. But see *Pine Valley*, 172 B.R. at 486 (stating court's only role is as "look back" review under § 329(b) to determine whether compensation exceeds reasonable value of services).

[FN23]. We will, of course, be discussing the trustee's duties in chapter 7 cases as compared to the DIP's duties in chapter 11. See *infra* note 319 and accompanying text.

[FN24]. For a general discussion of chapter 9 bankruptcy practice, see David S. Kupetz, *Municipal Debt Adjustment under the Bankruptcy Code*, 27 URB. LAW. 531 (1995). The thought of considering the ethical and fiduciary obligations of politicians is truly frightening. Luckily for everyone, Kathleen Clark is an expert in that area. See, e.g., Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer Form Fiduciary Theory*, 1996 U. ILL. L. REV. 57.

[FN25]. See generally H.R. CONF. REP. NO. 99-958, at 48-49 (1986).

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[FN26]. See, e.g., *In re Erickson*, 183 B.R. 189, 193-94 (Bankr. D. Minn. 1995) (discussing fiduciary duty of chapter 12 Debtor in Possession); *In re French*, 139 B.R. 485, 488 (Bankr. D.S.D. 1992) (discussing difference between individual chapter 12 Debtor and chapter 12 DIP).

[FN27]. See *infra* Part I.B.1.

[FN28]. See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355 (1985) (noting obligations of DIPs as trustees); *Gumport v. China Int'l Trust & Inv. (In re Intermagnetics Am., Inc.)*, 926 F.2d 912, 917 (9th Cir. 1991) (stating officers of DIP are officers of court and have fiduciary duties as such); *Ford Motor Credit Co. v. Weaver*, 680 F.2d 451, 461 (6th Cir. 1982) (listing various DIP duties); see also Raymond Nimmer & Richard Feinberg, Chapter 11 Business Governance: Fiduciary Duties, Business Judgment, Trustees and Exclusivity, 6 BANK. DEV. J. 1, 2 (1989) (arguing that attorneys for DIP have fiduciary duty only to client, not to creditors and shareholders whose interests may be adverse to Debtor) [hereinafter Chapter 11 Governance]. But see *St. Angelo v. Sidco (In re Sidco, Inc.)*, 173 B.R. 194, 196 (E.D. Cal. 1994) (discussing fiduciary obligations placed on those who operate business); *infra* note 304 and accompanying text (discussing fiduciary obligations more fully); see also *In re Coin Phones Inc.*, 148 B.R. 391, 394-95 (Bankr. S.D.N.Y. 1992) (finding third party that contracted to manage Bankruptcy Estate's business for DIP did not have fiduciary duty to Bankruptcy Estate).

[FN29]. See *infra* notes 32-52 and accompanying text.

[FN30]. See Fiduciary Obligations, *supra* note 6, at 134-35; Chapter 11 Governance, *supra* note 28, at 8; see also *infra* Part I.B.

[FN31]. See *Darth Vader, STAR WARS* (20th Century Fox 1997) (rerelease).

[FN32]. Although there are two separate and distinct lines of case authority in this area, problems on this issue rarely arise except in the odd case in which there is a serious question as to whether the Bankruptcy Estate can pay all of its creditors. Cf. *infra* notes 48-52, and accompanying text; *In re Central Ice Cream Co.*, 836 F.2d 1068, 1072 n.3 (7th Cir. 1987) (discussing options available to maximize assets for creditors and shareholders).

[FN33]. See e.g., *Yellowhouse Mach. Co. v. Mack (In re Hughes)*, 704 F.2d 820, 822 (5th Cir. 1983) (holding DIP has duties of trustee); *Ford Motor Credit Co. v. Weaver*, 680 F.2d 451, 462 n.8 (6th Cir. 1982) (same); *In re Anchorage Nautical Tours, Inc.*, 145 B.R. 637, 644 (9th Cir. BAP 1992) (same); *In re Tudor Assocs. Ltd. II*, 64 B.R. 656 (E.D.N.C. 1986) (same).

[FN34]. See *Weaver*, 680 F.2d at 461; cf. *In re O.P.M. Leasing Servs., Inc.*, 28 B.R. 740, 760 (Bankr. S.D.N.Y. 1983) (stating Debtor has duty not to give away security without bringing in corresponding value for creditors). For a recent discussion of this line of authority, see Janet M. Meiburger, Directors of Insolvent Corporations Owe Fiduciary Duties to Creditors, *ABI JOURNAL* 38 (May 1996).

[FN35]. See *Second Nat'l Bank of Nazareth v. Marcincin (In re Nadler)*, 8 B.R. 330, 333 (Bankr. E.D. Pa. 1980) (noting bankruptcy trustee and/or DIPs will have fiduciary duties to both secured and unsecured creditors). Some older Bankruptcy Act cases, however, indicate that a DIP's primary duty is to unsecured creditors and that a lesser duty is owed to secured creditors. See, e.g., *In re American Fidelity Corp.*, 28 F. Supp. 462, 471 (S.D. Cal. 1939).

[FN36]. See *Weaver*, 680 F.2d at 462 n.8.

[FN37]. See *id.*

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[FN38]. See, e.g., *Central Ice Cream*, 836 F.2d at 1072 (noting that risk creditors that face in bankruptcy parallels risk outside of bankruptcy process); Erica M. Ryland, Note, *Bracing for the "Failure Boom": Should a Revlon Auction Duty Arise in Chapter 11?*, 90 COLUM. L. REV. 2255 (1990).

[FN39]. See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355 (1985) (stating duty runs to shareholders and creditors); *Gumport v. China Int'l Trust & Inv.* (In re *Intermagetics America, Inc.*), 926 F.2d 912, 917 (9th Cir. 1991) (noting duty owed as "officer of the court"); *National Convenience Stores Inc. v. Shields* (In re *Schepps Food Stores, Inc.*), 160 B.R. 792, 797 (Bankr. S.D. Tex. 1993) (holding duty is owed to Debtor and its shareholders and all of Debtor's creditors); *In re Grabill Corp.*, 113 B.R. 966, 970 (Bankr. N.D. Ill. 1990) (noting duty to both equity interests and creditors).

[FN40]. See, e.g., *Intermagetics*, 926 F.2d at 917 (noting chapter 11 Debtors occupy fiduciary role with respect to contents of Estate); *Continental Illinois Nat'l Bank & Trust Co. v. Wooten* (In re *Evangeline Refining Co.*), 890 F.2d 1312, 1322-23 (5th Cir. 1989) (stating those who perform duties in administration of Bankruptcy Estate are officers of the court); *In re Consupak, Inc.*, 87 B.R. 529, 548 (Bankr. E.D. Ill. 1988) (same).

[FN41]. See *supra* note 39 and accompanying text; see also *In re DN Assocs.*, 144 B.R. 195, 199 (Bankr. D. Me. 1992) (indicating that DIP has fiduciary duties to all constituencies of estate); Harvey R. Miller, *Corporate Governance in Chapter 11: The Fiduciary Relationship Between Directors and Stockholders of Solvent and Insolvent Corporations*, 23 SETON HALL L. REV. 1467, 1485-86 (1993) (discussing DIP's role in chapter 11 to perform all duties of trustee) [hereinafter Miller]; Nancy B. Rapoport, *Seeing the Forest and the Trees: The Proper Role of the Bankruptcy Attorney*, 70 IND. L.J. 783, 807-17 (1995) (noting that DIPs may owe some duties to those who are neither creditors nor owners) [hereinafter Forest].

[FN42]. See, e.g., *C-T of Virginia, Inc. v. Barrett*, 124 B.R. 689, 692 (W.D. Va. 1990) (noting director's duties limited to shareholders); *Simons v. Cogan*, 549 A.2d 300, 304 (Del. 1988) (stating directors owe no special duty to debenture holder). But see *Pittsburgh Terminal Corp. v. Baltimore & O.R.R.*, 680 F.2d 933, 940 (3d Cir. 1982) (finding that when dealing with equity securities, fiduciary duty will exist). *Hartford Fire Ins. Co. v. Federated Dep't Stores*, 723 F. Supp. 976, 991 (S.D.N.Y. 1989) (stating duties to creditors limited to those set forth in debt instrument);

[FN43]. See, e.g., *In re Hargis*, 73 B.R. 622, 626 (Bankr. N.D. Tex. 1987); (stating that the individual used filing of reorganization as a shield from creditors and dismissing proceeding) *rev'd* on other grounds, 887 F.2d 77 (5th Cir. 1989).

[FN44]. For a comprehensive discussion of the relationship between business organizations and their alleged fiduciary duties to creditors, see Bruce A. Markell, *The Folly of Representing Insolvent Corporations: Examining Lawyer Liability and Ethical Issues Involved in Extending Fiduciary Duties to Creditors*, __ J. BANKR. L.&P. __ (forthcoming 1997) [hereinafter Folly].

[FN45]. See *Xonics Med. Sys. v. Haverty*, 99 B.R. 870, 872 (Bankr. N.D. Ill. 1989) (stating that position of trust to creditors is created when corporation becomes insolvent).

[FN46]. See *infra* notes 48-52 and accompanying text. There appear to be two types of "conflicts" in the literature: conflicts between the Debtor/DIP/TIB and a particular creditor or equity interest, and conflicts between the Debtor/DIP/TIB and all creditors or equity interests (or all of the creditors or equity interests, within a single class). We believe that the conflicts get worse the more particular they are, and that conflicts are less of a problem the more group-related or generalized they are.

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[FN47]. 471 U.S. 343 (1985). Donald Board does a marvelous job of discussing Weintraub in Donald P. Board, Retooling "A Bankruptcy Machine That Would Go of Itself," 72 B.U.L. REV. 243, 266-68 (1992) (reviewing DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY (2d ed. 1990) (book review)).

[FN48]. See *id.* at 355; see also *In re Delta Petroleum, Ltd.*, 193 B.R. 99, 110 n.22 (D. P.R. 1996) (finding that "while the Trustee should be commended for looking out for [the creditors'] interests, he seems to have forgotten that a course of action which preserves the debtor's viability while substantially guaranteeing the rights of creditors is preferable. After all, unlike chapter 7 proceedings, chapter 11 proceedings are aimed at preserving the debtor company wherever possible.").

[FN49]. Weintraub, 471 U.S. at 355 (citations omitted).

[FN50]. See *id.*; see also *supra* note 32.

[FN51]. See, e.g., *Manville Corp. v. Equity Sec. Holders Comm.* (*In re Johns-Manville Corp.*), 801 F.2d 60, 65 (2d Cir. 1986) (restricting shareholders' rights if debtor is insolvent); *In re Lifeguard Indus.*, 37 B.R. 3, 16 (Bankr. S.D. Ohio 1983) (same); *Louisiana World Expo v. Federal Ins.* (*In re Parkway Calabasas Ltd.*), 89 B.R. 832, 835-36 (Bankr. C.D. Cal. 1988) (same).

[FN52]. But see Lynn M. LoPucki & William C. Whitford, Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies, 139 U.P.A. L. REV. 125, 143 (1990) (noting only one of many attorneys interviewed, who were all representing equity holders' committees, believed shareholders had right to share in payout) [hereinafter *Equity's Share*].

Bruce Markell has pointed out that there's been a lot of confusion over what the attorney-client privilege does and doesn't cover:

Take the base case. Person walks in; talks to lawyer. Lawyer[] says X has to be disclosed. Person walks out, goes to other lawyer and does not disclose X. Second lawyer files without disclosure. Government finds out[] and prosecutes client for concealment. Can the first lawyer be compelled to testify in the criminal trial on the issue of whether the person/client had the requisite criminal intent[]? Yes. The crime/fraud exception to the attorney[-]client privilege applies.

Markell Mail, *supra* note 10, at 1 (citing 1 COLLIER ON BANKRUPTCY ¶ 7.10[2] [c] (Lawrence P. King ed., 15th ed. rev. 1996)). See *United States v. Ballard*, 779 F.2d 287 (5th Cir.), cert. denied, 475 U.S. 1109 (1986).

[FN53]. See Darth Vader, *THE EMPIRE STRIKES BACK* (20th Century Fox 1997) (rerelease).

[FN54]. See *Fiduciary Obligations*, *supra* note 6, at 133.

[FN55]. See *id.*, at 133-36, 144-150; see also Miller, *supra* note 41, at 1486.

[FN56]. See *Fiduciary Obligations*, *supra* note 6, at 136; see also *Fulton State Bank v. Schipper* (*In re Schipper*), 933 F.2d 513, 515 (7th Cir. 1991) (noting lower court's analogy of DIP's general fiduciary standard to duties of a corporate fiduciary); *In re Bellevue Place Assocs.*, 171 B.R. 615, 623 (Bankr. N.D. Ill. 1994) (same).

[FN57]. See *Fiduciary Obligations*, *supra* note 6, at 136; see also *In re Frankel*, 77 B.R. 401, 404 (Bankr. W.D.N.Y. 1987) (discussing traditional standard of trustee); *Schechter v. Department of Revenue*, (*In re Markos Gumees Partnership*), 182 B.R. 211, 214 (Bankr. N.D. Ill. 1995) (same).

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[FN58]. See, e.g., *Schipper*, 933 F.2d at 515 (finding duty owed by DIP analogous to that of corporate officer to shareholder); *Institutional Continental Airlines v. Continental Airlines* (In re Continental Airlines, Inc.), 780 F.2d 1223, 1226 (5th Cir. 1986) (holding DIP must use sound business judgment); *In re Bellevue Place Assocs.*, 171 B.R. 615, 623 (Bankr. N.D. Ill. 1994) (applying *Schipper* to find duty analogous to that of corporate fiduciary duty); *National Convenience Stores Inc. v. Shields* (In re Schepps Food Stores, Inc.), 160 B.R. 792, 797 (Bankr. S.D. Tex. 1993) (stating that trustee owes certain fiduciary duties similar to director's duties).

[FN59]. See *First Union Nat'l Bank v. Tenn-Fla Partners* (In re Tenn-Fla Partners), 170 B.R. 946, 969 (Bankr. W.D. Tenn. 1994); see also *In re BMW Group I, Ltd.*, 168 B.R. 731, 739 (Bankr. W.D. Okla. 1994); see also *In re Microwave Prod. of Am., Inc.*, 102 B.R. 666, 671 (Bankr. W.D. Tenn. 1989).

[FN60]. See *Schipper*, 109 B.R. at 836; see also *Comm. of Equity Sec. Holders v. Lionel Corp.* (In re Lionel Corp.), 722 F.2d 1063 (2d Cir. 1983); *In re S.N.A. Nut Co.*, 186 B.R. 98, 104 (Bankr. N.D. Ill. 1995); *In re After Six, Inc.*, 154 B.R. 876, 882 (Bankr. E.D. Pa. 1993).

[FN61]. See *Tenn-Fla Partners*, 170 B.R. at 970; *S.N.A. Nut*, 186 B.R. at 104; *In re Forster*, 162 B.R. 478, 483 (Bankr. N.D. Ohio 1993); *In re Heron, Burchette, Ruckert & Rothwell*, 148 B.R. 660, 682 (Bankr. D.C. 1992).

[FN62]. See *Fiduciary Obligations*, supra note 6, at 146-47.

[FN63]. See *id.* at 146-49.

[FN64]. See *Fiduciary Obligations*, supra note 6, at 146-49. Our opinion that there is little difference in how bankruptcy courts apply the "common-law trustee" standard and the "corporate fiduciary" standard should not be taken as criticism of this well-reasoned Note.

[FN65]. Under either line of cases, the DIP is considered to be an officer of the court and, as such, owes fiduciary duties to the court. See, e.g., *Bank v. H & D Entertainment, Inc.*, 926 F. Supp. 226 (D. Mass. 1996); *In re Tudor Associates Ltd. II*, 52 B.R. 385 (D. Minn. 1985); *In re St. Mary's Hosp.*, 155 B.R. 345 (Bankr. E.D. Pa. 1993); see also supra note 41 and accompanying text.

[FN66]. 109 B.R. 832 (Bankr. N.D. Ill. 1989), *aff'd*, 112 B.R. 917 (N.D. Ill. 1990), *aff'd*, 933 F.2d 513 (7th Cir. 1991).

[FN67]. See *id.* at 837 (stating that "[e]ven under the general standard of inherent fairness, which ... applie[s] to transactions involving fiduciaries and the entities to which the fiduciary obligation runs, the debtor's conduct passes muster").

[FN68]. See *Fulton State Bank v. Schipper* (In re Schipper), 112 B.R. 917, 919 (N.D. Ill. 1990), *aff'd*, 933 F.2d 513 (7th Cir. 1991) (stating that "[t]he bankruptcy court clearly held that a fiduciary duty did exist, noted the differences between the fiduciary duty in a bankruptcy case and that in a ... corporate setting, and unequivocally held no breach of any fiduciary duty regardless of which standard applied").

[FN69]. See *Fulton State Bank v. Schipper* (In re Schipper), 933 F.2d 513, 516 (7th Cir. 1991) (noting duties under Code are sufficiently demanding so as to not require "common law trustee" duties).

[FN70]. See *Gumport v. China Int'l Trust and Inv. Corp.* (In re Intermagnetics Am., Inc.), 926 F.2d 912, 917 (9th Cir. 1991) (holding insider dealing to be fraudulent); *In re Microwave Prods. of Am. Inc.*, 102 B.R. 666 (Bankr.

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W.D. Tenn 1989) (holding debtor cannot allow insider dealing to go on without prosecution).

[FN71]. See *First Union Nat'l Bank v. Tenn-Fla Partners* (In re *Tenn-Fla Partners*), 170 B.R. 946, 970 (Bankr. W.D. Tenn. 1994); see also *In re Sal Caruso Cheese, Inc.*, 107 B.R. 808 (Bankr. N.D.N.Y. 1989).

[FN72]. See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355 (1985) (stating "if a debtor remains in possession ... the debtor's directors bear essentially the same fiduciary obligation ... as would the trustee...."); see also *STN Enters. v. Noyes* (In re *STN Enters.*), 73 B.R. 470 (Bankr. D. Vt. 1987).

[FN73]. See, e.g., *Louisiana World Exposition v. Federal Ins. Co.*, 858 F.2d 233 (5th Cir. 1988); *In re Bonneville Pac. Corp.*, 196 B.R. 868 (Bankr. D. Utah 1996).

[FN74]. See, e.g., 11 U.S.C. § 1104 (1994) ("Appointment of a Trustee or Examiner"); id. § 1112 ("Conversion or Dismissal"); see also *Fiduciary Duties*, supra note 4, at 559-567.

[FN75]. Although defined separately for purposes of this Article, no one actually refers to individuals who have filed chapter 13 cases as DIPs. Indeed, in chapter 13 cases, the actual differences between the prepetition Debtor and the DIP are almost negligible.

[FN76]. See infra notes 77-80 and accompanying text.

[FN77]. See 11 U.S.C. § 521 (1994) (stating that "the first duty is to file ... a list of creditors ...; second, the debtor is required to cooperate with the trustee ...; finally, the debtor must surrender to the trustee all property of the estate").

[FN78]. See LUNDIN, CHAPTER 13 BANKRUPTCY § 3.25 (Wiley Law Pub. 2d ed. 1994) [hereinafter LUNDIN].

[FN79]. For a detailed discussion of the requirements of filing a chapter 13 case and obtaining confirmation of a chapter 13 plan, see LUNDIN, supra note 78, passim.

[FN80]. See LUNDIN, supra note 78, at §§ 5.16-5.26.

[FN81]. Compare LUNDIN, supra note 78, at § 3.25 (discussing fiduciary nature of chapter 13 Debtor's role in her case and citing two cases), with id. §§ 5.16-5.26 (discussing chapter 13 DIP's "good faith" requirements and noting over 320 reported decisions on this issue, including more than 30 courts of appeal decisions); see also *In re Harp*, 166 B.R. 740 (Bankr. N.D. Ala. 1993) (addressing differences in duties between individual DIP in chapter 11 case and chapter 13 DIP). But see *In re Oglesby*, 161 B.R. 917 (Bankr. E.D. Pa. 1993) (holding that there is no good faith filing requirement in chapter 13).

[FN82]. See LUNDIN, supra note 78, at § 5.16 for a discussion of the shifting nature of the chapter 13 good faith test.

[FN83]. For an example of how a court of appeals has difficulty in formulating a simple and workable good faith analysis, see *In re Love*, 957 F.2d 1350, 1354 (7th Cir. 1992).

[FN84]. Compare *Society Nat'l Bank v. Barrett* (In re *Barrett*), 964 F.2d 588 (6th Cir. 1992) (affirming confirmation of third chapter 13 case filed by debtors, even in light of their misconduct in earlier cases); *In re*

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LeMaire, 898 F.2d 1346 (8th Cir. 1990) (en banc) (reversing earlier decision that confirmed chapter 13 plan proposing to pay 62% of judgment debt that itself was based on debtor's attempted murder of creditor); In re Farley, 114 B.R. 711 (Bankr. S.D. Cal. 1990) (confirmation of 15% plan discharging drunk driving claim against debtor), with *supra* notes 27-51.

[FN85]. And, to a lesser extent, Committee Counsel. Cf. *infra* note 256 and accompanying text.

[FN86]. In re Harp, 166 B.R. 740, 747 (Bankr. N.D. Ala. 1993) (emphasis added); see also In re Delta Petroleum (P.R.) Ltd., 193 B.R. 99, 111 (D.P.R. 1996); Inherent Conflicts, *supra* note 4, at 303.

[FN87]. See *infra* note 209 and accompanying text. The court in Delta Petroleum makes our point nicely: The situation is more complicated for trustee's counsel. On one hand, the attorney is retained at the trustee's request. On the other, the attorney's client is the estate, not the trustee. According to Model Rule 1.13(a), "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Model Rules of Professional Conduct Rule 1.13(a) (1983). The Model Code provided similar guidance, in stating that "[a] lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity." Model Code of Professional Responsibility EC 5-18 (1981). By analogy, in the bankruptcy setting, trustee's counsel owes a higher fiduciary duty to the estate than to the trustee. Delta Petroleum, 193 B.R. at 111 (citations omitted).

[FN88]. See Nancy B. Rapoport, Turning and Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in Bankruptcy, 26 CONN. L. REV. 913, 917-40 (1994) [hereinafter Turning].

[FN89]. See Bruce A. Green, Conflicts of Interest in Litigation; The Judicial Role, 65 FORDHAM L. REV. 71 (1996); Bankruptcy Ethics, *supra* note 4, at 392-98; Marvin E. Frankel, The Search for Truth: An Empirical View, 123 U. PA. L. REV. 1031 (1975); Monroe Freedman, Judge Frankel's Search for Truth, 123 U. PA. L. REV. 1060 (1975); H. Richard Uviller, The Advocate, the Truth and Judicial Hackles: A Reaction to Judge Frankel's Idea, 123 U. PA. L. REV. 1067 (1975); see also Forest, *supra* note 41, at 789-806.

[FN90]. See *infra* notes 294-95, and accompanying text.

[FN91]. See Bankruptcy Ethics, *supra* note 4, at 392; see also Turning, *supra* note 88, at 940-65.

[FN92]. See Turning, *supra* note 88, at 917-26.

[FN93]. We're willing to bet that we didn't come up with this turn of phrase.

[FN94]. See DeVlieg-Bullard v. Natale (In re DeVlieg, Inc.), 174 B.R. 497 (N.D. Ill. 1994) (counsel filed unauthorized law suit against chapter 11 corporate Debtor's insiders).

[FN95]. See, In re Rusty Jones, Inc., 134 B.R. 321 (Bankr. N.D. Ill. 1991).

[FN96]. Cf. *infra* notes 309-16 and accompanying text (noting that courts lack definition of "Estate" and this causes confusion as to duties of Estate Counsel); see In re Grabill Corp., 113 B.R. 966 (Bankr. N.D. Ill. 1990) (noting counsel for corporation owes duty to corporation and not principals). But see St. Angelo v. Sidco, Inc. (In re Sidco, 173 B.R. 194 (E.D. Cal. 1994) (finding only "weak" authority for finding any fiduciary duty of Estate Counsel to Bankruptcy Estate). Sidco may have been overruled by In re Perez, 30 F.3d 1209 (9th Cir. 1994). See

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discussion of Perez, *infra* notes 297-303 and accompanying text.

[FN97]. See *In re Harp*, 166 B.R. 740 (Bankr. N.D. Ala. 1993) (individual chapter 11); *In re Manguff*, 147 B.R. 875, 879 (Bankr. D.C. Va. 1992) (chapter 7 trustee's counsel also has fiduciary duty to Bankruptcy Estate); *In re Rusty Jones, Inc.*, 134 B.R. 321, 343 (Bankr. N.D. Ill. 1991) (corporate chapter 11); *In re Storms*, 101 B.R. 645, 648 (Bankr. S.D. Cal. 1989) (individual chapter 11).

[FN98]. See *Harp*, 166 B.R. at 748; *In re Consupak, Inc.*, 87 B.R. 529, 548 (Bankr. N.D. Ill. 1988).

[FN99]. See *Consupak*, 87 B.R. at 549.

[FN100]. See *supra* Part I. and accompanying text. As the court noted in *Consupak*:

In evaluating the performance of a trustee's attorney, then, it is necessary to determine the extent of duty to advise a trustee. The lower bounds of that duty are obvious: any attorney must, at a minimum, respond to client requests for legal advice. Because a trustee's attorney also has duties to the estate and to the court, however, the duty to advise requires a more active concern for the interests of the estate and of its beneficiaries, the unsecured creditors.

* * *

A trustee's attorney cannot close his eyes to matters having legal consequences for the estate. Especially where legally adverse facts come to his attention, the attorney for a trustee must take the initiative to inform his client of the need for preventative or corrective action.

Id. at 549.

[FN101]. See *Forest*, *supra* note 41, at 798-801; *In re Whitney Place Partners*, 147 B.R. 619 (Bankr. N.D. Ga. 1992) (noting attorney's fiduciary duties).

[FN102]. See *In re Rivers*, 167 B.R. 288, 300 (Bankr. N.D. Ga. 1994).

[FN103]. See *infra* Part II.B.4.

[FN104]. Or the Debtor's (individual) affairs, for that matter. See *infra* Part II.G.2. (discussing *Bonneville* as case in which Estate Counsel simply didn't adequately investigate).

[FN105]. See *In re Brennan*, 187 B.R. 135, 150 (Bankr. D.N.J. 1995).

[FN106]. See *Knepper v. Skekloff* (*In re Knepper*), 154 B.R. 75 (N.D. Ind. 1993); *In re Whitney Place Partners*, 147 B.R. 619, 621 (Bankr. N.D. Ga. 1993) (discussing that attorney will not be liable for negligence).

[FN107]. See FED. R. BANKR. P. 9011.

[FN108]. See *id.*

[FN109]. See *Mapother & Mapother v. Cooper* (*In re Downs*), 103 F.3d 472, 480 (6th Cir. 1996) (noting attorney's actions were unreasonable but circumstances warranted no imposition of sanction).

[FN110]. See *In re DN Assocs.*, 144 B.R. 195, 201 (Bankr. D. Me. 1992) (stating fee of \$125 per hour for bankruptcy attorney is permissible).

[FN111]. See *In re Whitney Place Partners*, 147 B.R. 619, 622-23 (Bankr. N.D. Ga. 1992) (finding no violation of

BRP 9011 due to lack of experience).

[FN112]. See, e.g., *In re National Liquidators, Inc.*, 182 B.R. 186, 192 (S.D. Ohio 1995) (permitting dual representation for member and committee); *In re Daido Steel Co., Ltd.*, 178 B.R. 129, 132 (N.D. Ohio 1995) (finding it unnecessary to prohibit representation of firm that represented committee and purchaser); *In re Office Prods. of Am., Inc.*, 136 B.R. 983, 989 n.2 (Bankr. W.D. Tex. 1992) (explaining that one of the purposes of full disclosure is to prevent repeat of "sordid chapters" in history of corporate bankruptcy reorganizations); see also S. REP. NO. 95-989, at 40 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 5826.

[FN113]. See *Downs*, 103 F.3d at 472 (6th Cir. 1996); *Neben & Starrett v. Chartwell Fin. Corp.* (*In re Park-Helena Corp.*), 63 F.3d 877, 882 (9th Cir. 1993) (discussing denial of attorney compensation).

[FN114]. See *supra* note 113 ; see also *In re Arlan's Dept. Stores, Inc.*, 615 F.2d 925, 936 (2d Cir. 1979); Robert M. Lawless et al., *A Glimpse at Professional Fees and Other Direct Costs in Small Firm Bankruptcies*, 1994 U. ILL. L. REV. 847-88.

[FN115]. See *In re Wood & Henderson*, 210 U.S. 246, 252 (1908) (stating that court can reduce fees if there is opportunity to contest charges).

[FN116]. See C.R. Bowles, Jr., *The Problem of Retroactive or Nunc Pro Tunc Employment of Professionals in Bankruptcy Cases*, 1996 ANNUAL SURVEY OF BANKRUPTCY LAW 219 (1996) (noting rare cases where counsel may try nunc pro tunc employment application when circumstances permit).

[FN117]. See *In re Bonneville Pac. Corp.*, 196 B.R. 868, 880-81 (Bankr. D. Utah 1996); see also *infra* Part II.G.2.; see also *In re Rogers-Pyatt Shellac Co.*, 51 F.2d 988 (2d Cir. 1931).

[FN118]. See 11 U.S.C. § 329 (1994); see also *Downs*, 103 F.3d at 477; *Park-Helena Corp.*, 63 F.3d at 877.

[FN119]. See *In re Brennan*, 187 B.R. 135, 150 (Bankr. D.N.J. 1995) (stating professionals hired by Debtor in Possession have fiduciary duty to Estate); *In re Rusty Jones, Inc.*, 134 B.R. 321, 343 (Bankr. N.D. Ill. 1991) (discussing attorney's fiduciary duty); *In re Churchfield Management & Inv. Corp.*, 100 B.R. 389 (Bankr. N.D. Ill. 1989) (finding breach of fiduciary duty).

[FN120]. See *supra* note 112.

[FN121]. See *id.*

[FN122]. See Nancy B. Rapoport, *Avoiding Judicial Wrath: The Ten Commandments for Bankruptcy Practitioners*, 5 J. BANKR. L. & P. 615, 619-22 (1996) [hereinafter *Commandments*].

[FN123]. See *infra* notes 190-96, 209-19 and accompanying text.

[FN124]. See *supra* note 112.

[FN125]. See *In re Arlan's Dep't Stores, Inc.*, 615 F.2d 925 (2d Cir. 1979); *In re Burke*, 147 B.R. 787 (Bankr. N.D. Okla. 1992) (chapter 12 case).

[FN126]. See *Arlan's*, 615 F.2d at 925.

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[FN127]. See *id.* at 935.

[FN128]. *Id.*

[FN129]. See *In re Arlan's Dep't Stores, Inc.*, 615 F.2d at 925 (providing an excellent discussion of how not to handle fees and expenses in reorganizations); see also *In re Midwestern Cos.*, 55 B.R. 856 (Bankr. W. D. Mo. 1985) (taking attorney fees without court authorization).

[FN130]. See *Arlan's*, 615 F.2d at 944. *In re Burke*, 147 B.R. 787 (Bankr. N.D. Okla. 1992), tells of a smaller, but far worse, breach of an attorney's fiduciary duty regarding fees. In *Burke*, Estate's Counsel demanded and received payment of a nonrefundable retainer of \$20,000.00. The \$20,000.00 paid by the Debtors represented all of the Estate's cash. This payment left the chapter 12 Debtors with no way to buy feed for their herd of cattle, which was subsequently decimated by starvation. After an overwhelmingly unsuccessful attempt at reorganization, the chapter 12 case was converted to a proceeding under chapter 7, and the trustee filed a motion with the court to review the chapter 12 Estate Counsel's fees and transactions with the Debtor. See *id.* at 794 ("When last heard of by this Court, debtors were living in a state of demoralized squalor."). After a lengthy hearing on the fees, the court leniently allowed Estate Counsel to keep \$10,000.00 of the nonrefundable retainer and required Estate Counsel to turn the remainder over to the trustee. See *id.*

[FN131]. See *Arlan's*, 615 F.2d at 932-33 (failure to disclose pertinent information in application for appointment as Counsel was violation of Counsel's fiduciary duty to court). Cf. *Forest*, *supra* note 41, at 789 (stating that duty as officer of court trumps duty to client).

[FN132]. See *In re Office Prods. of Am., Inc.*, 136 B.R. 983 (Bankr. W.D. Tex. 1992); *In re Davison*, 79 B.R. 859 (Bankr. W.D. Mo. 1987).

[FN133]. *DN Assocs.*, 144 B.R. at 195; *Storms*, 101 B.R. at 645; *Kendavis*, 91 B.R. at 742.

[FN134]. See *In re Reed*, 890 F.2d 104, 105 (8th Cir. 1989).

[FN135]. *Id.*

[FN136]. 136 B.R. 983 (Bankr. W.D. Tex. 1992).

[FN137]. *Id.* at 984-991.

[FN138]. *Id.* at 986-87. The Office Products court also refused to find that the Estate Counsel in this case actually represented the officers and directors of the Debtor, stating that such findings should not be "lightly made." *Id.* at 988.

[FN139]. *DN Assocs.*, 144 B.R. at 220 (Bankr D. Me. 1992), *aff'd*, 160 B.R. 20 (D. Me 1993). The court didn't agree with the applicant's novel argument that, because there was a confirmed plan in place, where Creditor was obliged to pay administrative claims, standards governing compensation by the Estate didn't pertain. See *id.* The applicants were never relieved from their obligation of fidelity to the Debtor in Possession. The context of Casco's plan obligation to pay administrative fees was the context that the Code provides, which authorizes compensation for "necessary and reasonable" expenses and fees based on, among other things, the value of those services. *Id.* at 202 n.28.

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[FN140]. See *In re Brennan*, 187 B.R. 135, 150 (Bankr. D.N.J. 1995) (noting that professionals will be obligated to report Debtor's breach); *In re Rivers*, 167 B.R. 288, 301 (Bankr. N.D. Ga. 1994) (claiming that attorney, as fiduciary of Estate, must further Estate's interest); *In re Barrie Reed Buick-GMC, Inc.*, 164 B.R. 378, 381 (Bankr. S.D. Fla. 1984) (noting the duty of Debtor's counsel to bring breaches of fiduciary to attention of court). See generally *In re Love*, 163 B.R. 164 (Bankr. D. Mont. 1993); *In re Granite Sheet Metal Works, Inc.*, 159 B.R. 840 (Bankr. S.D. Ill. 1993); *In re United Utensils Corp.*, 141 B.R. 306 (Bankr. W.D. Pa. 1992); *In re Wilde Horse Enterprises, Inc.*, 136 B.R. 830 (Bankr. C.D. Cal. 1991); *In re Sky Valley, Inc.*, 135 B.R. 925 (Bankr. N.D. Ga. 1992); *In re Rusty Jones, Inc.*, 134 B.R. 321 (Bankr. N.D. Ill. 1991).

[FN141]. See Bankruptcy Ethics, *supra* note 4, at 355.

[FN142]. We've been unable to find any reported case where Estate Counsel was sanctioned for wrongly disclosing DIP misconduct.

[FN143]. 134 B.R. 321 (Bankr. N.D. Ill. 1991).

[FN144]. See *id.* at 343.

[FN145]. See *id.*

[FN146]. Of course, there is plenty of law regarding the duty of corporate counsel to "rat" on the misconduct of its management. See, e.g., MODEL RULE OF PROFESSIONAL CONDUCT 1.13 (1983) [hereinafter MODEL RULE 1.13]; MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18 (1980); Ellen A. Pansky, *Between an Ethical Rock and a Hard Place: Balancing Duties to the Organizational Client and its Constituents*, 37 S. TEX. L. REV. 1167 (1996); Stanley Pietrusiak, Jr., *Changing the Nature of Corporate Representation: Attorney Liability Aiding and Abetting the Breach of Fiduciary Duty*, 28 ST. MARY'S L.J. 213 (1996).

[FN147]. We haven't found any reported bankruptcy case law discussing how Estate Counsel should inform the bankruptcy court about DIP misconduct. The Estate Counsel could attempt what has become known as "noisy withdrawal," which requires the lawyer not only to withdraw but to disaffirm any documents that he prepared that related to the misconduct. See Hazard, *supra* note 3, at 727-288 (discussing ABA Professional Ethics Formal Opinion 93-366, which expressly permitted lawyer to disavow work to prevent its use by client perpetrating a fraud). In the "real world" of bankruptcy practice, Estate Counsel will actually do this in cases involving serious client misconduct. But is noisy withdrawal sufficient? What if the judge doesn't smile knowingly and sign the withdrawal papers? And what if she asks the horrible "Why?" question? Case law is silent. See *infra* Part IV (discussing our proposed solution).

[FN148]. See *In re Sky Valley, Inc.*, 135 B.R. 925, 937-38 (Bankr. N.D. Ga. 1992) (stating Debtor's attorney has "duty" to inquire about all connections that may reveal adverse interest or render professional "not disinterested" under §§ 327(a) and 101(14)).

[FN149]. See *id.* at 939 (discussing attorney's duty to monitor disposition of assets and to assure rights of creditors are protected).

[FN150]. See *CPY Co. v. Ameriscribe Corp. (In re Chas. P. Young Co.)*, 145 B.R. 131, 136 (Bankr. S.D.N.Y. 1992) (stating transactions with insiders are subject to careful and vigorous scrutiny).

[FN151]. *Agresti v. RosenKranz (In re United Utensils Corp.)*, 141 B.R. 306, 309 (Bankr. W.D. Pa. 1992)

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(holding attorney has responsibility and duty to disclose Debtor's failure to fulfill fiduciary duty); see also *infra* Part II.B.5. (discussing attorney's duty to police DIP).

[FN152]. See *In re Barrie Reed Buick-GMC*, 164 B.R. 378, 381 (Bankr. S.D. Fla 1994) (finding duty to detect DIP's failure to preserve assets of estate).

[FN153]. See *In re Rivers*, 167 B.R. 288, 300 (Bankr. N.D. Ga 1994) (denying compensation for attorney's failure to disclose the DIP's legal incompetency due to his stroke).

[FN154]. See *In re Brennan*, 187 B.R. 135 (Bankr. D. N.J. 1995) (stating, in dicta, which professionals are obligated to report Debtor's conversion of estate property).

[FN155]. See *Vining v. Ward (In re Ward)*, 894 F.2d 771, 776 (5th Cir. 1990) (stating attorney had ethical duty to disclose Debtor's concealment of assets if such concealment was known to attorney). There is at least one state court ethics decision that required even former counsel of the Debtors to disclose this type of fraud. See *Columbus Bar Ass'n v. Wright*, 568 N.E.2d 1218 (1991) (affirming suspension of attorney who failed to disclose his former clients' misrepresentations in their bankruptcy petition).

[FN156]. See *Bankruptcy Ethics*, *supra* note 4, at 388-389 (footnotes omitted) (emphasis in original). Query whether Committee Counsel, acting as an advocate for all unsecured creditors, could take over the "distasteful" actions that Estate Counsel might be reluctant to file. See *infra* notes 328-31 and accompanying text (discussing available tools for monitoring Estate Counsel).

In somewhat disturbing dicta in *In re Whitney Place Partners*, 147 B.R. 619 (Bankr. N.D. Ga. 1992), the Bankruptcy Court for the Northern District of Georgia indicated that Estate Counsel may have breached the "candor" required by its fiduciary duties by not making certain affirmative disclosures concerning the proposed chapter 11 reorganization plans. *Id.* at 621.

However, in the courts' zeal to ensure such integrity, it is possible to overlook a simple, basic fact: no matter who the professionals are, it is the client who makes the ultimate decision as to the positions taken in the matters for which the professionals are employed. Where the same individuals control related parties, those parties will act in concert in their mutual interests. Subject to the fiduciary duty of estate professionals and the Rules of Professional Conduct, attorneys have a duty of loyalty to their clients.

Brennan, 187 B.R. at 150.

The court ultimately refused to sanction Estate Counsel under BRP 9011 due to Counsel's "lack of experience" in chapter 11 practice. *Id.* at 621. We note that there was apparently no disclosure in this case. *Whitney Place*, therefore, can't stand for the horrifying proposition that Estate Counsel must disclose the entire strategy in chapter 11 and chapter 12 proceedings.

[FN157]. See *DeVlieg-Bullard Inc. v. Natale (In re DeVlieg Inc.)*, 174 B.R. 497, 502 (N.D. Ill. 1994) (finding that purpose behind disinterested requirement is not directly related to fees but rather is intended to ensure objective advice). See also *infra* notes 181-91 (discussing *DeVlieg*).

[FN158]. See *In re Love*, 163 B.R. 164 (Bankr. D. Mont. 1993) (disallowing attorneys' fee for failure to disclose previous representation of DIP's partner in previous proceedings); *In re DN Assocs.*, 144 B.R. 195, 199 (Bankr. D. Me 1992) (finding DIP's attorney cannot be compensated for representation of Debtor, Debtor's directors, officers, or shareholders in matters that did not benefit the estate); *Agresti v. RosenKranz (In re United Utensils Corp.)*, 141 B.R. 306, 308 (Bankr. W.D. Pa 1992) (stating attorney employed by corporation owes allegiance to corporate entity, not shareholders, directors, officers, employees, or other related parties); *In re Rusty Jones*, 134 B.R. 321, 343 (Bankr. N.D. Ill 1991) (stating conflict of interest exists when attorney represents DIP and Debtor's

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shareholders); *In re Kendavis Indus. Int'l. Inc.*, 91 B.R. 742, 751 (Bankr. N.D. Tex. 1988) (finding conflict of interest existed when attorney represented Debtor and Debtor affiliates).

[FN159]. See *In re Rivers*, 167 B.R. 301 (Bankr. N.D. Ga. 1994) ("The unique circumstances . . . of a Chapter 11 case place the attorney for the debtor in possession in the unusual position of sometimes owing a higher duty to the estate and bankruptcy court than to his client") (citing *Whitney Place*, 146 B.R. 619, 620-21 (N.D. Ga. 1992)).

[FN160]. See *Barrie Reed Buick-GMC*, 164 B.R. 381, 378 (Bankr. S.D. Fla. 1994) (disallowing accounting fee related to services provided to DIP's operation); *In re Sky Valley, Inc.*, 135 B.R. 925 (Bankr. N.D. Ga. 1992) (denying fees to realtor who provided services to DIP).

[FN161]. See *In re Brennan*, 187 B.R. 135, 150 (Bankr. D. N.J. 1995) (finding individual DIP owes fiduciary duty to estate); *Love*, 163 B.R. at 177 (denying attorney's fee where substantial work had been provided to DIP in his individual capacity).

[FN162]. See *supra* note 158 and accompanying text (discussing confusion as to whom the attorney owes his duty).

[FN163]. 187 B.R. 135.

[FN164]. *Id.* at 150.

[FN165]. See *Rivers*, 167 B.R. at 288; *In re Harp*, 166 B.R. 740, 748 (Bankr. N.D. Ala. 1993) (imposing special duty on attorney for Debtor to ensure that Debtor is complying with Bankruptcy Code); *In re Wilde Horse Enter's, Inc.*, 136 B.R. 830, 840 (Bankr. C.D. Cal. 1991) (requiring attorney to take active role in protecting interests of Estate, beneficiaries, and unsecured creditors); *Sky Valley*, 135 B.R. at 937 (discussing attorneys' ongoing duty to investigate professionals hired by Debtor); *In re Davison*, 79 B.R. 859 (finding that attorney is not liable for Debtor's waste of assets unless attorney takes active role in Debtor's wrongful conduct). But see *In re Derringer*, 132 B.R. 34 (Bankr. N.D. Cal. 1991) (arguing that Debtor's counsel should not be "policeman; rather, that role should be left to creditors' committee").

[FN166]. Professional Responsibility, *supra* note 4, at 23.

[FN167]. *Derringer*, 132 B.R. at 36 (requiring active participation in wrongful conduct by debtor's counsel for liability).

[FN168]. See *Davison*, 79 B.R. at 859.

[FN169]. See *id.* at 861.

[FN170]. *Id.* at 864 (footnotes omitted).

[FN171]. *Id.* (stating that court refuses to endorse, by awarding attorney fees, practices that virtually ensure unsuccessful chapter 11 proceeding).

[FN172]. 135 B.R. 925 (Bankr. N.D. Ga. 1992).

[FN173]. See *id.* at 928

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[FN174]. See id. at 929.

[FN175]. See id.

[FN176]. See id. The court's opinion provided that no compensation be paid without court approval.

[FN177]. Sky Valley, 135 B.R. at 933-34.

[FN178]. See id. at 939-40. The court denied \$19,299 in requested compensation for work on the auction and reduced other fees by \$20,000. Id.

[FN179]. See id at 939.

[FN180]. See, e.g., *In re Wilde Horse Enters., Inc.*, 136 B.R. 830, 838 (Bankr. C.D. Cal 1991) (finding Estate Counsel allowed DIP to attempt to sell Estate's assets to her boyfriend/landlord for below-market value); *In re Harp*, 166 B.R. 740, 744 (Bankr. N.D. Ala. 1993) (finding chapter 11 individual Debtors took postpetition vacation to Netherlands, Antilles, and hosted large pregame brunch for their friends before the 1992 Alabama-Auburn football game).

[FN181]. *DeVlieg-Bullard, Inc. v. Natale (In re DeVlieg, Inc.)*, 174 B.R. 497 (N.D. Ill 1994).

[FN182]. See id. at 497.

[FN183]. See id.

[FN184]. See id. at 503-04.

[FN185]. See id.

[FN186]. *DeVlieg*, 174 B.R. at 499-500.

[FN187]. See id. at 503.

[FN188]. See id. at 499.

[FN189]. See id. at 503.

[FN190]. Id. at 502 n.7 (citations omitted); see also *In re Delta Petroleum (P.R.), Ltd.*, 193 B.R. 99, 110-11 (D. P.R. 1996) (awarding counsel fees to attorney for services rendered to trustee in bankruptcy proceeding even though attorney provided services to Debtor in criminal proceeding because of attorney's inability to withdraw from either case).

[FN191]. See, e.g., *Forest*, supra n.41, at 823-826 (discussing repercussions of lawyers rendering nonlegal advice).

[FN192]. See, e.g., *FDIC v. O'Melveny & Meyers*, 969 F.2d 744 (9th Cir. 1992), rev'd on other grounds, 512 U.S. 79 (1994) (holding attorney has duty to avoid public harm when he discovers his client is engaging in fraud, and attorney has duty to investigate information supplied for inclusion into materials intended for public use).

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[FN193]. See *In re Harp*, 166 B.R. 740, 748 (Bankr. N.D. Ala. 1993).

[FN194]. *Id.* at 746 (discussing challenge of serving needs of debtor when attorney's duty is owed to others).

[FN195]. See *In re Philadelphia Athletic Club, Inc.*, 20 B.R. 328 (E.D. Pa. 1982) (discussing importance of attorneys avoiding any appearance of impropriety in bankruptcy context); *In re Granite Sheet Metal Works, Inc.*, 159 B.R. 840 (Bankr. S.D. Ill. 1993) (stating failure to disclose potential conflicts subjects attorney to risk of court denying compensation pursuant to § 328).

Perhaps the most difficult issues in individual chapter 11 cases are: (1) whether a Chapter 11 Debtor's postpetition income is property of the Estate, see *Harp*, 166 B.R. at 740; *In re Herberman*, 122 B.R. 273 (Bankr. W.D. Tex. 1990); and (2) for what purposes the individual who filed the Chapter 11 may use Estate assets and/or postpetition income. See *In re Duque*, 48 B.R. 965 (S.D. Fla. 1984) (retaining criminal counsel at Estate's expense); *In re Engel*, 190 B.R. 206 (Bankr. D. N.J. 1995) (retaining criminal counsel); *In re Warner*, 141 B.R. 762 (M.D. Fla. 1992) (retaining criminal counsel); *Harp*, 166 B.R. at 740 (personal expenditures). Detailed discussions of these issues are clearly beyond the scope of this Article, but we want to remind Estate Counsel that they must take care not to violate their fiduciary duty to the Estate in these areas. See *id.* 166 B.R. at 740.

[FN196]. See *In re Brennan*, 187 B.R. 135, 151-55 (Bankr. D.N.J. 1995) (allowing retention of Estate Counsel where Counsel's retainer and prepetition claim were paid by Debtor on eve of bankruptcy).

[FN197]. See *In re Central Ice Cream Co.*, 114 B.R. 956, 964 (N.D. Ill. 1989) (holding attorney did not engage in conflict of interest violation by negotiating settlement on behalf of debtor's president); see also *In re Central Ice Cream Co.*, 836 F.2d 1068 (7th Cir. 1987) (finding trustee was entitled to reasonable attorney's fees incurred defending suits by creditors and shareholders).

[FN198]. See *Central Ice Cream*, 59 B.R. 476, 489 (Bankr. N.D. Ill. 1985) (imposing fee sanction upon special counsel for negotiating settlement for debtor while attempting to obtain a release from a principal shareholder in exchange for certain direct payment to the shareholder). This section was later reversed by the 7th Circuit in *In re Central Ice Cream Co.*, 836 F.2d 1068 (7th Cir. 1987).

[FN199]. Cf. *Central Ice Cream*, 59 B.R. 476.

[FN200]. *Mapother & Mapother v. Cooper (In re Downs)*, 103 F.3d 472 (6th Cir. 1996) (stating that bankruptcy courts enjoy inherent power to sanction attorneys for improper behavior); *Futuronics Corp v. Arutt, Nachamie & Benjamin (In re Futuronics Corp.)*, 655 F.2d 463, 469-70 (2d Cir. 1981) cert. denied, 455 U.S. 941 (1982) (finding bankruptcy court had power to deny compensation based upon violation of Bankruptcy Code provision).

[FN201]. See *infra* Part II.F. (discussing third-party and criminal liability).

[FN202]. Disqualification, at least from the Debtor's and the Bankruptcy Estate's point of view, is the most drastic. Fee reduction is probably a more painful sanction to the attorney involved, given that the attorney has expended uncompensated efforts.

[FN203]. See *In re Granite Sheet Metal Works*, 159 B.R. 840, 846-47 (Bankr. S.D. Ill. 1993) (disqualifying attorney for failure to disclose prepetition representation of Debtor in employment application and affidavit); *In re Rusty Jones*, 134 B.R. 321, 341 (Bankr. N.D. Ill. 1991) (stating bankruptcy court can disqualify attorney after retention and before completion of assignment).

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[FN204]. Rusty Jones, 134 B.R. at 347 (refusing to disqualify attorney because of great hardship that would result).

[FN205]. Granite Sheet Metal Works, 159 B.R. at 848 (finding that even, though disqualification after significant services were rendered was a harsh remedy, it was appropriate where attorney's actions reflected allegiance to Debtor's controlling shareholder rather than Debtor). We've noticed that, in most reported cases in this area, Estate Counsel have been relieved of their duties long before the court begins to consider imposing any sanctions.

[FN206]. See 28 U.S.C. § 1927 (1994); see *Knepper v. Skeloff* (In re Knepper), 154 B.R. 75, 79 (N.D. Ill. 1993) (holding bankruptcy courts have sanctions power under § 1927 for unreasonably multiplying proceedings).

[FN207]. See FED. R. BANKR. P. 9011; see *In re Downs*, 103 F.3d 472., 481 (6th Cir. 1996) (stating attorney is subject to sanction under Rule 9011 when motion is filed that is not "well grounded in fact or warranted by existing law or a good faith argument for extension or modification, or reversal of existing law").

[FN208]. See *Downs*, 103 F.3d at 481-82, (affirming bankruptcy court's sanction of chapter 7 Debtor's counsel for violating 11 U.S.C. § 329 and denial of sanctions under Rule 9011).

[FN209]. Well, not to us, really, but to some people, it might be offensive.

[FN210]. See, e.g., *In re Sky Valley, Inc.*, 135 B.R. 925, 937-38 (Bankr. N.D. Ga. 1992) (punishing less than diligent attorney by denying portion of fees); *In re Rusty Jones, Inc.*, 134 B.R. 321, 325 (Bankr. N.D. Ill. 1991) (describing attorney fee application as an "unhappy issue").

[FN211]. See 11 U.S.C. § 330 (1994) (prescribing process of compensating officers).

[FN212]. See *Sky Valley*, 135 B.R. at 925 (denying approximately \$40,000 of \$339,000 in requested fees); *In re Consupak, Inc.*, 87 B.R. 529, 552 (Bankr. N.D. Ill. 1988) (denying \$11,309.50 in fees).

[FN213]. See, e.g., *In re Wilde Horse Enters. Inc.*, 136 B.R. 830, 834 (Bankr. C.D. Cal. 1991) (denying attorney's fee and requiring disgorgement of retainer); *In re Churchfield Management & Inv. Corp.* 100 B.R. 389, 394-95 (Bankr. N.D. Ill. 1989) (noting unethical attorney not entitled to any fees).

[FN214]. 103 F.3d 472 (6th Cir. 1996).

[FN215]. See *id.* at 479-80 (noting failure to fully disclose retainer was "willful disregard" of fiduciary duties imposed by statute). The retainer was paid during a time when the Debtors were attempting to convert their case to a chapter 11 proceeding. The court ultimately denied the motion to convert. See *id.* at 479.

[FN216]. *Downs*, 103 F.3d at 476.

[FN217]. *Id.* at 479; see also *Neben & Starrett, Inc. v. Chartwell Fin. Corp.* (In re Park-Helena Corp.), 63 F.3d 877, 882 (9th Cir. 1995) (holding attorney failure to disclose retainer was willful), cert. denied, 116 S.Ct. 712 (1996).

[FN218]. Heaven forbid. In all seriousness, though, using the sledgehammer of wholesale denial of fees as the sole appropriate remedy undercuts some necessary judicial flexibility.

[FN219]. See, e.g., *In re Office Prods., of Am., Inc.* 136 B.R. 983, 988 (Bankr. W.D. Tex. 1992) (describing that

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under both chapters 7 and 11 reasonable fees may be awarded only for those services "actual, necessary, and/or beneficial to the estate").

[FN220]. See *In re Mangum*, 147 B.R. 875, 880 (Bankr. E.D. Va. 1992) (removing counsel from present case and requiring future filings of petitions to be accompanied by his application to employ counsel).

[FN221]. See *infra* Part II.G.2., and then ask yourself if you would want to be any of the counsel mentioned in *In re Bonneville Pacific Corp.*, 196 B.R. 868 (Bankr. D. Utah 1996).

Judge William T. Bodoh visited NBR's Debtor-Creditor class on March 17, 1997, and concluded his remarks with a story about counsel who had misrepresented the law to him. He emphasized that any counsel who chooses to misstate either the law or the facts to him can count on the fact that he will never--repeat, never--believe that lawyer again. See also Commandments, *supra* note 120, at 619-23.

To beat a dead horse here (and we really mean to do that--this point is important), it's not just the distrust of the individual judge that should worry the practitioner. Individual judges publish opinions, which means that a lawyer's reputation can be tarnished far beyond the jurisdiction of the judge who observed the unethical behavior in the first place.

[FN222]. See *supra* Part I.C.

[FN223]. See *In re Harp*, 166 B.R. 740, 754 (Bankr. N.D. Ala. 1993) (discussing differences between individual chapter 11 case and chapter 13 case).

[FN224]. LUNDIN, *supra* note 78, at §1.86.

[FN225]. See *id.* at §§ 1.86-1.134. For a complete discussion of the ethical obligations of counsel in all consumer bankruptcy cases, see Carol W. Gustavsen, *The Ethical Role of a Debtor's Attorney in a Consumer Bankruptcy Filing*, 6 GEO.J. LEGAL ETHICS 665 (1993). This Article clearly shows that the attorney's primary obligation to chapter 13 debtors is to keep them from defrauding the court either by concealing assets, improper bankruptcy planning, or simply disregarding their duties under the Code. See *id.*

[FN226]. See, e.g., *Cohn v. United States Trustee (In re Ostas)*, 158 B.R. 312, 316 (N.D.N.Y. 1993) (mandating that attorney return certain fees due to failure to disclose); *In re Damon*, 40 B.R. 36, 378 (Bankr. S.D.N.Y. 1984) (precluding all fees where attorney failed to disclose fees to court and committed various ethical violations). The reduced nature of the fiduciary duties of Estate Counsel in a chapter 13 also reflects the reality of Chapter 13 practice: the level of direct supervision that the drafters of the Code might have contemplated is simply impossible, given the economics of the practice:

Chapter 13 can be a deadly combination for lawyers: high speed, low fees, "small" cases, big emotions, complicated legal questions, unsophisticated clients, a judiciary intent on moving cases and impatient with variations and litigation. Substantial rights of debtors and creditors are at issue, but often the time available for an individual debtor or creditor is minimal. Sophisticated things happen very quickly, but the clients tend to be unsophisticated. Getting information from an unsophisticated client is hard work; giving effective instructions to an unsophisticated client is similarly difficult.

The counsel fees in a Chapter 13 case are modest. Creditors' claims are relatively small, and the amount that a creditor is willing to spend to resolve a claim is usually small. Whatever is to be done on behalf of a debtor or creditor must be done quickly and efficiently. Lawyers must get it right the first time because the transaction costs of correcting mistakes may be prohibitive.

LUNDIN, *supra* note 78, at § 1.86.

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[FN227]. See *Vining v. Ward* (In re *Ward*), 894 F.2d 771, 776 (5th Cir. 1990) (noting law firm did not have duty to inform bankruptcy court of existence of judgment because attorneys had not been employed as Estate Counsel); *In re Arlan's Dept. Stores, Inc.*, 615 F.2d 925, 941 (2d Cir. 1979) (stating that attorney seeking fee in bankruptcy matter has fiduciary obligation to court as officer of court); *In re Philadelphia Athletic Club, Inc.*, 20 B.R. 328, 336 (E.D. Pa. 1982) (stating public and bar demand officers of the court and judiciary adhere to highest standards); *In re Consupak, Inc.*, 87 B.R. 529, 548 (Bankr. N.D. Ill. 1988) (noting those performing duties in administration of bankruptcy estate are officers of the court and may be held to fiduciary standards); *In re Damon*, 40 B.R. 367, 376 (Bankr. S.D.N.Y. 1984) (mandating forfeiture of fees if attorney violates duty as officer of the court); see also *supra* note 40 and accompanying text.

[FN228]. 101 U.S. 494 (1879)

[FN229]. *Baker*, 101 U.S. at 502. It would be lovely if lawyers really aspired to behave this way, wouldn't it?

[FN230]. See, e.g., *Arlan's*, 615 F.2d at 925, 937 (refusing to accept that law firms' action was inadvertent); *Damon*, 40 B.R. at 377 (same).

[FN231]. 894 F.2d 771 (5th Cir. 1990).

[FN232]. See *id.* at 776.

[FN233]. See Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don't Get It*, 6 GEO. J. LEGAL ETHICS 701, 721-31 (1993); *Meyerhoffer v. Empire Fire & Marine Ins. Co.*, 497 F.2d 1190, 1195 (2d Cir. 1974) (noting that lawyers must strive to avoid even the appearance of impropriety). Counsel may need to report such crimes to the court in order to permit the court to fulfill its duty, under 18 U.S.C. § 3057, to report to the U.S. Attorney that reasonable grounds exist for believing that a bankruptcy crime has been committed. Only judges, receivers, and trustees have this duty to report. See 18 U.S.C. § 3057 (1994) (governing bankruptcy investigations).

[FN234]. See *supra* Part II.B.4.

[FN235]. It is this ancient duty that is probably, in our humble opinion, the progenitor of the duty to "rat" in bankruptcy cases.

[FN236]. For a much more comprehensive discussion of bankruptcy crimes, see 1 COLLIER ON BANKRUPTCY ¶¶ 7.01-7.1H (Lawrence P. King ed., 15th ed. rev. 1996) [hereinafter *Crimes*]. For a shorter summary, see Ned W. Waxman, *The Bankruptcy Reform Act of 1994*, 11 BANKR. DEV. L.J. 311, 341 (1995).

[FN237]. See 18 U.S.C. §§ 152-157 (1994); see also *Crimes*, *supra* note 236, at ¶ 7.02.

[FN238]. For a view of bankruptcy crimes involving attorneys, see Joan B. Safford, *The Slippery Slope: The Road From Ethical Practice to Attorney Negligence, Contempt or Fraud in Bankruptcy Cases*, 1996 Workshop for Bankruptcy Judges II 277 (1996) [hereinafter *Slippery Slope*]. For a discussion of 18 U.S.C. § 157, see Maureen A. Tighe, *Criminal Bankruptcy Fraud*, 1996 Workshop for Bankruptcy Judges II 297 (1996) [hereinafter *Criminal Fraud*]. 18 U.S.C. § 157 is especially broad, so all attorneys who plan to represent a Debtor or DIP should read it.

[FN239]. See *Slippery Slope*, *supra* note 238, at 282-85. The facts of several unpublished criminal cases scared the heck out of us.

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[FN240]. Not bankruptcy attorneys who represent criminals, but attorneys who are crooks.

[FN241]. See *United States v. Switzer*, 252 F.2d 139 (2d Cir. 1958) (convicting attorney of conspiracy to transfer property illegally); *Coghlan v. United States*, 147 F.2d 233, 235 (8th Cir. 1945) (convicting attorney of making false documents and concealing property of debtors).

[FN242]. See *United States v. Goodstein*, 883 F.2d 1326 (7th Cir. 1989) (convicting attorney who'd had over 40 years of bankruptcy experience).

[FN243]. See *supra* note 226.

[FN244]. For an excellent discussion of issues related to the unusual crime committed when "officers of the court" purchase Estate property (18 U.S.C. § 154), see Bernard Shapiro and Neil Wyland, *Ethical Quandaries of Professionals in Bankruptcy Cases*, 402 PLI/REAL 313, 360 (1994).

[FN245]. 49 F.3d 138 (5th Cir. 1995).

[FN246]. 853 F.2d 568 (7th Cir. 1988).

[FN247]. 16 F.3d 1313 (2d Cir. 1994).

[FN248]. 775 F.2d 612 (5th Cir. 1985).

[FN249]. 943 F.2d 1204 (10th Cir. 1991); see also *Crimes*, *supra* note 239 at ¶ 7.08.

[FN250]. See *United States v. Levine*, 970 F.2d 681 (10th Cir. 1992); *United States v. Brown*, 943 F.2d 1246 (10th Cir. 1991).

[FN251]. See *Levine*, 970 F.2d at 683-684.

[FN252]. See *Brown*, 943 F.2d at 1248-49; see also *Crimes*, *supra* note 239 at ¶ 7.02. Note to all associates in law firms. This case illustrates the sad but true principle that a defense based on a theory of "just following orders" does not work any better in criminal prosecutions of bankruptcy crimes than it does in war crime trials.

[FN253]. See *Zimmerman* 943 F.2d at 1208, 1211 (discussing strength of evidence against Zimmerman).

[FN254]. We believe that the most blatant case of defrauding a bankruptcy estate of its assets is *United States v. Edgar*, 971 F.2d 89 (8th Cir. 1992). In that case, the attorney for the owner of a corporation in a chapter 11 proceeding negotiated the sale of the Debtor's business, drew up the paperwork concerning the transfer of the business, and structured the sale so the assets of the Debtor and the proceeds of the sale paid to the Debtor's owner would be difficult to trace. See *id.* at 91. Needless to say, the bankruptcy court was not informed of the Debtor's president's excellent sales ability until seven months after the completion of the sale. The Court of Appeals for the Eighth Circuit upheld the conviction but remanded the case for resentencing. See *id.* at 96.

The strangest bankruptcy-related crime to result in an attorney's conviction is undoubtedly the crime of circumventing the blind case--draw system of assigning judges to bankruptcy cases. See *United States v. August*, 745 F.2d 400 (6th Cir. 1984). In *August*, the attorney was having an affair with a Bankruptcy Court "intake" clerk. The attorney conspired with the intake clerk to ensure that his cases were not assigned to a bankruptcy judge who was conservative in awarding attorneys' fees. Even though the crime in *August* is unlikely to be repeated, it does

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illustrate that any attempt to manipulate the bankruptcy system in a questionable manner could lead to federal criminal charges. This is especially true given the new Justice Department emphasis on bankruptcy crimes. See *Slippery Slope*, supra note 238, for a general discussion of the "new" attitude toward bankruptcy crimes involving attorneys.

[FN255]. You didn't think that we'd let you off without a Clint Eastwood reference, did you? *THE GOOD, THE BAD, AND THE UGLY* (Metro-Goldwyn-Mayer 1966)).

[FN256]. Cf. *JOHN REED, TEN DAYS THAT SHOOK THE WORLD* (Penguin Books ed., 1966).

[FN257]. 526 So. 2d 1386, 1387 (La. Ct. App. 1988). Please note that neither of us is familiar with Louisiana law, so our terminology may be somewhat imprecise.

[FN258]. See *id.* at 1387.

[FN259]. See *id.* Not surprisingly, given its stellar performance in lending, the bank was taken over by the FDIC during the pendency of this appeal.

[FN260]. See *id.* at 1387-88. The language of the bankruptcy court's order was so specific about what the law firm was supposed to do that it clarified, beyond cavil, the extent of the law firm's fiduciary duty to the Bankruptcy Estate in this case.

[FN261]. See 11 U.S.C. § 363(a)(1994).

[FN262]. See *Louisiana Bank & Trust*, 526 So. 2d at 1388.

[FN263]. See *id.* at 1387.

[FN264]. See *id.*; see also *Agrico Chem. Co. v. E.K. Paintings, Inc.*, 432 So. 2d 253, 255 (La. 1983) (reversing rule of law relied upon by Debtors).

[FN265]. See *Louisiana Bank & Trust*, 526 So. 2d at 1388.

[FN266]. Compare the Louisiana State trial court judge's understanding of this problem with the Ninth Circuit's decision in *In re Perez*, 30 F.3d 1209 (9th Cir. 1994), discussed *infra* notes 297-303.

[FN267]. *Louisiana Bank & Trust*, 526 So. 2d at 1389-90.

[FN268]. *Scheftner v. Foster (In re Derringer)*, 132 B.R. 34 (Bankr. N.D. Cal. 1991).

[FN269]. State law is all over the map when it comes to bootstrapping the duties of a lawyer representing a fiduciary to create a duty of the lawyer directly to the beneficiary. Compare *Arpadi v. First MSP Corp.*, 68 Ohio St. 3d 453, 458 (1994) (attorney for a general partnership owed a fiduciary duty to limited partners of general partnership); *Johnson v. Superior Court*, 38 Cal. App. 4th 463, 477-79 (1995) (same), with *Rose v. Summers, Compton, Wells & Hamburg, P.C.* 887 S.W.2d 683, 686-87 (Mo. Ct. App. 1994) (rejecting Arpadi's reasoning and holding that there was no duty extending from partnership's attorney to individual partners).

[FN270]. See *infra*, notes 298-308 and accompanying text. The better-reasoned cases refrain from blindly applying

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any hard-and-fast rule, preferring instead to consider the totality of the circumstances. See, e.g., *McClure v. Tremaine*, 77 Wash. App. 312 (1995) (holding whether attorney-client relationship exists as a matter of substantive law is to be addressed by tribunal); *Brennan v. Ruffner*, 640 So. 2d 143 (Fla. Dist. Ct. App. 1994) (considering facts as whole as prelude to decision).

[FN271]. *In re Bonneville Pac. Corp.*, 196 B.R. 868 (Bankr. D. Utah 1996); see also *In re Bonneville Pac. Corp.*, 147 B.R. 803 (Bankr. D. Utah 1992) (using authority to disgorge attorney of fees), motion to amend denied, 196 B.R. 868.

[FN272]. *Bonneville*, 196 B.R. 868.

[FN273]. We're not kidding. See *id.* at 870 n.3 (discussing various convictions, indictments, and guilty pleas entered by debtor's officers and directors to numerous federal felony counts).

[FN274]. See *id.* at 874 n.11 (discussing \$30,000,000 Debtor's prebankruptcy counsel paid to Bankruptcy Estate in settlement of Estate's claims against counsel).

[FN275]. See *id.* at 875. Most of the debtor's principals--who later had criminal problems--were managing the DIP postpetition.

[FN276]. See *id.* at 878.

[FN277]. See *Bonneville*, 196 B.R. 868, 871 n.6 (Bankr. D. Utah 1996).

[FN278]. See *id.* at 873.

[FN279]. The hearings included: (1) a lift-stay motion on a questionable asset, (2) a motion by the debtor for an injunction to protect the principals of *Bonneville* from a suit by one of their largest creditors (denied by the bankruptcy court); and (3) a sua sponte appointment by the bankruptcy court of an examiner to investigate numerous charges of wrongdoing alleged by various creditors. *Id.* at 875-77.

[FN280]. See *id.* at 878.

[FN281]. See *Bonneville*, 196 B.R. 887. In fact, Estate Counsel informed the court that he was concentrating on "present tense, . . . not dwelling on historical events which . . . weren't going to change." *Id.* We read this as evidence that Estate Counsel was afraid to investigate his client.

[FN282]. See *id.* at 878.

[FN283]. Even the examiner did not escape the Court's displeasure. See *id.* at 878-81.

[FN284]. Given the advantage of 20/20 hindsight, it's clear that the parties controlling the bankruptcy were merely playing for time. We can't tell, though, whether the Committee Counsel knew of the extent of the fraud at that point.

[FN285]. See *Bonneville*, 196 B.R. at 879.

[FN286]. See *id.*

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[FN287]. One of us is currently serving as a Brownie troop co-leader. That's why we chose this particular version of the well-known phrase. It gets by them.

[FN288]. See *Bonneville*, 196 B.R. at 879.

[FN289]. See *id.* at 881 n.20.

[FN290]. See *In re Bonneville Pac. Corp.*, 147 B.R. 803 (Bankr. D. Utah 1992) (regarding application for interim compensation).

[FN291]. *Id.* at 806.

[FN292]. There is no indication as to why there was a four-year lapse between the entry of the original opinion and the opinion on reconsideration.

[FN293]. See *In re Bonneville Pac. Corp.*, 196 B.R. 868, 868 (Bankr. D. Utah 1996).

[FN294]. See *id.* at 882.

[FN295]. See *id.* at 883. Although the court clearly stated that its findings as to the former Committee Counsel were mere dicta, we doubt that they'd get much from a fee request in the future. See *id.*

[FN296]. We have some sympathy for Committee Counsel, but it appears that the language of the opinion and sanctions were justified as to the Estate Counsel. Other courts have also been wary of the relationship between Estate Counsel and Committee Counsel. See, e.g., *Pierson & Gaylen v. Creel & Atwood (In re Consol. Bankshares, Inc.)*, 785 F.2d 1249 (5th Cir. 1986):

Too frequently, court-appointed counsel for debtor and the official creditor committees' interests in a case, sharing the mutual goal of securing approval for their fees, enter into a conspiracy of silence with regard to contesting each other's fee applications. (One bankruptcy judge characterized this process as a "massive backscratching exercise.") This is a violation of their duties as fiduciaries not only to their specific clients but to the interests of the debtor's estate.

Id. at 1255 (citing *In re Arlan's Dept. Stores*, 615 F.2d 925, 941 (2d Cir. 1979)).

[FN297]. *Everett v. Perez (In re Perez)*, 30 F.3d 1209 (9th Cir. 1994).

[FN298]. *Id.* at 1215. For other cases linking corporate counsel's duty to third parties, see *Willner's Fuel Distribs. Inc. v. Noreen*, 882 P.2d 399, 406 (Alaska 1994) (noting corporate counsel owes fiduciary duty to creditors). But cf. *Skarbrevik v. Cohen, England & Whitfield*, 231 Cal. App. 3d 692, 700- 04 (1991) (stating no such duty to individual shareholders).

