Consumer Bankruptcy Practice in Kentucky: Chapter 7 Practice

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Consumer Bankruptcy Practice In Kentucky: Chapter 7 Practice

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# TABLE OF CONTENTS

## CHAPTER 1: AMERICAN BANKRUPTCY LAW: AN OVERVIEW

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>PURPOSE AND SCOPE OF PUBLICATION</td>
<td>1</td>
</tr>
<tr>
<td>II.</td>
<td>HISTORICAL OVERVIEW OF AMERICAN BANKRUPTCY LAW</td>
<td>1</td>
</tr>
<tr>
<td>III.</td>
<td>OVERVIEW OF CHAPTERS 7, 11 AND 13 OF THE UNITED STATES BANKRUPTCY CODE</td>
<td>2</td>
</tr>
<tr>
<td>IV.</td>
<td>ENDNOTES</td>
<td>2</td>
</tr>
</tbody>
</table>

## CHAPTER 2: REPRESENTING THE CHAPTER 7 DEBTOR

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>INTRODUCTION</td>
<td>21</td>
</tr>
<tr>
<td>II.</td>
<td>INITIAL CLIENT CONTACT</td>
<td>21</td>
</tr>
<tr>
<td>A.</td>
<td>Role Of Secretary</td>
<td>21</td>
</tr>
<tr>
<td>1.</td>
<td>Specific Inquiries Referred to Attorney</td>
<td>21</td>
</tr>
<tr>
<td>2.</td>
<td>Basic Information and Fee Schedules</td>
<td>21</td>
</tr>
<tr>
<td>3.</td>
<td>Specific Inquiries and Preparation for Initial Client Interview</td>
<td>22</td>
</tr>
<tr>
<td>III.</td>
<td>INITIAL CLIENT INTERVIEW</td>
<td>22</td>
</tr>
<tr>
<td>A.</td>
<td>Client Relations</td>
<td>22</td>
</tr>
<tr>
<td>B.</td>
<td>Ascertaining Conflicts Of Interest</td>
<td>23</td>
</tr>
<tr>
<td>C.</td>
<td>Immediate Problems And Future Concerns</td>
<td>23</td>
</tr>
<tr>
<td>D.</td>
<td>Review Of Financial Statement</td>
<td>23</td>
</tr>
<tr>
<td>1.</td>
<td>Are the Debts Jointly Owed by Husband and Wife?</td>
<td>23</td>
</tr>
<tr>
<td>2.</td>
<td>Should the Debtors have their Assets Appraised?</td>
<td>23</td>
</tr>
<tr>
<td>3.</td>
<td>What are the Tax Ramifications of Filing?</td>
<td>24</td>
</tr>
<tr>
<td>4.</td>
<td>Does the Client have Substantial Equity in His/Her Assets?</td>
<td>24</td>
</tr>
<tr>
<td>5.</td>
<td>Has the Client made any Payments to Creditors Other than Regular Installment Payments or Monthly Living Expenses Within the Last Year?</td>
<td>25</td>
</tr>
<tr>
<td>6.</td>
<td>Has the Client Granted any Mortgages or Security Interests to Secure Antecedent Debt Within one Year?</td>
<td>26</td>
</tr>
<tr>
<td>E.</td>
<td>Client Desires And Goals</td>
<td>26</td>
</tr>
<tr>
<td>F.</td>
<td>Chapter 13 Versus Chapter 7 Bankruptcies</td>
<td>26</td>
</tr>
<tr>
<td>1.</td>
<td>Design of Chapter 13</td>
<td>26</td>
</tr>
<tr>
<td>2.</td>
<td>Design of Chapter 7</td>
<td>26</td>
</tr>
<tr>
<td>Section</td>
<td>Description</td>
<td></td>
</tr>
<tr>
<td>---------</td>
<td>-------------</td>
<td></td>
</tr>
<tr>
<td>G.</td>
<td>Discussion Of Bankruptcy Process And Procedure</td>
<td></td>
</tr>
<tr>
<td>1.</td>
<td>Generally</td>
<td></td>
</tr>
<tr>
<td>2.</td>
<td>Surrender of Property</td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td>Redemption of Property</td>
<td></td>
</tr>
<tr>
<td>4.</td>
<td>Reaffirmation of Debt</td>
<td></td>
</tr>
<tr>
<td>H.</td>
<td>Timing Of The Bankruptcy Filing</td>
<td></td>
</tr>
<tr>
<td>I.</td>
<td>Petition Information And Client Questionnaire</td>
<td></td>
</tr>
<tr>
<td>J.</td>
<td>Discussion Of Attorney Fees</td>
<td></td>
</tr>
<tr>
<td>IV.</td>
<td>INFORMATION GATHERING</td>
<td></td>
</tr>
<tr>
<td>A.</td>
<td>Client Inquiries And Additional Creditors</td>
<td></td>
</tr>
<tr>
<td>B.</td>
<td>Credit Bureau Report</td>
<td></td>
</tr>
<tr>
<td>C.</td>
<td>Lien Search</td>
<td></td>
</tr>
<tr>
<td>D.</td>
<td>Inquiries From Creditors</td>
<td></td>
</tr>
<tr>
<td>V.</td>
<td>SECOND CLIENT CONFERENCE</td>
<td></td>
</tr>
<tr>
<td>A.</td>
<td>Fee Agreement</td>
<td></td>
</tr>
<tr>
<td>B.</td>
<td>Fee Disclosure Statement</td>
<td></td>
</tr>
<tr>
<td>C.</td>
<td>Post-Execution Filing Deadline</td>
<td></td>
</tr>
<tr>
<td>VI.</td>
<td>TELEPHONE AND MAIL TRAFFIC</td>
<td></td>
</tr>
<tr>
<td>A.</td>
<td>Basic Information</td>
<td></td>
</tr>
<tr>
<td>B.</td>
<td>Secured Creditors And Statement Of Intent</td>
<td></td>
</tr>
<tr>
<td>C.</td>
<td>Reaffirmation Agreements</td>
<td></td>
</tr>
<tr>
<td>D.</td>
<td>Creditor Activities</td>
<td></td>
</tr>
<tr>
<td>VII.</td>
<td>CREDITORS' MEETING</td>
<td></td>
</tr>
<tr>
<td>A.</td>
<td>Preparation Of Client</td>
<td></td>
</tr>
<tr>
<td>B.</td>
<td>Trustee Report Of No Assets</td>
<td></td>
</tr>
<tr>
<td>C.</td>
<td>Dealing With Creditors</td>
<td></td>
</tr>
<tr>
<td>VIII.</td>
<td>FOLLOW UP</td>
<td></td>
</tr>
<tr>
<td>A.</td>
<td>Amendments To Petition</td>
<td></td>
</tr>
<tr>
<td>B.</td>
<td>Redeeming Property</td>
<td></td>
</tr>
<tr>
<td>C.</td>
<td>Lien Avoidance</td>
<td></td>
</tr>
</tbody>
</table>
## APPENDIX

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A.</td>
<td>Reaffirmation Agreement</td>
<td>37</td>
</tr>
<tr>
<td>B.</td>
<td>Bankruptcy Questionnaire</td>
<td>39</td>
</tr>
<tr>
<td>C.</td>
<td>Fee Agreement</td>
<td>53</td>
</tr>
<tr>
<td>D.</td>
<td>Disclosure Of Compensation Of Attorney For Debtor</td>
<td>55</td>
</tr>
<tr>
<td>E.</td>
<td>Notice Of Stay</td>
<td>57</td>
</tr>
<tr>
<td>F.</td>
<td>Amendment To Schedules</td>
<td>59</td>
</tr>
<tr>
<td>G.</td>
<td>Motion And Order To Redeem Property</td>
<td>61</td>
</tr>
<tr>
<td>H.</td>
<td>Motion To Avoid Lien With Order</td>
<td>63</td>
</tr>
</tbody>
</table>

### CHAPTER 3:

#### THE AUTOMATIC STAY AND ABANDONMENT

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>THE AUTOMATIC STAY</td>
<td>67</td>
</tr>
<tr>
<td>A.</td>
<td>Introduction</td>
<td>67</td>
</tr>
<tr>
<td>B.</td>
<td>Scope Of The Automatic Stay</td>
<td>67</td>
</tr>
<tr>
<td>1.</td>
<td>Litigation</td>
<td>68</td>
</tr>
<tr>
<td>2.</td>
<td>Enforcement of Judgments</td>
<td>68</td>
</tr>
<tr>
<td>3.</td>
<td>Acts to Obtain Possession of Property of the Estate</td>
<td>68</td>
</tr>
<tr>
<td>4.</td>
<td>Acts to Create, Perfect or Enforce any Lien Against Property of the Debtor or the Estate of the Debtor</td>
<td>68</td>
</tr>
<tr>
<td>5.</td>
<td>Acts to Collect, Assess or Recover Claims Against the Debtor</td>
<td>68</td>
</tr>
<tr>
<td>6.</td>
<td>Setoff</td>
<td>69</td>
</tr>
<tr>
<td>C.</td>
<td>Violation Of The Stay; Penalties</td>
<td>69</td>
</tr>
<tr>
<td>D.</td>
<td>Grounds For Relief From The Automatic Stay</td>
<td>70</td>
</tr>
<tr>
<td>1.</td>
<td>Cause Defined</td>
<td>71</td>
</tr>
<tr>
<td>2.</td>
<td>Adequate Protection Defined</td>
<td>72</td>
</tr>
<tr>
<td>E.</td>
<td>Obtaining Stay Relief: Distinctions Between Chapter 7 And Chapter 13</td>
<td>72</td>
</tr>
<tr>
<td>1.</td>
<td>Burdens of Proof</td>
<td>73</td>
</tr>
<tr>
<td>2.</td>
<td>Procedure</td>
<td>73</td>
</tr>
<tr>
<td>II.</td>
<td>ABANDONMENT OF PROPERTY OF THE ESTATE</td>
<td>74</td>
</tr>
<tr>
<td>A.</td>
<td>Generally</td>
<td>74</td>
</tr>
<tr>
<td>B.</td>
<td>Grounds</td>
<td>75</td>
</tr>
<tr>
<td>C.</td>
<td>Procedure</td>
<td>75</td>
</tr>
</tbody>
</table>
### III. APPENDIX

<table>
<thead>
<tr>
<th>Appendix</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Motion For Relief From Stay</td>
<td>77</td>
</tr>
<tr>
<td>B. Notice Regarding Lapse Of Insurance</td>
<td>81</td>
</tr>
<tr>
<td>C. Certificate Of Noncompliance</td>
<td>83</td>
</tr>
<tr>
<td>D. Motion By Secured Creditor For Abandonment Of Property</td>
<td>85</td>
</tr>
</tbody>
</table>

### CHAPTER 4: EXEMPTIONS, LIEN AVOIDANCE AND OTHER ASPECTS OF DEALING WITH SECURED CREDITORS IN CHAPTER 7 BANKRUPTCIES

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>EXEMPTIONS</td>
<td>87</td>
</tr>
<tr>
<td>A.</td>
<td>Introduction</td>
<td>87</td>
</tr>
<tr>
<td>B.</td>
<td>Basic Categories Of Exemptions</td>
<td>87</td>
</tr>
<tr>
<td>C.</td>
<td>Claiming Exemptions</td>
<td>89</td>
</tr>
<tr>
<td>1.</td>
<td>Trustee's and Creditors' Right to Object to Exemptions</td>
<td>90</td>
</tr>
<tr>
<td>a.</td>
<td>Burden of Proof</td>
<td>90</td>
</tr>
<tr>
<td>b.</td>
<td>Time Limitations</td>
<td>90</td>
</tr>
<tr>
<td>II.</td>
<td>LIEN AVOIDANCE</td>
<td>91</td>
</tr>
<tr>
<td>A.</td>
<td>Introduction</td>
<td>91</td>
</tr>
<tr>
<td>B.</td>
<td>Bases For Lien Avoidance</td>
<td>91</td>
</tr>
<tr>
<td>1.</td>
<td>Impairment of Exemption</td>
<td>92</td>
</tr>
<tr>
<td>2.</td>
<td>Preference</td>
<td>93</td>
</tr>
<tr>
<td>3.</td>
<td>Fraudulent Conveyance</td>
<td>93</td>
</tr>
<tr>
<td>4.</td>
<td>Lien Defects</td>
<td>94</td>
</tr>
<tr>
<td>C.</td>
<td>Procedure For Avoiding Liens</td>
<td>94</td>
</tr>
<tr>
<td>D.</td>
<td>Burden And Standard Of Proof</td>
<td>95</td>
</tr>
<tr>
<td>III.</td>
<td>OTHER ASPECTS OF DEALING WITH SECURED CREDITORS IN CHAPTER 7 BANKRUPTCIES</td>
<td>95</td>
</tr>
<tr>
<td>A.</td>
<td>What Is A &quot;Secured Creditor&quot;?</td>
<td>95</td>
</tr>
<tr>
<td>B.</td>
<td>Rights And Remedies Of Secured Creditors</td>
<td>95</td>
</tr>
<tr>
<td>C.</td>
<td>Reaffirmation</td>
<td>95</td>
</tr>
<tr>
<td>D.</td>
<td>Adequate Protection</td>
<td>96</td>
</tr>
<tr>
<td>E.</td>
<td>Relief From The Automatic Stay</td>
<td>97</td>
</tr>
<tr>
<td>1.</td>
<td>The Existence of a Valid Secured Claim in an Amount Certain</td>
<td>97</td>
</tr>
<tr>
<td>2.</td>
<td>The Lack of Adequate Protection of the Secured Creditor's Interest in the Collateral</td>
<td>97</td>
</tr>
<tr>
<td>Section</td>
<td>Title</td>
<td>Page</td>
</tr>
<tr>
<td>-----------</td>
<td>-----------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>3. [4.25]</td>
<td>The Debtor's Lack of Equity in the Collateral</td>
<td>98</td>
</tr>
<tr>
<td>4. [4.26]</td>
<td>Procedure for Obtaining Relief from the Automatic Stay</td>
<td>98</td>
</tr>
<tr>
<td>F. [4.27]</td>
<td>Redemption</td>
<td>98</td>
</tr>
</tbody>
</table>

**CHAPTER 5:**

**ADVERSARY PROCEEDINGS TO DETERMINE DISCHARGEABILITY OF DEBTS AND TO CHALLENGE DEBTOR'S GENERAL DISCHARGE**

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. [5.1]</td>
<td>INTRODUCTION AND SCOPE</td>
<td>99</td>
</tr>
<tr>
<td>II. [5.2]</td>
<td>BANKRUPTCY TERMINOLOGY AND CONCEPTS</td>
<td>99</td>
</tr>
<tr>
<td>A. [5.3]</td>
<td>Non-Dischargeable Debt</td>
<td>99</td>
</tr>
<tr>
<td>B. [5.4]</td>
<td>Denial Of Debtor's Discharge</td>
<td>100</td>
</tr>
<tr>
<td>C. [5.5]</td>
<td>Adversary Proceedings</td>
<td>100</td>
</tr>
<tr>
<td>D. [5.6]</td>
<td>Reaffirmation Of Debts</td>
<td>100</td>
</tr>
<tr>
<td>E. [5.7]</td>
<td>Procedure In Adversary Proceedings</td>
<td>101</td>
</tr>
<tr>
<td>III. [5.8]</td>
<td>BANKRUPTCY CODE §523 - NON-DISCHARGEABILITY</td>
<td>101</td>
</tr>
<tr>
<td>A. [5.9]</td>
<td>§523(a)(2)(A) - False Pretense, False Representation Or Actual Fraud</td>
<td>101</td>
</tr>
<tr>
<td>B. [5.11]</td>
<td>§523(a)(2)(C) - Luxury Goods</td>
<td>103</td>
</tr>
<tr>
<td>1. [5.12]</td>
<td>Presumption Periods</td>
<td>104</td>
</tr>
<tr>
<td>C. [5.13]</td>
<td>§523(a)(2)(B) - Use Of A False Statement In Writing</td>
<td>104</td>
</tr>
<tr>
<td>D. [5.15]</td>
<td>Unjustified 523(a)(2) Claims</td>
<td>107</td>
</tr>
<tr>
<td>F. [5.18]</td>
<td>§523(a)(8) - Student Loans</td>
<td>109</td>
</tr>
<tr>
<td>G. [5.20]</td>
<td>§523(a)(5) And (15)-Obligations Incident To A Divorce</td>
<td>111</td>
</tr>
<tr>
<td>1. [5.21]</td>
<td>Case Law: §§523(a)(5) and (15)</td>
<td>114</td>
</tr>
<tr>
<td>H. [5.22]</td>
<td>The Automatic Stay And §523 Judgment Collection</td>
<td>114</td>
</tr>
<tr>
<td>V. [5.25]</td>
<td>PRACTICE TIPS</td>
<td>117</td>
</tr>
</tbody>
</table>
B. [5.27] The Subpoena Duces Tecum .................................................. 118
  1. [5.28] Checking and Savings Account Records ......................... 118
  2. [5.29] Policies of Property Insurance and Riders ................... 119
C. [5.30] Use Of Written Discovery .................................................... 119
D. [5.31] Settlement Document .......................................................... 119

VI. [5.32] CONCLUSION ........................................................................... 120

CHAPTER 6: THE CHAPTER 7 BANKRUPTCY TRUSTEE AND THE BANKRUPT ESTATE

I. [6.1] PROPERTY OF THE ESTATE ......................................................... 121
A. [6.2] Estate Property Defined .......................................................... 121
  1. [6.3] Property Received Within Six Months of Petition ........... 121
  2. [6.4] Proceeds of Estate Property .............................................. 121
  3. [6.5] Property Not Part of the Estate ........................................ 121
  4. [6.6] Effect of Restrictions on Transfer of Property Interest .......... 121
B. [6.7] Property Of Estate And The Chapter 7 Trustee, Generally ...... 122
  1. [6.8] Property Exemptions .......................................................... 122
  2. [6.9] Objections to Exemptions .................................................. 122
  3. [6.10] Abandonment of Property ............................................. 122

II. [6.12] PREFERENCE LITIGATION ....................................................... 122
A. [6.13] Introduction ......................................................................... 122
B. [6.14] Preferences-Purpose ............................................................. 126
C. [6.15] Definitions ........................................................................... 126
  1. [6.16] §547(a) ........................................................................... 126
     a. [6.17] Inventory .................................................................. 126
     b. [6.18] New Value ............................................................... 126
     c. [6.19] Receivable ............................................................... 127
     d. [6.20] Taxes ..................................................................... 127
  2. [6.21] §547(b)-Elements of Preference ......................................... 127
     a. [6.21] Transfer of Interest of Debtor .................................. 127
     b. [6.22] Antecedent Debt ..................................................... 127
     c. [6.24] Insolvency ............................................................... 128
     d. [6.25] 90-Day Rule ........................................................... 128
     e. [6.26] One Year Rule ........................................................ 128
     f. [6.27] Liquidation Test ......................................................... 128
D. [6.28] Defenses Of Creditors .......................................................... 129
  2. [6.30] Ordinary Course ............................................................. 130
E. [6.31] Security Interests ................................................................. 130
D. [6.65] Statute Of Limitations ................................................................. 142

V. [6.66] OTHER ISSUES RELATING TO TRUSTEE'S ADMINISTRATION OF
THE BANKRUPTCY ESTATE ................................................................. 143
   A. [6.67] Post-Petition Transfers .............................................................. 143
   B. [6.68] Trustee's Power To Compel Turnover Of Property .......... 143
         1. [6.69] §542 Turnover of Property of the Estate ................. 143
         2. [6.70] §543 Turnover of Property by Custodian .......... 144
   C. [6.71] Trustee's Standing To Object To Or Revoke Discharge .... 144
   D. [6.72] Operation Of The Debtor's Business ................................. 145
   E. [6.73] General Duties And Responsibilities Of A Trustee .......... 145
         1. [6.74] Control Property of the Estate ............................. 145
         2. [6.75] Insure Debtor's Performance of §521 Intentions .... 146
         3. [6.76] Duty to Examine Debtor Concerning Knowledge
            of the Bankruptcy Proceedings ............................. 146
         4. [6.77] Duty to Investigate Financial Affairs of Debtor .... 146
         5. [6.78] Examination of Proof of Claims ......................... 147
         6. [6.79] Duty to Furnish Information ............................ 147
         7. [6.80] Duty to File a Final Account ............................ 147

VI. [6.81] ENDNOTES ................................................................................. 149

CHAPTER 7: BASIC CREDITOR ISSUES IN CHAPTER 7 BANKRUPTCIES

I. [7.1] CREDITOR ISSUES .................................................................... 151
   A. [7.2] Types Of Claims Against A Bankruptcy Estate .......... 151
   B. [7.3] Leases And Executory Contracts ................................. 152
   C. [7.4] Involuntary Bankruptcy Proceedings ......................... 153
   D. [7.5] Utility Service In Bankruptcy Cases ............................ 154
   E. [7.6] Rule 2004 Examinations, The Ultimate Discovery Tool ... 155
   F. [7.7] Working With A Bankruptcy Trustee ............................ 155

CHAPTER 8: BANKRUPTCY ETHICS: A DIFFERENT WORLD?