[FN299]. See *Perez*, 30 F.3d at 1218; cf. *CASABLANCA* (Warner Bros. 1943) (in which Claude Rains's character exclaims something on the order of: "I'm shocked, shocked, that gambling is going on here.")

[FN300]. See *Perez*, 30 F.3d at 1218. The authors are puzzled by the court's implication that this type of behavior is somehow different from that usually attributed to wealthy parties in non-bankruptcy cases.

[FN301]. *Id.* at 1219 (emphasis added).

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[FN302]. Of course, the Perez majority isn't alone in its confusion. See *In re Bonneville Pac. Corp.*, 196 B.R. 868, 883 (Bankr. D. Utah 1996) (perpetuating bootstrapping of the duty of counsel to DIP--now a "fiduciary duty to the estate"--to DIP's own fiduciary duty to estate). At least the court in *In re Brennan*, 187 B.R. 135, 149-50 (Bankr. D.N.J. 1995), recognized that it was bootstrapping: "[T]he fiduciary duty of the debtor's professionals is derivative of the debtor's fiduciary duty." *Id.* at 149-50. Perez didn't involve unconscionable attorney conduct but, unlike Brennan, Perez is a problem for the average bankruptcy practitioner. The estate counsel in Perez wasn't trying to destroy the estate in a "scorched earth" war as in *In re Kendavis Indus. Int'l, Inc.*, 91 B.R. 742 (Bankr. N.D. Tex. 1988), and wasn't manipulating a mentally impaired Debtor-attorney as in *In re Rivers*, 167 B.R. 288 (Bankr. N.D. Ga. 1994). Here, Debtor's counsel attempted, with some success, to get confirmation of an individual's chapter 11 plan that paid 100% on the claims of all creditors, even though it didn't pay interest on the claims. Unless Mr. Perez was hopelessly solvent (i.e., "rich"), this strategy hardly smacks of bad faith or unfair dealings. If counsel's conduct in Perez is sanctionable or otherwise improper, then it is almost impossible for Estate Counsel to ethically fulfill its duties in a chapter 11 or chapter 12 case other than by filing plans that call for payments in full with interest to all creditors.

[FN303]. See Perez, 30 F.3d at 1218-19.

[FN304]. *St. Angelo v. Sidco, Inc. (In re Sidco, Inc.)*, 173 B.R. 194 (E.D. Cal. 1994) (affirming bankruptcy judge's holding that "the notion of a duty by debtor-in-possession's counsel to the debtor-in-possession's creditors [was] a 'flight into the absurd'"). As the district court in Sidco explained:

[T]he authorities cited by appellant to create a fiduciary duty of counsel to the estate [are] very weak. These nonbinding cases speak of the attorney's fiduciary duty to the estate in unusual contexts, and not as a general principle. These cases do not overthrow [the bankruptcy judge's] basic tenet that attorneys for debtors-in-possession have a fiduciary duty to their client, the debtor-in-possession, not to the creditors and shareholders whose interests may be adverse to the debtor. In fact, 11 U.S.C. § 327 guards against concurrent representation of both the creditor and a debtor-in-possession.

* * *

Furthermore, it is the debtor-in-possession who ultimately manages the creditors' and shareholders' interests, while the attorney only advises the debtor. The debtor-in-possession, not the attorney, acts as the trustee to the estate. *Id.* at 196-97 (emphasis added) (citations omitted). The bankruptcy judge in Sidco also wryly observed that, because any attorney for the DIP was likely to be carrying out the wishes of the DIP's 90% owner, any lawyer for the DIP would be as good as any other, and the only way to avoid that type of owner control would be to appoint a trustee instead of permitting the Debtor to remain in possession. See *id.* at 195.

[FN305]. See Turning, *supra* note 88, at 927 (defining "official entities" to include Debtors, creditors' committees, and parties that are paid by Estate funds).

[FN306]. See Forest, *supra* note 41, at 789-906 (discussing various possibilities of how much lawyer can advise her client on extra-legal issues); *In re Consupak, Inc.*, 87 B.R. 529, 550-51 (Bankr. N.D. Ill. 1988) (discussing whether attorney must volunteer legal advice or must simply wait for client to ask for her opinion) (emphasis added).

[FN307]. See Forest, *supra* note 41, at 789; see also discussion of Arlan's, *supra* note 126-31 and accompanying text. In addition, lawyers are subject to ethical rules that imply a duty to the court. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983) (stating that lawyer must disclose, to tribunal, criminal or fraudulent acts).

[FN308]. The theory behind NBR's "tie-breaker" is that making the duty to the court superior to the duty to the

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client would best preserve the integrity of the entire system. See *Forest*, supra note 41, at 789.

[FN309]. Compare *In re Grabill Corp.*, 113 B.R. 966, 970 (Bankr. N.D. Ill. 1990) (explaining that "[c]hapter 11 debtor in possession administers the assets of the estate and any business conducted therein as a fiduciary for both the equity interests and the creditors[;] . . . [c]ounsel for a Chapter 11 debtor owes a fiduciary duty to the corporation or partnership as an entity, and represents its interests, not those of its principals."); with *In re Harp*, 166 B.R. 740, 746-47 (Bankr. N.D. Ala. 1993) (noting fiduciary responsibilities of DIP require DIP to ensure that resources benefit "the unsecured creditors and other parties in interest.") (emphasis added).

[FN310]. We're using "Estate constituents" to mean parties with an interest in the outcome of the case (e.g., parties in interest under 11 U.S.C. § 1109(b) (1994)) as well as those with outlying interests, such as employees. Cf. Karen Gross, *Taking Community Interests Into Account in Bankruptcy: An Essay*, 72 WASH. U. L.Q. 1031 (1994); Elizabeth Warren, *Bankruptcy Policy*, 54 U.CHL. L. REV. 775 (1987); Douglas G. Baird, *Loss Distribution, Forum Shopping and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 815 (1987) ("On what in my view is a different front, Warren and I also think existing laws do not adequately protect many, such as workers who are affected when a firm fails."). But see, e.g., Hon. Barry S. Schermer, *Response to Professor Gross: Taking the Interests of the Community Into Account in Bankruptcy--A Modern-Day Tale of Belling the Cat*, 72 WASH. U. L.Q. 1031 (1994).

[FN311]. See *Turning*, supra note 88, at 919 (parties in interest may change allegiance several times during case).

[FN312]. See, e.g., *Mapother & Mapother v. Cooper (In re Downs)*, 103 F.3d 472, 479 (6th Cir. 1996) (discussing possible sanctions for attorney's breach of "his fiduciary obligations to the court") (quoting *Futuronics Corp. v. Arutt, Nachamie & Benjamin (In re Futuronics Corp.)*, 655 F.2d 463, 471 (2d Cir. 1981)).

[FN313]. See *Knepper v. Skekloff (In re Knepper)*, 154 B.R. 75, 78-79 (N.D. Ind. 1993) (denying fees to DIP's counsel on the grounds that DIP's counsel should have recognized that reorganization was impossible and thus should have converted case to one under chapter 7); see also *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1219 (9th Cir. 1994) (stating "[c]ounsel for the estate must keep firmly in mind that his client is the estate and not the debtor individually"). Perez reflects the consistent cognitive leap that courts make when they discuss counsel's "independent responsibility to determine whether a proposed course of action is likely to benefit the estate or will merely cause delay or produce some other procedural advantage to the debtor." *Id.* at 1219. Until we know which interests comprise the interests of the Estate, Judge Kozinski's majority opinion sheds no light on these duties. Cf. Jonathan M. Landers & Kathryn A. Coleman, *Unexpected Allies: The Bankruptcy Judge and Debtor's Counsel*, 112 BANKING L.J. 997, 1002-03 (1995) (noting that Perez and others hold Debtor as fiduciary to creditors, but "[t]he interests of different creditor constituencies are vastly different...[y]et the debtor has an obligation to maximize the overall return to creditors on a more or less utilitarian principle--that is, the greatest good for the greatest number.").

[FN314]. See *In re Wilde Horse Enters., Inc.*, 136 B.R. 830, 840 (Bankr. C.D. Cal. 1991) (stating that "[b]ecause the attorney for the debtor in possession is a fiduciary of the estate and an officer of the Court, the duty to advise the client goes beyond responding to the client's request for advice.... [and the] attorney has the duty to remind the debtor in possession, and its principals, of its duties under the Code, and to assist the debtor in fulfilling those duties."); see also *In re Sky Valley, Inc.*, 135 B.R. 925, 929 (Bankr. N.D. Ga. 1992) ("Debtor's attorney's duty as fiduciary of the estate requires an active concern for the interests of the estate and its beneficiaries.") (citing *In re Consupak, Inc.*, 87 B.R. 529 (Bankr. M.D. Ill. 1988), *In re Whitney Place Partners*, 147 B.R. 619, 620 (Bankr. N.D. Ga. 1992) ("The attorney for the debtor in possession is also a fiduciary to the estate.") (citing *In re Doors & More, Inc.*, 126 B.R. 43 (Bankr. E.D. Mich. 1991)); *In re Adam Furniture Indus., Inc.*, 158 B.R. 291, 301 (Bankr.

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S.D. Ga. 1993) ("Even though the law firm acts as attorney for the debtor in possession, it also has certain fiduciary duties to the estate, including insuring that the rights of the creditors are protected.")

In re Doors & More has the misfortune of perpetually being miscited by sloppy judicial clerks. In fact, In re Doors & More states the basic principles correctly, observing that the Estate encompasses the interests of creditors and shareholders. In re Doors & More, Inc., 126 B.R. 43, 46 (Bankr. E.D. Mich. 1991) (citing *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985)). It also correctly observes that Estate Counsel is a fiduciary for the Estate. *Id.* (citing *Shaw & Levine v. Gulf & W. Indus., Inc.* (In re Bohack Corp.), 607 F.2d 258 (2d Cir. 1979) and *In re Consupak, Inc.*, 87 B.R. 529, 548-49 (Bankr. N.D. Ill. 1988)). What In re Doors & More avoids (but what some judicial clerks have misconstrued) is the transitive reasoning linking the Estate Counsel's fiduciary duty to its client (the Estate) with any duty to particular interests related to the Estate. It's unfortunate that this mistake in citing has been perpetuated by those who haven't read Doors & More. On the other hand, those mistakes have enabled us to write this Article.

Let's discuss some courts who have tried, at least, to "get it right." The bankruptcy court in In re Rivers, 167 B.R. 288 (Bankr. N.D. Ga. 1994), attempted to spell out the concept of the DIP's attorney's fiduciary duty to the Estate:

The role of a court-approved professional employed in a bankruptcy case is to "advise" and "assist" the fiduciary. The professional's duties run not merely to the person or persons holding the office of the fiduciary but to the trust to which the fiduciary owes allegiance. Thus in a Chapter 11 case, an attorney for a debtor in possession must balance a role as counselor to the debtor with the role of officer of the court and fiduciary to the bankruptcy estate. When the interests of the former conflict with those of the latter, it is the estate and the court to which the attorney owes his highest allegiance.

Id. at 301. The Brennan court's view on the scope of the fiduciary duties of the DIP's counsel is different: "The fiduciary duty of the debtor's professionals is essentially to assist the debtor in fulfilling his fiduciary duty and to take action if the debtor fails to do so in a manner which is detrimental to the estate." In re Brennan, 187 B.R. 135, 150 (Bankr. D.N.J. 1995).

The analytical misstep of Wilde Horse and cases similar to it stems from superimposing the duty of the DIP (which is a fiduciary of the Estate) to the duty of the DIP's counsel to represent the DIP in all of its fiduciary splendor. We believe that these courts are confusing the counsel's legitimate duty as officer of the court with the DIP's fiduciary duty to the Estate. Such a cognitive leap in terms of duties puts too much pressure on the DIP's counsel and creates infinite loops of conflict. Still, there are those who insist on such a scenario:

A Chapter 11 debtor in possession acts in a fiduciary capacity for the benefit of creditors and other parties in interest. Counsel for the debtor in possession, therefore, not only has an obligation to the debtor, but also has an obligation to the debtor's creditors as well. It may be difficult for counsel to satisfy these two roles in a small business case.... [But] counsel is responsible for seeing that the requirements and obligations imposed on the debtor in possession by the Code, Rules, and bankruptcy courts are strictly observed. Failure of counsel to fulfill that obligation can have severe repercussions.

Hon. A. Thomas Small, *Small Business Bankruptcy Cases*, 1 AM. BANKR. INST. L. REV. 305, 326-27 (1993) (citations omitted and emphasis added). If Judge Small can write so forebodingly about the precarious position of DIP's counsel, how likely is it that firms will continue to be willing to represent DIPs in the future? See Folly, *supra* note 44.

[FN315]. See *St. Angelo v. Sidco, Inc.* (In re Sidco, Inc.), 173 B.R. 194, 196 (E.D. Cal. 1994) (rejecting overall theory of DIP's counsel's duty to estate in favor of DIP's counsel's fiduciary duty to DIP itself, and approving bankruptcy judge's "basic tenet that attorneys for debtors-in-possession have a fiduciary duty to their client, the debtor-in-possession, not to the creditors and shareholders whose interests may be adverse to the debtor"). For a more thorough discussion of the status of Sidco in the Ninth Circuit today, see *supra* note 288 and accompanying text.

[FN316]. How can Estate Counsel give legal advice in the best interests of the Estate if we can't pinpoint what the

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Estate is?

[FN318]. See *Inherent Conflicts*, supra note 4, at 288 (discussing superior talents of Debtor's counsel and how dangerous it would be to lose talented lawyers to justified fear of lawsuits), Folly, supra note 44 (questioning whether ethical and rational lawyers would ever want to represent insolvent corporations).

As usual, Jack Ayer puts it succinctly and accurately:

"We" (meaning: the sovereign, the polity, the system) haven't really made up our mind how far the trustee/DIP should be able to go in protecting the debtor, at the creditors' expense. It would be possible to design a system of bankruptcy that served the interest of creditors only. Up to now, we have been unwilling to go that far. But we seem to have a bit of a bad conscience about it. We'll let the debtor go a ways, but not too far. And we have a way of changing the rules from case to case--sometimes even mid-case.

Brenda Hacker Osborne, Note, *Attorneys' Fees in Chapter 11 Reorganizations: A Case for Modified Procedures*, 69 IND. L.J. 581, 589 (1994) [hereinafter Osborne] (quoting John D. Ayer, *Professional Responsibility in Bankruptcy Cases*, in *BANKRUPTCY ETHICS REVISITED* 2-5 to 2-6 (1992)). For an interesting comparison of the "broad fiduciary duty" and the "no fiduciary duty" views, see Stephen McJohn, *Claims & Opinions: Person or Property? On the Legal Nature of the Bankruptcy Estate*, 10 BANKR. DEV. J. 465, 506-11 n.211 (1994) (citing, as support for the "no fiduciary duty" approach, Thomas G. Kelch, *The Phantom Fiduciary: The Debtor in Possession in Chapter 11*, 38 WAYNE L. REV. 1323 (1992), and citing, for the "broad fiduciary duty" approach, John T. Roache, Note, *The Fiduciary Obligations of a Debtor in Possession*, 1993 U. ILL. L. REV. 133 (1993)).

[FN319]. See Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669, 680-83 (1993) [hereinafter *Corporate Governance*] (noting in large reorganizations creditors and shareholders are parties in interest); *Equity's Share*, supra note 52, at 143 (noting other interests besides creditors share in distribution); Osborne, supra note 318, at 589 n.49 (one of many manuscripts citing LoPucki & Whitford for the proposition that shareholders also have interest in estate). Osborne observes that:

Many cases...[state] that the DIP's role in bankruptcy is to maximize the value of the estate for the benefit of creditors.... The DIP does have a duty to [do so,] but this does not mean that creditors must be served to the detriment of equity. No courts have held that the DIP must select a mode of maximization that harms equity in order to satisfy creditors faster, when another alternative exists which serves creditors' as well as equity's interests.

Id. at 588 n.47 (emphasis added and citations omitted). But see *In re Perez*, 30 F.3d 1209 (9th Cir. 1994), discussed in more detail supra at notes 297-303 and accompanying text.

Jay Westbrook's thoughtful piece on special conflicts issues for the DIP focused on the DIP's "conflicting obligations" to its creditors and, possibly, its owners. See *Inherent Conflicts*, supra note 4, at 289-90. "The Bankruptcy Code never specifies to whom the trustee owes duties, except perhaps in its references to 'parties in interest,' an undefined term. If the DIP represents owners, along with creditors, then it has an inherent and recurring conflict of interest, one that its attorneys must inevitably share." *Id.* at 290 (footnotes omitted).

In *Inherent Conflicts*, Westbrook discusses three cases--*Diamond Lumber, Inc. v. Unsecured Creditors' Committee of Diamond Lumber, Inc.*, 88 B.R. 773 (N.D. Tex. 1988), *In re Kendavis Indus. Int'l, Inc.*, 91 B.R. 742 (Bankr. N.D. Tex. 1988), and *In re Chapel Gate Apts., Ltd.*, 64 B.R. 569 (Bankr. N.D. Tex. 1986)--that add support for the proposition that creditors' interests are paramount in a bankruptcy case. See *Inherent Conflicts*, supra note 4 at 290 & n.10. The structure of the argument bootstraps the duty that the DIP might owe to creditors and creates a duty of the DIP's attorney to those selfsame creditors. *Id.* at 290-91 & note 14 (discussing the debate, and citing LoPucki & Whitford, *Equity's Share*, supra note 52, about whether an insolvent DIP owes a duty to the owners or only to the creditors). But Westbrook correctly rejects this simple analysis:

Indeed, for that reason a decision that DIPs should regard only the interests of creditors by no means resolves the problem of inherent conflict for the DIP and its counsel. But the existence of cramdown does highlight the statutory

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role of the debtor, just as the provisions relating to interest holders demonstrate that owners have legitimate interests in Chapter 11 proceedings.

Inherent Conflicts, *supra* note 4, at 293 n.23 (citing to 11 U.S.C. §§ 1129(a)(7), (b)(2)(c) (1994)).

[FN320]. Corporate Governance, *supra* note 319, at 709-10. In a valiant attempt to clarify the muddled law in this area, they explain:

[T]he cases are unclear as to whom management "owes" fiduciary duties. Most authorities agree that once insolvency intervenes, creditors can sue for breach of fiduciary duties by directors and officers. There is considerable wisdom in this point of view. Once insolvency intervenes, it is creditors who will bear the bulk of the company's losses, so they should be able to initiate legal action when losses result from inappropriate management behavior. The case for a fiduciary duty to creditors is especially strong in bankruptcy, where creditors' contractual rights are suspended by the automatic stay. There is a growing number of statements, however, that post-insolvency fiduciary duties run only to creditors. If that were an accepted statement of current law, it would be possible to argue that when a conflict of interest arises between creditors and shareholders, management of an insolvent corporation has a legal obligation to serve the creditors' interests.

We do not believe, however, that these statements should be viewed as establishing current law. First, contrary statements appear in both the cases and the law reviews. Second, the view that managers of insolvent companies owe fiduciary duties only to creditors fails to recognize the very real interest that shareholders can have in the management of those companies. For many insolvent companies a substantial possibility exists for a return to solvency prior to the confirmation of the plan. Even if the company never returned to solvency, shareholders might be able to win a share of the distribution under the plan. If the value of those possibilities is reduced by the wrongful acts of management, shareholders should have a remedy.

Id. at 707-09. In fact, LoPucki and Whitford concluded that "management does not consistently favor or represent either creditor or shareholder interests [and] the alignment of management is clearly a function of solvency." *Id.* at 745. According to their study, managers of solvent companies didn't tend to align with creditors, but managers of insolvent companies tended to align more with creditors than with shareholders. *Id.* at 745-46.

[FN321]. See, e.g., *Dwyer v. Jones (In re Tri-State Paving Inc.)*, 32 B.R. 2 (Bankr. W.D. Pa. 1982) (involving managements use of Estate funds to gamble in Las Vegas); Corporate Governance, *supra* note 319, at 683 ("Senior interests are often in sharp conflict with juniors as to the level of risk an insolvent company should accept in its investment policy."). Not surprisingly, junior interests are much less risk-adverse than are senior interests. See *id.* at 684-86. Risk-tolerance, thus, may disproportionately harm creditors in favor of shareholders. See *id.* at 768-69. For this reason, LoPucki and Whitford suggested transfers of wealth in the form of "risk compensation payments." See Lynn M. LoPucki and William C. Whitford, *Compensating Unsecured Creditors for Extraordinary Bankruptcy Reorganization Risks*, 72 WASH. U. L.Q. 1133 (1994). But see Charles W. Mooney, Jr., *Hosing Down Senior Claims With a Quicker and Dirtier Chapter 11*, 72 WASH. U. L.Q. 1133 (1994); see also Lynn M. LoPucki & William C. Whitford, *Compensating Unsecured Creditors for Extraordinary Bankruptcy Reorganization Risks*, 72 WASH. U. L.Q. 1133 (1995). But see Charles W. Mooney, Jr., *Hosing Down Senior Claims With a Quicker and Dirtier Chapter 11*, 72 WASH. U. L.Q. 1153 (1994). Those who were more willing to have management engage in riskier decisions would pay those affected by any downside from the risk. Corporate Governance, *supra* note 319, at 788-800. We'll have to set aside for now this intriguing Coasian possibility, as our inquiry in this Article is different from their focus. What we do draw from LoPucki and Whitford is that we can't simply say that the DIP owes its duty merely to the creditors. The LoPucki and Whitford studies have done a marvelous job of dispelling that simplistic notion. See also *In re Grabill Corp.*, 113 B.R. 966, 970 (Bankr. N.D. Ill. 1990) ("A Chapter 11 debtor-in-possession administers the assets of the estate and any business conducted therein, as a fiduciary for both the equity interests and the creditors.")

For other good descriptions of the relationship between risk-tolerance and insolvency, see, e.g., Barry E. Adler, *Bankruptcy and Risk Allocation*, 77 CORNELL L. REV. 439 (1992); Elizabeth Warren, *Bankruptcy Policymaking*

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in an Imperfect World, 92 MICH. L. REV. 336, 357-59 (1993).

NBR's personal, Jiminy Cricket-type approach to risk tolerance as it applies to fiduciaries is that everyone is underemphasizing how a voluntary fiduciary will behave towards its beneficiary. Of course, everyone has his own personal interests that will pose at least potential conflicts with the interests of the beneficiary itself. Cf. Inherent Conflicts, supra note 4 (discussing compensation as example of conflicts between attorneys own interests and interests of client). Voluntary fiduciaries, by definition, understand that they are obligated to put the interests of their beneficiaries first. They agree to that. And, for the most part, they abide by it. It's those few bad actors who make being a voluntary fiduciary seem difficult.

[FN322]. See generally Geoffrey C. Hazard, Jr., Triangular Lawyer Relationships: An Exploratory Analysis, 1 GEO. J. LEGAL ETHICS 15 (1987) (examining "the nature of a lawyer's responsibilities where the lawyer's client has a special legal relationship with another party that modifies the lawyer's 'normal' professional responsibilities.") [hereinafter Triangular Relationships]. A special thanks goes to Ray Warner for pointing us in this direction.

[FN323]. See id. at 15-16.

[FN324]. See id. at 16.

[FN325]. See id. at 21-26 (defining three possible relationships lawyer may have).

[FN326]. See id. at 26-31 (finding established three-tiered conceptual system inadequate where traditionally disparate relationships overlap, thereby giving rise to "very serious practical and conceptual difficulties").

[FN327]. See Triangular Relationships supra note 322, at 30 (finding established conceptual system rendered simplistic by "complex interdependencies in the lawyer-->guardian-->ward and lawyer-->corporation<--corporate officer situations").

[FN328]. See id. at 40-41 (emphasis in original and footnotes omitted).

[FN329]. See id. at 41.

[FN330]. Bruce Markell has suggested that Hazard's triangulation theory can't work here because the "triangle" is actually more of a "pentagon": "The lawyer (1) represents the DIP (2), but is hired by the DIP's management (3), which itself dut[i]es to the DIP's equity holders (4) and likely the DIP's creditors (5)." Markell Mail, supra note 10, at 2. We could try to sketch this concept as:

Court --> Lawyer --> Estate <-- DIP <-- DIP's management

Creditors

Shareholders

It's clear that this sketch doesn't clarify matters much, but it's more accurate than a simple triangle. Still, Hazard's triangulation theory gives us a good starting point.

[FN331]. See supra II.G.

[FN332]. See supra note 310 and accompanying text (discussing need for definitions to be used on day-to-day basis).

[FN333]. Another way to say the same thing is: Estate Counsel represents the DIP, which is the entity running the Estate. Because the Estate itself can't hire attorneys or give orders (the Estate is a concept, not a real physical

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being), the "management" of the Estate has to do those things. Usually, "management" is the DIP. Sometimes, circumstances call for the appointment of a TIB. But, in either event, the DIP is to the Estate what the management is to a corporation. Therefore, the Estate itself is the ultimate client of the DIP counsel.

[FN334]. See Robert R. Summerhays, *The Problematic Expansion of the Garner v. Wolfenbarger Exception to the Corporate Attorney-Client Privilege*, 31 TULSA L.J. 275, 284 (1995) (stating corporate managers and directors owe a fiduciary duty to the corporation as a whole); see, e.g., *Fiduciary Duties*, supra note 4, at 543 (restating issue of DIP's financing duty).

[FN335]. See supra note 146 and accompanying text; see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1983) (considering duty owed by lawyer to organization as client); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18 (1980) (considering allegiance owed by "lawyer employed or retained by a corporation or similar entity"). Of course, that suggestion is by no means a cure-all. Corporate managers and corporate counsel are understandably perplexed about their fiduciary duties. See Lawrence E. Mitchell, *Cooperation and Constraint in the Modern Corporation: An Inquiry into the Causes of Corporate Immorality*, 73 TEX. L. REV. 477, 508-09 (1995) ("Jay Lorsch ... concludes that corporate directors believe that their legal duty is to the stockholders, but feel moral obligations to a much broader range of constituents, including employees, creditors, customers, and sometimes the public.") (citing JAY W. LORSCH & ELIZABETH MACIVER, *PAWNS OR POTENTATES: THE REALITY OF AMERICA'S CORPORATE BOARDS* 37-50 (1989)) (footnote omitted); Summerhays, supra note 335, at 289-90 (noting ambiguous nature of fiduciary duties owed within corporations).

But using the Model Rules's "entity" approach only goes so far: "[T]he Model Rules ... provide that the organization, rather than the owners or managers, is the client. Nonetheless, some have suggested that the attorney who represents a person in a fiduciary capacity to another may owe duties to the beneficiary of the client's duties." Robert R. Keatinge, *The Implications of Fiduciary Relationships in Representing Limited Liability Companies and Other Unincorporated Associations and their Partners or Members*, 25 STETSON. L. REV. 389, 401-02 (1995) (citations omitted); see also supra notes 298-308 and accompanying text (noting existence of varying opinions whether attorney's fiduciary duty to entity runs to human manifestations of corporation).

[FN336]. See supra notes 47-50 and accompanying text.

[FN337]. Here's one way to phrase your argument if you're trying to remind recalcitrant Estate Counsel or Committee Counsel of certain of their fiduciary duties:

1. Dicta in *Weintraub* permits an analogy from corporate counsel outside bankruptcy to Estate Counsel in a chapter 11 case. See supra notes 47-50 and accompanying text.
2. Not only would the Estate hold the privilege in the chapter 11 case, but the duty of Estate Counsel to the Estate would be analogous to the duty of corporate counsel toward the organization as client. See, e.g., supra notes 298-308.
3. The duties of Estate Counsel to the Estate can be monitored by asking whether Estate Counsel's behavior is in the Estate's interests (or, at least, whether the behavior was reasonably intended to be in the Estate's interest). Any outrageous behavior is probably sanctionable under BRP 9011. See supra Part.II.C.2.

Of course, if you're trying to invent new fiduciary duties for Estate Counsel and Committee Counsel to follow, you can always cite to *Perez*, supra Part.II.G.3.

[FN338]. See *Griva v. Davison*, 637 A.2d 830, 841-42 (D.C. Cir. 1994) (discussing Model Rule 1.13 and reasoning that, where lawyer represents both partnership and constituents whose interest lawyer finds adverse to organization, lawyer may not represent constituents further because lawyer's loyalty to partnership is paramount); see also *Crandon v. State*, 257 Kan, 727, 741-42 (1995) (noting organization's attorney has responsibility to give

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advice; and when necessary to prevent or rectify unlawful or improper acts of organization or employers); MODEL RULES Rule 1.13 (describing options available to corporate counsel); MODEL RULES Rule 1.16 (describing lawyer's option to resign); see generally Geoffrey C. Hazard, Jr., Rectification of Client Fraud: Death and Revival of the Professional Norm, 33 EMORY L.J. 271 (1984) [hereinafter Rectification] (discussing lawyer's obligations "when he discovers that a transaction he is handling for a client is tainted with fraud"); see also Richard W. Painter & Jennifer E. Duggan, Lawyer Disclosure of Corporate Fraud: Establishing a Firm Foundation, 50 SMU L. REV. 225, 263-64 (1996) (discussing attorney's options of resignation or "waving the red flag" (noisy withdrawal)).

[FN339]. See Rectification, *supra* note 339, at 286 (noting attorney's obligations to withdraw if client persists with fraudulent conduct and if there is a possibility of attorney being adverse witness); Jeffrey Pennelly, Proceedings of the Conference on Ethical Issues in Representing Older Clients: Report of Working Group on Representing Fiduciaries, 62 FORDHAM L. REV. 1045, 1051 (1994) (noting traditional view that lawyer who becomes aware of breach of responsibility has option to effect "noisy withdrawal"); Mark A. Riekhof, Fraud, Withdrawal & Disclosure: What to Tell the Lawyer Who Steps Into My Shoes, 34 SANTA CLARA L. REV. 1235, 1261 (1994) (stating Model Rule 1.16, comment 15, allows lawyer to send "signals" to third parties regarding his former client's fraudulent acts); cf. David B. Wilkins, Making Context Count: Regulating Lawyers After Kaye, Scholer, 66 S. CAL. L. REV. 1145, 1164 (1993) (noting that, where lawyer learns client intends to engage in prohibited conduct, attorney must choose between "gatekeeper" strategy, withholding support and thereby making client's accomplishment of prohibited purpose more difficult, and "whistleblower" strategy, reporting client's wrongful intentions to regulators); Brian W. Smith & M. Lindsay Childress, Avoiding Lawyer Liability in the Wake of Kaye, Scholer, 8 ST. JOHN'S J.L. COMM. 385, 391 (1993) (noting that, although attorney might have duty to report misconduct to third parties, duty does not extend to reporting to regulators absent special circumstances); Fred C. Zacharias, Reconciling Professionalism and Client Interests, 36 WM. & MARY L. REV. 1303, 1377 (1995) (calling for reeducation of lawyers to be more objective).

[FN340]. Once it's clear beyond cavil that the Estate is (or isn't) insolvent, then Estate Counsel can fine-tune her duty, in much the same way that counsel for the corporation originally answers to the Board of Directors until and unless it's clear that the board wants to do something contrary to the interests of shareholders. Of course, corporate law is easier here, too. In corporate law, it's not so much a problem of knowing to whom counsel's ultimate duty is owed. The (solvent) corporation, and thus corporate counsel, owes its duty to the shareholders. The problem for corporate counsel is isolating exactly what is in the shareholders' best interests. See Folly, *supra* note 44.

[FN341]. But see Forest, *supra* note 44, at 832-37 (giving examples of when advocacy model breaks down).

[FN342]. But see *supra* note 281 (describing tendency of Committee Counsel and Estate Counsel not to contest each other's fee applications, apparently in violation of their respective fiduciary duties).

[FN343]. See 11 U.S.C. § 1102 (1994) (allowing for foundation of equity security holders' committee).

[FN344]. We like Westbrook's approach.

The "quantum" cases seem removed from the de facto conflict cases, but they're really not. They focus on "what's at stake," and that issue in turn depends on the perspective from which the case is viewed, namely, whom the lawyer represents. To put it the other way around, if the lawyer spends time on "x" matter and "x" matter is only of value to the owners of the firm, the court may hold that the lawyer's time was of little actual benefit to the creditors, the only real parties in interest, or it may hold the lawyer must really have been representing the owners and must lose the entire fee, disqualified for conflict of interest. The first approach is the "benefit" analysis used by Judge Clark in OPA, while the second is the "adverse interest" approach followed by Judge Jones in Humble Place. Any per se rule for inherent DIP conflicts has the potential to reduce substantially the pool of debtor-qualified

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lawyers willing to represent Chapter 11 debtors. Not only does it threaten counsel's livelihood, but it puts the reputations of lawyers at an unreasonable risk. The latter factor will discourage the very lawyers, conscientious and respectable, whom we would want to have making the tough decisions in the conflict-ridden context of Chapter 11 DIP representation. While the prevention of abuse is important, it cannot justify the cost. The cases just discussed offer a more sensible and balanced approach. First, where there is no actual representation of ownership interests, the courts should analyze the performance of DIP counsel on a benefit basis, rather than disqualifying counsel and denying all compensation. That course is more fair and less likely to chill DIP representation. Second, benefit must be understood to include the process benefits of competent and effective representation of the DIP. As long as Congress chooses to keep a debtor-driven system, that sort of advocacy is essential to its success. On that basis, a finding of no benefit to the estate should be because of over-litigation of futile or hopeless positions, rather than because the positions taken would benefit the ownership interest as such.

Inherent Conflicts, *supra* note 4, at 295.

[FN345]. FED. R. BANKR. P. 9011 (1994) (providing sanctions including payment of reasonable fees, where it is found attorney signed document absent factually supported, legally tenable good faith argument).

[FN346]. Along with the other sanctions mentioned in *supra* notes 190-196, 209-219.

[FN347]. See *In re Palumbo Family Ltd. Partnership*, 182 B.R. 447, 472 (Bankr. E.D. Va. 1995) (noting Bankruptcy Rule 9011 requires court impose "appropriate sanction" where document filed under frivolous or improper purpose); see also *In re Poterek & Sons, Inc.*, 169 B.R. 896, 909 (Bankr. N.D. Ill. 1994) (stating bad faith "certainly warrants" sanctions under Rule 9011; however, bad faith not required); *In re Food Workshop, Inc.*, 70 B.R. 962, 966 (Bankr. S.D.N.Y. 1987) (stating Rule 9011 provides for attorney sanctions if attorney "sign[s] and file[s] pleadings, motions and other papers ... without making reasonable inquiry as to whether they are factually and legally well-grounded").

[FN348]. Of course, that problem didn't trouble the Supreme Court overmuch in *Weintraub*. See *supra* notes 47-50 and accompanying text.

There are two main jobs for the Estate in a reorganization: "pie-dividing" issues (who gets what and by what mechanisms) and "pie-enhancing" issues (how to get more, period). Markell Mail, *supra* note 52, at 2; see also e/mail from Edward Janger to Nancy B. Rapoport (March 26, 1997) (on file with author) (discussing the difference between "size" and "equality"). Our solution doesn't do a thing for "pie-dividing" issues, except to the limited extent that it keeps Estate Counsel from inappropriately dividing the pie in favor of particular constituents' interests. But, to the extent that our solution enables the bankruptcy court to watch over Estate Counsel more closely, it's likely to enhance the pie. Our solution makes it tricky for Estate Counsel to represent the Estate and the prepetition Debtor, to the extent that those interest may conflict. We leave the implications of that statement for another day and another article.

Our solution, though, does seem to produce the correct result in our good/bad/ugly trilogy of cases. See Part II. G., *supra*. In *Louisiana Bank & Trust v. Anderson*, 526 So. 2d 1386 (La. Ct. App. 1988), Estate Counsel clearly represented the Estate and not the DIP's own interests. Recall that the advice that Estate Counsel gave regarding the use of purported cash collateral was wrong, at least after Louisiana changed its rules on perfection of the collateral. Nonetheless, the "wrong" advice didn't rise to the level of a BRP 9011 violation. It didn't even come close to a violation. So, under our solution, the Estate Counsel would have been safe.

If we applied our solution to the facts in *In re Bonneville Pacific Corp.*, 196 B.R. 868 (Bankr. D. Utah 1996), we would have reached the same result that the bankruptcy court did. In *Bonneville*, it seems clear that the Estate Counsel was representing the DIP's interests and not the Estate's interests. Why else would Estate Counsel have submitted several unconfirmable plans or refused to investigate the Debtor's prepetition activities? Moreover, Estate Counsel seems to have filed several meritless pleadings, which would have violated BRP 9011. Our solution

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would sanction Estate Counsel for violating the duty to the Estate.

And then we come to *In re Perez*, 30 F.2d 1209 (9th Cir. 1994). Here, our solution would diverge from the majority's decision. As we read the facts in *Perez*, Estate Counsel was at least trying to represent the Estate by proposing a reasonable (if legally impermissible) plan of reorganization. (In fact, the plan could have been confirmed in some other jurisdictions). Therefore, Estate Counsel was attempting to fulfill his duty to the Estate and shouldn't have been punished so harshly. Even if we wanted to punish Estate Counsel slightly for failing to present a confirmable plan, our solution, at the very worst, would result only in a small reduction in fees (if the appeal were truly frivolous)--not the wholesale denial of fees presented in *Perez*.

[FN349]. See generally *Inherent Conflicts*, supra note 4 (considering ethical questions and compensation issues in bankruptcy).

[FN350]. See *id.*

[FN351]. See *id.* at 295.

[FN352]. See 11 U.S.C. § 328(c) (1994) (denying compensation for services and reimbursement of expenses where professional found "not disinterested"); see also *Inherent Conflicts*, supra note 4, at 295.

[FN353]. See *Inherent Conflicts*, supra note 4, at 303 (stating reorganization bankruptcy is "financial hospital for sick companies"); see also *Folly*, supra note 44.

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American Bankruptcy Institute Journal
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**Column
Straight & Narrow**

***26 NOISY WITHDRAWALS: URBAN BANKRUPTCY LEGEND OR INVALUABLE ETHICAL TOOL?**

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One of the greatest professional nightmares a chapter 11 debtor's attorney can face is discovering, during a bankruptcy case, that the people running the debtor are crooks. [FN2] Such a discovery will immediately cause the attorney to seriously consider whether she should withdraw from representing the debtor. [FN3] Assuming that the individuals acting as debtors-in-possession (DIPs) do not take steps to rectify their improper actions, this action is probably inevitable. [FN4] At such a time, many bankruptcy practitioners think in terms of the famous (or infamous) "noisy withdrawal" as a way out. Unfortunately, there is little authority that describes what constitutes a noisy withdrawal in a bankruptcy proceeding or that explains exactly how a noisy withdrawal may be accomplished. This article attempts to address the question of what a noisy withdrawal is, how a noisy withdrawal can be accomplished and what steps an attorney must take to ensure that her noisy withdrawal is effective.

Please note, for purposes of this article, it will be assumed that the confidences of a chapter 11 client [FN5] will be revealed if the attorney takes any action to disclose the fraud to the bankruptcy court. Although an interesting question, it is beyond the scope of this article to determine whether your client is the chapter 11 bankruptcy estate [FN6] or the DIP that operates the debtor. [FN7]

Formal Opinion 92-366--the Mother of "Noisy Withdrawals"

The genesis of what constitutes a "noisy withdrawal" can be found in ABA Formal Opinion 92-366. Under that opinion, a noisy withdrawal is a withdrawal from the representation of a client accomplished by a disavow of work product provided by the attorney. [FN8] The ABA Committee on Ethics and Professional Responsibility concluded that an attorney could only make a "noisy withdrawal" if the attorney's work product was being used or was intended to be used in a future fraud or criminal activity. Opinion 92-366 stated that a noisy withdrawal was a permissive step the attorney could take, not a required step. [FN9] In fact, the ABA Committee further held that if a fraud had already been completed, or if the attorney did not know or reasonably believe that the client would

continue the fraud or commit a future fraud through the use of the attorney services or work product, the attorney could not make a noisy withdrawal. [FN10]

While Opinion 92-366 is important to understand the ethical framework surrounding a noisy withdrawal, it is not directly applicable to a typical bankruptcy situation. In a fact pattern presented to the ABA Committee, the fraud involved the use of an attorney's opinion letter, which was based on false evidence given to the attorney by his clients. The opinion letter was used to obtain a loan and was not used in proceedings before a court. Indeed, Opinion 92-366 noted that while the ABA Committee had considered the ramifications of Rule 1.6 [FN11] of the Model Rules of Professional Conduct, given the facts submitted to the ABA Committee, it did not have to address the issue of whether Model Rule 3.3 [FN12] requiring the disclosure of the fraud to the tribunal would require a noisy withdrawal or even a more explicit disclosure. [FN13]

Strike Up the Band: A Noisy Withdrawal in Bankruptcy

Chapter 11 debtor representations, unlike many legal services provided by attorneys in civil practice, tend to involve activities that are generally governed by a tribunal, where counsel has been appointed by the bankruptcy court and all activities of debtor's counsel are technically done before the tribunal. [FN14] Therefore, unlike the situation governed by Opinion 92-366, Model Rule 3.3 is almost always implicated when the question of client fraud arises in chapter 11 debtor representation. It is the difficulties in balancing an attorney's duties to keep certain information confidential under Rule 1.6, with a duty to disclose fraud on a tribunal under Rule 3.3, that places debtor's counsel in such a difficult position. [FN15]

In many respects, this difficulty is misperceived. The vast majority of cases [FN16] clearly indicates that a chapter 11 debtor's counsel's duty to the court, under either Model Rule 3.3 or under the common-law duty of counsel as an "officer of the court," will override his duty to maintain client confidentiality under Model Rule 1.6. [FN17] However, even if counsel for a chapter 11 debtor has a duty to disclose fraudulent activity to a court, there is no clear-cut rule as to how that disclosure should be made. [FN18] Indeed, although Rule 3.3 does require disclosure of facts necessary to prevent fraud *27 by a client on a tribunal, attorneys should not ignore the dictates of Model Rule 1.6 in a frenzied effort to comply with Rule 3.3. [FN19]

Rule 3.3 Comment 11, "Remedial Measures," offers some important guidance on this point. Comment 11 states in pertinent part that "if perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to redemonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court." It would seem from this comment that immediate disclosure of fraud to the court is not the required or even preferred ethical course of action in a situation where an attorney has knowledge of a client's fraud and less drastic action than disclosure will be effective in alerting the tribunal of the problem. However, steps must be taken to remedy any fraud perpetuated by a client on a court. Therefore, given the unique nature of bankruptcy, where a client refuses to correct the false testimony or disclose the fraud, a noisy withdrawal may very well be the preferred course of action in order to disclose the fraudulent conduct.

Tuning Your Tuba: How to Properly Make a "Noisy Withdrawal" in Bankruptcy Court

Assuming that a bankruptcy court could be alerted as to a potential "problem" with a debtor, or more importantly, the people running the debtor as DIP, by a noisy withdrawal, [FN20] such a withdrawal may be the most appropriate course of action. Given the fact that bankruptcy courts must approve both the hiring and the withdrawal of debtor's counsel in a chapter 11 proceeding, performing a noisy withdrawal is often easier in a bankruptcy case than it is in other situations. Further, given the frequent active participation of numerous other groups in a

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bankruptcy proceeding, a proper motion for a noisy withdrawal will more than likely have the desired effect of alerting the court to a potential fraud on the tribunal than it would in other proceedings. [FN21]

In order to effectively make a noisy withdrawal, counsel should include three things in their pleading in order to properly alert the court as to the possibility of a serious issue concerning the DIP's activities. First, upon discovery of the fraud and the failure of the attorney to have the DIP rectify and/or disclose the fraud, counsel should move on an expedited basis to be permitted to withdraw as counsel for the estate. Delaying withdrawal as debtor's counsel after determining your clients will not rectify or disclose the fraud [FN22] will not only allow your client's fraud to continue uninvestigated, but may be a violation of your own fiduciary duty to the bankruptcy estate, [FN23] as well as your ethical duties under the State Rules of Professional Conduct.

The second element required to make an effective noisy withdrawal is to set forth, as your primary grounds for withdrawal, that continued representation is impossible under your applicable state rules of ethics. Depending on the circumstances, you may wish to cite Rule 1.2, [FN24] which prohibits attorneys from assisting a client in a crime or fraud; Rule 1.16, [FN25] which requires withdrawal of representation when continued representation of a client will result in a violation of the rules; and/or Rule 3.3, which governs candor to the tribunal. Not only will invoking these ethics rules make it far more likely that the court will grant the motion to withdraw, it will also clearly illustrate to the court the underlying reasons for the withdrawal and the need for additional inquiry without having to directly divulge any client confidential information.

Finally, if necessary under the circumstances of your case, in your motion to withdraw you may also have to disavow any pleadings based on your client's fraud or on false evidence. [FN26] Whether this should be included in the motion to withdraw will depend on the individual facts and circumstances of your case, but counsel cannot continue to allow the court or other third parties in a case to be deceived or defrauded by documents based on false evidence, perjured testimony or some other variety of a client's fraud.

The Female Nordic Opera Star Begins Her Final Aria: Conclusion

Exposing fraud by a DIP as the chapter 11 debtor's counsel is a difficult task, especially given the fact that the people who have committed the fraud are likely the ones who hired you as debtor's counsel and from whom you take your orders. [FN27] A noisy withdrawal gives you a middle ground on which to fulfill ⁴¹ your ethical and fiduciary duties to the bankruptcy court and the bankruptcy estate without having to directly disclose a client's confidences directly to the tribunal or other parties. Given the nature of bankruptcy, if a noisy withdrawal is not deemed sufficient by a bankruptcy court, the court has other options, including appointing a trustee or examiner who can waive the attorney/client privilege and question you about the fraud, thereby bypassing the Rule 1.6 issues, or simply taking you "off the hook" by determining that there is no attorney/client privilege concerning the actions of the parties that are conducting the fraud (i.e., the DIP) and ordering you to reveal any material facts concerning fraud to the court or any other appropriate party. Hopefully, the ethical nightmare discussed above will not happen to you, but in the event that you are faced with such an ethical disaster, be sure to consider the loud, proud and noisy withdrawal as a way out of your dilemma.

[FN1]. The author would like to thank Tracy Sullivan, an associate at Greenebaum Doll & McDonald PLLC, for her assistance with this article.

[FN2]. *In re Bonneville Pac Corp.*, 196 B.R. 868 (Bankr. D. Utah); *aff'd.*, in part, *rev'd.*, in part, *Hansen, Jones & Leta P.C. v. Segal*, 220 B.R. 434 (D. Utah 1998).

[FN3]. ABA Model Rule of Professional Conduct 1.16(a)(1) requires an attorney to withdraw from representing a

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client "if the representation will result in violation of the Rules of Professional Conduct or other law." Rule 1.2 states that an attorney may not "counsel ... or assist a client, in conduct that the lawyer knows is criminal or fraudulent ..."

[FN4]. *Id.* See, also, ABA Formal Opinion 92-366 (1992); Rule 3.3, Comment Paragraph 11.

[FN5]. Compare *In re Perez*, 30 F.3d 1209, 1219 (9th Cir. 1994) (bankruptcy estate is client of chapter 11 debtor's attorney) with *Hansen*, 220 B.R. 434, 449 (DIP is client).

[FN6]. See *In re Perez*, 30 F.3d at 1219; *Hansen*, 220 B.R. at 448-449 (citing cases).

[FN7]. See *Hansen*, 220 B.R. at 449; *In re Sidco Inc.*, 173 B.R. 194 (E.D. Cal. 1994).

[FN8]. Opinion 92-366. It is important to note that there was strong dissent to this opinion that would have found that the attorney could not disavow any work product under the facts as presented.

[FN9]. *Id.* ("A lawyer may disavow any of her work product to prevent its use in the client's continuing or intended future fraud ..." (emphasis added)).

[FN10]. *Id.* ("If the fraud is completed and the lawyer does not know or reasonably believe that the client intends to continue the fraud ... the lawyer may not disavow any work product.")

[FN11]. (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantially bodily harm, or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

[FN12]. (a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal,

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client,

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal to make an informed decision, whether or not the facts are adverse.

[FN13]. See, generally, Rapoport and Bowles, "Has the DIP's Attorney Become the Ultimate Creditor's Lawyer in Bankruptcy Reorganization Cases?" 5 Am. Bank. Inst. L.R. 47, 64 n. 140 (1997) (collecting cases where debtor's

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counsel were required to disclose fraud or DIP's breaches of fiduciary duty).

[FN14]. See, generally, *In re Ward*, 894 F.2d 771, 776 (5th Cir. 1990).

[FN15]. See *In re DeVlieg*, 174 B.R. 497, 502 n. 7 (N.D. Ill. 1994) (counsel who sued debtor's corporate officers against their direction was found to have followed duty to estate in filing suit, but court refused to "pass on whether such behavior would comply with applicable standards of professional responsibility").

[FN16]. See Note 12, *supra*.

[FN17]. Opinion 92-366, n. 8 ("Rule 3.3 ... whose text contains an explicit exception to the confidentiality requirement of Rule 1.6 ...").

[FN18]. See Rapoport and Bowles, "DIP's Attorney" at 65, n. 147.

[FN19]. See *In re Brennan*, 187 B.R. 135, 150 (Bankr. D. N.J. 1995) (generally discussing balancing Rule 1.6 concerns with Rule 3.3 duty to courts).

[FN20]. It is important to note that in certain situations (i.e., the debtor's president calling from the airport with \$1 million of the debtor's cash and a one-way ticket to the Crook Islands), only immediate and direct disclosure of the fraud will be an adequate remedy under Rule 3.3.

[FN21]. In a case with competent counsel, a well-done "noisy withdrawal" motion will at least draw motions for 2004 exams of the debtor and more likely motions for the appointment of a trustee or receiver.

[FN22]. Rule 3.3, Comment 11.

[FN23]. See, generally, *In re Banie Reed Buick-GMC Inc.*, 164 B.R. 378 (Bankr. S.D. Fla. 1984).

[FN24]. Rule 1.2, Scope of Representation.

[FN25]. Rule 1.16, Declining or Terminating Representation.

[FN26]. Opinion 92-366.

[FN27]. See "The Debtor's Lawyer as Trojan Horse," reprinted in Warren & Westbrook, *The Law of Debtors and Creditors: Text Cases and Problems* (3d ed. 1996), for a discussion of why counsel for the debtor's first duty may be to oust the person who hired him.

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CHANGES TO CONSUMER BANKRUPTCY PRACTICES – CHAPTER 7

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SECTION C

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**MEANS TESTING UNDER THE BANKRUPTCY ABUSE
PREVENTION AND CONSUMER PROTECTION ACT OF 2005**

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INTRODUCTION:

Among many "reforms" imposed by Congress in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 is that debtors must qualify to file Chapter 7. The inception of a "means test" to determine the eligibility of a proposed debtor is set forth in 11 U.S.C. § 707. Much angst, comment, debate and vilification has been made of this concept. The implementation of the means test has not been without its own issues. For example, a form was handed out at the Midwest Regional Bankruptcy Seminar in August of 2005, which was declared to be the last and final version of the worksheet regarding the implementation of this test. Yet, less than two weeks later, interim rules were implemented including new and revised forms which changed the context of the form that was delivered for the August conference. While this counsel expects that the number of those who will not qualify for Chapter 7 relief under the means test will be few, it does not mean that counsel will not have to pay considerable attention to the means test. Considerable time will be consumed, and additional fees will be paid by debtors, strictly to meet, beat or interpret this section. However, the mastery of the means test by counsel should result in the expected result, that is that the number of individuals who will be disenfranchised from filing Chapter 7 will in fact be few. The review and actions by the debtor(s) in the six months prior to the filing of the petition will be determinative of the effectiveness of the means test. In this regard, I see tremendous opportunities for creative counsel in guiding clients through this difficult quagmire created by Congress.

Attached to this presentation are several appendices for your review. The first is the form, as proposed by the Official Forms Committee. This is the interim form and is still subject to being reviewed as of the time of writing this presentation. There are separate forms for Chapter 7 from other chapters, and there are separate forms depending upon what the Internal Revenue Service does with regard to housing expenses, which is still under consideration. It would be my expectation that

these forms will be included by your software provider, but they are included for your review, and we will go through a couple of these forms. I also attach, as Appendix "B," allowable living expenses for transportation by the Internal Revenue Service, which is part of the means test. I also include, as Appendix "C," income, medium family income by the number of earners in a family as proposed by the United States Census Bureau, and, as Appendix "D," state medium family income by state, which is broken down by family size, and, as Appendix "E," from the Internal Revenue Service, the current standards for maximum monthly allowance on housing broken down by county for the Commonwealth of Kentucky. For updates on any and all of these, I would refer you to the www.uscourts.gov site, which may send you to other sites, including that of the United States Trustee. However, as of the time of the writing of this material, those documents were not included yet on websites, as they were still being developed.

THE MEANS TEST:

In looking at all of the forms, allowances, disallowances, expenditures and income, allowed and disallowed, it is easy to forget that the means test in its rawest form is very simple. It is the debtor's current monthly income, which is one-sixth ($1/6$) of the last six (6) month's income that the debtor received from all sources. It matters not whether the income was received within the last three months. It matters not whether all of the income was received in the sixth month. It matters not when, as long as it was received sometime within the previous six (6) months. Social Security benefits are excluded from this definition. However, it is the timing of this six (6) months that will make practitioners creative. Do you file before tax season? Do you plan bonuses? If married, the income of a spouse who lives with you is included. This may present extremely difficult questions

and issues to address with clients when the non-filing spouse, who is highly successful, is told that his or her income must be included for purposes of determining whether the spouse can eliminate his or her debt load. Congress has allowed some actual pecuniary deductions in determining whether the means test will apply. These include amounts reasonably necessary for health and disability insurance; health savings accounts; expenses incurred to maintain safety from family violence; deductions for the cost of administering a Chapter 13; the actual expenses for the care or support of elderly, chronically ill or disabled household members; actual elementary and secondary school expenses up to \$1,500.00 for each dependent child under the age of 18; actual mortgage or housing expense, if it can be documented; and actual business expenses, if it can be documented.

As stated, the Internal Revenue Service is reviewing the reasonableness of its housing and its transportation expenses to determine whether they should also be raised. For purposes of calculating the test, also deducted are secured payments, whether it be inside or outside a Chapter 13; payment on priority claims, divided by 60, so that after one calculates what the monthly income is, and then deducts all of these expenses, the debtor then multiplies that net monthly income number by 60, and to be disqualified under the means test, the debtor must be able to either pay 25 percent (25%) of the debtor's nonpriority, unsecured debt or \$6,000.00, whichever is greater, or be able to pay \$10,000.00. If either of those are met, then the debtor cannot file Chapter 7. In addition, debtor's counsel must mark on the petition whether the presumption of abuse arises after running this test. If the presumption of abuse arises, and a Chapter 7 is still filed, then both the Court and the United States Trustee (and probably the Chapter 7 Trustee) will notify all creditors that the debtor has filed a Chapter 7 with the presumption that one has abused 11 U.S.C. § 707.

The debtor can rebut the presumption of abuse by demonstrating “special circumstances,” such as (1) serious medical condition, (2) being called to active duty, or (3) to the extent such special circumstances that justify additional expenses or adjustments to the current monthly income leaves no reasonable alternative. See § 707(b)(2)(B). The debtor must also provide the documentation to justify these additional expenditures. Even if all of these subsections apply, if the debtor is a disabled veteran and the result is that the indebtedness was incurred while the debtor was on active duty or performing a homeland defense activity, then the presumption can also be overcome.

Notwithstanding everything I just said, 11 U.S.C. § 707(a)(3) also allows the Court to examine whether the debtor has abused Chapter 7 by allowing the Court to determine whether the debtor filed the petition in bad faith or under the totality of the circumstances the Court should not grant the relief under Chapter 7. These are the provisions that the United States Trustee will continue to address to the Court and debtors rather than look at the means test as a way of forcing people into Chapter 13.

ATTORNEYS LIABILITIES:

The Court, on its own motion, or on the motion of a party in interest, may file a motion under Rule 9011 and, should the Court grant the motion, the attorney for the debtor can be ordered to reimburse the Trustee for any and all reasonable costs, including his own attorneys fees in prosecuting a motion under 11 U.S.C. § 707. In addition, if the Court should find that the attorney for the debtor violated Rule 9011, the Court, on its own initiative, or on the motion of a party in interest, may order (1) the assessment of a “civil penalty”; and (2) the payment of such penalty to the Trustee or the United States Trustee. The signature of the attorney of the debtor on a petition,

pleading or written motion, constitutes a certification that the attorney has (1) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading or written motion; and (2) determine that the petition, pleading or written motion is well granted in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law and does not constitute an abuse. The signature of the attorney for the debtor on the bankruptcy petition constitutes a certification that the attorney has no knowledge, after an inquiry, that the information in the schedules filed with such petition is incorrect. See § 707(b)(3)(D).

If I can provide comfort, with the exception of a small business person who has fewer than 25 full-time employees and is engaged in commercial or business activity, a movant who files for sanctions under Rule 9011, and loses, can also be forced to pay attorneys fees to counsel for the debtor, if the Court does not sustain the original motion, and the Court finds that the petition of the movant that filed the original motion violated Rule 9011; or, if the attorney who filed the motion did not comply with the requirements, or the Court finds that the motion was made for the purpose of coercing a debtor into waiving a right.

Another limitation is that only the Court or the United States Trustee may file a motion to dismiss under § 707(b) if the debtor's income is less than the medium income for the applicable state in which the bankruptcy is filed.

NECESSITY OF DOCUMENTATION:

The debtor is required to file, with the petition, at the request of any party in interest, documents that supports income, including tax returns for up to the last four (4) years; pay stubs over the last six (6) months; and any other data that would prove that the debtor does not qualify for the

means test. So, do not wait for the request. Counsel for the debtor has a new standard to meet. That standard is collecting all of the relevant documentation that either overcomes the presumption of abuse, or supports the presumption of abuse. Except for exigent circumstances, it is incumbent upon counsel for the debtor to collect any and all of the necessary documentation regarding the means test. Since the means test allows for certain expenses, if actually incurred, collect that necessary documentation as well.

Practitioners in Kentucky are familiar with providing documentation to Trustees. Documents have routinely been turned over to Chapter 7 Panel Trustees in the Eastern District of Kentucky for more than two generations. Documentation requests in the Western District of Kentucky, while more recent, are still fairly common at this point. So, in addition to gathering the documentation that is turned over to the Chapter 7 Trustee, such as all deeds; mortgages; car titles; bank statements; most recent tax return; 401(k), or other pension plan documentation; insurance policies; automobile leases; and other documentation that supports the value of assets placed on the petition, counsel should also get the following: (1) copies of all tax returns for the previous four (4) years (transcripts will do); (2) copies of all bills, particularly with regard to mailing addresses for purposes of notifying creditors of the imposition of the automatic stay; (3) the bills also document the actual payments necessary for the debtor to maintain either a mortgage, mobile home, automobile, or other actual expense you are documenting; (4) perhaps a subsection of before, but copies of any bills documenting dependent expenses, including child care, tuition and book bills; (5) any document that supports safety under the family violence protection act; (6) documents that itemize those expenditures necessary to support chronically ill or chronically disabled dependants, particularly elderly; (7) utility bills, particularly if the Internal Revenue Services changes its housing allowance;

(8) insurance receipts; and (9) any other document that can support an actual expense incurred by the debtor.

Remember, even if the presumption of abuse arises, counsel can still file a Chapter 7 if counsel is prepared to document special circumstances. That would require a motion to be filed by counsel for the debtor asking the Court to determine whether sufficient special circumstances arise so that the presumption can be overcome. Obviously, all of that will need to be documented.

The impact of this pre-filing discovery mission is that the cost of filing bankruptcy is going to increase dramatically. Unfortunately, that will convince some people who would otherwise need to file for bankruptcy to not incur that cost, particularly when you add the additional cost of budget counseling, credit counseling, increased filing fees and other expenses that will certainly increase, such as security deposits and others that will be associated with the bankruptcy.

But, if counsel takes the time to collect all of this data, and some of it is available online, and therefore can be obtained with the debtor's consent while sitting in your office, then the application of the means test will become a fairly simple, clerical task. I do not advocate that the office policy be implemented so that others besides the attorney for the debtor do the means test, particularly in the beginning. However, I believe that after a practitioner runs through the means test a few times, it will become apparent when the means test will need to be strongly considered and strategized for, or when simply parts one and two are filled out, and then you go to the real issue, the debtor's actual income and expenses, that you place on Schedules I and J.

FAKE INCOME AND EXPENSES VERSUS ACTUAL INCOME AND EXPENSES:

The means test is ironic in that because it considers income that may have already been earned, or income that has yet to be earned, and expenses that are simply prescribed, rather than incurred, it is an implementation of a test using fake data. But, in addition to completing worksheets regarding fake data and fake numbers, counsel for the debtor is also required to complete a schedule of actual income and actual expenses as of the date of the filing of the petition. See 11 U.S.C. § 521.

Because counsel is still required to fill out schedules that show the actual income and expenses of the debtor, the United States Trustee has indicated it will continue to pursue motions to dismiss pursuant to 11 U.S.C. § 707(b)(3), using “the totality of the circumstances” test.

Thus, one can infer that even if the means test is beaten back, that the Office of the United States Trustee may deem a case to be worthy of an abuse and, therefore, file a motion to dismiss seeking conversion to Chapter 11 or 13. It would be difficult to conceive of a case where the debtor is not disqualified by the means test that would be required to file Chapter 11, but that is not a remedy often sought by the Office of the United States Trustee. In addition to reviewing the means test, counsel must gather together the documentation that itemizes the actual income and/or expenses incurred by the debtor. Many of these items will be necessary for implementation of the means test, including income, housing expense, utilities, health insurance and the like. Thus, the additional burden of documenting the balance of expenses, if at all possible, should not be that extraordinarily difficult.

CONCLUSION:

Since the forms, including what the income, medium income and other important numbers will probably be included in software packages, this practitioner believes that the implementation of the means test will exclude only very few and that the angst and turmoil regarding the means test that has exploded since the enactment of the Bill, has been overstated. That is not to say that for those few who actually are disqualified from filing under Chapter 7, and must file under Chapter 13, which particularly when they are presented with some difficult choices, such as automobile purchases incurred within the previous 910 days, or consumer purchase money security interests incurred within 910 days, that their cases certainly will be difficult and will need careful pruning and attention. When counsel carefully gathers the documentation that is necessary to support the numbers that are placed on the petition, then it is this practitioners belief that the means test will become just another form that will be overcome fairly quickly. It also offers opportunities for creative practicing, particularly with regard to the new laws regarding 401(k)s, domestic support obligations, the maintenance of filing tax returns and payment of taxes and other more substantive issues that arise as a result of this new law. I do look that sanctions upon counsel for either a creditor or a debtor will be rare and usually will be earned. Courts are reluctant to impose sanctions, but if counsel has not done homework, has not exercise due diligence and has not taken the time to do the necessary work themselves, I do foresee that the Court will sanction the unwary counsel. On a final note, how a bankruptcy petition preparer can do everything that would be necessary and not engage in the practice of law, is beyond me.

OFFICIAL FORMS

APPROVED BY THE EXECUTIVE COMMITTEE OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES ON

AUGUST 11, 2005

*[Please note that two sections of the means testing forms
are under study and subject to revision.]*

OFFICIAL FORM 22

In re _____
Debtor(s)Case Number: _____
(If known)

Check the box as directed in Parts I, III, and VI of this statement.

☐ **Presumption arises**☐ **Presumption does not arise****STATEMENT OF CURRENT MONTHLY INCOME AND MEANS TEST CALCULATION**
FOR USE IN CHAPTER 7

In addition to Schedules I and J, this statement must be completed by every individual Chapter 7 debtor, whether or not filing jointly, whose debts are primarily consumer debts. Joint debtors may complete one statement only.

Part I. EXCLUSION FOR DISABLED VETERANS

1

If you are a disabled veteran described in the Veteran's Declaration in this Part I, (1) check the box at the beginning of the Veteran's Declaration, (2) check the "Presumption does not arise" box at the top of this statement, and (3) complete the verification in Part VIII. Do not complete any of the remaining parts of this statement.

☐ **Veteran's Declaration.** By checking this box, I declare under penalty of perjury that I am a disabled veteran (as defined in 38 U.S.C. § 3741(1)) whose indebtedness occurred primarily during a period in which I was on active duty (as defined in 10 U.S.C. § 101(d)(1)) or while I was performing a homeland defense activity (as defined in 32 U.S.C. § 901(1)).**Part II. CALCULATION OF MONTHLY INCOME FOR § 707(b)(7) EXCLUSION**

2

Marital/filing status. Check the box that applies and complete the balance of this part of this statement as directed.a. ☐ **Unmarried. Complete only Column A ("Debtor's Income") for Lines 3-11.**b. ☐ **Married, not filing jointly, with declaration of separate households.** By checking this box, debtor declares under penalty of perjury: "My spouse and I are legally separated under applicable non-bankruptcy law or my spouse and I are living apart other than for the purpose of evading the requirements of § 707(b)(2)(A) of the Bankruptcy Code." **Complete only Column A ("Debtor's Income") for Lines 3-11.**c. ☐ **Married, not filing jointly, without the declaration of separate households set out in Line 2.b above. Complete both Column A ("Debtor's Income") and Column B (Spouse's Income) for Lines 3-11.**d. ☐ **Married, filing jointly. Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 3-11.**

All figures must reflect average monthly income for the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If you received different amounts of income during these six months, you must total the amounts received during the six months, divide this total by six, and enter the result on the appropriate line.

**Column A
Debtor's
Income****Column B
Spouse's
Income**

3

Gross wages, salary, tips, bonuses, overtime, commissions.

\$

\$

4

Income from the operation of a business, profession, or farm. Subtract Line b from Line a and enter the difference on Line 4. Do not enter a number less than zero. **Do not include any part of the business expenses entered on Line b as a deduction in Part V.**

a.	Gross receipts	\$
b.	Ordinary and necessary business expenses	\$
c.	Business income	Subtract Line b from Line a

\$

\$

5

Rent and other real property income. Subtract Line b from Line a and enter the difference on Line 5. Do not enter a number less than zero. **Do not include any part of the operating expenses entered on Line b as a deduction in Part V.**

a.	Gross receipts	\$
b.	Ordinary and necessary operating expenses	\$
c.	Rental income	Subtract Line b from Line a

\$

\$

6

Interest, dividends, and royalties.

\$

\$

7

Pension and retirement income.

\$

\$

8

Regular contributions to the household expenses of the debtor or the debtor's dependents, including child or spousal support. Do not include contributions from the debtor's spouse if Column B is completed.

\$

\$

9	Unemployment compensation. Enter the amount in Column A and, if applicable, Column B. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: <table border="1"> <tr> <td>Unemployment compensation claimed to be a benefit under the Social Security Act</td> <td>Debtor \$ _____</td> <td>Spouse \$ _____</td> </tr> </table>		Unemployment compensation claimed to be a benefit under the Social Security Act	Debtor \$ _____	Spouse \$ _____	\$	\$			
Unemployment compensation claimed to be a benefit under the Social Security Act	Debtor \$ _____	Spouse \$ _____								
10	Income from all other sources. If necessary, list additional sources on a separate page. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. Specify source and amount. <table border="1"> <tr> <td>a.</td> <td>_____</td> <td>\$ _____</td> </tr> <tr> <td>b.</td> <td>_____</td> <td>\$ _____</td> </tr> </table>		a.	_____	\$ _____	b.	_____	\$ _____	\$	\$
a.	_____	\$ _____								
b.	_____	\$ _____								
Total and enter on Line 10			\$	\$						
11	Subtotal of Current Monthly Income for § 707(b)(7). Add Lines 3 thru 10 in Column A, and, if Column B is completed, add Lines 3 through 10 in Column B. Enter the total(s).		\$	\$						
12	Total Current Monthly Income for § 707(b)(7). If Column B has been completed, add Line 11, Column A to Line 11, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 11, Column A.		\$							

Part III. APPLICATION OF § 707(b)(7) EXCLUSION		
13	Annualized Current Monthly Income for § 707(b)(7). Multiply the amount from Line 12 by the number 12 and enter the result.	\$
14	Applicable median family income. Enter the median family income for the applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: _____ b. Enter debtor's household size: _____	\$
15	Application of Section 707(b)(7). Check the applicable box and proceed as directed. <input type="checkbox"/> The amount on Line 13 is less than or equal to the amount on Line 14. Check the "Presumption does not arise" box at the top of page 1 of this statement, and complete Part VIII; do not complete Parts IV, V, VI, or VII. <input type="checkbox"/> The amount on Line 13 is more than the amount on Line 14. Complete the remaining parts of this statement.	

Complete Parts IV, V, VI, and VII of this statement only if required. (See Line 15.)