I. [8.1] INTRODUCTION ......................................................................... 157


xvi
### CHAPTER 8: DEBTOR'S ETHICAL RESPONSIBILITIES

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>8.4 Multiple Representation of Related Parties</td>
<td>158</td>
</tr>
<tr>
<td>2.</td>
<td>8.5 Conflicts Between the Debtor and its Attorney</td>
<td>159</td>
</tr>
<tr>
<td>a.</td>
<td>8.6 Representation of Third Parties</td>
<td>159</td>
</tr>
<tr>
<td>b.</td>
<td>8.7 Business and Financial Ties Between the Debtor and the Proposed Attorneys</td>
<td>159</td>
</tr>
<tr>
<td>c.</td>
<td>8.8 Retainer and Pre-Petition Payment Problems</td>
<td>159</td>
</tr>
<tr>
<td>d.</td>
<td>8.9 Other Problems</td>
<td>160</td>
</tr>
<tr>
<td>B.</td>
<td>8.10 11 U.S.C. §327(e): Employment As Special Counsel</td>
<td>160</td>
</tr>
<tr>
<td>C.</td>
<td>8.11 11 U.S.C. §1103(b): Employment As Counsel For A Committee Of Creditors</td>
<td>161</td>
</tr>
<tr>
<td>D.</td>
<td>8.12 Full Disclosure, The Key Issue?</td>
<td>161</td>
</tr>
<tr>
<td>E.</td>
<td>8.13 Nunc Pro Tunc Employment: Better Late Than Never?</td>
<td>162</td>
</tr>
</tbody>
</table>

### CHAPTER 9: OFFICE OF THE UNITED STATES TRUSTEE

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>9.1 INTRODUCTION</td>
<td>175</td>
</tr>
<tr>
<td>A.</td>
<td>9.2 Statutory Authority</td>
<td>175</td>
</tr>
<tr>
<td>B.</td>
<td>9.3 Mission Statement</td>
<td>176</td>
</tr>
</tbody>
</table>
CHAPTER 10: SPECIAL ISSUES FOR CASES INVOLVING DOMESTIC RELATIONS CASES

I. [10.1] INTRODUCTION ................................................................. 185

II. [10.2] SUPPORT OBLIGATIONS ......................................................... 185
B. [10.4] Refining Calhoun ............................................................... 186
   1. [10.5] Practice Pointer .......................................................... 186
C. [10.6] Procedure ................................................................. 187
   1. [10.7] Jurisdiction ............................................................... 187
   2. [10.8] Adversary Proceeding ..................................................... 187
   3. [10.9] Burden of Proof ......................................................... 187
   4. [10.10] Standard of Proof ...................................................... 187

III. [10.11] DISCHARGEABILITY OF NON-SUPPORT (PROPERTY) OBLIGATIONS ......................................................... 187
A. [10.12] Exception To Discharge .................................................. 187
B. [10.13] Elements ............................................................... 188
   1. [10.14] Nature of Debt ......................................................... 188
   2. [10.15] When Debtor is Entitled to Relief/Burdens of Proof ... 188
3. [10.16] Affirmative Defense: The Debtor Lacks the Ability to Pay the Debt from Property or Disposable Income .... 189
4. [10.17] Affirmative Defense: Discharge Results in a Benefit to the Debtor that Outweighs Detrimental Consequences to Spouse (Creditor) ................................................................. 189
5. [10.18] Time of Measurement ................................................................. 189

C. [10.19] Procedure .................................................................................. 190
1. [10.20] Statute of Limitations for Determinations Pursuant to Section 523(a)(15) ......................................................... 190

D. [10.21] Kentucky Rulings .................................................................... 190

IV. [10.22] PRACTICE POINTERS ................................................................. 191
A. [10.23] Representing The Debtor .......................................................... 191
B. [10.24] Representing The Creditor Non-Debtor Spouse ........................ 191

V. [10.25] THE AUTOMATIC STAY - EXCEPTION FOR SUPPORT OBLIGATIONS ................................................................. 191
A. [10.26] Practice Pointers ..................................................................... 192

VI. [10.27] TRANSFERS TO SPOUSES - EXCEPTIONS TO PREFERENCES ................................................................. 193
A. [10.28] Transfers To Spouses - Protection Of Liens ............................... 194

VII. [10.29] CONCLUSION ......................................................................... 194

VIII. [10.30] APPENDIX ............................................................................ 197
A. [10.31] Complaint To Determine Dischargeability Of Debt .............. 197
B. [10.32] Pre-Trial Order ........................................................................ 199

GENERAL APPENDICES ........................................................................... 203

I. Official Bankruptcy Forms ................................................................... 205
II. Statutory Provisions ........................................................................... 245
III. Local Bankruptcy Rules And Forms .................................................... 289

INDEX .................................................................................................... 385

xix
Chapter 1

AMERICAN BANKRUPTCY LAW: AN OVERVIEW

C. R. Bowles, Jr.

I. [1.1] PURPOSE AND SCOPE OF PUBLICATION

This publication is intended to provide the Kentucky legal practitioner with a practical desk reference to Chapter 13 Consumer Bankruptcy practice in the Commonwealth of Kentucky. After the brief historical overview of bankruptcy law and a general overview of Chapter 7, Chapter 11, and Chapter 13 of the United States Bankruptcy Code provided by this chapter, the reader is provided with coverage of representation issues for the Chapter 13 debtor; automatic stay and stay litigation; confirmation and dismissal litigation; bankruptcy trustee practice; creditor issues; fee applications; and ethical considerations in bankruptcy practice. Numerous appendices and forms are included in order to provide the attorney with time-saving tools for a more efficient practice.

II. [1.2] HISTORICAL OVERVIEW OF AMERICAN BANKRUPTCY LAW

The leading bankruptcy historian, Charles Warren, accurately described bankruptcy law as, "a gloomy and depressing subject." However, while gloomy, bankruptcy is now a fixture of American economic life. Entities from newly divorced poor consumers to major retailers and industrial companies have taken advantage of the provisions contained in the U.S. Bankruptcy Code. Until the turn of the century, however, bankruptcy law was not a constant fixture of American law.

American bankruptcy law has its roots in the English bankruptcy system. The earliest English bankruptcy laws were somewhat criminal in nature and gave creditors massive powers against debtors. Indeed, debtors guilty of fraud could be put to death. However, just before the American Revolution, bankruptcy law began to move to a commercial rather than criminal basis with the 1732 statute of King George II. This law allowed for certain limited discharges of indebtedness and modest exemptions of property. The law also gave jurisdiction over bankruptcy matters to the Chancellor's Court of Equity.

In the years between the American Revolution and the passage of the United States Constitution in 1787, the states had jurisdiction over bankruptcy matters. Many of these state laws were discriminatory against non-resident creditors. Therefore, the framers of the Constitution believed that a uniform bankruptcy law was necessary to promote interstate commerce and prevent fraud. However, while the Constitution gave the Federal government the power to pass bankruptcy laws, Congress did not exercise that power until 1800 with the passage of the Bankruptcy Act of 1800.

Between 1800 and 1878, three separate Bankruptcy Acts were passed and repealed. Each of these Acts were passed in response to a specific economic crisis. These Acts were supplemented by the creation of Federal Equity Receivership to deal with railroad insolvency problems. In 1898, Congress passed the Bankruptcy Act of 1898. This Act, which formed the basis of most of the current Bankruptcy Code, remained in force until 1978 when it was replaced with the current Bankruptcy Code.
III. [1.3] OVERVIEW OF CHAPTERS 7, 11, AND 13 OF THE UNITED STATES BANKRUPTCY CODE

The remaining pages to this chapter contain an overview and analysis of Chapter 7, Chapter 11, and Chapter 13 Bankruptcies. The information is reprinted from the Public Information Series of the Bankruptcy Judges Division, Administrative Office of the United States Courts and provides an excellent analysis of the options available under the Code.

IV. [1.4] ENDNOTES

1 Warren, Bankruptcy in United States History (1935).
2 The Federalist, No. 42 (James Madison).
Liquidation Under The Bankruptcy Code - Chapter 7

Public Information Series of the Bankruptcy Judges Division
December 1995

Chapter 7 of the United States Bankruptcy Code is the Bankruptcy Code's "liquidation" chapter. Lawyers sometimes refer to it as a "straight bankruptcy." It is used primarily by individuals who wish to free themselves of debt simply and inexpensively, but may also be used by businesses that wish to liquidate and terminate their business.

Debtors should be aware that there are several alternatives to chapter 7 relief. For example, debtors who are engaged in business, including corporations, partnerships, and sole proprietorships, may prefer to remain in business and avoid liquidation. Such debtors should consider filing a petition under chapter 11 of the Bankruptcy Code. Under chapter 11, the debtor may seek an adjustment of debts, either by reducing the debt or by extending the time for repayment, or may seek a more comprehensive reorganization. Sole proprietorships may also be eligible for relief under chapter 13 of the Bankruptcy Code.

In addition, individual debtors who have regular income may seek an adjustment of debts under chapter 13 of the Bankruptcy Code. Indeed, a court may dismiss a chapter 7 case filed by an individual whose debts are primarily consumer rather than business debts if the court finds that the granting of relief would be a substantial abuse of the provisions of chapter 7. 11 U.S.C. § 707(b). A number of courts have concluded that a chapter 7 case may be dismissed for substantial abuse when the debtor has the ability to propose and carry out a workable and meaningful chapter 13 plan. The Bankruptcy Judges Division has prepared a separate pamphlet which discusses chapter 13 of the Bankruptcy Code in greater detail.

Debtors should also be aware that out-of-court agreements with creditors or debt counseling services may provide an alternative to a bankruptcy filing.

**Background**

The potential chapter 7 debtor should understand that a straight bankruptcy case does not involve the filing of a plan of repayment as in chapter 13, but rather envisions the bankruptcy trustee's gathering and sale of the debtor's nonexempt assets, from which holders of claims (creditors) will receive distributions in accordance with the provisions of the Bankruptcy Code. Part of the debtor's property may be subject to liens and mortgages that pledge the property to other creditors. In addition, under chapter 7, the individual debtor is permitted to retain certain "exempt" property. The debtor's remaining assets are liquidated by a trustee. Accordingly, potential debtors should realize that the filing of a petition under chapter 7 may result in the loss of property.

In order to qualify for relief under chapter 7 of the Bankruptcy Code, the debtor must be an individual, a partnership, or a corporation. 11 U.S.C. §§ 109(b); 101(41). Relief is available under chapter 7 irrespective of the amount of the debtor's debts or whether the debtor is solvent or insolvent. An individual cannot file
Under chapter 7 or any other chapter, however, if during the preceding 180 days a prior bankruptcy petition was dismissed due to the debtor's willful failure to appear before the court or comply with orders of the court or the debtor voluntarily dismissed the previous case after creditors sought relief from the bankruptcy court to recover property upon which they hold liens. 11 U.S.C. §§ 109(g), 362(d) and (e).

One of the primary purposes of bankruptcy is to discharge certain debts to give an honest individual debtor a "fresh start." The discharge has the effect of extinguishing the debtor's personal liability on dischargeable debts. In a chapter 7 case, however, a discharge is available to individual debtors only, not to partnerships or corporations. 11 U.S.C. § 727(a)(1). Although the filing of an individual chapter 7 petition usually results in a discharge of debts, an individual's right to a discharge is not absolute, and some types of debts are not discharged. Moreover, a bankruptcy discharge does not extinguish a lien on property.

**How Chapter 7 Works**

A chapter 7 case begins with the debtor's filing a petition with the bankruptcy court. The petition should be filed with the bankruptcy court serving the area where the individual lives or where the business debtor has its principal place of business or principal assets. 28 U.S.C. § 1408. In addition to the petition, the debtor is also required to file with the court several schedules of assets and liabilities, a schedule of current income and expenditures, a statement of financial affairs, and a schedule of executory contracts and unexpired leases. Bankruptcy Rule 1007(b). A husband and wife may file a joint petition or individual petitions. 11 U.S.C. § 302(a). (Official Bankruptcy Forms can be purchased at a legal stationery store. They are not available from the court.)

In order to complete the Official Bankruptcy Forms which make up the petition and schedules, the debtor(s) will need to compile the following information:

- A list of all creditors and the amount and nature of their claims;
- The source, amount, and frequency of the debtor's income;
- A list of all of the debtor's property; and
- A detailed list of the debtor's monthly living expenses, i.e., food, clothing, shelter, utilities, taxes, transportation, medicine, etc.

Currently, the courts are required to charge a $130 case filing fee, a $30 miscellaneous administrative fee, and a $15 trustee surcharge (a total of $175). The fees should be paid to the clerk of the court upon filing or may, with the court's permission, be paid by individual debtors in installments. 28 U.S.C. § 1930(a); Bankruptcy Rule 1006(b); Bankruptcy Court Miscellaneous Fee Schedule, item 8. Rule 1006(b) limits to four the number of installments for the filing fee. The final installment shall be payable not later than 120 days after filing the petition. For cause shown, the court may extend the time of any installment, provided that the last installment is paid not later than 180 days after the filing of the petition. Bankruptcy Rule 1006(b). The $30 administrative fee and the $15 trustee surcharge may be paid in installments in the same manner as the filing fee. If a joint petition is filed, only one filing fee, one administrative fee, and one trustee surcharge are charged. Debtors should be aware that failure to pay these fees may result in dismissal of the case. 11 U.S.C. § 707(a).

The filing of a petition under chapter 7 "automatically stays" most actions against the debtor or the debtor's property, 11 U.S.C. § 362. This stay arises by operation of law and requires no judicial action. As long as the stay is in effect, creditors generally cannot initiate or continue any lawsuits, wage garnishments, or even telephone calls demanding payments. Creditors normally receive notice of the filing of the petition from the clerk.

One of the schedules that will be filed by the individual debtor is a schedule of " exempt" property. Federal bankruptcy law provides that an individual debtor can protect some property from the claims of creditors either because it is exempt under federal bankruptcy law or because it is exempt under the laws of the debtor's home state. 11 U.S.C. § 522(b). Many states have taken advantage of a provision in the bankruptcy law that permits each state to adopt its own exemption law in place of the federal exemptions. In other jurisdictions, the individual debtor has the option of choosing between a federal package of exemptions or exemptions available under state law. Thus, whether certain property is exempt and may be kept by the debtor is often a question of state law. Legal counsel should be consulted to determine the law of the state in which the debtor lives.

A "meeting of creditors" is usually held 20 to 40 days after the petition is filed. If the United States trustee or
Role of the Case Trustee

Upon the filing of the chapter 7 petition, an impartial case trustee is appointed by the United States trustee (or by the court in Alabama and North Carolina) to administer the case and liquidate the debtor's nonexempt assets. 11 U.S.C. §§ 701, 704. If, as is often the case, all of the debtor's assets are exempt or subject to valid liens, there will be no distribution to unsecured creditors. Typically, most chapter 7 cases involving individual debtors are "no asset" cases. If the case appears to be an "asset" case at the outset, however, unsecured creditors5 who have claims against the debtor must file their claims with the clerk of court within 90 days after the first date set for the meeting of creditors. Bankruptcy Rule 3002(c). In the typical no asset chapter 7 case, there is no need for creditors to file proofs of claim. If the trustee later recovers assets for distribution to unsecured creditors, creditors will be given notice of that fact and additional time to file proofs of claim. Although secured creditors are not required to file proofs of claim in chapter 7 cases in order to preserve their security interests or liens, there may be circumstances when it is desirable to do so. A creditor in a chapter 7 case who has a lien on the debtor's property should consult an attorney for advice.

The commencement of a bankruptcy case creates an "estate." The estate technically becomes the temporary legal owner of all of the debtor's property. The estate consists of all legal or equitable interests of the debtor in property as of the commencement of the case, including property owned or held by another person if the debtor has an interest in the property. Generally speaking, the debtor's creditors are paid from nonexempt property of the estate.

The primary role of a chapter 7 trustee in an "asset" case is to liquidate the debtor's nonexempt assets in a manner that maximizes the return to the debtor's unsecured creditors. To accomplish this, the trustee attempts to liquidate the debtor's nonexempt property, i.e., property that the debtor owns free and clear of liens and the debtor's property which has market value above the amount of any security interest or lien and any exemption that the debtor holds in the property. The trustee also pursues causes of action (lawsuits) belonging to the debtor and pursues the trustee's own causes of action to recover money or property under the trustee's "avoiding powers." The trustee's avoiding powers include the power to set aside preferential transfers made to creditors within 90 days before the petition, the power to undo security interests and other prepetition transfers of property that were not properly perfected under nonbankruptcy law at the time of the petition, and the power to pursue nonbankruptcy claims such as fraudulent conveyance and bulk transfer remedies available under state law. In addition, if the debtor is a business, the bankruptcy court may authorize the trustee to operate the debtor's business for a limited period of time, if such operation will benefit the creditors of the estate and enhance the liquidation of the estate. 11 U.S.C. § 721.

The distribution of the property of the estate is governed by section 726 of the Bankruptcy Code, which sets forth the order of payment of all claims. Under section 726, there are six classes of claims, and each class must be paid in full before the next lower class is paid anything. The debtor is not particularly interested in the trustee's disposition of the estate assets, except with respect to the payment of those debts which for some reason are not dischargeable in bankruptcy, administrator2 designates a place for the meeting that is not regularly staffed by the United States trustee or bankruptcy administrator, the meeting may be held no more than 60 days after the order for relief. Bankruptcy Rule 2003(a). The debtor must attend this meeting, at which creditors may appear and ask questions regarding the debtor's financial affairs and property. 11 U.S.C. § 343. If a husband and wife have filed a joint petition, they both must attend the creditors' meeting. The trustee also will attend this meeting. It is important for the debtor to cooperate with the trustee and to provide any financial records or documents that the trustee requests. The trustee is required to examine the debtor orally at the meeting of creditors to ensure that the debtor is aware of the potential consequences of seeking a discharge in bankruptcy, including the effect on credit history, the ability to file a petition under a different chapter, the effect of receiving a discharge, and the effect of reaffirming a debt. In some courts, trustees may provide written information on these topics at or in advance of the meeting, to ensure that the debtor is aware of this information. In order to preserve their independent judgment, bankruptcy judges are prohibited from attending the meeting of creditors. 11 U.S.C. § 341(c).

In order to accord the debtor complete relief, the Bankruptcy Code allows the debtor to convert a chapter 7 case to either a chapter 11 reorganization case or a case under chapter 13,4 as long as the debtor meets the eligibility standards under the chapter to which the debtor seeks to convert, and the case has not previously been converted to chapter 7 from either chapter 11 or chapter 13. Thus, the debtor will not be permitted to convert the case repeatedly from one chapter to another. 11 U.S.C. § 706(a).
the bankruptcy case. The debtor’s major interests in a chapter 7 case are in retaining exempt property and in gaining a discharge that covers as many debts as possible.

Discharge

A discharge releases the debtor from personal liability for discharged debts and may bar creditors from seeking recovery of those debts from taking any action against the debtor or his property to collect the debts. The bankruptcy law regarding the scope of a chapter 7 discharge is complex, and debtors should consult competent legal counsel in this regard prior to filing. As a general rule, however, excluding cases which are dismissed or converted, individual debtors receive a discharge in more than 99 percent of chapter 7 cases. In most cases, unless a complaint has been filed objecting to the discharge or the debtor has filed a written waiver, the discharge will be granted to a chapter 7 debtor relatively early in the case, that is, 60 to 90 days after the date first set for the meeting of creditors. Bankruptcy Rule 4004(c).

The grounds for denying an individual debtor a discharge in a chapter 7 case are very narrow and are construed against a creditor or trustee seeking to deny the debtor a chapter 7 discharge. Among the grounds for denying a discharge to a chapter 7 debtor are that the debtor failed to keep or produce adequate books or financial records; the debtor failed to explain satisfactorily any loss of assets; the debtor committed a bankruptcy crime such as perjury; the debtor failed to obey a lawful order of the bankruptcy court, or the debtor fraudulently transferred, concealed, or destroyed property that would have become property of the estate. 11 U.S.C. § 727; Bankruptcy Rule 4005.

In certain jurisdictions, secured creditors may retain some rights to seize pledged property, even after a discharge is granted. Depending on individual circumstances, a debtor wishing to keep possession of the pledged property, such as an automobile, may find it advantageous to “reaffirm” the debt. A reaffirmation is an agreement between the debtor and the creditor that the debtor will pay all or a portion of the money owed, even though the debtor has filed bankruptcy. In return, the creditor promises that, as long as payments are made, the creditor will not repossess or take back the automobile or other property. Because there is a disagreement among the courts concerning whether a debtor whose debt is not in default may retain the property and pay under the original contract terms without reaffirming the debt, legal counsel should be consulted to ensure that the debtor’s rights are protected and that any reaffirmation is in the debtor’s best interest.

If the debtor elects to reaffirm the debt, the reaffirmation should be accomplished in writing. A written agreement to reaffirm a debt must be filed with the court and, if the debtor is not represented by an attorney, must be approved by the judge. 11 U.S.C. § 524(a). The Bankruptcy Code requires that reaffirmation agreements contain an explicit statement advising the debtor that the agreement is not required by bankruptcy or non-bankruptcy law. In addition, the debtor’s attorney is required to advise the debtor of the legal effect and consequences of such an agreement, including a default under such an agreement. The Code requires a reaffirmation hearing only if the debtor has not been represented by an attorney during the negotiating of the agreement. 11 U.S.C. § 524(d). The debtor may repay any debt voluntarily, however, whether or not a reaffirmation agreement exists. 11 U.S.C. § 524(f).

Most claims against an individual chapter 7 debtor are discharged. A creditor whose unsecured claim is discharged may no longer initiate or continue any legal or other action against the debtor to collect the obligation. A discharge under chapter 7, however, does not discharge an individual debtor from certain specific types of debts listed in section 523 of the Bankruptcy Code. Among the types of debts which are not discharged in a chapter 7 case are alimony and child maintenance and support obligations, certain taxes, debts for certain educational benefit overpayments or loans made or guaranteed by a governmental unit, debts for willful and malicious injury by the debtor to another entity or to the property of another entity, debts for death or personal injury caused by the debtor’s operation of a motor vehicle while the debtor was intoxicated from alcohol or other substances, and debts for criminal restitution orders under title 18, United States Code. 11 U.S.C. § 523(a). To the extent that these types of debts are not fully paid in the chapter 7 case, the debtor is still responsible for them after the bankruptcy case has concluded. Debts for money or property obtained by false pretenses, debts for fraud or defalcation while acting in a fiduciary capacity, debts for willful and malicious injury by the debtor to another entity or to the property of another entity, and debts arising from a property settlement agreement incurred during or in connection with
a divorce or separation are discharged unless a creditor timely files and prevails in an action to have such debts declared excepted from the discharge. 11 U.S.C. § 523(c); Bankruptcy Rule 4007(c).

The court may revoke a chapter 7 discharge on the request of the trustee, a creditor, or the United States trustee if the discharge was obtained through fraud by the debtor or if the debtor acquired property that is property of the estate and knowingly and fraudulently failed to report the acquisition of such property or to surrender the property to the trustee. 11 U.S.C. § 727(d).

1. An involuntary chapter 7 case may be commenced under certain circumstances by the filing of a petition by creditors holding claims against the debtor. 11 U.S.C. § 303.

2. Each debtor in a joint case (both husband and wife) can claim exemptions under the federal bankruptcy laws. 11 U.S.C. § 522(m).

3. United States trustees and bankruptcy administrators are responsible for establishing a panel of private trustees to serve as trustees in chapter 7 cases and for supervising the administration of cases and trustees in cases under chapters 7, 11, 12, and 13 of the Bankruptcy Code. Bankruptcy administrators serve in the judicial districts in the states of Alabama and North Carolina.

4. A fee of $400 is charged for converting, on request of the debtor, a case under chapter 7 to a case under chapter 11. There is no fee for converting from chapter 7 to chapter 13.

5. Unsecured debts generally may be defined as those for which the extension of credit was based purely upon an evaluation by the creditor of the debtor's ability to pay, as opposed to secured debts, for which the extension of credit was based upon the creditor's right to seize pledged property on default, in addition to the debtor's ability to pay.
Reorganization Under The Bankruptcy Code - Chapter 11

Public Information Series of the Bankruptcy Judges Division
May 1995

A case filed under chapter 11 of the United States Bankruptcy Code is frequently referred to as a 'reorganization' bankruptcy.

While the information presented herein is accurate as of the date of publication, it should not be cited or relied upon as legal authority. This information should not be used as a substitute for reference to the United States Bankruptcy Code (title 11, United States Code) and the Bankruptcy Rules, both of which may be reviewed at local law libraries, or to any local rules of practice adopted and disseminated by each bankruptcy court. Finally, this fact sheet should not substitute for the advice of competent legal counsel. For additional copies of this publication, please contact the Bankruptcy Judges Division, Administrative Office of the United States Courts (202) 272-1900.

Background

An individual may file under chapter 11; however, the provisions of chapter 11 are generally used to reorganize a business. Chapter 11 allows the debtor to continue its business operations by means of a plan of reorganization, which must meet certain statutory criteria. 11 U.S.C. § 1129. By enacting chapter 11, Congress gave the debtor a chance to restructure its finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. Because chapter 11 envisions an ongoing business, the most likely persons to have knowledge of the operation and details of the business are the existing managers who normally continue operations during the chapter 11 process. A major rationale for business reorganization under chapter 11 is that the value of a business as an ongoing concern is greater than it would be if its assets were sold. When a business develops financial difficulties, such as not being able to pay its creditors due to cash flow problems, it may consider filing a chapter 11 bankruptcy. If the business can extend or reduce its debts or drastically lower its operating costs, it often can be returned to a viable state. Generally, it is more economically efficient to reorganize than to liquidate, because doing so preserves jobs and assets. Cooperation among the various interests is crucial to a successful reorganization.

How Chapter 11 Works

The bankruptcy petition is the document which commences a bankruptcy case. Fed. R. Bankr. P. 1002. A petition may be a voluntary petition, which is filed by the debtor, or it may be an involuntary petition, which is filed by creditors that meet certain requirements. 11 U.S.C. §§ 301, 303. A voluntary petition should adhere to the format of Form 1 of the Official Forms prescribed by the Judicial Conference of the United States. The Official Forms may be purchased at legal stationery stores. The voluntary petition will include standard information concerning the debtor's name(s), social security number or tax identification number, residence, location of principal assets (if a business), the debtor's plan or intention to file a plan, and a request for relief under chapter 11 of the Bankruptcy Code. In addition, the voluntary petition will indicate whether the debtor qualifies as a small business as defined in 11 U.S.C. § 101(51C) and whether the debtor elects to be considered a small business under 11 U.S.C. § 1121(a). Upon the filing of a voluntary petition for relief under chapter 11 or, in an involuntary case, the entry of an order for such relief, the debtor automatically assumes an additional identity as the "debtor in possession." 11 U.S.C. § 1101. The term refers to a debtor that keeps possession and control of its assets while undergoing a reorganization under chapter 11.
without the appointment of a case trustee and prior to confirmation of a chapter 11 plan. The appointment or election of a trustee occurs only in a small number of cases. Generally, the debtor, as "debtor in possession," continues to operate the business and performs many of the functions that a trustee performs in cases under other chapters. 11 U.S.C. § 1107(a). For a further discussion of trustees, refer to pages 4 and 5 below.

A written disclosure statement and a plan of reorganization must be filed with the court. 11 U.S.C. § 1121. The disclosure statement is a document that must contain information concerning the assets, liabilities, and affairs of the debtor sufficient to enable a creditor to make an informed judgment about the plan. 11 U.S.C. § 1125. The information required is governed by judicial discretion and the circumstances of the case. The contents of the plan must include a classification of claims and must specify how each class of claims will be treated under the plan. The plan must be voted upon by those creditors whose claims are "impaired," i.e., those whose contractual rights are to be modified or who will be paid less than the full value of their claims under the plan. 11 U.S.C. § 1126. After the disclosure statement is approved and the ballots are collected and tallied, there must be a confirmation hearing at which the court determines whether to confirm the plan. 11 U.S.C. § 1128.

The Chapter 11 Debtor in Possession

While individuals are not precluded from using chapter 11, it is more typically used to reorganize a business, which may be a corporation, sole proprietorship, or partnership. A corporation exists separate and apart from its owners, the stockholders. The chapter 11 bankruptcy case of a corporation does not put the personal assets of the stockholders at risk, although they may lose the value of their investment in the company's stock. A sole proprietorship, on the other hand, does not have an identity separate and distinct from its owner(s); accordingly, a bankruptcy case involving a sole proprietorship includes both the business and personal estates of the owners-debtors. Like a corporation, a partnership exists separate and apart from its partners; however, the partners' personal assets may, in some cases, be used to pay creditors in the bankruptcy case or the partners may, themselves, be forced to file for bankruptcy protection.

Section 1107 of the Code places the debtor in possession in the position of a fiduciary, with the rights and powers of a chapter 11 trustee, and requires the performance of all but the investigative functions and duties of a trustee. These duties are set forth in the Bankruptcy Code and Federal Rules of Bankruptcy Procedure. 11 U.S.C. §§ 1106, 1107; Fed. R. Bankr. P. 2015(e). Such powers and duties include accounting for property, examining and objecting to claims, and filing informational reports as required by the court and the United States Trustee, such as monthly operating reports. The debtor in possession also has many of the other powers and duties of a trustee including the right, with the court's approval, to employ attorneys, accountants, appraisers, auctioneers, or other professional persons. Other responsibilities include filing tax returns and filing such reports as are necessary or as the court orders after confirmation, such as a final accounting. The United States Trustee is responsible for monitoring the compliance of the debtor in possession with the reporting requirements.

It should be noted that railroad reorganizations have specific requirements under subsection IV of chapter 11 which will not be addressed here and that stock and commodity brokers are prohibited from filing under chapter 11 and are restricted to chapter 7. 11 U.S.C. § 109(d).

The Small Business Debtor

Certain types of debtors are defined in the Bankruptcy Code and have special provisions that apply only to them. One such debtor is a "small business," defined as a person engaged in commercial or business activities (not including a person that primarily owns or operates real property) that has aggregate noncontingent liquidated secured and unsecured debts that do not exceed $2,000,000. 11 U.S.C. § 101(51C). If a debtor qualifies and elects to be considered a small business under 11 U.S.C. § 1121(e), the case is put on a "fast track" and treated differently than a regular chapter 11 case under the Code. For example, the appointment of a creditors' committee and a separate hearing to approve the disclosure statement are not mandatory. On request of a party in interest and for cause, the court may order that a creditors' committee not be appointed. 11 U.S.C. § 1102(a)(3). The court may conditionally approve a disclosure statement, subject to final approval after notice and a hearing. Solicitation of votes for acceptance or rejection of the plan may proceed based on the conditional approval of the disclosure statement. Thereafter, the disclosure statement hearing may be combined with the confirmation hearing. 11 U.S.C. § 1125(h). In addition, the debtor has a shortened period of time (100 days from the date of the order for relief) within
which only the debtor may file a plan. After the 100-day period expires, any party in interest may file a plan; however, all plans must be filed within 160 days from the date of the order for relief. 11 U.S.C. § 1121(a). (The filing of a voluntary bankruptcy petition constitutes an "order for relief." 11 U.S.C. § 301.)

The Single Asset Real Estate Debtor

Another type of debtor that has special provisions under the Bankruptcy Code is a single asset real estate debtor. The term "single asset real estate" is defined as "a single property or project, other than residential real property with fewer than four residential units, which generates substantially all of the gross income of a debtor and on which no substantial business is being conducted by a debtor" other than operating the real property and which has aggregate noncontingent liquidated secured debts of no more than $4,000,000. 11 U.S.C. § 101(51B). The Code provides circumstances under which creditors of a single asset real estate debtor may obtain relief from the automatic stay. 11 U.S.C. § 362(d). For example, on request of a creditor with a claim secured by the real estate and after notice and a hearing, the court will grant relief from the automatic stay to the creditor, within 90 days from the date of the order for relief, unless the debtor files a feasible plan of reorganization or begins making payments to the creditor. The payments must be equal to the current fair market interest rate on the value of the creditor’s interest in the real estate. 11 U.S.C. § 362(d)(3).

The Automatic Stay

The automatic stay provides for a period of time in which all judgments, collection activities, foreclosures, and repossessions of property are suspended and may not be pursued on any debt or claim that arise before the filing of the bankruptcy petition. As with cases under other chapters of the Bankruptcy Code, a stay of creditor actions against the debtor automatically goes into effect when the bankruptcy petition is filed. 11 U.S.C. § 362(a). The filing of a petition, however, does not operate as a stay for certain types of actions listed under 11 U.S.C. § 362(b). The stay provides a breathing spell for the debtor, during which negotiations can take place to try to resolve the difficulties in the debtor’s financial situation.

Under certain circumstances, such as when the debtor has no equity in the particular property and that property is not necessary for an effective reorganization, the secured creditor can obtain an order from the court granting relief from the automatic stay to foreclose on the property, sell it, and apply the proceeds to the debt. 11 U.S.C. § 362(d). A secured creditor is one which has a lien against or interest in certain property of the debtor to secure payment of a debt or performance of an obligation. See 11 U.S.C. § 101(37).

It should be noted that, although creditors are stayed from action against the debtor unless relief is granted by the court, section 331 of the Code permits applications for fees to be made by certain professionals during the case. Thus, a trustee, a debtor’s attorney, or any professional person may apply to the court at intervals of 120 days for interim compensation and reimbursement payments. In very large cases with extensive legal work the court may permit more frequent applications. Although professional fees may be paid pursuant to authorization by the court, the debtor cannot make payments to creditors on prepetition obligations, i.e., obligations which arose before the filing of the bankruptcy petition. The ordinary expenses of the ongoing business, however, continue to be paid.

Creditors’ Committees

Creditors’ committees can play a major role in chapter 11 cases. The United States trustee, a federal employee to be distinguished from a private case trustee or panel trustee, appoints the committee, which ordinarily consists of the persons willing to serve on the committee who hold the seven largest unsecured claims against the debtor. 11 U.S.C. § 1102. Unsecured claims are those for which the extension of credit was based upon an evaluation by the creditor of the debtor’s ability to pay, as opposed to retaining a lien against the property of the debtor to secure payment. In addition, other types of unsecured claims may arise from patent infringement, personal injury, or other damage claims. The committee may consult with the debtor in possession on the administration of the case, investigate the conduct of the debtor and the operation of the business, and participate in the formulation of a plan. 11 U.S.C.
§ 1103. A creditors' committee can be an important safeguard to the proper management of the business by the debtor in possession.

Who Can File A Plan

There is no specific statutory time limit set for the filing of a plan; however, the debtor (unless a "small business" debtor, as set out above) has a 120-day period during which it has an exclusive right to file a plan. 11 U.S.C. § 1121(b). The debtor's exclusive period in which to file a plan may be extended or reduced by the court. After the exclusive period has expired, a creditor or the case trustee may file a competing plan. The United States trustee, however, may not file a plan. 11 U.S.C. § 307.

A chapter 11 case may continue for many years unless the court, the United States trustee, the committee, or another party in interest acts to ensure its timely resolution. The creditors' right to file a competing plan, however, provides incentive for the debtor to file a plan within the exclusive period and acts as a check on excessive delay in the bankruptcy.

Avoidable Transfers

The debtor in possession or the trustee, as the case may be, has what are called "avoiding" powers. Such powers may be used to undo a transfer of money or property made during a certain period of time prior to the filing of the bankruptcy petition. By avoiding a particular transfer of property, the debtor in possession can cancel the transaction and force the return or "disgagement" of the payments or property, which then are available to pay all creditors, rather than only one. Generally, the power to avoid transfers is effective against transfers made within 90 days prior to the filing of the petition. However, transfers to insiders (i.e., relatives, general partners, and directors or officers of the debtor) made up to a year prior to filing can be avoided or undone. 11 U.S.C. §§ 101(31), 101(54), 547, 548. In addition, under 11 U.S.C. § 544, the trustee is given the authority to avoid transfers under applicable state law, which often provides for longer time periods.

Cash Collateral, Adequate Protection, And Operating Capital

Although the preparation, confirmation, and implementation of a plan of reorganization is at the heart of a chapter 11 case, other issues may arise which must be addressed by the debtor in possession. The debtor in possession may use, sell, or lease property of the estate in the ordinary course of its business, without prior approval, unless the court orders otherwise. 11 U.S.C. § 363(c). If the sale or use is outside the ordinary course of business, permission from the court is required. A debtor in possession may not use "cash collateral," i.e., collections of accounts subject to security interests or proceeds from the sale of pledged inventory or equipment, without the consent of the secured party or authorization by the court which must first examine whether the interest of the secured party is adequately protected. 11 U.S.C. § 363.

When "cash collateral" is used, either in the ordinary course of business or outside of it, the secured creditors receive additional protection under section 363 of the Bankruptcy Code. Section 363 defines "cash collateral" as cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents, whenever acquired, in which the estate and an entity other than the estate have an interest. It includes the proceeds, products, offspring, rent, or profits of property and the fees, charges, accounts or payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a creditor's security interest. The debtor in possession must file a motion requesting an order from the court authorizing the use of the cash collateral. Pending consent of the secured creditor or court authorization, after notice and hearing, the debtor in possession must segretate and account for cash collateral. 11 U.S.C. § 363(c)(4). A party with an interest in property being used by the debtor may request that the court prohibit or condition this use to the extent necessary to provide "adequate protection" to the creditor.

Adequate protection may be required to protect the value of the creditor's interest in the property being used by the debtor in possession. This is especially important when there is a decrease in value of the property. The debtor may make periodic or lump sum cash payments, or provide an additional or replacement lien that will result in the creditor's property interest being adequately protected. 11 U.S.C. § 361.

When a chapter 11 debtor needs operating capital, it may be able to obtain it from a lender by giving the lender a court-approved "superiority" over other unsecured creditors or a lien on property of the estate. 11 U.S.C. § 364.

Appointment Or Election Of A Case Trustee

Although the appointment of a case trustee is a rarity in a chapter 11 case,
a party in interest or the United States trustee can request the appointment of a case trustee or examiner at any time prior to confirmation in a chapter 11 case. The court, on motion by a party in interest or the United States trustee and after notice and hearing, shall order the appointment of a case trustee for cause, including fraud, dishonesty, incompetence, or gross mismanagement, or if such an appointment is in the interest of creditors, any equity security holders, and other interests of the estate. 11 U.S.C. § 1104(a). The trustee is appointed by the United States trustee, after consultation with parties in interest and subject to the court’s approval. Fed. R. Bankr. P. 2007.1. Alternatively, a trustee in a case may be elected if a party in interest requests the election of a trustee within 30 days after the court orders the appointment of a trustee. In that instance, the United States trustee convenes a meeting of creditors for the purpose of electing a person to serve as trustee in the case. 11 U.S.C. § 1104(b).

In chapter 11 cases, the United States trustee, a federal employee, does not act as a case trustee, who is generally a private individual. The United States trustee is responsible for monitoring all chapter 11 cases and has standing to appear and be heard on any issue in any case, but may not file a plan. See 11 U.S.C. § 307. The case trustee, on the other hand, is responsible for management of the property of the estate, operation of the debtor’s business, and, if appropriate, the filing of a plan of reorganization. Section 1106 of the Code requires the trustee to file a plan “as soon as practicable” or, alternatively, to file a report explaining why a plan will not be filed or to recommend that the case be converted to another chapter or dismissed. 11 U.S.C. § 1106(e)(5).

The court, after notice and hearing, may, at any time before confirmation, upon the request of a party in interest or the United States trustee, terminate the trustee’s appointment and restore the debtor to possession and management of the property of the estate and of the operation of the debtor’s business. 11 U.S.C. § 1105.