Part IV. CALCULATION OF CURRENT MONTHLY INCOME FOR § 707(b)(2)		
16	Enter the amount from Line 12.	\$
17	Marital adjustment. If you checked the box at Line 2.c, enter the amount of the income listed in Line 11, Column B that was NOT regularly contributed to the household expenses of the debtor or the debtor's dependents. If you did not check box at Line 2.c, enter zero.	\$
18	Current monthly income for § 707(b)(2). Subtract Line 17 from Line 16 and enter the result.	\$

Part V. CALCULATION OF DEDUCTIONS ALLOWED UNDER § 707(b)(2)		
Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)		
19	National Standards: food, clothing, household supplies, personal care, and miscellaneous. Enter "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable family size and income level. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	\$

20	<p>Local Standards: housing and utilities. Enter the amount of the IRS Housing and Utilities Standards allowance for your county and family size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court), adjusted to deduct any portion of the allowance that includes payments on debts secured by your home, listed in Line 41. (Under revision)</p>		\$									
21	<p>Local Standards: transportation; vehicle operation/public transportation expense. You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation.</p> <p>Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 8. <input type="checkbox"/> 0 <input type="checkbox"/> 1 <input type="checkbox"/> 2 or more.</p> <p>Enter the amount from IRS Transportation Standards, Operating Costs & Public Transportation Costs for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)</p>		\$									
22	<p>Local Standards: transportation ownership/lease expense; Vehicle 1. Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.) <input type="checkbox"/> 1 <input type="checkbox"/> 2 or more.</p> <p>Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, First Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 41; subtract Line b from Line a and enter the result in Line 22. Do not enter an amount less than zero.</p> <table border="1"> <tr> <td>a.</td> <td>IRS Transportation Standards, Ownership Costs, First Car</td> <td>\$</td> </tr> <tr> <td>b.</td> <td>Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 41</td> <td>\$</td> </tr> <tr> <td>c.</td> <td>Net ownership/lease expense for Vehicle 1</td> <td>Subtract Line b from Line a.</td> </tr> </table>		a.	IRS Transportation Standards, Ownership Costs, First Car	\$	b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 41	\$	c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a.	\$
a.	IRS Transportation Standards, Ownership Costs, First Car	\$										
b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 41	\$										
c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a.										
23	<p>Local Standards: transportation ownership/lease expense; Vehicle 2. Complete this Line only if you checked the "2 or more" Box in Line 23.</p> <p>Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, Second Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 41; subtract Line b from Line a and enter the result in Line 23. Do not enter an amount less than zero.</p> <table border="1"> <tr> <td>a.</td> <td>IRS Transportation Standards, Ownership Costs, Second Car</td> <td>\$</td> </tr> <tr> <td>b.</td> <td>Average Monthly Payments for debts secured by Vehicle 2, if any, as stated in Line 41</td> <td>\$</td> </tr> <tr> <td>c.</td> <td>Net ownership/lease expense for Vehicle 2</td> <td>Subtract Line b from Line a.</td> </tr> </table>		a.	IRS Transportation Standards, Ownership Costs, Second Car	\$	b.	Average Monthly Payments for debts secured by Vehicle 2, if any, as stated in Line 41	\$	c.	Net ownership/lease expense for Vehicle 2	Subtract Line b from Line a.	\$
a.	IRS Transportation Standards, Ownership Costs, Second Car	\$										
b.	Average Monthly Payments for debts secured by Vehicle 2, if any, as stated in Line 41	\$										
c.	Net ownership/lease expense for Vehicle 2	Subtract Line b from Line a.										
24	<p>Other Necessary Expenses: taxes. Enter the total average monthly expense that you actually incur for all federal, state, and local taxes, other than real estate and sales taxes, such as income taxes, self employment taxes, social security taxes, and Medicare taxes. Do not include real estate or sales taxes.</p>											
25	<p>Other Necessary Expenses: mandatory payroll deductions. Enter the total average monthly payroll deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. Do not include discretionary amounts, such as non-mandatory 401(k) contributions.</p>		\$									
26	<p>Other Necessary Expenses: life insurance. Enter average monthly premiums that you actually pay for term life insurance for yourself. Do not include premiums for insurance on your dependents, for whole life, or for any other form of insurance.</p>		\$									
27	<p>Other Necessary Expenses: court-ordered payments. Enter the total monthly amount that you are required to pay pursuant to court order, such as spousal or child support payments. Do not include payments on past due support obligations included in Line 43.</p>		\$									
28	<p>Other Necessary Expenses: education for employment or for a physically or mentally challenged child. Enter the total monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.</p>		\$									
29	<p>Other Necessary Expenses: childcare. Enter the average monthly amount that you actually expend on childcare. Do not include payments made for children's education.</p>		\$									
30	<p>Other Necessary Expenses: health care. Enter the average monthly amount that you actually expend on health care expenses that are not reimbursed by insurance or paid by a health savings account. Do not include payments for health insurance listed in Line 33.</p>		\$									

31	Other Necessary Expenses: telecommunication services. Enter the average monthly expenses that you actually pay for cell phones, pagers, call waiting, caller identification, special long distance, or internet services necessary for the health and welfare of you or your dependents. Do not include any amount previously deducted.	\$																				
32	Total Expenses Allowed under IRS Standards. Enter the total of Lines 19 through 31	\$																				
Subpart B: Additional Expense Deductions under § 707(b) Note: Do not include any expenses that you have listed in Lines 19-31																						
33	Health Insurance, Disability Insurance, and Health Savings Account Expenses. List the average monthly amounts that you actually expend in each of the following categories and enter the total.	\$																				
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 5%; text-align: center;">a.</td> <td style="width: 75%;">Health Insurance</td> <td style="width: 20%; text-align: center;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td>Disability Insurance</td> <td style="text-align: center;">\$</td> </tr> <tr> <td style="text-align: center;">c.</td> <td>Health Savings Account</td> <td style="text-align: center;">\$</td> </tr> <tr> <td colspan="2"></td> <td style="text-align: center;">Total: Add Lines a, b and c</td> </tr> </table>		a.	Health Insurance	\$	b.	Disability Insurance	\$	c.	Health Savings Account	\$			Total: Add Lines a, b and c									
a.	Health Insurance	\$																				
b.	Disability Insurance	\$																				
c.	Health Savings Account	\$																				
		Total: Add Lines a, b and c																				
		\$																				
34	Continued contributions to the care of household or family members. Enter the actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses.	\$																				
35	Protection against family violence. Enter any average monthly expenses that you actually incurred to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law.	\$																				
36	Home energy costs in excess of the allowance specified by the IRS Local Standards. Enter the average monthly amount by which your home energy costs exceed the allowance in the IRS Local Standards for Housing and Utilities. You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.	\$																				
37	Education expenses for dependent children less than 18. Enter the average monthly expenses that you actually incur, not to exceed \$125 per child, in providing elementary and secondary education for your dependent children less than 18 years of age. You must provide your case trustee with documentation demonstrating that the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.	\$																				
38	Additional food and clothing expense. Enter the average monthly amount by which your food and clothing expenses exceed the combined allowances for food and apparel in the IRS National Standards, not to exceed five percent of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.	\$																				
39	Continued charitable contributions. Enter the amount that you will continue to contribute in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2).	\$																				
40	Total Additional Expense Deductions under § 707(b). Enter the total of Lines 33 through 39	\$																				
Subpart C: Deductions for Debt Payment																						
41	Future payments on secured claims. For each of your debts that is secured by an interest in property that you own, list the name of creditor, identify the property securing the debt, and state the Average Monthly Payment. The Average Monthly Payment is the total of all amounts contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. Do not include items you have previously deducted, such as insurance and taxes.	\$																				
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <th style="width: 5%;"></th> <th style="width: 30%;">Name of Creditor</th> <th style="width: 35%;">Property Securing the Debt</th> <th style="width: 30%;">60-month Average Payment</th> </tr> <tr> <td style="text-align: center;">a.</td> <td></td> <td></td> <td style="text-align: center;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td></td> <td></td> <td style="text-align: center;">\$</td> </tr> <tr> <td style="text-align: center;">c.</td> <td></td> <td></td> <td style="text-align: center;">\$</td> </tr> <tr> <td colspan="3"></td> <td style="text-align: center;">Total: Add Lines a, b and c</td> </tr> </table>			Name of Creditor	Property Securing the Debt	60-month Average Payment	a.			\$	b.			\$	c.			\$				Total: Add Lines a, b and c	
	Name of Creditor	Property Securing the Debt	60-month Average Payment																			
a.			\$																			
b.			\$																			
c.			\$																			
			Total: Add Lines a, b and c																			
		\$																				

42		Past due payments on secured claims. If any of the debts listed in Line 41 are in default, and the property securing the debt is necessary for your support or the support of your dependents, you may include in your deductions 1/60th of the amount that you must pay the creditor as a result of the default (the "cure amount") in order to maintain possession of the property. List any such amounts in the following chart and enter the total. If necessary, list additional entries on a separate page.	
	Name of Creditor	Property Securing the Debt in Default	1/60th of the Cure Amount
	a.		\$
	b.		\$
	c.		\$
			Total: Add Lines a, b and c
			\$
43		Payments on priority claims. Enter the total amount of all priority claims (including priority child support and alimony claims), divided by 60.	\$
44		Chapter 13 administrative expenses. If you are eligible to file a case under Chapter 13, complete the following chart, multiply the amount in Line a by the amount in Line b, and enter the resulting administrative expense.	
	a.	Projected average monthly Chapter 13 plan payment.	\$
	b.	Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	x
	c.	Average monthly administrative expense of Chapter 13 case	Total: Multiply Lines a and b
			\$
45		Total Deductions for Debt Payment. Enter the total of Lines 41 through 44.	\$
Subpart D: Total Deductions Allowed under § 707(b)(2)			
46		Total of all deductions allowed under § 707(b)(2). Enter the total of Lines 32, 40, and 45.	\$

Part VI. DETERMINATION OF § 707(b)(2) PRESUMPTION		
47	Enter the amount from Line 18 (Current monthly income for § 707(b)(2))	\$
48	Enter the amount from Line 46 (Total of all deductions allowed under § 707(b)(2))	\$
49	Monthly disposable income under § 707(b)(2). Subtract Line 48 from Line 47 and enter the result	\$
50	60-month disposable income under § 707(b)(2). Multiply the amount in Line 49 by the number 60 and enter the result.	\$
51	Initial presumption determination. Check the applicable box and proceed as directed. <div style="margin-left: 20px;"> <input type="checkbox"/> The amount on Line 50 is less than \$6,000 Check the "Presumption does not arise" box at the top of page 1 of this statement, and complete the verification in Part VII. Do not complete the remainder of Part VI. </div> <div style="margin-left: 20px;"> <input type="checkbox"/> The amount set forth on Line 50 is more than \$10,000. Check the "Presumption arises" box at the top of page 1 of this statement, and complete the verification in Part VII. Do not complete the remainder of Part VI. </div> <div style="margin-left: 20px;"> <input type="checkbox"/> The amount on Line 50 is at least \$6,000, but not more than \$10,000. Complete the remainder of Part VI (Lines 52 through 54). </div>	
52	Enter the amount of your total non-priority unsecured debt	\$
53	Threshold debt payment amount. Multiply the amount in Line 52 by the number 0.25 and enter the result.	\$
54	Secondary presumption determination. Check the applicable box and proceed as directed. <div style="margin-left: 20px;"> <input type="checkbox"/> The amount on Line 50 is less than the amount on Line 53. Check the "Presumption does not arise" box at the top of page 1 of this statement, and complete the verification in Part VIII. </div> <div style="margin-left: 20px;"> <input type="checkbox"/> The amount on Line 50 is equal to or greater than the amount on Line 53. Check the "Presumption arises" box at the top of page 1 of this statement, and complete the verification in Part VIII. You may also complete Part VII. </div>	

Part VII: ADDITIONAL EXPENSE CLAIMS

55

Other Expenses. List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.

Expense Description	Monthly Amount
a.	\$
b.	\$
c.	\$
Total: Add Lines a, b, and c	\$

Part VIII: VERIFICATION

56

I declare under penalty of perjury that the information provided in this statement is true and correct. *(If this a joint case, both debtors must sign.)*

Date: _____

Signature: _____
(Debtor)

Date: _____

Signature: _____
(Joint Debtor, if any)

In re _____
Debtor(s)Case Number: _____
(if known)

Check the box as directed in Parts I, III, and VI of this statement.

☐ Presumption arises☐ Presumption does not arise**STATEMENT OF CURRENT MONTHLY INCOME AND MEANS TEST CALCULATION**
FOR USE IN CHAPTER 7 (IF IRS SEPARATES ITS HOUSING ALLOWANCE)

In addition to Schedules I and J, this statement must be completed by every individual Chapter 7 debtor, whether or not filing jointly, whose debts are primarily consumer debts. Joint debtors may complete one statement only.

Part I. EXCLUSION FOR DISABLED VETERANS

1

If you are a disabled veteran described in the Veteran's Declaration in this Part I, (1) check the box at the beginning of the Veteran's Declaration, (2) check the "Presumption does not arise" box at the top of this statement, and (3) complete the verification in Part VIII. Do not complete any of the remaining parts of this statement.

☐ **Veteran's Declaration.** By checking this box, I declare under penalty of perjury that I am a disabled veteran (as defined in 38 U.S.C. § 3741(1)) whose indebtedness occurred primarily during a period in which I was on active duty (as defined in 10 U.S.C. § 101(d)(1)) or while I was performing a homeland defense activity (as defined in 32 U.S.C. § 901(1)).**Part II. CALCULATION OF MONTHLY INCOME FOR § 707(b)(7) EXCLUSION**

2

Marital/filing status. Check the box that applies and complete the balance of this part of this statement as directed.a. ☐ **Unmarried. Complete only Column A ("Debtor's Income") for Lines 3-11.**b. ☐ **Married, not filing jointly, with declaration of separate households.** By checking this box, debtor declares under penalty of perjury: "My spouse and I are legally separated under applicable non-bankruptcy law or my spouse and I are living apart other than for the purpose of evading the requirements of § 707(b)(2)(A) of the Bankruptcy Code." **Complete only Column A ("Debtor's Income") for Lines 3-11.**c. ☐ **Married, not filing jointly, without the declaration of separate households set out in Line 2.b above. Complete both Column A ("Debtor's Income") and Column B (Spouse's Income) for Lines 3-11.**d. ☐ **Married, filing jointly. Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 3-11.**

All figures must reflect average monthly income for the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If you received different amounts of income during these six months, you must total the amounts received during the six months, divide this total by six, and enter the result on the appropriate line.

Column A
Debtor's
Income**Column B**
Spouse's
Income

3

Gross wages, salary, tips, bonuses, overtime, commissions.

\$

\$

4

Income from the operation of a business, profession, or farm. Subtract Line b from Line a and enter the difference on Line 4. Do not enter a number less than zero. **Do not include any part of the business expenses entered on Line b as a deduction in Part V.**

a.	Gross receipts	\$
b.	Ordinary and necessary business expenses	\$
c.	Business income	Subtract Line b from Line a

\$

\$

5

Rent and other real property income. Subtract Line b from Line a and enter the difference on Line 5. Do not enter a number less than zero. **Do not include any part of the operating expenses entered on Line b as a deduction in Part V.**

a.	Gross receipts	\$
b.	Ordinary and necessary operating expenses	\$
c.	Rental income	Subtract Line b from Line a

\$

\$

6

Interest, dividends, and royalties.

\$

\$

7

Pension and retirement income.

\$

\$

8

Regular contributions to the household expenses of the debtor or the debtor's dependents, including child or spousal support. Do not include contributions from the debtor's spouse if Column B is completed.

\$

\$

9	Unemployment compensation. Enter the amount in Column A and, if applicable, Column B. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: <table border="1"> <tr> <td>Unemployment compensation claimed to be a benefit under the Social Security Act</td> <td>Debtor \$ _____</td> <td>Spouse \$ _____</td> </tr> </table>	Unemployment compensation claimed to be a benefit under the Social Security Act	Debtor \$ _____	Spouse \$ _____	\$	\$			
Unemployment compensation claimed to be a benefit under the Social Security Act	Debtor \$ _____	Spouse \$ _____							
10	Income from all other sources. If necessary, list additional sources on a separate page. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. Specify source and amount. <table border="1"> <tr> <td>a.</td> <td>_____</td> <td>\$ _____</td> </tr> <tr> <td>b.</td> <td>_____</td> <td>\$ _____</td> </tr> </table> Total and enter on Line 10	a.	_____	\$ _____	b.	_____	\$ _____	\$	\$
a.	_____	\$ _____							
b.	_____	\$ _____							
11	Subtotal of Current Monthly Income for § 707(b)(7). Add Lines 3 thru 10 in Column A, and, if Column B is completed, add Lines 3 through 10 in Column B. Enter the total(s).	\$	\$						
12	Total Current Monthly Income for § 707(b)(7). If Column B has been completed, add Line 11, Column A to Line 11, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 11, Column A.	\$ _____							

Part III. APPLICATION OF § 707(b)(7) EXCLUSION

13	Annualized Current Monthly Income for § 707(b)(7). Multiply the amount from Line 12 by the number 12 and enter the result.	\$
14	Applicable median family income. Enter the median family income for the applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: _____ b. Enter debtor's household size: _____	\$
15	Application of Section 707(b)(7). Check the applicable box and proceed as directed. <input type="checkbox"/> The amount on Line 13 is less than or equal to the amount on Line 14. Check the "Presumption does not arise" box at the top of page 1 of this statement, and complete Part VIII; do not complete Parts IV, V, VI, or VII. <input type="checkbox"/> The amount on Line 13 is more than the amount on Line 14. Complete the remaining parts of this statement.	

Complete Parts IV, V, VI, and VII of this statement only if required. (See Line 15.)

Part IV. CALCULATION OF CURRENT MONTHLY INCOME FOR § 707(b)(2)

16	Enter the amount from Line 12.	\$
17	Marital adjustment. If you checked the box at Line 2.c, enter the amount of the income listed in Line 11, Column B that was NOT regularly contributed to the household expenses of the debtor or the debtor's dependents. If you did not check box at Line 2.c, enter zero.	\$
18	Current monthly income for § 707(b)(2). Subtract Line 17 from Line 16 and enter the result.	\$ _____

Part V. CALCULATION OF DEDUCTIONS ALLOWED UNDER § 707(b)(2)

Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)

19	National Standards: food, clothing, household supplies, personal care, and miscellaneous. Enter "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable family size and income level. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	\$
20	Local Standards: housing and utilities; utilities/maintenance expense. Enter the amount of the IRS Housing and Utilities Standards; Utilities/Maintenance Expense for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	\$

21	<p>Local Standards: housing and utilities; mortgage/rental expense. Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; Mortgage/Rental Expense for your county and family size (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 42; subtract Line b from Line a and enter the result in Line 21. Do not enter an amount less than zero.</p> <p>(Under revision)</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 5%; text-align: center;">a.</td> <td style="width: 75%;">IRS Housing and Utilities Standards; Mortgage/Rental Expense</td> <td style="width: 20%;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td>Average Monthly Payment for any debts secured by your home, if any, as stated in Line 42</td> <td>\$</td> </tr> <tr> <td style="text-align: center;">c.</td> <td>Net mortgage/rental expense</td> <td>Subtract Line b from Line a.</td> </tr> </table>	a.	IRS Housing and Utilities Standards; Mortgage/Rental Expense	\$	b.	Average Monthly Payment for any debts secured by your home, if any, as stated in Line 42	\$	c.	Net mortgage/rental expense	Subtract Line b from Line a.	
a.	IRS Housing and Utilities Standards; Mortgage/Rental Expense	\$									
b.	Average Monthly Payment for any debts secured by your home, if any, as stated in Line 42	\$									
c.	Net mortgage/rental expense	Subtract Line b from Line a.									
22	<p>Local Standards: transportation; vehicle operation/public transportation expense. You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation.</p> <p>Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 8. <input type="checkbox"/> 0 <input type="checkbox"/> 1 <input type="checkbox"/> 2 or more.</p> <p>Enter the amount from IRS Transportation Standards, Operating Costs & Public Transportation Costs for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)</p>	\$									
23	<p>Local Standards: transportation ownership/lease expense; Vehicle 1. Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.) <input type="checkbox"/> 1 <input type="checkbox"/> 2 or more.</p> <p>Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, First Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 42; subtract Line b from Line a and enter the result in Line 23. Do not enter an amount less than zero.</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 5%; text-align: center;">a.</td> <td style="width: 75%;">IRS Transportation Standards, Ownership Costs, First Car</td> <td style="width: 20%;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td>Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 42</td> <td>\$</td> </tr> <tr> <td style="text-align: center;">c.</td> <td>Net ownership/lease expense for Vehicle 1</td> <td>Subtract Line b from Line a.</td> </tr> </table>	a.	IRS Transportation Standards, Ownership Costs, First Car	\$	b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 42	\$	c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a.	\$
a.	IRS Transportation Standards, Ownership Costs, First Car	\$									
b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 42	\$									
c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a.									
24	<p>Local Standards: transportation ownership/lease expense; Vehicle 2. Complete this Line only if you checked the "2 or more" Box in Line 23.</p> <p>Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, Second Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 42; subtract Line b from Line a and enter the result in Line 24. Do not enter an amount less than zero.</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 5%; text-align: center;">a.</td> <td style="width: 75%;">IRS Transportation Standards, Ownership Costs, Second Car</td> <td style="width: 20%;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td>Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 42</td> <td>\$</td> </tr> <tr> <td style="text-align: center;">c.</td> <td>Net ownership/lease expense for Vehicle 2</td> <td>Subtract Line b from Line a.</td> </tr> </table>	a.	IRS Transportation Standards, Ownership Costs, Second Car	\$	b.	Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 42	\$	c.	Net ownership/lease expense for Vehicle 2	Subtract Line b from Line a.	\$
a.	IRS Transportation Standards, Ownership Costs, Second Car	\$									
b.	Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 42	\$									
c.	Net ownership/lease expense for Vehicle 2	Subtract Line b from Line a.									
25	<p>Other Necessary Expenses: taxes. Enter the total average monthly expense that you actually incur for all federal, state, and local taxes, other than real estate and sales taxes, such as income taxes, self employment taxes, social security taxes, and Medicare taxes. Do not include real estate or sales taxes.</p>										
26	<p>Other Necessary Expenses: mandatory payroll deductions. Enter the total average monthly payroll deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. Do not include discretionary amounts, such as non-mandatory 401(k) contributions.</p>	\$									
27	<p>Other Necessary Expenses: life insurance. Enter average monthly premiums that you actually pay for term life insurance for yourself. Do not include premiums for insurance on your dependents, for whole life or for any other form of insurance.</p>	\$									
28	<p>Other Necessary Expenses: court-ordered payments. Enter the total monthly amount that you are required to pay pursuant to court order, such as spousal or child support payments. Do not include payments on past due support obligations included in Line 44.</p>	\$									

29	Other Necessary Expenses: education for employment or for a physically or mentally challenged child. Enter the total monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.		\$	
30	Other Necessary Expenses: childcare. Enter the average monthly amount that you actually expend on childcare. Do not include payments made for children's education.		\$	
31	Other Necessary Expenses: health care. Enter the average monthly amount that you actually expend on health care expenses that are not reimbursed by insurance or paid by a health savings account. Do not include payments for health insurance listed in Line 34.		\$	
32	Other Necessary Expenses: telecommunication services. Enter the average monthly expenses that you actually pay for cell phones, pagers, call waiting, caller identification, special long distance, or Internet services necessary for the health and welfare of you or your dependents. Do not include any amount previously deducted.		\$	
33	Total Expenses Allowed under IRS Standards. Enter the total of Lines 19 through 32.		\$	
Subpart B: Additional Expense Deductions under § 707(b)				
Note: Do not include any expenses that you have listed in Lines 19-32				
34	Health Insurance, Disability Insurance, and Health Savings Account Expenses. List the average monthly amounts that you actually expend in each of the following categories and enter the total.		\$	
	a.	Health Insurance		\$
	b.	Disability Insurance		\$
	c.	Health Savings Account		\$
	Total: Add Lines a, b, and c			
35	Continued contributions to the care of household or family members. Enter the actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses.		\$	
36	Protection against family violence. Enter any average monthly expenses that you actually incurred to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law.		\$	
37	Home energy costs in excess of the allowance specified by the IRS Local Standards. Enter the average monthly amount by which your home energy costs exceed the allowance in the IRS Local Standards for Housing and Utilities. You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.		\$	
38	Education expenses for dependent children less than 18. Enter the average monthly expenses that you actually incur, not to exceed \$125 per child, in providing elementary and secondary education for your dependent children less than 18 years of age. You must provide your case trustee with documentation demonstrating that the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.		\$	
39	Additional food and clothing expense. Enter the average monthly amount by which your food and clothing expenses exceed the combined allowances for food and apparel in the IRS National Standards, not to exceed five percent of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.		\$	
40	Continued charitable contributions. Enter the amount that you will continue to contribute in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2).		\$	
41	Total Additional Expense Deductions under § 707(b). Enter the total of Lines 34 through 40		\$	

Subpart C: Deductions for Debt Payment

42	Future payments on secured claims. For each of your debts that is secured by an interest in property that you own, list the name of creditor, identify the property securing the debt, and state the Average Monthly Payment. The Average Monthly Payment is the total of all amounts contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. Do not include items you have previously deducted, such as insurance and taxes.	<table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 5%;"></th> <th style="width: 30%;">Name of Creditor</th> <th style="width: 30%;">Property Securing the Debt</th> <th style="width: 35%;">60-month Average Payment</th> </tr> </thead> <tbody> <tr> <td>a.</td> <td></td> <td></td> <td>\$</td> </tr> <tr> <td>b.</td> <td></td> <td></td> <td>\$</td> </tr> <tr> <td>c.</td> <td></td> <td></td> <td>\$</td> </tr> <tr> <td colspan="3"></td> <td>Total: Add Lines a, b, and c.</td> </tr> </tbody> </table>		Name of Creditor	Property Securing the Debt	60-month Average Payment	a.			\$	b.			\$	c.			\$				Total: Add Lines a, b, and c.	\$
	Name of Creditor	Property Securing the Debt	60-month Average Payment																				
a.			\$																				
b.			\$																				
c.			\$																				
			Total: Add Lines a, b, and c.																				
43	Past due payments on secured claims. If any of the debts listed in Line 42 are in default, and the property securing the debt is necessary for your support or the support of your dependents, you may include in your deductions 1/60th of the amount that you must pay the creditor as a result of the default (the "cure amount") in order to maintain possession of the property. List any such amounts in the following chart and enter the total. If necessary, list additional entries on a separate page.	<table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 5%;"></th> <th style="width: 30%;">Name of Creditor</th> <th style="width: 30%;">Property Securing the Debt in Default</th> <th style="width: 35%;">1/60th of the Cure Amount</th> </tr> </thead> <tbody> <tr> <td>a.</td> <td></td> <td></td> <td>\$</td> </tr> <tr> <td>b.</td> <td></td> <td></td> <td>\$</td> </tr> <tr> <td>c.</td> <td></td> <td></td> <td>\$</td> </tr> <tr> <td colspan="3"></td> <td>Total: Add Lines a, b, and c.</td> </tr> </tbody> </table>		Name of Creditor	Property Securing the Debt in Default	1/60th of the Cure Amount	a.			\$	b.			\$	c.			\$				Total: Add Lines a, b, and c.	\$
	Name of Creditor	Property Securing the Debt in Default	1/60th of the Cure Amount																				
a.			\$																				
b.			\$																				
c.			\$																				
			Total: Add Lines a, b, and c.																				
44	Payments on priority claims. Enter the total amount of all priority claims (including priority child support and alimony claims), divided by 60.		\$																				
45	Chapter 13 administrative expenses. If you are eligible to file a case under Chapter 13, complete the following chart, multiply the amount in Line a by the amount in Line b, and enter the resulting administrative expense.	<table border="1" style="width: 100%; border-collapse: collapse;"> <tbody> <tr> <td style="width: 5%; text-align: center;">a.</td> <td style="width: 55%;">Projected average monthly Chapter 13 plan payment.</td> <td style="width: 40%;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td>Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)</td> <td style="text-align: center;">x</td> </tr> <tr> <td style="text-align: center;">c.</td> <td>Average monthly administrative expense of Chapter 13 case</td> <td>Total: Multiply Lines a and b</td> </tr> </tbody> </table>	a.	Projected average monthly Chapter 13 plan payment.	\$	b.	Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	x	c.	Average monthly administrative expense of Chapter 13 case	Total: Multiply Lines a and b	\$											
a.	Projected average monthly Chapter 13 plan payment.	\$																					
b.	Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	x																					
c.	Average monthly administrative expense of Chapter 13 case	Total: Multiply Lines a and b																					
46	Total Deductions for Debt Payment. Enter the total of Lines 42 through 45.		\$																				
Subpart D: Total Deductions Allowed under § 707(b)(2)																							
47	Total of all deductions allowed under § 707(b)(2). Enter the total of Lines 33, 41, and 46.		\$																				

Part VI. DETERMINATION OF § 707(b)(2) PRESUMPTION

48	Enter the amount from Line 18 (Current monthly income for § 707(b)(2))	\$
49	Enter the amount from Line 47 (Total of all deductions allowed under § 707(b)(2))	\$
50	Monthly disposable income under § 707(b)(2). Subtract Line 49 from Line 48 and enter the result	\$
51	60-month disposable income under § 707(b)(2). Multiply the amount in Line 50 by the number 60 and enter the result.	\$

52	Initial presumption determination. Check the applicable box and proceed as directed. <input type="checkbox"/> The amount on Line 51 is less than \$6,000. Check the "Presumption does not arise" box at the top of page 1 of this statement, and complete the verification in Part VII. Do not complete the remainder of Part VI. <input type="checkbox"/> The amount set forth on Line 51 is more than \$10,000. Check the "Presumption arises" box at the top of page 1 of this statement, and complete the verification in Part VII. Do not complete the remainder of Part VI. <input type="checkbox"/> The amount on Line 51 is at least \$6,000, but not more than \$10,000. Complete the remainder of Part VI (Lines 53 through 55).	
53	Enter the amount of your total non-priority unsecured debt	\$
54	Threshold debt payment amount. Multiply the amount in Line 53 by the number 0.25 and enter the result.	\$
55	Secondary presumption determination. Check the applicable box and proceed as directed. <input type="checkbox"/> The amount on Line 51 is less than the amount on Line 54. Check the "Presumption does not arise" box at the top of page 1 of this statement, and complete the verification in Part VIII. <input type="checkbox"/> The amount on Line 51 is equal to or greater than the amount on Line 54. Check the "Presumption arises" box at the top of page 1 of this statement, and complete the verification in Part VIII. You may also complete Part VII.	

Part VII: ADDITIONAL EXPENSE CLAIMS

56	Other Expenses. List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.	
	Expense Description	Monthly Amount
	a.	\$
	b.	\$
	c.	\$
	Total: Add Lines a, b, and c	\$

Part VIII: VERIFICATION

57	I declare under penalty of perjury that the information provided in this statement is true and correct. <i>(If this a joint case, both debtors must sign.)</i>	
	Date: _____	Signature: _____ <div style="text-align: center; font-size: small;">(Debtor)</div>
	Date: _____	Signature: _____ <div style="text-align: center; font-size: small;">(Joint Debtor, if any)</div>

Form B22B (Chapter 11) (10/05)

In re _____
Debtor(s)

Case Number: _____
(If known)

STATEMENT OF CURRENT MONTHLY INCOME
FOR USE IN CHAPTER 11

In addition to Schedules I and J, this statement must be completed by every individual Chapter 11 debtor, whether or not filing jointly. Joint debtors may complete one statement only.

Part I. CALCULATION OF CURRENT MONTHLY INCOME					
1	Marital/filing status. Check the box that applies and complete the balance of this part of this statement as directed. a. <input type="checkbox"/> Unmarried. Complete only Column A ("Debtor's Income") for Lines 2-10. b. <input type="checkbox"/> Married, not filing jointly. Complete only Column A ("Debtor's Income") for Lines 2-10. c. <input type="checkbox"/> Married, filing jointly. Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 2-10. All figures must reflect average monthly income for the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If you received different amounts of income during these six months, you must total the amounts received during the six months, divide this total by six, and enter the result on the appropriate line.			Column A Debtor's Income	Column B Spouse's Income
2	Gross wages, salary, tips, bonuses, overtime, commissions.			\$	\$
3	Net income from the operation of a business, profession, or farm. Subtract Line b from Line a and enter the difference on Line 3. Do not enter a number less than zero.				
	a.	Gross receipts	\$		
	b.	Ordinary and necessary business expenses	\$		
	c.	Business income	Subtract Line b from Line a	\$	\$
4	Net rental and other real property income. Subtract Line b from Line a and enter the difference on Line 4. Do not enter a number less than zero.				
	a.	Gross receipts	\$		
	b.	Ordinary and necessary operating expenses	\$		
	c.	Rental income	Subtract Line b from Line a	\$	\$
5	Interest, dividends, and royalties.			\$	\$
6	Pension and retirement income.			\$	\$
7	Regular contributions to the household expenses of the debtor or the debtor's dependents, including child or spousal support. Do not include contributions from the debtor's spouse if Column B is completed.			\$	\$
8	Unemployment compensation. Enter the amount in Column A and, if applicable, Column B. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below:				
	Unemployment compensation claimed to be a benefit under the Social Security Act Debtor \$ _____ Spouse \$ _____			\$	\$
9	Income from all other sources. If necessary, list additional sources on a separate page. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. Specify source and amount.				
	a.		\$		
	b.		\$		
	Total and enter on Line 9			\$	\$
10	Subtotal of current monthly income. Add Lines 2 thru 9 in Column A, and, if Column B is completed, add Lines 2 through 9 in Column B. Enter the total(s).			\$	\$
11	Total current monthly income. If Column B has been completed, add Line 10, Column A to Line 10, Column B, and enter the total. If Column B has not been completed, enter the				

amount from Line 10, Column A.	\$
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Part II: VERIFICATION	
12	<p>I declare under penalty of perjury that the information provided in this statement is true and correct. <i>(If this a joint case, both debtors must sign.)</i></p> <p>Date: _____ Signature: _____ (Debtor)</p> <p>Date: _____ Signature: _____ (Joint Debtor, if any)</p>

In re _____
Debtor(s)Case Number: _____
(If known)

Check the box as directed in Part II, Line 14 of this statement.

- ☐ Disposable income determined under § 1325(b)(3)
☐ Disposable income not determined under § 1325(b)(3)

STATEMENT OF CURRENT MONTHLY INCOME AND DISPOSABLE INCOME CALCULATION

FOR USE IN CHAPTER 13

In addition to Schedules I and J, this statement must be completed by every Individual Chapter 13 debtor, whether or not filing jointly. Joint debtors may complete one statement only.

Part I. CALCULATION OF CURRENT MONTHLY INCOME														
1	Marital/filing status. Check the box that applies and complete the balance of this part of this statement as directed. a. <input type="checkbox"/> Unmarried. Complete only Column A ("Debtor's Income") for Lines 2-10. b. <input type="checkbox"/> Married, not filing jointly. Complete only Column A ("Debtor's Income") for Lines 2-10. (Under Revision) c. <input type="checkbox"/> Married, filing jointly. Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 2-10. All figures must reflect average monthly income for the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If you received different amounts of income during these six months, you must total the amounts received during the six months, divide this total by six, and enter the result on the appropriate line.			Column A Debtor's Income	Column B Spouse's Income									
2	Gross wages, salary, tips, bonuses, overtime, commissions.			\$	\$									
3	Income from the operation of a business, profession, or farm. Subtract Line b from Line a and enter the difference on Line 3. Do not enter a number less than zero. Do not include any part of the business expenses entered on Line b as a deduction in Part III. <table border="1" style="width: 100%; margin-top: 5px;"> <tr> <td style="width: 5%;">a.</td> <td style="width: 45%;">Gross receipts</td> <td style="width: 50%;">\$</td> </tr> <tr> <td>b.</td> <td>Ordinary and necessary business expenses</td> <td>\$</td> </tr> <tr> <td>c.</td> <td>Business income</td> <td>Subtract Line b from Line a</td> </tr> </table>			a.	Gross receipts	\$	b.	Ordinary and necessary business expenses	\$	c.	Business income	Subtract Line b from Line a	\$	\$
a.	Gross receipts	\$												
b.	Ordinary and necessary business expenses	\$												
c.	Business income	Subtract Line b from Line a												
4	Rent and other real property income. Subtract Line b from Line a and enter the difference on Line 4. Do not enter a number less than zero. Do not include any part of the operating expenses entered on Line b as a deduction in Part III. <table border="1" style="width: 100%; margin-top: 5px;"> <tr> <td style="width: 5%;">a.</td> <td style="width: 45%;">Gross receipts</td> <td style="width: 50%;">\$</td> </tr> <tr> <td>b.</td> <td>Ordinary and necessary operating expenses</td> <td>\$</td> </tr> <tr> <td>c.</td> <td>Rental income</td> <td>Subtract Line b from Line a</td> </tr> </table>			a.	Gross receipts	\$	b.	Ordinary and necessary operating expenses	\$	c.	Rental income	Subtract Line b from Line a	\$	\$
a.	Gross receipts	\$												
b.	Ordinary and necessary operating expenses	\$												
c.	Rental income	Subtract Line b from Line a												
5	Interest, dividends, and royalties.			\$	\$									
6	Pension and retirement income.			\$	\$									
7	Regular contributions to the household expenses of the debtor or the debtor's dependents, including child or spousal support. Do not include contributions from the debtor's spouse if Column B is completed.			\$	\$									
8	Unemployment compensation. Enter the amount in Column A and, if applicable, Column B. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: <table border="1" style="width: 100%; margin-top: 5px;"> <tr> <td style="width: 40%;">Unemployment compensation claimed to be a benefit under the Social Security Act</td> <td style="width: 30%;">Debtor \$ _____</td> <td style="width: 30%;">Spouse \$ _____</td> </tr> </table>			Unemployment compensation claimed to be a benefit under the Social Security Act	Debtor \$ _____	Spouse \$ _____	\$	\$						
Unemployment compensation claimed to be a benefit under the Social Security Act	Debtor \$ _____	Spouse \$ _____												
9	Income from all other sources. Specify source and amount. If necessary, list additional sources on a separate page. Total and enter on Line 9. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. <table border="1" style="width: 100%; margin-top: 5px;"> <tr> <td style="width: 5%;">a.</td> <td style="width: 45%;"></td> <td style="width: 50%;">\$</td> </tr> <tr> <td>b.</td> <td></td> <td>\$</td> </tr> </table>			a.		\$	b.		\$	\$	\$			
a.		\$												
b.		\$												
10	Subtotal of current monthly income. Add Lines 2 thru 9 in Column A, and, if Column B is completed, add Lines 2 through 9 in Column B. Enter the total(s).			\$	\$									

11	Total current monthly income. If Column B has been completed, add Line 10, Column A to Line 10, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 10, Column A.	\$
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Part II. APPLICATION OF § 1325(b)(3)		
12	Annualized current monthly income. Multiply the amount from Line 11 by the number 12 and enter the result.	\$
13	Applicable median family income. Enter the median family income for applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: _____ b. Enter debtor's household size: _____	\$
14	Application of § 1325(b)(3). Check the applicable box and proceed as directed. <input type="checkbox"/> The amount on Line 12 is less than or equal to the amount on Line 13. Check the box at the top of page 1 of this statement that states "Disposable income not determined under § 1325(b)(3)" and complete Part VI of this statement; do not complete Parts III, IV, or V. <input type="checkbox"/> The amount on Line 12 is more than the amount on Line 13. Check the box at the top of page 1 of this statement that states "Disposable income determined under § 1325(b)(3)" and complete the remaining parts of this statement.	

Complete Parts III, IV, and V of this statement only if required. (See Line 14.)

Part III. CALCULATION OF DEDUCTIONS ALLOWED UNDER § 707(b)(2)											
Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)											
15	National Standards: food, clothing, household supplies, personal care, and miscellaneous. Enter the "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable family size and income level. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	\$									
16	Local Standards: housing and utilities. Enter the amount of the IRS Housing and Utilities Standards allowance for your county and family size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court), adjusted to deduct any portion of the allowance that includes payments on debts secured by your home, listed in Line 37. (Under revision)	\$									
17	Local Standards: transportation; vehicle operation/public transportation expense. You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation. Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 7. <input type="checkbox"/> 0 <input type="checkbox"/> 1 <input type="checkbox"/> 2 or more. Enter the amount from IRS Transportation Standards, Operating Costs & Public Transportation Costs for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	\$									
18	Local Standards: transportation ownership/lease expense; Vehicle 1. Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.) <input type="checkbox"/> 1 <input type="checkbox"/> 2 or more. Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, First Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 37; subtract Line b from Line a and enter the result in Line 18. Do not enter an amount less than zero.	\$									
	<table border="1" style="width: 100%;"> <tr> <td style="width: 5%;">a.</td> <td style="width: 60%;">IRS Transportation Standards, Ownership Costs, First Car</td> <td style="width: 35%; text-align: right;">\$</td> </tr> <tr> <td>b.</td> <td>Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 37</td> <td style="text-align: right;">\$</td> </tr> <tr> <td>c.</td> <td>Net ownership/lease expense for Vehicle 1</td> <td style="text-align: right;">Subtract Line b from Line a.</td> </tr> </table>	a.	IRS Transportation Standards, Ownership Costs, First Car	\$	b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 37	\$	c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a.	\$
a.	IRS Transportation Standards, Ownership Costs, First Car	\$									
b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 37	\$									
c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a.									

11	Total current monthly income. If Column B has been completed, add Line 10, Column A to Line 10, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 10, Column A.	\$
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Part II. APPLICATION OF § 1325(b)(3)		
12	Annualized current monthly income. Multiply the amount from Line 11 by the number 12 and enter the result.	\$
13	Applicable median family income. Enter the median family income for applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: _____ b. Enter debtor's household size: _____	\$
14	Application of § 1325(b)(3). Check the applicable box and proceed as directed. <input type="checkbox"/> The amount on Line 12 is less than or equal to the amount on Line 13. Check the box at the top of page 1 of this statement that states "Disposable income not determined under § 1325(b)(3)" and complete Part VI of this statement; do not complete Parts III, IV, or V. <input type="checkbox"/> The amount on Line 12 is more than the amount on Line 13. Check the box at the top of page 1 of this statement that states "Disposable income determined under § 1325(b)(3)" and complete the remaining parts of this statement.	

Complete Parts III, IV, and V of this statement only if required. (See Line 14.)

Part III. CALCULATION OF DEDUCTIONS ALLOWED UNDER § 707(b)(2)											
Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)											
15	National Standards: food, clothing, household supplies, personal care, and miscellaneous. Enter the "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable family size and income level. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	\$									
16	Local Standards: housing and utilities. Enter the amount of the IRS Housing and Utilities Standards allowance for your county and family size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court), adjusted to deduct any portion of the allowance that includes payments on debts secured by your home, listed in Line 37. (Under revision)	\$									
17	Local Standards: transportation; vehicle operation/public transportation expense. You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation. Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 7. <input type="checkbox"/> 0 <input type="checkbox"/> 1 <input type="checkbox"/> 2 or more. Enter the amount from IRS Transportation Standards, Operating Costs & Public Transportation Costs for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	\$									
18	Local Standards: transportation ownership/lease expense; Vehicle 1. Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.) <input type="checkbox"/> 1 <input type="checkbox"/> 2 or more. Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, First Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 37; subtract Line b from Line a and enter the result in Line 18. Do not enter an amount less than zero.										
	<table border="1" style="width: 100%;"> <tr> <td style="width: 5%;">a.</td> <td style="width: 60%;">IRS Transportation Standards, Ownership Costs, First Car</td> <td style="width: 35%; text-align: right;">\$</td> </tr> <tr> <td>b.</td> <td>Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 37</td> <td style="text-align: right;">\$</td> </tr> <tr> <td>c.</td> <td>Net ownership/lease expense for Vehicle 1</td> <td style="text-align: right;">Subtract Line b from Line a.</td> </tr> </table>	a.	IRS Transportation Standards, Ownership Costs, First Car	\$	b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 37	\$	c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a.	\$
a.	IRS Transportation Standards, Ownership Costs, First Car	\$									
b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 37	\$									
c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a.									

19		<p>Local Standards: transportation ownership/lease expense; Vehicle 2. Complete this Line only if you checked the "2 or more" Box in Line 18.</p> <p>Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, Second Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 37; subtract Line b from Line a and enter the result in Line 19. Do not enter an amount less than zero.</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 5%; text-align: center;">a.</td> <td style="width: 55%;">IRS Transportation Standards, Ownership Costs, Second Car</td> <td style="width: 40%;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td>Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 37</td> <td>\$</td> </tr> <tr> <td style="text-align: center;">c.</td> <td>Net ownership/lease expense for Vehicle 2</td> <td>Subtract Line b from Line a.</td> </tr> </table>	a.	IRS Transportation Standards, Ownership Costs, Second Car	\$	b.	Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 37	\$	c.	Net ownership/lease expense for Vehicle 2	Subtract Line b from Line a.	\$			
a.	IRS Transportation Standards, Ownership Costs, Second Car	\$													
b.	Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 37	\$													
c.	Net ownership/lease expense for Vehicle 2	Subtract Line b from Line a.													
20		<p>Other Necessary Expenses: taxes. Enter the total average monthly expense that you actually incur for all federal, state and local taxes, other than real estate and sales taxes, such as income taxes, self employment taxes, social security taxes, and Medicare taxes. Do not include real estate or sales taxes.</p>	\$												
21		<p>Other Necessary Expenses: mandatory payroll deductions. Enter the total average monthly payroll deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. Do not include discretionary amounts, such as non-mandatory 401(k) contributions.</p>	\$												
22		<p>Other Necessary Expenses: life insurance. Enter average monthly premiums that you actually pay for term life insurance for yourself. Do not include premiums for insurance on your dependents, for whole life, or for any other form of insurance.</p>	\$												
23		<p>Other Necessary Expenses: court-ordered payments. Enter the total monthly amount that you are required to pay pursuant to court order, such as spousal or child support payments. Do not include payments on past due support obligations included in Line 39.</p>	\$												
24		<p>Other Necessary Expenses: education for employment or for a physically or mentally challenged child. Enter the total monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.</p>													
25		<p>Other Necessary Expenses: childcare. Enter the average monthly amount that you actually expend on childcare. Do not include payments made for children's education.</p>	\$												
26		<p>Other Necessary Expenses: health care. Enter the average monthly amount that you actually expend on health care expenses that are not reimbursed by insurance or paid by a health savings account. Do not include payments for health insurance listed in Line 29.</p>	\$												
27		<p>Other Necessary Expenses: telecommunication services. Enter the average monthly expenses that you actually pay for cell phones, pagers, call waiting, caller identification, special long distance, or internet services necessary for the health and welfare of you or your dependents. Do not include any amount previously deducted.</p>	\$												
28		<p>Total Expenses Allowed under IRS Standards. Enter the total of Lines 15 through 27</p>	\$												
<p>Subpart B: Additional Expense Deductions under § 707(b)</p> <p>Note: Do not include any expenses that you have listed in Lines 15-27</p>															
29		<p>Health Insurance, Disability Insurance, and Health Savings Account Expenses. List the average monthly amounts that you actually expend in each of the following categories and enter the total.</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 5%; text-align: center;">a.</td> <td style="width: 55%;">Health Insurance</td> <td style="width: 40%;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td>Disability Insurance</td> <td>\$</td> </tr> <tr> <td style="text-align: center;">c.</td> <td>Health Savings Account</td> <td>\$</td> </tr> <tr> <td colspan="2"></td> <td>Total: Add Lines a, b, and c</td> </tr> </table>	a.	Health Insurance	\$	b.	Disability Insurance	\$	c.	Health Savings Account	\$			Total: Add Lines a, b, and c	\$
a.	Health Insurance	\$													
b.	Disability Insurance	\$													
c.	Health Savings Account	\$													
		Total: Add Lines a, b, and c													
30		<p>Continued contributions to the care of household or family members. Enter the actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. Do not include payments listed in Line 24.</p>	\$												
31		<p>Protection against family violence. Enter any average monthly expenses that you actually incurred to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law.</p>	\$												
32		<p>Home energy costs in excess of the allowance specified by the IRS Local Standards. Enter the average monthly amount by which your home energy costs exceed the allowance in the IRS Local Standards for Housing and Utilities. You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.</p>	\$												

33	Education expenses for dependent children under 18. Enter the average monthly expenses that you actually incur, not to exceed \$125 per child, in providing elementary and secondary education for your dependent children less than 18 years of age. You must provide your case trustee with documentation demonstrating that the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.	\$
34	Additional food and clothing expense. Enter the average monthly amount by which your food and clothing expenses exceed the combined allowances for food and apparel in the IRS National Standards, not to exceed five percent of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.	\$
35	Continued charitable contributions. Enter the amount that you will continue to contribute in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2).	\$
36	Total Additional Expense Deductions under § 707(b). Enter the total of Lines 29 through 35.	\$

Subpart C: Deductions for Debt Payment

37	Future payments on secured claims. For each of your debts that is secured by an interest in property that you own, list the name of creditor, identify the property securing the debt, and state the Average Monthly Payment. The Average Monthly Payment is the total of all amounts contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. Do not include items you have previously deducted, such as insurance and real estate taxes.																					
	<table border="1"> <thead> <tr> <th></th> <th>Name of Creditor</th> <th>Property Securing the Debt</th> <th>60-month Average Payment</th> </tr> </thead> <tbody> <tr> <td>a.</td> <td></td> <td></td> <td>\$</td> </tr> <tr> <td>b.</td> <td></td> <td></td> <td>\$</td> </tr> <tr> <td>c.</td> <td></td> <td></td> <td>\$</td> </tr> <tr> <td colspan="3"></td> <td>Total: Add Lines a, b, and c</td> </tr> </tbody> </table>		Name of Creditor	Property Securing the Debt	60-month Average Payment	a.			\$	b.			\$	c.			\$				Total: Add Lines a, b, and c	\$
	Name of Creditor	Property Securing the Debt	60-month Average Payment																			
a.			\$																			
b.			\$																			
c.			\$																			
			Total: Add Lines a, b, and c																			
38	Past due payments on secured claims. If any of the debts listed in Line 37 are in default, and the property securing the debt is necessary for your support or the support of your dependents, you may include in your deductions 1/60th of the amount that you must pay the creditor as a result of the default (the "cure amount") in order to maintain possession of the property. List any such amounts in the following chart and enter the total. If necessary, list additional entries on a separate page.																					
	<table border="1"> <thead> <tr> <th></th> <th>Name of Creditor</th> <th>Property Securing the Debt in Default</th> <th>1/60th of the Cure Amount</th> </tr> </thead> <tbody> <tr> <td>a.</td> <td></td> <td></td> <td>\$</td> </tr> <tr> <td>b.</td> <td></td> <td></td> <td>\$</td> </tr> <tr> <td>c.</td> <td></td> <td></td> <td>\$</td> </tr> <tr> <td colspan="3"></td> <td>Total: Add Lines a, b, and c</td> </tr> </tbody> </table>		Name of Creditor	Property Securing the Debt in Default	1/60th of the Cure Amount	a.			\$	b.			\$	c.			\$				Total: Add Lines a, b, and c	\$
	Name of Creditor	Property Securing the Debt in Default	1/60th of the Cure Amount																			
a.			\$																			
b.			\$																			
c.			\$																			
			Total: Add Lines a, b, and c																			
39	Payments on priority claims. Enter the total amount of all priority claims (including priority child support and alimony claims), divided by 60.		\$																			
40	Chapter 13 administrative expenses. Multiply the amount in Line a by the amount in Line b, and enter the resulting administrative expense.																					
	<table border="1"> <tbody> <tr> <td>a.</td> <td>Projected average monthly Chapter 13 plan payment.</td> <td>\$</td> </tr> <tr> <td>b.</td> <td>Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)</td> <td>x</td> </tr> <tr> <td>c.</td> <td>Average monthly administrative expense of Chapter 13 case</td> <td>Total: Multiply Lines a and b</td> </tr> </tbody> </table>	a.	Projected average monthly Chapter 13 plan payment.	\$	b.	Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	x	c.	Average monthly administrative expense of Chapter 13 case	Total: Multiply Lines a and b	\$											
a.	Projected average monthly Chapter 13 plan payment.	\$																				
b.	Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	x																				
c.	Average monthly administrative expense of Chapter 13 case	Total: Multiply Lines a and b																				
41	Total Deductions for Debt Payment. Enter the total of Lines 37 through 40.		\$																			

Subpart D: Total Deductions Allowed under § 707(b)(2)

42	Total of all deductions allowed under § 707(b)(2). Enter the total of Lines 28, 36, and 41.	\$
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Part IV. DETERMINATION OF DISPOSABLE INCOME UNDER § 1325(b)(2)		
43	Total current monthly income. Enter the amount from Line 11.	\$
44	Support income. Enter the monthly average of any child support payments, foster care payments, or disability payments for a dependent child, included in Line 7, that you received in accordance with applicable nonbankruptcy law, to the extent reasonably necessary to be expended for such child.	\$
45	Qualified retirement deductions. Enter the monthly average of (a) all contributions or wage deductions made to qualified retirement plans, as specified in § 541(b)(7) and (b) all repayments of loans from retirement plans, as specified in § 362(b)(19).	\$
46	Total of all deductions allowed under § 707(b)(2). Enter the amount from Line 42.	\$
47	Total adjustments to determine disposable income. Add the amounts on Lines 44, 45, and 46 and enter the result.	\$
48	Monthly Disposable Income Under § 1325(b)(2). Subtract Line 47 from Line 43 and enter the result.	\$

Part V: ADDITIONAL EXPENSE CLAIMS		
49	Other Expenses. List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.	
	Expense Description	Monthly Amount
	a.	\$
	b.	\$
	c.	\$
	Total: Add Lines a, b, and c	\$

Part VI: VERIFICATION		
50	I declare under penalty of perjury that the information provided in this statement is true and correct. <i>(If this a joint case, both debtors must sign.)</i>	
	Date: _____	Signature: _____ (Debtor)
	Date: _____	Signature: _____ (Joint Debtor, if any)

In re _____
Debtor(s)Case Number: _____
(If known)

Check the box as directed in Part II, Line 14 of this statement.

- ☐ Disposable income determined under § 1325(b)(3)
☐ Disposable income not determined under § 1325(b)(3)

STATEMENT OF CURRENT MONTHLY INCOME AND DISPOSABLE INCOME CALCULATION

FOR USE IN CHAPTER 13 (IF IRS SEPARATES ITS HOUSING ALLOWANCE)

In addition to Schedules I and J, this statement must be completed by every individual Chapter 13 debtor, whether or not filing jointly. Joint debtors may complete one statement only.

Part I. CALCULATION OF CURRENT MONTHLY INCOME

1	Marital/filing status. Check the box that applies and complete the balance of this part of this statement as directed. a. <input type="checkbox"/> Unmarried. Complete only Column A ("Debtor's Income") for Lines 2-10. b. <input type="checkbox"/> Married, not filing jointly. Complete only Column A ("Debtor's Income") for Lines 2-10. (Under revision) c. <input type="checkbox"/> Married, filing jointly. Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 2-10. All figures must reflect average monthly income for the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If you received different amounts of income during these six months, you must total the amounts received during the six months, divide this total by six, and enter the result on the appropriate line.		Column A Debtor's Income	Column B Spouse's Income									
2	Gross wages, salary, tips, bonuses, overtime, commissions.		\$	\$									
3	Income from the operation of a business, profession, or farm. Subtract Line b from Line a and enter the difference on Line 3. Do not enter a number less than zero. Do not include any part of the business expenses entered on Line b as a deduction in Part III. <table border="1" style="width: 100%; border-collapse: collapse; margin-top: 5px;"> <tr> <td style="width: 5%; text-align: center;">a.</td> <td style="width: 45%;">Gross receipts</td> <td style="width: 50%;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td>Ordinary and necessary business expenses</td> <td>\$</td> </tr> <tr> <td style="text-align: center;">c.</td> <td>Business income</td> <td>Subtract Line b from Line a</td> </tr> </table>		a.	Gross receipts	\$	b.	Ordinary and necessary business expenses	\$	c.	Business income	Subtract Line b from Line a	\$	\$
a.	Gross receipts	\$											
b.	Ordinary and necessary business expenses	\$											
c.	Business income	Subtract Line b from Line a											
4	Rent and other real property income. Subtract Line b from Line a and enter the difference on Line 4. Do not enter a number less than zero. Do not include any part of the operating expenses entered on Line b as a deduction in Part III. <table border="1" style="width: 100%; border-collapse: collapse; margin-top: 5px;"> <tr> <td style="width: 5%; text-align: center;">a.</td> <td style="width: 45%;">Gross receipts</td> <td style="width: 50%;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td>Ordinary and necessary operating expenses</td> <td>\$</td> </tr> <tr> <td style="text-align: center;">c.</td> <td>Rental income</td> <td>Subtract Line b from Line a</td> </tr> </table>		a.	Gross receipts	\$	b.	Ordinary and necessary operating expenses	\$	c.	Rental income	Subtract Line b from Line a	\$	\$
a.	Gross receipts	\$											
b.	Ordinary and necessary operating expenses	\$											
c.	Rental income	Subtract Line b from Line a											
5	Interest, dividends, and royalties.		\$	\$									
6	Pension and retirement income.		\$	\$									
7	Regular contributions to the household expenses of the debtor or the debtor's dependents, including child or spousal support. Do not include contributions from the debtor's spouse if Column B is completed.		\$	\$									
8	Unemployment compensation. Enter the amount in Column A and, if applicable, Column B. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: <table border="1" style="width: 100%; border-collapse: collapse; margin-top: 5px;"> <tr> <td style="width: 40%;">Unemployment compensation claimed to be a benefit under the Social Security Act</td> <td style="width: 30%;">Debtor \$ _____</td> <td style="width: 30%;">Spouse \$ _____</td> </tr> </table>		Unemployment compensation claimed to be a benefit under the Social Security Act	Debtor \$ _____	Spouse \$ _____	\$	\$						
Unemployment compensation claimed to be a benefit under the Social Security Act	Debtor \$ _____	Spouse \$ _____											
9	Income from all other sources. Specify source and amount. If necessary, list additional sources on a separate page. Total and enter on Line 9. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. <table border="1" style="width: 100%; border-collapse: collapse; margin-top: 5px;"> <tr> <td style="width: 5%; text-align: center;">a.</td> <td style="width: 55%;"></td> <td style="width: 40%;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td></td> <td>\$</td> </tr> </table>		a.		\$	b.		\$	\$	\$			
a.		\$											
b.		\$											
10	Subtotal of current monthly income. Add Lines 2 thru 9 in Column A, and, if Column B is completed, add Lines 2 through 9 in Column B. Enter the total(s).		\$	\$									

11	Total current monthly income. If Column B has been completed, add Line 10, Column A to Line 10, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 10, Column A.	\$
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Part II. APPLICATION OF § 1325(b)(3)		
12	Annualized current monthly income. Multiply the amount from Line 11 by the number 12 and enter the result.	\$
13	Applicable median family income. Enter the median family income for applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: _____ b. Enter debtor's household size: _____	\$
14	Application of § 1325(b)(3). Check the applicable box and proceed as directed. <input type="checkbox"/> The amount on Line 12 is less than or equal to the amount on Line 13. Check the box at the top of page 1 of this statement that states "Disposable income not determined under § 1325(b)(3)" and complete Part VI of this statement; do not complete Parts III, IV, or V. <input type="checkbox"/> The amount on Line 12 is more than the amount on Line 13. Check the box at the top of page 1 of this statement that states "Disposable income determined under § 1325(b)(3)" and complete the remaining parts of this statement.	

Complete Parts III, IV, and V of this statement only if required. (See Line 14.)

Part III. CALCULATION OF DEDUCTIONS ALLOWED UNDER § 707(b)(2)											
Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)											
15	National Standards: food, clothing, household supplies, personal care, and miscellaneous. Enter the "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable family size and income level. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	\$									
16	Local Standards: housing and utilities; utilities/maintenance expense. Enter the amount of the IRS Housing and Utilities Standards; Utilities/Maintenance Expense for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) (Under revision)	\$									
17	Local Standards: housing and utilities; mortgage/rental expense. Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; Mortgage/Rental Expense for your county and family size (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 38; subtract Line b from Line a and enter the result in Line 17. Do not enter an amount less than zero. <table border="1" style="width: 100%; margin-top: 5px;"> <tr> <td style="width: 5%; text-align: center;">a.</td> <td style="width: 60%;">IRS Housing and Utilities Standards; Mortgage/Rental Expense</td> <td style="width: 35%; text-align: right;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td>Average Monthly Payment for any debts secured by your home, if any, as stated in Line 38</td> <td style="text-align: right;">\$</td> </tr> <tr> <td style="text-align: center;">c.</td> <td>Net mortgage/rental expense</td> <td style="text-align: right;">Subtract Line b from Line a.</td> </tr> </table>		a.	IRS Housing and Utilities Standards; Mortgage/Rental Expense	\$	b.	Average Monthly Payment for any debts secured by your home, if any, as stated in Line 38	\$	c.	Net mortgage/rental expense	Subtract Line b from Line a.
a.	IRS Housing and Utilities Standards; Mortgage/Rental Expense	\$									
b.	Average Monthly Payment for any debts secured by your home, if any, as stated in Line 38	\$									
c.	Net mortgage/rental expense	Subtract Line b from Line a.									
18	Local Standards: transportation; vehicle operation/public transportation expense. You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation. Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 7. <input type="checkbox"/> 0 <input type="checkbox"/> 1 <input type="checkbox"/> 2 or more. Enter the amount from IRS Transportation Standards, Operating Costs & Public Transportation Costs for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)										

19	<p>Local Standards: transportation ownership/lease expense; Vehicle 1. Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.) <input type="checkbox"/> 1 <input type="checkbox"/> 2 or more.</p> <p>Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, First Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 38; subtract Line b from Line a and enter the result in Line 19. Do not enter an amount less than zero.</p> <table border="1"> <tr> <td>a.</td> <td>IRS Transportation Standards, Ownership Costs, First Car</td> <td>\$</td> </tr> <tr> <td>b.</td> <td>Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 38</td> <td>\$</td> </tr> <tr> <td>c.</td> <td>Net ownership/lease expense for Vehicle 1</td> <td>Subtract Line b from Line a.</td> </tr> </table>	a.	IRS Transportation Standards, Ownership Costs, First Car	\$	b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 38	\$	c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a.	\$
a.	IRS Transportation Standards, Ownership Costs, First Car	\$									
b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 38	\$									
c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a.									
20	<p>Local Standards: transportation ownership/lease expense; Vehicle 2. Complete this Line only if you checked the "2 or more" Box in Line 20.</p> <p>Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, Second Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 38; subtract Line b from Line a and enter the result in Line 20. Do not enter an amount less than zero.</p> <table border="1"> <tr> <td>a.</td> <td>IRS Transportation Standards, Ownership Costs, Second Car</td> <td>\$</td> </tr> <tr> <td>b.</td> <td>Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 38</td> <td>\$</td> </tr> <tr> <td>c.</td> <td>Net ownership/lease expense for Vehicle 2</td> <td>Subtract Line b from Line a.</td> </tr> </table>	a.	IRS Transportation Standards, Ownership Costs, Second Car	\$	b.	Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 38	\$	c.	Net ownership/lease expense for Vehicle 2	Subtract Line b from Line a.	\$
a.	IRS Transportation Standards, Ownership Costs, Second Car	\$									
b.	Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 38	\$									
c.	Net ownership/lease expense for Vehicle 2	Subtract Line b from Line a.									
21	<p>Other Necessary Expenses: taxes. Enter the total average monthly expense that you actually incur for all federal, state, and local taxes, other than real estate and sales taxes, such as income taxes, self employment taxes, social security taxes, and Medicare taxes. Do not include real estate or sales taxes.</p>	\$									
22	<p>Other Necessary Expenses: mandatory payroll deductions. Enter the total average monthly payroll deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. Do not include discretionary amounts, such as non-mandatory 401(k) contributions.</p>	\$									
23	<p>Other Necessary Expenses: life insurance. Enter average monthly premiums that you actually pay for term life insurance for yourself. Do not include premiums for insurance on your dependents, for whole life or for any other form of insurance.</p>	\$									
24	<p>Other Necessary Expenses: court-ordered payments. Enter the total monthly amount that you are required to pay pursuant to court order, such as spousal or child support payments. Do not include payments on past due support obligations included in Line 40.</p>	\$									
25	<p>Other Necessary Expenses: education for employment or for a physically or mentally challenged child. Enter the total monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.</p>	\$									
26	<p>Other Necessary Expenses: childcare. Enter the average monthly amount that you actually expend on childcare. Do not include payments made for children's education.</p>	\$									
27	<p>Other Necessary Expenses: health care. Enter the average monthly amount that you actually expend on health care expenses that are not reimbursed by insurance or paid by a health savings account. Do not include payments for health insurance listed in Line 30.</p>	\$									
28	<p>Other Necessary Expenses: telecommunication services. Enter the average monthly expenses that you actually pay for cell phones, pagers, call waiting, caller identification, special long distance, or internet services necessary for the health and welfare of you or your dependents. Do not include any amount previously deducted.</p>	\$									
29	<p>Total Expenses Allowed under IRS Standards. Enter the total of Lines 15 through 28</p>	\$									

Subpart B: Additional Expense Deductions under § 707(b)**Note: Do not include any expenses that you have listed in Lines 15-28**

30	Health Insurance, Disability Insurance, and Health Savings Account Expenses. List the average monthly amounts that you actually expend in each of the following categories and enter the total.			
	a.	Health Insurance	\$	
	b.	Disability Insurance	\$	
	c.	Health Savings Account	\$	
	Total: Add Lines a, b, and c		\$	
31	Continued contributions to the care of household or family members. Enter the actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. Do not include payments listed in Line 25.			\$
32	Protection against family violence. Enter any average monthly expenses that you actually incurred to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law.			\$
33	Home energy costs in excess of the allowance specified by the IRS Local Standards. Enter the average monthly amount by which your home energy costs exceed the allowance in the IRS Local Standards for Housing and Utilities. You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.			\$
34	Education expenses for dependent children under 18. Enter the average monthly expenses that you actually incur, not to exceed \$125 per child, in providing elementary and secondary education for your dependent children less than 18 years of age. You must provide your case trustee with documentation demonstrating that the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.			\$
35	Additional food and clothing expense. Enter the average monthly amount by which your food and clothing expenses exceed the combined allowances for food and apparel in the IRS National Standards, not to exceed five percent of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.			\$
36	Continued charitable contributions. Enter the amount that you will continue to contribute in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2).			\$
37	Total Additional Expense Deductions under § 707(b). Enter the total of Lines 30 through 36.			\$

Subpart C: Deductions for Debt Payment

38	Future payments on secured claims. For each of your debts that is secured by an interest in property that you own, list the name of creditor, identify the property securing the debt, and state the Average Monthly Payment. The Average Monthly Payment is the total of all amounts contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. Do not include items you have previously deducted, such as insurance and real estate taxes.				
		Name of Creditor	Property Securing the Debt	60-month Average Payment	
	a.			\$	
	b.			\$	
	c.			\$	
Total: Add Lines a, b, and c				\$	
39	Past due payments on secured claims. If any of the debts listed in Line 38 are in default, and the property securing the debt is necessary for your support or the support of your dependents, you may include in your deductions 1/60th of the amount that you must pay the creditor as a result of the default (the "cure amount") in order to maintain possession of the property. List any such amounts in the following chart and enter the total. If necessary, list additional entries on a separate page.				
		Name of Creditor	Property Securing the Debt in Default	1/60th of the Cure Amount	
	a.			\$	
	b.			\$	
	c.			\$	
Total: Add Lines a, b, and c				\$	

40	Payments on priority claims. Enter the total amount of all priority claims (including priority child support and alimony claims), divided by 60.	\$	
41	Chapter 13 administrative expenses. Multiply the amount in Line a by the amount in Line b, and enter the resulting administrative expense.		
	a.	Projected average monthly Chapter 13 plan payment.	\$
	b.	Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	x
	c.	Average monthly administrative expense of Chapter 13 case	Total: Multiply Lines a and b
		\$	
42	Total Deductions for Debt Payment. Enter the total of Lines 38 through 41.	\$	
Subpart D: Total Deductions Allowed under § 707(b)(2)			
43	Total of all deductions allowed under § 707(b)(2). Enter the total of Lines 29, 37, and 42.	\$	

Part IV. DETERMINATION OF DISPOSABLE INCOME UNDER § 1325(b)(2)		
44	Total current monthly income. Enter the amount from Line 11.	\$
45	Support income. Enter the monthly average of any child support payments, foster care payments, or disability payments for a dependent child, included in Line 7, that you received in accordance with applicable nonbankruptcy law, to the extent reasonably necessary to be expended for such child.	\$
46	Qualified retirement deductions. Enter the monthly average of (a) all contributions or wage deductions made to qualified retirement plans, as specified in § 541(b)(7) and (b) all repayments of loans from retirement plans, as specified in § 362(b)(19).	\$
47	Total of all deductions allowed under § 707(b)(2). Enter the amount from Line 43.	\$
48	Total adjustments to determine disposable income. Add the amounts on Lines 45, 46, and 47 and enter the result.	\$
49	Monthly Disposable Income Under § 1325(b)(2). Subtract Line 48 from Line 44 and enter the result.	\$

Part V: ADDITIONAL EXPENSE CLAIMS		
50	Other Expenses. List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.	
	Expense Description	Monthly Amount
	a.	\$
	b.	\$
	c.	\$
	Total: Add Lines a, b, and c	
		\$

Part VI: VERIFICATION		
51	I declare under penalty of perjury that the information provided in this statement is true and correct. (If this a joint case, both debtors must sign.)	
	Date: _____	Signature: _____ (Debtor)
	Date: _____	Signature: _____ (Joint Debtor, if any)

COMMITTEE NOTE

A. Overview

One of the changes in bankruptcy practice introduced by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 is a definition of “current monthly income,” set out in § 101(10A) of the Code. Certain individual debtors in Chapter 7, all individual debtors in Chapter 11, and all Chapter 13 debtors are required to calculate their income under this definition. Certain Chapter 7 and 13 debtors are further required to calculate deductions from current monthly income allowed under the means test of § 707(b)(2)(A). Chapter 7 debtors subject to the means test may, as a result of these calculations, be subject to a presumption of abuse. The means test deductions are used in Chapter 13 to calculate disposable income under § 1325(b)(2) and (3). To comply with the reporting and calculation requirements involving current monthly income and the means test, three separate forms have been provided – one for Chapter 7, one for Chapter 11, and one for Chapter 13. This note first describes the “current monthly income” calculation that is common to all three of the forms, next describes the means test deductions employed in the Chapter 7 and 13 forms, and finally addresses particular issues that are unique to each of the separate forms.

B. Calculation of current monthly income

Current monthly income (“CMI”), as defined in § 101(10A), has different purposes in each of the three chapters in which it is used, but basic computation is the same. CMI is a monthly average of defined “income” received in the six calendar months prior to the bankruptcy filing by the debtor and, in a joint case, the debtor’s spouse. The “income” to be included in this average is (1) income from all sources, whether or not taxable, and (2) any amount paid by an entity other than the debtor (or the debtor’s spouse in a joint case) on a regular basis for the household expenses of the debtor, the debtors dependents, and (in a joint case) the debtor’s spouse if not otherwise a dependent. However, the income to be averaged is defined as not including “benefits received under the Social Security Act” and certain payments received by victims of terrorism, war crimes, and crimes against humanity.

The forms address the calculation of CMI, in each chapter, by a series of line entries, divided into columns providing for separate entries by the debtor and the debtor’s spouse. The calculation line entries are set out in Part II of the Chapter 7 form, and Part I of the forms for Chapter 11 and Chapter 13. These line entries for calculating CMI are introduced by a set of instructions and check boxes indicating when the “debtor’s spouse” column is required to be completed. The instructions also direct the required averaging of the income reported on the line entries.

The line entries specify several common types of income and then include a "catch-all" line for other types. The specific entry lines address gross wages; business and rental income; interest, dividends, and royalties; pension and retirement income; and regular contributions to the debtor's household expenses. Gross wages (before taxes) are required to be entered. Consistent with usage in the Internal Revenue Manual and the American Community Survey of the Census Bureau, business and rental income is defined as gross receipts less ordinary and necessary expenses. Unemployment compensation is given special treatment. Because the federal government provides funding for state unemployment compensation under the Social Security Act, there may be a dispute about whether unemployment compensation is a "benefit received under the Social Security Act." The forms take no position on the merits of this argument, but give debtors the option of making the argument by reporting unemployment compensation separately from their current monthly income. The separate reporting allows parties in interest to determine the materiality of an exclusion of unemployment compensation and to challenge it. The forms provide instruction for proper totaling of the income lines.

C. Means test deductions from current monthly income

Deductions from CMI are set out in § 707(b)(2)(A)(ii)-(iv). The forms for Chapter 7 and Chapter 13 have identical sections (Parts V and III, respectively) for calculating these deductions. The calculations are divided into subparts reflecting three different kinds of allowed deductions.

1. Deductions under IRS standards

Subpart A deals with deductions from CMI, set out in § 707(b)(2)(A)(ii), for "the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides." The forms provide entry lines for each of the specified expense deductions under the IRS standards, and instructions on the entry lines identify the web pages where the relevant IRS allowances can be found. As with all of the deductions in § 707(b)(2)(A)(ii), deductions under the IRS standards are subject to the proviso that they not include "any payments for debts."

The IRS National Standards provide a single allowance for food, clothing, household supplies, personal care, and miscellany, depending on income and household size. The forms contain an entry line for the applicable allowance.

The IRS Local Standards provide separate deductions for housing and utilities and for transportation, with different amounts for different areas of the country, depending on the debtor's family size and number of the number of the debtor's vehicles. Each of the amounts specified by the IRS in the Local Standards are treated by the IRS as a cap on actual expenses, but because § 707(b)(2)(A)(ii)(I) provides for deduction in the "amounts specified under the . . . Local Standards," the forms treat these amounts as allowed deductions.