The Role Of An Examiner

The appointment of an examiner in a chapter 11 case happens rarely, as does the appointment of a case trustee. In addition, the role of an examiner is generally more limited than that of a trustee. The examiner is authorized to perform the investigatory functions of the trustee and is required to file a statement of any investigation conducted. If ordered to do so by the court, however, an examiner may carry out any other duties of a trustee that the court orders the debtor in possession not to perform. 11 U.S.C. § 1106. The individual court has the authority to determine the duties of an examiner in each particular case. In some cases, the examiner may file a plan of reorganization, negotiate or help the parties negotiate, or review the debtor’s schedules to determine whether some of the claims are improperly listed as disputed, contingent, or unliquidated, or whether other claims should be listed as such. Sometimes, the examiner may be directed to determine if objections to any proofs of claim should be filed or whether causes of action have sufficient merit so that further action should be taken. The examiner in a case, however, may not serve as a trustee. 11 U.S.C. § 321.

The United States Trustee Or Bankruptcy Administrator

In addition to the private case trustee or examiner and the creditors’ committee, the United States trustee plays a major role in monitoring the progress of a chapter 11 case and supervising its administration. The United States trustee is responsible for monitoring the debtor in possession’s operation of the business, the submission of operating reports and fees, applications for compensation and reimbursement, plans and disclosure statements, and creditors’ committees. The United States trustee conducts a meeting of the creditors, often referred to as the “section 341 meeting,” in a chapter 11 case. 11 U.S.C. § 341. The United States trustee and creditors may question the debtor under oath at the section 341 meeting concerning the debtor’s acts, conduct, property, and the administration of the case.

The United States trustee also imposes certain requirements on the debtor in possession concerning matters such as reporting its monthly income and operating expenses, the establishment of new bank accounts, and the payment of current employee withholding and other taxes. By law, the debtor in possession must pay a quarterly fee to the United States
trustee for each quarter of a year until a plan is confirmed or the case is converted or dismissed. 28 U.S.C. § 1930(a)(6). The amount of the fee, which may range from $250 to $5,000, depends upon the amount of disbursements during each quarter. Should a debtor in possession fail to comply with the reporting requirements of the United States trustee or orders of the bankruptcy court or fail to take the appropriate steps to bring the case to confirmation, the United States trustee may file a motion with the court to have the debtor's chapter 11 case converted to a case under another chapter of the Code or to have the case dismissed.

It should be noted that in North Carolina and Alabama, bankruptcy administrators perform similar functions that United States trustees perform in the remaining forty-eight states. The bankruptcy administrator program is administered by the Administrative Office of the United States Courts, while the United States trustee program is administered by the Department of Justice. For purposes of this fact sheet, references to United States trustees are also applicable to bankruptcy administrators.

Motions

Prior to confirmation of a plan, there ares several activities that may take place in a chapter 11 case. The continued operation of the debtor's business may lead to the filing of a number of strongly-contested motions. The most common are those seeking relief from the automatic stay, the use of cash collateral, or to obtain credit. There may also be litigation over executory (i.e., unfulfilled) contracts and unexpired leases and the assumption or rejection of those executory contracts and unexpired leases by the debtor in possession. 11 U.S.C. § 365. Delays in formulating, filing, and obtaining confirmation of a plan often cause creditors to file motions for relief from stay or motions to convert the case to a chapter 7 or to dismiss the case altogether.

Adversary Proceedings

Frequently, the debtor in possession will institute a lawsuit, known as an adversary proceeding, to recover money or property for the estate. Adversary proceedings may take the form of lien avoidance actions, actions to avoid preference, actions to avoid fraudulent transfers, or actions to avoid post petition transfers. Such proceedings are governed by Part VII of the Federal Rules of Bankruptcy Procedure. At times, a creditors' committee may be authorized by the bankruptcy court to pursue these actions against insiders if the plan provides for the committee to do so or if the debtor has refused a demand to do so. Creditors may also initiate adversary proceedings by filing complaints to determine the validity or priority of a lien, to revoke an order confirming a plan, to determine the dischargeability of a debt, to obtain an injunction, or to subordinate a claim of another creditor.

Claims

A claim is a right to payment or a right to an equitable remedy for a failure of performance if the breach gives rise to a right to payment. 11 U.S.C. § 101(5). In some instances, a creditor must file a proof of claim form along with documentation evidencing the validity and amount of the claim. When proofs of claim are required to be filed, creditors must file the proofs of claim with the bankruptcy clerk in the district where the case is pending. The clerk is required to keep a list of claims filed in a case when it appears that there will be a distribution to unsecured creditors. Fed. R. Bankr. P. 5003(b). Most creditors whose claims are scheduled (i.e., claims listed by the debtor on the debtor's schedules), but not listed as disputed, contingent, or unliquidated, need not file claims because the schedule of liabilities is deemed to constitute evidence of the validity and amount of those claims. 11 U.S.C. § 1111. Any creditor whose claim is not scheduled or is scheduled as disputed, contingent, or unliquidated must file a proof of claim in order to be treated as a creditor for purposes of voting on the plan and distribution under it. Fed. R. Bankr. P. 3003(c)(2).

If a scheduled creditor chooses to file a claim, a properly filed proof of claim supersedes any scheduling of that claim. Fed. R. Bankr. P. 3003(c)(4). It is the responsibility of the creditor to determine whether the claim is accurately listed. The debtor must provide notification to those creditors whose names are added and whose claims are listed as a result of an amendment to the schedules. The notification also should advise such creditors of their right to file proofs of claim and that their failure to do so may prevent them from voting upon the debtor's plan of reorganization or participating in any distribution under that plan. When a debtor amends the schedule of liabilities to add a creditor or change the status of any claims to disputed, contingent, or unliquidated claims, the debtor must provide notice of the amendment to any entity affected. Fed. R. Bankr. P. 1007(a).

Equity Security Holders

An equity security holder is a holder of an equity security of the debtor. Examples of an equity security are a share in a corporation, an interest of
a limited partner in a limited partnership, or a right to purchase, sell, or subscribe to a share, security, or interest in a share in a corporation or an interest in a limited partnership. 11 U.S.C. §§ 101(16) & (17). An equity security holder may vote on the plan of reorganization and may file a proof of interest, rather than a proof of claim. A proof of interest is deemed filed for any interest that appears in the debtor’s schedules, unless it is scheduled as disputed, contingent, or unliquidated. 11 U.S.C. § 1111. An equity security holder whose interest is not scheduled or scheduled as disputed, contingent, or unliquidated must file a proof of interest in order to be treated as a creditor for purposes of voting on the plan and distribution under it. Fed. R. Bankr. P. 3003(c)(2). A properly filed proof of interest supersedes any scheduling of that interest. Fed. R. Bankr. P. 3003(c)(4). Generally, most of the provisions that apply to proofs of claim, as discussed above, are also applicable to proofs of interest.

Conversion Or Dismissal

A debtor in a case under chapter 11 has a one-time absolute right to convert the chapter 11 case to a case under chapter 7 unless (1) the debtor is not a debtor in possession, (2) the case originally was commenced as an involuntary case under chapter 11, or (3) the case was converted to a case under chapter 11 other than at the debtor’s request. 11 U.S.C. § 1121(a). A debtor in a chapter 11 case does not have an absolute right to have the case dismissed upon request.

Generally, upon the request of a party in interest in the case or the United States trustee, after notice and hearing and “for cause,” the court may convert a chapter 11 case to a case under chapter 7 or dismiss the case, whichever is in the best interest of creditors and the estate. 11 U.S.C. § 1112(b). The court may convert or dismiss a case “for cause” when there is a continuing loss to the estate, an inability to effectuate a plan, unreasonable delay that is prejudicial to creditors, denial or revocation of confirmation, or inability to consummate a confirmed plan.

There are important exceptions to the conversion process in a chapter 11 case. One exception is that, unless the debtor requests the conversion, section 1112(c) of the Code prohibits the court from converting a case involving a farmer or charitable institution to a liquidation case under chapter 7.

The Disclosure Statement

The filing of a written disclosure statement is preliminary to the voting on a plan of reorganization, and the disclosure statement must provide “adequate information” concerning the affairs of the debtor to enable the holder of a claim or interest to make an informed judgment about the plan. 11 U.S.C. § 1125. After the disclosure statement is filed, the court must hold a hearing to determine whether the disclosure statement should be approved. Acceptance or rejection of a plan cannot be solicited without prior court approval of the written disclosure statement. 11 U.S.C. § 1125(b). After the disclosure statement has been approved, the debtor or proponent of a plan can begin to solicit acceptances of the plan, and creditors may also solicit rejections of the plan. Fed. R. Bankr. P. 3017(d) requires that, upon approval of a disclosure statement, unless the court orders otherwise with respect to unimpaired classes, the following must be mailed to the United States trustee and all creditors and equity security holders: (1) the plan, or a court approved summary of the plan; (2) the disclosure statement approved by the court; (3) notice of the time within which acceptances and rejections of the plan may be filed; and (4) such other information as the court may direct, including any opinion of the court approving the disclosure statement or a court-approved summary of the opinion. Fed. R. Bankr. P. 3017(d). In addition, the debtor may mail to the creditors and equity security holders entitled to vote on the plan or plans of chapter 11, an order for relief, or an order converting to chapter 7, a court order for relief, no later than the 120-day period after the filing of the voluntary bankruptcy petition, which filing also acts as the order of relief, only the debtor in possession may file a plan of reorganization. The debtor in possession has 150 days after the filing of the voluntary petition (or in a case commenced by an involuntary petition, after the order for relief) to obtain acceptances of the plan. 11 U.S.C. § 1121. For cause, the court may extend or reduce this exclusive period. 11 U.S.C. § 1121(d). The exclusive period begins on the date the debtor in possession files a plan. If the court orders a confirmation of the plan, and creditors and equity security holders may also solicit rejections of the plan (1) the plan, or

Acceptance Of The Plan Of Reorganization

As noted earlier, during the first 120-day period after the filing of the voluntary bankruptcy petition, which filing also acts as the order of relief, only the debtor in possession may file a plan of reorganization. The debtor in possession has 150 days after the filing of the voluntary petition (or in a case commenced by an involuntary petition, after the order for relief) to obtain acceptances of the plan. 11 U.S.C. § 1121. For cause, the court may extend or reduce this exclusive period. 11 U.S.C. § 1121(d). The exclusive period begins on the date the debtor in possession files a plan. If the court orders a confirmation of the plan, and creditors and equity security holders may also solicit rejections of the plan (1) the plan, or

14
class of claims or interests that is impaired under the plan within the 180-day period or any extensions granted by the court. 11 U.S.C. § 1121.

If the exclusive period expires before the debtor has filed and obtained acceptance of a plan, other parties in interest in the case, such as the creditors' committee or a creditor, may file a plan. Such a plan may compete with a plan filed by another party in interest or by the debtor. If a trustee is appointed, the trustee is responsible for filing a plan, a report of why the trustee will not file a plan, or a recommendation for the conversion or dismissal of the case. 11 U.S.C. § 1106(c)(5). A proponent of a plan is subject to the same requirements as the debtor with respect to disclosure and solicitation.

It should be noted that, in a chapter 11 case, a liquidating plan is permissible. Such a plan often allows the debtor in possession to liquidate the business under more economically advantageous circumstances than a chapter 7 liquidation. It also permits the creditors to take a more active role in fashioning the liquidation of the assets and the distribution of the proceeds than in a chapter 7 case.

Section 1123(a) of the Bankruptcy Code lists the mandatory provisions of a chapter 11 plan and section 1123(b) lists the discretionary provisions. Section 1123(a)(1) provides that a chapter 11 plan shall designate classes of claims and interests for treatment under the reorganization. Generally, a plan will classify claim holders as secured creditors, unsecured creditors entitled to priority, general unsecured creditors, and equity security holders.

Under section 1126(c) of the Code, an entire class of claims has accepted a plan if the plan has been accepted by creditors that hold at least two-thirds in amount and more than one-half in number of the allowed claims of the class held by creditors that have accepted or rejected the plan, e.g., creditors who have voted on the plan. Under section 1129(a)(10), if there are impaired classes of claims, the court cannot confirm a plan unless it has been accepted by at least one class of non-insiders who hold impaired claims (i.e., claims that are not going to be paid completely or in which some legal, equitable, or contractual right is altered). Moreover, under section 1126(f), holders of unimpaired claims are deemed to have accepted the plan.

Under section 1127(a) of the Bankruptcy Code, the proponent may modify the plan at any time before confirmation, and the modified plan will become the plan; but the plan as modified must meet all the requirements of chapter 11. Federal Rule of Bankruptcy Procedure 3019 provides that, when there is a proposed modification after balloting has been conducted and the court finds after a hearing that the proposed modification does not adversely affect the treatment of any creditor who has not accepted the modification in writing, the modification shall be deemed to have been accepted by all creditors who previously accepted the plan. If it is determined that the proposed modification does have an adverse effect on the claims of nonconsenting creditors, then another balloting must take place.

Because more than one plan may be submitted to the creditors for approval, Federal Rule of Bankruptcy Procedure 3016(b) requires that every proposed plan and modification be dated and identified with the name of the entity or entities submitting such plan or modification. When competing plans are presented and the requirements for confirmation, the court must consider the preferences of the creditors and equity security holders in determining which plan to confirm.

Any party in interest may file an objection to confirmation of a plan. The Bankruptcy Code requires the court, after notice, to hold a hearing on the confirmation of a plan. If no objection to confirmation has been timely filed, the Code allows the court to determine that the plan has been proposed in good faith and according to law. Fed. R. Bankr. P. 3020(b)(2). Before confirmation can be granted, the court must be satisfied that there has been compliance with all the other requirements of confirmation set forth in section 1129 of the Code, even in the absence of any objections. In order to confirm the plan, the court must find that (1) the plan is feasible, (2) it is proposed in good faith, and (3) the plan and the proponent of the plan are in compliance with the Code. In addition, the court must find that confirmation of the plan is not likely to be followed by liquidation or the need for further financial reorganization.
The Discharge

While some courts have a practice of issuing a discharge order in a case involving an individual, a separate order of discharge is usually not entered in a chapter 11 case. Section 1141(d)(1) specifies that the confirmation of a plan discharges the debtor from any debt that arises before the date of confirmation. After the plan is confirmed, the debtor is required to make plan payments and is bound by the provisions of the plan of reorganization. The confirmed plan creates new contractual rights, replacing or superseding pre-bankruptcy contracts.

There are, of course, exceptions to the general rule that an order confirming a plan operates as a discharge. Confirmation of a plan of reorganization will discharge any type of debtor -- corporation, partnership, or individual -- from most types of prepetition debts. It does not, however, discharge an individual debtor from any debt made nondischargeable by section 523 of the Bankruptcy Code. Confirmation does not discharge the debtor if the plan is a liquidation plan, as opposed to one of reorganization, and the debtor is not an individual. When the debtor is an individual, confirmation of a liquidation plan will effect a discharge unless grounds would exist for denying the debtor a discharge if the case were proceeding under chapter 7 instead of chapter 11. 11 U.S.C. §§ 1141(d)(2), 727(a).

Postconfirmation Modification Of The Plan

At any time after confirmation and before "substantial consummation" of a plan, the proponent of a plan may modify a plan if the modified plan would meet certain Bankruptcy Code requirements. 11 U.S.C. § 1127(b).

This should be distinguished from preconfirmation modification of the plan. A modified postconfirmation plan does not automatically become the plan. A modified postconfirmation plan in a chapter 11 case becomes the plan only "if circumstances warrant such modification" and the court, after notice and hearing, confirms the plan as modified pursuant to chapter 11 of the Code.

Postconfirmation Administration

Federal Rule of Bankruptcy Procedure 3020(d) provides that, "[n]otwithstanding the entry of the order of confirmation, the court may issue any other order necessary to administer the estate." This authority would include the postconfirmation determination of objections to claims or adversary proceedings which must be resolved before a plan can be fully consummated. Sections 1106(a)(7) and 1107(a) of the Bankruptcy Code require a debtor in possession or a trustee to report on the progress made in implementing a plan after confirmation. A chapter 11 trustee or debtor in possession has a number of responsibilities to perform after confirmation, including consummating the plan, reporting on the status of consummation, and applying for a final decree.

Revocation Of The Confirmation Order

A revocation of the confirmation order is an undoing or cancellation of the confirmation of a plan. A request for revocation of confirmation, if made at all, must be made by a party in interest within 180 days of confirmation. The court, after notice and hearing, may revoke a confirmation order "if and only if [the confirmation] order was procured by fraud." 11 U.S.C. § 1144.

The Final Decree

A final decree closing the case must be entered after the estate has been "fully administered." Fed. R. Bankr. P. 3022. Local bankruptcy court policies may determine when the final decree should be entered and the case closed.
Individual Debt Adjustment
Bankruptcy - Chapter 13

Public Information Series of the Bankruptcy Judges Division
May 1995

Chapter 13 of the United States Bankruptcy Code is frequently referred to as a "wage earner" chapter, although it is available to individuals with regular income from any source, not just wages.

Background

Chapter 13 is designed for individuals with regular income who desire to pay their debts but are currently unable to do so. The purpose of chapter 13 is to enable financially distressed individual debtors, under court supervision and protection, to propose and carry out a repayment plan under which creditors are paid over an extended period of time. Under this chapter, debtors are permitted to repay creditors, in full or in part, in installments over a three-year period, during which time creditors are prohibited from starting or continuing collection efforts. A plan providing for payments over more than three years must be "for cause" and be approved by the court. In no case may a plan provide for payments over a period longer than five years. 11 U.S.C. § 1322(d).

Any individual, even if self-employed or operating an unincorporated business, is eligible for chapter 13 relief as long as the individual's unsecured debts are less than $250,000 and secured debts are less than $750,000. 11 U.S.C. § 109(e). A corporation or partnership may not be a chapter 13 debtor. Id.

An individual cannot file under chapter 13 or any other chapter if, during the preceding 180 days, a prior bankruptcy petition was dismissed due to the debtor's willful failure to appear before the court or comply with orders of the court or was voluntarily dismissed after creditors sought relief from the bankruptcy court to recover property upon which they hold liens. 11 U.S.C. §§ 109(g), 362(d) and (e).

How Chapter 13 Works

A chapter 13 case begins with the filing of a petition with the bankruptcy court serving the area where the debtor has a domicile or residence. Unless the court orders otherwise, the debtor also shall file with the court (1) schedules of assets and liabilities, (2) a schedule of current income and expenditures, (3) a schedule of executory contracts and unexpired leases, and (4) a statement of financial affairs. Bankruptcy Rule 1007(b). A husband and wife may file a joint petition or individual petitions. 11 U.S.C. § 302(a). (Official Bankruptcy Forms can be purchased at a legal stationery store. They are not available from the court.)

Currently, the courts are required to charge a $130 case filing fee and a $30 miscellaneous administrative fee. The fees should be paid to the clerk of the court upon filing or may, with the court’s permission, be paid in installments. 28 U.S.C. § 1930(a); Bankruptcy Rule 1006(b); Bankruptcy Court Miscellaneous Fee Schedule, Item B. Rule 1006(b) limits to four the number of installments for the filing fee. The final installment shall be payable not later than 120 days after
filing the petition. For cause shown, the court may extend the time of any installment, provided that the last installment is paid not later than 180 days after the filing of the petition. Bankruptcy Rule 1006(b). If a joint petition is filed, only one filing fee and one administrative fee are charged.

In order to complete the Official Bankruptcy Forms which make up the petition, statement of financial affairs, and schedules, the debtor will need to compile the following information:

- A list of all creditors and the amounts and nature of their claims;
- The source, amount, and frequency of the debtor's income;
- A list of all of the debtor's property;
- A detailed list of the debtor's monthly living expenses, i.e., food, clothing, shelter, utilities, taxes, transportation, medicine, etc.

When a husband and wife file a joint petition or each spouse files an individual petition, the above detailed data must be gathered for both spouses. So that financial responsibilities can be accurately assessed when only one spouse files, the income and expenses of the non-filing spouse should be included in the debtor's schedules and statement of financial affairs.

Upon the filing of the petition, an impartial trustee is appointed to administer the case. 11 U.S.C. § 1302. If the number of cases so warrants, the United States trustee may appoint a standing trustee to serve in all chapter 13 cases in a district. 28 U.S.C. § 586(b). A primary role of the chapter 13 trustee is to serve as a disbursing agent, collecting payments from debtors and making distributions to creditors. 11 U.S.C. § 1302.