~~{For use with the alternate versions of the Chapter 7 and 13 forms: The Local Standards for housing and utilities separate this expense category into a utilities/maintenance component and a mortgage/rental expense component. The utilities/maintenance component is a simple allowance, covering a variety of expenses involved in the operation of a residence. The mortgage/rental expense component covers the cost of acquiring the residence; for homeowners with mortgages, the mortgage/rental expense thus involves debt payment, since the cost of a mortgage is part of the allowance. Accordingly, the form requires debtors to deduct from allowance for mortgage/rental expense the average monthly mortgage payment (principal and interest), up to the full amount of the IRS mortgage/rental expense. This average payment is as reported on the separate line of the form for deductions of secured debt pursuant to § 707(b)(2)(a)(iii).}~~ (Under revision)

~~{For use with the original versions of the Chapter 7 and 13 forms: The Local Standards for housing and utilities provide a single expense allowance covering both the cost of acquiring housing (rent or mortgage payments) and the cost of utilities, insurance, and maintenance connected with the housing. Because this allowance includes debt payment, the form directs debtors to deduct any portion of the allowance that includes payments on debts secured by their homes. The proper manner of calculating this deduction from the housing and utilities allowance will have to be determined by judicial decisions.}~~ (Under revision)

The Local Standards for transportation separate this expense category into a vehicle operation/public transportation component and a component for ownership/lease expense. The amount of the vehicle operation/public transportation allowance depends on the number of vehicles the debtor operates, with debtors who do not operate vehicles being given a public transportation expense. The instruction for this line item makes it clear that every debtor is thus entitled to some transportation expense allowance. No debt payment is involved in this allowance. However, for debtors with debt secured by the vehicles that they operate, the ownership/lease expense does involve debt payment. Accordingly, the form requires debtors to reduce the allowance for ownership/lease expense by the average monthly loan payment amount (principal and interest), up to the full amount of the IRS ownership/lease expense amount. This average payment is as reported on the separate line of the form for deductions of secured debt pursuant to § 707(b)(2)(a)(iii).

The IRS does not set out allowances for "Other Necessary Expenses." Rather, it sets out a number of categories for such expenses, and describes the nature of the expenses that may be deducted in each of these categories. Section 707(b)(2)(a)(ii) allows a deduction for the debtor's actual expenses in these specified categories, subject to its requirement that payment of debt not be included. Several of the IRS categories deal with debt repayment and so are not included in the forms. Several other categories deal with expense items that are more expansively addressed by specific statutory allowances. The remaining IRS categories are set out in individual line entries. Instructions on the individual entry lines reflect limitations imposed by the IRS and the need to avoid inclusion of items deducted elsewhere on the forms.

The forms call for a subtotal of the deductions allowed under the IRS standards.

2. Additional statutory expense deductions

In addition to the IRS expense deductions, subclauses (I), (II), (IV), and (V) of § 707(b)(2)(A)(ii) allow six special expense deductions. Each of these additional expense items is set out on a separate line entry in Subpart B, introduced by an instruction that there should not be double counting of any expense already included in the IRS deductions. Contributions to tax-exempt charities provide another statutory expense deduction. Specifically, § 1325(b)(2)(A)(ii) expressly allows a deduction from CMI for such contributions (up to 15% of the debtor's gross income), and § 707(b)(1) provides that in considering whether a Chapter 7 filing is an abuse, the court may not take into consideration "whether a debtor . . . continues to make [tax-exempt] charitable contributions." Accordingly, Subpart B also includes an entry line for charitable contributions. Again, the forms call for the additional statutory expense deductions to be subtotaled.

3. Deductions for payment of debt

Subpart C of the forms deals with deductions from CMI for payment of secured and priority debt, as well as a deduction for administrative expenses that would be incurred if the debtor paid debts through a Chapter 13 plan. In accord with § 707(b)(2)(A)(iii), the deduction for secured debt is divided into two entry lines – one for payments that are contractually due during the 60 months following the bankruptcy filing, the other for amounts needed to retain necessary collateral securing debts in default. In each situation, the instructions for the entry lines require dividing the total payment amount by 60, as the statute directs. Priority debt, deductible pursuant to § 707(b)(2)(A)(iv), is treated on a single entry line, also requiring division by 60. The defined deduction for the expenses of administering a Chapter 13 plan is allowed by § 707(b)(2)(A)(ii)(III) only for debtors eligible for Chapter 13. The forms treat this deduction in an entry line that requires the eligible debtor to state the amount of the prospective Chapter 13 plan payment and multiply that payment amount by the percentage fee established for the debtor's district by the Executive Office for United States Trustees. The forms refer debtors to a website that will set out this percentage fee. An entry line is provided for subtotaling the debt payment deductions.

4. Total deductions

Finally, the forms direct that the subtotals from Subparts A, B, and C be added together to arrive at the total of allowed deductions from CMI.

5. Additional claimed deductions

The forms do not provide for deductions from CMI for expenses in categories that are not specifically identified as "Other Necessary Expenses" in the Internal Revenue Manual. However,

debtors may wish to claim expenses that do not fall within the categories listed as "Other Necessary Expenses" in the forms. The forms provide sections (Part VII in the Chapter 7 form and Part V in the Chapter 13 form) for such expenses to be identified and totaled. Although expenses listed in these sections are not deducted from CMI for purposes of the forms' calculations, the listing provides a basis for debtors to assert that these expenses should be deducted from CMI under § 707(b)(2)(A)(ii)(I), and that the results of the forms' calculation are therefore inaccurate.

D. The Chapter-specific forms

1. Chapter 7

The Chapter 7 form has several unique aspects. The form includes, in the upper right corner of the first page, a check box requiring the debtor to state whether or not a presumption of abuse exists as a result of the calculations required by the form. This check box is intended to give clerks of court a conspicuous indication of the cases for which they will be required to provide notice of a presumption of abuse pursuant to § 342(d).

Part I of the form implements the provision of § 707(b)(2)(D) that excludes certain disabled veterans from any form of means testing, making it unnecessary to compute the CMI of such veterans. Debtors who declare under penalty of perjury that they are disabled veterans within the statutory definition are directed to verify their declaration in Part VII, to check the "no presumption" box at the beginning of the form, and to disregard the remaining parts of the form.

Part II of the form is the computation of current monthly income ("CMI") as defined in § 101(10A). Section 707(b)(2) eliminates standing to assert the means test's presumption of abuse if the debtor's annualized CMI does not exceed a defined median state income. For this purpose, the CMI of the debtor's spouse is added to the debtor's CMI even if the debtor's spouse is not a joint debtor, unless the debtor declares under penalty of perjury that the spouses are legally separated or living separately other than for purposes of evading the means test. Accordingly, the calculation of CMI in Part II directs a computation of the CMI of the debtor's spouse in all cases of married debtors where the debtor is unable to make the specified declaration or where the debtors are filing jointly, and the CMI of both spouses in these cases is added for purposes of determining standing under § 707(b)(7).

Part III of the form provides for the comparison of the debtor's CMI for purposes of § 707(b)(7) to the applicable state median income. It then directs debtors whose income does not exceed the applicable median to verify the form and check the "no presumption" box at the beginning of the form, but not to complete the remaining parts of the form. Debtors whose CMI does exceed the applicable state median are required to complete the remaining parts of the form.

Part IV of the form provides for an adjustment to the CMI of a married debtor, not filing jointly, whose spouse's CMI was included with the debtor's for purposes of determining standing

to assert the means test presumption. The means test itself does not charge a married debtor in a non-joint case with the income of the non-filing spouse, but rather only with contributions made by that spouse to the household expenses of the debtor and the debtor's dependents, as provided in the definition of CMI in § 101(10A). Accordingly, Part IV calls for the combined CMI total of Part II to be reduced by the amount of the non-filing spouse's income that was not contributed to the household expenses of the debtor or the debtor's dependents.

Part V of the form provides for a calculation of allowed deductions from the debtor's CMI, as described above.

Part VI provides for a determination of whether the debtor's CMI, less the allowed deductions, gives rise to a presumption of abuse under § 707(b)(2)(A). Depending on the outcome of this determination, the debtor is directed to check the appropriate box at the beginning of the form and to sign the verification in Part VIII. Part VII allows the debtor to claim additional deductions, as discussed above.

2. Chapter 11

The Chapter 11 form is the simplest of the three, since the means-test deductions of § 707(b)(2) are not employed in determining the extent of an individual Chapter 11 debtor's disposable income. Rather, § 1129(a)(15) requires payments of disposable income "as defined in section 1325(b)(2)," and that paragraph allows calculation of disposable income under judicially-determined standards, rather than pursuant to the means test deductions, specified for higher income Chapter 13 debtors by § 1325(b)(3). However, § 1325(b)(2) does require that CMI be used as the starting point in the judicial determination of disposable income, and so the Chapter 11 form requires this calculation (in Part I of the form), as described above, together with a verification (in Part II).

3. Chapter 13

Like the Chapter 7 form, the form for Chapter 13 debtors contains a number of special provisions. Because § 1325(b)(3) employs the means test deductions for debtors whose CMI exceeds the applicable state median income, the upper right corner of the first page includes check boxes requiring the debtor to state whether § 1325(b)(3) applies, thus quickly informing standing trustees and other interested parties of the need to consider these deductions.

Part I of the form is the calculation of CMI, as described above.

Part II of the form compares the debtor's CMI to the applicable state median, allowing the determination of the applicability of the means-test deductions required by § 1325(b)(3).

Part III provides for calculation of the means-test deductions provided in § 707(b)(2), described above, as incorporated by § 1325(b)(3) for debtors with CMI above the applicable state median.

Part IV provides for three adjustments required by special provisions affecting disposable income. First, § 1325(b)(2) itself excludes from CMI in the determination of disposable income certain "child support payments, foster care payments, [and] disability payments for a dependent child[.]" Because payments of this kind are included in the definition of CMI in § 101(10A), a line entry for deduction of these payments is provided. Second, a line entry is provided for deduction of contributions by the debtor to certain retirement plans, listed in § 541(b)(7)(B), since that provision states that such contributions "shall not constitute disposable income, as defined in section 1325(b)(2)[.]" Third, the same line entry also allows a deduction from disposable income for payments on loans from retirement accounts that are excepted from the automatic stay by § 362(b)(19), since § 1322(f) provides that for a "loan described in section 362(b)(19) . . . any amounts required to repay such loan shall not constitute 'disposable income' under section 1325."

The Chapter 13 form does not provide a deduction from disposable income for the Chapter 13 debtor's anticipated attorney fees. There is no specific statutory allowance for such a deduction, and none appears necessary. Section 1325(b)(1)(B) requires that disposable income contributed to a Chapter 13 plan be used to pay "unsecured creditors." A debtor's attorney who has not taken a security interest in the debtor's property is an unsecured creditor who may be paid from disposable income.

Part V of the form allows the debtor to claim additional deductions, as described above, and Part VI is the verification.

Allowable Living Expenses for Transportation



Internal Revenue Service IRS.gov

DEPARTMENT OF THE TREASURY

Allowable Living Expenses for Transportation

Collection Financial Standards

Financial Analysis - Local Standards: Transportation *

Ownership Costs			
National	First Car		Second Car
	\$475		\$338
Operating Costs & Public Transportation Costs			
Region	No Car	One Car	Two Cars
Northeast Region	\$230	\$298	\$393
New York	\$302	\$384	\$479
Philadelphia	\$236	\$298	\$392
Boston	\$259	\$284	\$380
Pittsburgh	\$161	\$286	\$380
Midwest Region	\$194	\$251	\$345
Chicago	\$257	\$329	\$422
Detroit	\$312	\$376	\$469
Milwaukee	\$212	\$247	\$341
Minneapolis-St. Paul	\$276	\$303	\$397
Cleveland	\$198	\$293	\$387
Cincinnati	\$222	\$272	\$365
St. Louis	\$203	\$287	\$383
Kansas City	\$246	\$291	\$384
South Region	\$197	\$242	\$336
Washington, D.C.	\$289	\$313	\$407
Baltimore	\$225	\$240	\$334

Allowable Living Expenses for Transportation

Atlanta	\$283	\$258	\$351
Miami	\$284	\$344	\$439
Tampa	\$255	\$265	\$359
Dallas-Ft. Worth	\$309	\$332	\$425
Houston	\$281	\$367	\$462
West Region	\$246	\$305	\$399
Los Angeles	\$275	\$353	\$448
San Francisco	\$317	\$373	\$466
San Diego	\$311	\$318	\$415
Portland	\$189	\$246	\$339
Seattle	\$258	\$335	\$427
Honolulu	\$295	\$314	\$409
Anchorage	\$312	\$336	\$431
Phoenix	\$273	\$326	\$420
Denver	\$302	\$351	\$442

* Does not include personal property taxes. (effective January 1, 2005)

For Use with Allowable Transportation Expenses Table

The Operating Costs and Public Transportation Costs sections of the Transportation Standards are provided by Census Region and Metropolitan Statistical Area (MSA). The following table lists the states that comprise each Census Region. Once the taxpayer's Census Region has been ascertained, to determine if an MSA standard is applicable, use the definitions below to see if the taxpayer lives within an MSA (MSAs are defined by county and city, where applicable). If the taxpayer does not reside in an MSA, use the regional standard.

Northeast Census Region

Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Pennsylvania, New York, New Jersey		
MSA	COUNTIES	
New York	in NY:	Bronx, Dutchess, Kings, Nassau, New York, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Westchester

Allowable Living Expenses for Transportation

	<i>in NJ:</i>	Bergen, Essex, Hudson, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Ocean, Passaic, Somerset, Sussex, Union, Warren
	<i>in CT:</i>	Fairfield, Litchfield, Middlesex, New Haven
	<i>in PA:</i>	Pike
Philadelphia	<i>in PA:</i>	Bucks, Chester, Delaware, Montgomery, Philadelphia
	<i>in NJ:</i>	Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Salem
	<i>in DE:</i>	New Castle
	<i>in MD:</i>	Cecil
Boston	<i>in MA:</i>	Bristol, Essex, Hampden, Middlesex, Norfolk, Plymouth, Suffolk, Worcester
	<i>in NH:</i>	Hillsborough, Merrimack, Rockingham, Strafford
	<i>in CT:</i>	Windham
	<i>in ME:</i>	York
Pittsburgh	<i>in PA:</i>	Allegheny, Beaver, Butler, Fayette, Washington, Westmoreland

Midwest Census Region

North Dakota, South Dakota, Nebraska, Kansas, Missouri, Illinois, Indiana, Ohio, Michigan, Wisconsin, Minnesota, Iowa		
MSA	COUNTIES (unless otherwise specified)	
Chicago	<i>in IL:</i>	Cook, DeKalb, DuPage, Grundy, Kane, Kankakee, Kendall, Lake, McHenry, Will
	<i>in IN:</i>	Lake, Porter
	<i>in WI:</i>	Kenosha
Detroit	<i>in MI:</i>	Genesee, Lapeer, Lenawee, Livingston, Macomb, Monroe, Oakland, St. Clair, Washtenaw, Wayne

Allowable Living Expenses for Transportation

Milwaukee	in WI:	Milwaukee, Ozaukee, Racine, Washington, Waukesha
Minneapolis-St. Paul	in MN:	Anoka, Carver, Chisago, Dakota, Hennepin, Isanti, Ramsey, Scott, Sherburne, Washington, Wright
	in WI:	Pierce, St. Croix
Cleveland	in OH:	Ashtabula, Cuyahoga, Geauga, Lake, Lorain, Medina, Portage, Summit
Cincinnati	in OH:	Brown, Butler, Clermont, Hamilton, Warren
	in KY:	Boone, Campbell, Gallatin, Grant, Kenton, Pendleton
	in IN:	Dearborn, Ohio
St. Louis	in MO:	Crawford, Franklin, Jefferson, Lincoln, St. Charles, St. Louis, Warren, St. Louis city
	in IL:	Clinton, Jersey, Madison, Monroe, St. Clair
Kansas City	in MO:	Cass, Clay, Clinton, Jackson, Lafayette, Platte, Ray
	in KS:	Johnson, Leavenworth, Miami, Wyandotte

South Census Region

Texas, Oklahoma, Arkansas, Louisiana, Mississippi, Tennessee, Kentucky, West Virginia, Virginia, Maryland, District of Columbia, Delaware, North Carolina, South Carolina, Georgia, Florida, Alabama		
MSA	COUNTIES (unless otherwise specified)	
Washington, D.C.	in DC:	District of Columbia
	in MD:	Calvert, Charles, Frederick, Montgomery, Prince George's, Washington
	in VA:	Arlington, Clarke, Culpepper, Fairfax, Fauquier, King George, Loudoun, Prince William, Spotsylvania, Stafford, Warren, Alexandria city, Fairfax city, Falls Church city, Fredericksburg city, Manassas city, Manassas Park city
	in	Berkeley, Jefferson

Allowable Living Expenses for Transportation

	WV:	
Baltimore	in MD:	Anne Arundel, Baltimore, Carroll, Harford, Howard, Queen Anne's, Baltimore city
Atlanta	in GA:	Barrow, Bartow, Carroll, Cherokee, Clayton, Cobb, Coweta, DeKalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Henry, Newton, Paulding, Pickens, Rockdale, Spalding, Walton
Miami	in FL:	Broward, Miami-Dade
Tampa	in FL:	Hernando, Hillsborough, Pasco, Pinellas
Dallas-Ft. Worth	in TX:	Collin, Dallas, Denton, Ellis, Henderson, Hood, Hunt, Johnson, Kaufman, Parker, Rockwall, Tarrant
Houston	in TX:	Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, Waller

West Census Region:

New Mexico, Arizona, Colorado, Wyoming, Montana, Nevada, Utah, Washington, Oregon, Idaho, California, Alaska, Hawaii		
MSA	COUNTIES (unless otherwise specified)	
Los Angeles	in CA:	Los Angeles, Orange, Riverside, San Bernadino, Ventura
San Francisco	in CA:	Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Santa Cruz, Solano, Sonoma
San Diego	in CA:	San Diego
Portland	in OR:	Clackamas, Columbia, Marion, Multnomah, Polk, Washington, Yamhill
	in WA:	Clark
Seattle	in WA:	Island, King, Kitsap, Pierce, Snohomish, Thurston
Honolulu	in HI:	Honolulu
Anchorage	in AK:	Anchorage borough
Phoenix	in AZ:	Maricopa, Pinal
Denver	in CO:	Adams, Arapahoe, Boulder, Denver, Douglas, Jefferson, Weld

U.S. Census Bureau

Income

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Income - Median Family Income by Number of Earners in Family

MEDIAN FAMILY INCOME IN THE PAST 12 MONTHS (IN 2003 INFLATION-ADJUSTED DOLLARS) BY NUMBER OF EARNERS IN FAMILY

Geography ID	State	Table ID	Line Number	Line Description	Median Family Income (dollars)		
					Estimate	90-percent confidence interval	
						Lower Bound	Upper Bound
04000US01	Alabama	B19121	1	Total:	43307	42168	44446
04000US01	Alabama	B19121	2	No earners (dollars)	18730	17296	20164
04000US01	Alabama	B19121	3	1 earner (dollars)	32060	31140	32980
04000US01	Alabama	B19121	4	2 earners (dollars)	57484	55267	59701
04000US01	Alabama	B19121	5	3 or more earners (dollars)	74346	67515	81177
04000US02	Alaska	B19121	1	Total:	61117	59519	62715
04000US02	Alaska	B19121	2	No earners (dollars)	28484	26835	30133
04000US02	Alaska	B19121	3	1 earner (dollars)	40479	35566	45392
04000US02	Alaska	B19121	4	2 earners (dollars)	71030	69009	73051
04000US02	Alaska	B19121	5	3 or more earners (dollars)	95755	87510	104000
04000US04	Arizona	B19121	1	Total:	47219	45844	48594
04000US04	Arizona	B19121	2	No earners (dollars)	29070	27806	30334
04000US04	Arizona	B19121	3	1 earner (dollars)	32090	31230	32950
04000US04	Arizona	B19121	4	2 earners (dollars)	63682	61489	65875
04000US04	Arizona	B19121	5	3 or more earners (dollars)	78842	75844	81840
04000US05	Arkansas	B19121	1	Total:	41072	40355	41789
04000US05	Arkansas	B19121	2	No earners (dollars)	21033	19449	22617

Income - Median Family Income by Number of Earners in Family

04000US05	Arkansas	B19121	3	1 earner (dollars)	30765	29703	31827
04000US05	Arkansas	B19121	4	2 earners (dollars)	51356	49370	53342
04000US05	Arkansas	B19121	5	3 or more earners (dollars)	68645	63292	73998
04000US06	California	B19121	1	Total:	56530	55804	57256
04000US06	California	B19121	2	No earners (dollars)	24933	23873	25993
04000US06	California	B19121	3	1 earner (dollars)	40167	39331	41003
04000US06	California	B19121	4	2 earners (dollars)	72610	71516	73704
04000US06	California	B19121	5	3 or more earners (dollars)	84664	82622	86706
04000US08	Colorado	B19121	1	Total:	59252	55104	63400
04000US08	Colorado	B19121	2	No earners (dollars)	27577	22110	33044
04000US08	Colorado	B19121	3	1 earner (dollars)	39562	36890	42234
04000US08	Colorado	B19121	4	2 earners (dollars)	69362	65031	73693
04000US08	Colorado	B19121	5	3 or more earners (dollars)	86917	83857	89977
04000US09	Connecticut	B19121	1	Total:	69917	67631	72203
04000US09	Connecticut	B19121	2	No earners (dollars)	30441	27591	33291
04000US09	Connecticut	B19121	3	1 earner (dollars)	46467	43961	48973
04000US09	Connecticut	B19121	4	2 earners (dollars)	83449	81198	85700
04000US09	Connecticut	B19121	5	3 or more earners (dollars)	97711	92618	102804
04000US10	Delaware	B19121	1	Total:	61270	59319	63221
04000US10	Delaware	B19121	2	No earners (dollars)	36911	34584	39238
04000US10	Delaware	B19121	3	1 earner (dollars)	41825	38619	45031
04000US10	Delaware	B19121	4	2 earners (dollars)	74721	72113	77329
04000US10	Delaware	B19121	5	3 or more earners (dollars)	90595	86759	94431
04000US11	District of Columbia	B19121	1	Total:	50243	46885	53601
04000US11	District of Columbia	B19121	2	No earners (dollars)	10298	7177	13419
04000US11	District of Columbia	B19121	3	1 earner (dollars)	32039	29598	34480
04000US11	District of Columbia	B19121	4	2 earners (dollars)	92679	88015	97343
04000US11	District of Columbia	B19121	5	3 or more earners (dollars)	81870	71477	92263
04000US12	Florida	B19121	1	Total:	47442	46460	48424
04000US12	Florida	B19121	2	No earners (dollars)	29532	28366	30698
04000US12	Florida	B19121	3	1 earner (dollars)	34847	33762	35932
04000US12	Florida	B19121	4	2 earners (dollars)	62195	61125	63265
04000US12	Florida	B19121	5	3 or more earners (dollars)	75688	73504	77872
04000US13	Georgia	B19121	1	Total:	50647	49907	51387
04000US13	Georgia	B19121	2	No earners (dollars)	20767	19474	22060

Income - Median Family Income by Number of Earners in Family

04000US13	Georgia	B19121	3	1 earner (dollars)	33117	31739	34495
04000US13	Georgia	B19121	4	2 earners (dollars)	65488	64054	66922
04000US13	Georgia	B19121	5	3 or more earners (dollars)	80084	77210	82958
04000US15	Hawaii	B19121	1	Total:	60647	58387	62907
04000US15	Hawaii	B19121	2	No earners (dollars)	31130	29184	33076
04000US15	Hawaii	B19121	3	1 earner (dollars)	41778	40222	43334
04000US15	Hawaii	B19121	4	2 earners (dollars)	71158	68674	73642
04000US15	Hawaii	B19121	5	3 or more earners (dollars)	96967	90566	103368
04000US16	Idaho	B19121	1	Total:	46783	44656	48910
04000US16	Idaho	B19121	2	No earners (dollars)	28552	25877	31227
04000US16	Idaho	B19121	3	1 earner (dollars)	34331	32029	36633
04000US16	Idaho	B19121	4	2 earners (dollars)	53252	51393	55111
04000US16	Idaho	B19121	5	3 or more earners (dollars)	65776	61971	69581
04000US17	Illinois	B19121	1	Total:	57385	56029	58741
04000US17	Illinois	B19121	2	No earners (dollars)	25115	23880	26350
04000US17	Illinois	B19121	3	1 earner (dollars)	39407	38152	40662
04000US17	Illinois	B19121	4	2 earners (dollars)	71054	69250	72858
04000US17	Illinois	B19121	5	3 or more earners (dollars)	87032	84539	89525
04000US18	Indiana	B19121	1	Total:	51338	50620	52056
04000US18	Indiana	B19121	2	No earners (dollars)	27086	25751	28421
04000US18	Indiana	B19121	3	1 earner (dollars)	35764	34843	36685
04000US18	Indiana	B19121	4	2 earners (dollars)	62967	61416	64518
04000US18	Indiana	B19121	5	3 or more earners (dollars)	77261	75022	79500
04000US19	Iowa	B19121	1	Total:	51336	49769	52903
04000US19	Iowa	B19121	2	No earners (dollars)	28019	26102	29936
04000US19	Iowa	B19121	3	1 earner (dollars)	33697	31801	35593
04000US19	Iowa	B19121	4	2 earners (dollars)	60055	58481	61629
04000US19	Iowa	B19121	5	3 or more earners (dollars)	74822	69956	79688
04000US20	Kansas	B19121	1	Total:	51157	50076	52238
04000US20	Kansas	B19121	2	No earners (dollars)	26750	24716	28784
04000US20	Kansas	B19121	3	1 earner (dollars)	36298	34128	38468
04000US20	Kansas	B19121	4	2 earners (dollars)	59874	58066	61682
04000US20	Kansas	B19121	5	3 or more earners (dollars)	76760	73688	79832
04000US21	Kentucky	B19121	1	Total:	41898	40559	43237
04000US21	Kentucky	B19121	2	No earners (dollars)	18138	16243	20033

Income - Median Family Income by Number of Earners in Family

04000US21	Kentucky	B19121	3	1 earner (dollars)	31166	29841	32491
04000US21	Kentucky	B19121	4	2 earners (dollars)	55744	54271	57217
04000US21	Kentucky	B19121	5	3 or more earners (dollars)	75318	71542	79094
04000US22	Louisiana	B19121	1	Total:	41831	40579	43083
04000US22	Louisiana	B19121	2	No earners (dollars)	17123	16010	18236
04000US22	Louisiana	B19121	3	1 earner (dollars)	29373	27557	31189
04000US22	Louisiana	B19121	4	2 earners (dollars)	60463	59244	61682
04000US22	Louisiana	B19121	5	3 or more earners (dollars)	74745	71930	77560
04000US23	Maine	B19121	1	Total:	48541	47241	49841
04000US23	Maine	B19121	2	No earners (dollars)	25191	22076	28306
04000US23	Maine	B19121	3	1 earner (dollars)	34560	32299	36821
04000US23	Maine	B19121	4	2 earners (dollars)	58767	57272	60262
04000US23	Maine	B19121	5	3 or more earners (dollars)	71201	66297	76105
04000US24	Maryland	B19121	1	Total:	69087	66176	71998
04000US24	Maryland	B19121	2	No earners (dollars)	28544	26123	30965
04000US24	Maryland	B19121	3	1 earner (dollars)	45073	42377	47769
04000US24	Maryland	B19121	4	2 earners (dollars)	83956	81805	86107
04000US24	Maryland	B19121	5	3 or more earners (dollars)	103037	99797	106277
04000US25	Massachusetts	B19121	1	Total:	67527	66145	68909
04000US25	Massachusetts	B19121	2	No earners (dollars)	22908	21052	24764
04000US25	Massachusetts	B19121	3	1 earner (dollars)	45625	43599	47651
04000US25	Massachusetts	B19121	4	2 earners (dollars)	81663	80289	83037
04000US25	Massachusetts	B19121	5	3 or more earners (dollars)	103144	100969	105319
04000US26	Michigan	B19121	1	Total:	55018	54160	55876
04000US26	Michigan	B19121	2	No earners (dollars)	28086	27012	29160
04000US26	Michigan	B19121	3	1 earner (dollars)	39681	38870	40492
04000US26	Michigan	B19121	4	2 earners (dollars)	68092	66935	69249
04000US26	Michigan	B19121	5	3 or more earners (dollars)	87639	85353	89925
04000US27	Minnesota	B19121	1	Total:	61417	60001	62833
04000US27	Minnesota	B19121	2	No earners (dollars)	29489	26327	32651
04000US27	Minnesota	B19121	3	1 earner (dollars)	40864	38789	42939
04000US27	Minnesota	B19121	4	2 earners (dollars)	70330	68636	72024
04000US27	Minnesota	B19121	5	3 or more earners (dollars)	87106	84364	89848
04000US28	Mississippi	B19121	1	Total:	39182	37991	40373

Income - Median Family Income by Number of Earners in Family

04000US28	Mississippi	B19121	2	No earners (dollars)	16773	15621	17925
04000US28	Mississippi	B19121	3	1 earner (dollars)	26534	25429	27639
04000US28	Mississippi	B19121	4	2 earners (dollars)	53676	52328	55024
04000US28	Mississippi	B19121	5	3 or more earners (dollars)	68111	64382	71840
04000US29	Missouri	B19121	1	Total:	49441	48128	50754
04000US29	Missouri	B19121	2	No earners (dollars)	26653	25672	27634
04000US29	Missouri	B19121	3	1 earner (dollars)	33969	31781	36157
04000US29	Missouri	B19121	4	2 earners (dollars)	61373	60276	62470
04000US29	Missouri	B19121	5	3 or more earners (dollars)	78933	75096	82770
04000US30	Montana	B19121	1	Total:	44503	42838	46168
04000US30	Montana	B19121	2	No earners (dollars)	28482	26156	30808
04000US30	Montana	B19121	3	1 earner (dollars)	30259	28957	31561
04000US30	Montana	B19121	4	2 earners (dollars)	52075	49975	54175
04000US30	Montana	B19121	5	3 or more earners (dollars)	64438	60563	68313
04000US31	Nebraska	B19121	1	Total:	50756	49577	51935
04000US31	Nebraska	B19121	2	No earners (dollars)	26588	25414	27762
04000US31	Nebraska	B19121	3	1 earner (dollars)	34138	31384	36892
04000US31	Nebraska	B19121	4	2 earners (dollars)	58424	56564	60284
04000US31	Nebraska	B19121	5	3 or more earners (dollars)	72357	68623	76091
04000US32	Nevada	B19121	1	Total:	52502	50672	54332
04000US32	Nevada	B19121	2	No earners (dollars)	26134	23010	29258
04000US32	Nevada	B19121	3	1 earner (dollars)	35773	33684	37862
04000US32	Nevada	B19121	4	2 earners (dollars)	67971	64348	71594
04000US32	Nevada	B19121	5	3 or more earners (dollars)	82839	74225	91453
04000US33	New Hampshire	B19121	1	Total:	63439	61450	65428
04000US33	New Hampshire	B19121	2	No earners (dollars)	27059	24325	29793
04000US33	New Hampshire	B19121	3	1 earner (dollars)	42669	39870	45468
04000US33	New Hampshire	B19121	4	2 earners (dollars)	72755	70494	75016
04000US33	New Hampshire	B19121	5	3 or more earners (dollars)	92826	88064	97588
04000US34	New Jersey	B19121	1	Total:	70263	69169	71357
04000US34	New Jersey	B19121	2	No earners (dollars)	29974	28308	31640
04000US34	New Jersey	B19121	3	1 earner (dollars)	50963	49641	52285
04000US34	New Jersey	B19121	4	2 earners (dollars)	85379	83659	87099
04000US34	New Jersey	B19121	5	3 or more earners (dollars)	103128	100398	105858
04000US35	New Mexico	B19121	1	Total:	41661	39674	43648

Income - Median Family Income by Number of Earners in Family

04000US35	New Mexico	B19121	2	No earners (dollars)	24094	20590	27598
04000US35	New Mexico	B19121	3	1 earner (dollars)	27543	25404	29682
04000US35	New Mexico	B19121	4	2 earners (dollars)	53629	50831	56427
04000US35	New Mexico	B19121	5	3 or more earners (dollars)	72547	64971	80123
04000US36	New York	B19121	1	Total:	55309	54546	56072
04000US36	New York	B19121	2	No earners (dollars)	22193	21399	22987
04000US36	New York	B19121	3	1 earner (dollars)	38718	37671	39765
04000US36	New York	B19121	4	2 earners (dollars)	72064	71050	73078
04000US36	New York	B19121	5	3 or more earners (dollars)	93617	91648	95586
04000US37	North Carolina	B19121	1	Total:	45540	44209	46871
04000US37	North Carolina	B19121	2	No earners (dollars)	22102	20690	23514
04000US37	North Carolina	B19121	3	1 earner (dollars)	31730	30879	32581
04000US37	North Carolina	B19121	4	2 earners (dollars)	59807	58011	61603
04000US37	North Carolina	B19121	5	3 or more earners (dollars)	74205	71265	77145
04000US38	North Dakota	B19121	1	Total:	48386	46010	50762
04000US38	North Dakota	B19121	2	No earners (dollars)	21531	20036	23026
04000US38	North Dakota	B19121	3	1 earner (dollars)	32496	30414	34578
04000US38	North Dakota	B19121	4	2 earners (dollars)	55682	54528	56836
04000US38	North Dakota	B19121	5	3 or more earners (dollars)	74256	71262	77250
04000US39	Ohio	B19121	1	Total:	51522	50668	52376
04000US39	Ohio	B19121	2	No earners (dollars)	25798	24901	26695
04000US39	Ohio	B19121	3	1 earner (dollars)	36010	35107	36913
04000US39	Ohio	B19121	4	2 earners (dollars)	64289	63076	65502
04000US39	Ohio	B19121	5	3 or more earners (dollars)	81088	78258	83918
04000US40	Oklahoma	B19121	1	Total:	43259	41783	44735
04000US40	Oklahoma	B19121	2	No earners (dollars)	21421	19942	22900
04000US40	Oklahoma	B19121	3	1 earner (dollars)	30994	29691	32297
04000US40	Oklahoma	B19121	4	2 earners (dollars)	56631	55098	58164
04000US40	Oklahoma	B19121	5	3 or more earners (dollars)	74409	71275	77543
04000US41	Oregon	B19121	1	Total:	49800	48401	51199
04000US41	Oregon	B19121	2	No earners (dollars)	27080	25273	28887
04000US41	Oregon	B19121	3	1 earner (dollars)	34999	32378	37620
04000US41	Oregon	B19121	4	2 earners (dollars)	60883	59907	61859
04000US41	Oregon	B19121	5	3 or more earners (dollars)	77097	74544	79650
04000US42	Pennsylvania	B19121	1	Total:	51339	50688	51990
04000US42	Pennsylvania	B19121	2	No earners (dollars)	24535	23743	25327

Income - Median Family Income by Number of Earners in Family

04000US42	Pennsylvania	B19121	3	1 earner (dollars)	37553	36499	38607
04000US42	Pennsylvania	B19121	4	2 earners (dollars)	64661	63661	65661
04000US42	Pennsylvania	B19121	5	3 or more earners (dollars)	82485	80456	84514
04000US44	Rhode Island	B19121	1	Total:	60165	58020	62310
04000US44	Rhode Island	B19121	2	No earners (dollars)	20389	18549	22229
04000US44	Rhode Island	B19121	3	1 earner (dollars)	40389	38356	42422
04000US44	Rhode Island	B19121	4	2 earners (dollars)	72026	70362	73690
04000US44	Rhode Island	B19121	5	3 or more earners (dollars)	94013	90615	97411
04000US45	South Carolina	B19121	1	Total:	47081	45815	48347
04000US45	South Carolina	B19121	2	No earners (dollars)	25385	22796	27974
04000US45	South Carolina	B19121	3	1 earner (dollars)	32068	30527	33609
04000US45	South Carolina	B19121	4	2 earners (dollars)	60408	58941	61875
04000US45	South Carolina	B19121	5	3 or more earners (dollars)	77172	72814	81530
04000US46	South Dakota	B19121	1	Total:	46824	45351	48297
04000US46	South Dakota	B19121	2	No earners (dollars)	25579	23330	27828
04000US46	South Dakota	B19121	3	1 earner (dollars)	32423	31115	33731
04000US46	South Dakota	B19121	4	2 earners (dollars)	53967	52274	55660
04000US46	South Dakota	B19121	5	3 or more earners (dollars)	68788	65293	72283
04000US47	Tennessee	B19121	1	Total:	46654	45533	47775
04000US47	Tennessee	B19121	2	No earners (dollars)	22105	20785	23425
04000US47	Tennessee	B19121	3	1 earner (dollars)	32434	31207	33661
04000US47	Tennessee	B19121	4	2 earners (dollars)	58778	57134	60422
04000US47	Tennessee	B19121	5	3 or more earners (dollars)	80756	77902	83610
04000US48	Texas	B19121	1	Total:	47479	46609	48349
04000US48	Texas	B19121	2	No earners (dollars)	21107	20082	22132
04000US48	Texas	B19121	3	1 earner (dollars)	31550	30937	32163
04000US48	Texas	B19121	4	2 earners (dollars)	62047	60978	63116
04000US48	Texas	B19121	5	3 or more earners (dollars)	74430	72559	76301
04000US49	Utah	B19121	1	Total:	52481	50919	54043
04000US49	Utah	B19121	2	No earners (dollars)	31726	26815	36637
04000US49	Utah	B19121	3	1 earner (dollars)	39371	36579	42163
04000US49	Utah	B19121	4	2 earners (dollars)	57347	55525	59169
04000US49	Utah	B19121	5	3 or more earners (dollars)	83556	80761	86351
04000US50	Vermont	B19121	1	Total:	52895	51435	54355
04000US50	Vermont	B19121	2	No earners (dollars)	23932	22050	25814
04000US50	Vermont	B19121	3	1 earner (dollars)	33255	29630	36880

Income - Median Family Income by Number of Earners in Family

04000US50	Vermont	B19121	4	2 earners (dollars)	60811	58572	63050
04000US50	Vermont	B19121	5	3 or more earners (dollars)	79238	75175	83301
04000US51	Virginia	B19121	1	Total:	60174	59160	61188
04000US51	Virginia	B19121	2	No earners (dollars)	28049	25606	30492
04000US51	Virginia	B19121	3	1 earner (dollars)	41302	40252	42352
04000US51	Virginia	B19121	4	2 earners (dollars)	71978	70561	73395
04000US51	Virginia	B19121	5	3 or more earners (dollars)	88775	85348	92202
04000US53	Washington	B19121	1	Total:	56461	54775	58147
04000US53	Washington	B19121	2	No earners (dollars)	34012	31793	36231
04000US53	Washington	B19121	3	1 earner (dollars)	42092	40343	43841
04000US53	Washington	B19121	4	2 earners (dollars)	69500	67562	71438
04000US53	Washington	B19121	5	3 or more earners (dollars)	87667	81043	94291
04000US54	West Virginia	B19121	1	Total:	38568	36896	40240
04000US54	West Virginia	B19121	2	No earners (dollars)	20574	18619	22529
04000US54	West Virginia	B19121	3	1 earner (dollars)	31001	29531	32471
04000US54	West Virginia	B19121	4	2 earners (dollars)	56323	53089	59557
04000US54	West Virginia	B19121	5	3 or more earners (dollars)	71264	67109	75419
04000US55	Wisconsin	B19121	1	Total:	54500	52441	56559
04000US55	Wisconsin	B19121	2	No earners (dollars)	28039	25355	30723
04000US55	Wisconsin	B19121	3	1 earner (dollars)	37069	35641	38497
04000US55	Wisconsin	B19121	4	2 earners (dollars)	63348	61914	64782
04000US55	Wisconsin	B19121	5	3 or more earners (dollars)	78302	74881	81723
04000US56	Wyoming	B19121	1	Total:	51627	49140	54114
04000US56	Wyoming	B19121	2	No earners (dollars)	27790	25448	30132
04000US56	Wyoming	B19121	3	1 earner (dollars)	36345	34122	38568
04000US56	Wyoming	B19121	4	2 earners (dollars)	60444	57265	63623
04000US56	Wyoming	B19121	5	3 or more earners (dollars)	71309	68054	74564

SOURCE: U.S. Census Bureau, American Community Survey, 2003

Contact the HHES Information area at 301-763-3242 or visit ask.census.gov for further information on Income Data.

Source: U.S. Census Bureau, Housing and Household Economic Statistics Division
Last Revised: June 08, 2005

Income - Median Family Income by Number of Earners in Family

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Income - Median Family Income by Family Size

MEDIAN FAMILY INCOME IN THE PAST 12 MONTHS (IN 2003 INFLATION-ADJUSTED DOLLARS) BY FAMILY SIZE

Geography ID	State	Table ID	Line Number	Line Description	Median Family Income (dollars)		
					Estimate	90-percent confidence interval	
						Lower Bound	Upper Bound
04000US01	Alabama	B19119	1	Total:	43307 42168		44446
04000US01	Alabama	B19119	2	2-person families	39227 37402		41052
04000US01	Alabama	B19119	3	3-person families	45849 44059		47639
04000US01	Alabama	B19119	4	4-person families	51082 48672		53492
04000US01	Alabama	B19119	5	5-person families	45745 41671		49819
04000US01	Alabama	B19119	6	6-person families	47193 38767		55619
04000US01	Alabama	B19119	7	7-or-more-person families	48326 23994		72658
04000US02	Alaska	B19119	1	Total:	61117 59519		62715
04000US02	Alaska	B19119	2	2-person families	59070 55594		62546
04000US02	Alaska	B19119	3	3-person families	58137 54426		61848

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04000US02	Alaska	B19119	4	4-person families	6600963320	68698
04000US02	Alaska	B19119	5	5-person families	6346057254	69666
04000US02	Alaska	B19119	6	6-person families	6067734288	87066
04000US02	Alaska	B19119	7	7-or-more-person families	6995231404	108500
04000US04	Arizona	B19119	1	Total:	4721945844	48594
04000US04	Arizona	B19119	2	2-person families	4407942080	46078
04000US04	Arizona	B19119	3	3-person families	4803045069	50991
04000US04	Arizona	B19119	4	4-person families	5140049307	53493
04000US04	Arizona	B19119	5	5-person families	5143644680	58192
04000US04	Arizona	B19119	6	6-person families	5710447211	66997
04000US04	Arizona	B19119	7	7-or-more-person families	5607044848	67292
04000US05	Arkansas	B19119	1	Total:	4107240355	41789
04000US05	Arkansas	B19119	2	2-person families	3814136820	39462
04000US05	Arkansas	B19119	3	3-person families	4305338909	47197
04000US05	Arkansas	B19119	4	4-person families	4961346206	53020
04000US05	Arkansas	B19119	5	5-person families	4586137481	54241
04000US05	Arkansas	B19119	6	6-person families	3369429735	37653
04000US05	Arkansas	B19119	7	7-or-more-person families	5171238347	65077
04000US06	California	B19119	1	Total:	5653055804	57256
04000US06	California	B19119	2	2-person families	5228051379	53181
04000US06	California	B19119	3	3-person families	5852056964	60076

Income - Median Family Income by Family Size and State

04000US06	California	B19119	4	4-person families	62916 61101	64731
04000US06	California	B19119	5	5-person families	55579 53063	58095
04000US06	California	B19119	6	6-person families	53710 51184	56236
04000US06	California	B19119	7	7-or-more-person families	58970 56183	61757
04000US08	Colorado	B19119	1	Total:	59252 55104	63400
04000US08	Colorado	B19119	2	2-person families	53609 49180	58038
04000US08	Colorado	B19119	3	3-person families	60639 57249	64029
04000US08	Colorado	B19119	4	4-person families	67487 61727	73247
04000US08	Colorado	B19119	5	5-person families	61296 53531	69061
04000US08	Colorado	B19119	6	6-person families	61619 55822	67416
04000US08	Colorado	B19119	7	7-or-more-person families	71129 62264	79994
04000US09	Connecticut	B19119	1	Total:	69917 67631	72203
04000US09	Connecticut	B19119	2	2-person families	58386 55192	61580
04000US09	Connecticut	B19119	3	3-person families	73805 69971	77639
04000US09	Connecticut	B19119	4	4-person families	79599 76187	83011
04000US09	Connecticut	B19119	5	5-person families	85944 77920	93968
04000US09	Connecticut	B19119	6	6-person families	73657 45504	101810
04000US09	Connecticut	B19119	7	7-or-more-person families	85700 70144	101256
04000US10	Delaware	B19119	1	Total:	61270 59319	63221
04000US10	Delaware	B19119	2	2-person families	52829 50096	55562
04000US10	Delaware	B19119	3	3-person families	62213 56925	67501

Income - Median Family Income by Family Size and State

04000US10	Delaware	B19119	4	4-person families	7484969870	79828
04000US10	Delaware	B19119	5	5-person families	7144966449	76449
04000US10	Delaware	B19119	6	6-person families	7235162721	81981
04000US10	Delaware	B19119	7	7-or-more-person families	6287831019	94737
04000US11	District of Columbia	B19119	1	Total:	5024346885	53601
04000US11	District of Columbia	B19119	2	2-person families	5391350674	57152
04000US11	District of Columbia	B19119	3	3-person families	4359238254	48930
04000US11	District of Columbia	B19119	4	4-person families	5058842495	58681
04000US11	District of Columbia	B19119	5	5-person families	4437531241	57509
04000US11	District of Columbia	B19119	6	6-person families	5150724286	78728
04000US11	District of Columbia	B19119	7	7-or-more-person families	4458318283	70883
04000US12	Florida	B19119	1	Total:	4744246460	48424
04000US12	Florida	B19119	2	2-person families	4248841382	43594
04000US12	Florida	B19119	3	3-person families	4829446667	49921
04000US12	Florida	B19119	4	4-person families	5616354683	57643
04000US12	Florida	B19119	5	5-person families	5576352537	58989
04000US12	Florida	B19119	6	6-person families	5512251589	58655
04000US12	Florida	B19119	7	7-or-more-person families	5872352315	65131
04000US13	Georgia	B19119	1	Total:	5064749907	51387
04000US13	Georgia	B19119	2	2-person families	4513543430	46840
04000US13	Georgia	B19119	3	3-person families	5019548081	52309

Income - Median Family Income by Family Size and State

04000US13	Georgia	B19119	4	4-person families	56674 53960	59388
04000US13	Georgia	B19119	5	5-person families	60604 56674	64534
04000US13	Georgia	B19119	6	6-person families	53939 47977	59901
04000US13	Georgia	B19119	7	7-or-more-person families	48117 42254	53980
04000US15	Hawaii	B19119	1	Total:	60647 58387	62907
04000US15	Hawaii	B19119	2	2-person families	51855 48395	55315
04000US15	Hawaii	B19119	3	3-person families	63179 58218	68140
04000US15	Hawaii	B19119	4	4-person families	69133 65984	72282
04000US15	Hawaii	B19119	5	5-person families	69234 63272	75196
04000US15	Hawaii	B19119	6	6-person families	66628 46742	86514
04000US15	Hawaii	B19119	7	7-or-more-person families	101162 74994	127330
04000US16	Idaho	B19119	1	Total:	46783 44656	48910
04000US16	Idaho	B19119	2	2-person families	42477 40868	44086
04000US16	Idaho	B19119	3	3-person families	47162 43081	51243
04000US16	Idaho	B19119	4	4-person families	51722 48932	54512
04000US16	Idaho	B19119	5	5-person families	53403 50974	55832
04000US16	Idaho	B19119	6	6-person families	56114 50156	62072
04000US16	Idaho	B19119	7	7-or-more-person families	49438 30612	68264
04000US17	Illinois	B19119	1	Total:	57385 56029	58741
04000US17	Illinois	B19119	2	2-person families	49855 48290	51420
04000US17	Illinois	B19119	3	3-person families	57987 56124	59850

Income - Median Family Income by Family Size and State

04000US17	Illinois	B19119	4	4-person families	69141 66676	71606
04000US17	Illinois	B19119	5	5-person families	67687 62478	72896
04000US17	Illinois	B19119	6	6-person families	60750 54256	67244
04000US17	Illinois	B19119	7	7-or-more-person families	64233 51852	76614
04000US18	Indiana	B19119	1	Total:	51338 50620	52056
04000US18	Indiana	B19119	2	2-person families	45036 43815	46257
04000US18	Indiana	B19119	3	3-person families	54848 52723	56973
04000US18	Indiana	B19119	4	4-person families	59781 57336	62226
04000US18	Indiana	B19119	5	5-person families	57063 53008	61118
04000US18	Indiana	B19119	6	6-person families	57115 53347	60883
04000US18	Indiana	B19119	7	7-or-more-person families	58471 44465	72477
04000US19	Iowa	B19119	1	Total:	51336 49769	52903
04000US19	Iowa	B19119	2	2-person families	45386 43064	47708
04000US19	Iowa	B19119	3	3-person families	53366 50040	56692
04000US19	Iowa	B19119	4	4-person families	59001 55904	62098
04000US19	Iowa	B19119	5	5-person families	57933 53423	62443
04000US19	Iowa	B19119	6	6-person families	59152 56548	61756
04000US19	Iowa	B19119	7	7-or-more-person families	71720 49104	94336
04000US20	Kansas	B19119	1	Total:	51157 50076	52238
04000US20	Kansas	B19119	2	2-person families	44578 43246	45910
04000US20	Kansas	B19119	3	3-person families	52003 49915	54091

Income - Median Family Income by Family Size and State

04000US20	Kansas	B19119	4	4-person families	59484 56222	62746
04000US20	Kansas	B19119	5	5-person families	61240 57706	64774
04000US20	Kansas	B19119	6	6-person families	61358 48803	73913
04000US20	Kansas	B19119	7	7-or-more-person families	57205 35199	79211
04000US21	Kentucky	B19119	1	Total:	41898 40559	43237
04000US21	Kentucky	B19119	2	2-person families	37466 35751	39181
04000US21	Kentucky	B19119	3	3-person families	43325 40759	45891
04000US21	Kentucky	B19119	4	4-person families	47742 44131	51353
04000US21	Kentucky	B19119	5	5-person families	51572 48715	54429
04000US21	Kentucky	B19119	6	6-person families	49926 35606	64246
04000US21	Kentucky	B19119	7	7-or-more-person families	50327 33032	67622
04000US22	Louisiana	B19119	1	Total:	41831 40579	43083
04000US22	Louisiana	B19119	2	2-person families	38327 36345	40309
04000US22	Louisiana	B19119	3	3-person families	40185 37791	42579
04000US22	Louisiana	B19119	4	4-person families	51325 48785	53865
04000US22	Louisiana	B19119	5	5-person families	48607 44554	52660
04000US22	Louisiana	B19119	6	6-person families	42270 30140	54400
04000US22	Louisiana	B19119	7	7-or-more-person families	47080 36409	57751
04000US23	Maine	B19119	1	Total:	48541 47241	49841
04000US23	Maine	B19119	2	2-person families	42581 40771	44391
04000US23	Maine	B19119	3	3-person families	53882 51381	56383

Income - Median Family Income by Family Size and State

04000US23	Maine	B19119	4	4-person families	56196 54260	58132
04000US23	Maine	B19119	5	5-person families	52243 41357	63129
04000US23	Maine	B19119	6	6-person families	61546 50481	72611
04000US23	Maine	B19119	7	7-or-more-person families	61319 44915	77723
04000US24	Maryland	B19119	1	Total:	69087 66176	71998
04000US24	Maryland	B19119	2	2-person families	58077 55258	60896
04000US24	Maryland	B19119	3	3-person families	68540 64013	73067
04000US24	Maryland	B19119	4	4-person families	85156 82011	88301
04000US24	Maryland	B19119	5	5-person families	75405 68991	81819
04000US24	Maryland	B19119	6	6-person families	77893 73641	82145
04000US24	Maryland	B19119	7	7-or-more-person families	83203 71914	94492
04000US25	Massachusetts	B19119	1	Total:	67527 66145	68909
04000US25	Massachusetts	B19119	2	2-person families	52816 51052	54580
04000US25	Massachusetts	B19119	3	3-person families	67112 64891	69333
04000US25	Massachusetts	B19119	4	4-person families	83781 80993	86569
04000US25	Massachusetts	B19119	5	5-person families	86592 83068	90116
04000US25	Massachusetts	B19119	6	6-person families	88180 80213	96147
04000US25	Massachusetts	B19119	7	7-or-more-person families	83846 63054	104638
04000US26	Michigan	B19119	1	Total:	55018 54160	55876
04000US26	Michigan	B19119	2	2-person families	47110 45868	48352
04000US26	Michigan	B19119	3	3-person families	56871 54960	58782

Income - Median Family Income by Family Size and State

04000US26	Michigan	B19119	4	4-person families	65093 63236	66950
04000US26	Michigan	B19119	5	5-person families	66047 63345	68749
04000US26	Michigan	B19119	6	6-person families	68536 62450	74622
04000US26	Michigan	B19119	7	7-or-more-person families	55096 50867	59325
04000US27	Minnesota	B19119	1	Total:	61417 60001	62833
04000US27	Minnesota	B19119	2	2-person families	52922 49756	56088
04000US27	Minnesota	B19119	3	3-person families	64005 62316	65694
04000US27	Minnesota	B19119	4	4-person families	73290 70177	76403
04000US27	Minnesota	B19119	5	5-person families	67671 64442	70900
04000US27	Minnesota	B19119	6	6-person families	67898 60557	75239
04000US27	Minnesota	B19119	7	7-or-more-person families	65927 53072	78782
04000US28	Mississippi	B19119	1	Total:	39182 37991	40373
04000US28	Mississippi	B19119	2	2-person families	36068 34743	37393
04000US28	Mississippi	B19119	3	3-person families	39317 36842	41792
04000US28	Mississippi	B19119	4	4-person families	47398 44461	50335
04000US28	Mississippi	B19119	5	5-person families	41252 39109	43395
04000US28	Mississippi	B19119	6	6-person families	41224 38187	44261
04000US28	Mississippi	B19119	7	7-or-more-person families	40657 26455	54859
04000US29	Missouri	B19119	1	Total:	49441 48128	50754
04000US29	Missouri	B19119	2	2-person families	44437 42309	46565
04000US29	Missouri	B19119	3	3-person families	49134 47044	51224

Income - Median Family Income by Family Size and State

04000US29	Missouri	B19119	4	4-person families	60528 58362	62694
04000US29	Missouri	B19119	5	5-person families	56065 52365	59765
04000US29	Missouri	B19119	6	6-person families	60077 45725	74429
04000US29	Missouri	B19119	7	7-or-more-person families	46763 34428	59098
04000US30	Montana	B19119	1	Total:	44503 42838	46168
04000US30	Montana	B19119	2	2-person families	41125 39304	42946
04000US30	Montana	B19119	3	3-person families	44635 40833	48437
04000US30	Montana	B19119	4	4-person families	54372 51218	57526
04000US30	Montana	B19119	5	5-person families	47522 42545	52499
04000US30	Montana	B19119	6	6-person families	47053 40128	53978
04000US30	Montana	B19119	7	7-or-more-person families	37412 28648	46176
04000US31	Nebraska	B19119	1	Total:	50756 49577	51935
04000US31	Nebraska	B19119	2	2-person families	45658 44341	46975
04000US31	Nebraska	B19119	3	3-person families	55079 51647	58511
04000US31	Nebraska	B19119	4	4-person families	57814 54575	61053
04000US31	Nebraska	B19119	5	5-person families	54116 51008	57224
04000US31	Nebraska	B19119	6	6-person families	60297 50631	69963
04000US31	Nebraska	B19119	7	7-or-more-person families	54645 38537	70753
04000US32	Nevada	B19119	1	Total:	52502 50672	54332
04000US32	Nevada	B19119	2	2-person families	46796 44359	49233
04000US32	Nevada	B19119	3	3-person families	53139 49450	56828

Income - Median Family Income by Family Size and State

04000US32	Nevada	B19119	4	4-person families	65442 61619	69265
04000US32	Nevada	B19119	5	5-person families	50119 46568	53670
04000US32	Nevada	B19119	6	6-person families	59240 42262	76218
04000US32	Nevada	B19119	7	7-or-more-person families	52013 33449	70577
04000US33	New Hampshire	B19119	1	Total:	63439 61450	65428
04000US33	New Hampshire	B19119	2	2-person families	53100 50797	55403
04000US33	New Hampshire	B19119	3	3-person families	65307 60996	69618
04000US33	New Hampshire	B19119	4	4-person families	75994 72034	79954
04000US33	New Hampshire	B19119	5	5-person families	85731 78226	93236
04000US33	New Hampshire	B19119	6	6-person families	80113 66041	94185
04000US33	New Hampshire	B19119	7	7-or-more-person families	95463 73567	117359
04000US34	New Jersey	B19119	1	Total:	70263 69169	71357
04000US34	New Jersey	B19119	2	2-person families	56722 54876	58568
04000US34	New Jersey	B19119	3	3-person families	71481 69123	73839
04000US34	New Jersey	B19119	4	4-person families	83482 80482	86482
04000US34	New Jersey	B19119	5	5-person families	87322 81751	92893
04000US34	New Jersey	B19119	6	6-person families	79773 72729	86817
04000US34	New Jersey	B19119	7	7-or-more-person families	72222 57901	86543
04000US35	New Mexico	B19119	1	Total:	41661 39674	43648
04000US35	New Mexico	B19119	2	2-person families	40612 38605	42619
04000US35	New Mexico	B19119	3	3-person families	40400 37060	43740

Income - Median Family Income by Family Size and State

04000US35	New Mexico	B19119	4	4-person families	45308 43170	47446
04000US35	New Mexico	B19119	5	5-person families	43768 37327	50209
04000US35	New Mexico	B19119	6	6-person families	41389 24844	57934
04000US35	New Mexico	B19119	7	7-or-more-person families	44742 30981	58503
04000US36	New York	B19119	1	Total:	55309 54546	56072
04000US36	New York	B19119	2	2-person families	47123 46020	48226
04000US36	New York	B19119	3	3-person families	55133 53649	56617
04000US36	New York	B19119	4	4-person families	66206 64557	67855
04000US36	New York	B19119	5	5-person families	67833 64692	70974
04000US36	New York	B19119	6	6-person families	64705 59591	69819
04000US36	New York	B19119	7	7-or-more-person families	61100 53996	68204
04000US37	North Carolina	B19119	1	Total:	45540 44209	46871
04000US37	North Carolina	B19119	2	2-person families	41184 39898	42470
04000US37	North Carolina	B19119	3	3-person families	45310 43584	47036
04000US37	North Carolina	B19119	4	4-person families	58000 55981	60019
04000US37	North Carolina	B19119	5	5-person families	47131 41418	52844
04000US37	North Carolina	B19119	6	6-person families	47797 38385	57209
04000US37	North Carolina	B19119	7	7-or-more-person families	40996 36572	45420
04000US38	North Dakota	B19119	1	Total:	48386 46010	50762
04000US38	North Dakota	B19119	2	2-person families	42704 41015	44393
04000US38	North Dakota	B19119	3	3-person families	51093 46886	55300

Income - Median Family Income by Family Size and State

04000US38	North Dakota	B19119	4	4-person families	56652 52244	61060
04000US38	North Dakota	B19119	5	5-person families	59320 54954	63686
04000US38	North Dakota	B19119	6	6-person families	51365 36323	66407
04000US38	North Dakota	B19119	7	7-or-more-person families	75260 67018	83502
04000US39	Ohio	B19119	1	Total:	51522 50668	52376
04000US39	Ohio	B19119	2	2-person families	43027 41907	44147
04000US39	Ohio	B19119	3	3-person families	54038 51840	56236
04000US39	Ohio	B19119	4	4-person families	62642 61099	64185
04000US39	Ohio	B19119	5	5-person families	63294 60190	66398
04000US39	Ohio	B19119	6	6-person families	61846 55473	68219
04000US39	Ohio	B19119	7	7-or-more-person families	55318 49266	61370
04000US40	Oklahoma	B19119	1	Total:	43259 41783	44735
04000US40	Oklahoma	B19119	2	2-person families	41244 39506	42982
04000US40	Oklahoma	B19119	3	3-person families	41895 39780	44010
04000US40	Oklahoma	B19119	4	4-person families	49224 46733	51715
04000US40	Oklahoma	B19119	5	5-person families	45149 40529	49769
04000US40	Oklahoma	B19119	6	6-person families	46423 38758	54088
04000US40	Oklahoma	B19119	7	7-or-more-person families	56474 28665	84283
04000US41	Oregon	B19119	1	Total:	49800 48401	51199
04000US41	Oregon	B19119	2	2-person families	44155 42462	45848
04000US41	Oregon	B19119	3	3-person families	53546 51317	55775

Income - Median Family Income by Family Size and State

04000US41	Oregon	B19119	4	4-person families	59490 55609	63371
04000US41	Oregon	B19119	5	5-person families	51803 48396	55210
04000US41	Oregon	B19119	6	6-person families	52579 49688	55470
04000US41	Oregon	B19119	7	7-or-more-person families	60558 52637	68479
04000US42	Pennsylvania	B19119	1	Total:	51339 50688	51990
04000US42	Pennsylvania	B19119	2	2-person families	43915 42954	44876
04000US42	Pennsylvania	B19119	3	3-person families	55006 53403	56609
04000US42	Pennsylvania	B19119	4	4-person families	62901 61223	64579
04000US42	Pennsylvania	B19119	5	5-person families	61814 59080	64548
04000US42	Pennsylvania	B19119	6	6-person families	54997 51352	58642
04000US42	Pennsylvania	B19119	7	7-or-more-person families	52622 44121	61123
04000US44	Rhode Island	B19119	1	Total:	60165 58020	62310
04000US44	Rhode Island	B19119	2	2-person families	51131 49418	52844
04000US44	Rhode Island	B19119	3	3-person families	63621 57828	69414
04000US44	Rhode Island	B19119	4	4-person families	72032 68469	75595
04000US44	Rhode Island	B19119	5	5-person families	69549 64200	74898
04000US44	Rhode Island	B19119	6	6-person families	75910 61036	90784
04000US44	Rhode Island	B19119	7	7-or-more-person families	91879 36244	147514
04000US45	South Carolina	B19119	1	Total:	47081 45815	48347
04000US45	South Carolina	B19119	2	2-person families	43569 40609	46529
04000US45	South Carolina	B19119	3	3-person families	43770 40370	47170

Income - Median Family Income by Family Size and State

04000US45	South Carolina	B19119	4	4-person families	57410 54505	60315
04000US45	South Carolina	B19119	5	5-person families	59524 54426	64622
04000US45	South Carolina	B19119	6	6-person families	56512 39805	73219
04000US45	South Carolina	B19119	7	7-or-more-person families	38147 32776	43518
04000US46	South Dakota	B19119	1	Total:	46824 45351	48297
04000US46	South Dakota	B19119	2	2-person families	41880 40919	42841
04000US46	South Dakota	B19119	3	3-person families	47066 44592	49540
04000US46	South Dakota	B19119	4	4-person families	55595 52710	58480
04000US46	South Dakota	B19119	5	5-person families	58974 53419	64529
04000US46	South Dakota	B19119	6	6-person families	57732 54212	61252
04000US46	South Dakota	B19119	7	7-or-more-person families	46235 19384	73086
04000US47	Tennessee	B19119	1	Total:	46654 45533	47775
04000US47	Tennessee	B19119	2	2-person families	41365 40018	42712
04000US47	Tennessee	B19119	3	3-person families	49642 46004	53280
04000US47	Tennessee	B19119	4	4-person families	54871 52937	56805
04000US47	Tennessee	B19119	5	5-person families	59636 55186	64086
04000US47	Tennessee	B19119	6	6-person families	51614 42607	60621
04000US47	Tennessee	B19119	7	7-or-more-person families	58523 44096	72950
04000US48	Texas	B19119	1	Total:	47479 46609	48349
04000US48	Texas	B19119	2	2-person families	44357 43260	45454
04000US48	Texas	B19119	3	3-person families	48502 46261	50743

Income - Median Family Income by Family Size and State

04000US48	Texas	B19119	4	4-person families	52182 51024	53340
04000US48	Texas	B19119	5	5-person families	47833 44784	50882
04000US48	Texas	B19119	6	6-person families	45383 42233	48533
04000US48	Texas	B19119	7	7-or-more-person families	45039 39888	50190
04000US49	Utah	B19119	1	Total:	52481 50919	54043
04000US49	Utah	B19119	2	2-person families	43895 41819	45971
04000US49	Utah	B19119	3	3-person families	54089 48114	60064
04000US49	Utah	B19119	4	4-person families	57103 54452	59754
04000US49	Utah	B19119	5	5-person families	62715 56327	69103
04000US49	Utah	B19119	6	6-person families	58572 50443	66701
04000US49	Utah	B19119	7	7-or-more-person families	78055 66053	90057
04000US50	Vermont	B19119	1	Total:	52895 51435	54355
04000US50	Vermont	B19119	2	2-person families	45283 43556	47010
04000US50	Vermont	B19119	3	3-person families	53765 50627	56903
04000US50	Vermont	B19119	4	4-person families	64758 61795	67721
04000US50	Vermont	B19119	5	5-person families	63203 54858	71548
04000US50	Vermont	B19119	6	6-person families	60515 51966	69064
04000US50	Vermont	B19119	7	7-or-more-person families	75809 64630	86988
04000US51	Virginia	B19119	1	Total:	60174 59160	61188
04000US51	Virginia	B19119	2	2-person families	53217 51546	54888
04000US51	Virginia	B19119	3	3-person families	59730 57271	62189

Income - Median Family Income by Family Size and State

04000US51	Virginia	B19119	4	4-person families	70657 68064	73250
04000US51	Virginia	B19119	5	5-person families	66660 63411	69909
04000US51	Virginia	B19119	6	6-person families	77124 69475	84773
04000US51	Virginia	B19119	7	7-or-more-person families	73975 59535	88415
04000US53	Washington	B19119	1	Total:	56461 54775	58147
04000US53	Washington	B19119	2	2-person families	50951 49285	52617
04000US53	Washington	B19119	3	3-person families	58672 55979	61365
04000US53	Washington	B19119	4	4-person families	66223 62966	69480
04000US53	Washington	B19119	5	5-person families	58977 56039	61915
04000US53	Washington	B19119	6	6-person families	62695 44623	80767
04000US53	Washington	B19119	7	7-or-more-person families	54952 46605	63299
04000US54	West Virginia	B19119	1	Total:	38568 36896	40240
04000US54	West Virginia	B19119	2	2-person families	33454 31556	35352
04000US54	West Virginia	B19119	3	3-person families	42012 37573	46451
04000US54	West Virginia	B19119	4	4-person families	51534 48271	54797
04000US54	West Virginia	B19119	5	5-person families	45575 39736	51414
04000US54	West Virginia	B19119	6	6-person families	38639 19856	57422
04000US54	West Virginia	B19119	7	7-or-more-person families	45372 25759	64985
04000US55	Wisconsin	B19119	1	Total:	54500 52441	56559
04000US55	Wisconsin	B19119	2	2-person families	47416 45488	49344
04000US55	Wisconsin	B19119	3	3-person families	59442 56936	61948

Income - Median Family Income by Family Size and State

04000US55	Wisconsin	B19119	4	4-person families	63947 59748	68146
04000US55	Wisconsin	B19119	5	5-person families	62288 58236	66340
04000US55	Wisconsin	B19119	6	6-person families	55878 48963	62793
04000US55	Wisconsin	B19119	7	7-or-more-person families	55725 36583	74867
04000US56	Wyoming	B19119	1	Total:	51627 49140	54114
04000US56	Wyoming	B19119	2	2-person families	48455 44784	52126
04000US56	Wyoming	B19119	3	3-person families	47110 43853	50367
04000US56	Wyoming	B19119	4	4-person families	62005 58361	65649
04000US56	Wyoming	B19119	5	5-person families	59801 56106	63496
04000US56	Wyoming	B19119	6	6-person families	56369 45628	67110
04000US56	Wyoming	B19119	7	7-or-more-person families	40698 34494	46902

SOURCE: U.S. Census Bureau, American Community Survey, 2003

Contact the HHES Information area at 301-763-3242 or visit ask.census.gov for further information on Income Data.

Source: U.S. Census Bureau, Housing and Household Economic Statistics Division
Last Revised: June 08, 2005

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Kentucky - Housing and Utilities Allowable Living Expenses



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DEPARTMENT OF THE TREASURY

Kentucky - Housing and Utilities Allowable Living Expenses

Collection Financial Standards

Financial Analysis - Local Standards: Housing and Utilities (effective 1/1/2005)

Maximum Monthly Allowance

County	Family of 2 or less	Family of 3	Family of 4 or more
Adair County	677	797	916
Allen County	732	861	990
Anderson County	843	991	1,140
Ballard County	667	785	902
Barren County	770	906	1,042
Bath County	701	825	949
Bell County	637	750	862
Boone County	1,106	1,301	1,497
Bourbon County	853	1,003	1,154
Boyd County	745	876	1,008
Boyle County	807	950	1,092
Bracken County	732	861	990
Breathitt County	693	815	938
Breckinridge County	694	816	939
Bullitt County	894	1,051	1,209
Butler County	692	814	936
Caldwell County	686	808	929
Calloway County	844	993	1,142
Campbell County	962	1,131	1,301

Kentucky - Housing and Utilities Allowable Living Expenses

Carlisle County	661	778	895
Carroll County	822	967	1,112
Carter County	638	751	863
Casey County	607	715	822
Christian County	753	886	1,019
Clark County	852	1,002	1,153
Clay County	576	678	779
Clinton County	573	674	775
Crittenden County	618	727	836
Cumberland County	594	699	804
Daviess County	782	920	1,058
Edmonson County	724	851	979
Elliott County	612	720	828
Estill County	617	726	834
Fayette County	967	1,138	1,308
Fleming County	673	792	911
Floyd County	717	844	970
Franklin County	853	1,003	1,154
Fulton County	643	756	870
Gallatin County	810	953	1,096
Garrard County	790	929	1,068
Grant County	888	1,045	1,202
Graves County	712	837	963
Grayson County	699	823	946
Green County	625	735	846
Greenup County	737	867	997
Hancock County	772	908	1,044
Hardin County	853	1,003	1,154
Harlan County	631	742	853
Harrison County	780	918	1,056

Kentucky - Housing and Utilities Allowable Living Expenses

Hart County	654	769	885
Henderson County	827	973	1,119
Henry County	818	963	1,107
Hickman County	624	734	845
Hopkins County	700	824	948
Jackson County	539	634	729
Jefferson County	945	1,111	1,278
Jessamine County	897	1,056	1,214
Johnson County	715	841	968
Kenton County	980	1,153	1,326
Knott County	642	755	868
Knox County	698	821	944
Larue County	703	827	951
Laurel County	744	875	1,007
Lawrence County	636	749	861
Lee County	553	650	748
Leslie County	647	761	875
Letcher County	605	711	818
Lewis County	605	711	818
Lincoln County	698	821	944
Livingston County	644	757	871
Logan County	753	886	1,019
Lyon County	731	860	989
Madison County	857	1,009	1,160
Magoffin County	702	826	950
Marion County	689	811	933
Marshall County	798	939	1,080
Martin County	751	883	1,015
Mason County	792	932	1,072
McCracken County	835	983	1,130

Kentucky - Housing and Utilities Allowable Living Expenses

McCreary County	549	646	743
McLean County	686	807	927
Meade County	836	984	1,131
Menifee County	625	735	846
Mercer County	758	892	1,026
Metcalf County	592	696	801
Monroe County	674	793	912
Montgomery County	765	901	1,036
Morgan County	635	747	860
Muhlenberg County	668	786	904
Nelson County	775	911	1,048
Nicholas County	698	821	944
Ohio County	675	794	914
Oldham County	1,189	1,399	1,609
Owen County	782	920	1,058
Owsley County	525	617	710
Pendleton County	810	953	1,096
Perry County	729	858	987
Pike County	765	901	1,036
Powell County	712	837	963
Pulaski County	680	800	920
Robertson County	633	744	856
Rockcastle County	698	821	944
Rowan County	721	848	975
Russell County	628	739	850
Scott County	955	1,124	1,292
Shelby County	971	1,142	1,313
Simpson County	803	944	1,086
Spencer County	1,011	1,189	1,367
Taylor County	745	876	1,008

Kentucky - Housing and Utilities Allowable Living Expenses

Todd County	655	770	886
Trigg County	737	867	997
Trimble County	794	934	1,075
Union County	719	846	973
Warren County	907	1,067	1,227
Washington County	686	807	927
Wayne County	619	728	837
Webster County	688	810	931
Whitley County	712	838	964
Wolfe County	552	649	746
Woodford County	975	1,148	1,320

**AUTOMATIC STAY, REAFFIRMATIONS & REDEMPTIONS
UNDER THE BANKRUPTCY ABUSE PREVENTION AND
CONSUMER PROTECTION ACT OF 2005**

**Thomas L. Canary, Jr.
Mapother & Mapother, P.S.C.
Louisville, Kentucky**

Changes to the Bankruptcy Code
Under the
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005
For Consumer Creditors in Chapter 7
Traps for the Unwary

By
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The passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAP") was a cause for much rejoicing among the creditors' ranks. Gone were the days of serial filings and "ride through" on secured debts. Now creditors have automatic termination of the stay or the promise of adequate protection if a debtor does not timely perform his statement of intent. It was believed that creditors would be able to handle more of their own cases and that reliance on attorneys to get the stay terminated or a reaffirmation signed were gone. Debtors could now assume leases in Chapter 7 situations. Redemption is now at retail, not wholesale. Those annoying preference actions that arise out of large Chapter 11 cases just became easier to defend and world peace is just around the corner.

Upon further reflection, some of this initial euphoria has evaporated. This outline covers just a very few areas common to secured creditors in Chapter 7 cases. The perspective of this outline is from that of a creditor's attorney, so some may say that it is jaundice. The author invites you to read on and draw your own conclusions regarding the changes BAP has made to the Bankruptcy Code and whether the perceived advantages are fact or fiction.

Ride Through and Automatic Termination of the Stay

Section 304 of BAP amended 11 U.S.C. §521(a) (6) by adding the following language to the end of that subsection:

... in a case under chapter 7 of this title **in which the debtor is an individual**, not retain possession of **personal property as to which a creditor has an allowed claim for the purchase price** secured in whole or in part by an interest in such personal property unless the debtor, not later than **45 days after the first meeting of creditors** under section 341(a), either

- (A) **enters into an agreement with the creditor** pursuant to section 524(c) with respect to the claim secured by such property; or
- (B) **redeems such property** from the security interest pursuant to section 722.

If the debtor fails to so act within the 45-day period . . . the stay under section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law, . . . [Emphasis added]

So, conventional wisdom says that the stay is terminated on the 46th day after the scheduled meeting of creditors unless the debtor reaffirms or redeems, right? Your author suggests that all may not be as it seems. Let's examine the highlighted language in amended §521(a) (6).

"in which the debtor is an individual"

If the Chapter 7 debtor is a corporation, partnership, or the like, creditors do not get the benefit of the automatic termination of the stay. This could be tricky where the note and security interest are signed by the debtor as a corporate officer of the closely held corporation, and the note is guaranteed by the debtor, individually. The debtor then files Chapter 7. This would seem to say that a creditor gets the benefit of the automatic termination of the stay after 45 days since the debtor is an individual, and both the corporation and the debtor have signed the security interest.

However, does the picture change if only the corporation has given a security interest in the property? For example, what if the collateral in question is an automobile titled only in the name of the corporation, but the debtor is a cosigner on the note. The debtor is still an individual, but does that individual have to possess an interest in the collateral for the creditor to get the benefit of the automatic termination of the stay? Your author says no.

§521(a) (6) only requires that the debtor be an individual. It does not require that the collateral be owned by the debtor. In fact, the statute talks about property of the estate *or of the debtor which is affected by the stay*. Additionally, some will argue that the debtor's possessory or equitable interest of the collateral is sufficient to make the collateral "property of the estate" under §541(a) (1) mandating termination of the stay.

But assume for the second that the possessory interest is not tantamount to "property of the estate." The creditor **does** have an "allowed claim for the purchase price." The debtor cosigned the note and provided the creditor has filed a proof of claim, it is presumed under §502(a) that the claim is allowed. §521(a) (6) does **NOT** say the creditor must have an allowed **secured** claim, only an allowed claim for the purchase price. The debt is not an allowed secured claim since the debt is secured by property that is not property in which the debtor has an interest (remember; in our example, only the corporation appears on the certificate of title). However having an allowed secured claim is not a prerequisite under §521(a) (6).

What are the two things that a debtor must do in order for the stay not to terminate after 45 days: either enter into an agreement to reaffirm under §524 or redeem the lien under

§722. This debtor can enter into a reaffirmation agreement with the creditor since he is personally obligated on the note. The fact the collateral is titled in the corporation's name is immaterial. While the debtor may not be able to redeem the lien on the personal property since he has no ownership interest in it, that does not negate the effect of amended §521(a) (6), it only limits his options. As a practical matter, neither could the corporation redeem the lien if it were in bankruptcy since §722 is reserved for individual, not corporate debtors.

"as to which a creditor has an allowed claim"

I think this is where a trap lies for the unwary creditor. A literal reading of this provision means that before a creditor gets the benefit of the automatic termination of the stay, it must have an "allowed claim." §502(a) states that "[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, objects." [Emphasis added]. This is the only section of the Code that talks about a claim being allowed. This leads to a series of questions:

1. Must a creditor have filed a claim with the Bankruptcy Court before it can get the benefit of the automatic termination of the stay?
2. If a creditor does not file such a claim, and yet repossesses after the 45th day, has it violated the stay provisions of §362(a)?
3. If a creditor files a claim and an objection is filed, but the debtor does not reaffirm or redeem within the 45 day period, is the creditor still stayed?

Your author would submit that the answer to all these questions is "yes." The requirement that a proof of claim be filed is consistent with the language of the statute and the fact that this property is also abandoned by the trustee after the 45th day ("such property shall no longer be property of the estate"). By requiring a creditor to file its claim, give proof of its perfection and state the amount of its claim, the trustee is given an opportunity to see if the lien can be avoided (if not properly perfected) and to ascertain whether there may be equity in the property that would inure to the benefit of the unsecured creditors of the estate.

Recall that under Section 304 of the BAP and amended §521(a)(6), the trustee can file a motion, before the expiration of the 45 days asking that the stay not be terminated if he feels the property is of consequential value or benefit to the estate [or is it really 30 days? See the next section of this discussion on the 45 day period]. Unless and until a proof of claim is filed, the trustee has no accurate way to determine if the lien is perfected or the property of value to the estate. The only disclosure of the amount due the creditor prior to a claim being filed is from the debtor's schedules.

Creditors waiting to file their claims towards the end of the 45 day period should expect that trustees will file the motion to extend the stay in order to investigate the situation. The morale of this story is that creditors should file their claims as soon in the process as possible.

If the trustee does obtain this order, the court must order appropriate adequate protection of the creditor's interest and may order the debtor to deliver any collateral in the debtor's possession to the trustee. (NOTE interestingly that this provision does not require the creditor to turn over the property in its possession. Presumably, this section does not alter the trustee's rights under §542(a) of the Bankruptcy Code). How will the amount of this adequate protection be determined?

§361(1) states that the trustee can be required to make cash payments to the creditor to the extent that the imposition of the stay results in a decrease in value of the creditor's interest in the property. Will this depreciation be set using the NADA retail, wholesale, midpoint? Will there need to be an appraisal? Most importantly, where will a Chapter 7 trustee get the funds to make these payments if the source of the estate's funding is the equity in the creditor's collateral?

Remember, §361(3) prohibits the court from giving the creditor an administrative priority status for the diminution in value as adequate protection. The "adequate protection" could be a lien on the proceeds from the sale of the collateral equal to the diminution in value from the date of the entry of the order for relief until the proceeds are paid.

However, what if the sale of the collateral does not generate proceeds sufficient to make the adequate protection payments? The creditor should insist that the sale be conditioned upon payment in full of its interest in the collateral. The creditor should also reserve its right to object to the trustee's surcharge under 506(c) in the event the sale will not satisfy the creditor's allowed secured claim. Is the creditor entitled to the time value of its interest in the collateral pending the conclusion of the sale and distribution of the proceeds? If that value has been liquidated, then I would argue, "yes". While this change in the law sounds good in theory, like much of the BAPCPA, it fails the reality test.

My conclusion is that creditors must file a proof of claim with the Bankruptcy Court before the expiration of the 45 day period set out in amended §521(6) [or the 30 day period set out in §521(a)(2)(B)] before it gets the benefit of the automatic termination of the stay on the 46th [or 30th] day. It remains to be seen how the court will set the adequate protection payment amounts and then how they will be paid in a Chapter 7.

Creditors waiting to file their claims towards the end of the 45 [or 30] day period should expect that trustees will file the motion to extend the stay in order to investigate the situation. The lesson of this story is that creditors should file their claims as soon in the process as possible.

"for the purchase price"

Even if a creditor meets the thresholds set out above, §521(a) (6) is effective only if the creditor has a purchase money security interest. As will be set out below, §521(a) (2) (B) in conjunction with §362(h) will give **any** secured creditor, even one not possessing a pmsi, automatic relief from the stay. If a creditor is going to rely on 521(a) (6), then it must possess a claim secured by the purchase price.

“45 days after the first meeting of creditors” [versus §521(a) (2) (B) and 362(h)]

When does this 45 day period really begin to run? Is it 45 days after the first setting for the meeting of creditors? Is it 45 days after the first meeting of creditors is actually held? Is it 45 days after the first meeting of creditor is “concluded” to be consistent with Bankruptcy Rule 4003(b) on objecting to exemptions? How do you square this with §521(a) (2) (B) which seems to give the same relief to ALL secured creditors in less time? Read on McDuff!

Bankruptcy Rule 2003(a) states that the first meeting of creditors in a Chapter 7 case must be called [not concluded] no fewer than 20 and no greater than 40 days after the order for relief. Bankruptcy Rule 2003(e) states that those first meetings can be adjourned from time to time by announcement at the meeting of creditors without further written notice. If the 45 days begins to run from the conclusion of a first meeting of creditors, how will a secured creditor know when the 45 day period under §521(6) begins to run without (1) attending the hearing, (b) hiring counsel to appear at the hearing, or (c) routinely checking PACER to see if the first meeting was concluded? With the additional burdens being placed on the trustees and debtors under BAP, might it not become commonplace for the first meetings to be continued? If a creditor is not aware of these possibilities, it could unwittingly violate the stay by repossessing collateral before the stay has been terminated by operation of law under §521(6).

The safe approach will be to begin the 45 day period after the conclusion of the first meeting of creditors. That is a date certain that can be definitively calculated. However, read the next section and explore the dangers of knowing if and when the debtor has complied with the statement of intent.

You must also compare this 45 day period with the 30 day period set out in amended §521(a)(2)(B) and §362(h) of the Code. As noted above, this section is not limited to purchase money secured claims. §521(a) (2) (C) makes specific reference to §362(h) and §362(h) (1) (A) makes specific reference to §521(a) (2). §362(h) (1) provides for termination of the stay for **“personal property of the estate or of the debtor securing in whole or in part a claim. . .”**. There is no requirement here that the claim be *allowed*. Creditors claiming a termination of the stay under this provision are NOT mandated to file a proof of claim in order to get the benefit of the statute. THIS DISTINCTION COULD BE HUGE.

Also, the time period under this provision is much more certain. §521(a)(2)(B) provides that the stay is terminated and the personal property no longer considered property of the estate within 30 days **of the first date set** for the meeting of creditors if the debtor does not fulfill his statement of intent under §521. Some commentators have opined that this 30 day period terminates the stay on personal property securing non-purchase money loans, only. This distinction is not mentioned anywhere in the amended Code section

Lastly, §362(h)(2) requires the trustee to make his/her motion to keep the personal property from being abandoned “before the expiration of the applicable time set by section 521(a)(2)”. §521(a)(2)(B) sets forth a 30, not a 45, day period

It therefore can be argued that the automatic termination of the stay under §521(a)(6) is a nullity for the following reasons:

1. The time period in amended §521(a)(2)(B) is 15 day shorter at worst.
2. The time period in amended §521(a)(2)(B) begins on the date **first set for the meeting of creditors** and not “after the meeting of creditors” as stated in new §521(a)(6). Even if there were a continuation of the first meeting of creditors that might delay the application of §521(a)(6), that prohibition does not exist for amended §521(a)(2)(B). **However** note that the trustee could request that the stay remain in effect if he thought the property were of consequential value or benefit to the estate, if that motion is file before the expiration of this 30 day period. §362(h)(2).
3. There is nothing in amended §521(a)(2)(B) indicating that this section is applicable to non-purchase money situations, only.
4. A creditor does not need to have an allowed claim under §521(a)(2)(B), i.e., the creditor does not need to file a proof of claim to get the benefit of the termination of the stay.

Perhaps there will be some technical amendment that will clarify this issue. For the time being, debtors and trustees should expect creditors to start to enforce their state law rights 30 days after the first setting for the meeting of creditors if the debtor does not enter into a reaffirmation agreement with the creditor nor redeems the lien on the collateral.

“enters into an agreement with the creditor”

This seemingly innocent provision is fraught with peril. When does a debtor “enter into” a reaffirmation agreement with a creditor? An example will demonstrate this potential conundrum.

Debtor owes a debt to the creditor secured by the debtor’s only automobile. The creditor sends the debtor a reaffirmation agreement in the mail. This creditor has adopted a conservative policy to wait until 45 days after the first meeting of creditors before presuming the stay is terminated. Creditor sends its representative to the first meeting of creditors to question the debtor about reaffirming the debt and files its claim. The representative presents the agreement to the debtor and his counsel. The retort is that the debtor and his counsel are still considering their options. The representative returns without the agreement being signed. On day 46, the creditor has not received the reaffirmation agreement back from the debtor so it repossesses the automobile. The creditor is safe, right? Think again.

Dictionary.com (<http://dictionary.reference.com/>) defines the phrase “enter into” as: “To become party to (a contract)” What if the debtor has signed the reaffirmation agreement within the 45 day period and it is “in the mail” to the creditor. Hasn’t the debtor “entered into” an agreement with the creditor pursuant to section 524(c) by accepting the offer made by the creditor? What if the debtor has signed the reaffirmation agreement and it is with his attorney pending signature by counsel of new the new Part C – Certification of Debtor’s Attorney (If Any). Has the **debtor** entered into the reaffirmation agreement at that point such that he has met his obligation under §521(a) (6)? If the debtor signed the reaffirmation agreement within 30 days after the first date set for the meeting of creditors, does this meet the requirement under §521(a)(2)(B) that the debtor perform his stated intent within that time period?

If the court were to decide that the debtor’s signing the reaffirmation agreement within the appropriate time period, DOES met this threshold, how is a creditor ever to know whether it is safe to repossess its collateral or have its counsel file a request/motion with the court for the entry of an order confirming the termination of the stay under new §362(j)? Couldn’t the debtor’s attorney use this “method” to thwart the automatic termination of the stay?

There are two methods a creditor may employ:

1. Attend the first meeting and require that the debtor and his attorney sign the reaffirmation agreement then and there. Do not let the debtor take the reaffirmation agreement away from the meeting of creditors. Do not have the debtor sign the reaffirmation agreement and then hand it to his attorney who will get back with you. Tell the debtor and his counsel that the reaffirmation offer is open that day only and if they do not sign the agreement, then the offer is withdrawn.

If you send the reaffirmation agreement through the mail, either in the letter to the debtor (or his attorney) or in the reaffirmation agreement itself, state that if the agreement is not **received in the office of the creditor** (or its counsel) on a date certain, then the offer to reaffirm is withdrawn and the creditor will not consider that the parties have “entered into” any agreement (i.e., there is no “meeting of the minds” to form a contract). If the debtor were to sign the agreement, but the attorney refused to sign new Part C, you could then move the court to approve the reaffirmation agreement as provided under §§524(k)(7), (8) and §524(m). Make is clear that if the debtor wants to reaffirm he must sign creditor’s form – no other form or “offer” from the debtor will be accepted.

2. File the motion to terminate the stay under §362(d). This is not a change in the law. This is the right that you had prior to BAP and continues after BAP. This may be the only sure-fire way to safely confirm termination of the automatic stay.

“redeems such property”

Section 304 of the BAP makes it clear that redemption in payments is no longer allowed and that the redemption sum must be paid "in full at the time of redemption." What if the order tendered by the debtor does not give a date by when the funds are to be paid? This is clearly contrary to amended §722, but if the mandate is not in the court's order, how can the creditor push the issue before the court? The author has seen such orders and will always object to them, but this begs the question. If the court enters an order allowing redemption of the personal property, is §521(a) (6) satisfied even if the funds are not paid upon the entry of the order? Has the debtor redeemed the lien by simply filing the motion? Does this change to §722 found at Section 304 of the BAP now **require** that the full redemption amount be paid to the creditor upon the entry of the order?

The point here is that there is the possibility of delay in the automatic termination of the stay if a creditor is not attentive. Debtor's counsel will argue that §521(a) (6) is satisfied upon the entry of the order, not the payment of the money to the creditor. This is a reasonable reading of the statute. Unless creditors insist that the funds be paid to the creditor upon the entry of the order of redemption, or very shortly thereafter, the BAP's automatic termination of the stay loses some of its teeth.

Also, §506(a)(2) has been added to the Code stating the value with respect to personal property securing an allowed claim (make sure you have your claim filed) shall be the replacement value on the date of the filing of the petition, without deduction for costs of sale. If the property in question was for personal, family or household use, then replacement value shall be deemed to be retail. Expect fights over whether the property was for personal, family or household use. What if the collateral is a mini-van that is used to take the kids to school, but doubles as the delivery van for the debtor's small business? What if the automobile is in the name of the debtor's closely held corporation and the debtor, but used by the debtor as his family vehicle? Expect the case books to be rife with decisions on this issue and other inconsistencies created by BAP.

Termination of the Stay But No Resulting Order

Section 106 of the BAP amends §362 to include new subsection (j) which reads: "On **request** of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated." Both §§521(a)(2)(b) and (a)(6) state that not only will the stay be terminated, but the property no longer considered property of the estate. §362(c) (1) states that the stay against property of the estate continues until the property is no longer property of the estate. Therefore, a creditor can make a request to the court that the stay be terminated if the debtor does not perform his stated intent (but see discussions above on this point).

"Requesting" a termination of stay may seem very straightforward. However, like many of the provisions of BAP, there are traps for the unwary.

At two recent seminars on BAP, most creditors and some members of the bench took the position that this "request" had to be made by motion. The members of the bench stated that the only way to "request" the court to do anything is by motion.

This motion will be governed by Bankruptcy Rule 9014. There will be a notice and opportunity for objection. Generally, the objection time is 15 days. Otherwise, opposing counsel and the debtor would not get the appropriate notification that the Order was about to be entered. In the event that the debtor had "entered into" a reaffirmation agreement, it could be brought to the attention of the creditor that it was not entitled to the automatic termination of the stay.

This motion will need to be done by counsel, and could result in some delay before the attorney receives the Order from the court.

As stated above, there could be significant uncertainties as to whether the debtor has met his obligations under either §§521(a) (2) (B) or (a) (6). Counsel may be hesitant to declare in a "request" that the debtor has not met his duty to "enter into" a reaffirmation agreement, especially if counsel did not represent the creditor at the first meeting of creditors. Some of this hesitation could be alleviated by use of the author's strategies set out above.

Most certainly, creditors will want an order for their file, stating the stay is terminated. More importantly, those agents that the creditors hire to take back personal property will not agree to repossess collateral without either an order from the court or a letter of indemnity from the creditor. If the uncertainties described above exist, it may be more prudent for the creditor simply to file a motion to terminate the stay under §362(d).

Any order should be specific to the personal property, identifying it by make, model and serial or model number. It should recount the reason the stay was terminated in the event there is a question at a later time. This is true whether the creditor is making a "request" under §362(j) or filing a motion under 362(d).

The order should also state that this property is no longer deemed property of the estate besides not being bound by the bankruptcy stay. If a trustee is going to later challenge this, and there is an order that confirms the abandonment, the creditor can argue that any appeal of that order must be within in the 10 day appellate period set out in Bankruptcy Rule 8002.

Note that Bankruptcy Rule 8002 states that "[t]he notice of appeal shall be filed with the clerk within 10 days of the date of **the entry of the judgment, order or decree** appealed from." [Emphasis added]. If the creditor relies solely on the automatic termination of the stay and does not procure an order, then there is a real question as to whether the appeal time under Bankruptcy Rule 8002 ever begins to run.

Your author suggests a simple solution to this host of potential pitfalls: hire counsel, and procure the order or wait until the entry of the discharge order and closing of the case. It is the remedy for what could be a whole host of ills.

While your author understands that creditors want to save the \$150 filing fee, the delays occasioned with the application of these amended Code sections could outweigh the perceived savings. Consider these time lines:

3		<u>New Statute</u>			
0	40	70	85	90	105
Order for Relief	First Meeting of Creditor	Stay Term. 521(a) (2) (B)	Stay Term. 521(a) (6)	Order 521(a) (2) (B)	Order 521(a) (6)
<u>§362(d)</u>					
0	30	40	50		
Order for Relief	Creditor's Attorney Files Motion for Relief	First Meeting of Creditors	Order Entered		

If the collateral depreciates faster than \$150 per month, it makes more sense to simply file the motion and not worry about the perils of the automatic termination of the stay. Only time will tell what creditors prefer.

A couple of final notes

Both §§521(a) (6) and 521(a) (2) (B)/362(h) speak in terms of the stay being "terminated." However, §362(d) gives a creditor four remedies: terminating, annulling modifying or conditioning the stay. If a creditor wants the stay annulled to give the termination effect back to the date of the filing of the petition, then it will have to file a motion under §362(d). It cannot rely on §§521(a) (6) or 521(a) (2) (B) since those statutes only talk in terms of terminating the stay. The same is true if the creditor wants the stay modified or conditioned.

Secondly, note that there is another fundamental difference between §§521(a) (6) and 521(a) (2) (B)/362(h). §362(h) (1) (A) & (B) include in the statement of intent reaffirmation, redemption and the assumption of a lease pursuant to §365(p). This last provision is not found in §521(a) (6). So presumably, if the contract between the debtor and the creditor is a lease, you can get an automatic termination of the stay if you meet all the requirements of §§521(a) (2) (B) and 362(h) but that is not true if you base the termination of the stay on §521(a) (6). It appears that this has led some creditors to opine that if a debtor DOES assume a lease under new section §365(p), that obligation survives the debtor's discharge. Or does it? This issue is dealt with in the next section on Reaffirmation Agreements.

Reaffirmation Agreements – back to the “old days”

The addition of new §524(k) to the Code and the increased disclosures found in that statute will likely lead to debtor's counsel refusing to sign the affidavit or declaration on reaffirmation agreements. This in turn could lead to a couple different strategies by creditors:

Hire counsel to make a motion to approve the reaffirmation agreement

This is what I mean by going back to the old days. The author has had the privilege of practicing long enough to remember when creditors had to bring motions to approve ALL reaffirmation agreements. It is the author's opinion that with the changes in the Code through BAP, fewer debtors' counsel will sign the declarations on reaffirmation agreements (new Part C found in §524(k)). This will require a motion to be filed for approval and an order entered before the reaffirmation agreement will have a binding and enforceable effect post discharge.

New §524(k) of the Code contains significant disclosure requirements. The author has seen a draft agreement prepared and reviewed by some of the nation's leading creditors' rights attorneys. It is approximately 8 pages long. The new disclosures under 524(k) contain a Part C which is a declaration by the debtor's attorney that entering into the reaffirmation agreement does not impose an undue hardship on the debtor or the debtor's dependents.

Part D of the reaffirmation agreement is the debtor's statement in support of the reaffirmation agreement. The debtor must disclose his monthly take home pay, plus any other income received, and subtracts that sum from his monthly expenses, which includes payments on (1) post bankruptcy debt, and (2) payments on any **other** reaffirmed debts. If under that calculation, the debts are greater than the income, then an undue hardship is presumed and the reaffirmation must be reviewed/approved by the court (unless the creditor is a credit union as defined under the Federal Reserve Act). The debtor will have to demonstrate to the satisfaction of the court how he proposes to make those payments. If he cannot, the reaffirmation will not be approved.

Your author has been told by many debtors' counsel that they will not represent the debtor during the course of negotiations of reaffirmation agreements with the creditor. They will not then sign the declaration mandated by §524. In that case, even if the debtor shows in Part D of the reaffirmation agreement that paying this obligation will not work an undue burden on him or his dependents, the court will still have to approve the agreement before it can be enforceable. See new §§524(k) (3) (J) (i) and (k) (7) [Motion for Court Approval]. Only time will tell how many judges will approve of the debtor re-obligating himself where debtor's counsel was unwilling to sign Part C of the reaffirmation agreement. If Part D does show that reaffirmation of the debt WILL work an undue hardship on the debtor or his dependents, then your author predicts the court will be loathe to approve ANY such reaffirmation agreement.

As a consequence, if the creditor is not present at the first meeting of creditors, the likelihood of having the reaffirmation agreement completed will diminish significantly. Even then, creditors will need to retain counsel to seek approval of the reaffirmation agreements if the debtor cannot demonstrate that he can afford to pay the obligation or if his counsel refuses to sign Part C.

File the motion to terminate the stay to force the issue

Creditors will then need to decide if they want to continue to allow the debtor to pay the obligation without the benefit of an approved reaffirmation agreement or whether they will need to have the stay terminated. (Funny how that ride through still exists, huh?)

NOTE that in this situation creditors will NOT be entitled to the automatic termination of the stay under either §521(a) (2) (B) or (a) (6) if the debtor has entered into the agreement within either the 30 or 45 day periods. Those sections do not require that the reaffirmation agreement be approved, only that the debtor enters into the agreement with the creditor. The creditor will need to retain counsel to file the motion to terminate the stay under §362(d) or wait until the case has been discharged and closed. All this while, the debtor continues to drive the depreciating asset.

365(p) (2) (A) – must a debtor reaffirm a lease if he accepts it?

This new provision allows a debtor to advise a creditor that he desires to reaffirm a lease in a Chapter 7 proceeding. The creditor then has the right under the statute to condition the acceptance on the cure of any defaults under the contract. There is NOTHING in this new subsection that provides for the liability on the “assumed” lease obligation to be excepted from discharge under §524. Neither is there anything in §524 that states a lease assumed by a debtor under §365(p) excepted from discharge. Perhaps Congress intended that an assumption would be tantamount to reaffirmation of the obligation, but this loose end was not tied. Creditors relying on the assumption of a lease to give that executory contract post-discharge effect does so at their own peril.

Therefore, your author opines that even if the debtor does assume the lease obligation, the liability on this debt (See §524(a) (2)) is dischargeable in the Chapter 7 proceeding. A debt is a liability on a claim. See §101(12). Basically a “claim” is a right to payment. See §101(5). This liability will be discharged if not reaffirmed under §524(c). I do not see where §365(p) adds anything to the debtor/creditor relationship nor does anything to preserve that relationship. This changes nothing and only adds to the confusion that is known as the BAPCPA.

Change in Preference Litigation

There were some substantial changes made to §547 of the Code. It will make the defense of preference claims easier for the creditor.

First, the 20 day time period found in §547(c) (3) has been increased to 30 days. This brings it in line with the time period that a creditor has to perfect its lien on a certificate of title in Kentucky before the title is printed with the lien being noted. If a creditor files an application for title and registration, but does not file the motor vehicle lien statement at the same time, the county court clerk will place a "pending lien flag" in the automated system (AVIS). That flag will remain active for 30 days. If the creditor files the motor vehicle lien statement with the county court clerk in that 30 day period, the lien information is to be put in AVIS and the flag is to be removed. The title will then print in Frankfort with bearing the creditor's lien information. If motor vehicle lien statement is not filed in the 30 day period, or if the information is not placed in AVIS within 30 days, the flag is removed by operation of the program and the title prints without a lien being noted.

In the past, there were situations where the information was put in AVIS within day 21-30 and the debtor filed bankruptcy 90 days thereafter. Even though the creditor has complied with state law, they lost before the bankruptcy court. This change clears up this discrepancy.

Also, it used to be that if a creditor wanted to defend a preference action under §547(c) (2) it had to show:

1. the alleged preferential transfer was in payment of a debt incurred by the debtor in the ordinary course of business between the debtor and the creditor, AND
2. that the payment was made in the ordinary course of business or financial affairs, AND
3. the payment was made according to ordinary business terms.

It was this last requirement that made the defense of a preference so expensive. It required the creditor to retain an expert to testify about the ordinary business terms in the debtor's industry. The retention of the expert often cost more than the monies sought by the trustee or post-petition committee leading to "forced" settlements.

BAP has changed all this. Now the creditor need only prove either

1. the transfer/payment was made in the ordinary course of business or financial affairs of the debtor and the transferee (the creditor), OR
2. made according to ordinary business terms.

If the creditor can show that the payments in the preference period were no different than payments made to it by the debtor in the period 6, 12 or 18 months before the bankruptcy filing by the debtor, then the creditor may prevail without the necessity of hiring an expert. **NOTE:** this 6, 12 or 18 month period is what is reviewed by the author. It is not mandated by the statute and is not the only way to examine this issue.

Secondly, creditors will no longer be forced to defend many of these actions in foreign jurisdictions. Many businesses are incorporated, for instance, in Delaware. If the

preference action relative to the bankruptcy filing were commenced there, creditors would have to hire local counsel to defend them.

28 U.S.C. §1409 has been changed to relieve creditors having smaller, alleged preferences from defending from afar. If an action is commenced to recover a money judgment or of property worth less than \$1,000, or a consumer debt of less than \$15,000, or a debt (excluding a consumer debt) against a noninsider of less than \$10,000, then it can be commenced ONLY in the district court for the district in which the defendant resides. There remains a question in my mind whether a trustee or post-petition committee will be able to add alleged preferential transfers together to meet this threshold, or whether each transfer will stand on its own for jurisdictional purposes. This is another one of those questions that will be answered over time.

Conclusion

At first blush the BAP seemed to be a very creditor friendly bill. However, sloppy drafting and inconsistent/conflicting sections have taken much of the steam out of this locomotive. Only time will tell how the bench and bar will react to these changes. Rumors abound about a "technical amendment bill" (read "fix the screw ups bill") to explain some of these inconsistencies. At last word, no such bill is in the works.

BAP does graft many creditor-friendly provisions onto the existing Code. Until some of this drama has played out, creditor would be wise to tread carefully.

**DOMESTIC RELATIONS CHANGES UNDER THE
BANKRUPTCY ABUSE PREVENTION AND CONSUMER
PROTECTION ACT OF 2005**

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Domestic relations changes under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

1. **PRIORITY.** Claims for support or maintenance arising out of a domestic relations order are now of the first priority, above even administrative claims. 11 USC 507(a)(1) (A) and (B) A carve out has been made for the trustee's administrative expenses, allowing a super priority claim for the trustee who collects the asset. 11 USC 507(a)(1) (C). This refers back to 11 USC 503(b)(1)(A), costs of preserving the estate, (2), trustee's commission and (6), fees and mileage under 28 USC 119, but not to (1)(B), taxes of the estate.

2. **NON-DISCHARGEABILITY.**

a. 11 USC 523(A)(5) has been amended to substitute the term "domestic support obligation" for support, maintenance or alimony. This new term is defined in 101(14A), and specifically includes all debts in the nature of alimony, maintenance or support, owed to the former spouse or child or to a government unit on a voluntary assignment.

b. 11 USC 523(a)(15), non-dischargeability of a debt incurred in the course of a divorce, has been amended to exclude the weighing of equities test, and to delete the sixty day time limit to file a complaint under 11 USC 523(c).

3. AUTOMATIC STAY

362(b)(2) excepts from stay several specific actions, including the establishment of paternity, domestic support orders, child custody or visitation, domestic violence and the dissolution of a marriage, except for the division of estate property.

4. TRUSTEE'S DUTIES

Chapter 7 trustees have a new duty to give notice to domestic support creditors under 11 USC 704(a)(10). The trustee is required to notify such a creditor in writing of the right to use support agencies and collection agencies. Also the trustee must provide notice to those agencies. Also the trustee must provide an explanation of the creditor's right to payments of the claim in the bankruptcy. The trustee must then at the time the discharge is entered provide notice to the claimant and the State support agencies of any reaffirmation, the entry of a discharge, the name of all creditors whose claims were not discharged under 523(a) (2) (4) and (14A), and the current address and employment of the debtor. The Code provides that the domestic support creditor may then contact such creditor and request information.

**CHAPTER 7 TRUSTEE ISSUES & DUTIES
UNDER THE BANKRUPTCY ABUSE PREVENTION AND
CONSUMER PROTECTION ACT OF 2005**

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A. Introduction

The Bankruptcy Abuse and Consumer Protection Act of 2005 (BAPCPA or "The Bill") substantially changes Chapter 7 Trustee duties and obligations. While not as onerous as the burden placed on debtor attorneys, still the changes will require some modifications in substantive matters as well as procedures affecting Chapter 7 Trustee practices. Section C contains an outline presented by Robert H. Waldschmidt and Samuel K Crocker, Chapter 7 Bankruptcy Trustees in Nashville, Tennessee. These materials were presented at the National Association of Bankruptcy Trustees (NABT) Annual Conference in New York City on August 17, 2005. The materials are reprinted with the permission of NABT, Mr. Waldschmidt and Mr. Crocker. The outline sets forth specific provisions of The Bill which will affect Chapter 7 Trustees. In addition to the issues raised in the outline, hereafter are several other provisions which will affect the Chapter 7 Trustees' administration of cases.

It took Congress 9 years to pass BAPCPA. When it became apparent that the bill had a chance to pass, attempts were made to make modifications to The Bill of some of the obvious errors. A comprehensive Managers' Amendment was proposed in the Senate. However, the Managers' Amendment died, and failed to pass. Therefore, there are a number of substantive and procedural changes which need to be made to The Bill. At the time of this writing, the Technical Corrections Bill has been drafted. However, it is uncertain if this will pass.

In addition to the materials contained in this outline, anyone wanting to learn more about impact of BAPCPA on Chapter 7 Trustee practice, the following is recommended reading:

NABTalk "*Impact of the 2005 Bankruptcy Amendments on Chapter 7 Trustees*", Samuel K. Crocker and Robert H. Waldschmidt, (Vol. 21, #2 2005)

B. Supplemental Material Regarding Issues Affecting Chapter 7 Trustees

1. Waiver of Filing Fee (*in forma pauperis*):

Amended 28 USC § 1930(f)(1) provides for the waiver of Chapter 7 case filing fees for individuals with less than 150% of the income official poverty line, if the Court determines the individual is unable to pay the fee in installments. This provision is problematic to trustees because The Act makes no provision for payments to the trustee in cases where the filing fees are waived. Trustees are paid compensation of \$60.00 for administering cases in which no assets are available for liquidation. The funding for these fees is derived from the Chapter 7 case filing fee [see 11 USC §330(b)(1)] and miscellaneous bankruptcy court fees described by the Judicial Conference of the United States [see 11 USC §330(b)(2)].

2. Protecting Patient Records:

The Act adds a new §351 to the Code that provides for a procedure for notification and disposal of patient records in cases where the trustee does not have sufficient funds to pay for the storage of records in the manner required under applicable federal or state law. This provision has potential for massive problems for trustees in healthcare bankruptcy cases. For example, under §351 trustees are required to entertain various costly actions including: storing records for one year; publishing a notice in one or more appropriate newspapers; notifying every patient and insurance carrier by mail; communicating certified mail with each appropriate federal agency and destroying the records. Costs in these cases for these services alone could run in the thousands of dollars. If trustees do not have the funds to pay for the storage and notice requirements under §351, some patients records may not be administered properly and could be lost.

3. Exemptions:

As we know, effective June 20, 2005 debtors have the opportunity to "opt in" to the federal exemptions. The exemption scheme contained in §522 has undergone an extension overhaul under BAPCPA. Careful analysis of the §522 exemptions is recommended. (See page 8 of the Crocker and Waldschmidt outline for more detailed analysis of the exemption changes.)

4. Duties of Trustee in regard to the "Means Test":

Implementation of the "Means Test" is principally the responsibility of the U.S. Trustee. However, Chapter 7 Trustees are expected to assist the U.S. Trustee in collection of verification information provided by debtor, which will include the following:

- a. Verification of the accuracy of the debtor's report of income by reviewing pay stubs of employers, and verification of income of self-employed debtors. This information is to be

in the form of verification of income and payments received within 60 days prior to the filing date; also review of income tax returns of the debtor;

- b. Verification of the number of dependents claimed;
- c. Verification of debtor's disabled veterans status (if applicable).

The Chapter 7 Trustee may return the above documents to the debtor at the 341 meeting however, the debtor should be cautious and keep the returns available for inspection pursuant to §521 (g)(2). The trustee will retain the documents if the payment verification and/or tax returns do not confirm the debtor's scheduled income, appear to disclose non-scheduled assets, the U.S. Trustee instructs the Chapter 7 Trustee to retain the documents, or if there are any reasons for case administration for prosecution of abuse. However, all this needs to be done by the trustee while the trustee makes every effort to protect the privacy of the debtor in dealing with tax returns.

The Chapter 7 Trustee will also collect other documents required as a prerequisite to file for certain exceptions under the mean test provisions. These documents will include receipts for private schooling and other school expenses and other documentation to support additional food and clothing and/or home energy expenses in excess of IRS guidelines.

5. Role of Private Chapter 7 Trustee and Credit Counseling:

The credit counseling is generally considered to be the individual "ticket in" to bankruptcy. Neither the Chapter 7 nor Chapter 13 Trustees are eligible to serve as credit counselors. While the Bankruptcy Court Clerk will be responsible for determining if the credit counseling certificate has been filed, the private trustee will be responsible for confirming that the credit counseling certificate was issued by an approved credit counselor and if not, referring the matter to the UST.

Trustees may also be asked to assist in the monitoring of credit counseling services and making specific inquiries at the 341 meeting of a random sampling of debtors. Any complaints regarding credit counselors received by Trustees or problems noted by the Trustee will be referred to the US Trustee .

6. Role of Private Chapter 7 Trustee and Debtor Education:

The individual debtor will not be granted a discharge until the debtor completes an instructional core on personal financial management provided by a UST - approved provider. Debtor educators are required to issue a certificate of course completion to the debtors. The debtor education requirements are commonly referred to as the individuals "ticket out" of bankruptcy. Chapter 13 Trustees can be approved as providers of debtor education courses for debtors for whom they serve as case trustees. According to the initial guidelines of the U.S. Trustee's office the Chapter 7 Trustees will not be expected to monitor the debtors compliance with the filing of the

debtor education compliance certificate.

7. Conclusion:

The U.S. Trustee Program regards implementation of the BAPCPA as a continuing partnership with Chapter 7 Panel Trustees. The U.S. Trustee Program has issued written materials for training of panel trustees entitled: *BAPCPA Trustee Training - U.S. Trustees/Trustee Issues and Guidelines*. All Chapter 7 Panel Trustees should carefully review these materials. Additionally, the UST program is conducting training sessions for panel trustees throughout the state.

PROVISIONS OF THE BANKRUPTCY BILL WHICH EFFECT CHAPTER 7 TRUSTEES

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§101 Definitions

— There are numerous amendments and newly defined “terms” under §101, including (10) current monthly income, (13A) debtor’s principal residence, (14A) domestic support obligation, (27A) health care business, (27B) incidental property, (41A) personally identifiable information, and (51A) Small business debtor. Trustees need to become familiar with all definitions, particularly where they relate to the administration of a particular estate.

§328 Limitation on compensation of Professionals

— One phrase has been added within §328(a), to specifically allow professionals to be hired “on a fixed or percentage fee basis” as well as on an hourly basis, or a contingent fee basis.

§330 Compensation - Trustee commission clarified

— The standard for compensating trustees has been modified to state that trustees are to be paid on a commission basis. Under section 407 of the Bill, a new sub-section, §330(a)(7), is created which provides:

(7) In determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on §326.

The fee must still be “reasonable” and the court still has discretion to determine the amount of the fee, but the extent to which the trustee’s hours are even relevant is either eliminated, or severely reduced. Interestingly, §330(a)(3), where the factors for determining compensation are set forth - including hours and rates - the individuals included in the subsection are the “examiner, trustee under chapter 11, or professional person”; Chapter 7 trustees are specifically omitted, and treated separately in §330(a)(7), thus eliminating the factors set forth in §330(a)(3). This amendment would seem to overrule the Circuit Decisions which have computed Trustee compensation pursuant to the lodestar method, adjusted by enhancing factors such as the complexity of the case and extraordinary results. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), followed in *In re Miniscribe*

§341 Meetings of Creditors

— Creditors (and representatives/employees of creditors) in consumer cases are specifically allowed to participate in §341 hearings without an attorney, under §341(c). This is limited to creditors "holding a consumer debt", and only applies to Chapter 7 and Chapter 13 cases.

§342 Notice to Creditors

— Creditors who appear often in bankruptcy court can now request that all notices in all cases be sent to specific addresses, under §342(f). Although debtors attorneys should be aware of the proper addresses when filing the original petition, trustees should also be alerted, in order to make sure that any action requiring "notice and a hearing" is properly served at the correct address. (Even if the debtor provides an address different than the one given to clerk by the creditor, notices must be sent to the requested address.) Notice which is given to a creditor at another address is not effective, under §342(g). (This provision also applies on an individual case basis, where a creditor requests that notices be sent to a particular address in that case only.) The amendment only refers directly to notices by the clerk or the debtor, but might be applied to trustees as well.

§346 Special provisions related to state and local taxes

— Extensive amendments were made to §346, dealing with state and local tax issues. Many of the changes incorporate reference to federal law; for example, if an entity is treated as a separate entity under federal tax law, it will be treated the same under state and local tax laws. Trustees should make their accountants aware of these changes, since it might require the filing of additional returns in some cases.

§348 Conversion Issues

— In cases converted from Chapter 13 to Chapter 7, §348(f)(1)(B) now specifies that any valuations of property in the chapter 13 do not apply to the chapter 7 case. This overrules a line of cases holding that plan confirmation constitutes an implied valuation which applies in the Chapter 7 case upon conversion. *See In re Slack*, 290 B.R. 282 (Bankr.D.N.J. 2003). Section 348(f)(1)(B) has been amended further to provide that payments made on secured claims through a Chapter 13 plan do not reduce the allowed claim in the converted Chapter 7 case. This reverses cases such as *In re Peter*, 309 B.R. 792 (Bankr.D.Ore. 2004).

— Under §348(f)(1)(C), a secured creditor that has not received payment in full of its claim under applicable non-bankruptcy law shall retain a security interest in

the collateral after conversion to chapter 7. Thus, even if the secured portion of the claim is paid in the Chapter 13, the creditor will retain a lien on the property after conversion.

§362 Stay Relief

— Under the new §362(c)(3), serial filers will now only obtain limited automatic stay relief. If a case has been pending and dismissed during the previous year, the stay expires 30 days after filing, unless additional time is requested, and, under §362(c)(4) if 2 or more cases have been pending during the year, there is no automatic stay; it can only be imposed by the Court, after notice and a hearing, upon a showing of good faith to effected creditors. Trustees with equity in assets may find those assets being repossessed or foreclosed, if they do not take immediate action to preserve the stay or obtain injunctive relief.

— In rem stay relief can be obtained under §362(d)(4) and enforced in subsequent cases under §362(b)(20), where property has been transferred to various debtors who attempt to abuse the stay, with multiple filings involving the same property. Creditors can get relief which will flow with the property in any subsequent filing involving the same property. If trustees perceive equity in any such properties, they may need to seek injunctive relief to avoid the loss of value to the estate.

— Under a new §362(b)(24) the stay does not apply to any transfers of property that are not otherwise avoidable under §544 or §549. This applies to post-petition foreclosures, where the purchaser has no knowledge of the bankruptcy filing. These sales have been held void under §362. The purchaser will be able to rely on the good-faith transferee defense of §549(c) under this amendment. *See In re Schwartz*, 954 F.2d 569 (9th Cir. 1992). This may also reverse a line of cases involving re-financing secured creditors, who close a loan pre-petition, but record their mortgage post-petition. Courts have previously held that, under §362, the post-petition recording is void, and the claimant's argument that the transfer would not be avoidable under §549 is irrelevant.

— Section 362(h): Under this section the stay is terminated as to "personal property of the estate securing a claim," if the individual Debtor fails to timely declare and perform his intentions pursuant to §521(a)(2). Upon such failure, the subject property is "no longer property of the estate." The Trustee can halt this process by filing a motion before expiration of the §521(a)(2) deadline, asserting that there is equity in the property for the bankruptcy estate. See §521(a)(6) below.

§363 Sales of Property

— Additional language was added to §363(b), to prohibit the trustee from selling personally identifiable information (defined in §101(41A)), where the debtor had a policy concerning the protection of that information.

§365 Executory contracts

— Under §365(b), the trustee can cure a default in an executory contract of residential real property without curing non-monetary defaults, if such cure would be impossible for the trustee. (This does not apply to non-residential real property, which requires full performance by the trustee.)

— The 60 day deadline for assuming executory contracts still applies in chapter 7. However, under §365(d) in any chapter (or in chapter 7 if that 60 day period has been extended), there is now a 120 deadline for assumption of executory contracts involving non-residential real property where the debtor was lessee - after which time the lease is deemed rejected, and the trustee shall immediately surrender possession. In addition, the largest extension that can be granted in any case is 90 days, unless the lessor consents otherwise.

— If a trustee rejects an executory contract for personal property, and the debtor wants to retain that property, §365(p) allows for the debtor to assume that lease, pursuant to the conditions set forth in that subsection.

§366 Utility service

— The term “assurance of payment” which must be shown, in order to keep utility companies from discontinuing service, is specifically defined in §366(c), using methods of providing such “assurance”. Subsection (B) now prohibits the tender of an administrative expense priority, in order to comply with this requirement.

§503(b) Administrative expenses:

— Section 503(b)(1)(A)(ii) includes, as administrative expenses, wages and benefits awarded as a result of violation of federal or state law by the Debtor. It further provides that the time of the occurrence of the unlawful conduct and the payments are immaterial, provided that the Court determines payment of such wages and benefits will not "substantially increase the probability of layoff or termination of current employees, or of non-payment of domestic support obligations during the case under this title;"

— Amended §503(b)(1)(B) includes, as administrative expenses, taxes incurred by the estate "whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both." Subsection D exempts governmental units

from the requirement of filing a request for payment as a condition to allowance of its administrative expense.

— Section 503(b)(2)(F)(9) expands administrative expenses to include the value of goods received by the Debtor within 20 days prior to case commencement, where the goods have been sold to the Debtor in the ordinary course of business.

— Amended §§503(c) and 503(d) deal with payments to insiders under an employee retention or severance plan, and other transfers or obligations outside the ordinary course of business which are not justified by the facts and circumstances of the case. Such payments are not allowed administrative expenses.

§505 Changes in the Determination of Tax Liability by the Bankruptcy Court:

— Ad valorem property taxes cannot be contested under a new subsection, §505(a)(2)(C).

— When a trustee requests a determination of taxes under §505(b), notice must be sent to certain addresses. The bill clarifies that the clerk of the court shall maintain a listing of those places, as well as additional requirements for notifications which may be necessary to obtain a §505(b) determination. If no designation of address is given to the Clerk, the request should be mailed to the same address where the tax return would be mailed. [This parallels the current tax procedure with the IRS, and codifies the notice requirements.]

— A technical correction to §505(b)(1)(B)(2) - which allows the trustee to request a determination that the amount of tax paid is correct - will now protect the bankruptcy estate, as well as the trustee and the debtor. (Formerly, the “estate” was not included within the protected entities, and this led to at least one instance where a trustee obtained a §505 determination, and the taxing authority later filed pleadings asserting that the estate still owed additional taxes; the trustee was then surcharged for allowing the estate to be penalized.)

§506 Determination of secured claims:

— Under a new §506(a)(2) the value of personal property shall be the replacement value, as if the property were purchased (in its present condition) from a retail merchant - without deduction for costs of sale or marketing.

— The ad valorem property taxes paid by a trustee can now be included in a trustee’s request for a surcharge against secured claims under §506(c).

§507 Priorities:

— Domestic support claims were elevated, under §507(a)(1) to the number one position, ABOVE most administrative claims for priority purposes under §507. However, a “carve-out” provision (subsection (C)) was added to the end of §507(a)(1) which will allow trustees to pay their administrative fees and expenses as a “super-priority” before payment to the support claimants.

(C) If a trustee is appointed or elected under section 701, 702, 703, 1104, 1202, or 1302, the administrative expenses of the trustee allowed under paragraphs (1)(A), (2), and (6) of section 503(b) shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for payment of such claims.

This “carve-out” does not include taxes incurred by the estate (allowable under §503(b)(1)(B)), nor does it include administrative fees or claims from a prior chapter in a converted case. However, it covers most other costs of administration of a Chapter 7 liquidation, as well as fees awarded under §330.

— The Wage claim maximum (currently at \$4,925) is increased to \$10,000 under §507(a)(4). To the extent the maximum is not reached in subsection (a)(4), the maximum priority on claims for contributions to employee benefit plans, under (a)(5), is increased up to \$10,000.

— There are minor technical changes to the tax priorities under §507(a)(8).

— a new subsection, §507(a)(10) creates a priority for claims resulting from death or injuries in which the Debtor was driving a vehicle or vessel while under the influence of drugs or alcohol.

§511 Rate of Interest on tax claims:

— A new section, §511, has been added to provide that, when interest is to be allowed on tax claims, the applicable rate of interest shall be that rate that applies to those tax claims under applicable non-bankruptcy law.

§521 Debtor’s Duties are dramatically increased, with automatic dismissal as a “penalty”:

— The debtor’s initial filings under §521(a)(1) now include statements and schedules, certificate of alternate options, statement of monthly net income, current monthly income (different?) Anticipated increases in income/expenses, statement of intent, a certificate from NBCCA, and 60 days of paystubs from the employer.

This requirement alone does not effect trustees. However, §521(i)(1) provides that (in the case of an individual in a voluntary case) if the information is not completely filed within 45 days, the case will be automatically dismissed on the 46th day. Apparently, the Clerk will dismiss the case, without prior notice to any parties in interest.

This could create complications in cases where a Trustee has already begun to administer assets, and either has funds in the estate, assets under control, or administrative expenses incurred and unpaid. §521(i)(4) does allow the trustee to request an extension of the 45 day period, but (1) the Trustee must become aware of the missing documents in time, (2) the request must be made before the 45 days expire, and (3) the court must find that the debtor attempted in good faith to file the information.

A clever debtor could easily use this provision as an “escape valve” to obtain a dismissal of a case where the Trustee discovers unperfected liens, unencumbered assets, or fraud by the debtor. (The debtor could hold off filing one piece of information until the 45th day, and if anything adverse occurred at the §341 hearing the case could just be dismissed.) Obviously, Congress did not intend to allow the debtors to use this provision to defeat trustees or creditors, and courts may find a mechanism to keep these cases from being dismissed.

— The debtor has 45 days (or maybe 30 days under (a)(2)) to reaffirm or redeem personal property subject to a security interest. However, the new sanctions under §521(a)(6) could be frightening. If the debtor does not reaffirm or redeem within 45 days (or 30 days), (1) the stay is lifted to allow the secured creditor to assert its rights under non-bankruptcy law, and (2) the property is removed from property of the estate (“the property shall no longer be property of the estate”) The stay is also not in effect pursuant to the new §362(h).

Trustees do have the right to file a request (within the 45 day period) asserting that the property is of consequential value, in which case the court can retain the property in the estate, and keep the stay in effect, but only if adequate protection is provided to the creditor.

— The debtor must provide the trustee with a copy of their last tax return within 7 days before the date set for the first §341 hearing, under §521(e)(2). If the debtor fails to do this, the case will be dismissed under §521(e)(2)(B). However, this dismissal appears to require some action by the trustee, reporting the failure to provide the tax returns. Thus, the case will probably not be automatically dismissed by the Clerk, and the Trustee will have some control over this process.

Many districts already have local rules requiring debtors to bring certain information (including tax returns) with them to the §341 hearing. It is possible that trustees will only report the failure to provide this information if it is not submitted before end the meeting of creditors; otherwise, monitoring and receiving this information, piecemeal, from numerous debtors could become burdensome. Further, the statute requires that the returns be “provided” to the trustee; it does not require the

trustee to keep the returns. Thus, as long as the debtors offer their returns to the Trustee, the Trustees could elect to retain only those returns in cases where the information could be helpful to the administration of the case.

§522 Exemptions (Additions and Limitations):

— Under a new §522(b)(3)(A), the 180 day domicile requirement has been increased to 730 days (2 years). The applicable state will be the state where the debtor has resided for the 730 days prior to filing the petition; if the debtor has moved during that time period, then the applicable state is the one where the debtor resided for the greater portion of the 180 days prior to that 730 day period.

It is possible that a debtor will not be able to claim exemptions under any state law (many states require the debtor to be domiciled within the state at the time the exemption is claimed). In these cases, the federal exemptions in §522(d) will be available for the debtor.

— Under §522(b)(3)(c) retirement funds which are exempt under sections 401, 403, 408, 408A, 414, 457 or 501(a) of the Internal Revenue Code are exempt under bankruptcy law. §522(b)(4) then goes forward to provide specific rules to apply to determine if funds fit into that category. (This exemption is also carried over into the list of exempt property under the federal exemptions in §522(d)(12).)

— §522(b)(4)(C) provides that a "direct transfer" of exempt retirement funds... "shall not cease to qualify for exemption... by reason of such direct transfer." Subsection (D) provides that any distribution of exempt retirement funds which qualifies as an eligible rollover distribution shall not cease to qualify for exemption. These sections reverse the line of cases holding that exempt pensions lose their exempt status when withdrawn and placed in another account, *In re McCollum*, 287 B.R. 750 (Bankr.E.D.Mo. 2002); or when distributed to an ex-spouse through a QUADRO. See *In re Anderson*, 269 B.R. 27 (8th Cir. BAP 2001).

— §522(n) limits the amount of funds that can be exempted under §408 or §408A of the Internal Revenue Code to \$1 million. There are exclusions and the amount can be increased by the Court, "if the interests of justice so require".

— §522(o) is another new provision; in subsection (o)(4), if a debtor has committed a fraudulent conveyance (with intent) during the 10 years prior to the filing of the petition, then any allowed homestead exemption can be reduced to the extent of said fraudulent conveyance.

— §522(p) limits a homestead exemption to anyone who has purchased their real property within 1215 days (3 years, 4 months) prior to the filing of the petition. The debtor may only claim a homestead exemption of up to \$125,000 in property that was acquired within those 1215 days. (If the debtors sell one residence, purchased

outside the 1215 day window, and purchases a new residence – all within the same state - this limitation does not apply.)

— §522(q) The homestead exemption may also be limited to \$125,000 if the debtor has committed certain tortuous acts defined within the section.

§541 The bankruptcy estate will now exclude additional assets:

— Under §541(b)(5) & (6), funds that are transferred into an education IRA under IRC §530(b)(1), or into a tuition credit or certificate, are not property of the estate if:

(1) the funds are transferred into the fund either (a) outside 720 days prior to the filing or (b) between 365 days and 720 days prior to filing and the amount of said transfer is not greater than \$5,000, and

(2) the beneficiary is a child, step child, grandchild or step grandchild or the debtor.

— Under the new §541(b)(7) withheld funds for employee benefits, annuities, and health insurance plans are not property of the estate.

— Under the new §541 (b)(8) assets pledged for non-recourse loans, where the lender takes possession of the assets, and the debtor's only rights involve redemption, are not property of the estate.

§546 The reclamation rights of vendors is also enhanced.

— Under §546(c)(1), the time for sellers of goods to give notice of their rights to reclaim goods is increased to 45 days from receipt of the goods by the debtor (from 10 days), and, if a bankruptcy petition is filed during that 45 day period, the seller has 20 days after the filing to thus perfect their claim. The new subsection (c)(1) further affirms case law which holds that a prior security interest in reclamation goods trumps the rights of the reclaiming creditor. *See Pester Ref. Co. v. Ethyl Corp. (In re Pester Ref. Co.)*, 964 F.2d 842 (8th Cir. 1992).

— Under §546(c)(2), if the seller fails to give the required Notice under (c)(1), the seller can still assert a priority, administrative claim under §503(b) - for the goods shipped within the 20 days prior to the filing, even though they did not perfect their reclamation claim. See the changes to §503(b)(2)(F)(9).

§547 The defenses to preference recovery are expanded.

— Under §547(c)(2) the language in the ordinary course of business exception is modified to include transfers “made according to ordinary business terms”, to expand the defense to include more than just the relationship between the transferor and transferee. The “and” is replaced by “or” in §547(c)(2)(A), which seems to indicate that it is sufficient to prove either ordinary course between the parties or according to ordinary business terms (within the industry). This reverses cases such as *Gulf City Seafoods, Inc. v. Ludvig Shrimp Co., Inc.*, 296 F.3d 363 (5th Cir. 2002), which have required proof of both elements to meet the affirmative defense burden.

— Under §547 (c)(3), the 20 day relation-back period for the perfection of purchase money security interests is now increased to thirty (30) days from the possession date. (The only change is the substitution of the number “30” for the number “20”.)

— Under §547(c)(7) trustees cannot recover payments of domestic support obligations. (Note: after the increase in the priority of support claimants in §507(a)(1), this seems unnecessary.)

— Under §547(c)(8) payments in the aggregate amount of less than \$5,000, to creditors in non-consumer cases, cannot be recovered.

— §547(e)(2) is modified to increase the “relation-back” period for purchase money security interests from 10 days to 30 days.

— Under §547(h) the trustee cannot avoid payments made as part of a repayment plan to a non-profit credit counseling agency.

— Under §547(i) the DePrizio doctrine is forever abolished, and the only recovery that a trustee can obtain from an insider preference (outside 90 days but within 1 year) is directly from the insider.

§548 Fraudulent Conveyance provisions are expanded.

— The one year period within which fraudulent conveyances can be recovered is increased to 2 years. (In many states, trustees have been using state law, under §544(b), to recover fraudulent conveyances outside one year, but this change will now allow all trustees to use the federal statute going back two years.)

— Under §548(a)(1)(B)(IV), transfers to insiders under employment contracts, and out of the ordinary course of business, can be avoided. The trustee will still have to show a lack of fair consideration.

— A new §548(e)(1) is added to create an avoidance action where a debtor

makes a transfer to a self-settled trust any time within 10 years prior to the filing of the petition, if that transfer was made with intent to hinder, delay, or defraud creditors existing at that time.

§704 Duties of Trustees

— Under §704(a)(10), trustees must provide a specified Notice to all Support claimants, in any case (asset or no-asset) where such a claimant exists. The exact information to be supplied is set forth in §704(c), and requires a Notice to the Support Claimant, a Notice to the State agency where the Claimant resides, and similar Notices after the entry of the discharge including new information about any non-discharged debt, reaffirmations, and the address of the employer. This new requirement will be a burden for trustees, and the methods for implementation could vary greatly around the country.

— Under §704(a)(11), trustees must assume the role of the Plan Administrator of an Employee benefit plan, if the debtor held those responsibilities.

— In health care cases, §704(a)(12) now requires trustees to be responsible for transfers of patients. In a related new section, §351 also requires trustees to preserve all patient records, to notify all patients of the records, and to proceed through a costly and difficult process to properly deal with the records. In No Asset cases, this provision is unworkable; the costs of compliance are enormous. Health Care cases will not be very attractive to Trustees, and they may need to decline appointment to avoid devastating consequences.

§707(b) Dismissal for Abuse

— The Means test is not discussed herein; refer to ABI website and numerous articles for discussion of this test.

— As part of the extensive changes to §707(b), the U.S. Trustee must the filing of a Report in every case (within 10 days after the §341 hearing) establishing whether the debtor is within the financial limitations for relief under chapter 7, and whether the case may be subject to a motion to dismiss. The duties of the UST are incorporated into a new section 704(b), which is not applicable to case trustees.

— §707(b) does permit panel trustees (and creditors), in cases where the debtor's income exceeds the median average, to file motions to dismiss in cases. Although it is doubtful the trustees will pursue motions to dismiss in many instances, there may be circumstances where the trustee will want to raise the issue, perhaps where the debtor has substantial exempt assets and the ability to repay creditors, but somehow survives the needs-based test.

§724 Lien avoidance is restricted to limit the rights of the trustee to “avoid” or subordinate tax liens, in order to pay priority claims.

— Subsection (b) specifies that ad valorem taxes on property cannot be avoided.

— Subsection (b)(2) limits the administrative expenses allowable to be paid for Chapter 7 expenses (the word “fees” does not appear), and specifically disallows Chapter 11 expenses to be paid as a “carve-out” from tax liens. This was intended to prevent a Chapter 11 debtor from accumulating massive post-petition obligations, and then using §724 to avoid pre-petition tax liens to pay those claims.

— Under §724(e) the trustee must first exhaust all other unencumbered assets, and recover any allowable §506(c) expenses, before seeking to subordinate tax liens under the section.

§726 Priorities for distribution in Chapter 7 are clarified.

— under subsection 726(a) all timely-filed priority claims are paid, but this section also includes tardily-filed claims. The statute has been clarified to specify that these tardily-filed claims can only be paid if they are filed before the earlier of (1) 10 days after the mailing of the trustee’s final report, or (2) the date the trustee commences final distribution.

§727 Additional Grounds for Objections to Discharge are added.

— The time between filings for chapter 7 cases and receiving a discharge is increased from six (6) years to eight (8) years. The only change in §727(a)(8) is the replacement of the number “8” for the number “6”.

— Under §727(a)(11), debtors must complete a financial education course as a condition to their discharge. Section 105 of the bill provides for pilot programs in 6 districts to explore methods for this education, but Section 106 adds this condition to §727 before the pilot program is complete. The application of this section may be dependent upon the approval of the U.S. Trustee in each district, and only where the methods to implement this educational program.

§1112: Conversion or dismissal.

— The statute dealing with conversion or dismissal from Chapter 11 is radically altered. Under present law the Court has broad, permissive discretion under §1112(b) to convert or dismiss a Chapter 11 case, including cases where plans cannot be confirmed and liquidation is in process. *See Loop Corp., et al. v. United States Trustee, et al.*, 379 F.3d 511 (8th Cir. 2004). The new §1112(b) essentially shifts the

burden to the Debtor upon showing of cause for conversion or dismissal. Additionally, a non-inclusive list of 18 specific examples of cause are stated. This amendment appears to address the problem of Chapter 11 cases being kept alive by insiders, who continue getting paid, and wasting assets to the detriment of creditors. This provision should result in more cases being converted to Chapter 7 before all of the assets are consumed. Further, with the addition of §1115, post-petition assets remain part of the estate.

§1115 Property of the Estate

— Under a new §1115, an Individual in a Chapter 11, which converts to Chapter 7, 12, or 13, has claim to the property or earnings acquired post-petition. After-acquired, pre-conversion assets in unconfirmed cases are now specifically property of the estate, subject to administration by the trustee in the converted case. The confirmation of a Plan can modify this. (A similar provision already exists in Chapter 13 - §1306(a), but, since most converted Chapter 13 cases involve a confirmed Plan which modifies the debtor's rights to property, trustees seldom benefit from this provision.)

§1326 Limitation on Compensation in Converted Cases

— If the Trustee is awarded a trustee's fee in a case converted due to §707(b), that awarded is limited, under §1326(b)(3). This amendment had previously referenced the allowance of a fee notwithstanding the §326 cap, but the Senate Bill did not include that language. Also, a prior version would have allowed the trustee a fee in any case converted or dismissed because of the trustee's actions (or threats of administration of assets), other than under §707(b); that provision also was deleted from the final Bill. Any payments under this provision are limited to the greater of: (1) \$25 per month, or (2) 5% of the proposed distribution to unsecured creditors, spread out over the length of the plan. The amendment did not alter the rights of professionals working for the trustee to be compensated (as provided in §330) as administrative claims in any converted case. The amendments do not seem to effect the payment structure of a trustee's fee (if awarded) in cases where the conversion takes place for other reasons than under §707(b). Under the present language, this provision will have virtually no effect on Chapter 7 practices, and would tend to penalize, not reward, Trustees for participating in the §707(b) process.

28 U.S.C. 1409(b) Venue limitations

— Actions to avoid preferences or recover judgments in amounts not exceeding \$10,000, against non-insiders in non-consumer cases, must be brought in the district where the defendant resides (not the court where the bankruptcy proceeding is pending). That amount is increased to \$15,000 (from \$5,000) for actions to recover a consumer debt. (That minimum is \$1,000 for insiders.)

28 U.S.C. §586(d) Due Process for Trustees

— The procedures for obtaining a fair review in District Court, when a trustee is suspended or removed from the panel, are included in the bill. These are the same provisions which were exhaustively discussed and compromised with the EOUST, the NACTT, and NABT several years ago. [These provisions require the trustee to exhaust administrative remedies - already established by the Executive Director - and certain time limitations are set forth in the section.]

**SIGNIFICANT CHANGES IN CHAPTER 13 PRACTICE
AS A RESULT OF
THE BANKRUPTCY ABUSE PREVENTION AND
CONSUMER PROTECTION ACT OF 2005**

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SECTION D

**SIGNIFICANT CHANGES IN
CHAPTER 13 PRACTICE
AS A RESULT OF
THE BANKRUPTCY ABUSE PREVENTION AND
CONSUMER PROTECTION ACT OF 2005**

by

Beverly M. Burden
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Prepared for

BAPCPA: Nuts and Bolts
University of Kentucky College of Law
September 30, 2005

**WARNING:
DO NOT RELY ON THIS OUTLINE!**

**YOU MUST READ THE AMENDED BANKRUPTCY CODE
AND FORMULATE YOUR OWN CONCLUSIONS.**

This outline generally reflects my interpretation of the provisions of the BAPCPA to chapter 13 practice. I reserve the right to take a contrary position in any particular case depending on the facts of that case, and I reserve the right to argue an interpretation of the law that may differ from that set forth in this outline.

Furthermore, this outline does not necessarily reflect the viewpoint of the other speakers on this panel.

**SIGNIFICANT CHANGES IN CHAPTER 13 PRACTICE AS A RESULT
OF THE BANKRUPTCY ABUSE PREVENTION AND
CONSUMER PROTECTION ACT OF 2005**

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A) Treatment of Secured Claims

- 1) § 1325(a)(5) – The plan can be confirmed if, with respect to each allowed secured claim provided for by the plan –
 - a) the creditor has accepted the plan [no change]; or
 - b) if the debtor keeps the property, the plan provides that:
 - (i) the creditor retains the lien until the earlier of:
 - (01) “the payment of the underlying debt determined under nonbankruptcy law” or
 - (02) the discharge under § 1328;
 - (03) and
 - (ii) “the value, as of the effective date of the plan, of property to distributed under the plan on account of such claim is not less than the allowed amount of such claim” [no change]; and
 - (iii) if “property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly installments”; and
 - (iv) if “the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan”;
 - (v) or
 - c) the debtor surrenders the collateral.
- 2) Section 506 is not applicable to certain claims. § 1325(a) unnumbered paragraph following § 1325(a)(9) provides: “For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if . . .”

- a) "910 car claims":
 - (i) the creditor has a purchase money security interest,
 - (ii) in a motor vehicle (as defined in title 49 U.S.C.),
 - (iii) purchased for:
 - (01) the personal use
 - (02) of the debtor,
 - (iv) within 910 days (2-1/2 years) before bankruptcy;
 - b) "1-year claims":
 - (i) the collateral consists of "any other thing of value", and
 - (ii) the debt was incurred during the 1-year period preceding bankruptcy.
 - c) 910 car claims and 1-year claims do not have to be paid according to the terms of the contract. Section 506 cannot be used to value the collateral and bifurcate the claim into a secured and unsecured portion. However, nothing appears to prohibit a modification of the interest rate or other terms of the note (such as the length of time during which payments can be made).
 - d) If section 506 does not apply to 910 car claims or 1-year claims, then it appears that creditors holding those claims would not be entitled to a contract rate of interest even though fully secured, nor would creditors holding those claims be entitled to post-petition attorneys' fees as provided by section 506(b).
 - e) Also, creditors holding 910 car claims or 1-year claims would appear to lack standing to object to the debtor's disposable income under § 1325(b)(1) because the creditor would not be a holder of an allowed unsecured claim.
- 3) In the event a modification of value is permitted, the method of valuation is now codified as "replacement value."
- a) § 506(a), which provides for the bifurcation of a claim into a secured claim to the extent of the value of the collateral and an unsecured claim as to the balance, now consists of 2 paragraphs.

- b) § 506(a)(2) provides: "If the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined."
 - c) It appears that the "garage sale" value is no longer appropriate. However, the end result may be the same if the value is instead determined by what a merchant at a flea market or on E-Bay would charge for similar property.
- 4) § 348(f)(1)(B): Valuations in chapter 13 do not apply in a case converted to chapter 7.
- 5) Payments on secured debts:
- a) § 1325(a)(5)(B)(iii)(I): Payments must be in equal monthly installments (i.e., the trustee can no longer distribute to the class of secured claims on a pro-rata basis), and
 - b) § 1325(a)(5)(B)(iii)(II): If the claim is secured by personal property, payments must be sufficient to provide "adequate protection" "during the period of the plan."
 - (i) What constitutes "adequate protection" is described in § 361.
 - (ii) Per § 361 [no change], adequate protection may be provided by –
 - (01) making periodic payments to the extent that the use of the collateral under § 363(e) results in a decrease in the value of the creditor's interest in the collateral;
 - (02) providing an additional or replacement lien to the extent of the decrease in the value of the creditor's interest in the collateral;
 - (03) granting other relief "as will result in the realization by such entity of the indubitable equivalent of" the creditor's interest in the collateral.
 - (iii) An over-secured creditor may not be entitled to pre-confirmation adequate protection payments if the equity cushion is sufficient to protect the creditor.

- c) As discussed elsewhere in these materials, the requirement that all secured creditors be paid in equal monthly payments coupled with the requirement that creditors with security interests in personal property receive adequate protection payments will make it unlikely that the debtor's attorney fee can be paid first.
- 6) § 1326(a)(1), Pre-confirmation adequate protection payments:
- a) Unless the court orders otherwise, the debtor must pay postpetition/pre-confirmation adequate protection payments directly to a creditor holding an allowed claim secured by a purchase-money security interest in personal property, reducing the plan payment by the amount of the adequate protection payment and providing the trustee with evidence of the payment.
 - b) Because of the difficulties in accounting for pre-confirmation adequate protection payments made directly by the debtor to a creditor, expect that most trustees will seek a local rule or court order that will have the trustee disburse pre-confirmation adequate protection payments.
 - c) In order to receive pre-confirmation adequate protection payments, the creditor must file a proof of claim, which is allowed if not objected to.
- 7) Pre-confirmation adequate protection payments may differ in amount from post-confirmation payments.
- a) The purpose of the pre-confirmation adequate protection payments is merely to compensate the creditor for the depreciation in property pending confirmation.
 - b) Payments made to the secured creditor through the plan must be sufficient to pay the secured value of the vehicle in full with interest, and those payments must also provide adequate protection.
 - c) For example, a creditor secured by a car valued at \$10,000 depreciating at the rate of 1% per month would be entitled to pre-confirmation adequate protection payments of \$100. However, in order to pay the creditor the full \$10,000 at 7% over 55 months, post-confirmation disbursements to the creditor would need to be about \$215 per month.
- 8) § 1326(a)(4): Within 60 days after filing the petition, the debtor must provide to a creditor holding a purchase money security interest in personal property evidence of insurance.