The filing of the petition under chapter 13 "automatically stays" most collection actions against the debtor or the debtor's property. 11 U.S.C. § 362. As long as the "stay" is in effect, creditors generally cannot initiate or continue any lawsuits, wage garnishment, or even telephone calls demanding payments. Creditors receive notice of the filing of the petition from the clerk or the trustee. Further, chapter 13 contains a special automatic stay provision applicable to creditors. Specifically, after the commencement of a chapter 13 case, unless the bankruptcy court authorizes otherwise, a creditor may not seek to collect a "consumer debt" from any individual who is liable with the debtor. 11 U.S.C. § 1301. Consumer debts are those incurred for consumer, as opposed to business, needs.

By virtue of the automatic stay, an individual debtor faced with a threatened foreclosure of the mortgage on his or her principal residence can prevent an immediate foreclosure by filing a chapter 13 petition. Chapter 13 then permits the debtor to cure defects on long-term home mortgage debts by bringing the payments current over a reasonable period of time. The debtor is permitted to cure a default with respect to a lien on the debtor's principal residence up until the completion of a foreclosure sale under state law. 11 U.S.C. § 1322(c).

The debtor must file a plan of repayment with the petition or within fifteen days thereafter, unless extended by the court for cause. Bankruptcy Rule 3015. The chapter 13 plan must provide for the full payment of all claims entitled to priority under section 507(a) (unless the holder of a particular claim agrees to different treatment of the claim); if the plan classifies claims, provide the same treatment for each claim within each class; and provide for the submission of such portion of the debtor's future income to the supervision of the trustee as is necessary for the execution of the plan. 11 U.S.C. § 1322. Other plan provisions are permissive. Id. Plans, which must be approved by the court, provide for payments of fixed amounts to the trustee on a regular basis, typically biweekly or monthly. The trustee then distributes the funds to creditors according to the terms of the plan, which may offer creditors less than full payment on their claims. If the trustee or a creditor with an unsecured claim objects to confirmation of the plan, the debtor is obligated to pay the amount of the claim or commit to the proposed plan all projected "disposable income" during the period in which the plan is in effect. 11 U.S.C. § 1325(b). Disposable income is defined as income not reasonably necessary for the maintenance or support of the debtor or dependents. If the debtor operates a business, disposable income is defined as excluding those amounts which are necessary for the payment of ordinary operating expenses. 11 U.S.C. § 1325(b)(2)(A) and (B).

A meeting of creditors is held in every case, during which the debtor is examined under oath. It is usually held 20 to 50 days after the petition is filed. If the United States trustee or bankruptcy administrator designates a place for the meeting which is not regularly staffed by the United States trustee or bankruptcy administrator, the meeting may be held no more than 60 days after the order for relief. Bankruptcy Rule 2003(a). The debtor
must attend the meeting, at which creditors may appear and ask questions regarding the debtor's financial affairs and the proposed terms of the plan. 11 U.S.C. § 343. If a husband and wife have filed a joint petition, they both must attend the creditors' meeting. The trustee will also attend the meeting and question the debtor on the same matters. In order to preserve their independent judgment, bankruptcy judges are prohibited from attending. 11 U.S.C. § 341(c). If there are problems with the plan, they are typically resolved during or shortly after the creditors' meeting. Generally, problems may be avoided if the petition and plan are complete and accurate and the trustee has been consulted prior to the meeting.

In a chapter 13 case, unsecured creditors who have claims against the debtor must file their claims with the court within 90 days after the first date set for the meeting of creditors. Bankruptcy Rule 3002(c). A governmental unit, however, may file a proof of claim until the expiration of 180 days from the date the case is filed. 11 U.S.C. § 502(b)(9).

After the meeting of creditors is concluded, the bankruptcy judge must determine at a confirmation hearing whether the plan is feasible and meets the standards for confirmation set forth in the Bankruptcy Code. 11 U.S.C. §§ 1324 and 1325. Creditors, who will receive 25 days' notice of the hearing, may object to confirmation. While a variety of objections may be made, the most frequent ones are that payments offered under the plan are less than creditors would receive if the debtor's assets were liquidated or that the debtor's plan does not commit all of the debtor's projected disposable income for the three-year period of the plan.

Within thirty days after the filing of the plan, even if the plan has not yet been approved by the court, the debtor must start making payments to the trustee. 11 U.S.C. § 1326(a)(1). If the plan is confirmed by the bankruptcy judge, the chapter 13 trustee commences distribution of the funds received in accordance with the plan "as soon as practicable." 11 U.S.C. § 1326(a)(2).

If the plan is not confirmed, the debtor has a right to file a modified plan. 11 U.S.C. § 1323. The debtor also has a right to convert the case to a liquidation case under chapter 7. 11 U.S.C. § 1307. If the plan or modified plan is not confirmed and the case is dismissed, the court may authorize the trustee to retain a specified amount for costs, but all other funds paid to the trustee are returned to the debtor. 11 U.S.C. § 1326(a)(2).

On occasion, changed circumstances will affect a debtor's ability to make plan payments, a creditor may object or threaten to object to a plan, or a debtor may inadvertently have failed to list all creditors. In such instances, the plan may be modified either before or after confirmation. 11 U.S.C. §§ 1323 and 1329. Modification after confirmation is not limited to an initiative by the debtor, but may be at the request of the trustee or an unsecured creditor. 11 U.S.C. § 1329(a).

Making The Plan Work

The provisions of a confirmed plan are binding on the debtor and each creditor. 11 U.S.C. § 1327. Once the court confirms the plan, it is the responsibility of the debtor to make the plan succeed. The debtor must make regular payments to the trustee, which will require adjustment to living on a fixed budget for a prolonged period. Alternatively, the debtor's employer can withhold the amount of the payment from the debtor's paycheck and transmit it to the chapter 13 trustee. Furthermore, while confirmation of the plan entitles the debtor to retain property as long as payments are made, the debtor may not incur any significant new credit obligations without consulting the trustee, as such credit obligations may have an impact upon the execution of the plan. 11 U.S.C. §§ 1305(c), 1322(a)(1) and 1327.

A debtor may consent to the deduction of the plan payments from the debtor’s paycheck. Experience has shown that this practice increases the likelihood that payments will be made on time and that the plan will be completed. In any event, failure to make the payments in accordance with the confirmed plan may result in dismissal of the case or its conversion to a liquidation case under chapter 7 of the Bankruptcy Code. 11 U.S.C. § 1307(c).

The Chapter 13 Discharge

The bankruptcy law regarding the scope of the chapter 13 discharge is complex and has recently undergone major changes. Therefore, debtors should consult competent legal counsel prior to filing regarding the scope of the chapter 13 discharge.

The chapter 13 debtor is entitled to a discharge upon successful completion of all payments under the chapter 13 plan. 11 U.S.C. § 1328(a). The discharge has the effect of releasing the debtor from all debts provided for by the plan or disallowed (under section 502), with limited exceptions. Those creditors who were provided for in full or in part under the chapter 13 plan may no longer initiate or continue any legal or other action
against the debtor to collect the discharged obligations.

In return for the willingness of the chapter 13 debtor to undergo the discipline of a repayment plan for three to five years, a broader discharge is available under chapter 13 than in a chapter 7 case. As a general rule, the debtor is discharged from all debts provided for by the plan or disallowed, except certain long term obligations (such as a home mortgage), debts for alimony or child support, debts for most government funded or guaranteed educational loans or benefit overpayments, debts arising from death or personal injury caused by driving while intoxicated or under the influence of drugs, and debts for restitution or a criminal fine included in a sentence on the debtor’s conviction of a crime. 11 U.S.C. § 1328(a). To the extent that these types of debts are not fully paid pursuant to the chapter 13 plan, the debtor will still be responsible for these debts after the bankruptcy case has concluded.

The Chapter 13 Hardship Discharge

After confirmation of a plan, there are limited circumstances under which the debtor may request the court to grant a “hardship discharge” even though the debtor has failed to complete plan payments. 11 U.S.C. § 1328(b). Generally, such a discharge is available only to a debtor whose failure to complete plan payments is due to circumstances beyond the debtor’s control and through no fault of the debtor, after creditors have received at least as much as they would have received in a chapter 7 liquidation case and when modification of the plan is not possible. Injury or illness that precludes employment sufficient to fund even a modified plan may serve as the basis for a hardship discharge. The hardship discharge is more limited than the discharge described above and does not apply to any debts that are nondischargeable in a chapter 7 case. 11 U.S.C. § 523.

1. Section 507 sets forth nine categories of unsecured claims which Congress has, for public policy reasons, given priority of distribution over other unsecured claims.

2. Unsecured debts generally may be defined as those for which the extension of credit was based purely upon an evaluation by the creditor of the debtor’s ability to pay. In contrast, secured debts are those for which the extension of credit was based upon not only the creditor’s evaluation of the debtor’s ability to pay, but upon the creditor’s right to seize pledged property on default.

Chapter 2
REPRESENTING THE CHAPTER 7 DEBTOR
Sandra D. Freeburger

I. [2.1] INTRODUCTION

It is the goal of the following chapter to assist the bankruptcy practitioner in effectively, efficiently and ethically handling Chapter 7 bankruptcy cases. Dealing with cases in this manner will bring plaudits from one's peers, but plaudits will not pay the rent. Therefore, an emphasis will also be placed upon obtaining, fostering and preserving the goodwill of your clients throughout the attorney/client relationship. After all, good recommendations from former clients are the best, most cost effective form of advertising.

The chapter is arranged chronologically as most cases unfold. So we begin with the initial client telephone call.

II. [2.2] INITIAL CLIENT CONTACT

A. [2.3] Role Of Secretary

I am uncertain whether we lawyers truly appreciate a well trained staff. Fielding the initial telephone call from a financially distressed individual falls to one's secretary, receptionist, administrative assistant, etc., whatever title you chose to bestow upon that person who bravely addresses the unknown public each time the telephone rings. For the purposes of this chapter, I will refer to this staff member as "secretary." The truism that first impressions are the most important was never more accurate than in this setting.

1. [2.4] Specific Inquiries Referred to Attorney

If the caller begins the conversation with a narrative of a specific event—a car has been repossessed, a lawsuit has been filed, a contract dispute has arisen—the secretary should go no further with the conversation. The caller should be promptly referred to an attorney.

2. [2.5] Basic Information and Fee Schedules

However, many inquiries are received from individuals who know that their financial affairs are desperate. As the number of consumer Chapter 7 filings continue to grow, many individuals are facing their second or third bankruptcy under the Bankruptcy Code of 1978. Information about bankruptcy law is more widespread due to legal advertising, press coverage of high profile bankruptcy cases and word of mouth. It is estimated that by the year's end 1,000,000 people in the United States will have filed for bankruptcy protection. The Courier-Journal, Sept. 9, 1996, at A3. So often your secretary will receive a call from an individual who knows very well that a bankruptcy case will be required to deal with his or her debts.

Your secretary must impart brief, accurate information about your services and fees. Highly visible advertising has increased the numbers of legal fee price shoppers. Unless your secretary can
impert to the caller information about your fees in consumer cases, you may find your calendar cluttered with long office conferences with individuals who really only want to know your charges.

In the author's office, the secretary will advise the caller of the firm's basic fee for routine Chapter 7 cases but will inform the caller that more complex cases require higher fees. Further, the secretary will tell the caller that there may be a charge for the initial consultation unless the firm is retained. This practice has eliminated some unproductive office conferences and distilled those would-be clients with whom the attorneys meet.

3. [2.6] Specific Inquiries and Preparation for Initial Client Interview

The caller will make inquiries of the secretary about substantive matters. It is important that one's secretary understand that bankruptcy protection from creditors will occur immediately upon filing; so when asked by a caller about the length of time required to stop a wage garnishment, the secretary can answer. See, 11 U.S.C. §362(a). In many areas a secretary is more competent to answer questions than the attorney. For example, when asked about the promptness of getting the petition filed, the secretary is often more aware of the existing workload and time demands. In the event a petition needs to be filed expeditiously, the secretary should know about the availability of skeleton and emergency filings, so the caller can be assured that the office and the court system can work with sufficient speed to meet a critical situation.

The secretary should ascertain the identities of the caller's major creditors. If the firm represents those creditors, then the secretary should advise the caller that a conflict of interest would prevent the firm from representing the caller.

To allow for a productive meeting between the caller and the attorney, the secretary must instruct the caller to prepare for the meeting by gathering financial information which lists the assets and the debts of the caller. The potential client should be asked to value those assets and designate which assets are encumbered by mortgages and liens. If the caller has been sued, the secretary should direct that copies of the complaint and other relevant pleadings be brought to the meeting. Certainly any deeds, wills, notes, and security agreements which the caller has on hand should be included in the portfolio. Tax returns can provide important information. As such, the caller should be asked to bring his/her tax returns for the past two (2) years to the initial meeting.

III. [2.7] INITIAL CLIENT INTERVIEW

A. [2.8] Client Relations

Many people who are forced to consider a Chapter 7 filing have never dealt with attorneys. Filled with the images of lawyers provided them by pop culture, they will arrive in the law office for the initial interview anxious not only about their circumstances, but about the lawyer. The attorney and support staff must put these interviewees at ease. Offering coffee or a beverage is elementary, but also think about dress and the conference room environment. By conducting the meeting in your best blue suit you may never develop a rapport with an hourly worker who has come to your office wearing dusty work clothes. By meeting in an austere law library, you may never engage in an open dialog which will fully apprise you of the clients' problems. These guests in your office should be impressed not only by your credentials but also your compassion.

While the stigma of filing a bankruptcy petition may have lessened since 1978, for most people bankruptcy is still an unthinkable act, the very consideration of which is emotionally wrenching. You are meeting people at a low point in their lives and you can observe their depression in their demeanor.
and posture. Realize that with the privileges afforded by the Bankruptcy Code, you have the power to help them.

B. [2.9] Ascertain Conflicts Of Interest

As you move into the actual interview, but before any discussion of specific legal issues, ask to review the list of creditors to whom the interviewee is indebted. Obviously, the attorney must ascertain if she/he has a conflict of interest which would prevent the formation of an attorney-client relationship. Any discussion of the client’s particular circumstances which occurs prior to a review of the creditor list can disqualify the attorney from representing either the debtor or the creditor client. KBA E.36, SCR 3.130-1.7, 1.9. Clients will respect an attorney who zealously seeks to avoid conflicts and appearances of impropriety.

C. [2.10] Immediate Problems And Future Concerns

Assuming no conflict of interest, it is then logical to ask the client about the immediate problem which has brought him or her into your office. In that way one can determine the rapidity of action which is required. For example, a wage earner whose salary is being garnished will need to decide whether to file and which form of bankruptcy relief to seek before his/her next paycheck is issued. Someone who has been served with a summons will have limited time to decide whether a good defense can be raised or whether legal fees are best spent on obtaining a discharge from the claim of the plaintiff. A client who foresees difficult financial times in the future may want to understand bankruptcy’s ramifications and has time for careful analysis.


The discussion should now refocus on the financial statement. Many clients insist that they have limited credit problems and that but for a delinquency or disagreement with one creditor no bankruptcy relief would be required. As the discussion proceeds, it may become evident that the problems are widespread and the resources limited. As you review the client’s financial information, consider the issues discussed below.

1. [2.12] Are the Debts Jointly Owed by Husband and Wife?

Assume the husband has participated in a failed business venture, leaving unpaid suppliers and business credit cards. The wife has liability only on bank notes which are secured by the residence and vehicles. The couple agrees that they wish to reaffirm the bank obligations. In such circumstances, there may be no reason for the spouse to join in the filing. Assume the residence arguably has value which exceeds the claim of the mortgagee and the statutory exemptions allowed by KRS 427.060 and KRS 427.160. Recognizing that the trustee can sell jointly owned property after obtaining a judgment in an adversary proceeding, consider whether the trustee is less likely to sell the residence if the co-owner spouse has filed no petition. See, 11 U.S.C.§ 363(g), (h). The spouse will participate in one-half of the sale proceeds with the debtor’s portion of the proceeds being surcharged with the sales expenses and the trustee’s commission. Consequently, it is not as attractive for the trustee to sell marginally nonexempt jointly owned assets as it would have been had the couple filed a joint petition.

2. [2.13] Should the Debtors have their Assets Appraised?

If the estate’s assets consist of automobiles or other kinds of property which are the subject of independent, well publicized valuation guides, then there may be no need to incur the expense of an appraisal. However, if the asset is out of the ordinary, say an antique automobile or specialty equipment, then an appraisal may be beneficial. It is the author’s experience that clients who have never been involved with the bankruptcy process habitually overestimate the worth of their property. Without an
appraisal the client may be adamant that the property is worth much more than the debt it secures; with the appraisal the client, and the trustee, can quickly see that no equity exists.

Conversely, an appraisal could reveal equity which the client did not know existed. Remember that the debtor must sign his/her schedules, under oath, valuing the assets at market value. See, FRBP 1008, 1007(b) which incorporates Official Form No. 6. An appraisal performed before filing must be considered by the debtor while affixing the value of the asset. Valuation of the asset at an amount significantly below the appraised value could conceivably create grounds for action against the debtor. 11 U.S.C.§727(a)(4).

3. [2.14] What are the Tax Ramifications of Filing?

If the debtor owns property which is encumbered to secure debts far in excess of value, then in all likelihood, this property will be abandoned from the bankruptcy estate and liquidated by the creditor. It is important to discuss the tax basis of such property. If the property is worth more than the taxpayer's basis, then the taxpayer will have a taxable gain when the property is sold, even if all the proceeds go to the creditor. See, 26 U.S.C.§ 61. The sale of depreciated equipment can lead to tremendous tax liability, for the debtor will be taxed on all the recaptured depreciation, even though the creditor receives all the proceeds. See, 26 U.S.C.§ 1245. These results will occur whether or not a Chapter 7 case was filed, but the attorney has a duty to advise clients of the ramifications of their actions. If the asset has equity and the Chapter 7 trustee decides to sell the property, then the taxpayer's basis passes to the estate and the tax liability will rest in the bankruptcy estate. See, 26 U.S.C.§ 1398.

Occasionally a creditor will recognize that the value of the asset which secures its debt is the most the creditor can hope to recover. In return for a quick sale, the creditor may be willing to forgive any debt which remains after the collateral is sold thereby eliminating the necessity of a bankruptcy filing. The attorney must advise the debtor that this proposal is fraught with peril. Recall that debt which is discharged as a part of a bankruptcy proceeding creates no tax; but, outside a bankruptcy case, the discharge or forgiveness of debt will likely create taxable income for the debtor. See, 26 U.S.C.§108(a)(1). Once created, income tax debt can not be discharged for three (3) years. See, 11 U.S.C.§ 523(a)(1A), 11 U.S.C.§ 507(a)(8)(A)(i). It may be necessary to decline the offer of the forgiving creditor in favor of filing a Chapter 7 case in order to escape debt forgiveness income.

In cases where significant tax liability may be created as a result of the debtor's action in liquidating property, a tax professional knowledgeable about the tax aspects of bankruptcy law should be involved in the prebankruptcy discussions.

4. [2.15] Does the Client have Substantial Equity in His/Her Assets?

Chapter 7 works best for those debtors who have accumulated significant unsecured debt and whose assets are encumbered to the full extent of their value by mortgages which are being paid on a current basis. Counselling the client with unexempt equity must be undertaken carefully. Obviously the client must be told that a Chapter 7 trustee is under an obligation to liquidate assets which will benefit the unsecured creditors. See, 11 U.S.C.§ 704(1). Occasionally a client will respond to that disclosure by expressing a willingness to allow the trustee to sell the asset. In light of the potential tax aspects of a sale, it may be best for the bankruptcy estate to bear the tax consequences of the sale.

Generally the debtor will ask the attorney about ways to preserve the asset. For an attorney, danger attaches to the response. Law journal articles and lectures have addressed the role of the attorney in prebankruptcy planning. See, Safford, The Slippery Slope: The Road from Ethical Practice to Attorney Negligence, Contempt or Fraud in Bankruptcy Cases, 2 Workshop for Bankruptcy Judges 227 (NCBJ 1996). These scholars examine the fine line that lawyers must draw between advising the clients of the status of the law and actively participating in defrauding creditors. If the lawyer crosses the line between
counselor and becomes an active participant in a scheme to defraud creditors, sanctions can attach. 18 U.S.C.§ 157.

Clients are entitled to fully understand state law exemptions and how they can be applied to their property. If a client has significant equity in an asset, the attorney should advise that by selling the assets or borrowing against the equity the client may invest the proceeds in a retirement account approved by KRS 427.150 and protect the equity (albeit in a different form).