- 9) § 524(i) The willful failure of a creditor to credit payments made to the creditor pursuant to the plan in accordance with the plan constitutes a violation of the discharge injunction if the failure to properly credit the payments caused a material injury to the debtor.
- 10) Interest rate on secured tax debts: If interest is required to be paid on a tax claim, the interest rate is determined under applicable nonbankruptcy law (i.e., statutory interest), and the rate of interest payable through a confirmed plan is determined as of the calendar month in which the plan is confirmed. § 511.

B) Disposable Income

- 1) § 1325(b)(1)(B): If the trustee or a creditor holding an unsecured claim objects to confirmation, the Plan must provide that: "all of the debtor's projected disposable income to be received in the applicable commitment period will be applied to make payments to the unsecured creditors under the plan."
- 2) Start with "current monthly income" ("CMI") defined in § 101(10A) as:
 - a) "the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive)" for the 6 full calendar months prior to the petition;
 - b) include "any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse) on a regular basis for the household expenses of the debtor or the debtor's dependents";
 - c) Exclude per § 101(10A):
 - (i) benefits received under the Social Security Act (is unemployment compensation a benefit under the SSA?),
 - (ii) payments to victims of war crimes,
 - (iii) payments to victims of terrorism.
 - d) All income figures must reflect the average monthly income for the six calendar months ending on the last day of the month prior to bankruptcy.
 - (i) For example, regardless of whether a case is filed on November 1 or November 30, the six-month period prior to bankruptcy will end on October 31.
 - (ii) To arrive at the six-month average income, total all amounts received during the six-month period and divide by 6.
 - (iii) Be prepared to provide to the trustee or UST documentation and/or worksheets showing the amount and source of each month's income.

- 3) Determine which expenses are allowable by comparing the debtor's current monthly income with the median income for a family of the same size in the state in which the debtor resides.
 - a) § 1325(b)(3): "Amounts reasonably necessary to be expended under [§ 1325(b)(2)] shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2) if the debtor has current monthly income, when multiplied by 12, greater than" the median family income of the applicable State for the appropriate family size.
 - b) § 101(39A): "Median Family Income" is the median family income calculated and reported by the Bureau of the Census, adjusted to reflect changes in the Consumer Price Index.
 - (i) For a single debtor with no dependents, use the Median Family Income By Number of Earners in Family.
 - (ii) For debtors with 2-, 3-, or 4-person families, use the Median Family Income By Family Size.
 - (iii) For debtors with 5 or more persons in the family, use the Median Family Income for a family of 4 and "add \$525 per month for each individual in excess of 4." § 1325(b)(3)(C).
 - c) If the debtor's CMI is greater than the applicable median income, expenses will be those allowed in the § 707(b)(2) means test. § 1325(b)(3).
 - d) If the debtor's CMI is less than median income, presumably the amount of reasonably necessary expenses is determined in the same manner as under present law.
- 4) Deduct allowable expenses from CMI. If expenses are determined under § 1325(b)(3) and § 707(b)(2), the following expenses are allowed. The descriptions are from the proposed Interim Form Statement of Current Monthly Income and Disposable Income Calculation For Use In Chapter 13 Only (with IRS housing and maintenance expenses separated).
 - a) From CMI, deduct the following expenses that are allowable pursuant to the IRS Financial Standards.
 - (i) The relevant IRS Collection Financial Standards are included in the Appendix to this outline. The National Financial Standards for food, household expenses, etc. are determined based on the debtor's family size

and income level. The income levels are based on "gross monthly income." As of the date this outline was prepared, it was not clear whether the applicable gross monthly income will be the income set forth on Schedule I or the "Current Monthly Income" as calculated above.

- (ii) The portion of the Internal Revenue Manual addressing the IRS Financial Collection Standards is also included in the Appendix. It is unclear how relevant the IRS' procedures will be in determining 707(b) or disposable income issues in the context of a bankruptcy case. For example, according to the IRS Manual, charitable contributions would not be an allowable expense. However, the drafters of the proposed Interim Form 22C included a deduction for ongoing charitable contributions, and an argument could be made that the 15% cap of § 1325(b)(2)(A)(ii) still applies.

National Standards: food, clothing, household supplies, personal care, and miscellaneous. Enter "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable family size and income level. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)

Local Standards: housing and utilities; utilities/maintenance expense. Enter amount from the IRS Housing and Utilities Standards; Utilities/Maintenance Expense for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)

Local Standards: housing and utilities; mortgage/rental expense. Enter amount from the IRS Housing and Utilities Standards; Mortgage/Rental Expense for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court). **Do not include payments on any debt secured by your home included in Line 37. Subtract the amount of the Line 37 Average Monthly Payment attributable to such debts from the IRS Mortgage/Rental Expense, but do not list an amount less than zero.**

Local Standards: transportation; vehicle operation/public transportation expense.

You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation. Enter the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 7.

0 1 2 or more.

Enter the amount from IRS Transportation Standards, Operating Costs & Public Transportation Costs for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (This information is available at www.irs.gov; www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)

Local Standards: transportation ownership/lease expense; Vehicle 1.

Enter the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.)

1 2 or more.

Enter the amount from IRS Transportation Standards, Ownership Costs, First Car. (This information is available at www.irs.gov; www.usdoj.gov/ust/ or from the clerk of the bankruptcy court). **Do not include payments on any debt secured by Vehicle 1 included in Line 37. Subtract the amount of the Line 37 Average Monthly Payment attributable to the vehicle from the IRS transportation Standards, Ownership Costs, First Car, but do not list an amount less than zero.**

Local Standards: transportation ownership/lease expense; Vehicle 2.

Complete this Line only if you checked the "2 or more" Box in Line 21.

Enter the amount from IRS Transportation Standards, Ownership Costs, Second Car. (This information is available at www.irs.gov; www.usdoj.gov/ust/ or from the clerk of the bankruptcy court). **Do not include payments on any debt secured by Vehicle 2 included in Line 37. Subtract the amount of the Line 37 Average Monthly Payment attributable to the vehicle from the IRS Transportation Standards, Ownership Costs, Second Car, but do not list an amount less than zero.**

Other Necessary Expenses: taxes. Enter the total average monthly expense that you actually incur for all federal, state and local taxes, other than real estate and sales taxes, such as income taxes, self employment taxes, social security taxes, and Medicare taxes. **Do not include real estate or sales taxes.**

Other Necessary Expenses: mandatory payroll deductions. Enter the total average monthly payroll deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. **Do not include discretionary amounts, such as non-mandatory 401(k) contributions.**

Other Necessary Expenses: insurance. Enter average monthly premiums that you actually pay for term life, dental, vision, long term care, and other types of insurance not deducted elsewhere in the statement. **Do not include automobile, liability, homeowner's or contents insurance, whole life premiums, or any amounts included in Lines 26 or 29.**

Other Necessary Expenses: court-ordered payments. Enter the total monthly amount that you are required to pay pursuant to court order, such as spousal or child support payments. **Do not include payments on past due support obligations included in Line 39.**

Other Necessary Expenses: childcare. Enter the average monthly amount that you actually expend on childcare. **Do not include payments made for primary and secondary education.**

Other Necessary Expenses: health care. Enter the average monthly amount that you actually expend on health care expenses that are not reimbursed by insurance or paid by a health savings account.

Other Necessary Expenses: business expenses. Enter the average monthly expenses that you incur in order to operate a business or otherwise produce income. **Do not include any amount previously deducted.**

- b) Then deduct additional expenses expressly allowed under § 707(b) (these are not part of the IRS Financial Collection Standards):

Health Insurance, Disability Insurance and Health Savings Account

Expenses. List the average monthly amounts that you actually expend in each of the following categories and enter the total.

- a. Health Insurance
- b. Disability Insurance
- c. Health Savings Account

Continued contributions to the care of household or family members.

Enter the actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses.

Protection against family violence. Enter any average monthly expenses that you actually incurred to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law.

Home energy costs in excess of the allowance specified by the IRS Local Standards. Enter the average monthly amount by which your home energy costs exceed the allowance in the IRS Local Standards for Housing and Utilities. **You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.**

Education expenses for dependent children under 18. Enter the average monthly expenses that you actually incur, not to exceed \$125 per child, in providing elementary and secondary education for your dependent children less than 18 years of age. **You must provide your case trustee with documentation demonstrating that the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.**

Additional food and clothing expense. Enter the average monthly amount by which your food and clothing expenses exceed the combined allowances for food and apparel in the IRS National Standards, not exceed five percent of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) **You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.**

Continued charitable contributions. Enter the amount that you will continue to contribute in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2).

- c) Then calculate deductions allowed under § 707(b)(2) for debt payment not previously deducted under the IRS Financial Standards or elsewhere.
- (i) First, read § 707(b)(2)(A)(iii) carefully: “The debtor’s average monthly payment on account of secured debts shall be calculated as the sum of –
- (I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition; and
- (II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor’s primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor’s dependents, that serves as collateral for secured debts;
- divided by 60.”
- (ii) Note that the first part of the equation, the “total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition,” does not have the qualification that the collateral securing debts contractually due be necessary for the support of the debtor and the debtor’s dependents, nor is there any requirement that the amounts be reasonable.

(01) If the collateral is to be surrendered in the chapter 13 case, is the deduction for that debt appropriate?

(02) If the deduction is for a "luxury" item such as an ATV, a boat, or an expensive car, is there a valid good faith objection?

Future payments on secured claims. For each of your debts that is secured by an interest in property that you own, list the name of creditor, identify the property securing the debt, and state the Average Monthly Payment. The Average Monthly Payment is the total of all amounts contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. **Do not include items you have previously deducted, such as insurance and taxes.**

Name of Creditor	Property Securing the Debt	Average Monthly Payment

Past due payments on secured claims. If any of the debts listed in Line 37 are in default, and the property securing the debt is necessary for your support or the support of your dependents, you may include in your deductions 1/60th of the amount that you must pay the creditor as a result of the default (the "cure amount") in order to maintain possession of the property. List any such amounts in the following chart and enter the total. If necessary, list additional entries on a separate page.

Name of Creditor	Property Securing the Debt in Default	1/60th of the Cure Amount

Payments on priority claims. Enter the total amount of all priority claims (including priority child support and alimony claims), divided by 60.

Chapter 13 administrative expenses. Multiply the amount in line a by the amount in line b, and enter the resulting administrative expense.

a. Projected average monthly Chapter 13 plan payment. \$

b. Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)

c. Total average monthly administrative expense of Chapter 13 case: \$

- d) Then deduct certain support income pursuant to § 1325(b)(2) (this income should have been included when calculating the debtor's CMI and is now backed out of the disposable income equation).

Support income. Enter the monthly average of any child support payments, foster care payments, or disability payments for a dependent child, included in Line 7, that you received in accordance with applicable nonbankruptcy law, to the extent reasonably necessary to be expended for such child.

- e) Then deduct contributions to qualified retirement plans and repayment of loans from retirement plans. (e.g., 401K contributions and loan repayments).

Qualified retirement deductions. Enter the monthly average of (a) all contributions or wage deductions made to qualified retirement plans, as specified in § 541(b)(7) and (b) all repayments of loans from retirement plans, as specified in § 362(b)(19).

5) CMI minus the above-described deductions = Monthly Disposable Income under § 1325(b)(2).

6) Projected Disposable Income to be received in the “applicable commitment period” will be paid to unsecured creditors.

a) § 1325(b)(4)(A): The “Applicable Commitment Period” is:

(i) 3 years, or

(ii) not less than 5 years “if the current monthly income of the debtor and the debtor’s spouse combined, when multiplied by 12, is not less than . . .” the median family income.

b) The maximum duration of the plan is set forth in § 1322(d):

(i) “If the current monthly income of the debtor and the debtor’s spouse combined, when multiplied by 12, is not less than” the median family income, “the plan may not provide for payments over a period that is longer than 5 years.”

(ii) “If the current monthly income of the debtor and the debtor’s spouse combined, when multiplied by 12, is less than” the median family income, “the plan may not provide for payments over a period that is longer than 3 years,” unless the court approves a period that is not longer than 5 years.

c) It is not clear if the “applicable commitment period” is the required duration of the plan, or if it merely a multiplier to determine the amount of funds available under the disposable income test to distribute to unsecured creditors.

7) Verification of Income:

a) § 521(a)(1)(B): Debtor must file:

(i) copies of all “payment advices or evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor;”

- (ii) “a statement of the amount of monthly net income, itemized to show how the amount is calculated”; (“Monthly net income” is not defined. Is it the amount left over after deducting Schedule J expenses from Schedule I income? Or is it the calculation of disposable income described above?) and
 - (iii) “a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition.”
- b) It does not appear that the debtor’s present income or the debtor’s reasonably anticipated increase in income has any effect on the calculation of the debtor’s disposable income.
- c) § 521(e)(2)(A): Debtor must provide to the trustee and any requesting creditor a copy of the debtor’s most recent Federal tax return, or at the debtor’s option a transcript of the return.
 - (i) The tax return/transcript must be provided to the trustee at least 7 days before the date first set for the meeting of creditors.
 - (ii) If the debtor fails to comply, “the court shall dismiss the case” unless the debtor demonstrates that noncompliance was due to circumstances beyond the control of the debtor.
- d) § 521(f)(1)-(f)(3): At the request of the court, the U.S. Trustee, or party in interest, an individual debtor in chapter 7, 11, or 13 must file with the court:
 - (i) tax returns/transcripts for “each tax year of the debtor ending while the case is pending”;
 - (ii) tax returns/transcripts for the preceding 3 years if the returns had not been filed with the IRS as of the date of the petition but were subsequently filed;
 - (iii) amendments to those tax returns.
- e) § 521(f)(4): At the request of the court, the U.S. trustee, or a party in interest, in a chapter 13 case, the debtor must file annually a statement of income and expenses for the preceding year, and a statement of monthly income, “that shows how income, expenditures, and monthly income are calculated.”
 - (i) deadlines for filing the 521(f)(4) statement:

- (01) if the plan has not been confirmed, 90 days after the end of the tax year or one year after the petition date, whichever is later;
 - (02) after confirmation, annually, "not later than the date that is 45 days before the anniversary of the confirmation of the plan."
- (ii) § 521(g): The statement must disclose:
- (01) "the amount and sources of income of the debtor";
 - (02) "the identity of any person responsible with the debtor for the support of any dependent of the debtor"; and
 - (03) "the identity of any person who contributed, and the amount contributed, to the household in which the debtor resides."
- (iii) It is unclear whether the trustee can use information showing that the debtor's real income has increased as a basis for seeking an increase in plan payments, or whether the disposable income test is binding for the duration of the plan. § 1329(b)(1) does not require that the disposable income test of § 1325(b) be satisfied to modify a plan after confirmation.

C) Treatment of Unsecured Claims

- 1) Amended § 1325(b)(1)(B) now provides that the debtor's projected disposable income to be received in the applicable commitment period will go to unsecured creditors under the plan.
 - a) Unsecured creditors include those holding priority claims and those holding non-priority claims (commonly referred to as general unsecured creditors).
 - b) Priority claims include administrative expenses: debtor's attorney fee, case filing fee, chapter 13 trustee's percentage fee, etc.
 - c) Therefore, the debtor's disposable income (if any, after deducting the secured debt allowance, pension contributions, pension loan repayments, support income, and the IRS standard deductions) goes to satisfy administrative expenses and other priority claims, and anything remaining will go to general unsecured creditors.
- 2) The requirement of § 1322(a)(2), that a plan provide for payment in full of all priority claims, must still be satisfied.
- 3) The liquidation test of § 1325(a)(4) must still be satisfied.
- 4) Although the debtor must pay in to the plan sufficient funds to pay the debtor's attorney's fees in full, the question of when and how the debtor's attorney will be paid is not so easily resolved.
 - a) The dual requirement of equal monthly payments in amounts sufficient to adequately protect secured creditors make it unlikely in most cases that the attorney will be paid first ahead of secured creditors.
 - b) The most likely scenario will be that the attorney's fee will be paid concurrently with secured claims. See § 1326(b)(1) ("Before or at the time of each payment to creditors under the plan, there shall be paid any unpaid claim of the kind specified in ~~507(a)(1)~~ 507(a)(2) of this title.").
 - c) If there are no secured debts to be paid through the plan, it would seem that the plan could propose payment of the attorney's fee first, ahead of other priority creditors and general unsecured creditors.

- d) Similarly, if there is only an arrearage claim to be paid but no claims secured by personal property, there is no requirement that each monthly payment adequately protect the creditor, so perhaps it may be possible to propose in the plan that the attorney's fee will be paid in the first x months, after which disbursements in equal monthly payments will begin on the arrearage claim (although the creditor may argue that having \$0 paid in the first x months violates the requirement of equal monthly payments).
- e) Another option may be to fund all or part of the attorney's fee with funds that accrue pre-confirmation. Using a prior example, a creditor secured by a car valued at \$10,000 depreciating at the rate of 1% per month would be entitled to pre-confirmation adequate protection payments of \$100. However, in order to pay the creditor the full \$10,000 at 7% over 55 months, post-confirmation disbursements to the creditor would need to be about \$215 per month. If the debtor is making a monthly plan payment based on disbursements to the creditor of \$215 per month, but only \$100 per month is going to the creditor prior to confirmation, the plan could provide that the difference (less the trustee's percentage fee, of course) be paid to the attorney.

D) Other Issues

- 1) There are no changes to the co-debtor stay of § 1301. "Repeat-filer" joint debtors who may be stuck with an abbreviated (or non-existent) stay under § 362 may still be able to stop a foreclosure sale by having only one spouse file a chapter 13 case and thereby invoking the co-debtor stay.
- 2) § 1302 imposes on chapter 13 trustees the obligation to provide certain notices to holders of domestic support obligation claims and to the appropriate child support enforcement agency at the time of the petition and at the time the debtor receives a discharge.
- 3) Filing of prepetition tax returns:
 - a) New § 1308 provides:
 - (i) If the debtor has not filed (with the appropriate tax authorities) tax returns for any of the four tax years preceding the petition, the debtor must file those tax returns no later than the day before the first date set for the meeting of creditors.
 - (ii) If the tax returns are not timely filed, the trustee may hold open the meeting of creditors to allow the debtor additional time to file the returns, but the additional period shall not extend beyond:
 - (01) 120 days after the date of the meeting of creditors (for returns that are past due as of the date of the petition); or
 - (02) the later of 120 days or the expiration of the last automatic extension, whichever is later (for returns that were not past due as of the date of the petition).
 - (iii) Prior to the expiration of the deadline, the debtor can request the court to extend the deadline if the debtor can demonstrate that the failure to file a return was due to circumstances beyond the debtor's control, but the extended period cannot exceed:
 - (01) 30 days (for returns that are past due as of the date of the petition); or

(02) the applicable extended due date (for returns that were not past due as of the date of the petition).

- b) On request of a party in interest or the UST and after notice and hearing, the court shall dismiss or convert a case for failure to file tax returns as required by § 1308. § 1307(e).
- 4) The debtor's failure to pay post-petition domestic support obligations is a new ground for dismissal or conversion of a chapter 13 case under § 1307(c)(11).
- 5) Certain domestic support obligations (DSO's) can be separately classified in a plan.
 - a) Section 507(a)(1) makes a distinction between DSO's owed directly to a DSO claim holder and DSO's that have been assigned to a governmental agency.
 - b) Assigned DSO claims do not have to be paid in full "if the plan provides that all of the debtor's projected disposable income for a 5-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan." § 1322(a)(4).
- 6) Interest on nondischargeable debts can be paid through the plan if the debtor has disposable income available to pay such interest after paying all allowed claims in full. § 1322(b)(10).
- 7) The confirmation "may be held not earlier than 20 days and not later than 45 days after the date of the meeting of creditors under section 341(a), unless the court determines that it would be in the best interests of the creditors and the estate to hold such hearing at an earlier date and there is no objection to the earlier date." § 1324(b).
- 8) § 1326(a)(1): Unless the court orders otherwise, the debtor must commence making payments 30 days after the filing of the petition. Actually, the statute says the debtor shall commence making payments not later than 30 days "after the date of the filing of the plan or the order for relief, whichever is earlier," but how can a plan be filed earlier than the petition?
- 9) Compensation for a chapter 7 trustee in a case converted to chapter 13:
 - a) If a chapter 7 trustee "chases" a debtor into chapter 13 due to § 707(b) issues and is awarded compensation for so doing, the chapter 7 trustee can be paid through the plan monthly at a rate of at least \$25 per month. § 1326(b)(3).

b) This provision should not limit a chapter 7 trustee's right to assert a quantum meruit claim if the case converts from a 7 to a 13 for reasons other than § 707(b) (e.g., where the chapter 7 trustee finds an avoidable lien and the debtor converts to a chapter 13 in order to retain possession of the property).

10) The debtor can modify a plan after confirmation in certain instances to reduce plan payments as may be necessary to enable the debtor to purchase or maintain health insurance. § 1329(a)(4).

E) Discharge

- 1) § 1328: There are additional conditions that must be satisfied before the discharge can be entered:
 - a) § 1328(a): If the debtor owed or owes a debt under a “domestic support obligation” (child support, for example), the debtor must certify that all amounts required to be paid have been paid.
 - b) § 1328(g): The debtor must complete a course in personal financial management. Proposed Interim Form #23 is a Debtor’s Certification of Completion of Instructional Course Concerning Personal Financial Management.
 - c) § 1328(h): The court must determine, after notice and hearing no more than 10 days before entering the discharge:
 - (i) that there is no reasonable cause to believe that § 522(q)(1) applies to the debtor; that is, that the debtor has claimed under state law certain exemptions totaling more than \$125,000, and
 - (01) per § 522(q)(1)(A) has been convicted of a felony which shows an abuse of the bankruptcy laws; or
 - (02) per § 522(q)(1)(B) the debtor owes a debt for securities fraud; or
 - (03) per § 522(q)(1)(B)(iv) the debtor owes a debt arising from “any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding 5 years.”
 - (ii) and that there is no reasonable cause to believe that there is a pending proceeding that might give rise to a § 522(q)(1) situation.
- 2) The “super-discharge” is greatly diminished. Debts that are nondischargeable in a chapter 13 case have been expanded and now include:
 - a) § 1322(b)(5) long-term debts [no change];
 - b) § 507(a)(8)(C) priority tax debts;

- c) the following obligations that are nondischargeable under § 523(a):
 - (i) § 523(a)(1)(B) – debts arising from unfiled or late-filed tax returns;
 - (ii) § 523(a)(1)(C) debts arising from fraudulent tax returns;
 - (iii) § 523(a)(2) debts obtained by fraud, false financial statements; debts for luxury goods or cash advances obtained shortly before bankruptcy;
 - (iv) § 523(a)(3) unscheduled debts;
 - (v) § 523(a)(4) debts for defalcation or embezzlement;
 - (vi) § 523(a)(5) debts for “domestic support obligations” (defined in § 101(14A));
 - (vii) § 523(a)(8) student loan debts;
 - (viii) § 523(a)(9) DUI debts;
 - d) § 1328(a)(3) restitution and criminal fines [no change];
 - e) § 1328(a)(4) restitution or damages awarded as a result of a willful or malicious personal injury.
- 3) § 1328(f): A debtor may not receive a discharge in a chapter 13 if the debtor received a discharge:
- a) per § 1328(f)(1), in a chapter 7, 11 or 12 case filed within 4 years of the filing of the chapter 13; or
 - b) per § 1328(f)(2), in a chapter 13 case filed within 2 years prior to the current chapter 13 case.

APPENDIX

for

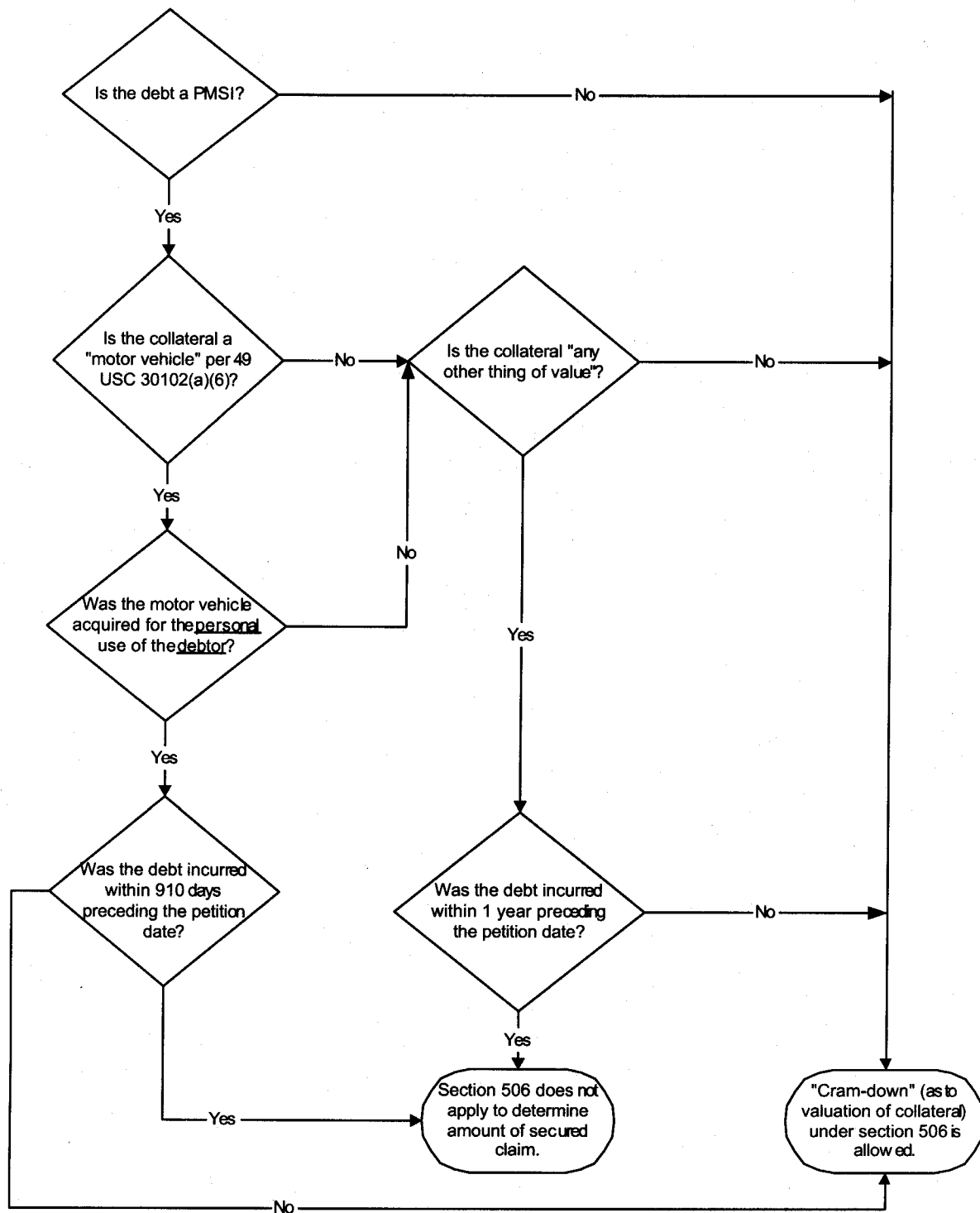
SIGNIFICANT CHANGES IN CHAPTER 13 PRACTICE AS A RESULT OF THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

by

Beverly M. Burden
Chapter 13 Trustee, Eastern District of Kentucky
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Prepared for

BAPCPA: Nuts and Bolts
University of Kentucky College of Law
September 30, 2005



**"CRAM-DOWN" FLOWCHART:
DOES SECTION 506 APPLY?**

BY:

**Beverly M. Burden
Chapter 13 Trustee, EDKY**

In re _____
Debtor(s)

Case Number: _____
(If known)

Check the box as directed in Part II, Line 13 of this statement.

- ☐ Disposable income determined under § 1325(b)(3)
☐ Disposable income not determined under § 1325(b)(3)

STATEMENT OF CURRENT MONTHLY INCOME AND DISPOSABLE INCOME CALCULATION

FOR USE IN CHAPTER 13 ONLY

In addition to Schedule I and J, this statement must be completed by every individual Chapter 13 debtor, whether or not filing jointly. Joint debtors may complete one statement only

Part I. CALCULATION OF CURRENT MONTHLY INCOME											
1	Marital/filing status. Check the box that applies and complete the balance of this part of this statement as directed. a. <input type="checkbox"/> Unmarried. Complete only Column A ("Debtor's Income") for Lines 2-9. b. <input type="checkbox"/> Married, not filing jointly. Complete only Column A ("Debtor's Income") for Lines 2-9. c. <input type="checkbox"/> Married, filing jointly. Complete both Column A ("Debtor's Income") and Column B (Spouse's Income) for Lines 2-9. All figures must reflect average monthly income for the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If you received different amounts of income during these six months, you must total the amounts received during the six months, divide this total by six, and enter the result on the appropriate line.			Column A Debtor's Income	Column B Spouse's Income						
2	Wages, salary, tips, bonuses, overtime, commissions.			\$	\$						
3	Gross income from the operation of a business, profession or farm.			\$	\$						
4	Interest, dividends and royalties.			\$	\$						
5	Rents and other real property income.			\$	\$						
6	Pension and retirement income.			\$	\$						
7	Regular contributions to the household expenses of the debtor or the debtor's dependents, including child or spousal support. Do not include contributions from the debtor's spouse if Column B is completed.			\$	\$						
8	Unemployment compensation. Enter the amount in Column A and, if applicable, Column B. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 40%;">Unemployment compensation claimed to be a benefit under the Social Security Act</td> <td style="width: 30%;">Debtor \$ _____</td> <td style="width: 30%;">Spouse \$ _____</td> </tr> </table>			Unemployment compensation claimed to be a benefit under the Social Security Act	Debtor \$ _____	Spouse \$ _____	\$	\$			
Unemployment compensation claimed to be a benefit under the Social Security Act	Debtor \$ _____	Spouse \$ _____									
9	Income from all other sources. If necessary, list additional sources on a separate page. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. Specify source and amount. <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 10%;">a.</td> <td style="width: 60%;"></td> <td style="width: 30%; text-align: center;">\$</td> </tr> <tr> <td>b.</td> <td></td> <td style="text-align: center;">\$</td> </tr> </table> Total and enter on Line 9			a.		\$	b.		\$	\$	\$
a.		\$									
b.		\$									
10	Subtotal of current monthly income. Add Lines 2 thru 9 in Column A, and, if Column B is completed, add Lines 2 through 9 in Column B. Enter the total(s).			\$	\$						
11	Total current monthly income. If Column B has been completed, add Line 10, Column A to Line 10, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 10, Column A.			\$							

Part II. APPLICATION OF § 1325(b)(3)

12	Annualized current monthly income. Multiply the amount from Line 11 by the number 12 and enter the result.	\$
13	Applicable median family income. Enter the median family income for applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: _____ b. Enter debtor's household size: _____	\$
14	Application of § 1325(b)(3). Check the applicable box and proceed as directed. <input type="checkbox"/> The amount on Line 12 is less than or equal to the amount on Line 13. Check the box at the top of page 1 of this statement that states "Disposable income not determined under § 1325(b)(3)" and complete Part V of this statement; do not complete Parts III and IV. <input type="checkbox"/> The amount on Line 12 is more than the amount on Line 13. Check the box at the top of page 1 of this statement that states "Disposable income determined under § 1325(b)(3)" and complete the remaining parts of this statement.	

Complete Parts III and IV of this statement only if required. (See Line 14).

Part III. CALCULATION OF DEDUCTIONS ALLOWED UNDER § 707(b)(2)

Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)

15	National Standards: food, clothing, household supplies, personal care, and miscellaneous. Enter "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable family size and income level. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	\$
16	Local Standards: housing and utilities. Enter amount from the IRS Housing and Utilities Standards for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court). Do not include payments on secured debts, such as mortgage payments, to the extent that they are accounted for in the IRS Housing and Utilities Standards.	\$
17	Local Standards: transportation; vehicle operation/public transportation expense. You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation. Enter the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 7. <input type="checkbox"/> 0 <input type="checkbox"/> 1 <input type="checkbox"/> 2 or more. Enter the amount from IRS Transportation Standards, Operating Costs & Public Transportation Costs for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (This information is available at www.irs.gov ; www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	
18	Local Standards: transportation ownership/lease expense; Vehicle 1. Enter the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.) <input type="checkbox"/> 1 <input type="checkbox"/> 2 or more. Enter the amount from IRS Transportation Standards, Ownership Costs, First Car. (This information is available at www.irs.gov ; www.usdoj.gov/ust/ or from the clerk of the bankruptcy court). Do not include payments on any debt secured by Vehicle 1 included in Line 36. Subtract the amount of the Line 36 Average Monthly Payment attributable to the vehicle from the IRS Transportation Standards, Ownership Costs, First Car, but do not list an amount less than zero.	\$
19	Local Standards: transportation ownership/lease expense; Vehicle 2. Complete this Line only if you checked the "2 or more" Box in Line 21. Enter the amount from IRS Transportation Standards, Ownership Costs, Second Car. (This information is available at www.irs.gov ; www.usdoj.gov/ust/ or from the clerk of the bankruptcy court). Do not include payments on any debt secured by Vehicle 2 included in Line 36. Subtract the amount of the Line 36 Average Monthly Payment attributable to the vehicle from the IRS Transportation Standards, Ownership Costs, Second Car, but do not list an amount less than zero.	\$
20	Other Necessary Expenses: taxes. Enter the total average monthly expense that you actually incur for all federal, state and local taxes, other than real estate and sales taxes, such as income taxes, self employment taxes, social security taxes, and Medicare taxes. Do not include real estate or sales taxes.	\$

21	Other Necessary Expenses: mandatory payroll deductions. Enter the total average monthly payroll deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. Do not include discretionary amounts, such as non-mandatory 401(k) contributions.		\$	
22	Other Necessary Expenses: insurance. Enter average monthly premiums that you actually pay for term life, dental, vision, long term care, and other types of insurance not deducted elsewhere in the statement. Do not include automobile, liability, homeowner's or contents insurance, whole life premiums, or any amounts included in Lines 25 or 28.		\$	
23	Other Necessary Expenses: court-ordered payments. Enter the total monthly amount that you are required to pay pursuant to court order, such as spousal or child support payments. Do not include payments on past due support obligations included in Line 38.		\$	
24	Other Necessary Expenses: childcare. Enter the average monthly amount that you actually expend on childcare. Do not include payments made for primary and secondary education.		\$	
25	Other Necessary Expenses: health care. Enter the average monthly amount that you actually expend on health care expenses that are not reimbursed by insurance or paid by a health savings account.		\$	
26	Other Necessary Expenses: business expenses. Enter the average monthly expenses that you incur in order to operate a business or otherwise produce income. Do not include any amount previously deducted.		\$	
27	Total Expenses Allowed under IRS Standards. Enter the total of Lines 15 through 26		\$	
Subpart B: Additional Expense Deductions under § 707(b) Note: Do not include any expenses that you have listed in Lines 15-26				
28	Health Insurance, Disability Insurance and Health Savings Account Expenses. List the average monthly amounts that you actually expend in each of the following categories and enter the total.		\$	
	a.	Health Insurance		\$
	b.	Disability Insurance		\$
	c.	Health Savings Account		\$
	Total: Add Lines a, b and c			
29	Continued contributions to the care of household or family members. Enter the actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses.		\$	
30	Protection against family violence. Enter any average monthly expenses that you actually incurred to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law.		\$	
31	Home energy costs in excess of the allowance specified by the IRS Local Standards. Enter the average monthly amount by which your home energy costs exceed the allowance in the IRS Local Standards for Housing and Utilities. You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.		\$	
32	Education expenses for dependent children under 18. Enter the average monthly expenses that you actually incur, not to exceed \$125 per child, in providing elementary and secondary education for your dependent children less than 18 years of age. You must provide your case trustee with documentation demonstrating that the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.		\$	
33	Additional food and clothing expense. Enter the average monthly amount by which your food and clothing expenses exceed the combined allowances for food and apparel in the IRS National Standards, not exceed five percent of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.		\$	
34	Continued charitable contributions. Enter the amount that you will continue to contribute in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2).		\$	
35	Total Additional Expense Deductions under § 707(b). Enter the total of Lines 28 through 34.		\$	

Subpart C: Deductions for Debt Payment

36	<p>Future payments on secured claims. For each of your debts that is secured by an interest in property that you own, list the name of creditor, identify the property securing the debt, and state the Average Monthly Payment. The Average Monthly Payment is the total of all amounts contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. Do not include items you have previously deducted, such as insurance and taxes.</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 5%;"></th> <th style="width: 30%;">Name of Creditor</th> <th style="width: 35%;">Property Securing the Debt</th> <th style="width: 30%;">Average Monthly Payment</th> </tr> </thead> <tbody> <tr> <td>a.</td> <td></td> <td></td> <td>\$</td> </tr> <tr> <td>b.</td> <td></td> <td></td> <td>\$</td> </tr> <tr> <td>c.</td> <td></td> <td></td> <td>\$</td> </tr> <tr> <td colspan="3"></td> <td>Total: Add Lines a, b and c</td> </tr> </tbody> </table>		Name of Creditor	Property Securing the Debt	Average Monthly Payment	a.			\$	b.			\$	c.			\$				Total: Add Lines a, b and c	\$
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a.			\$																			
b.			\$																			
c.			\$																			
			Total: Add Lines a, b and c																			
37	<p>Past due payments on secured claims. If any of the debts listed in Line 36 are in default, and the property securing the debt is necessary for your support or the support of your dependents, you may include in your deductions 1/60th of the amount that you must pay the creditor as a result of the default (the "cure amount") in order to maintain possession of the property. List any such amounts in the following chart and enter the total. If necessary, list additional entries on a separate page.</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 5%;"></th> <th style="width: 30%;">Name of Creditor</th> <th style="width: 35%;">Property Securing the Debt in Default</th> <th style="width: 30%;">1/60th of the Cure Amount</th> </tr> </thead> <tbody> <tr> <td>a.</td> <td></td> <td></td> <td>\$</td> </tr> <tr> <td>b.</td> <td></td> <td></td> <td>\$</td> </tr> <tr> <td>c.</td> <td></td> <td></td> <td>\$</td> </tr> <tr> <td colspan="3"></td> <td>Total: Add Lines a, b and c</td> </tr> </tbody> </table>		Name of Creditor	Property Securing the Debt in Default	1/60th of the Cure Amount	a.			\$	b.			\$	c.			\$				Total: Add Lines a, b and c	\$
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38	<p>Payments on priority claims. Enter the total amount of all priority claims (including priority child support and alimony claims), divided by 60.</p>	\$																				
39	<p>Chapter 13 administrative expenses. Multiply the amount in line a by the amount in line b, and enter the resulting administrative expense.</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tbody> <tr> <td style="width: 5%; text-align: center;">a.</td> <td style="width: 60%;">Projected average monthly Chapter 13 plan payment.</td> <td style="width: 35%;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td>Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)</td> <td style="text-align: center;">x</td> </tr> <tr> <td style="text-align: center;">c.</td> <td>Average monthly administrative expense of Chapter 13 case</td> <td>Total: Multiply Lines a and b</td> </tr> </tbody> </table>	a.	Projected average monthly Chapter 13 plan payment.	\$	b.	Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	x	c.	Average monthly administrative expense of Chapter 13 case	Total: Multiply Lines a and b	\$											
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40	<p>Total Deductions for Debt Payment. Enter the total of Lines 36 through 39.</p>	\$																				
Subpart D: Total Deductions Allowed under § 707(b)(2)																						
41	<p>Total of all deductions allowed under § 707(b)(2). Enter the total of Lines 27, 35, and 40.</p>	\$																				

Part IV. DETERMINATION OF DISPOSABLE INCOME UNDER § 1325(b)(2)

42	<p>Total current monthly income. Enter the amount from Line 11.</p>	\$
43	<p>Support income. Enter the monthly average of any child support payments, foster care payments, or disability payments for a dependent child, included in Line 7, that you received in accordance with applicable nonbankruptcy law, to the extent reasonably necessary to be expended for such child.</p>	\$
44	<p>Qualified retirement deductions. Enter the monthly average of (a) all contributions or wage deductions made to qualified retirement plans, as specified in § 541(b)(7) and (b) all repayments of loans from retirement plans, as specified in § 362(b)(19).</p>	\$
45	<p>Total of all deductions allowed under § 707(b)(2). Enter the amount from Line 41.</p>	\$
46	<p>Total adjustments to determine disposable income. Add the amounts on Lines 43, 44, and 45 and enter the result.</p>	\$
47	<p>Monthly Disposable Income Under § 1325(b)(2). Subtract Line 46 from Line 42 and enter the result.</p>	\$

Part V: VERIFICATION

48

I declare under penalty of perjury that the information provided in this statement is true and correct. *(If this a joint case, both debtors must sign.)*

Date: _____

Signature: _____
(Debtor)

Date: _____

Signature: _____
(Joint Debtor, if any)

In re _____
Debtor(s)

Case Number: _____
(If known)

Check the box as directed in Part II, Line 13 of this statement.

- ☐ Disposable income determined under § 1325(b)(3)
☐ Disposable income not determined under § 1325(b)(3)

STATEMENT OF CURRENT MONTHLY INCOME AND DISPOSABLE INCOME CALCULATION

FOR USE IN CHAPTER 13 ONLY IRS EXTRA

In addition to Schedule I and J, this statement must be completed by every individual Chapter 13 debtor, whether or not filing jointly. Joint debtors may complete one statement only

Part I. CALCULATION OF CURRENT MONTHLY INCOME

1	Marital/filing status. Check the box that applies and complete the balance of this part of this statement as directed. a. <input type="checkbox"/> Unmarried. Complete only Column A ("Debtor's Income") for Lines 2-9. b. <input type="checkbox"/> Married, not filing jointly. Complete only Column A ("Debtor's Income") for Lines 2-9. c. <input type="checkbox"/> Married, filing jointly. Complete both Column A ("Debtor's Income") and Column B (Spouse's Income) for Lines 2-9. All figures must reflect average monthly income for the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If you received different amounts of income during these six months, you must total the amounts received during the six months, divide this total by six, and enter the result on the appropriate line.		Column A Debtor's Income	Column B Spouse's Income						
2	Wages, salary, tips, bonuses, overtime, commissions.	\$	\$							
3	Gross income from the operation of a business, profession or farm.	\$	\$							
4	Interest, dividends and royalties.	\$	\$							
5	Rents and other real property income.	\$	\$							
6	Pension and retirement income.	\$	\$							
7	Regular contributions to the household expenses of the debtor or the debtor's dependents, including child or spousal support. Do not include contributions from the debtor's spouse if Column B is completed.	\$	\$							
8	Unemployment compensation. Enter the amount in Column A and, if applicable, Column B. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 40%;">Unemployment compensation claimed to be a benefit under the Social Security Act</td> <td style="width: 30%;">Debtor \$ _____</td> <td style="width: 30%;">Spouse \$ _____</td> </tr> </table>		Unemployment compensation claimed to be a benefit under the Social Security Act	Debtor \$ _____	Spouse \$ _____	\$	\$			
Unemployment compensation claimed to be a benefit under the Social Security Act	Debtor \$ _____	Spouse \$ _____								
9	Income from all other sources. If necessary, list additional sources on a separate page. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. Specify source and amount. <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 10%;">a.</td> <td style="width: 60%;"></td> <td style="width: 30%; text-align: center;">\$</td> </tr> <tr> <td>b.</td> <td></td> <td style="text-align: center;">\$</td> </tr> </table> Total and enter on Line 9		a.		\$	b.		\$	\$	\$
a.		\$								
b.		\$								
10	Subtotal of current monthly income. Add Lines 2 thru 9 in Column A, and, if Column B is completed, add Lines 2 through 9 in Column B. Enter the total(s).		\$	\$						
11	Total current monthly income. If Column B has been completed, add Line 10, Column A to Line 10, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 10, Column A.		\$							

Part II. APPLICATION OF § 1325(b)(3)

12	Annualized current monthly income. Multiply the amount from Line 11 by the number 12 and enter the result.	\$
13	Applicable median family income. Enter the median family income for applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: _____ b. Enter debtor's household size: _____	\$
14	Application of § 1325(b)(3). Check the applicable box and proceed as directed. <input type="checkbox"/> The amount on Line 12 is less than or equal to the amount on Line 13. Check the box at the top of page 1 of this statement that states "Disposable income not determined under § 1325(b)(3)" and complete Part V of this statement; do not complete Parts III and IV. <input type="checkbox"/> The amount on Line 12 is more than the amount on Line 13. Check the box at the top of page 1 of this statement that states "Disposable income determined under § 1325(b)(3)" and complete the remaining parts of this statement.	

Complete Parts III and IV of this statement only if required. (See Line 13).

Part III. CALCULATION OF DEDUCTIONS ALLOWED UNDER § 707(b)(2)

Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)

15	National Standards: food, clothing, household supplies, personal care, and miscellaneous. Enter "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable family size and income level. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	\$
16	Local Standards: housing and utilities; utilities/maintenance expense. Enter amount from the IRS Housing and Utilities Standards; Utilities/Maintenance Expense for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court).	\$
17	Local Standards: housing and utilities; mortgage/rental expense. Enter amount from the IRS Housing and Utilities Standards; Mortgage/Rental Expense for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court). Do not include payments on any debt secured by your home included in Line 37. Subtract the amount of the Line 37 Average Monthly Payment attributable to such debts from the IRS Mortgage/Rental Expense, but do not list an amount less than zero.	
18	Local Standards: transportation; vehicle operation/public transportation expense. You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation. Enter the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 7. <input type="checkbox"/> 0 <input type="checkbox"/> 1 <input type="checkbox"/> 2 or more. Enter the amount from IRS Transportation Standards, Operating Costs & Public Transportation Costs for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (This information is available at www.irs.gov ; www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	\$
19	Local Standards: transportation ownership/lease expense; Vehicle 1. Enter the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.) <input type="checkbox"/> 1 <input type="checkbox"/> 2 or more. Enter the amount from IRS Transportation Standards, Ownership Costs, First Car. (This information is available at www.irs.gov ; www.usdoj.gov/ust/ or from the clerk of the bankruptcy court). Do not include payments on any debt secured by Vehicle 1 included in Line 37. Subtract the amount of the Line 37 Average Monthly Payment attributable to the vehicle from the IRS Transportation Standards, Ownership Costs, First Car, but do not list an amount less than zero.	\$

20	Local Standards: transportation ownership/lease expense; Vehicle 2. Complete this Line only if you checked the "2 or more" Box in Line 21. Enter the amount from IRS Transportation Standards, Ownership Costs, Second Car. (This information is available at www.irs.gov ; www.usdoj.gov/ust/ or from the clerk of the bankruptcy court). Do not include payments on any debt secured by Vehicle 2 included in Line 37. Subtract the amount of the Line 37 Average Monthly Payment attributable to the vehicle from the IRS Transportation Standards, Ownership Costs, Second Car, but do not list an amount less than zero.	\$												
21	Other Necessary Expenses: taxes. Enter the total average monthly expense that you actually incur for all federal, state and local taxes, other than real estate and sales taxes, such as income taxes, self employment taxes, social security taxes, and Medicare taxes. Do not include real estate or sales taxes.	\$												
22	Other Necessary Expenses: mandatory payroll deductions. Enter the total average monthly payroll deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. Do not include discretionary amounts, such as non-mandatory 401(k) contributions.	\$												
23	Other Necessary Expenses: insurance. Enter average monthly premiums that you actually pay for term life, dental, vision, long term care, and other types of insurance not deducted elsewhere in the statement. Do not include automobile, liability, homeowner's or contents insurance, whole life premiums, or any amounts included in Lines 26 or 29.	\$												
24	Other Necessary Expenses: court-ordered payments. Enter the total monthly amount that you are required to pay pursuant to court order, such as spousal or child support payments. Do not include payments on past due support obligations included in Line 39.	\$												
25	Other Necessary Expenses: childcare. Enter the average monthly amount that you actually expend on childcare. Do not include payments made for primary and secondary education.	\$												
26	Other Necessary Expenses: health care. Enter the average monthly amount that you actually expend on health care expenses that are not reimbursed by insurance or paid by a health savings account.	\$												
27	Other Necessary Expenses: business expenses. Enter the average monthly expenses that you incur in order to operate a business or otherwise produce income. Do not include any amount previously deducted.	\$												
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Part IV. DETERMINATION OF DISPOSABLE INCOME UNDER § 1325(b)(2)

43	Total current monthly income. Enter the amount from Line 11.	\$
44	Support income. Enter the monthly average of any child support payments, foster care payments, or disability payments for a dependent child, included in Line 7, that you received in accordance with applicable nonbankruptcy law, to the extent reasonably necessary to be expended for such child.	\$
45	Qualified retirement deductions. Enter the monthly average of (a) all contributions or wage deductions made to qualified retirement plans, as specified in § 541(b)(7) and (b) all repayments of loans from retirement plans, as specified in § 362(b)(19).	\$
46	Total of all deductions allowed under § 707(b)(2). Enter the amount from Line 42.	\$
47	Total adjustments to determine disposable income. Add the amounts on Lines 44, 45, and 46 and enter the result.	\$
48	Monthly Disposable Income Under § 1325(b)(2). Subtract Line 47 from Line 43 and enter the result.	\$

Part V: VERIFICATION

49	I declare under penalty of perjury that the information provided in this statement is true and correct. <i>(If this a joint case, both debtors must sign.)</i>	
	Date: _____	Signature: _____ (Debtor)
	Date: _____	Signature: _____ (Joint Debtor, if any)

COMMITTEE NOTE

A. Overview

One of the changes in bankruptcy practice introduced by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 is a definition of "current monthly income," set out in § 101(10A) of the Code. Certain individual debtors in Chapter 7, all individual debtors in Chapter 11, and all Chapter 13 debtors are required to calculate their income under this definition. Certain Chapter 7 and 13 debtors are further required to calculate deductions from current monthly income allowed under the means test of § 707(b)(2)(A). Chapter 7 debtors subject to the means test may, as reflected in these calculations, be subject to a presumption of abuse. To comply with the reporting and calculation requirements involving current monthly income and the means test, three separate forms have been provided—one for Chapter 7, one for Chapter 11, and one for Chapter 13. This note first describes the "current monthly income" calculation that is common to all three of the forms, next describes the means test deductions employed in the Chapter 7 and 13 forms, and finally addresses particular issues that are unique to each of the separate forms.

B. Calculation of current monthly income

Current monthly income ("CMI"), as defined in § 101(10A), has different purposes in each of the three chapters in which it is used, but basic computation is the same. CMI is a monthly average of defined "income" received in the six calendar months prior to the bankruptcy filing by the debtor and, in a joint case, the debtor's spouse. The "income" to be included in this average is (1) income from all sources, whether or not taxable, and (2) any amount paid by an entity other than the debtor (or the debtor's spouse in a joint case) on a regular basis for the household expenses of the debtor, the debtor's dependents, and (in a joint case) the debtor's spouse if not otherwise a dependent. However, the income to be averaged is defined as not including "benefits received under the Social Security Act" and certain payments received by victims of terrorism, war crimes, and crimes against humanity.

The forms address the calculation of CMI, in each chapter, by a series of line entries, divided into columns providing for separate entries by the debtor and the debtor's spouse. The calculation line entries are set out in Part II of the Chapter 7 form, and Part I of the forms for Chapter 11 and Chapter 13. These line entries for calculating CMI are introduced by a set of instructions and check boxes indicating when the "debtor's spouse" column is required to be completed. The instructions also direct the required averaging of the income reported on the line entries. The line entries set out all of the common forms of income and then include a "catch-all" line for other types of income. A line is included for regular contributions of support. Unemployment compensation is given special treatment. Because the federal government provides funding for state unemployment compensation under the Social Security Act, there may

be a dispute about whether unemployment compensation is a "benefit received under the Social Security Act." The forms take no position on the merits of this argument, but allow debtors to make the argument by excluding unemployment compensation from current monthly income and reporting it separately, so that the exclusion may be challenged. The forms provide instruction for proper totaling of the income lines.

C. Means test deductions from current monthly income

Deductions from CMI are set out in § 707(b)(2)(A)(ii)-(iv). In Chapter 7, these deductions result in a net number that may generate a presumption of abuse; in Chapter 13, these deductions may result in the amount of "disposable income" that a debtor may be required to pay to unsecured creditors under § 1325(b). The forms for Chapter 7 and Chapter 13 have identical sections (Parts V and III, respectively) for calculating the deductions of § 707(b)(2)(A)(ii)-(iv). The calculations are divided into subparts reflecting different kinds of deductions allowed.

1. Deductions under IRS standards

Subpart A deals with deductions from CMI, set out in § 707(b)(2)(A)(ii), for "the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides." The forms provide entry lines for each of the specified expense deductions under the IRS standards, and instructions on the entry lines identify the web pages where the relevant IRS allowances can be found. As with all of the deductions in § 707(b)(2)(A)(ii), deductions under the IRS standards are subject to the proviso that they not include "any payments for debts."

The IRS National Standards provide a single allowance for food, clothing, household supplies, personal care, and miscellany, depending on income and household size. The forms contain a single entry line for the applicable allowance.

The IRS Local Standards provide separate deductions for housing and utilities and for transportation, with different amounts for different areas of the country, depending on family size and number of vehicles owned or leased. Each of the amounts specified by the IRS in the Local Standards are treated by the IRS as a cap on actual expenses, but because § 707(b)(2)(A)(ii) provides for deduction in the "amounts specified under the . . . Local Standards," the forms treat these amounts as allowed deductions.

[If the IRS separates its housing allowance in time for the "IRS Extra" versions to be used: The Local Standards for housing and utilities separate this expense category into a utilities/maintenance component and a mortgage/rental expense component. The utilities/maintenance expense is a simple allowance. However, for homeowners with mortgages, the mortgage/rental expense involves debt payment. Accordingly, the form requires debtors to deduct from allowance for mortgage/rental expense the average monthly mortgage payment

(principal and interest), up to the full amount of the IRS mortgage/rental expense. This average payment is as reported on the separate line of the form for deductions of secured debt, pursuant to § 707(b)(2)(a)(iii).]

[If the IRS does not separate its housing allowance in time for the "IRS Extra" versions, so that the "Plain" versions must be used: The Local Standards for housing and utilities provide a single expense allowance covering both the cost of acquiring housing (rent or mortgage payments) and the cost of utilities, insurance and maintenance connected with the housing. Because this allowance includes debt payment, the form directs debtors not to include their mortgage payments to the extent covered by the IRS allowance. The proper manner of calculating this required adjustment of the housing and utilities allowance will have to be determined by judicial decisions.]

The Local Standards for transportation separate this expense category into a vehicle operation/public transportation component and a component for ownership/lease expense. The amount of the vehicle operation/public transportation allowance depends on the number of vehicles the debtor operates [or "for which the debtor pays the operating expenses"], with debtors who do not operate vehicles being given a public transportation expense. The instruction for this line item makes it clear that every debtor is thus entitled to some transportation expense allowance. No debt payment is involved in this allowance. However, for debtors with debt secured by the vehicles that they operate, the ownership/lease expense does involve debt payment. Accordingly, the form requires debtors to deduct from allowance for ownership/lease expense the average monthly loan payment amount (principal and interest), up to the full amount of the IRS ownership/lease expense amount. This average payment is as reported on the separate line of the form for deductions of secured debt, pursuant to § 707(b)(2)(a)(iii).

The IRS does not set out allowances for "Other Necessary Expenses." Rather, it sets out a number of categories for such expenses, and describes the nature of the expenses that may be deducted in each of these categories. Section 707(b)(2)(a)(ii) allows a deduction for the debtor's actual expenses in these specified categories, subject to its requirement that payment of debt not be included. Several of the IRS categories deal with debt repayment and so are not included in the forms. Several other categories deal with business expenses, and the forms combine these categories into a single line entry. The remaining IRS categories are each set out in individual line entries. Instructions on the individual entry lines reflect limitations imposed by the IRS and the need to avoid inclusion of items deducted elsewhere on the forms.

The forms call for a subtotal of the deductions allowed under the IRS standards.

2. Additional statutory expense deductions

In addition to the IRS expense deductions, subclauses (I), (II), (IV), and (V) of § 707(b)(2)(A)(ii) allow six special expense deductions. Each of these additional expense items is set out on a separate line entry in Subpart B, introduced by an instruction that there should not be

double counting of any expense already included in the IRS deductions. Contributions to tax-exempt charities provide another statutory expense deduction. Section 1325(b)(2)(A)(ii) expressly allows a deduction from CMI for such contributions (up to 15% of the debtor's gross income), and § 707(b)(1) provides that in considering whether a Chapter 7 filing is an abuse, the court may not take into consideration "whether a debtor . . . continues to make [tax-exempt] charitable contributions." Accordingly, Subpart B also includes an entry line for charitable contributions. Again, the forms call for the additional statutory expense deductions to be subtotaled.

3. Deductions for payment of debt

Subpart C of the forms deals with deductions from CMI for payment of secured and priority debt, as well as a deduction for the administrative fees that would be incurred if the debtor made debt payments through a Chapter 13 plan. In accord with § 707(b)(2)(A)(iii), the deduction for secured debt is divided into two entry lines—one for payments that are contractually due during the 60 months following the bankruptcy filing, the other for amounts needed to retain necessary collateral for secured debts in default. In each situation, the instructions for the entry lines require dividing the total payment amount by 60, in accord with the statutory directive. Priority debt, deductible pursuant to § 707(b)(2)(A)(iv), is treated on a single entry line, also directing division by 60. The defined deduction for the expenses of administering a Chapter 13 plan, allowed by § 707(b)(2)(A)(ii)(III) for debtors eligible for Chapter 13, is treated in an entry line that requires the eligible debtor to state the amount of the debtor's prospective Chapter 13 plan payment and multiply that payment amount by the percentage fee established for the debtor's district by the Executive Office for United States Trustees. The forms refer debtors to a website that will set out this percentage fee. An entry line is provided for subtotaling the debt payment deductions.

4. Total deductions

Finally, the forms direct that the subtotals from Subparts A, B, and C be added together to arrive at the total of allowed deductions from CMI.

D. The Chapter-specific forms

1. Chapter 7

The Chapter 7 form has several unique aspects. The form includes, in the upper right corner of the first page, a check box requiring the debtor to state whether or not a presumption of abuse exists as a result of the information provided by the form. This check box is intended to give clerks of court a conspicuous indication of the cases for which they will be required to provide notice of a presumption of abuse pursuant to § 342(d).

Part I of the form implements the provision of § 707(b)(2)(D) that excludes certain disabled veterans from any form of means testing, making it unnecessary to compute the CMI of such veterans. Debtors who declare under penalty of perjury that they are disabled veterans within the statutory definition are directed to verify their declaration in Part VII, to check the "no presumption" box at the beginning of the form, and to disregard the remaining parts of the form.

Part II of the form is the computation of current monthly income ("CMI") as defined in § 101(10A). Section 707(b)(2) eliminates standing to assert the means test's presumption of abuse if the debtor's annualized CMI does not exceed a defined median state income. For this purpose, the CMI of the debtor's spouse is added to the debtor's CMI even if the debtor's spouse is not a joint debtor, unless the debtor declares under penalty of perjury that the spouses are legally separated or living separately other than for purposes of evading the means test. Accordingly, the calculation of CMI in Part II directs a computation of the CMI of the debtor's spouse in all cases of married debtors where the debtor is unable to make the specified declaration or where the debtors are filing jointly, and the CMI of both spouses in these cases is added for purposes of determining standing under § 707(b)(7).

Part III of the form provides for the comparison of the debtor's CMI for purposes of § 707(b)(7) to the applicable state median income. It then directs debtors whose income does not exceed the applicable median to verify the form, to check the "no presumption" box at the beginning of the form, but to disregard the remaining parts of the form. Debtors whose CMI does exceed the applicable state median are directed to complete the remaining parts of the form.

Part IV of the form provides for an adjustment of the CMI of a married debtor, not filing jointly, whose spouse's CMI was included with the debtor's for purposes of determining standing to assert the means test presumption. The means test itself does not charge a married debtor in a non-joint case with the income of the non-filing spouse, but rather only with contributions made by that spouse to the household expenses of the debtor and the debtor's dependents, as provided in the definition of CMI in § 101(10A). Accordingly, Part IV calls for the combined CMI total of Part II to be reduced by the amount of the non-filing spouse's income that was not contributed to the household expenses of the debtor or the debtor's dependents.

Part V of the form provides for a calculation of allowed deductions from the debtor's CMI, as described above.

Part VI provides for a determination of whether the debtor's CMI, less the allowed deductions, gives rise to a presumption of abuse under § 707(b)(2)(A). Depending on the outcome of this determination, the debtor is directed to check the appropriate box at the beginning of the form and to sign the verification in Part VII.

2. Chapter 11

The Chapter 11 form is the simplest of the three, since the means-test deductions of § 707(b)(2) are not employed in determining the extent of an individual Chapter 11 debtor's disposable income. Rather, § 1129(a)(15) requires payments of disposable income "as defined in section 1325(b)(2)," and that paragraph allows calculation of disposable income under judicially-determined standards, rather than pursuant to the means test deductions, specified for higher income Chapter 13 debtors by § 1325(b)(3). However, § 1325(b)(2) does require that CMI be used as the starting point in the judicial determination of disposable income, and so the Chapter 11 form requires this calculation (in Part I of the form), as described above, together with a verification (in Part II).

3. Chapter 13

Like the Chapter 7 form, the form for Chapter 13 debtors contains a number of special provisions. Because § 1325(b)(3) employs the means test deductions for debtors whose CMI exceeds the applicable state median income, the upper right corner of the first page includes check boxes requiring the debtor to state whether § 1325(b)(3) applies, thus quickly informing the standing trustees and interested parties of the need to consider these deductions.

Part I of the form is the calculation of CMI, as described above.

Part II of the form compares the debtor's CMI to the applicable state median, allowing the determination of the applicability of the means-test deductions required by § 1325(b)(3).

Part III provides for calculation of the means-test deductions provided in § 707(b)(2), as described above, and as incorporated by § 1325(b)(3) for debtors with CMI above the applicable state median.

Part IV provides for three adjustments required by special provisions affecting disposable income. First, § 1325(b)(2) itself excludes from CMI as used to determine disposable income certain "child support payments, foster care payments, [and] disability payments for a dependent child." Because such payments are otherwise included in the definition of CMI in § 101(10A), a line entry for deduction of these payments is provided. Second, a line entry is provided for deduction of contributions by the debtor to certain retirement plans, as listed in § 541(b)(7)(B), since that provision states that such contributions "shall not constitute disposable income, as defined in section 1325(b)." Third, the same line entry also allows a deduction from disposable income for payments on loans from retirement accounts that are excepted from the automatic stay by § 362(b)(19), since § 1322(f) provides that for a "loan described in section 362(b)(19) . . . any amounts required to repay such loan shall not constitute 'disposable income' under section 1325."

The Chapter 13 form does not provide a deduction from disposable income for the Chapter 13 debtor's anticipated attorney fees. There is no specific statutory allowance for such a

deduction, and none appears necessary. Section 1325(b)(1)(B) requires that disposable income contributed to a Chapter 13 plan be used to pay "unsecured creditors." A debtor's attorney who has not taken a security interest in the debtor's property is an unsecured creditor who may be paid from disposable income.

Part V of the form is the verification.

IRS Collection Financial Standards

www.irs.gov; search site for "collection financial standards"

General

Collection Financial Standards are used to help determine a taxpayer's ability to pay a delinquent tax liability.

Allowances for food, clothing and other items, known as the National Standards, apply nationwide except for Alaska and Hawaii, which have their own tables. Taxpayers are allowed the total National Standards amount for their family size and income level, without questioning amounts actually spent.

Maximum allowances for housing and utilities and transportation, known as the Local Standards, vary by location. Unlike the National Standards, the taxpayer is allowed the amount actually spent or the standard, whichever is less.

Food, Clothing and Other Items

National Standards for reasonable amounts have been established for five necessary expenses: food, housekeeping supplies, apparel and services, personal care products and services, and miscellaneous.

All standards except miscellaneous are derived from the Bureau of Labor Statistics (BLS) Consumer Expenditure Survey (CES). The miscellaneous standard has been established by the IRS.

Alaska and Hawaii

Due to their unique geographic circumstances and higher cost of living, separate standards for food, clothing and other items have been established for Alaska and Hawaii.

Housing and Utilities

The housing and utilities standards are derived from Census and BLS data, and are provided by state down to the county level.

Transportation

The transportation standards consist of nationwide figures for monthly loan or lease payments referred to as ownership costs, and additional amounts for monthly operating costs broken down by Census Region and Metropolitan Statistical Area (MSA). Public

transportation is included under operating costs. A conversion chart has been provided with the standards which shows which IRS districts fall under each Census Region, as well as the counties included in each MSA. The ownership cost portion of the transportation standard, although it applies nationwide, is still considered part of the Local Standards.

The ownership costs provide maximum allowances for the lease or purchase of up to two automobiles if allowed as a necessary expense. The operating costs are derived from BLS data.

If a taxpayer has a car payment, the allowable ownership cost added to the allowable operating cost equals the allowable transportation expense. If a taxpayer has no car payment, or no car, only the operating costs portion of the transportation standard is used to come up with the allowable transportation expense.

Recent Revisions

The Local Standards for housing and utilities and transportation were revised on 01/01/04 to:

- add family size to the housing and utilities allowances (two or less, three, and four or more);
- base automobile ownership/leasing costs on the five-year average of new and used car financing data compiled by the Federal Reserve Board of Governors; and,
- reflect updated information from the Bureau of Labor Statistics.

The revised Local Standards for housing and utilities and transportation are effective for financial analysis conducted on or after January 1, 2004.

National Standards for Allowable Living Expenses

Collection Financial Standards for Food, Clothing and Other Items. Due to their unique geographic circumstances and higher cost of living, separate standards have been established for Alaska and Hawaii .

One Person National Standards Based on Gross Monthly Income								
Item	less than \$833	\$833 to \$1,249	\$1,250 to \$1,666	\$1,667 to \$2,499	\$2,500 to \$3,333	\$3,334 to \$4,166	\$4,167 to \$5,833	\$5,834 and over
Food	197	215	231	258	300	339	369	543
Housekeeping supplies	19	20	25	26	29	36	37	51
Apparel & services	60	61	70	75	100	124	134	207
Personal care products & services	19	24	26	27	40	42	43	44
Miscellaneous	108	108	108	108	108	108	108	108
Total	\$403	\$428	\$460	\$494	\$577	\$649	\$691	\$953

Two Persons National Standards Based on Gross Monthly Income								
Item	less than \$833	\$833 to \$1,249	\$1,250 to \$1,666	\$1,667 to \$2,499	\$2,500 to \$3,333	\$3,334 to \$4,166	\$4,167 to \$5,833	\$5,834 and over
Food	336	337	338	424	439	487	559	691
Housekeeping supplies	36	37	38	48	52	53	107	108
Apparel & services	81	88	91	95	125	132	164	276
Personal care products & services	33	34	35	43	44	51	56	71
Miscellaneous	134	134	134	134	134	134	134	134
Total	\$620	\$630	\$636	\$744	\$794	\$857	\$1,020	\$1,280

Three Persons National Standards Based on Gross Monthly Income								
Item	less than \$833	\$833 to \$1,249	\$1,250 to \$1,666	\$1,667 to \$2,499	\$2,500 to \$3,333	\$3,334 to \$4,166	\$4,167 to \$5,833	\$5,834 and over

Food	467	468	469	470	490	546	622	778
Housekeeping supplies	41	42	43	49	53	55	108	109
Apparel & services	132	144	157	158	159	188	204	303
Personal care products & services	34	36	37	44	45	52	61	79
Miscellaneous	161	161	161	161	161	161	161	161
Total	\$835	\$851	\$867	\$882	\$908	\$1,002	\$1,156	\$1,430

Four Persons National Standards Based on Gross Monthly Income								
Item	less than \$833	\$833 to \$1,249	\$1,250 to \$1,666	\$1,667 to \$2,499	\$2,500 to \$3,333	\$3,334 to \$4,166	\$4,167 to \$5,833	\$5,834 and over
Food	468	525	526	527	528	640	722	868
Housekeeping supplies	42	43	44	50	54	61	109	110
Apparel & services	146	169	170	171	174	189	217	317
Personal care products & services	37	42	43	45	46	53	62	81
Miscellaneous	188	188	188	188	188	188	188	188
Total	\$881	\$967	\$971	\$981	\$990	\$1,131	\$1,298	\$1,564

More than Four Persons National Standards Based on Gross Monthly Income								
Item	less than \$833	\$833 to \$1,249	\$1,250 to \$1,666	\$1,667 to \$2,499	\$2,500 to \$3,333	\$3,334 to \$4,166	\$4,167 to \$5,833	\$5,834 and over
For each additional person, add to four person total allowance:	\$134	\$145	\$155	\$166	\$177	\$188	\$199	\$209

effective January 1, 2005

Kentucky - Housing and Utilities Allowable Living Expenses

Collection Financial Standards

Financial Analysis - Local Standards: Housing and Utilities (effective 1/1/2005)

Maximum Monthly Allowance			
County	Family of 2 or less	Family of 3	Family of 4 or more
Adair County	677	797	916
Allen County	732	861	990
Anderson County	843	991	1,140
Ballard County	667	785	902
Barren County	770	906	1,042
Bath County	701	825	949
Bell County	637	750	862
Boone County	1,106	1,301	1,497
Bourbon County	853	1,003	1,154
Boyd County	745	876	1,008
Boyle County	807	950	1,092
Bracken County	732	861	990
Breathitt County	693	815	938
Breckinridge County	694	816	939
Bullitt County	894	1,051	1,209
Butler County	692	814	936
Caldwell County	686	808	929
Calloway County	844	993	1,142
Campbell County	962	1,131	1,301
Carlisle County	661	778	895
Carroll County	822	967	1,112
Carter County	638	751	863
Casey County	607	715	822
Christian County	753	886	1,019
Clark County	852	1,002	1,153
Clay County	576	678	779
Clinton County	573	674	775
Crittenden County	618	727	836

Cumberland County	594	699	804
Daviess County	782	920	1,058
Edmonson County	724	851	979
Elliott County	612	720	828
Estill County	617	726	834
Fayette County	967	1,138	1,308
Fleming County	673	792	911
Floyd County	717	844	970
Franklin County	853	1,003	1,154
Fulton County	643	756	870
Gallatin County	810	953	1,096
Garrard County	790	929	1,068
Grant County	888	1,045	1,202
Graves County	712	837	963
Grayson County	699	823	946
Green County	625	735	846
Greenup County	737	867	997
Hancock County	772	908	1,044
Hardin County	853	1,003	1,154
Harlan County	631	742	853
Harrison County	780	918	1,056
Hart County	654	769	885
Henderson County	827	973	1,119
Henry County	818	963	1,107
Hickman County	624	734	845
Hopkins County	700	824	948
Jackson County	539	634	729
Jefferson County	945	1,111	1,278
Jessamine County	897	1,056	1,214
Johnson County	715	841	968
Kenton County	980	1,153	1,326
Knott County	642	755	868
Knox County	698	821	944
Larue County	703	827	951
Laurel County	744	875	1,007
Lawrence County	636	749	861

Lee County	553	650	748
Leslie County	647	761	875
Letcher County	605	711	818
Lewis County	605	711	818
Lincoln County	698	821	944
Livingston County	644	757	871
Logan County	753	886	1,019
Lyon County	731	860	989
Madison County	857	1,009	1,160
Magoffin County	702	826	950
Marion County	689	811	933
Marshall County	798	939	1,080
Martin County	751	883	1,015
Mason County	792	932	1,072
McCracken County	835	983	1,130
McCreary County	549	646	743
McLean County	686	807	927
Meade County	836	984	1,131
Menifee County	625	735	846
Mercer County	758	892	1,026
Metcalf County	592	696	801
Monroe County	674	793	912
Montgomery County	765	901	1,036
Morgan County	635	747	860
Muhlenberg County	668	786	904
Nelson County	775	911	1,048
Nicholas County	698	821	944
Ohio County	675	794	914
Oldham County	1,189	1,399	1,609
Owen County	782	920	1,058
Owsley County	525	617	710
Pendleton County	810	953	1,096
Perry County	729	858	987
Pike County	765	901	1,036
Powell County	712	837	963
Pulaski County	680	800	920

Robertson County	633	744	856
Rockcastle County	698	821	944
Rowan County	721	848	975
Russell County	628	739	850
Scott County	955	1,124	1,292
Shelby County	971	1,142	1,313
Simpson County	803	944	1,086
Spencer County	1,011	1,189	1,367
Taylor County	745	876	1,008
Todd County	655	770	886
Trigg County	737	867	997
Trimble County	794	934	1,075
Union County	719	846	973
Warren County	907	1,067	1,227
Washington County	686	807	927
Wayne County	619	728	837
Webster County	688	810	931
Whitley County	712	838	964
Wolfe County	552	649	746
Woodford County	975	1,148	1,320

Allowable Living Expenses for Transportation

Collection Financial Standards

Financial Analysis - Local Standards: Transportation *

Ownership Costs			
National		First Car	Second Car
		\$475	\$338
Operating Costs & Public Transportation Costs			
Region	No Car	One Car	Two Cars
Northeast Region	\$230	\$298	\$393
New York	\$302	\$384	\$479
Philadelphia	\$236	\$298	\$392
Boston	\$259	\$284	\$380
Pittsburgh	\$161	\$286	\$380
Midwest Region	\$194	\$251	\$345
Chicago	\$257	\$329	\$422
Detroit	\$312	\$376	\$469
Milwaukee	\$212	\$247	\$341
Minneapolis-St. Paul	\$276	\$303	\$397
Cleveland	\$198	\$293	\$387
Cincinnati	\$222	\$272	\$365
St. Louis	\$203	\$287	\$383
Kansas City	\$246	\$291	\$384
South Region	\$197	\$242	\$336
Washington, D.C.	\$289	\$313	\$407
Baltimore	\$225	\$240	\$334
Atlanta	\$283	\$258	\$351
Miami	\$284	\$344	\$439
Tampa	\$255	\$265	\$359
Dallas-Ft. Worth	\$309	\$332	\$425
Houston	\$281	\$367	\$462
West Region	\$246	\$305	\$399
Los Angeles	\$275	\$353	\$448
San Francisco	\$317	\$373	\$466
San Diego	\$311	\$318	\$415

Portland	\$189	\$246	\$339
Seattle	\$258	\$335	\$427
Honolulu	\$295	\$314	\$409
Anchorage	\$312	\$336	\$431
Phoenix	\$273	\$326	\$420
Denver	\$302	\$351	\$442

* Does not include personal property taxes. (effective January 1, 2005)

For Use with Allowable Transportation Expenses Table

The Operating Costs and Public Transportation Costs sections of the Transportation Standards are provided by Census Region and Metropolitan Statistical Area (MSA). The following table lists the states that comprise each Census Region. Once the taxpayer's Census Region has been ascertained, to determine if an MSA standard is applicable, use the definitions below to see if the taxpayer lives within an MSA (MSAs are defined by county and city, where applicable). If the taxpayer does not reside in an MSA, use the regional standard.