If asked about giving property to the client's family, the practitioner should advise the client of the bankruptcy and state fraudulent conveyance statutes. See, 11 U.S.C.§ 548, KRS 378.010 et seq. Advise them that such gifts made within a year of the filing of a bankruptcy case can be easily set aside by the trustee. Clients should also be counseled that while Kentucky fraudulent conveyance law has a five (5) year statute of limitations, its requirements are more difficult to prove than the bankruptcy cause of action. The statement of affairs contained within the petition requires disclosure of gifts made within one (1) year of the filing date, so the overworked trustee may never discover transfers made outside the one (1) year time frame. See, FRBP 1007 (b)(1) incorporating Official Form No. 7.

If the client does not have at least $5,000.00 ($10,000.00 if a joint petition has been filed) equity in his/her home, the homestead exemption will not be fully utilized. See, KRS 427.060. In advance of filing, clients may consider liquidating an asset which has equity and investing those funds in their home. Either real property or mobile homes qualify. Beware that the exemption statute, KRS 427.060, limits the availability of the exemption, for it can be claimed only against creditors with claims acquired after the homestead was purchased. The trustee can use the powers granted under 11 U.S.C.§ 544 (b) to exercise the rights held by any unsecured creditor. So if any creditor’s debt was incurred before the homestead equity was created, the trustee can sell the homestead.

When in doubt, the attorney should claim any exemption to which the client is arguably entitled and place the burden on the trustee to object to the petitioner’s entitlement. Under Taylor v. Freeland & Kronz, 503 U.S. 638, 112 S.Ct. 1644, 118 L.Ed. 2d 280 (1992), the trustee has only thirty (30) days to object to the exemption.

5. [2.16] Has the Client Made any Payments to Creditors Other than Regular Installment Payments or Monthly Living Expenses Within the Last Year?

This information may not appear on the client's financial statement, so it is important that you probe. Often the payments which fall into this category are made to family members. It is understandable that the debtor would want to devote his/her limited resources in repaying a relative or friend. The debtor must know that filing a bankruptcy petition within one (1) year of the payment to an insider and within ninety (90) days of the payment to other creditors will entitle the trustee to investigate the preferential payment and probably recapture it for distribution to all creditors. See, 11 U.S.C.§ 550(a)(1).

Many Chapter 7 debtors have liability on which third parties have cosigned. These debtors must realize that payments to a bank on an unsecured note that has been cosigned by their parents (or other insiders) can entitle the trustee to recover the payments from the parents if a bankruptcy is filed within a year after the payments are made. See, 11 U.S.C.§ 547 (b)(4)(B). Those payments benefited an insider by decreasing the liability of the insider, so the payments are preferential. Note that voluntary payments on the same debt after bankruptcy are not preferential.

Understanding basic preference law can lead the client to consider Chapter 13 relief and thereby protect the preferential payment, to delay the filing of the bankruptcy to allow the payment to fall outside the preference period, or to accelerate the filing to enable the trustee to recover a preference that has been paid to a creditor in order to benefit other creditors, particularly tax creditors.
6. [2.17] Has the Client Granted any Mortgages or Security Interests to Secure Antecedent Debt Within One Year?

Clearly granting a creditor a mortgage to secure an otherwise unsecured debt can fall within the purview of a preferential conveyance, for such a transfer enables that creditor to receive more in repayment of debt than would have been the case without the transfer. In a Chapter 7 case, the recipient of a preferential security interest or mortgage is likely to be a creditor whose good opinion the debtor believes he/she needs to survive after bankruptcy. In such circumstances, the debtor will want to make every effort to avoid filing a bankruptcy petition until after the preference period has passed.

E. [2.18] Client Desires And Goals

After a thorough analysis of the debtors' financial information, it is helpful to ask the clients what they realistically hope to accomplish through the bankruptcy process. Often the clients will say that they will be happy if they can save their home or their car. They may proclaim that they just want out from under all their debt. Consider writing the clients a letter after the initial meeting and reiterating your understanding of their purpose. It is important to have this discussion at the very beginning of the representation. Expectations tend to soar as the bankruptcy case progresses, for the protection of the bankruptcy court is narcotic to some debtors, lulling them into false optimism while they are protected from making payments. When the case concludes and the debtors are faced with the reality of having to make payments on debts they have reaffirmed or new debts they have undertaken since filing, one can tactfully remind them that their initial goals have been met. They will feel more positively about their experience and about your representation.

Commonly clients will advise their lawyer that they want to pay all their debts. Attorneys are obligated to discuss Chapter 13 with clients and present it as a means of paying their debts, or at least a substantial portion of them. See, FRBP 1002 incorporating therein Official Form No. 1. As a part of the initial interview the practitioner must give clients an overview of both Chapter 13 and Chapter 7 bankruptcies.

F. [2.19] Chapter 13 Versus Chapter 7 Bankruptcies

1. [2.20] Design of Chapter 13

In general, Chapter 13 is designed to permit the payment of a significant amount to unsecured creditors and to return to secured creditors the value of their collateral, be it through the actual surrender of the collateral or the payment of the value of the collateral over the term of the plan with interest at the market rate. See, 11 U.S.C.§ 1325 (a)(5) and Memphis Bank & Trust Co. v. Whitman, 692 F.2d 427 (6th Cir. 1982). Discrimination between creditors who are similarly situated is prohibited. See, 11 U.S.C.§ 1322 (a)(3). Chapter 13 cases tend to be more complicated from the perspective of both the debtor and debtor's counsel; consequently legal fees are higher than fees in Chapter 7 cases, although the payment of these fees through the trustee's office in installments may be easier on the debtor's budget than Chapter 7 fees which are typically paid in one or two installments. At a minimum, Chapter 13 cases require a three (3) year commitment from the debtor, with court supervision of any additional, non-medical debt. 11 U.S.C.§ 1322 (d). However, Chapter 13 offers a means of dealing with debts which are nondischargeable in Chapter 7 and it offers protection for the debtor's cosigners, to the extent that the debtor proposes to pay the debt under his/her plan. 11 U.S.C.§ 1301(a). No assets will be sold or preferences recovered by the Chapter 13 trustee, as long as the debtor's plan proposes payment of an amount equivalent to these potential recoveries. See, 11 U.S.C.§ 1325 (a)(4).

2. [2.21] Design of Chapter 7

On the other hand, Chapter 7 is designed to completely discharge unsecured debt, at the cost of the debtor's equity. Most Chapter 7 proceedings are no asset cases, so debtors risk no equity by filing a
Chapter 7 proceeding. Congress has limited the filing of Chapter 7 cases by prohibiting a debtor from filing more than once every six (6) years. See, 11 U.S.C § 727 (a)(8). A Chapter 7 case is concluded quickly, requiring only one court appearance. 11 U.S.C § 341(d). The economic value of a Chapter 7 case can be tremendous. The debtor can obtain a discharge from many thousand dollars of debt, while attorney fees rarely exceed one thousand dollars. There is no prohibition against discriminating between creditors after the filing, so a Chapter 7 debtor can voluntarily repay one unsecured creditor, ignoring all other unsecured claimholders. See, 11 U.S.C § 524(f). Some debts will not be effected by a Chapter 7 filing. See, 11 U.S.C §§ 523 (a)(1),(3),(5),(7),(8),(9),(10),(11),(12),(13),(14) and (16). Taxes, child support obligations and student loan debts are examples. Other debts may be excepted from discharge if the creditors assert their rights in a timely manner. These debts include debts predicated upon a false financial statement, certain credit card debts incurred immediately before filing, debts arising out of fraud, etc. See, 11 U.S.C §§ 523(a)(2),(4),(6), and (15).

Having discussed the differences between Chapter 13 and Chapter 7 in general terms, it is then necessary to discuss these alternatives using the specific circumstances of the client. Ask the client if any money remains from his/her salary after payment of living expenses. Most will respond negatively. In those cases, no further exploration of Chapter 13 is required for there is no ability to fund the plan. If the client believes that he/she could make a Chapter 13 payment and meet his/her living expenses, then have the client complete Schedules I and J of the bankruptcy petition and delay further discussion of Chapter 13 until you have reviewed these schedules which list living expenses and income.

G. [2.22] Discussion Of Bankruptcy Process And Procedure

1. [2.23] Generally

If your clients have not previously asked how the bankruptcy system works, they will surely do so before the conclusion of the initial conference. Reassure them that bankruptcy relief goes into effect as soon as the petition is filed. Most of these clients will be concerned about their jobs and will ask questions like, “Will my employer be notified?” You can assure them that in all likelihood there will be no need to inform the employer, but that it will be necessary for the client to take off work to attend the creditors’ meeting. Advise the client that the notice of the creditors meeting will come to him/her at the same time as it comes to you and that the “Notice of Commencement of Case Under Chapter 7 of the Bankruptcy Code, Order for Relief, Meeting of Creditors and Fixing of Dates” (herein referred to as “creditors’ meeting”) will be received several days in advance of the meeting, so that he/she can schedule time off.

Explain to clients that the filing of a bankruptcy case draws a line between their prepetition activities and their postpetition affairs. They will be comforted to learn that earnings generated after filing are free and clear of prebankruptcy debt and that property which they acquire after the bankruptcy filing can not be subjected to the payment of the prepetition debt. See, 11 U.S.C § 541(a). There is one exception to this rule. Advise your clients that any property inherited within six (6) months of the filing of a bankruptcy petition is drawn into the bankruptcy estate and divided between creditors. See, 11 U.S.C § 541 (a)(5). A client with an elderly or ailing parent, sibling, etc. may want to consider suggesting to that potential testator that his/her will be rewritten.

2. [2.24] Surrender of Property

Reaffirmation, redemption and surrender of property should be discussed during the initial client meeting. Often the client has been attempting to sell a boat or vehicle, having decided that they are unable to make the monthly payment on the collateral. Being told that they can surrender this property to the secured creditor—paying the creditor no additional monies—will be well received. See, 11 U.S.C § 506 (a). Redemption of property from the secured creditor is more difficult to explain and, in the author’s opinion, underutilized by Chapter 7 debtors.
3. **Redemption of Property**

Typically, redemption is used with creditors which hold purchase money security interests in household goods. A revolving charge account may retain for the merchant a security interest in anything that was ever financed on the account as long as a debt is outstanding. Appliances, furniture and stereo equipment purchased several years ago may still be held as collateral for substantial debt, even though the property has minimal value. A debt of several thousand dollars may be secured by property worth only a few hundred dollars. Ask the client how much the property is worth in its current condition. Explain to the client that by offering to pay that amount, usually in a lump sum, the creditor's interest in the property can be purchased. See, 11 U.S.C.§ 722. Both debtors and creditors are aided by redemption. Debtors are spared the humiliation of having their personal items repossessed, and creditors are spared the expense of repossession and sale. You can not force the creditor to allow your client to make installment payments on a redemption, but increasingly, creditors have allowed Chapter 7 debtors this flexibility. Redemption must be approved by the Court and a dispute over the value of the property can lead to a hearing. These disputes are best resolved through negotiations, for the Chapter 7 debtor can rarely afford additional attorney fees arising out of the hearing, and the Court will not deal kindly with lawyers who take up courtroom time to determine the value of a ten year old refrigerator.

4. **Reaffirmation of Debt**

Frequently the Chapter 7 case will involve at least one reaffirmation of a secured debt. Clients will tell you that they want to “resign” with a creditor. The attorney is advised to inform the client of the legal consequences of such an act. Make sure they realize that by reaffirming the debt, they are recommitting their personal liability on the debt and will be subject to suit and garnishment if they default on the payment.

Reaffirmation is easily accomplished if the clients are current on their payments to the creditor and if the collateral is worth approximately the same amount as the debt which is owed. Local Rule 22 of the United States Bankruptcy Court for the Western District of Kentucky provides a simple reaffirmation agreement form to be signed by the client, the creditor and the debtors' counsel. See, Appendix A to this chapter. The completed form must be filed with the court within the time period set forth in the notice of creditors' meeting. It is unclear whether a debtor has an absolute right to reaffirm a debt which is being paid according to contract terms.

Reaffirmation is somewhat complicated when the client is delinquent in the payment of the debt. Clearly, the creditor must consent to this reaffirmation, and the creditor will require some agreement on curing the arrearage in the account. If the debtors have been habitually delinquent in their payments, creditors may refuse to negotiate a reaffirmation of the debt and the Court will not intervene on behalf of the debtors. It has been this author's experience that creditors will usually allow the debtors reasonable time to cure the delinquency and will consent to the reaffirmation. Again, an agreement must be drafted setting forth the terms of the agreement and the document must be filed with the court after it has been signed by the debtors, debtors' counsel and the creditor.

Debtors may want to reaffirm an unsecured debt. Courts rarely approve such reaffirmations and only then if the reaffirmation is done in settlement of a nondischargeability case. You can remind your client that he/she may voluntarily pay any prepetition debt, without reaffirming the debt and resubmitting his/her personal liability to the creditor.

Pursuant to 11 U.S.C.§ 524 (d), as a part of the reaffirmation procedure as debtors' counsel, you must sign an affidavit stating:

I, ________________________________, attorney for the debtors in the above captioned bankruptcy proceeding declare that I represented the debtors during the negotiation of the foregoing Agreement and that said Agreement repre-
sents a fully informed and voluntary agreement by the debtors which does not impose an undue hardship on the debtors or a dependent of the debtor. I have fully advised the debtors of the legal effect and consequences of this agreement and any default under the agreement. (Emphasis added).

The emphasized language is of concern. Can the creditor assert a claim against debtors' counsel if there is a subsequent default? Conceivably debtors' counsel makes an actionable misrepresentation by signing the affidavit knowing that the clients do not have the ability to repay the debt. There have been occasions when I doubted the wisdom of my clients' decision to reaffirm a debt. On occasions I have refused to sign the reaffirmation affidavit. If debtors' counsel does not sign the affidavit, then a hearing must be held on the reaffirmation. The hearing will necessitate the client's attendance. See, 11 U.S.C.§ 524 (c)(6).

H. [2.27] Timing Of The Bankruptcy Filing

By now, the attorney has formed an opinion about the timing of the petition's filing. If an emergency exists and you practice in a division of court other than Louisville or Lexington, you may need to ask permission from the bankruptcy clerk to file a skeleton petition at the office of the U. S. District Court nearest you. See, LBR 4 (W.D. Ky). You may file the petition in the division of court which is most available to you, even though the case may actually proceed in another division. For example, assume you practice in Henderson, Kentucky which is about 30 miles from Owensboro, the nearest seat of the district court. Your client needs to file an emergency petition to stop a wage garnishment and that client resides in Princeton, Kentucky. The petition can be filed in Owensboro even though the case will be designated a Paducah Division case. Verbal permission of the bankruptcy clerk must be obtained before an emergency petition is filed, but permission is readily granted. Cessation of garnishments, avoidance of the entry of a judgment or cancellation of a judicial sale have all been deemed sufficient grounds for the accommodation. After the bankruptcy clerk has spoken with the attorney, she/he will call the district clerk's office in the division where you plan to file the petition. The deputy district court clerk will be given the bankruptcy number which will be assigned to the case. The district clerk will accept the petition and filing fee, stamp it and give it a case number. The district clerk will then mail the petition to Louisville or Lexington and will have no other dealings with the case, unless the case results in an appeal.

Most emergency filings are also skeleton filings. A skeleton petition is composed of the first page of the petition and a list of creditors' names and addresses. Obviously one can complete the necessary paperwork to accomplish a skeleton filing in much less time than that required for the complete petition and schedules. Your client need only estimate his/her total debt and total asset value for the skeleton petition; specifics about individual creditor claims are not required. Permission of court is not required to file a skeleton petition. After the petition has been filed, you have fifteen (15) days within which to file the statement of affairs and schedule. See, FRBP 1007(c).

Whether the attorney uses the shorthand procedure of a skeleton filing or delays the filing until the complete petition has been prepared, it is most important that one file the petition in conjunction with the timetable agreed upon with the client. Failure to timely file petitions have led to disciplinary sanctions. See, KBA v. Watson, Ky., 862 S.W.2d 317 (1993); KBA v. Goodrich, 851 S.W.2d 479 (1993); KBA v. Reeves, Ky., 851 S.W.2d 478 (1993).

I. [2.28] Petition Information And Client Questionnaire

As the office conference concludes, give the client a questionnaire which will assist the client in gathering the information necessary to complete the bankruptcy petition. The questionnaire is invaluable for it will allow your staff to work on the petition in the client's absence and more efficiently utilize staff time. Further, the questionnaire will provide protection should a question ever arise about the
failure to list an asset or creditor. A sample questionnaire is set forth in the Appendix to this chapter for your consideration. See, Appendix B.

The Bankruptcy Court has developed two pamphlets which practitioners are asked to distribute to Chapter 7 filers. The pamphlets reiterate many of the concepts that you will discuss with your client during the initial conference. Supplying the pamphlets is ideal, for the clients can review the information after they have left your office and refresh their memories about some of the important subject matters that you have covered.

J. [2.29] Discussion Of Attorney Fees

Before the client leaves the office, attorney fees must be discussed. It is customary to require a retainer in Chapter 7 cases. If the retainer is equivalent to the total charges for the representation, then technically the attorney has received a fraudulent transfer because the attorney is going to be paid for work which will not have been performed when the petition is filed – attendance at the creditors’ meeting and creditor negotiations, for example. Fraudulent transfers are defined for bankruptcy purposes as transfers without equivalent value. See, 11 U.S.C.§ 548 (a)(2). However, the author is unaware of any challenges having been made to a retainer unless the amount appears excessive. If the client is unable to pay the entire fee before filing, an arrangement which requires the payment of one-half of the fee in advance of filing and one-half on or before the creditors’ meeting is standard. The attorney is at peril under this arrangement, for he/she is required to attend the creditors’ meeting whether or not payment has been received. See, LBR 3(d) (W.D. Ky.).

IV. [2.30] INFORMATION GATHERING

A. [2.31] Client Inquiries And Additional Creditors

As the client undertakes to complete the questionnaire, be prepared for many questions to arise. Queries about the questionnaire can often be handled by one's secretary. Often the client needs clarification of an issue which was discussed at the initial meeting. Many times the client will recall a creditor which was omitted from their financial statement and want to discuss that creditor's position after a Chapter 7 filing.

During this phase of the case, the client may tell the attorney about a creditor that they do not wish to list on their petition – say a family friend or a credit card that they want to retain. Counsel must remind the client that the bankruptcy petition is a document, executed under penalties of perjury, and that all creditors to whom they are indebted at the time of filing must be listed on the petition. See, 18 U.S.C.§§ 152 and 3571. If the client has the financial wherewithal to pay the debt before filing, then there will be no need to list that entity on the petition. Unless the payment exceeds $600.00, it will not be pursued as a preference. See, 11 U.S.C.§ 547 (c)(8).

B. [2.32] Credit Bureau Report

For a nominal sum, the client-debtor can obtain a copy of his/her local credit bureau report. The report may assist the client in recalling all of his/her creditors and it may provide addresses of collection agencies which hold assignments of claims against the client. Giving notice to these agencies will hasten the notice process and eliminate future collection efforts against the client.

C. [2.33] Lien Search

Ideally, a courthouse lien search is performed during this period. It is particularly important that counsel learn about any judgment liens which may have been filed against the clients’ real prop-
Representing The Chapter 7 Debtor

In the Western District of Kentucky, the practitioner has only sixty (60) days following the first meeting of creditors within which to file a motion to avoid that lien. See, In re Hunter, 164 B.R. 738 (Bkrtcy. W.D. Ky 1994). Furthermore, the client may believe that a creditor has a lien on some item or parcel of property; yet a review of the records may indicate that the creditor did not properly perfect its mortgage or security interest. In such event, this knowledge may equip the attorney to negotiate with the creditor to compromise the debt and give the creditor an opportunity to file its lien or it may make the bankruptcy more beneficial for the sale of the asset may allow the trustee to pay a priority claim such as a tax or child support. See, 11 U.S.C.§ 507.

Conducting even a cursory lien search adds to the time expenditure on the case. Chapter 7 fees are very competitive. As such, charging an additional fee to conduct a lien search may well cost an attorney the representation. Whether a lien search is a necessity or a luxury is unclear. However, creditors are using the judgment lien statute with great frequency and you may not learn about the lien unless you search the records. It is difficult to explain to a client two years after the case is closed why you took no action to remove a judgment lien. The client's failure to advise you about the lien's existence will be forgotten; your failure to avoid the lien will be remembered.