Northeast Census Region		
Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Pennsylvania, New York, New Jersey		
MSA	COUNTIES	
New York	<i>in NY:</i>	Bronx, Dutchess, Kings, Nassau, New York, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Westchester
	<i>in NJ:</i>	Bergen, Essex, Hudson, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Ocean, Passaic, Somerset, Sussex, Union, Warren
	<i>in CT:</i>	Fairfield, Litchfield, Middlesex, New Haven
	<i>in PA:</i>	Pike
Philadelphia	<i>in PA:</i>	Bucks, Chester, Delaware, Montgomery, Philadelphia
	<i>in NJ:</i>	Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Salem
	<i>in DE:</i>	New Castle
	<i>in MD:</i>	Cecil
Boston	<i>in MA:</i>	Bristol, Essex, Hampden, Middlesex, Norfolk, Plymouth, Suffolk, Worcester
	<i>in NH:</i>	Hillsborough, Merrimack, Rockingham, Strafford

	<i>in</i> <i>CT:</i>	Windham
	<i>in</i> <i>ME:</i>	York
Pittsburgh	<i>in</i> <i>PA:</i>	Allegheny, Beaver, Butler, Fayette, Washington, Westmoreland

Midwest Census Region

North Dakota, South Dakota, Nebraska, Kansas, Missouri, Illinois, Indiana, Ohio, Michigan, Wisconsin, Minnesota, Iowa

MSA	COUNTIES (unless otherwise specified)	
Chicago	<i>in</i> <i>IL:</i>	Cook, DeKalb, DuPage, Grundy, Kane, Kankakee, Kendall, Lake, McHenry, Will
	<i>in</i> <i>IN:</i>	Lake, Porter
	<i>in</i> <i>WI:</i>	Kenosha
Detroit	<i>in</i> <i>MI:</i>	Genesee, Lapeer, Lenawee, Livingston, Macomb, Monroe, Oakland, St. Clair, Washtenaw, Wayne
Milwaukee	<i>in</i> <i>WI:</i>	Milwaukee, Ozaukee, Racine, Washington, Waukesha
Minneapolis-St. Paul	<i>in</i> <i>MN:</i>	Anoka, Carver, Chisago, Dakota, Hennepin, Isanti, Ramsey, Scott, Sherburne, Washington, Wright
	<i>in</i> <i>WI:</i>	Pierce, St. Croix
Cleveland	<i>in</i> <i>OH:</i>	Ashtabula, Cuyahoga, Geauga, Lake, Lorain, Medina, Portage, Summit
Cincinnati	<i>in</i> <i>OH:</i>	Brown, Butler, Clermont, Hamilton, Warren
	<i>in</i> <i>KY:</i>	Boone, Campbell, Gallatin, Grant, Kenton, Pendleton
	<i>in</i> <i>IN:</i>	Dearborn, Ohio
St. Louis	<i>in</i> <i>MO:</i>	Crawford, Franklin, Jefferson, Lincoln, St. Charles, St. Louis, Warren, St. Louis city
	<i>in</i> <i>IL:</i>	Clinton, Jersey, Madison, Monroe, St. Clair
Kansas City	<i>in</i> <i>MO:</i>	Cass, Clay, Clinton, Jackson, Lafayette, Platte, Ray
	<i>in</i> <i>KS:</i>	Johnson, Leavenworth, Miami, Wyandotte

South Census Region

Texas, Oklahoma, Arkansas, Louisiana, Mississippi, Tennessee, Kentucky, West Virginia, Virginia, Maryland, District of Columbia, Delaware, North Carolina, South Carolina, Georgia, Florida, Alabama		
MSA	COUNTIES (unless otherwise specified)	
Washington, D.C.	<i>in DC:</i>	District of Columbia
	<i>in MD:</i>	Calvert, Charles, Frederick, Montgomery, Prince George's, Washington
	<i>in VA:</i>	Arlington, Clarke, Culpepper, Fairfax, Fauquier, King George, Loudoun, Prince William, Spotsylvania, Stafford, Warren, Alexandria city, Fairfax city, Falls Church city, Fredericksburg city, Manassas city, Manassas Park city
	<i>in WV:</i>	Berkeley, Jefferson
Baltimore	<i>in MD:</i>	Anne Arundel, Baltimore, Carroll, Harford, Howard, Queen Anne's, Baltimore city
Atlanta	<i>in GA:</i>	Barrow, Bartow, Carroll, Cherokee, Clayton, Cobb, Coweta, DeKalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Henry, Newton, Paulding, Pickens, Rockdale, Spalding, Walton
Miami	<i>in FL:</i>	Broward, Miami-Dade
Tampa	<i>in FL:</i>	Hernando, Hillsborough, Pasco, Pinellas
Dallas-Ft. Worth	<i>in TX:</i>	Collin, Dallas, Denton, Ellis, Henderson, Hood, Hunt, Johnson, Kaufman, Parker, Rockwall, Tarrant
Houston	<i>in TX:</i>	Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, Waller

West Census Region:		
New Mexico, Arizona, Colorado, Wyoming, Montana, Nevada, Utah, Washington, Oregon, Idaho, California, Alaska, Hawaii		
MSA	COUNTIES (unless otherwise specified)	
Los Angeles	<i>in CA:</i>	Los Angeles, Orange, Riverside, San Bernadino, Ventura
San Francisco	<i>in CA:</i>	Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Santa Cruz, Solano, Sonoma
San Diego	<i>in CA:</i>	San Diego
Portland	<i>in OR:</i>	Clackamas, Columbia, Marion, Multnomah, Polk, Washington, Yamhill
	<i>in WA:</i>	Clark
Seattle	<i>in WA:</i>	Island, King, Kitsap, Pierce, Snohomish, Thurston

Honolulu	<i>in HI:</i>	Honolulu
Anchorage	<i>in AK:</i>	Anchorage borough
Phoenix	<i>in AZ:</i>	Maricopa, Pinal
Denver	<i>in CO:</i>	Adams, Arapahoe, Boulder, Denver, Douglas, Jefferson, Weld

Internal Revenue Manual

<http://www.irs.gov/irm/part5>

5.15.1.7 (05-01-2004)

Allowable Expense

Overview

1. Allowable expenses include those expenses that meet the necessary expense test. *The necessary expense test is defined as expenses that are necessary to provide for a taxpayer's and his or her family's health and welfare and/or production of income.* The expenses must be reasonable. The total necessary expenses establish the minimum a taxpayer and family needs to live.
2. There are three types of necessary expenses:
 - National Standards
 - Local Standards
 - Other Expenses
3. National Standards: These establish standards for reasonable amounts for five necessary expenses. Four of them come from the Bureau of Labor Statistics (BLS) Consumer Expenditure Survey: food, housekeeping supplies, apparel and services, and personal care products and services. The fifth category, miscellaneous, is a discretionary amount established by the Service. It is \$100 for one person and \$25 for each additional person in the taxpayer's household.

Note:

All five standards are included in one total national standard expense.

4. Local Standards: These establish standards for two necessary expenses: housing and transportation. Taxpayers will be allowed the local standard or the amount actually paid, whichever is less.
 - A. Housing - Standards are established for each county within a state. When deciding if a deviation is appropriate, consider the cost of moving to a new residence; the increased cost of transportation to work and school that will result from moving to lower-cost housing and the tax consequences. The tax consequence is the difference between the benefit the taxpayer currently derives from the interest and property tax deductions on Schedule A to the benefit the taxpayer would derive without the same or adjusted expense.
 - B. Transportation - The transportation standards consist of nationwide figures for loan or lease payments referred to as ownership cost, and additional amounts for operating costs broken down by Census Region and Metropolitan Statistical Area. Operating costs were derived from BLS data. If a taxpayer has a car payment, the allowable ownership cost added to the allowable operating cost equals the allowable transportation expense. If a taxpayer has no car payment only the operating cost portion of the transportation standard is used to figure the allowable transportation expense. Under ownership costs, separate caps are provided for the first car and second car. If the taxpayer does not own a car a standard public transportation amount is allowed.
5. Other - Other expenses may be allowed if they meet the necessary expense test. The amount allowed must be reasonable considering the taxpayer's individual facts and circumstances.
6. Conditional expenses. These expenses do not meet the necessary expenses test. However, they are allowable if the tax liability, including projected accruals, can be fully paid within five years.
7. National local expense standards are guidelines. If it is determined a standard amount is inadequate to provide for a specific taxpayer's basic living expenses, allow a deviation. Require the taxpayer to provide reasonable substantiation and document the case file.
8. Generally, the total number of persons allowed for national standard expenses should be the same as those allowed as dependents on the taxpayer's current year income tax return. Verify

exemptions claimed on taxpayer's income tax return meet the dependency requirements of the IRC. There may be reasonable exceptions. Fully document the reasons for any exceptions. For example, foster children or children for whom adoption is pending.

9. A deviation from the local standard is not allowed merely because it is inconvenient for the taxpayer to dispose of valued assets.
10. Revenue officers should consider the length of the payments. Although it may be appropriate to allow for payments made on the secured debts that meet the necessary expense test, if the debt will be fully repaid in one year only allow those payments for one year.

5.15.1.8 (05-01-2004)

National Standards

1. National standards include the following expenses:
 - A. Apparel and services. Includes shoes and clothing, laundry and dry cleaning, and shoe repair.
 - B. Food. Includes all meals, home and away.
 - C. Housekeeping supplies. Includes laundry and cleaning supplies; other household products such as cleaning and toilet tissue, paper towels and napkins; lawn and garden supplies; postage and stationary; and other miscellaneous household supplies.
 - D. Personal care products and services. Includes hair care products, haircuts and beautician services, oral hygiene products and articles, shaving needs, cosmetics, perfume, bath preparations, deodorants, feminine hygiene products, electric personal care appliances, personal care services, and repair of personal care appliances.
 - E. Miscellaneous. A discretionary allowance of \$100 for one person and \$25 for each additional person in a taxpayer's family.
2. Allow taxpayers the total national standard amount for their income level.

Example: The taxpayer's expenses are: housekeeping supplies - \$150, clothing - \$150, food - \$600, miscellaneous - \$400 (Total Expenses - \$1,300). The taxpayer is allowed the national standard of \$1,100.

3. A taxpayer that claims more than the total allowed by the national standards must substantiate and justify each separate expense of the total national standard amounts.

Example: A taxpayer may claim a higher food expense than allowed. Justification would be based on prescribed or required dietary needs.

5.15.1.9 (05-01-2004)

Local Standards

1. Local standards include the following expenses:
 - A. Housing and Utilities. The utilities include gas, electricity, water, fuel, oil, bottled gas, trash and garbage collection, wood and other fuels, septic cleaning, and telephone. Housing expenses include: mortgage or rent, property taxes, interest, parking, necessary maintenance and repair, homeowner's or renter's insurance, homeowner dues and condominium fees. Usually, this is considered necessary only for the place of residence. Any other housing expenses should be allowed only if, based on a taxpayer's individual facts and circumstances, disallowance will cause the taxpayer economic hardship.
 - B. Transportation. Vehicle insurance, vehicle payment (lease or purchase), maintenance, fuel, state and local registration, required inspection, parking fees, tolls, driver's license, public transportation. Transportation costs not required to produce income or ensure the health and welfare of the family are not considered necessary. Consider availability of public transportation if car payments (purchase or lease) will prevent the tax liability

from being paid in part or full. Public transportation costs could be an option if it does not significantly increase commuting time and inconvenience the taxpayer.

Note:

If the taxpayer has no car payment, or no car, question how the taxpayer travels to and from work, grocer, medical care, etc. The taxpayer is only allowed the operating cost or the cost of transportation.

**5.15.1.10 (05-01-2004)
Other Expenses**

1. Other expenses may be considered if they meet the necessary expense test - they must provide for the health and welfare of the taxpayer and/or his or her family or they must be for the production of income. This is determined based on the facts and circumstances of each case.
2. If other expenses are determined to be necessary and, therefore allowable, document the reasons for the decision in your history.
3. The amount allowed for necessary or conditional expenses depends on the taxpayer's ability to full pay the liability within five years and on the taxpayer's individual facts and circumstances. If the liability can be paid within 5 years, it may be appropriate to allow the taxpayer the excessive necessary and conditional expenses. If the taxpayer cannot pay within 5 years, it may be appropriate to allow the taxpayer the excessive necessary and conditional expenses for up to one year in order to modify or eliminate the expense. *(See IRM 5.14, Installment Agreements)*

Expense Item	Expense is Necessary if:	Notes/Tips
Accounting and legal fees.	Representation before the Service is needed or meets the necessary expense tests. Amount must be reasonable.	Disallow any other accounting or legal fees. Disallow costs not related to solving current liability.
Charitable contributions <i>(Donations to tax exempt organizations)</i>	If it is a condition of employment or meets the necessary expense tests. Example: A minister is required to tithe according to his employment contract.	Disallow any other charitable contributions that are not considered necessary. Example: Review the employment contract.
Child Care(<i>Baby-sitting, day care, nursery and preschool</i>)	It meets the necessary expense test. Only reasonable amounts are allowed.	Cost of child care can vary greatly. Do not allow unusually large child care expense if more reasonable alternatives are available. Consider the age of the child and if both parents work.
Court-Ordered Payments(<i>Alimony, child support, including orders made by the state, and other</i>)	If court ordered and being paid, they are allowable. If payments are not being made, do not allow the expense. Child support	Review the court order.

<i>court ordered payments)</i>	payments for natural children or legally adopted dependents may be allowed.	
Dependent Care(<i>For the care of the elderly, invalid, or handicapped.</i>)	If there is no alternative to the taxpayer paying the expense.	
Education	It is required for a physically or mentally challenged child and no public education providing similar services is available. Also allowed only for the taxpayer and only if required as condition of employment.	Example: An attorney must take so many education credits each year or they will not be accredited and could eventually lose their license to practice before the State Bar. A teacher could lose their position or in some States their pay is commensurate with their education credits.
Health Care	Required for the health and welfare of the family. Elective surgery would not be allowed such as plastic surgery or elective dental work. The taxpayer must provide proof of excessive out of pocket medical expenses.	To determine monthly expenses, the total out of pocket expenses would be divided by 12. The Schedule A may also be used to determine the yearly expense. Ensure that the amount used is out of pocket after insurance claims are paid. Substantiate that payments are being made.
Involuntary Deductions	If it is a requirement of the job; i.e. union dues, uniforms, work shoes.	To determine monthly expenses, the total out of pocket expenses would be divided by 12.
Life Insurance	If it is a term policy on the life of the taxpayer only.	If there are whole life policies, these should be reviewed as an asset for borrowing against or liquidating. Life insurance used as an investment is not a necessary expense.
Secured or legally perfected debts	If it meets the necessary expense test.	Taxpayer must substantiate that the payments are being made.
Unsecured Debts	If the taxpayer substantiates and justifies	Examples of unsecured debts which

	the expense, the minimum payment may be allowed. The necessary expense test of health and welfare and/or production of income must be met. Except for payments required for the production of income, payments on unsecured debts will not be allowed if the tax liability, including projected accruals, can be paid in full within 90 days.	may be necessary expenses include: Payments required for the production of income such as payments to suppliers and payments on lines of credit needed for business and payment of debts incurred in order to pay a federal tax liability.
Taxes	It is for current federal, FICA, Medicare, state and local taxes.	Current taxes are allowed regardless of whether the taxpayer made them in the past or not. Delinquent state and local taxes are allowable depending on the priority of the FTL and/or Service agreement with the state and local taxing agencies.
Optional Telephones and Telephone Services (<i>Cell phone, pager, Call waiting, caller identification or long distance</i>)	It must meet the necessary expense test.	
Student Loans	If it is secured by the federal government and only for the taxpayer's education.	Taxpayer must substantiate that the payments are being made.
Internet Provider/E-mail	If it meets the necessary expense test - generally for production of income.	
Repayment of loans made for payment of Federal Taxes	If the loan is secured by the taxpayer's assets when those assets are of reasonable value and are necessary to provide for the health and welfare of the family.	

In re _____
Debtor(s)Case Number: _____
(If known)

Check the box as directed in Part II, Line 14 of this statement.

- ☐ **Disposable income determined under § 1325(b)(3)**
- ☐ **Disposable income not determined under § 1325(b)(3)**

STATEMENT OF CURRENT MONTHLY INCOME AND DISPOSABLE INCOME CALCULATION

FOR USE IN CHAPTER 13 (IF IRS SEPARATES ITS HOUSING ALLOWANCE)

In addition to Schedules I and J, this statement must be completed by every individual Chapter 13 debtor, whether or not filing jointly. Joint debtors may complete one statement only.

Part I. CALCULATION OF CURRENT MONTHLY INCOME

1	Marital/filing status. Check the box that applies and complete the balance of this part of this statement as directed. a. <input type="checkbox"/> Unmarried. Complete only Column A ("Debtor's Income") for Lines 2-10. b. <input type="checkbox"/> Married, not filing jointly. Complete only Column A ("Debtor's Income") for Lines 2-10. (Under revision) c. <input type="checkbox"/> Married, filing jointly. Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 2-10. All figures must reflect average monthly income for the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If you received different amounts of income during these six months, you must total the amounts received during the six months, divide this total by six, and enter the result on the appropriate line.		Column A Debtor's Income	Column B Spouse's Income									
2	Gross wages, salary, tips, bonuses, overtime, commissions.		\$	\$									
3	Income from the operation of a business, profession, or farm. Subtract Line b from Line a and enter the difference on Line 3. Do not enter a number less than zero. Do not include any part of the business expenses entered on Line b as a deduction in Part III. <table border="1" style="width: 100%; margin-top: 5px;"> <tr> <td style="width: 5%;">a.</td> <td style="width: 65%;">Gross receipts</td> <td style="width: 30%;">\$</td> </tr> <tr> <td>b.</td> <td>Ordinary and necessary business expenses</td> <td>\$</td> </tr> <tr> <td>c.</td> <td>Business income</td> <td>Subtract Line b from Line a</td> </tr> </table>		a.	Gross receipts	\$	b.	Ordinary and necessary business expenses	\$	c.	Business income	Subtract Line b from Line a	\$	\$
a.	Gross receipts	\$											
b.	Ordinary and necessary business expenses	\$											
c.	Business income	Subtract Line b from Line a											
4	Rent and other real property income. Subtract Line b from Line a and enter the difference on Line 4. Do not enter a number less than zero. Do not include any part of the operating expenses entered on Line b as a deduction in Part III. <table border="1" style="width: 100%; margin-top: 5px;"> <tr> <td style="width: 5%;">a.</td> <td style="width: 65%;">Gross receipts</td> <td style="width: 30%;">\$</td> </tr> <tr> <td>b.</td> <td>Ordinary and necessary operating expenses</td> <td>\$</td> </tr> <tr> <td>c.</td> <td>Rental income</td> <td>Subtract Line b from Line a</td> </tr> </table>		a.	Gross receipts	\$	b.	Ordinary and necessary operating expenses	\$	c.	Rental income	Subtract Line b from Line a	\$	\$
a.	Gross receipts	\$											
b.	Ordinary and necessary operating expenses	\$											
c.	Rental income	Subtract Line b from Line a											
5	Interest, dividends, and royalties.		\$	\$									
6	Pension and retirement income.		\$	\$									
7	Regular contributions to the household expenses of the debtor or the debtor's dependents, including child or spousal support. Do not include contributions from the debtor's spouse if Column B is completed.		\$	\$									
8	Unemployment compensation. Enter the amount in Column A and, if applicable, Column B. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: <table border="1" style="width: 100%; margin-top: 5px;"> <tr> <td style="width: 40%;">Unemployment compensation claimed to be a benefit under the Social Security Act</td> <td style="width: 30%;">Debtor \$ _____</td> <td style="width: 30%;">Spouse \$ _____</td> </tr> </table>		Unemployment compensation claimed to be a benefit under the Social Security Act	Debtor \$ _____	Spouse \$ _____	\$	\$						
Unemployment compensation claimed to be a benefit under the Social Security Act	Debtor \$ _____	Spouse \$ _____											
9	Income from all other sources. Specify source and amount. If necessary, list additional sources on a separate page. Total and enter on Line 9. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. <table border="1" style="width: 100%; margin-top: 5px;"> <tr> <td style="width: 5%;">a.</td> <td style="width: 65%;"></td> <td style="width: 30%;">\$</td> </tr> <tr> <td>b.</td> <td></td> <td>\$</td> </tr> </table>		a.		\$	b.		\$	\$	\$			
a.		\$											
b.		\$											
10	Subtotal of current monthly income. Add Lines 2 thru 9 in Column A, and, if Column B is completed, add Lines 2 through 9 in Column B. Enter the total(s).		\$	\$									

11	Total current monthly income. If Column B has been completed, add Line 10, Column A to Line 10, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 10, Column A.	\$
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Part II. APPLICATION OF § 1325(b)(3)		
12	Annualized current monthly income. Multiply the amount from Line 11 by the number 12 and enter the result.	\$
13	Applicable median family income. Enter the median family income for applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: _____ b. Enter debtor's household size: _____	\$
14	Application of § 1325(b)(3). Check the applicable box and proceed as directed. <input type="checkbox"/> The amount on Line 12 is less than or equal to the amount on Line 13. Check the box at the top of page 1 of this statement that states "Disposable income not determined under § 1325(b)(3)" and complete Part VI of this statement; do not complete Parts III, IV, or V. <input type="checkbox"/> The amount on Line 12 is more than the amount on Line 13. Check the box at the top of page 1 of this statement that states "Disposable income determined under § 1325(b)(3)" and complete the remaining parts of this statement.	

Complete Parts III, IV, and V of this statement only if required. (See Line 14.)

Part III. CALCULATION OF DEDUCTIONS ALLOWED UNDER § 707(b)(2)											
Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)											
15	National Standards: food, clothing, household supplies, personal care, and miscellaneous. Enter the "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable family size and income level. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	\$									
16	Local Standards: housing and utilities; utilities/maintenance expense. Enter the amount of the IRS Housing and Utilities Standards; Utilities/Maintenance Expense for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court). (Under revision)	\$									
17	Local Standards: housing and utilities; mortgage/rental expense. Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; Mortgage/Rental Expense for your county and family size (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 38; subtract Line b from Line a and enter the result in Line 17. Do not enter an amount less than zero. <table border="1" style="width: 100%; margin-top: 5px;"> <tr> <td style="width: 5%; text-align: center;">a.</td> <td style="width: 65%;">IRS Housing and Utilities Standards; Mortgage/Rental Expense</td> <td style="width: 30%; text-align: center;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td>Average Monthly Payment for any debts secured by your home, if any, as stated in Line 38</td> <td style="text-align: center;">\$</td> </tr> <tr> <td style="text-align: center;">c.</td> <td>Net mortgage/rental expense</td> <td style="text-align: center;">Subtract Line b from Line a.</td> </tr> </table>		a.	IRS Housing and Utilities Standards; Mortgage/Rental Expense	\$	b.	Average Monthly Payment for any debts secured by your home, if any, as stated in Line 38	\$	c.	Net mortgage/rental expense	Subtract Line b from Line a.
a.	IRS Housing and Utilities Standards; Mortgage/Rental Expense	\$									
b.	Average Monthly Payment for any debts secured by your home, if any, as stated in Line 38	\$									
c.	Net mortgage/rental expense	Subtract Line b from Line a.									
18	Local Standards: transportation; vehicle operation/public transportation expense. You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation. Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 7. <input type="checkbox"/> 0 <input type="checkbox"/> 1 <input type="checkbox"/> 2 or more. Enter the amount from IRS Transportation Standards, Operating Costs & Public Transportation Costs for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)										

19	Local Standards: transportation ownership/lease expense; Vehicle 1. Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.) <input type="checkbox"/> 1 <input type="checkbox"/> 2 or more. Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, First Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 38; subtract Line b from Line a and enter the result in Line 19. Do not enter an amount less than zero.		
	a.	IRS Transportation Standards, Ownership Costs, First Car	\$
	b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 38	\$
	c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a.
			\$
20	Local Standards: transportation ownership/lease expense; Vehicle 2. Complete this Line only if you checked the "2 or more" Box in Line 20. Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, Second Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 38; subtract Line b from Line a and enter the result in Line 20. Do not enter an amount less than zero.		
	a.	IRS Transportation Standards, Ownership Costs, Second Car	\$
	b.	Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 38	\$
	c.	Net ownership/lease expense for Vehicle 2	Subtract Line b from Line a.
			\$
21	Other Necessary Expenses: taxes. Enter the total average monthly expense that you actually incur for all federal, state, and local taxes, other than real estate and sales taxes, such as income taxes, self employment taxes, social security taxes, and Medicare taxes. Do not include real estate or sales taxes.		\$
22	Other Necessary Expenses: mandatory payroll deductions. Enter the total average monthly payroll deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. Do not include discretionary amounts, such as non-mandatory 401(k) contributions.		\$
23	Other Necessary Expenses: life insurance. Enter average monthly premiums that you actually pay for term life insurance for yourself. Do not include premiums for insurance on your dependents, for whole life or for any other form of insurance.		\$
24	Other Necessary Expenses: court-ordered payments. Enter the total monthly amount that you are required to pay pursuant to court order, such as spousal or child support payments. Do not include payments on past due support obligations included in Line 40.		\$
25	Other Necessary Expenses: education for employment or for a physically or mentally challenged child. Enter the total monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.		
26	Other Necessary Expenses: childcare. Enter the average monthly amount that you actually expend on childcare. Do not include payments made for children's education.		\$
27	Other Necessary Expenses: health care. Enter the average monthly amount that you actually expend on health care expenses that are not reimbursed by insurance or paid by a health savings account. Do not include payments for health insurance listed in Line 30.		\$
28	Other Necessary Expenses: telecommunication services. Enter the average monthly expenses that you actually pay for cell phones, pagers, call waiting, caller identification, special long distance, or internet services necessary for the health and welfare of you or your dependents. Do not include any amount previously deducted.		\$
29	Total Expenses Allowed under IRS Standards. Enter the total of Lines 15 through 28		\$

Subpart B: Additional Expense Deductions under § 707(b)
Note: Do not include any expenses that you have listed in Lines 15-28

30	Health Insurance, Disability Insurance, and Health Savings Account Expenses. List the average monthly amounts that you actually expend in each of the following categories and enter the total.			
	a.	Health Insurance	\$	
	b.	Disability Insurance	\$	
	c.	Health Savings Account	\$	
		Total: Add Lines a, b, and c		\$
31	Continued contributions to the care of household or family members. Enter the actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. Do not include payments listed in Line 25.			\$
32	Protection against family violence. Enter any average monthly expenses that you actually incurred to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law.			\$
33	Home energy costs in excess of the allowance specified by the IRS Local Standards. Enter the average monthly amount by which your home energy costs exceed the allowance in the IRS Local Standards for Housing and Utilities. You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.			\$
34	Education expenses for dependent children under 18. Enter the average monthly expenses that you actually incur, not to exceed \$125 per child, in providing elementary and secondary education for your dependent children less than 18 years of age. You must provide your case trustee with documentation demonstrating that the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.			\$
35	Additional food and clothing expense. Enter the average monthly amount by which your food and clothing expenses exceed the combined allowances for food and apparel in the IRS National Standards, not to exceed five percent of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.			\$
36	Continued charitable contributions. Enter the amount that you will continue to contribute in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2).			\$
37	Total Additional Expense Deductions under § 707(b). Enter the total of Lines 30 through 36.			\$

Subpart C: Deductions for Debt Payment

38	Future payments on secured claims. For each of your debts that is secured by an interest in property that you own, list the name of creditor, identify the property securing the debt, and state the Average Monthly Payment. The Average Monthly Payment is the total of all amounts contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. Do not include items you have previously deducted, such as insurance and real estate taxes.			
		Name of Creditor	Property Securing the Debt	60-month Average Payment
	a.			\$
	b.			\$
	c.			\$
		Total: Add Lines a, b, and c		\$
39	Past due payments on secured claims. If any of the debts listed in Line 38 are in default, and the property securing the debt is necessary for your support or the support of your dependents, you may include in your deductions 1/60th of the amount that you must pay the creditor as a result of the default (the "cure amount") in order to maintain possession of the property. List any such amounts in the following chart and enter the total. If necessary, list additional entries on a separate page.			
		Name of Creditor	Property Securing the Debt in Default	1/60th of the Cure Amount
	a.			\$
	b.			\$
	c.			\$
		Total: Add Lines a, b, and c		\$

40	Payments on priority claims. Enter the total amount of all priority claims (including priority child support and alimony claims), divided by 60.	\$	
41	Chapter 13 administrative expenses. Multiply the amount in Line a by the amount in Line b, and enter the resulting administrative expense.		
	a.	Projected average monthly Chapter 13 plan payment.	\$
	b.	Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	x
	c.	Average monthly administrative expense of Chapter 13 case.	Total: Multiply Lines a and b
		\$	
42	Total Deductions for Debt Payment. Enter the total of Lines 38 through 41.	\$	
Subpart D: Total Deductions Allowed under § 707(b)(2)			
43	Total of all deductions allowed under § 707(b)(2). Enter the total of Lines 29, 37, and 42.	\$	

Part IV. DETERMINATION OF DISPOSABLE INCOME UNDER § 1325(b)(2)

44	Total current monthly income. Enter the amount from Line 11.	\$
45	Support income. Enter the monthly average of any child support payments, foster care payments, or disability payments for a dependent child, included in Line 7, that you received in accordance with applicable nonbankruptcy law, to the extent reasonably necessary to be expended for such child.	\$
46	Qualified retirement deductions. Enter the monthly average of (a) all contributions or wage deductions made to qualified retirement plans, as specified in § 541(b)(7) and (b) all repayments of loans from retirement plans, as specified in § 362(b)(19).	\$
47	Total of all deductions allowed under § 707(b)(2). Enter the amount from Line 43.	\$
48	Total adjustments to determine disposable income. Add the amounts on Lines 45, 46, and 47 and enter the result.	\$
49	Monthly Disposable Income Under § 1325(b)(2). Subtract Line 48 from Line 44 and enter the result.	\$

Part V: ADDITIONAL EXPENSE CLAIMS

50	Other Expenses. List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.	
	Expense Description	Monthly Amount
	a.	\$
	b.	\$
	c.	\$
	Total: Add Lines a, b, and c	
		\$

Part VI: VERIFICATION

51	I declare under penalty of perjury that the information provided in this statement is true and correct. <i>(If this a joint case, both debtors must sign.)</i>	
	Date: _____	Signature: _____ (Debtor)
	Date: _____	Signature: _____ (Joint Debtor, if any)

FILING ISSUES UNDER THE BANKRUPTCY ACT OF 2005

Moderator:

***Jerry D. Truitt, Esq., Clerk of Court
U.S. Bankruptcy Court (E.D. of Kentucky)
Lexington, Kentucky***

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U.S. Bankruptcy Court (W.D. of Kentucky)
Louisville, Kentucky***

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SECTION E

FILING ISSUES UNDER THE BANKRUPTCY ACT OF 2005

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NEW DEFINITION OF WHO MAY BE A DEBTOR:

Amended §109 (attached)

- §109(a) – no changes
- §109(b) – minor changes – foreign banks and certain foreign insurance companies can be debtors
- §109(c) – (e) – no changes
- §109(f) – family fishermen can now file chapter 12 bankruptcy
- §109(g) – no changes
- §109(h) – entirely new section
- §109(h)(1) – individual cannot be a debtor unless they have received a briefing from an approved nonprofit credit counseling agency within 180 days prior to filing bankruptcy. This counseling:
 - must outline available credit counseling
 - must assist the individual in analyzing their budget
 - can be in a group setting
 - can be by telephone
 - can be over the internet
- §109(h)(2)(A) – there is an exception if the US Trustee or BA declare that no agency in the district is able to provide adequate counseling
- §109(h)(2)(B) -- The US Trustee or BA approves the agencies and must review their approvals annually, but may disapprove an agency at any time.
- §109(h)(3)(A) – Short term exception if debtor files a certification:
 - showing exigent circumstances exist that merit waiver, or
 - showing that debtor requested but was not able to obtain counseling for 5 days after the request was made, and
 - that is satisfactory to the court

- §109(h)(3)(B) – If debtor uses the above short term exception, they still must comply and get the counseling within 30 days (or 45 with a court ordered extension) after filing for bankruptcy
- §109(h)(4) – the only real exception is if, after notice and a hearing, the court determines that the debtor is:
 - so incapacitated that they cannot make rational decisions regarding finances, or
 - so disabled they are unable to receive the counseling in person, by phone or over the internet, or
 - in active duty in a military combat zone

NEW NOTICING PROVISIONS:

Amended §342 (attached)

- §342(a) – no change -- notice of entry of order for relief
- §342(b) - before case is filed, clerk has to give notice of chapters – including:
 - the purpose, benefits and costs of proceeding under each chapter
 - the types of services that are available from credit counseling agencies
 - warning that false statements or concealing assets is grounds for a fine or imprisonment or both
 - warning that all information “**supplied by a debtor**” in a case may be examined by the Attorney General
- §342(c)(1) - if notice is required to be given “**by the debtor**” to a creditor, the notice must contain the debtor name, address and last 4 digits of the SSN
- §342(c)(2) – if creditor sends 2 notices during 90 days prior to bankruptcy with account number and with address which creditor requests to receive correspondence, then any notice required to be sent “**by the debtor**” must be sent to this address and must include the account number

- §342(c)(2) – if creditor can't send 2 notices during 90 days prior to bankruptcy due to nonbankruptcy law, then last 2 notices before the 90 days must be reviewed to see if they have an account number and an address which creditor requests to receive correspondence at, then any notice required to be sent **“by the debtor”** must be sent to this address and must include the account number
- §342(c)(2) – if the notice is due to an amendment adding a creditor, **“the debtor”** must include the full SSN in the notice sent to the creditor, but must include only the last 4 digits of the SSN in the copy filed with the court.
- §342(d) – If the debtor “flunks” the “means test”, then, not later than 10 days after the Ch. 7 petition is filed, the **clerk's office** must send notice to all creditors that it is presumed that the debtor is abusing the bk laws by filing chapter 7.
- §342(e) – In a 7 or 13, a creditor may at any time file a notice with the court and debtor of an address to be used for the creditor in that case.
 - Six days later, the **court** and **debtor/debtor's attorney** must be using the new address for mailings.
- §342(f) - Creditor can give any court a preferred address(es) to use for noticing including a specific subdivision and/or a specific person's attention
 - Address can be national for all notices and all bk courts
 - Address can be regional for notices in that area
 - Address can be by district/court for cases filed in that area
 - 31 days later, notices must go to correct address(es)
 - Specific case addresses trump a national/regional/etc. address
 - Version 2.7 is changing CM/ECF so that when a party pulls up a creditor list, the system will check with the BNC to see if there is a preferred address on file and a pdf document will be returned momentarily with address labels with the correct addresses substituted (except for case specific ones). The BNC's computer will do a comparison, and, If in doubt, the notice goes to both the address provided by the debtor and the preferred address.

- When a preferred address request is made to our court, we will either direct the creditor to the BNC website or phone number or we will forward the request to the BNC.
 - The creditor will be able to sign up directly on-line at the BNC website.
 - Once the BNC is aware of the request, they will contact the creditor regarding electronic noticing alternatives (**EBN**)
 - Available EBN alternatives include EDI (the BNC computer talks to the creditor computer). Also, e-mail or fax noticing are available.
- §342(f) – The creditor can withdraw the preferred address
 - §342(g) – If **debtor** or **the court** sends a notice and it doesn't comply with creditor request, then it is ineffective until brought to creditor's attention.
 - Until the specific person or subdivision designated receives the notice, it will not have been brought to the creditor's attention.
 - What are the consequences if the notice is ineffective?
 - If it is a notice that an order for relief has been entered, the creditor can violate the automatic stay without fear of any monetary penalties.
 - For other notices, §342 is silent as to the consequences.

Amended FRBP 2002(g) is effective 12/1/05 (**attached**)

- FRBP 2002(g)(1):
 - 2002 notices must be addressed as last requested in the case by the entity
 - A proof of claim is a request unless it is filed in a no-asset case
 - A proof of interest filed by an equity security holder is a request
 - Other than those two listed items, it is unclear in both the code and the amended FRBP what exactly constitutes a request
- FRBP 2002(g)(2) – If no request is made, then notice will be sent to creditor as listed on the creditor matrix or debtor's schedules (**whichever is filed later**) or as listed on the list of equity security holders.

- FRBP 2002(g)(3) – notice will be sent to both the legal representative of an infant or incompetent as listed in schedules and to the requested address unless the legal representative is the one who made the address change request.
- §342(g)(4) – The entity and an AO approved notice provider (**BNC**) can agree as to where and how notice will be supplied and that will be the proper means to provide notice.
 - Even if the BNC then doesn't use the agreed upon procedure (**such as a form of EBN**), the notice is not invalidated.

NOTE: The Advisory Committee on Bankruptcy Rules has determined that the Act and the rule changes are different and can co-exist (5/10-11/05 Bankruptcy Noticing Working Group minutes)

NEW DEBTOR (DEBTOR ATTORNEY) DUTIES:

Amended §521 (**attached**)

- §521(a)(1) – Debtor must file the following:
 - a list of creditors,
 - a schedule of assets and liabilities,
 - a schedule of current income and expenses,
 - a statement of financial affairs, and
 - if debtor is an individual with primarily consumer debts, a certificate showing:
 - that the attorney/petition preparer delivered the §342(b) Clerk's Notice (re: available chapters, etc.) to the debtor,
- or
- if pro se, that the debtor received the §342(b) Clerk's Notice and read it
- copies of all payment "advices" or other evidence of payment by all employers of debtor for 60 days prior to filing date
- an itemized statement showing calculations of monthly net income

- a statement disclosing any expected increase in income or increase in expenses during 12 months after bankruptcy is filed
- §521(a)(2)(A) – if an individual's schedules show debts of any kind (**used to be just consumer**), which are secured by property of the estate, the debtor must file a statement of his intention with regard to the property by the 341 meeting or within 30 days after filing (**whichever is earlier**)
- §521(a)(2)(B) – by 30 days after the “date first set” for the meeting of creditors (or longer if request is made and granted prior to 30 days expiring), debtor must perform his stated intentions
- §521(a)(2)(C) – Debtors and trustees still retain their rights with regard to the property, but automatic stay is terminated if debtor fails to perform the above 2 steps unless:
 - the trustee proves the property has consequential value to the estate and adequate protection is provided to the creditor, or
 - the debtor tries to reaffirm and the creditor refuses
- §521(a)(3) – debtor must cooperate with trustee or auditor (if appointed) to enable them to perform their duties
- §521(a)(4) – debtor must turnover all records, documents and papers relating to the estate to a trustee or auditor (if appointed) regardless of whether immunity has been granted
- §521(a)(5) – debtor must appear at a discharge hearing (if held) and at a hearing regarding entering into a Reaffirmation Agreement (if debtor is pro se)
- §521(a)(6) – debtor must turnover any personal property secured by a PMSI within 45 days after the meeting of creditors (**code doesn't indicate if it is the date first set or the conclusion**) unless they have entered into a reaffirmation agreement or redeemed the property. If debtor fails to act within the 45 days, then the stay is terminated unless the trustee proves the property has consequential value to the estate and adequate protection is provided to the creditor.
- §521(a)(7) – unless a trustee has been appointed, the debtor must continue to perform the obligations required of an ERISA administrator for any employee benefit plan if they or their designee were serving as the administrator at the time the case was filed.
- §521(b) – an individual debtor must file with the court:

- a certificate from the approved credit counseling agency that describes the services provided to the debtor, and
- a copy of any debt repayment plan developed during the counseling
- §521(c) – debtor must file a record of any interest the debtor has in:
 - an education IRA, or
 - a qualified state tuition program
- §521(d) –if the debtor fails to timely take any of the actions previously mentioned, or to assume the lease as referred to in §362(h), then, if the original lease or agreement entered into by the debtor contains a clause that states that filing bankruptcy is a default under the lease/agreement, then nothing in this subsection limits the enforcement of such a provision.
- §521(e)(1) – states that creditor can get copies of petition, schedules, etc.
- §521(e)(2)(A) – at least 7 days prior to the “date first set” for the meeting of creditors, a debtor must give:
 - the trustee a copy of the most recent income tax return that the debtor filed prior to filing bankruptcy or a transcript of the return, and
 - at the same time, must give a copy of the return/transcript to any creditor who has requested one
- §521(e)(2)(B) – case will be dismissed if debtor doesn’t provide tax return/transcript to trustee unless it is due to circumstances beyond the debtor’s control
- §521(e)(2)(C) – case will be dismissed if debtor doesn’t provide tax return/transcript to requesting creditor at same time it is provided to trustee unless it is due to circumstances beyond the debtor’s control
- §521(e)(3) – within 5 days of a request by a creditor, court must provide a copy of the Ch. 13 plan for a reasonable cost
- §521(f)(1) – (3) – in all cases (except Ch. 12), **at the request** (not automatically) of the court, the US Trustee, or any party in interest, the debtor must file with the court:
 - each federal income tax return/transcript **required** by applicable law and filed with the taxing authority for each tax year that ends while a case is pending.

- each federal income tax return/transcript **required** by applicable law for each tax year that ended 3 years prior to bankruptcy which had not been filed before the bankruptcy but is filed with the taxing authority during the bankruptcy.
- any amendments to the above tax returns
- §521(f)(4) – a Ch. 13 debtor must file a statement under penalty of perjury of the income and expenses from the tax year just ended, and a statement of monthly income showing how month income and expenses were calculated within:
 - 90 days after the first tax year ends (or up to 1 year after the case is filed if there has been no plan confirmed yet), and
 - annually, after the plan is confirmed, until the case is closed
 - The annual statements must be filed 45 days before the anniversary of the confirmation date.
- §521(g)(1) – the statements referred to above must disclose:
 - the amount and sources of income
 - the identity of persons who are also responsible for the support of any dependent of the debtor
 - the identity of any person who contributed to the household in which the debtor resides and the amount they contributed
- §521(g)(2) – the tax returns/transcripts, amended returns/transcripts, and statements referred to above can be inspected and copied by the US Trustee or BA, the trustee, and any party in interest subject to privacy limitations
- §521(h) – if requested by US Trustee or trustee, a debtor must provide documentation establishing their identity
- §521(i)(1) – if the debtor does not file the documentation required by §521(a)(1) within 45 days, on the 46th day, the case will be automatically dismissed without following the normal §707(a) procedure of having notice and a hearing first
- §521(i)(2) – even though the case was automatically dismissed, any party in interest may request that an Order of Dismissal be entered and the court must do so within 5 days of the request

- §521(i)(3) – if the debtor requests an extension before the 45 days have expired, the court may grant the debtor up to an additional 45 days to file the required documents if it is justified
- §521(i)(4) – if a trustee files a motion requesting that the case not be dismissed before the 45 days have expired, the court, after notice and a hearing, may decline to dismiss the case if:
 - the court finds the debtor made a good faith attempt to provide the documents, and
 - it is in the best interest of the creditors to administer the case
- §521(j)(1) – if the debtor doesn't stay current on filing tax returns/extensions that become due after the bankruptcy is filed, the taxing authority can request that the case be converted or dismissed
- §521(j)(2) – if the debtor still isn't current on filing tax returns/extensions within 90 days after the taxing authority requests dismissal or conversion, the court will determine what is in the best interest of the creditors and then convert or dismiss the case

TAX RETURN REQUIREMENTS FOR CH. 13 DEBTORS IN ADDITION TO THOSE IN §521:

New §1308 (attached)

- §1308(a) – At least one day before the “date first set” for the meeting of creditors, the debtor must file with the taxing authorities all tax returns for all taxable periods ending during the 4 year period ending on the date of filing of the bankruptcy
- §1308(b)(1) – if the required tax returns have not been filed by the “date first set” for the meeting of creditors, the trustee **may** hold open the meeting to give the debtor additional time to file as follows:
 - an additional 120 days for returns that are past due
 - an additional 120 days or the date that the return is due under the last automatic extension requested by the debtor (**whichever is later**) if the return is not past due
- §1308(b)(2) – the court may extend the time 30 days beyond the time allowed by the trustee for returns that are past due in the following circumstances:

- if the debtor can show by a “preponderance of evidence” that the failure to file a return was due to circumstances beyond the debtor’s control, and
- if the request for the extension of time, and the holding of the hearing, and the entry of the order all occur prior to the above deadlines expiring
- §1308(c) – defines “return” broadly to include federal, state, local, and other tax returns even if prepared by the taxing authorities because the individual failed to prepare the return

NEW US TRUSTEE AND CASE TRUSTEE DUTIES:

Amended §704 (attached)

- §704(a)(1) – (9) – Unchanged
- §704(a)(10) – if someone has a claim against the debtor for domestic support obligations, the trustee must provide a detailed notice. **(the requirements for this notice are described further down in the materials under §704(c))**
- §704(a)(11) -- the trustee must perform the obligations required of an ERISA administrator for any employee benefit plan if the debtor or a designee of the debtor was serving as the administrator at the time the case was filed.
- §704(a)(12) – if the debtor is a health care business that is closing, the trustee must use their best efforts to transfer patients to an alternate health care facility that:
 - is in the vicinity of the one closing, and
 - provides substantially similar services, and
 - maintains a reasonable quality of care
- §704(b)(1) – if the debtor is an individual chapter 7 debtor, the US Trustee will review all materials filed and, within 10 days after the meeting of creditors, will file with the court a statement as to whether the case should be presumed to be an abuse under §707(b) and the court will serve a copy of the statement on all creditors within 5 days after receiving the US

Trustee statement. (The code is not clear if it is the "date first set" or the conclusion of the meeting of creditors that triggers the 10 day deadline.)

- §704(b)(2) – within 30 days after the statement referred to above was filed, the US Trustee must either file a motion to convert or dismiss or must file a statement as to why such a motion would not be appropriate even though the debtor's income is above the state medians
- §704(c)(1)(A) and (B) – **although §704(a)(10) only refers to one notice, this subsection describes 2 notices.** If there is a claim against the debtor for domestic support obligations, then the following notices referred to in §704(a)(10), must be sent by the trustee:
 - a notice to the holder of the claim that includes the following:
 - statement that the holder has the right to use the services of the state child support enforcement agency to collect child support during and after the bankruptcy case
 - the address and telephone number of the state child support enforcement agency
 - explanation of the rights of the holder to payment of the claim while debtor is in Ch. 7 bankruptcy
 - a notice to the state child enforcement agency that includes the following:
 - notice that the claim exists, and
 - the name, address and telephone number of the holder of the claim
- §704(c)(1)(C) – if the debtor receives a discharge, the trustee must send a notice to the holder of the claim and to the state child support enforcement agency that includes the following:
 - the fact that a discharge was granted
 - the last known recent address of the debtor
 - the name and address of the last known employer of the debtor
 - the name of each creditor that holds a claim that was not
 - discharged by the bankruptcy or that was reaffirmed by the debtor

- §704(c)(2) – the holder of a domestic support obligation or the state child support enforcement agency can request the last known address of the debtor from any of the creditors whose claims were not discharged by the bankruptcy or with whom the debtor reaffirmed a debt and the creditor cannot be held liable for disclosing the address

OTHER FILING CHANGES EFFECTIVE DECEMBER 1, 2005:

Several Federal Rules of Bankruptcy Procedure have been amended and become effective December 1, 2005. **(attached)**

These are not the new proposed Interim Federal Rules of Bankruptcy Procedure, but are amendments to current rules of bankruptcy procedure that went through the 3-year approval process and become effective December 1, 2005.

WEBSITES REGARDING THE BANKRUPTCY ACT OF 2005

U.S. Courts website where proposed Interim Rules and Forms are located:

<http://www.uscourts.gov/rules>

IRS Collection Standards site:

<http://www.irs.gov/individuals/article/0,,id=96543,00.html>

Census Bureau's Median Income by State site:

<http://www.census.gov/>

American Bankruptcy Institute's site:

<http://abiworld.net/bankbill/>

Bankruptcy Noticing Center site for registering preferred addresses:

www.NCRSuscourts.com

FLOWCHART

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Presumption of Abuse

Time Line

FILING OF PETITION

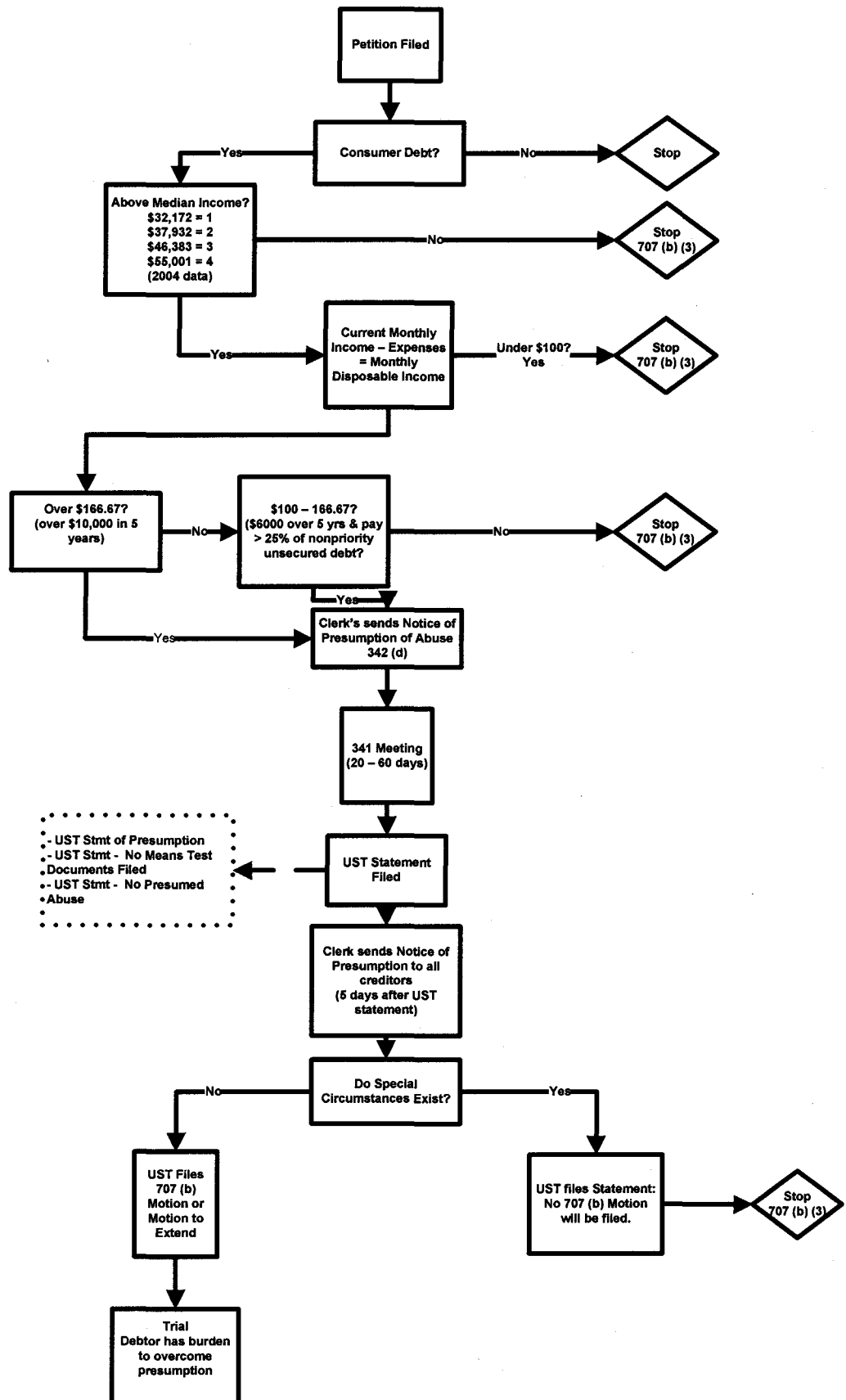
10 Days after Filing of Petition

46th day after Filing of Petition
Automatic Dismissal if no documents

10 days after 341 held

30 days after UST Statement of Presumption

60 days after 341 Meeting
Deadline for 727 & 707(a) and 707 (b) (3)



The following code sections were extracted from:

**Redline of Titles 11, 28, and 18, United States Code,
from current law (as of January 1, 2005)**

as enacted by

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

Pub. L. 109-8, 119 Stat. 23, enacted April 20, 2005

(Does not include amendments to other laws)

Last updated on April 20, 2005

§ 108. Extension of time

(a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of—

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
- (2) two years after the order for relief.

(b) Except as provided in subsection (a) of this section, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1201 or 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of—

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
- (2) 60 days after the order for relief.

(c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
- (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

§ 109. Who may be a debtor

(a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.

(b) A person may be a debtor under chapter 7 of this title only if such person is not—

- (1) a railroad;
- (2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, a New Markets Venture Capital company as defined in section 351 of the Small Business Investment Act of 1958, a small business investment company licensed by the Small Business Administration under ~~subsection (c) or (d) of~~ section 301 of the Small Business Investment Act of 1958, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act, except that an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor if a petition is filed at the direction of the Board of Governors of the Federal Reserve System; or

~~(3)(A) a foreign insurance company, engaged in such business in the United States; or~~
~~(B) a foreign bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business that has a branch or agency (as defined in section 1(b) of the International Banking Act of 1978) in the United States.~~

(c) An entity may be a debtor under chapter 9 of this title if and only if such entity—

- (1) is a municipality;
- (2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter;
- (3) is insolvent;
- (4) desires to effect a plan to adjust such debts; and
- (5)(A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;
(B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

- (C) is unable to negotiate with creditors because such negotiation is impracticable; or
(D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section

547 of this title.

(d) Only a railroad, a person that may be a debtor under chapter 7 of this title (except a stockbroker or a commodity broker), and an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor under chapter 11 of this title.

(e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than \$250,000⁸ and noncontingent, liquidated, secured debts of less than \$750,000,⁹ or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than \$250,000¹⁰ and noncontingent, liquidated, secured debts of less than \$750,000¹¹ may be a debtor under chapter 13 of this title.

(f) Only a family farmer or family fisherman with regular annual income may be a debtor under chapter 12 of this title.

(g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if—

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or

(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

(h)(1) Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section, an individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

(2)(A) Paragraph (1) shall not apply with respect to a debtor who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved nonprofit budget and credit counseling agencies for such district are not reasonably able to provide adequate services to the additional individuals who would otherwise seek credit counseling from such agencies by reason of the requirements of paragraph (1).

(B) The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in subparagraph (A) shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter. Notwithstanding the preceding sentence, a nonprofit budget and credit counseling agency may be disapproved by the United States trustee (or the bankruptcy administrator, if any) at any time.

(3)(A) Subject to subparagraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that—

(i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1);

(ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 5-day period beginning on the date on which the debtor made that request; and

(iii) is satisfactory to the court.

(B) With respect to a debtor, an exemption under subparagraph (A) shall cease to apply to that debtor on the date on which the debtor meets the requirements of paragraph (1), but in no case may the exemption apply to that debtor after the date that is 30 days after the debtor files a petition, except that the court, for cause, may order an additional 15 days.

(4) The requirements of paragraph (1) shall not apply with respect to a debtor whom the court determines, after notice and hearing, is unable to complete those requirements because of incapacity, disability, or active military duty in a military combat zone. For the purposes of this paragraph, incapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with

⁸ Under section 104, Adjustment of dollar amounts, currently \$307,675.

⁹ Under section 104, Adjustment of dollar amounts, currently \$922,975.

¹⁰ Under section 104, Adjustment of dollar amounts, currently \$307,675.

¹¹ Under section 104, Adjustment of dollar amounts, currently \$922,975.

respect to his financial responsibilities; and "disability" means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing required under paragraph (1).

§ 110. Penalty for persons who negligently or fraudulently prepare bankruptcy petitions

(a) In this section—

(1) "bankruptcy petition preparer" means a person, other than an attorney or an employee of an attorney, for the debtor or an employee of such attorney under the direct supervision of such attorney, who prepares for compensation a document for filing; and

(2) "document for filing" means a petition or any other document prepared for filing by a debtor in a United States bankruptcy court or a United States district court in connection with a case under this title.

(b)(1) A bankruptcy petition preparer who prepares a document for filing shall sign the document and print on the document the preparer's name and address. If a bankruptcy petition preparer is not an individual, then an officer, principal, responsible person, or partner of the bankruptcy petition preparer shall be required to—

(A) sign the document for filing; and

(B) print on the document the name and address of that officer, principal, responsible person or partner.

(2) A bankruptcy petition preparer who fails to comply with paragraph (1) may be fined not more than \$500 for each such failure unless the failure is due to reasonable cause.

(2)(A) Before preparing any document for filing or accepting any fees from a debtor, the bankruptcy petition preparer shall provide to the debtor a written notice which shall be on an official form prescribed by the Judicial Conference of the United States in accordance with rule 9009 of the Federal Rules of Bankruptcy Procedure.

(B) The notice under subparagraph (A)—

(i) shall inform the debtor in simple language that a bankruptcy petition preparer is not an attorney and may not practice law or give legal advice;

(ii) may contain a description of examples of legal advice that a bankruptcy petition preparer is not authorized to give, in addition to any advice that the preparer may not give by reason of subsection (e)(2); and

(iii) shall—

(I) be signed by the debtor and, under penalty of perjury, by the bankruptcy petition preparer; and

(II) be filed with any document for filing.

(c)(1) A bankruptcy petition preparer who prepares a document for filing shall place on the document, after the preparer's signature, an identifying number that identifies individuals who prepared the document.

(2)(A) Subject to subparagraph (B), for For purposes of this section, the identifying number of a bankruptcy petition preparer shall be the Social Security account number of each individual who prepared the document or assisted in its preparation.

(B) If a bankruptcy petition preparer is not an individual, the identifying number of the bankruptcy petition preparer shall be the Social Security account number of the officer, principal, responsible person, or partner of the bankruptcy petition preparer.

(3) A bankruptcy petition preparer who fails to comply with paragraph (1) may be fined not more than \$500 for each such failure unless the failure is due to reasonable cause.

(d)(1) A bankruptcy petition preparer shall, not later than the time at which a document for filing is presented for the debtor's signature, furnish to the debtor a copy of the document.

(2) A bankruptcy petition preparer who fails to comply with paragraph (1) may be fined not more than \$500 for each such failure unless the failure is due to reasonable cause.

(e)(1) A bankruptcy petition preparer shall not execute any document on behalf of a debtor.

(2)(A) A bankruptcy petition preparer may not offer a potential bankruptcy debtor any legal advice, including any legal advice described in subparagraph (B).

(B) The legal advice referred to in subparagraph (A) includes advising the debtor—

(i) whether—

(I) to file a petition under this title; or

(II) commencing a case under chapter 7, 11, 12, or 13 is appropriate;

(ii) whether the debtor's debts will be discharged in a case under this title;

(iii) whether the debtor will be able to retain the debtor's home, car, or other property after commencing a case under this title;

(iv) concerning—

(I) the tax consequences of a case brought under this title; or

§ 341. Meetings of creditors and equity security holders

(a) Within a reasonable time after the order for relief in a case under this title, the United States trustee shall convene and preside at a meeting of creditors.

(b) The United States trustee may convene a meeting of any equity security holders.

(c) The court may not preside at, and may not attend, any meeting under this section including any final meeting of creditors. Notwithstanding any local court rule, provision of a State constitution, any otherwise applicable nonbankruptcy law, or any other requirement that representation at the meeting of creditors under subsection (a) be by an attorney, a creditor holding a consumer debt or any representative of the creditor (which may include an entity or an employee of an entity and may be a representative for more than 1 creditor) shall be permitted to appear at and participate in the meeting of creditors in a case under chapter 7 or 13, either alone or in conjunction with an attorney for the creditor. Nothing in this subsection shall be construed to require any creditor to be represented by an attorney at any meeting of creditors.

(d) Prior to the conclusion of the meeting of creditors or equity security holders, the trustee shall orally examine the debtor to ensure that the debtor in a case under chapter 7 of this title is aware of—

(1) the potential consequences of seeking a discharge in bankruptcy, including the effects on credit history;

(2) the debtor's ability to file a petition under a different chapter of this title;

(3) the effect of receiving a discharge of debts under this title; and

(4) the effect of reaffirming a debt, including the debtor's knowledge of the provisions of section

524(d) of this title.

(e) Notwithstanding subsections (a) and (b), the court, on the request of a party in interest and after notice and a hearing, for cause may order that the United States trustee not convene a meeting of creditors or equity security holders if the debtor has filed a plan as to which the debtor solicited acceptances prior to the commencement of the case.

§ 342. Notice

(a) There shall be given such notice as is appropriate, including notice to any holder of a community claim, of an order for relief in a case under this title.

(b) ~~Prior to~~ Before the commencement of a case under this title by an individual whose debts are primarily consumer debts, the clerk shall give to such individual written notice to such individual that indicates each chapter of this title under which such individual may proceed containing—

(1) a brief description of—

(A) chapters 7, 11, 12, and 13 and the general purpose, benefits, and costs of proceeding under each of those chapters; and

(B) the types of services available from credit counseling agencies; and

(2) statements specifying that—

(A) a person who knowingly and fraudulently conceals assets or makes a false oath or statement under penalty of perjury in connection with a case under this title shall be subject to fine, imprisonment, or both; and

(B) all information supplied by a debtor in connection with a case under this title is subject to examination by the Attorney General.

(c) (1) If notice is required to be given by the debtor to a creditor under this title, any rule, any applicable law, or any order of the court, such notice shall contain the name, address, and last 4 digits of the taxpayer identification number of the debtor, but the failure of such notice to contain such information shall not invalidate the legal effect of such notice.

(2)(A) If, within the 90 days before the commencement of a voluntary case, a creditor supplies the debtor in at least 2 communications sent to the debtor with the current account number of the debtor and the address at which such creditor requests to receive correspondence, then any notice required by this title to be sent by the debtor to such creditor shall be sent to such address and shall include such account number.

(B) If a creditor would be in violation of applicable nonbankruptcy law by sending any such communication within such 90-day period and if such creditor supplies the debtor in the last 2 communications with the current account number of the debtor and the address at which such creditor requests to receive correspondence, then any notice required by this title to be sent by the debtor to such creditor shall be sent to such address and shall include such account number.

If the notice concerns an amendment that adds a creditor to the schedules of assets and liabilities, the debtor shall include the full taxpayer identification number in the notice sent to that creditor, but the debtor shall include only the last 4 digits of the taxpayer identification number in the copy of the notice filed with the court.

(d) In a case under chapter 7 of this title in which the debtor is an individual and in which the presumption of abuse arises under section 707(b), the clerk shall give written notice to all creditors not later than 10 days after the date of the filing of the petition that the presumption of abuse has arisen.

(e)(1) In a case under chapter 7 or 13 of this title of a debtor who is an individual, a creditor at any time may both file with the court and serve on the debtor a notice of address to be used to provide notice in such case to such creditor.

(2) Any notice in such case required to be provided to such creditor by the debtor or the court later than 5 days after the court and the debtor receive such creditor's notice of address, shall be provided to such address.

(f)(1) An entity may file with any bankruptcy court a notice of address to be used by all the bankruptcy courts or by particular bankruptcy courts, as so specified by such entity at the time such notice is filed, to provide notice to such entity in all cases under chapters 7 and 13 pending in the courts with respect to which such notice is filed, in which such entity is a creditor.

(2) In any case filed under chapter 7 or 13, any notice required to be provided by a court with respect to which a notice is filed under paragraph (1), to such entity later than 30 days after the filing of such notice under paragraph (1) shall be provided to such address unless with respect to a particular case a different address is specified in a notice filed and served in accordance with subsection (e).

(3) A notice filed under paragraph (1) may be withdrawn by such entity.

(g)(1) Notice provided to a creditor by the debtor or the court other than in accordance with this section (excluding this subsection) shall not be effective notice until such notice is brought to the attention of such creditor. If such creditor designates a person or an organizational subdivision of such creditor to be responsible for receiving notices under this title and establishes reasonable procedures so that such notices receivable by such creditor are to be delivered to such person or such subdivision, then a notice provided to such creditor other than in accordance with this section (excluding this subsection) shall not be considered to have been brought to the attention of such creditor until such notice is received by such person or such subdivision.

(2) A monetary penalty may not be imposed on a creditor for a violation of a stay in effect under section 362(a) (including a monetary penalty imposed under section 362(k)) or for failure to comply with section 542 or 543 unless the conduct that is the basis of such violation or of such failure occurs after such creditor receives notice effective under this section of the order for relief.

§ 343. Examination of the debtor

The debtor shall appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title. Creditors, any indenture trustee, any trustee or examiner in the case, or the United States trustee may examine the debtor. The United States trustee may administer the oath required under this section.

§ 344. Self-incrimination; immunity

Immunity for persons required to submit to examination, to testify, or to provide information in a case under this title may be granted under part V of title 18.

§ 345. Money of estates

(a) A trustee in a case under this title may make such deposit or investment of the money of the estate for which such trustee serves as will yield the maximum reasonable net return on such money, taking into account the safety of such deposit or investment.

(b) Except with respect to a deposit or investment that is insured or guaranteed by the United States or by a department, agency, or instrumentality of the United States or backed by the full faith and credit of the United States, the trustee shall require from an entity with which such money is deposited or invested—

(1) a bond—

(A) in favor of the United States;

(B) secured by the undertaking of a corporate surety approved by the United States trustee for the district in which the case is pending; and

(C) conditioned on—

(i) a proper accounting for all money so deposited or invested and for any return on such money;

(ii) prompt repayment of such money and return; and

§ 521. Debtor's duties

(a) The debtor shall—

(1) file —

(A) a list of creditors; and

(B) unless the court orders otherwise—

(i) a schedule of assets and liabilities;

(ii) a schedule of current income and current expenditures; and

(iii) a statement of the debtor's financial affairs and, if section 342(b) applies, a certificate—

(I) of an attorney whose name is indicated on the petition as the attorney for the debtor, or a bankruptcy petition preparer signing the petition under section 110(b)(1), indicating that such attorney or the bankruptcy petition preparer delivered to the debtor the notice required by section 342(b); or

(II) if no attorney is so indicated, and no bankruptcy petition preparer signed the petition, of the debtor that such notice was received and read by the debtor;

(iv) copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor;

(v) a statement of the amount of monthly net income, itemized to show how the amount is calculated; and

(vi) a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition;

(2) if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate—

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;

(B) within ~~forty-five days after the filing of a notice of intent under this section~~ 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such ~~forty-five~~ 30-day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and

(C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h);

(3) if a trustee is serving in the case or an auditor serving under section 586(f) of title 28,²⁶ cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;

(4) if a trustee is serving in the case or an auditor serving under section 586(f) of title 28, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title, and

(5) appear at the hearing required under section 524(d) of this title;

(6) in a case under chapter 7 of this title in which the debtor is an individual, not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either—

(A) enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or

(B) redeems such property from the security interest pursuant to section 722.

²⁶ Section 603(e) Effective Date.—The amendments made by this section [adding reference to an auditor in section 521(a)(3) and (4)] shall take effect 18 months after the date of enactment of this Act.

If the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law, unless the court determines on the motion of the trustee filed before the expiration of such 45-day period, and after notice and a hearing, that such property is of consequential value or benefit to the estate, orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee; and

(7) unless a trustee is serving in the case, continue to perform the obligations required of the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan if at the time of the commencement of the case the debtor (or any entity designated by the debtor) served as such administrator.

(b) In addition to the requirements under subsection (a), a debtor who is an individual shall file with the court—

(1) a certificate from the approved nonprofit budget and credit counseling agency that provided the debtor services under section 109(h) describing the services provided to the debtor; and

(2) a copy of the debt repayment plan, if any, developed under section 109(h) through the approved nonprofit budget and credit counseling agency referred to in paragraph (1).

(c) In addition to meeting the requirements under subsection (a), a debtor shall file with the court a record of any interest that a debtor has in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) or under a qualified State tuition program (as defined in section 529(b)(1) of such Code).

(d) If the debtor fails timely to take the action specified in subsection (a)(6) of this section, or in paragraphs (1) and (2) of section 362(h), with respect to property which a lessor or bailor owns and has leased, rented, or bailed to the debtor or as to which a creditor holds a security interest not otherwise voidable under section 542(f), 544, 545, 547, 548, or 549, nothing in this title shall prevent or limit the operation of a provision in the underlying lease or agreement that has the effect of placing the debtor in default under such lease or agreement by reason of the occurrence, pendency, or existence of a proceeding under this title or the insolvency of the debtor. Nothing in this subsection shall be deemed to justify limiting such a provision in any other circumstance.