D. [2.34] Inquiries From Creditors

If the client is being hard pressed by some creditors, the client may tell the creditor that he/she is filing a bankruptcy action. Be prepared to receive telephone calls from creditors asking whether a filing has occurred. It is best to discuss your handling of these calls with your client. See, Hughes v. Meade, Ky., 453 S.W.2d 538 (1970). The client will most likely consent to your telling the creditor that you have been retained to file a Chapter 7 petition. Such information will gain the client a respite from the collection calls. Make sure that the client understands that if she/he authorizes you to talk with the creditor, you must tell the creditor the truth. Clients have been known to tell their creditors that they have actually filed when they have merely made the decision to file. Counsel must not assist the client in misleading creditors about the actual filing date.

V. [2.35] SECOND CLIENT CONFERENCE

Once the actual bankruptcy petition has been completed, it will be necessary for your clients to again visit your office in order to sign the petition. Provide them with a comfortable environment to review the petition if they have not already been supplied a copy of the document via mail.

A. [2.36] Fee Agreement

If the clients have not already done so, they should be asked to sign a fee agreement. Ideally this contract would have been signed prior to preparation of the petition, although clients are rarely willing to commit to the filing of a bankruptcy petition after the initial conference. The occasion of the petition signing provides the best opportunity to memorialize the agreement of representation.

Attached as Appendix C to this chapter is a copy of a fee agreement. Note that the contract leaves the attorney with the option of renegotiating the representation in the event that an adversary proceeding is filed against the client.

B. [2.37] Fee Disclosure Statement

The attorney is required to attach a disclosure statement to the bankruptcy petition, advising the Court of the amount charged to represent the debtor in the proceeding. If the fee falls outside the normal range ($500 to $1,000), counsel should be prepared to justify the fee. If the Court concludes that
there has been an overcharge, the attorney can be required to turn over any excess fee to the trustee. See, 11 U.S.C. §329(b). A sample fee disclosure statement is set forth in the chapter appendix as Appendix D.

C. [2.38] Post-Execution Filing Deadline

Once the petition has been signed, it must be filed with the bankruptcy clerk's office within fourteen (14) days. If the petition is held in the attorney's office any longer than fourteen (14) days, it becomes stale and the clerk's office will not except it. See, LBR 5(d) (W.D. Ky.). The filing fee must be submitted to the clerk's office in the form of cash, certified check, money order or an attorney's office check. The client's check will not be accepted.

VI. [2.39] TELEPHONE AND MAIL TRAFFIC

A. [2.40] Basic Information

After the petition has been filed and the notices have been sent by the bankruptcy clerk's office to creditors, the attorney will get a flurry of telephone calls from creditors asking for very basic information such as the date of filing, the case number, and the date and location of the first meeting of creditors. These calls can be handled by your secretary.

B. [2.41] Secured Creditors And Statement Of Intent

There may be inquiries from secured creditors about your clients' intention regarding reaffirmation of their debt. The Bankruptcy Code requires that all creditors with liens on consumer goods receive notice of the debtors' intentions concerning their collateral within thirty (30) days following the filing of the petition. See, 11 U.S.C. § 521 (2)(A). Regardless of the fact that you have complied with this requirement, expect calls from larger national creditors which house many departments involved in the collection process. The Statement of Intentions will provide an easy reference for one's secretary in fielding the creditors' calls.

C. [2.42] Reaffirmation Agreements

Debtor's counsel will receive reaffirmation agreements from creditors for the client's consideration. The author usually holds the reaffirmation agreements until the first meeting of creditors. This procedure saves time and is not harmful to clients. Certainly you should review each reaffirmation agreement to make certain that the amount and debt being treated by the agreement is as expected.

D. [2.43] Creditor Activities

Since most creditors have computerized their billing systems, it is understandable that the debtor would receive a bill post-filing. However, bills which continue to be sent to Chapter 7 debtors sixty (60) days after the bankruptcy filing are inexcusable, assuming that the creditor's address used in the petition is correct. The client is going to want immediate cessation from creditor contact. Tell him/her to ignore the first statement received after filing, but to notify you if subsequent statements are received. Usually a short letter from counsel will bring a halt to postpetition collection activities. If collection activities do not cease, 11 U.S.C. § 362 (h) provides for significant sanctions, including attorney fees, against creditors who violate the automatic stay of the court.

Assume that prior to filing the bankruptcy case a motion for a default judgment against the client had been tendered in some pending litigation. If the judgment is entered before the judge gets notice of the bankruptcy filing, it is voidable. See, Easley v. Pettibone Michigan Corporation, 990 F2d 905
Representing The Chapter 7 Debtor

(6th Cir. 1993). It is good practice to file notices in all pending litigation advising the trial court about the bankruptcy. Attached as Appendix E is a sample of such a notice.

VII. [2.44] CREDITORS’ MEETING

A. [2.45] Preparation Of Client

Counsel should arrange to meet with clients a short time before the first meeting of creditors in order to prepare them for their session with the bankruptcy trustee. Suggest that the clients review their bankruptcy petition before coming to court.

It is helpful to get to the creditors’ meeting early so to allow your clients to sit through some of the other debtors’ meetings. Stay focused on your clients’ case. This author once received a business referral from a creditor’s attorney, simply as a result of sitting with her clients while they waited for their case to be called and explaining proceedings rather than abandoning her clients for the companionship of other lawyers.

The rudiments of the first meeting of creditors are set forth in 11 U.S.C. §§ 341 and 343. The trustee will ask the debtors if they have listed all their property and debts in the bankruptcy petition. Remind the clients about the discussion which you had with them during the initial meeting concerning Chapter 13 options. The trustee may ask them if they considered filing a Chapter 13 petition and if they are aware of the effect that Chapter 7 will have upon their credit. The trustee will want to verify that the petition correctly sets forth the debtors’ names and social security numbers.

The trustee will then open the meeting up to creditors. Questions about the location of collateral and the status of insurance are common.

If the client has sold collateral without turning over the proceeds to the creditor or has committed some other act which may constitute fraud or a criminal violation, she/he can claim the Fifth Amendment protection against self incrimination during their testimony. If the client does not testify and the bankruptcy court is asked to determine whether a debt should be excepted from discharge or a discharge should be denied this debtor altogether, then the judge can be expected to infer culpability from the debtor’s refusal to testify. See, In re Edmond, 934 F2d 1304 (4th Cir. 1991).

B. [2.46] Trustee Report Of No Assets

As mentioned earlier, the vast majority of Chapter 7 cases are declared to be no asset cases as soon as the trustee has conducted his/her examination of the debtors. The trustee will tell the debtors and the assembled creditors that a no asset report will be filed. By so doing, the trustee will abandon any interest which the bankruptcy estate had in your clients’ assets. See, 11 U.S.C. § 554(c). Counsel is left to deal with the creditors who hold liens or security interests in the clients’ property.

C. [2.47] Dealing With Creditors

After the hearing, creditors may encircle one’s clients, trying to get signatures upon reaffirmation agreements. Try to meet with as many creditors as possible, since clients are present and matters can be resolved quickly. If you return to the office without resolving an issue with a creditor, it will take several telephone calls and letters to get the debt reaffirmed or the property redeemed. If the client has chosen to surrender the asset to the creditor, then counsel can use the creditors’ meeting to discuss the time and place of delivery.
The attorney must discuss each reaffirmation agreement with the clients. Remember to tell clients that they are allowed to rescind any reaffirmation agreement if they do so in writing prior to the last date for filing nondischargeability complaints or sixty (60) days after the agreement has been filed with the court, whichever date is later. See, 11 U.S.C.§ 524(c)(4).

VIII. [2.48] FOLLOW UP

A. [2.49] Amendments To Petition

In the event a client has omitted a creditor from his/her petition, it will be necessary to file an amendment. Again, the Bankruptcy Court for the Western District has provided a straight-forward form for such an amendment. See, Appendix F. It will be necessary to serve a copy of the amendment upon the trustee, and it will be necessary to certify to the Court that you have mailed a copy of the notice of creditor's meeting to the added creditor. Each time you file an amendment which adds a creditor, an additional filing fee of $20.00 is required. Whether the amendment adds just one creditor or whether it adds 100, the cost is still $20.00.

If the client has failed to claim an exemption to which he/she is entitled or fails to list an asset, an amendment must be prepared and served upon the trustee but no additional fee is required.

B. [2.50] Redeeming Property

The Debtor's option to redeem property which is the subject of a secured creditor's claim was discussed supra. A written motion seeking court approval of the redemption amount must be filed. Having met with the creditor and client following the creditors' meeting, the attorney will be able to complete the motion to redeem property. A copy of the Western District of Kentucky form, provided in Local Rule 23, is attached as Appendix G. The Eastern District of Kentucky has also adopted a form for use in redeeming property and it can be found in the local rules of that court. See also, Local Rules Appendix.

C. [2.51] Lien Avoidance

If any asset in which a client has claimed an exemption is subject to a judicial lien, counsel must consider filing a motion to avoid that lien under 11 U.S.C.§ 522(f). Let us consider an example.

Assume that your client's residence was worth $12,000.00 and assume further that a debt of $3,800 was owed to a creditor which was properly secured by a real estate mortgage. A general creditor had obtained a judgment of $8,317 and had recorded a judgment lien. Your client has a homestead exemption of $5,000, pursuant to KRS 427.060. You file your motion to avoid the lien of the general creditor because it impairs the exemption of your client. Without the judgment lien, the homestead is worth a sufficient amount, if sold, to pay the first mortgageholder and your client's $5,000 entitlement. Your motion will be granted, in part. The Court will conclude that the amount of the first mortgageholder's debt and the exemption is $8,800 so the remaining value of the residence, $3,200, will be subjected to the judgment lien. If the sum of the valid mortgage and the exemption exceeded the value of the property, then the judgment lien would be avoided altogether. See, In re Powell, 173 B. R. 338 (Bktcy. E. D. Ky. 1994).

Bankruptcy Courts for both the Eastern and Western Districts of Kentucky have adopted Official Forms for use in filing motion to avoid liens. Attached hereto as Appendix H is the Western District form. Also
refer to Form Number 5(b) for the Eastern District of Kentucky, in the Local Rules Appendix.

IX. [2.52] CONCLUSION

Trial lawyers labor for years and risk thousands of dollars in costs to develop a case which may have an economic effect on their clients' lives as great as the relief which a properly handled Chapter 7 bankruptcy case will bring. Through your efforts, clients can be discharged of thousands of dollars of debt which they otherwise would have struggled for years to satisfy. Within sixty (60) days, an attorney can actually see the fruits of his or her labors. Few other legal specialities provide such positive reinforcement.
UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF KENTUCKY

IN RE:

Debtors

CASE NO. __________________

Debtors

REAFFIRMATION AGREEMENT

The debtors reaffirmation agreement is as follows:

1. REAFFIRMATION - The debtors reaffirm to pay __________________, in accordance with the loan documents, (copies are attached), the sum of $_____, the principal balance due, plus interest at the rate set forth in the instruments from __________, at the rate of $________ per month until fully paid, beginning on __________.

2. This agreement does/does not change the terms of the original contract.

3. PAST DUE PAYMENTS - In addition to the monthly payments provided in paragraph one (1) above, the debtors agree to make up payments as follows: ____________________________

(if applicable)

4. RESCISSION PERIOD - THE DEBTOR(S) MAY RESCIND THIS AGREEMENT BY GIVING NOTICE TO THE CREDITOR AT ANY TIME PRIOR TO THE LAST DATE FOR FILING DISCHARGEABILITY COMPLAINTS OR SIXTY (60) DAYS AFTER THIS AGREEMENT HAS BEEN FILED WITH THE COURT, WHICHEVER DATE IS LATER, BY GIVING NOTICE OF RESCISSION TO THE HOLDER OF THE CLAIM.

Executed this the _____ day of ______________________, 19____.

Debtor

Debtor

ACCEPTED AND AGREED TO:

Creditor

By: _________________________________

Title

37
AFFIDAVIT OF ATTORNEY FOR DEBTOR(S)

I, ____________________________, attorney for the debtors in the above captioned bankruptcy proceeding declare that I represented the debtors during the negotiation of the foregoing Agreement and that said Agreement represents a fully informed and voluntary agreement by the debtors which does not impose an undue hardship on the debtors or a dependent of the debtor. I have fully advised the debtors of the legal effect and consequences of this agreement and any default under the agreement.

_____________________________ ______________________________
Date Attorney for Debtor(s)
B. [2.55] Bankruptcy Questionaire

### CLIENT QUESTIONS—Individual or Joint

#### Name and Other Information

**You:**

1. **a. Name:**

   (1) **Mailing**
   
   (2) **Address**
   
   (3) 
   
   (4) 
   
   (5) **Telephone:** (______) ________
   
   (6) **County:**
   
   (7) **Have you moved within the last two years?**
      
      ____ No  ____ Yes
      
      (a) **If Yes, enter addresses, occupancy dates, and names used:**

2. **Are mailing address and residence the same?**
   
   ____ No  ____ Yes
   
   **If No, enter the residence below:**
   
   (a) 
   
   (b) 
   
   (c) 
   
   (d) 

3. **Social security number:** ______ - ______ - ______

4. **Tax identification number:**

5. **Gender:**  ____ Male  ____ Female

6. **Marital status:**
   
   ____ Never Married
   
   ____ Divorced  ____ Widowed
   
   ____ Married and living together
   
   ____ Married and living apart

7. **Other names used in last six years:**
   
   ____________________________
   
   ____________________________

**Spouse:**

8. **b. Name:**

   (1) **Mailing**
   
   (2) **Address**
   
   (3) 
   
   (4) 
   
   (5) **Telephone:** (______) ________
   
   (6) **County:**
   
   (7) **Have you moved within the last two years?**
      
      ____ No  ____ Yes
      
      (a) **If Yes, enter addresses, occupancy dates, and names used:**

9. **Are mailing address and residence the same?**
   
   ____ No  ____ Yes
If No, enter the residence below:
(a) 
(b) 
(c) 
(d) 
(9) Social security number: _____ - _____ - _____
(10) Tax identification number:
(11) Other names used in last six years:

2. a. Are you currently employed? __ Yes __ No
If Yes, provide the following information about employment:
(1) Employer’s name: ____________________________
(2) Employer’s address: ____________________________
(3) ____________________________
(4) ____________________________
(5) Telephone: (_____) _____ - ________
(6) Occupation and nature of business: ____________________________
(7) Dates employed: ____________________________
(8) Relationship to business described above: __ Employee __ Owner
   If more than one employer, provide the information requested above about other employer(s):
   ____________________________
   ____________________________

b. Is your spouse currently employed? __ Yes __ No
If Yes, provide the following information about employment:
(1) Employer’s name: ____________________________
(2) Employer’s address: ____________________________
(3) ____________________________
(4) ____________________________
(5) Telephone: (_____) _____ - ________
(6) Occupation and nature of business: ____________________________
(7) Dates employed: ____________________________
(8) Relationship to business described above: __ Employee __ Owner
   If more than one employer, provide the information requested above about other employer(s):
   ____________________________
   ____________________________

3. Please provide the Gross income received from your principal place of employment (If unemployed, write None at Source(s):
   You
   (a) This year: 19_____
      (i) Source: ____________________________
      (ii) Amount: $_____
   (b) Last year: 19_____
      (i) Source: ____________________________
      (ii) Amount: $_____
   (c) Previous year: 19_____
      (i) Source: ____________________________
      (ii) Amount: $_____

b. Have you received any other income, other than income received from your principal employment?
   __ No ___ Yes
   If Yes, provide the following information
   You
   (a) This year: 19__
      (i) Source(s): ____________________________
      (ii) Amount: $__________________________
   (b) Last year: 19__
      (i) Source(s): ____________________________
      (ii) Amount: $__________________________
   (c) Previous year: 19__
      (i) Source(s): ____________________________
      (ii) Amount: $__________________________

Spouse:
   (a) This year: 19__
      (i) Source(s): ____________________________
      (ii) Amount: $__________________________
   (b) Last year: 19__
      (i) Source(s): ____________________________
      (ii) Amount: $__________________________
   (c) Previous year: 19__
      (i) Source(s): ____________________________
      (ii) Amount: $__________________________

4. a. Have you made any PAYMENTS to anybody, within the past year of more than $600 other than normal scheduled payments?  __ No ___ Yes
   If Yes, provide for each creditor:
   Name & Address ____________________________
   Amount and Date ____________________________
   Relationship, if any, to you ____________________________

b. Has any creditor ATTACHED/GARNISHED/SEIZED property within last year?  __ No ___ Yes
   If Yes, provide for each garnishment or attachment:
   Name & Address ____________________________
   Date of garnishment or attachment ____________________________
   Property garnished or attached ____________________________
   Value ____________________________

c. Has any creditor REPOSSESSED/FORECLOSED/RETURNED property within last year?  __ No ___ Yes
   If Yes, provide for each repossession/foreclosure or return:
   Name & Address ____________________________
Date of repossession, foreclosure or return
Property repossessed, foreclosed upon or returned

Value

d. Have you given any creditor a mortgage or lien against any property within the last year?
   ___ No   ___ Yes
   If Yes, provide for each lien:
   Name & Address

   Date of lien
   Property mortgaged
   Value
   Relationship to you, if any

e. Has any creditor taken a SETOFF within last 90 days?
   ___ No   ___ Yes
   If Yes, provide for each setoff:
   Name & Address

   Date of setoff
   Amount setoff

5. Are you named in any LAWSUITS within last year? ___ No   ___ Yes
   If Yes, provide for each lawsuit:
   Title of lawsuit

   Number
   Type of suit
   Status
   Court name and location

   Title of lawsuit

   Number
   Type of suit
   Status
   Court name and location

6. Has any of your property been placed into a Court appointed RECEIVERSHIP within last year?
   ___ No   ___ Yes
   If Yes, provide the name and address of custodian; court name and location; title, number, and date of the
   order; and property description and value:
   Name & Address of custodian

   Court name and location
   Date of Court Order
   Property placed into receivership
   Value

7. Have you made any GIFT or CONTRIBUTION within the past year other than the normal gifts to family
   members or charitable organizations?
   ___ No   ___ Yes
   If Yes, provide for each gift or contribution:
   Name & Address
<table>
<thead>
<tr>
<th>Relationship to you</th>
<th>Date of gift</th>
<th>Property given</th>
<th>Value</th>
</tr>
</thead>
</table>

8. Any LOSSES from fire, theft, etc. within last year? ____ No ____ Yes
   If Yes, provide of each loss:
   Property lost
   Value
   Date of loss
   Circumstances of loss
   Covered by insurance?
   Name and address of insurance company
   Status of claim

9. Have you consulted and paid any other attorneys for DEBT COUNSELING? ____ No ____ Yes
   If Yes, provide for each attorney:
   Name & Address
   Date of payments and amounts

10. Have you made any TRANSFERS or CONVEYANCES of your property, within the past year?
    ____ No ____ Yes
    If Yes, provide for each transfer:
    Name & Address
    Relationship, if any, to you
    Date of transfer
    Property transfer
    Value received

11. Have you closed any bank ACCOUNTS within last year? ____ No ____ Yes
    If Yes, provide for each account:
    Name & Address of bank
    Type and number of account
    Final balance
    Date of closing

12. Have you maintained any SAFE DEPOSIT BOXES within last year? ____ No ____ Yes
    If Yes, provide for each box:
    Name & Address of bank
    Name Address of person(s) with access to box
    Description of contents and values
    Date surrendered (if applicable)

13. Are you currently in possession of any property belonging to another i.e. household goods, cars, etc.?
    ____ No ____ Yes
    If Yes, provide for each property:
    Name & Address of owner
    Description of property
    Location of property
    Value of property

43
14. Are you currently a party to any contracts that have not been completed, unexpired lease agreements, or timeshare agreements?  __No  __Yes
   If Yes, provide the following information for each contract/lease:
   Name & Address:
   ____________________________________________________________
   Description of property involved:
   ____________________________________________________________
   Terms of the contract ________________________________________
   Name & Address:
   ____________________________________________________________
   Description of property involved:
   ____________________________________________________________
   Terms of the contract ________________________________________
   Have you ever filed bankruptcy before?  __no  __yes
   If Yes, provide the following information about petition:
   (1) Name of filer: ____________________________________________
   (2) Location (district) filed: ________________________________
   (3) Case number: __________________________________________
   (4) Date filed: ____/____/____
   (5) Judge: _______________________________________________
   (6) Status (Pending, Dismissed, Judgment): __________________