(e)(1) If the debtor in a case under chapter 7 or 13 is an individual and if a creditor files with the court at any time a request to receive a copy of the petition, schedules, and statement of financial affairs filed by the debtor, then the court shall make such petition, such schedules, and such statement available to such creditor.

(2)(A) The debtor shall provide—

(i) not later than 7 days before the date first set for the first meeting of creditors, to the trustee a copy of the Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such return) for the most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return was filed; and

(ii) at the same time the debtor complies with clause (i), a copy of such return (or if elected under clause (i), such transcript) to any creditor that timely requests such copy.

(B) If the debtor fails to comply with clause (i) or (ii) of subparagraph (A), the court shall dismiss the case unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor.

(C) If a creditor requests a copy of such tax return or such transcript and if the debtor fails to provide a copy of such tax return or such transcript to such creditor at the time the debtor provides such tax return or such transcript to the trustee, then the court shall dismiss the case unless the debtor demonstrates that the failure to provide a copy of such tax return or such transcript is due to circumstances beyond the control of the debtor.

(3) If a creditor in a case under chapter 13 files with the court at any time a request to receive a copy of the plan filed by the debtor, then the court shall make available to such creditor a copy of the plan—

(A) at a reasonable cost; and

(B) not later than 5 days after such request is filed.

(f) At the request of the court, the United States trustee, or any party in interest in a case under chapter 7, 11, or 13, a debtor who is an individual shall file with the court—

(1) at the same time filed with the taxing authority, a copy of each Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such tax return) with respect to each tax year of the debtor ending while the case is pending under such chapter;

(2) at the same time filed with the taxing authority, each Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such tax return) that had not been filed with such

authority as of the date of the commencement of the case and that was subsequently filed for any tax year of the debtor ending in the 3-year period ending on the date of the commencement of the case;

(3) a copy of each amendment to any Federal income tax return or transcript filed with the court under paragraph (1) or (2); and

(4) in a case under chapter 13—

(A) on the date that is either 90 days after the end of such tax year or 1 year after the date of the commencement of the case, whichever is later, if a plan is not confirmed before such later date; and

(B) annually after the plan is confirmed and until the case is closed, not later than the date that is 45 days before the anniversary of the confirmation of the plan: a statement, under penalty of perjury, of the income and expenditures of the debtor during the tax year of the debtor most recently concluded before such statement is filed under this paragraph, and of the monthly income of the debtor, that shows how income, expenditures, and monthly income are calculated.

(e)(1) A statement referred to in subsection (f)(4) shall disclose—

(A) the amount and sources of the income of the debtor;

(B) the identity of any person responsible with the debtor for the support of any dependent of the debtor; and

(C) the identity of any person who contributed, and the amount contributed, to the household in which the debtor resides.

(2) The tax returns, amendments, and statement of income and expenditures described in subsections (e)(2)(A) and (f) shall be available to the United States trustee (or the bankruptcy administrator, if any), the trustee, and any party in interest for inspection and copying, subject to the requirements of section 315(c) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

(h) If requested by the United States trustee or by the trustee, the debtor shall provide—

(1) a document that establishes the identity of the debtor, including a driver's license, passport, or other document that contains a photograph of the debtor; or

(2) such other personal identifying information relating to the debtor that establishes the identity of the debtor.

(i)(1) Subject to paragraphs (2) and (4) and notwithstanding section 707(a), if an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition.

(2) Subject to paragraph (4) and with respect to a case described in paragraph (1), any party in interest may request the court to enter an order dismissing the case. If requested, the court shall enter an order of dismissal not later than 5 days after such request.

(3) Subject to paragraph (4) and upon request of the debtor made within 45 days after the date of the filing of the petition described in paragraph (1), the court may allow the debtor an additional period of not to exceed 45 days to file the information required under subsection (a)(1) if the court finds justification for extending the period for the filing.

(4) Notwithstanding any other provision of this subsection, on the motion of the trustee filed before the expiration of the applicable period of time specified in paragraph (1), (2), or (3), and after notice and a hearing, the court may decline to dismiss the case if the court finds that the debtor attempted in good faith to file all the information required by subsection (a)(1)(B)(iv) and that the best interests of creditors would be served by administration of the case.

(i)(1) Notwithstanding any other provision of this title, if the debtor fails to file a tax return that becomes due after the commencement of the case or to properly obtain an extension of the due date for filing such return, the taxing authority may request that the court enter an order converting or dismissing the case.

(2) If the debtor does not file the required return or obtain the extension referred to in paragraph (1) within 90 days after a request is filed by the taxing authority under that paragraph, the court shall convert or dismiss the case, whichever is in the best interests of creditors and the estate.

§ 522. Exemptions

(a) In this section—

(1) "dependent" includes spouse, whether or not actually dependent; and

SUBCHAPTER I—OFFICERS AND ADMINISTRATION

§ 701. Interim trustee

(a)(1) Promptly after the order for relief under this chapter, the United States trustee shall appoint one disinterested person that is a member of the panel of private trustees established under section 586(a)(1) of title 28 or that is serving as trustee in the case immediately before the order for relief under this chapter to serve as interim trustee in the case.

(2) If none of the members of such panel is willing to serve as interim trustee in the case, then the United States trustee may serve as interim trustee in the case.

(b) The service of an interim trustee under this section terminates when a trustee elected or designated under section 702 of this title to serve as trustee in the case qualifies under section 322 of this title.

(c) An interim trustee serving under this section is a trustee in a case under this title.

§ 702. Election of trustee

(a) A creditor may vote for a candidate for trustee only if such creditor—

(1) holds an allowable, undisputed, fixed, liquidated, unsecured claim of a kind entitled to distribution under section 726(a)(2), 726(a)(3), 726(a)(4), 752(a), 766(h), or 766(i) of this title;

(2) does not have an interest materially adverse, other than an equity interest that is not substantial in relation to such creditor's interest as a creditor, to the interest of creditors entitled to such distribution; and

(3) is not an insider.

(b) At the meeting of creditors held under section 341 of this title, creditors may elect one person to serve as trustee in the case if election of a trustee is requested by creditors that may vote under subsection (a) of this section, and that hold at least 20 percent in amount of the claims specified in subsection (a)(1) of this section that are held by creditors that may vote under subsection (a) of this section.

(c) A candidate for trustee is elected trustee if—

(1) creditors holding at least 20 percent in amount of the claims of a kind specified in subsection

(a)(1) of this section that are held by creditors that may vote under subsection (a) of this section vote; and

(2) such candidate receives the votes of creditors holding a majority in amount of claims specified in subsection (a)(1) of this section that are held by creditors that vote for a trustee.

(d) If a trustee is not elected under this section, then the interim trustee shall serve as trustee in the case.

§ 703. Successor trustee

(a) If a trustee dies or resigns during a case, fails to qualify under section 322 of this title, or is removed under section 324 of this title, creditors may elect, in the manner specified in section 702 of this title, a person to fill the vacancy in the office of trustee.

(b) Pending election of a trustee under subsection (a) of this section, if necessary to preserve or prevent loss to the estate, the United States trustee may appoint an interim trustee in the manner specified in section 701(a).

(c) If creditors do not elect a successor trustee under subsection (a) of this section or if a trustee is needed in a case reopened under section 350 of this title, then the United States trustee—

(1) shall appoint one disinterested person that is a member of the panel of private trustees established under section 586(a)(1) of title 28 to serve as trustee in the case; or

(2) may, if none of the disinterested members of such panel is willing to serve as trustee, serve as trustee in the case.

§ 704. Duties of trustee

(a) The trustee shall—

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;

(2) be accountable for all property received;

(3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title;

(4) investigate the financial affairs of the debtor;

(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;

(6) if advisable, oppose the discharge of the debtor;

(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;

(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires; and

(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee;

(10) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (c):

(11) if, at the time of the commencement of the case, the debtor (or any entity designated by the debtor) served as the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan, continue to perform the obligations required of the administrator; and

(12) use all reasonable and best efforts to transfer patients from a health care business that is in the process of being closed to an appropriate health care business that—

(A) is in the vicinity of the health care business that is closing;

(B) provides the patient with services that are substantially similar to those provided by the health care business that is in the process of being closed; and

(C) maintains a reasonable quality of care.

(b)(1) With respect to a debtor who is an individual in a case under this chapter—

(A) the United States trustee (or the bankruptcy administrator, if any) shall review all materials filed by the debtor and, not later than 10 days after the date of the first meeting of creditors, file with the court a statement as to whether the debtor's case would be presumed to be an abuse under section 707(b); and

(B) not later than 5 days after receiving a statement under subparagraph (A), the court shall provide a copy of the statement to all creditors.

(2) The United States trustee (or bankruptcy administrator, if any) shall, not later than 30 days after the date of filing a statement under paragraph (1), either file a motion to dismiss or convert under section 707(b) or file a statement setting forth the reasons the United States trustee (or the bankruptcy administrator, if any) does not consider such a motion to be appropriate, if the United States trustee (or the bankruptcy administrator, if any) determines that the debtor's case should be presumed to be an abuse under section 707(b) and the product of the debtor's current monthly income, multiplied by 12 is not less than—

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner; or

(B) in the case of a debtor in a household of 2 or more individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals.'

(c)(1) In a case described in subsection (a)(10) to which subsection (a)(10) applies, the trustee shall—

(A)(i) provide written notice to the holder of the claim described in subsection (a)(10) of such claim and of the right of such holder to use the services of the State child support enforcement agency established under sections 464 and 466 of the Social Security Act for the State in which such holder resides, for assistance in collecting child support during and after the case under this title;

(ii) include in the notice provided under clause (i) the address and telephone number of such State child support enforcement agency; and

(iii) include in the notice provided under clause (i) an explanation of the rights of such holder to payment of such claim under this chapter;

(B)(i) provide written notice to such State child support enforcement agency of such claim; and

(ii) include in the notice provided under clause (i) the name, address, and telephone number of such holder; and

(C) at such time as the debtor is granted a discharge under section 727, provide written notice to such holder and to such State child support enforcement agency of—

(i) the granting of the discharge;

(ii) the last recent known address of the debtor;

(iii) the last recent known name and address of the debtor's employer; and

(iv) the name of each creditor that holds a claim that—

(I) is not discharged under paragraph (2), (4), or (14A) of section 523(a); or

(II) was reaffirmed by the debtor under section 524(c).

(2)(A) The holder of a claim described in subsection (a)(10) or the State child support enforcement agency of the State in which such holder resides may request from a creditor described in paragraph (1)(C)(iv) the last known address of the debtor.

(B) Notwithstanding any other provision of law, a creditor that makes a disclosure of a last known address of a debtor in connection with a request made under subparagraph (A) shall not be liable by reason of making such disclosure.

§ 705. Creditors' committee

(a) At the meeting under section 341(a) of this title, creditors that may vote for a trustee under section 702(a) of this title may elect a committee of not fewer than three, and not more than eleven, creditors, each of whom holds an allowable unsecured claim of a kind entitled to distribution under section 726(a)(2) of this title.

(b) A committee elected under subsection (a) of this section may consult with the trustee or the United States trustee in connection with the administration of the estate, make recommendations to the trustee or the United States trustee respecting the performance of the trustee's duties, and submit to the court or the United States trustee any question affecting the administration of the estate.

§ 706. Conversion

(a) The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

(b) On request of a party in interest and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 of this title at any time.

(c) The court may not convert a case under this chapter to a case under chapter 12 or 13 of this title unless the debtor requests or consents to such conversion.

(d) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

§Sec. 707. Dismissal of a case or conversion to a case under chapter 11 or 13

(a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—

(1) unreasonable delay by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees or charges required under chapter 123 of title 28; and

(3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

(b)(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, ~~but not at the request or suggestion of trustee (or bankruptcy administrator, if any), or any party in interest,~~ may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an ~~substantial~~ abuse of the provisions of this chapter. ~~There shall be a presumption in favor of granting the relief requested by the debtor.~~ In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

(2)(A)(i) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of—

(I) 25 percent of the debtor's nonpriority unsecured claims in the case, or \$6,000, whichever is greater; or

(II) \$10,000.

(ii)(I) The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the order for relief, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent. Such expenses shall include reasonably necessary health insurance, disability insurance, and health savings account expenses for the debtor, the spouse of the debtor, or the

- (3) failure to file a plan timely under section 1321 of this title;
- (4) failure to commence making timely payments under section 1326 of this title;
- (5) denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;
- (6) material default by the debtor with respect to a term of a confirmed plan;
- (7) revocation of the order of confirmation under section 1330 of this title, and denial of confirmation of a modified plan under section 1329 of this title;
- (8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan;
- (9) only on request of the United States trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition commencing such case, the information required by paragraph (1) of section 521; ~~or~~
- (10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of section 521; or
- (11) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

(d) Except as provided in subsection (e) of this section, at any time before the confirmation of a plan under section 1325 of this title, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 or 12 of this title.

(e) Upon the failure of the debtor to file a tax return under section 1308, on request of a party in interest or the United States trustee and after notice and a hearing, the court shall dismiss a case or convert a case under this chapter to a case under chapter 7 of this title, whichever is in the best interest of the creditors and the estate.

(ef) The court may not convert a case under this chapter to a case under chapter 7, 11, or 12 of this title if the debtor is a farmer, unless the debtor requests such conversion.

(fg) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

§ 1308. Filing of prepetition tax returns

(a) Not later than the day before the date on which the meeting of the creditors is first scheduled to be held under section 341(a), if the debtor was required to file a tax return under applicable nonbankruptcy law, the debtor shall file with appropriate tax authorities all tax returns for all taxable periods ending during the 4-year period ending on the date of the filing of the petition.

(b)(1) Subject to paragraph (2), if the tax returns required by subsection (a) have not been filed by the date on which the meeting of creditors is first scheduled to be held under section 341(a), the trustee may hold open that meeting for a reasonable period of time to allow the debtor an additional period of time to file any unfiled returns, but such additional period of time shall not extend beyond—

(A) for any return that is past due as of the date of the filing of the petition, the date that is 120 days after the date of that meeting; or

(B) for any return that is not past due as of the date of the filing of the petition, the later of—

(i) the date that is 120 days after the date of that meeting; or

(ii) the date on which the return is due under the last automatic extension of time for filing that return to which the debtor is entitled, and for which request is timely made, in accordance with applicable nonbankruptcy law.

(2) After notice and a hearing, and order entered before the tolling of any applicable filing period determined under this subsection, if the debtor demonstrates by a preponderance of the evidence that the failure to file a return as required under this subsection is attributable to circumstances beyond the control of the debtor, the court may extend the filing period established by the trustee under this subsection for—

(A) a period of not more than 30 days for returns described in paragraph (1); and

(B) a period not to extend after the applicable extended due date for a return described in paragraph

(2).

(c) For purposes of this section, the term "return" includes a return prepared pursuant to subsection (a) or (b) of section 6020 of the Internal Revenue Code of 1986, or a similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal.

SUBCHAPTER II—THE PLAN

**AMENDMENTS TO THE
FEDERAL RULES OF
BANKRUPTCY PROCEDURES**

EFFECTIVE DECEMBER 1, 2005

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE****

Rule 1007. Lists, Schedules, and Statements; Time Limits

1 (a) LIST OF CREDITORS AND EQUITY SECURITY
2 HOLDERS, AND CORPORATE OWNERSHIP
3 STATEMENT.

4 (1) *Voluntary Case.* In a voluntary case, the debtor
5 shall file with the petition a list containing the name and
6 address of each creditor unless the petition is accompanied by
7 a schedule of liabilities entity included or to be included on
8 Schedules D, E, F, G, and H as prescribed by the Official
9 Forms. If the debtor is a corporation, other than a
10 governmental unit, the debtor shall file with the petition a
11 corporate ownership statement containing the information
12 described in Rule 7007.1. The debtor shall file a

**New material is underlined; matter to be omitted is lined through

FEDERAL RULES OF BANKRUPTCY PROCEDURE

13 supplemental statement promptly upon any change in
14 circumstances that renders the corporate ownership statement
15 inaccurate.

16 (2) *Involuntary Case.* In an involuntary case, the
17 debtor shall file within 15 days after entry of the order for
18 relief, a list containing the name and address of each creditor
19 ~~unless a schedule of liabilities has been filed~~ entity included
20 or to be included on Schedules D, E, F, G, and H as
21 prescribed by the Official Forms.

22 * * * * *

23 (c) TIME LIMITS. In a voluntary case, the The
24 schedules and statements, other than the statement of
25 intention, shall be filed with the petition ~~in a voluntary case,~~
26 ~~or if the petition is accompanied by a list of all the debtor's~~
27 ~~creditors and their addresses;~~ within 15 days thereafter, except
28 as otherwise provided in subdivisions (d), (e), (f), and (h) of
29 this rule. In an involuntary case, the list in subdivision (a)(2),

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30 and the schedules and statements, other than the statement of
31 intention, shall be filed by the debtor within 15 days of the
32 entry of the order for relief. ~~Schedules~~ Lists, schedules, and
33 statements filed prior to the conversion of a case to another
34 chapter shall be deemed filed in the converted case unless the
35 court directs otherwise. Any extension of time for the filing
36 of the schedules and statements may be granted only on
37 motion for cause shown and on notice to the United States
38 trustee and to any committee elected under § 705 or appointed
39 under § 1102 of the Code, trustee, examiner, or other party as
40 the court may direct. Notice of an extension shall be given to
41 the United States trustee and to any committee, trustee, or
42 other party as the court may direct.

* * * * *

44 (g) PARTNERSHIP AND PARTNERS. The general
45 partners of a debtor partnership shall prepare and file the list
46 required under subdivision (a), the schedules of the assets and

FEDERAL RULES OF BANKRUPTCY PROCEDURE

47 liabilities, schedule of current income and expenditures,
48 schedule of executory contracts and unexpired leases, and
49 statement of financial affairs of the partnership. The court
50 may order any general partner to file a statement of personal
51 assets and liabilities within such time as the court may fix.

52 * * * * *

COMMITTEE NOTE

Notice to creditors and other parties in interest is essential to the operation of the bankruptcy system. Sending notice requires a convenient listing of the names and addresses of the entities to whom notice must be sent, and virtually all of the bankruptcy courts have adopted a local rule requiring the submission of a list of these entities with the petition and in a particular format. These lists are commonly called the "mailing matrix."

Given the universal adoption of these local rules, the need for such lists in all cases is apparent. Consequently, the rule is amended to require the debtor to submit such a list at the commencement of the case. This list may be amended when necessary. *See* Rule 1009(a).

The content of the list is described by reference to Schedules D through H of the Official Forms rather than by reference to creditors or persons holding claims. The cross reference to the Schedules as the source of the names for inclusion in the list ensures that persons such as codebtors or nondebtor parties to executory contracts and unexpired leases will receive appropriate notices in the case.

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While this rule renders unnecessary, in part, local rules on the subject, this rule does not direct any particular format or form for the list to take. Local rules still may govern those particulars of the list.

Subdivision (c) is amended to reflect that subdivision (a)(1) no longer requires the debtor to file a schedule of liabilities with the petition in lieu of a list of creditors. The filing of the list is mandatory, and subdivision (b) of the rule requires the filing of schedules. Thus, subdivision (c) no longer needs to account for the possibility that the debtor can delay filing a schedule of liabilities when the petition is accompanied by a list of creditors. Subdivision (c) simply addresses the situation in which the debtor does not file schedules or statements with the petition, and the procedure for seeking an extension of time for filing.

Other changes are stylistic.

* * * * *

Changes Made After Publication and Comment:

No changes since publication.

Rule 3004. Filing of Claims by Debtor or Trustee

- 1 If a creditor ~~fails to file~~ does not timely file a proof of
- 2 claim under Rule 3002(c) or 3003(c), ~~on or before the first~~
- 3 date set for the meeting of creditors called pursuant to
- 4 § 341(a) of the Code, the debtor or trustee may do so in the

FEDERAL RULES OF BANKRUPTCY PROCEDURE

5 ~~name of the creditor, file a proof of the claim~~ within 30 days
6 after the expiration of the time for filing claims prescribed by
7 Rule 3002(c) or 3003(c), whichever is applicable. The clerk
8 shall forthwith mail give notice of the filing to the creditor,
9 the debtor and the trustee. ~~A proof of claim filed by a creditor~~
10 ~~pursuant to Rule 3002 or Rule 3003(c), shall supersede the~~
11 ~~proof filed by the debtor or trustee.~~

COMMITTEE NOTE

The rule is amended to conform to § 501(c) of the Code. Under that provision, the debtor or trustee may file proof of a claim if the creditor fails to do so in a timely fashion. The rule previously authorized the debtor and the trustee to file a claim as early as the day after the first date set for the meeting of creditors under § 341(a). Under the amended rule, the debtor and trustee must wait until the creditor's opportunity to file a claim has expired. Providing the debtor and the trustee with the opportunity to file a claim ensures that the claim will participate in any distribution in the case. This is particularly important for claims that are nondischargeable.

Since the debtor and trustee cannot file a proof of claim until after the creditor's time to file has expired, the rule no longer permits the creditor to file a proof of claim that will supersede the claim filed by the debtor or trustee. The rule leaves to the courts the issue of whether to permit subsequent amendment of such proof of claim.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Other changes are stylistic.

* * * * *

Changes Made After Publication and Comment:

No changes were made after publication. The Advisory Committee concluded that Mr. Van Allsburg's suggestion goes beyond the scope of the published proposal. Consequently, the Committee declined to adopt the suggestion but may consider it in greater detail at a future meeting.

Rule 3005. Filing of Claim, Acceptance, or Rejection by Guarantor, Surety, Indorser, or Other Codebtor

- 1 (a) FILING OF CLAIM. If a creditor does not timely file
2 has not filed a proof of claim under pursuant to Rule 3002(c)
3 or 3003(c), any entity that is or may be liable with the debtor
4 to that creditor, or who has secured that creditor, ~~may~~, may
5 file a proof of the claim within 30 days after the expiration of
6 the time for filing claims prescribed by Rule 3002(c) or Rule
7 3003(c) whichever is applicable, ~~execute and file a proof of~~
8 ~~claim in the name of the creditor, if known, or if unknown, in~~
9 ~~the entity's own name.~~ No distribution shall be made on the

FEDERAL RULES OF BANKRUPTCY PROCEDURE

10 claim except on satisfactory proof that the original debt will
11 be diminished by the amount of distribution. ~~A proof of~~
12 ~~claim filed by a creditor pursuant to Rule 3002 or 3003(c)~~
13 ~~shall supersede the proof of claim filed pursuant to the first~~
14 ~~sentence of this subdivision.~~

15 * * * * *

COMMITTEE NOTE

The rule is amended to delete the last sentence of subdivision (a). The sentence is unnecessary because if a creditor has filed a timely claim under Rule 3002 or 3003(c), the codebtor cannot file a proof of such claim. The codebtor, consistent with § 501(b) of the Code, may file a proof of such claim only after the creditor's time to file has expired. Therefore, the rule no longer permits the creditor to file a superseding claim. The rule leaves to the courts the issue of whether to permit subsequent amendment of the proof of claim.

The amendment conforms the rule to § 501(b) by deleting language providing that the codebtor files proof of the claim in the name of the creditor.

Other amendments are stylistic.

* * * * *

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Changes Made After Publication and Comment:

- (a) The reference on line 2 of Rule 3005 to "Rule 3002 or 3003(c)" was changed to read "Rule 3002(c) or 3003(c)" to make it parallel to the language in Rule 3004.
- (b) The phrase "file a proof of the claim" from line 7 of the proposed rule was moved up to line 4 of the proposed amendment immediately after the word "may". This makes the structure of Rules 3004 and 3005 more consistent.

Rule 4008. Discharge and Reaffirmation Hearing Filing of Reaffirmation Agreement

1 A reaffirmation agreement shall be filed not later than 30
2 days after the entry of an order granting a discharge or
3 confirming a plan in a chapter 11 reorganization case of an
4 individual debtor. The court, for cause, may extend the time,
5 and leave shall be freely given when justice so requires. Not
6 ~~more than 30 days following the entry of an order granting or~~
7 ~~denying a discharge, or confirming a plan in a chapter 11~~
8 ~~reorganization case concerning an individual debtor and on~~
9 ~~not less than 10 days notice to the debtor and the trustee, the~~
10 ~~court may hold a hearing as provided in § 524(d) of the Code.~~

FEDERAL RULES OF BANKRUPTCY PROCEDURE

- 11 ~~A motion by the debtor for approval of a reaffirmation~~
12 ~~agreement shall be filed before or at the hearing.~~

COMMITTEE NOTE

The rule is amended to establish a deadline for filing reaffirmation agreements. The Code sets out a number of prerequisites to the enforceability of reaffirmation agreements. Among those requirements are that the agreements be entered into prior to the discharge and that they be filed with the court. Since the parties must make their agreement prior to the entry of the discharge, they will have at least 30 days to file the agreement with the court. Requiring the filing of reaffirmation agreements by a certain deadline also serves to inform the court of the need to hold a hearing under § 524(d) whenever the agreement is not accompanied by an appropriate declaration or affidavit from counsel for the debtor.

The rule allows any party to the agreement to file it with the court. Thus, whichever party has a greater incentive to enforce the agreement usually will file it. In the event that the parties fail to timely file the reaffirmation agreement, the rule grants the court broad discretion to permit a late filing.

The rule also is amended by deleting the provisions formerly in the rule regarding the timing of the reaffirmation and discharge hearing. Instead, the rule leaves discretion to the courts to set the hearing at a time appropriate for the particular circumstances presented in the case and consistent with the scheduling needs of the parties.

Changes Made After Publication and Comment:

No changes were made after publication. The Advisory Committee considered the public comments and concluded that the rule should allow post discharge filing of reaffirmation agreements notwithstanding the issues raised in the public comments. In particular, the Committee recognized the problems that can arise if the reaffirmation agreement is not filed until 30 days after the discharge is entered. Nevertheless, the post-discharge filing of the reaffirmation agreement should not itself require the reopening of the case, so the prior action of closing the case should not be too problematic. The filing of a reaffirmation agreement without a declaration or affidavit by counsel for the debtor will inform the court that a hearing must be scheduled, but again may not require a reopening of the case.

The Advisory Committee considered the timing of the filing and selected thirty days after the discharge for several reasons. Most significantly, the timing of the entry of the discharge is subject to local practice, and in many districts the discharge order is entered quite early in a case. The debtor and creditor who are parties to the reaffirmation agreement may not know when the order will be entered, and if the agreement is made before that time, it should still be enforceable even if it takes a bit longer to accomplish the filing of the agreement with the court. Moreover, the fairly short time after the entry of the discharge that is allowed for filing the agreement should not delay the proceedings generally, and it should bring whatever applicable issues need to be addressed to the attention of the bankruptcy court in a timely fashion. Nothing in the rule as amended would prevent the clerk from closing the case as expeditiously as under current practice. Finally, any delay in the closing of the case

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should not postpone collection efforts of creditors because § 362(c)(2)(C) of the Bankruptcy Code would already have operated to dissolve the stay of actions against the debtor.

Rule 7004. Process; Service of Summons, Complaint

1 (a) SUMMONS; SERVICE; PROOF OF SERVICE.

2 (1) Except as provided in Rule 7004(a)(2), Rule 4(a),

3 (b), (c)(1), (d)(1), (e)-(j), (l), and (m) F.R.Civ.P. applies in

4 adversary proceedings. Personal service under pursuant to

5 Rule 4(e)-(j) F.R.Civ.P. may be made by any person at least

6 18 years of age who is not a party, and the summons may be

7 delivered by the clerk to any such person.

8 (2) The clerk may sign, seal, and issue a summons

9 electronically by putting an "s/" before the clerk's name and

10 including the court's seal on the summons.

11 * * * * *

COMMITTEE NOTE

This amendment specifically authorizes the clerk to issue a summons electronically. In some bankruptcy cases the trustee or debtor in possession may commence hundreds of adversary

FEDERAL RULES OF BANKRUPTCY PROCEDURE

proceedings simultaneously, and permitting the electronic signing and sealing of the summonses for those proceedings increases the efficiency of the clerk's office without any negative impact on any party. The rule only authorizes electronic issuance of the summons. It does not address the service requirements for the summons. Those requirements are set out elsewhere in Rule 7004, and nothing in Rule 7004(a)(2) should be construed as authorizing electronic service of a summons.

* * * * *

Changes Made After Publication and Comment:

No changes were made after publication.

Rule 9006. Time

* * * * *

- 1
- 2 (f) ADDITIONAL TIME AFTER SERVICE BY MAIL
- 3 OR UNDER RULE 5 (b)(2)(C) or (D) F.R.CIV.P. When
- 4 there is a right or requirement to ~~do some act or undertake~~
- 5 some proceedings within a prescribed period after service of
- 6 ~~a notice or other paper and the notice or paper other than~~
- 7 ~~process is served~~ and that service is by mail or under Rule 5
- 8 (b)(2)(C) or (D) F. R. Civ. P., three days ~~shall be~~ are added to

11 * * * * *

Rule 9006(f) is amended, consistent with a corresponding amendment to Rule 6(e) of the F.R. Civ. P., to clarify the method of counting the number of days to respond after service either by mail or under Civil Rule 5(b)(2)(C) or (D). Three days are added after the prescribed period expires. If, before the application of Rule 9006(f), the prescribed period is less than 8 days, intervening Saturdays, Sundays, and legal holidays are excluded from the calculation under Rule 9006(a). Some illustrations may be helpful.

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Thursday. If the paper is mailed on a Friday, the seven day period would conclude on a Tuesday, and the response is due three days later on a Friday.

No other change in the system of counting time is intended.

Other changes are stylistic.

* * * * *

Changes Made After Publication and Comment:

The phrase "would otherwise expire under Rule 9006(a)" was added to the end of the rule to clarify further that the three day extension is to be added to the end of the period that is established under the counting provisions of Rule 9006(a). This also maintains a parallel construction with Civil Rule 6(e) in which the same addition to the rule was made after the public comment period.

* * * * *

**B. Preliminary Draft of Proposed Amendments to
Bankruptcy Rules 1009, 2002, 4002, 7004, and 9001, and
Schedule I of Official Form 6.**

The Advisory Committee recommends that the Standing Committee approve the following preliminary draft of proposed amendments to the Bankruptcy Rules and Official Forms for publication for comment.

***1. Synopsis of Preliminary Draft of Proposed Amendments to
Bankruptcy Rules 1009, 2002, 4002, 7004, and 9001, and Schedule
I of Official Form 6.***

*** * * * ***

- (b) Rule 2002(g) is amended by adding a new subdivision (g)(4) that authorizes entities and notice providers to agree on the manner and address to which service may be effected. The amendment is intended to facilitate notices to creditors that operate on a national basis, although the rule allows such agreements by any entity with any notice provider. A related amendment to Rule 9001 defines notice providers.

*** * * * ***

- (e) Rule 9001 is amended to add a definition of notice provider to the rule. The definition is to be read in conjunction with the proposed amendment to Rule 2002(g).

*** * * * ***

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE***

* * * * *

**Rule 2002. Notices to Creditors, Equity Security Holders,
United States, and United States Trustee****

* * * * *

1

2

(g) ADDRESSING NOTICES.

3

(1) Notices required to be mailed under Rule 2002 to

4

a creditor, indenture trustee, or equity security holder shall be

5

addressed as such entity or an authorized agent has directed

6

in its last request filed in the particular case. For the purposes

7

of this subdivision –

***New material is underlined; matter to be omitted is lined through.**

**** The amendment to Rule 9001 should be considered in tandem with the proposed amendment to Rule 2002. Rule 9001 as proposed to be amended is set out at the end of this section of the report.**

FEDERAL RULES OF BANKRUPTCY PROCEDURE

8 (A) a proof of claim filed by a creditor or
9 indenture trustee that designates a mailing address constitutes
10 a filed request to mail notices to that address, unless a notice
11 of no dividend has been given under Rule 2002(e) and a later
12 notice of possible dividend under Rule 3002(c)(5) has not
13 been given; and

14 (B) a proof of interest filed by an equity security
15 holder that designates a mailing address constitutes a filed
16 request to mail notices to that address.

17 (2) If a creditor or indenture trustee has not filed a
18 request designating a mailing address under Rule 2002(g)(1),
19 the notices shall be mailed to the address shown on the list of
20 creditors or schedule of liabilities, whichever is filed later. If
21 an equity security holder has not filed a request designating a
22 mailing address under Rule 2002(g)(1), the notices shall be
23 mailed to the address shown on the list of equity security
24 holders.

25 (3) If a list or schedule filed under Rule 1007 includes
26 the name and address of a legal representative of an infant or
27 incompetent person, and a person other than that
28 representative files a request or proof of claim designating a
29 name and mailing address that differs from the name and
30 address of the representative included in the list or schedule,
31 unless the court orders otherwise, notices under Rule 2002
32 shall be mailed to the representative included in the list or
33 schedules and to the name and address designated in the
34 request or proof of claim.

35 (4) Notwithstanding Rule 2002(g) (1) - (3), an entity
36 and a notice provider may agree that when the notice provider
37 is directed by the court to give a notice, the notice provider
38 shall give the notice to the entity in the manner agreed to and
39 at the address or addresses the entity supplies to the notice
40 provider. That address is conclusively presumed to be a
41 proper address for the notice. The notice provider's failure to

FEDERAL RULES OF BANKRUPTCY PROCEDURE

- 42 use the supplied address does not invalidate any notice that is
43 otherwise effective under applicable law.

44 * * * * *

COMMITTEE NOTE

A new paragraph (g)(4) is inserted in the rule. The new paragraph authorizes an entity and a notice provider to agree that the notice provider will give notices to the entity at the address or addresses set out in their agreement. Rule 9001(9) sets out the definition of a notice provider.

The business of many entities is national in scope, and technology currently exists to direct the transmission of notice (both electronically and in paper form) to those entities in an accurate and much more efficient manner than by sending individual notices to the same creditor by separate mailings. The rule authorizes an entity and a notice provider to determine the manner of the service as well as to set the address or addresses to which the notices must be sent. For example, they could agree that all notices sent by the notice provider to the entity must be sent to a single, nationwide electronic or postal address. They could also establish local or regional addresses to which notices would be sent in matters pending in specific districts. Since the entity and notice provider also can agree on the date of the commencement of service under the agreement, there is no need to set a date in the rule after which notices would have to be sent to the address or addresses that the entity establishes. Furthermore, since the entity supplies the address to the notice provider, use of that address is conclusively presumed to be proper. Nonetheless, if that address is not used, the notice still may be effective if the notice is otherwise effective under applicable law. This is the same treatment

given under Rule 5003(e) to notices sent to governmental units at addresses other than those set out in that register of addresses.

The remaining subdivisions of Rule 2002(g) continue to govern the addressing of a notice that is not sent pursuant to an agreement described in Rule 2002(g)(4).

Public Comment on Proposed Amendment to Rule 2002:

No comments were received on the proposed amendment.

Changes Made After Publication and Comment:

No changes since publication.

* * * * *

Rule 9001. General Definitions

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(9) "Notice provider" means any entity approved by
the Administrative Office of the United States Courts to give
notice to creditors under Rule 2002(g)(4).

(10) (9) "Regular associate" means any attorney
regularly employed by, associated with, or counsel to an
individual or firm.

- 8 (11) ~~(10)~~ "Trustee" includes a debtor in possession in
9 a chapter 11 case.
- 10 (12) ~~(11)~~ "United States trustee" includes an assistant
11 United States trustee and any designee of the United States
12 trustee.

COMMITTEE NOTE

The rule is amended to add the definition of a notice provider and to renumber the final three definitions in the rule. A notice provider is an entity approved by the Administrative Office of the United States Courts to enter into agreements with entities to give notice to those entities in the form and manner agreed to by those parties. The new definition supports the amendment to Rule 2002(g)(4) that authorizes a notice provider to give notices under Rule 2002.

Many entities conduct business on a national scale and receive vast numbers of notices in bankruptcy cases throughout the country. Those entities can agree with a notice provider to receive their notices in a form and at an address or addresses that the creditor and notice provider agree upon. There are processes currently in use that provide substantial assurance that notices are not misdirected. Any notice provider would have to demonstrate to the Administrative Office of the United States Courts that it could provide the service in a manner that ensures the proper delivery of notice to creditors. Once the Administrative Office of the United States Courts approves the notice provider to enter into agreements with creditors, the notice

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provider and other entities can establish the relationship that will govern the delivery of notices in cases as provided in Rule 2002(g)(4).

Public Comment on Proposed Amendment to Rule 9001:

No comments were received on the proposed amendment.

Changes Made After Publication and Comment:

No changes since publication.

CHAPTER 11 CHANGES UNDER THE NEW BANKRUPTCY ACT

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SECTION F

Chapter 11 Changes Under the New Bankruptcy Act

I Introduction

While the bulk of changes which were brought on by the enactment of the Bankruptcy Abuse Prevention Consumer Protection Act of 2005 ("2005 Act") on April 20, 2005 primarily impact Chapter 7 and Chapter 13 cases, a significant amount of changes were made to Chapter 11 practice. This outline is to discuss the various issues which will arise with the changes to Chapter 11 law.

II Filing of Petition Issues

Amendments to 707(b)(4)(C) and (D) and Section 319 of the 2005 Act:

- A In the event a Chapter 11 case converts to a Chapter 7 case and the Chapter 11 Debtor's Counsel files the Chapter 7 Schedule, the requirements of 11 U.S.C. §§ 707(b)(4)(C) (reasonable investigation of circumstances giving rise to the debtor and that the petition is "well grounded in fact") and (b)(4)(D) (the attorney certifies that the attorney "has no knowledge after inquiry that the information in the schedules filed with such petition is incurred") will apply.
- B Potentially more troubling is Section 319 of the 2005 Act where Congress would in effect extend 11 U.S.C. § 707 (B)(4)(C) to Chapter 11 Petitions and Schedules, through a modification of Bankruptcy 9011.
 - **Question:** What is reasonable inquiry for 1,500+ page Schedules in complex Chapter 11 cases?

III Pre-Packaged Legislation: Amendments to 11 U.S.C. §§ 341 and 1125:

The existence of pre-packaged Chapter 11 has been recognized and implicitly approved by the 2005 Act by two separate amendments:

- A First, 11 U.S.C. § 341 has been amended to permit, after motion by a party in interest and notice and hearing, the Court to order the U.S. trustee not to hold a meeting of creditors and equity security holders in a case where "the debtor has filed a plan as to which the debtor solicited acceptances prior to the commencement of the case."
- B Second, new 11 U.S.C. § 1125(g) specifically permits pre-bankruptcy solicitation of plan acceptances if such solicitations comply with "applicable bankruptcy law."
 - **Question:** Exactly what non-bankruptcy law governs solicitation of acceptances of a proposed plan of reorganization in an unfiled Chapter 11 case?

IV Issues Involving Professionals in Chapter 11 Cases.

Although numerous major changes were made to consumer cases involving professionals, few changes were made to Chapter 11 which directly impact Chapter 11 professionals. The most important changes include:

- A **11 U.S.C. § 101(14).** Changes to the definition of disinterested person. The change to this section removes investment bankers and attorneys for investment bankers from the statutory definition of “disinterested person.” This means that Courts will be given discretion in determining whether investment bankers are disinterested for purposes of retention as professionals under 11 U.S.C. § 327. One impact of this change will be to overrule significant portions of In re Federated Department Stores, Inc., 44 F.3d 1310 (6th Cir. 1995).
- B **11 U.S.C. § 330.** This section is amended to specifically allow Courts to consider whether (1) a person is a board certified Bankruptcy professional or (2) has “demonstrated skill and experience in the bankruptcy field” in awarding fees.
- C **11 U.S.C. § 328.** This provision was amended by the 2005 Act to clarify that a Bankruptcy Court can approve professional fees on a fixed or percentage fee basis.

V Plan Exclusivity Issues.

- A **11 U.S.C. § 1121.** Section 411 of the 2005 Act significantly alters the debtor’s exclusivity rights under the Bankruptcy Code. 11 U.S.C. § 1121(d) is modified to require that exclusivity for the filing of a plan shall not be extended beyond “18 months after the date of the Order for Relief” and exclusivity for obtaining confirmation of a plan shall not be extended beyond “20 months after the date of the Order for Relief” in this case. Further, § 1121(e) is amended to limit exclusivity on the filing of a plan to 180 days in small business cases and require the filing of plan and disclosure statements within 300 days of the filing.
- **Question:** What impact will this have on Court discretion to control both the order and the pace of hearings on competing plans and disclosure hearings?

VI Motions to Appoint Trustees or Convert the Case.

In light of the increasing emphasis on corporate governance issues, it is not surprising that the 2005 Act made substantial changes to issues related to the conversion of a Chapter 11 case to a Chapter 7 case or for the appointment of an examiner or trustee.

- A **11 U.S.C. § 1112 -- Conversion or Dismissal.** This section is modified in a number of ways by the 2005 Act. First, subsection (b) is modified to

remove the United States Trustee and Bankruptcy Administrators from the statutory list of parties that can file an 11 U.S.C. § 1112 motion. It is unclear why this change was made and may lead to significant litigation.

- **Question:** Is the removal of U.S. Trustee and Bankruptcy Administrators in 11 U.S.C. § 1112 consistent with the expansion of the U.S. Trustee's duties in small business cases and under 11 U.S.C. § 1104(e)?

Second, subsection (b) was also amended to change the ultimate burden of persuasion test for conversion or dismissal of 11 U.S.C. § 1112(b)(2) by now requiring conversion or dismissal if a movant establishes cause, unless the debtor establishes "unusual circumstances" which must be specifically identified by the Court and which establish that conversion or dismissal is not in the best interest of the debtor's estate.

The debtor or other party in interest may also escape conversion or dismissal of a Chapter 11 by showing there is a reasonable likelihood a plan will be confirmed within a described time and there was a reasonable explanation for the act or omission which constituted the case.

Third, new 11 U.S.C. § 1112(b)(4) expands what might constitute cause.

- B **11 U.S.C. § 1104(a)(3).** This section is added to specifically provide that if grounds to convert or dismiss a case under 11 U.S.C. § 1112 exist, the Court may instead appoint an examiner, if the Court concludes the appointment of an examiner is in the best interests of the estate.

- C **11 U.S.C. § 1104(e).** Finally, subsection (e) is added to 11 U.S.C. § 1104 to require the U.S. Trustee's office to move for the appointment of a trustee under 11 U.S.C. § 1104(a) if there are reasonable grounds to suspect that debtor's current management (or former management that appointed the debtor's chief executive or chief financial officer) have participated in "fraud, dishonesty or criminal conduct." This section does not in any way directly change the Court's analysis for the appointment of trustees or examiners.

- **Question:** How far does the "appointment" taint go (*i.e.*, CFO appointed by a CEO who was appointed by a suspect board)?

VII Lease and Executory Contract Issues.

- A **11 U.S.C. § 365.** The 2005 Act makes numerous changes to this section:

First, the 2005 Act eliminates defaults arising from non-monetary obligations in unexpired leases of real property from the list of defaults to be cured if "it is impossible for the trustee to cure such defaults by performing non-monetary acts at or after the time of assumption" These defaults are primarily going dark

defaults in leases of non-residential real property, and now will be cured by payments of "pecuniary losses."

- **Question:** How will such pecuniary losses be calculated?

Second, 11 U.S.C. § 365(b)(2)(D) is amended to attempt to overrule a minority line of cases which held that debtors did not have to cure any non-monetary defaults in order to assume an executory contract.

Third, the 2005 Act limits the time to assume or reject a lease of non-residential real property to a maximum of 210 days even with Court extensions.

- B **11 U.S.C. § 503(b).** As perhaps corollary to the shortening of the time which the debtor has to assume or reject leases of non-residential real property, subsection (b)(7) was added to limit the amount of an administrative claim a landlord could be allowed in the event the debtor decides to reject a previously assumed lease to the two years of the monetary obligations due under the lease after the rejection, excluding any penalty provision and claims related to failure to operate provisions.

VIII Utility Issues.

11 U.S.C. § 366 was amended to:

- 1 Require that only certain forms of "assurance of payment" would satisfy the requirement of 11 U.S.C. § 366;
- 2 expand a utilities right to terminate services post-petition;
- 3 limit the matters a Court can consider in awarding "assurance of payment;" and
- 4 grant utilities setoff rights in security deposits provided to them by debtors "without notice or Court order."

- **Question:** Does this change pre-empt the automatic stay of 11 U.S.C. § 362?

IX Reclamation Issues.

- A **11 U.S.C. §§ 503(b)(9) and 546.** The 2005 Act amended 11 U.S.C. §§ 503(b)(9) and 546 to expand and clarify reclamation rights of creditors. The key changes to reclamation issues are:

- 1 Clarification that rights of reclaiming creditors are subject to the prior rights of creditors with a security interest in the goods sought to be reclaimed (11 U.S.C. § 546(c)(1));

- 2 establishment of a time (45 days) in which the debtors must have received the goods prior to bankruptcy (11 U.S.C. § 546(c)(1));
- 3 expansion of the notice periods for making reclamation claims (11 U.S.C. § 546(c)(1)(A) and (B));
- 4 permitting the seller to obtain a ninth (9th) level administrative expense under 11 U.S.C. § 503(b)(9) for goods received by the debtor within 20 days before the bankruptcy filing; and
- 5 eliminating old § 502(c)(2).

X Unsecured Creditor Committee Issues.

- A **11 U.S.C. § 1102(a).** New 11 U.S.C. § 1102(a)(4) clarifies Bankruptcy Court jurisdiction over Committee membership by providing that a Bankruptcy Court can direct the U.S. Trustee to change the membership of a Committee in order to “ensure adequate representation.”
 - B **11 U.S.C. § 1102(b).** New U.S.C. § 1102(b)(3), however, greatly changes access to information which a Committee has in a bankruptcy case by providing that a Committee shall:
 - 1 Provide access to information;
 - 2 to creditors who:
 - i hold claims of the kind represented by the Committee; and
 - ii are not appointed to the Committee.
- **Question:** What about privileged information?
 - **Question:** What about confidential information?
 - **Question:** When and under what circumstances must the information be provided?

XI Automatic Stay Issues.

- A **11 U.S.C. § 362(b) -- Exceptions to the Automatic Stay.** Significant amendments were made to the statutory exceptions to the automatic stay, including:
 - 1 Expansion of domestic relations exceptions (§ 362(b));
 - 2 exception for financial participants (§§ 362(b)(6) and (b)(7));

- 3 withholding from wages to pay certain retirement loans (§ 362(b)(19));
- 4 acts to enforce liens in real property where stay relief was granted in a prior bankruptcy case (§ 362(b)(20)) or the debtor was ineligible for relief (§§ 362(b)(20) and § 362(c));
- 5 certain eviction actions (§§ 362(b)(22) and (b)(23));
- 6 any transfer not avoidable under both 11 U.S.C. §§ 544 and 549 (§ 362 (b)(24));
- 7 certain securities investigations and actions (§ 362(b)(25));
- 8 certain tax setoffs (§ 362(b)(26));
- 9 certain setoffs under master netting agreements (§ 362(b)(27));
- 10 certain acts to exclude debtors from participation in Medicare and other Federal healthcare programs by HHS (§ 362(b)(28));
- B **11 U.S.C. § 362(d).** The 2005 Act makes significant changes to the time for stay relief in single asset real estate cases (§§ 362(d)(3)). 362(d)(4) is added and provides for stay relief in “serial filing” bankruptcy cases.
- C **11 U.S.C. § 362(e).** Subsection 362(e)(2) is added by the 2005 Act and provides that the automatic stay will terminate 60 days after a motion is filed unless:
 - 1 The Court makes a final decision during the 60-day period; or
 - 2 the 60-day period is extended by the agreement of all parties or the Court for good cause shown, as described in the Court’s findings, extends the 60 days for a specific period of time.

▪ **Question:** What is a “Final Decision?”

XII Avoidance Actions.

- A **11 U.S.C. § 547.** The 2005 Act made several changes to the preference statute, including:
 - 1 The ordinary course defense of 11 U.S.C. § 547(c)(2) was amended so that the defense would be established if it was either: (1) made in the ordinary course of business between the parties, or (2) was made according to ordinary terms of the industry;
 - 2 placing a floor of \$5,000.00 on business preferences (§ 547(c)(9));

- 3 increasing the time for perfection of a transfer from 10 to 30 days under § 547(e)(2);
- 4 transfers made under repayment schedules created by approved non-profit budget and credit counseling agencies (§ 547(h)); and
- 5 yet another attempt to fix the Deprizio problem (§ 547(i)). See Levit v. Ingersoll Rand Financial Corp., 874 F.2d 1186 (7th Cir. 1989).

B **11 U.S.C. § 548.** The Federal Fraudulent Conveyance Statute was amended to significantly expand the causes of action which can be brought under its provisions. Among the changes made by the 2005 Act are:

- 1 An increase of the time covered by 11 U.S.C. § 548 from one year prior to the bankruptcy to two years prior to the bankruptcy;
- 2 including certain key employee payments as avoidable transfers (§ 548(a)(1)(B)(iv));
- 3 excepting certain payments to master netting agreement participants, or financial participants from the provisions of 11 U.S.C. § 548; and
- 4 providing a 10-year look back period for avoiding transfers to certain self-settled trusts or similar devices made with the actual intent to hinder, defraud or delay any creditor.

C **28 U.S.C. § 1409 – Venue Issues.** The 2005 Act further limited non-consumer preference actions by requiring such actions involving less than \$15,000.00 be brought only in the U.S. District Court for the District where the defendant resides.

XIII Anti-KERP Changes.

See attached Exhibit A.

XIV Other General Chapter 11 Changes

- A Protection of Warehouseman's liens 11 U.S.C. § 546 is amended to protect these liens from avoidance under 11 U.S.C. § 545.
- B Courts are directed to hold status conferences to move cases to resolution. 11 U.S.C. § 105(d).
- C Section 419 of the 2005 Act requires the Judicial Conference to propose amendments to the Bankruptcy Rules to require debtors to provide

information related to the profitability of closely held corporations controlled by debtors.

- D 11 U.S.C. §§ 531, 704 and 1106 are amended by the 2005 Act to establish duties for debtors who are Retirement Plan Administrators.
- E 11 U.S.C. § 363 is amended to provide limits on the sale of assets held by Not-for-Profit Corporations.

XV Small Business Legislation

- A **Definitions:** The 2005 Act adds two definitions to the Bankruptcy Code: 11 U.S.C. § 101(51C) which defines small business cases and 101(51D) which defines small business debtors as persons engaging in commercial or business activities (excluding persons whose primary business is owning or operating real property) which has aggregate non-contingent liquidated debts of not more than \$2,000,000.00 and either no creditor's committee is appointed or it is an inactive committee. Further, small business debtor status is now mandatory not elective.
 - **Question:** Is there now a strange incentive of smaller debtors to increase debt prior to filing to escape small business treatment?
- B **11 U.S.C. § 308.** New Section 308 of the Bankruptcy Code places significant additional reporting requirements on small business debtors.
- C **11 U.S.C. § 1116.** This new section of the Bankruptcy Code imposes seven separate duties on either the debtor-in-possession or a small business debtors chapter 11 trustee.
- D **11 U.S.C. § 1121.** This section limits the exclusivity period in small business cases to 180 days and requires any plan and disclosure to be filed within 300 days. These time periods can be extended (along with a related time period in 11 U.S.C. § 1129(e) only if:
 - 1 the debtor, after notice to all parties, demonstrates that the court will confirm a plan within a reasonable time;
 - 2 the court establishes a new deadline; and
 - 3 the order extending the time is signed before the existing deadline expires.
- E **11 U.S.C. § 1129.** The 2005 Act added subsection (e) to 1129 and requires the court to confirm any plan that complies with the provisions of the Bankruptcy Code and was filed in accordance with 11 U.S.C. § 1121(e) not later than 45 days after it is filed unless an extension is granted.

- F **11 U.S.C. § 1125 and Section 433 Form Plan.** The requirements of 11 U.S.C. § 1125 are reduced by the 2005 Act. First, a Court may dispense with a disclosure statement if the plan itself provides adequate information 1125(f)(1). Second, even if a disclosure statement is required 1125(f)(2) provides that such a statement may be submitted on a standard form to be proposed and approved as provided for by section 433 of this 2005 Act.
- G **28 U.S.C. § 586(a).** Finally, the 2005 Act greatly expands the duties of the U.S. Trustee in small business cases. Of particular interest, is the U.S. Trustee's duty to move for conversion or dismissal under 11 U.S.C. § 1112 in appropriate cases. However, the U.S. Trustee has been removed from the list of parties which can file the Motion.

XVI Individual Chapter 11 Issues

One of the major areas of change in Chapter 11 practice involves the representation of individuals of Chapter 11 proceeding.

- A **11 U.S.C. § 1115.** The most important change in individual Chapter 11 practice comes with the enactment of 11 U.S.C. § 1115 which makes post-petition income property of the estate in addition to the property set forth in section 541 of the Bankruptcy Code.
- B **Domestic Support Obligations.** The 2005 Act eliminates most issues related to the dischargeability of debts arising from divorce and other related proceedings by making all such debts nondischargeable (except for 11 U.S.C. § 523(a)(15) debts in Chapter 13 cases) see 11 U.S.C. § 523(a)(5) and (a)(15). This legislation has an important impact on individual Chapter 11 cases as a significant percentage of individual chapter 11 cases heretofore involved marital or child support obligations. Among the key domestic relation changes are:
 - 1 Definition of Domestic Support Obligations. 11 U.S.C. § 101(12A)
 - 2 Establishment of Domestic Support Obligations as the highest priority administrative expense. 11 U.S.C. § 507(a)(1).
 - 3 Requirement of the timely payment of Domestic Support Obligations as a condition of confirmation. 11 U.S.C. § 1129.
 - 4 Most Domestic Support Obligations are now accepted from the provisions of the automatic stay. 11 U.S.C. § 362(b)(2)
- C **11 U.S.C. § 548.** Two changes were made to this provision which impact individuals' chapter 11 debtors.

- 1 11 U.S.C. § 548(a)(B)(ii)(IV) was added which makes certain payments to insiders made under employment contracts, not in the ordinary course of business, avoidable.
 - 2 11 U.S.C. § 548(e) was added to greatly expand the ability of debtors to avoid transfers of assets to self settled trusts as fraudulent conveyances.
- D **11 U.S.C. § 1127.** The 2005 Act added subsection (e) to 1127 and provides for a “Chapter 13 like” ability to modify their chapter 11 plans post-petition based upon, among other things, changes in the debtor’s post-confirmation income.
- E **11 U.S.C. § 1141.** The 2005 Act makes several important changes to the effect of a discharge in individual chapter 11 cases to make Chapter 11 discharge provisions closer to a “Chapter 13 like” model.
- F **11 U.S.C. § 1146.** Section 1146 was amended by eliminating the special tax provisions relating to individual debtors of former 1146(a) or 1146(b).

XVII Healthcare Bankruptcy Issues

See attached Exhibit B.

EXHIBIT A

US BANKRUPTCY

KERPS - Should we or shouldn't we?

BY ANTHONY H.N. SCHNELLING AND CARL H. YOUNG, III

Key Employee Retention Programs ("KERPS") have become a very controversial subject lately. Senator Kennedy recently indicated his desire to see an amendment offered and passed to the bankruptcy reform bill that has been working its way through the United States legislative process for several years. This amendment would seek to severely limit the ability of bankruptcy courts to allow payments to employees and executives of companies in Chapter 11 during a bankruptcy to encourage them to stay and work through their employers' issues. It would effectively shift the burden of proof to recipients of such programs. The amendment would require a judge to find that recipients of such payments in future were qualified to receive KERP treatment because they had offers to leave at comparable or greater compensation levels, were likely to accept such offers and were essential to the survival of the bankrupt entity and its reorganisation.

While there is nothing wrong with heightened scrutiny of such programs, the concept that a critical employee must find a better job, be willing to take it and destroy the employer's chance of reorganisation by doing so before a court can grant him or her added compensation to cover the risk of staying with a bankrupt company is absurd. It is like using an elephant gun to kill a gnat.

KERPS like everything else associated with the restructuring process go through cycles. Very popular today, indeed thought of in many turnaround management company circles as an essential part of the restructuring process, they were virtually unheard of before the early 1990s.

Before their introduction, managements of failed or failing companies, more often than not offered reductions in their own compensation when asking employees to suffer lay-offs or take significant pay cuts to support an enterprise's ability to reorganise. In that era, banks and major creditors routinely asked what management's commitment was to the restructuring before committing their funds, granting waivers or extending additional credit to a troubled company.

Philosophically, this is the position that Senator Kennedy would look back to, much as we look back to the golden days of our youth when things were always better than they are today. However, we cannot and should not legislate in a vacuum to correct trends which will more than likely reverse themselves as abuses are recognised by the public at large and objected to, unless they genuinely can achieve their stated

goals, by secured lenders and creditors' committees and rejected by the courts as over-reaching and inappropriate uses of debtor funds.

It is clear that the impetus behind Senator Kennedy's proposed amendment and much of the current public discomfort with KERPS comes from the significant recent abuses in the KERP process. From the 1990s forward there was a gradual recognition that, when companies failed in good economic times, it was difficult to retain qualified and often critical personnel because good jobs are always available to the top performers. In order to hold key middle management and senior executives who could make a real difference to a troubled enterprise's restructuring efforts, turn-around consultants and other professionals active in this field began to develop compensation programs designed to create golden handcuffs for the key players in an organisation. These programs were designed to reduce the risk of staying with a bankrupt entity for the employees a debtor really needed to retain. Such programs required little in return for significant additional payment guarantees than that the recipients stick around to assist in the restructuring work. It was assumed that, because the programs were severely limited in scope to cover only the top performers, the recipients would necessarily benefit their employer by their continued superior performance. These plans were quite different from previous practice and were not easy to sell to the major external constituents at the banks and on the creditors' committees.

Over time, very gradually, the whole nature of employee compensation in the context of the bankruptcy arena changed. No longer were KERPs offered primarily in situations where a strong job market mandated special treatment to keep top performers. KERPs became a fixture in many bankruptcy cases because employees read about these plans and pushed hard to have them put in place regardless of whether there were replacement jobs widely available to them. Failure to implement some form of KERP plan presented serious risks to debtor employees who ignored their work force.

The first significant excesses that crept in related to the breadth of KERP plans. They began to be less focused and became a way to pay large numbers of employees what was in effect a "bonus" not an incentive to stay and produce. Then senior executives began demanding inclusion in such programs at the outset of a restructuring as a condition of staying. Because it takes time to evaluate management

▶▶

"This amendment would seek to severely limit the ability of bankruptcy courts to allow payments to employees and executives of companies in Chapter 11."

quality, turn around managers were forced to acquiesce and design and recommend such plans before they had an opportunity to assess which executives should be shown the door instead of being compensated for staying at a company they may well have brought to its knees by their own actions or lack of actions.

Indeed as time went on the plans became more and more top-heavy and were designed to benefit incumbent management. While key employees in the rank and file were still included in KERP plans, at the dawn of the 21st century, the lion's share of the benefits went to the top guys. This culminated in the excesses seen in 2000-2004 in which high status staff at companies like Enron were able to organise substantial payments for themselves at the expense of more junior staff and personnel who were substantially overlooked. Indeed at Enron, many such payments were actually paid out at the beginning of the bankruptcy case and the employees who received them then left for greener pastures with the KERP money they had been paid to stay and see their employer through its bankruptcy.

These excesses have led courts to alter the playing field in several significant and meaningful ways. KERP orders, which used to be routinely approved as first day orders, designed to approve critical measures to keep a company in business, are now routinely deferred until a creditors' committee can be appointed and can review their terms and conditions. Indeed, today most bankruptcy professionals

caution debtor management not to be too hasty to come forward with a KERP plan lest they appear greedy to judge and creditors alike. Plans today stand very little chance of getting approved if they are perceived as top heavy and compensate senior management too highly. Plans which focus on the rank and file have a much better chance of being approved with or without objection from other creditors. Secured creditors are reluctant to carve out money for plans which don't have some objective measure for triggering payment – usually tied to a time period or a specific result the secured creditors wish to see achieved. As a result, successful KERP plans today frequently require performance against objective standards, release of employee claims which dilute other creditors' recoveries, satisfaction of specific time requirements during which the recipient is required to benefit the debtor by his or her work and presence or some combination of all of these criteria.

Despite earlier excesses, it would appear that the marketplace has been able to mandate sufficient changes to the approval process for KERP plans to once again drive employees to do what they were originally supposed to do when the first KERP plans were introduced – produce top level performance with some certainty that the employee's risk in staying with a troubled entity has been reasonably covered.

The real question today is not whether KERPs are sometimes reasonable and appropriate. The marketplace and the courts are seeing to it that they are both reasonable and appropriate before approving them. Therefore, we believe that an amendment like the one Senator Kennedy has proposed to the new bankruptcy bill would be harmful if offered and passed. If passed it would substantially de-rail the difficult process of enticing employees to continue with an employer through a bankruptcy proceeding. Passage of such an amendment would remove from bankruptcy professionals a key tool for motivating critical employees just when the excesses of the process have already been identified and largely eliminated.

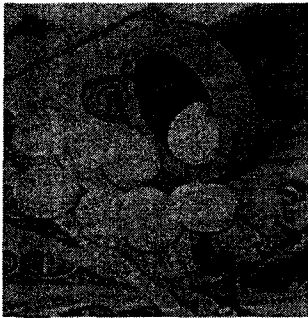
The more difficult question is how to get employees to return to the days when they felt it incumbent on themselves to sacrifice some of their own compensation to induce other constituents in a troubled situation to step forward and rescue their company? A return to those "golden days" would signal a profound shift in human nature for the better which it is hard to contemplate being effectively mandated by legislation. ■

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EXHIBIT B



Health Care Committee

ABI Committee News

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Impact of the New Bankruptcy Law on Health Care Bankruptcies

by William W. Kannel and Sara R. Bollerup; Mintz, Levin, Cohn, Ferris, Glovsky and Popeo PC; Boston

Much of the commentary on the pending bankruptcy legislation has focused on consumer bankruptcies. However, several provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, S. 256 (the "Act"), are specifically targeted to health care bankruptcies. If it becomes law, as is widely expected, the legislation will provide an exception to the automatic stay for government action to suspend a debtor from participation in the Medicare program or any other federal health care program. Additionally, the legislation would place new burdens on health care debtors by providing procedures for disposing of patient records, closing of a facility and transferring patients. The legislation also provides for the appointment of a patient advocate ombudsman. However, the amendments also have the salutary effect of recognizing patients as an important constituency in any health care bankruptcy.

I. Health Care Business is Now Defined

For the first time, the Act attempts to create a Bankruptcy Code definition of a health care business. Section 1101 of the Act provides that a health care business:

- A. means any public or private entity (without regard to whether that entity is organized for profit or not-for-profit) that is primarily engaged in offering to the general public facilities and services for—
 - i. the diagnosis or treatment of injury, deformity, or disease; and

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- ii. surgical, drug treatment, psychiatric, or obstetric care; and
- B. includes—
 - 1. any—
 - I. general or specialized hospital;
 - II. ancillary ambulatory, emergency, or surgical treatment facility;
 - III. hospice;
 - IV. home health agency; and
 - V. other health care institution that is similar to an entity referred to in subclause (I), (II), (III), or (IV); and
 - 2. any long-term care facility, including any—
 - I. skilled nursing facility;
 - II. intermediate care facility;
 - III. assisted living facility;
 - IV. home for the aged;
 - V. domiciliary care facility; and
 - VI. health care institution that is related to a facility referred to in subclause (I), (II), (III), (IV), or (V), if that institution is primarily engaged in offering room, board, laundry, or personal assistance with activities of daily living and incidentals to activities of daily living.

I. Health and Human Services Exception from the Automatic Stay

Section 1106 of the Act provides a new exception to the automatic stay by adding to the list of stay exceptions under Bankruptcy Code §362 the following:

- 28. under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the Medicare program or any other Federal health care program (as defined in Section 1128B(f) of the Social Security Act pursuant to Title XI or XVIII of such Act).

It appears that the primary intent of the amendment is to allow the Department of Health and Human Services expanded debt collection powers against a health care debtor. The provision appears to be derived from a bill introduced by Sens. Charles Grassley (R-Iowa) and John Breaux (D-La.) in the 106th Congress, called the

"Home Health Integrity Preservation Act of 1999," which sought to modify the Social Security Act. Sen. Grassley—who also sponsored the new bankruptcy bill—stated that the purpose of the 1999 Act was "to make it harder for all Medicare providers, not just home health agencies, to avoid penalties and repayment obligations by declaring bankruptcy." 145 Cong. Rec. S750, S756 (daily ed. Jan. 20, 1999) (statement of Sen. Grassley).

II. Restrictions on Health Care Debtors and Trustees/Protection of Patient Interests

Sections 1102 through 1105 of the Act place a greater burden on trustees and debtors-in-possession in health care bankruptcies. These provisions came out of one of the failed predecessors to the current legislation, known as the "Business Bankruptcy Reform Act, S. 1914." Senate Bill 1914 was developed, *inter alia*, in response to the increasing number of failures within the health care industry and sought to protect the interests of current and former patients of a reorganizing or liquidating health care business. See **Nancy A. Peterman**, *Intensive Care: Protecting Patients' Rights in Health Care Bankruptcies*, 17 Am. Bankr. Inst. J. 10 (1998) (analyzing Senate Bill 1914 and concluding that its provisions were critical to protecting the rights of patients in health care bankruptcies).

A. Disposal of Patient Records

Section 1102 of the proposed legislation adds a new §351 to the Bankruptcy Code, containing specific provisions for the disposal of patient records in a bankruptcy case. The new section provides:

If a health care business commences a case under chapter 7, 9, or 11, and the trustee does not have a sufficient amount of funds to pay for the storage of patient records in the manner required under applicable federal or state law, the following requirements shall apply:

1. The trustee shall—
 - A. promptly publish notice, in one or more appropriate newspapers, that if patient records are not claimed by the patient or an insurance provider (if applicable law permits the insurance provider to make that claim) by the date that is 365 days after the date of that notification, the trustee will destroy the patient records; and
 - B. during the first 180 days of the 365-day period described in subparagraph (A), promptly attempt to notify directly each patient that is the subject of the patient records and appropriate insurance carrier concerning the patient

records by mailing to the most recent known address of that patient, or a family member or contact person for that patient, and to the appropriate insurance carrier an appropriate notice regarding the claiming or disposing of patient records.

2. If, after providing the notification under paragraph (1), patient records are not claimed during the 365-day period described under that paragraph, the trustee shall mail, by certified mail, at the end of such 365-day period a written request to each appropriate federal agency to request permission from that agency to deposit the patient records with that agency, except that no federal agency is required to accept patient records under this paragraph.
3. If, following the 365-day period described in paragraph (2) and after providing the notification under paragraph (1), patient records are not claimed by a patient or insurance provider, or request is not granted by a federal agency to deposit such records with that agency, the trustee shall destroy those records by—
 - A. if the records are written, shredding or burning the records; or
 - B. if the records are magnetic, optical, or other electronic records, by otherwise destroying those records so that those records cannot be retrieved.

B. Administrative Expense Claims

Section 1103 of the Act modifies §503(b) of the Bankruptcy Code to add, as a new administrative expense, the actual and necessary costs and expenses of closing a health care business, including the required manner for disposing of patient records and transferring of patients:

8. the actual, necessary costs and expenses of closing a health care business incurred by a trustee or by a federal agency (as defined in Section 551(1) of Title 5) or a department or agency of a state or political subdivision thereof, including any cost or expense incurred—
 - A. in disposing of patient records in accordance with Section 351; or
 - B. in connection with transferring patients from the health care business that is in the process of being closed to another health care business...

C. Appointment of Ombudsman as Patient Advocate

Section 1104 of the Act adds a new §333 to the Code and requires the appointment of an ombudsman within 30 days of the commencement of any health care bankruptcy case, to act as a patient advocate. The appointment is not required if the court finds that it is not necessary for the protection of patients under the specific facts of the case. The duties of the ombudsman are to monitor the quality of patient care and report to the court every 60 days regarding the quality of patient care. If the ombudsman believes that the quality of patient care is declining significantly or is otherwise being materially compromised, he or she must report to the court immediately upon making that determination. The ombudsman maintains any information relating to patients as confidential and may not review confidential patient records without court approval and restrictions. Compensation is to be at the expense of the estate pursuant to an insertion in §330(a)(1) of the Code. The new Code section reads:

§333. Appointment of patient care ombudsman

1. If the debtor in a case under chapter 7, 9, or 11 is a health care business, the court shall order, not later than 30 days after the commencement of the case, the appointment of an ombudsman to monitor the quality of patient care and to represent the interests of the patients of the health care business unless the court finds that the appointment of such ombudsman is not necessary for the protection of patients under the specific facts of the case.
2.
 - A. If the court orders the appointment of an ombudsman under paragraph (1), the United States Trustee shall appoint one disinterested person (other than the United States Trustee) to serve as such ombudsman.
 - B. If the debtor is a health care business that provides long-term care, then the United States Trustee may appoint the State Long-term Care Ombudsman appointed under the Older Americans Act of 1965 for the state in which the case is pending to serve as the ombudsman required by paragraph (1).
 - C. If the United States Trustee does not appoint a State

Long-Term Ombudsman under subparagraph (B), the court shall notify the State Long-term Care Ombudsman appointed under the Older Americans Act of 1965 for the state in which the case is pending, of the name and address of the person who is appointed under subparagraph (A).

- b. An ombudsman appointed under subsection (a) shall—
 - 1. monitor the quality of patient care provided to patients of the debtor, to the extent necessary under the circumstances, including interviewing patients and physicians;
 - 2. not later than 60 days after the date of appointment, and not less frequently than at 60-day intervals thereafter, report to the court after notice to the parties in interest, at a hearing or in writing, regarding the quality of patient care provided to patients of the debtor; and
 - 3. if such ombudsman determines that the quality of patient care provided to patients of the debtor is declining significantly or is otherwise being materially compromised, file with the court a motion or written report, with notice to the parties in interest immediately upon making such determination.
- c.
 - 1. An ombudsman appointed under subsection (a) shall maintain any information obtained by such ombudsman under this section that relates to patients (including information relating to patient records) as confidential information. Such ombudsman may not review confidential patient records unless the court approves such review in advance and imposes restrictions on such ombudsman to protect the confidentiality of such records.
 - 2. An ombudsman appointed under subsection (a)(2)(B) shall have access to patient records consistent with authority of such ombudsman under the Older Americans Act of 1965 and under non-federal laws governing the State Long-term Care Ombudsman program.

D. Duty to Transfer Patients

Section 1105 of the Act adds to the duties of a trustee or debtor-in-possession a requirement to use all "reasonable and best efforts" to transfer patients from

a health care business debtor that is closed, to a health care business or other entity in the same general vicinity that provides substantially similar services and maintains a reasonable quality of care. Section 1105 provides:

- a. IN GENERAL.—Section 704(a) of Title 11, United States Code, as amended by Sections 102, 219, and 446, is amended by adding at the end the following:
 - 12. use all reasonable and best efforts to transfer patients from a health care business that is in the process of being closed to an appropriate health care business that—
 - A. is in the vicinity of the health care business that is closing;
 - B. provides the patient with services that are substantially similar to those provided by the health care business that is in the process of being closed; and
 - C. maintains a reasonable quality of care.

Conclusion

Although the primary focus of the debate over the proposed bankruptcy legislation has been on consumer bankruptcy, there are plenty of changes in store affecting health care bankruptcies. Patients' rights proponents may laud the protections Title IX of S. 156 provides, while trustees and debtors-in-possession may be concerned over the burdensome nature of the new law. Counsel for health care trustees and debtors will need to learn the details of the new provisions, as the amendments take effect for cases commenced 180 days after the date of enactment.