   Has a business partner or your spouse ever filed bankruptcy?  __No  __Yes
   If Yes, provide the following information about case:
   (1) Name of filer: __________________________________________
   (2) Relationship: __________________________________________
   (3) Location (district) filed: ________________________________
   (4) Case number: __________________________________________
   (5) Date filed: ____/____/____
   (6) Judge and status: __________________

CLIENT QUESTIONS—INDIVIDUALS IN BUSINESS

15. Have you been a partner, etc., or five percent owner of any other businesses within the last two years?  __No  __Yes
   If Yes, provide:
   Name & Address of Entity ___________________________________
   Nature of business __________________________________________
   Dates of operation __________________________________________

17. Has someone other than yourself kept your books of account within last six years?  __No  __Yes
   If Yes, provide:
   Name & Address ____________________________________________
   ____________________________________________________________
   Period of time books were kept ________________________________
18. Has any person AUDITED your books of account during last six years? __No __Yes
   If Yes, provide:
   Name & Address:
   __________________________________________________________
   __________________________________________________________
   Period of time books audited:

19. Is any person, other than yourself, CURRENTLY IN POSSESSION of books of account?
   __ No ___ Yes
   If Yes, provide:
   Name & Address
   __________________________________________________________
   __________________________________________________________
   Are all your books currently available?
   __ No ___ Yes
   If Yes, explain
   __________________________________________________________

20. Have you issued any FINANCIAL STATEMENTS in last two years to creditors or others? __No __Yes
   If Yes, provide the name and address of person(s) receiving statement(s), and date(s) issued:
   Name & Address
   __________________________________________________________
   __________________________________________________________
   Date issued:

21. Have you performed any inventories within the last two years? __No __Yes
   If Yes, provide the following information:
   a. Last inventory:
      (1) Date: __/__/____
      (2) Name and address of person with records:
      __________________________________________________________
      __________________________________________________________
      (3) Inventory dollar amount (cost, market, other):
      __________________________________________________________
      __________________________________________________________
      b. Previous inventory (if no previous inventory, write None in date space):
         (1) Date: __/__/____
         (2) Name and address of person with records:
         __________________________________________________________
         __________________________________________________________
         (3) Inventory dollar amount (cost, market, other):
         __________________________________________________________
         __________________________________________________________

TAX CREDITORS:

Do you owe any taxing authorities: _____yes _____no
If yes, please answer the following questions (use a separate sheet for additional tax creditors, if necessary):
   a. Name & Address
      __________________________________________________________
      __________________________________________________________
Type of tax
Person incurred debt __ you __ spouse __ joint
Is anyone else responsible for debt __ yes __ no
If yes, please provide
Name & Address

Relationship to you
Date debt was incurred
Amount due
Do you agree with this amount
Does the creditor owe you money? __ no __ yes
If yes, explain

Has creditor brought a lawsuit against you for this debt?
__ yes __ no
If yes, include on question 5 on client questions

b. Name & Address

Type of tax
Person incurred debt __ you __ spouse __ joint
Is anyone else responsible for debt __ yes __ no
If yes, provide:
Name & Address

Relationship to you
Date debt was incurred
Amount due
Do you agree with this amount
Does the creditor owe you money? __ no __ yes
If yes, explain

Has creditor brought a lawsuit against you for this debt?
__ yes __ no
If yes, include on question 5 on client questions

SECURED CREDITORS:

Please provide the following information about all creditors that have a lien on any of your property. Use a separate sheet of paper for additional secured creditors, if necessary.

a) Name & Address of secured creditor

Account number
Are you related to this creditor in any way
Person incurred debt __ you __ spouse __ joint
Is anyone else responsible for debt __ yes __ no
If yes, provide:
Name & Address

Relationship to you
Does the debt involve an unexpired contract or lease
Date debt was incurred
Representing The Chapter 7 Debtor

Amount due
Do you agree with this amount?

Does the creditor owe you money?  no  yes
If yes, explain

Has creditor turned this account over to an attorney or collection agency?  yes  no
If yes,
Name & Address

Has creditor brought a lawsuit against you for this debt?  yes  no
If yes, include on question 5 on client questions

Description of the collateral

Market value of collateral

Do you wish to keep this property

b) Name & Address of secured creditor

Account number

Are you related to this creditor in any way?

Person incurred debt  you  spouse  joint

Is anyone else responsible for debt  yes  no
If yes, provide:
Name & Address

Relationship to you

Does the debt involve an unexpired contract or lease

Date debt was incurred

Amount due

Do you agree with this amount?

Does the creditor owe you money?  no  yes
If yes, explain

Has creditor turned this account over to an attorney or collection agency?  yes  no
If yes,
Name & Address

Has creditor brought a lawsuit against you for this debt?  yes  no
If yes, include on question 5 on client questions

Description of the collateral

Market value of collateral

Do you wish to keep this property

c) Name & Address of secured creditor

Account number

Are you related to this creditor in any way

Person incurred debt  you  spouse  joint

Is anyone else responsible for debt  yes  no
If yes, provide:
Name & Address

Relationship to you
Does the debt involve an unexpired contract or lease
Date debt was incurred
Amount due
Do you agree with this amount?
Does the creditor owe you money? _ no _ yes
If yes, explain

Has creditor turned this account over to an attorney or collection agency? _ yes _ no
If yes,
Name & Address

Has creditor brought a lawsuit against you for this debt?
_ yes _ no
If yes, include on question 5 on client questions
Description of the collateral
Market value of collateral
Do you wish to keep this property

UNSECURED CREDITORS:

Please provide the following information about all unsecured creditors. This will include all credit cards, doctors bills, personal notes, etc. Use a separate sheet of paper for additional unsecured creditors, if necessary.

a) Name & Address of unsecured creditor

Account number
Are you related to this creditor in any way
Person incurred debt _ you _ spouse _ joint
Is anyone else responsible for debt _ yes _ no
If yes, provide:
Name & Address

Relationship to you
Does the debt involve an unexpired contract or lease
Date debt was incurred
Amount due
Do you agree with this amount?
Does the creditor owe you money? _ no _ yes
If yes, explain

Has creditor turned this account over to an attorney or collection agency? _ yes _ no
If yes,
Name & Address

Has creditor brought a lawsuit against you for this debt?
_ yes _ no
If yes, include on question 5 on client questions
b) Name & Address of unsecured creditor

Account number
Are you related to this creditor in any way
Person incurred debt __ you __ spouse __ joint
Is anyone else responsible for debt __ yes __ no
If yes, provide:
Name & Address

Relationship to you
Does the debt involve an unexpired contract or lease
Date debt was incurred
Amount due
Do you agree with this amount?
Does the creditor owe you money? __ no __ yes
If yes, explain

Has creditor turned this account over to an attorney or collection agency? __ yes __ no
If yes,
Name & Address

Has creditor brought a lawsuit against you for this debt?
__ yes __ no
If yes, include on question 5 on client questions

c) Name & Address of unsecured creditor

Account number
Are you related to this creditor in any way
Person incurred debt __ you __ spouse __ joint
Is anyone else responsible for debt __ yes __ no
If yes, provide:
Name & Address

Relationship to you
Does the debt involve an unexpired contract or lease
Date debt was incurred
Amount due
Do you agree with this amount?
Does the creditor owe you money? __ no __ yes
If yes, explain

Has creditor turned this account over to an attorney or collection agency? __ yes __ no
If yes,
Name & Address

Has creditor brought a lawsuit against you for this debt?
__ yes __ no
If yes, include on question 5 on client questions
d) Name & Address of unsecured creditor

________________________________________________________________________

Account number_________________________________________________________
Are you related to this creditor in any way____________________________________
Person incurred debt ______ you ______ spouse ______ joint______________
Is anyone else responsible for debt ______ yes ______ no ________________
If yes, provide:
Name & Address__________________________________________________________
________________________________________________________________________

Relationship to you________________________________________________________
Does the debt involve an unexpired contract or lease__________________________
Date debt was incurred_____________________________________________________
Amount due________________________________________________________________
Do you agree with this amount?_________no ______ yes__________________________
Does the creditor owe you money? ______ no ______ yes _______________________
If yes, explain____________________________________________________________
Has creditor turned this account over to an attorney or collection agency? ______ yes ______ no __________
If yes, Name & Address_____________________________________________________
________________________________________________________________________

Has creditor brought a lawsuit against you for this debt? ______ yes ______ no __________
If yes, include on question 5 on client questions___________________________

e) Name & Address of unsecured creditor

________________________________________________________________________

Account number_________________________________________________________
Are you related to this creditor in any way____________________________________
Person incurred debt ______ you ______ spouse ______ joint______________
Is anyone else responsible for debt ______ yes ______ no ________________
If yes, provide:
Name & Address__________________________________________________________
________________________________________________________________________

Relationship to you________________________________________________________
Does the debt involve an unexpired contract or lease__________________________
Date debt was incurred_____________________________________________________
Amount due________________________________________________________________
Do you agree with this amount?_________no ______ yes__________________________
Does the creditor owe you money? ______ no ______ yes _______________________
If yes, explain____________________________________________________________
Has creditor turned this account over to an attorney or collection agency? ______ yes ______ no __________
If yes, Name & Address_____________________________________________________
________________________________________________________________________

Has creditor brought a lawsuit against you for this debt? ______ yes ______ no __________
If yes, include on question 5 on client questions___________________________
PROPERTY QUESTIONS

Please answer the following questions about your property. If you do not own any property of the type requested, simply write "NONE".

What real estate do you own an interest in. Please provide the address of the property, and the market value.

________________________________________________________________________

How much cash do you have?

________________________________________________________________________

Please list all checking and savings accounts.

<table>
<thead>
<tr>
<th>Bank name &amp; address</th>
<th>Type of account</th>
<th>Balance</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

On a separate sheet of paper, list all of your household goods with the market value of each item.

What is the value of your wearing apparel

________________________________________________________________________

What is the value of your jewelry

________________________________________________________________________

Do you own any firearms? If yes, please list with values

________________________________________________________________________

Does your life insurance have a cash surrender value? If yes, how much and what insurance company

________________________________________________________________________

Value of any annuities

________________________________________________________________________

Value and location of any interests in IRA, ERISA, Keogh or other pension plans

________________________________________________________________________

Value of any stocks

________________________________________________________________________

Value of any interests in partnerships

________________________________________________________________________

Value of any bonds

________________________________________________________________________

Does anyone owe you money? If yes, who and how much

________________________________________________________________________

Are you owed a tax refund

________________________________________________________________________

Please list all automobiles, trucks and trailers and their values

________________________________________________________________________

Value of any boats

________________________________________________________________________

List and value of office equipment

________________________________________________________________________

Attach list and values of equipment used in business, if any.

________________________________________________________________________

Value of inventory

________________________________________________________________________

51
List and value of any crops, stored or growing

Attach list and value of any farm equipment

List and value any livestock

List and value any other property not listed above
BANKRUPTCY FEE AGREEMENT

The undersigned, whether one or more persons, hereby retain the law firm of __________, for representation in a bankruptcy proceeding in the bankruptcy division of the U. S. District Court for the Western District of Kentucky. The undersigned agree to pay said law firm the sum of __________ DOLLARS AND no/100 ($____) as a retainer in this proceeding. The undersigned also agree to pay the filing fee and all other costs of this action. The undersigned further understand that a record of the attorneys' time spent in working on this bankruptcy is being kept and that said attorneys will bill for the same at the rate of __________ DOLLARS ($__) per hour. In the event said attorneys' time, at such hourly rates, exceed the retainer, the undersigned further agree to pay and be responsible for that additional time. The retainer does not apply to any adversary proceedings which may be brought as a result of this bankruptcy. Nor does it apply to negotiations with creditors (other than meetings with creditors which occur at the first meeting of creditors). Additional retainers may be required from the debtors in the event of an adversary proceeding or extensive creditor negotiations. Unless attorney fees are paid promptly, reserves the right to withdraw from this proceeding with court approval at any time.

The undersigned further authorize and direct that any telephone expense may be charged to the number of _____.

This the _____ day of ______________ , 19__.

Debtor

Debtor

STATE OF KENTUCKY
COUNTY OF ____________...SCT.

SUBSCRIBED AND SWORN to before me by _____, on this the _____ day of ____________, 19__.

My commission expires:

______________________________
(Notarial Seal)

Notary Public
D. [2.57] Disclosure of Compensation of Attorney for Debtor

UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF KENTUCKY
_____ DIVISION

In re
Debtor
Social Security No.: __________________________
and Debtor's Employer's Tax Identification No.: __________________________

Case No.: Rule 2016(b) - Statement of Attorney Compensation
Chapter __________

DISCLOSURE OF COMPENSATION OF ATTORNEY FOR DEBTOR

1. Pursuant to 11 U.S.C. sec. 329(a) and Bankruptcy Rule 2016(b), I certify that I am the attorney for the above-named debtor(s) and that compensation paid to me within one year before the filing of the petition in bankruptcy, or agreed to be paid to me, for services rendered or to be rendered on behalf of the debtor(s) in contemplation or in connection with the bankruptcy case is as follows:

For legal services in connection with this case I have agreed to accept... .................................................. $ __________ or See Below

Prior to the filing of this statement, I have received... .................................................. $ __________

Balance Due... .................................................. $ __________ See below

(This is only used if there are special arrangements made for payment other than payment in full at filing)

The debtor agrees to pay the firm of __________ $ ____ at filing and an additional $ ____ at the ______ (first meeting of creditors or other designation) plus any amounts over and above the retainer at their normal hourly rate.

2. The source of the compensation paid to me was:

I I Debtor  I I Other (specify)

3. The source of compensation to be paid to me is:

I I Debtor  I I Other (specify)
4. I have not agreed to share the above-disclosed compensation with any other person unless they are members and associates of my law firm.

I have agreed to share the above-disclosed compensation with a person or persons who are not members or associates of my law firm. A copy of the agreement, together with a list of the names of the people sharing in the compensation, is attached.

5. In return for the above-disclosed fee, I have agreed to render legal services including:

a. Preparation and filing of any petition, schedules, statement of affairs and plan which may be required;

b. Representation of the debtor at the initial meeting of creditors;

c. Other provisions:

The debtor agrees to pay the firm of _________ at their normal hourly rate, any amounts over and above the retainer.

6. By agreement with the debtor(s), the above-disclosed fee does not include the following services:

The standard fee agreement is for the basic bankruptcy proceedings listed above and does not include representation in adversary proceeding or tax counseling. If any other services are required the fee will be discussed at that time.

In re ___________________________   Case No. (if known)

______________________________
Debtors

CERTIFICATION

I certify that the foregoing is a complete statement of any agreement or arrangement for payment to me for representation of the debtor(s) in this bankruptcy proceeding.

______________________________   ______________________________
Date                            Signature of Attorney

______________________________
Name of law firm
E. [2.58] Notice of Stay

COMMONWEALTH OF KENTUCKY
CIRCUIT/DISTRICT COURT
CASE NO. ___________________________

__________________________
PLAINTIFF

vs.

__________________________
DEFENDANTS

NOTICE OF STAY

All interested persons will please take notice that _________, have/has filed, on ________,
199__, in the United States Bankruptcy Court for the Western District of Kentucky, a petition under the provisions of
Chapter ____ of the United States Bankruptcy Code where said action is pending as Case No. ____________.

You will further take notice that 11 U.S.C. §362(a)(1) provides for an automatic stay of all
proceedings of this action.

__________________________, are/is represented in the above-mentioned Chapter _________ by the
undersigned counsel.

Respectively submitted,

DEITZ & FREEBURGER, P.S.C.
536 Chestnut Street
P. O. Box 21
Henderson, KY 42420
(502) 830-0830

By: ____________________________
Attorney for Debtor

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing Notice of Stay was mailed,
postage prepaid, to ____________; this the ___ day of ________, 199__.

__________________________________
F. [2.59] Amendment to Schedules

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

IN RE: )
) ) CASE NO.________________________

________________________
DEBTOR(S)

________________________

AMENDMENT TO SCHEDULES

Comes the debtor(s) and states that through error and inadvertence, _______ failed to list in schedule the following:

INSTRUCTIONS FOR COMPLETING AMENDMENTS
ON REVERSE SIDE OF THIS FORM

**** If amendment lists you as a Creditor, you have 90 days from the date of certification of mailing of amendment within which to file a proof of claim. (ONLY IF CASE IS A CHAPTER 13 OR ASSET CHAPTER 7).

The undersigned certifies under penalties of perjury, that I have read the foregoing amendment, and certify that the statements therein contained are true and complete to the best of my knowledge, information and belief.

Executed on: __________________________

________________________, Debtor

Executed on: __________________________

________________________, Debtor
CERTIFICATE OF SERVICE AND
NOTICE OF AMENDMENT TO SCHEDULES

I hereby certify that a copy of the attached Amendment to Schedules was this the _____ day of
____________________, 199_ forwarded to:

(List any creditor who has not been previously listed
and the trustee. Provide complete addresses.)

________________________________________, Trustee

________________________________________

along with a copy of the Order for Meeting of Creditors by depositing a copy of same in the United States mail,
properly addressed and postage prepaid.

________________________________________
Attorney for Debtor(s)
G. [2.60] Motion and Order to Redeem Property

UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF KENTUCKY

IN RE: )

_________________________ )

_________________________ )

_________________________ )

_________________________ )

Debtor(s) )

CASE NUMBER

MOTION TO REDEEM PROPERTY

Debtor(s) hereby move(s) the Court pursuant to Section 722 of Title 11, United States Code, for an Order permitting the Debtor(s) to redeem an item of tangible personal property from a lien securing a dischargeable consumer debt.

1) The item of personal property involved is _______, which is intended primarily for personal, family or household use.

2) The debtor originally purchased the property on _____ and the original purchase price was $______.

3) The debtor has/has not obtained an appraisal and believes the fair market value of the property to be $______.

4) The debtor represents that the debtor will have cash available to redeem the property within ten (10) days of the entry of the requested Order.

5) The security interest of ________ in said property, except to the extent of the amount of the allowed secured claim of said creditor, is a dischargeable consumer debt.

6) The amount of the allowed secured claim of said creditor has been or should be fixed by Court as the sum of $______.

WHEREFORE, the Debtor moves the Court for an Order permitting the Debtor to redeem said property by paying said creditor the aforesaid sum, and finding that the remainder of the claim of said creditor is a dischargeable consumer debt.

________________________________
Attorney for Debtor(s)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion to redeem was served by regular mail upon ________,
this the _____ day of ______, 199__.

________________________________
Attorney for Debtor(s)
No objections having been filed,

IT IS HEREBY ORDERED that the motion to redeem the _____ be SUSTAINED.

IT IS FURTHER ORDERED that the debtor shall tender to _____ the sum of $______ which is the amount of the allowed secured claim fixed by this Court within ten (10) days of the entry of this Order.

ENTERED BY ORDER OF COURT

Date: ____________

United States Bankruptcy Judge

Prepared by:

Phone: ____________
H. [2.61] Motion to Avoid Lien with Order

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF KENTUCKY

IN RE: )
) )
) ) CASE NO. ________
) )
DEBTOR(S) )
) )

MOTION TO AVOID LIEN

Debtor, by counsel, hereby moves the Court pursuant to Section 522(f) of the Bankruptcy Code to avoid the lien on the following described property:

In support of said Motion, Debtor states:

1. __________, a creditor, filed a lien in the Office of the Clerk of __________ and a copy of the lien is attached.

2. The amount of the claim which the lien secures is $__________.

3. The above mentioned lien is a __________ lien.

4. Debtor submits the following information on the value of the property:
   A). Fair Market Value: $__________.
   B). Value listed in Schedules: $__________.
   C). Value according to records of County Property Valuation Administration: $__________.
   D). Purchase Price: $__________.
   E). Date of Purchase: __________.
   F). Appraised Value (if recently appraised): $__________.

5. The trustee has/has not abandoned the property.

6. The debtor does/does not claim an exemption of $__________ in said property.

7. The lien held by the creditor impairs the exemption of the debtor in the property described in the motion.
WHEREFORE, the debtor moves the Court to order the lien void and for such other relief as may be entitled. Any objection to this Motion must be filed within 15 days of the certificate of service date below. If no objections are received, an order approving this motion to avoid lien may be entered.

CERTIFICATE OF SERVICE

I certify that a copy of this motion was served by first class mail upon, ____________; this the ___ day of ______, 199__.  

Respectfully submitted,

By: ____________________________
Attorney for Debtor
ORDER

No objections having been filed,

IT IS HEREBY ORDERED that the Motion to Avoid Lien of ________ in the following property be, and is, SUSTAINED.

Property Description:

________________________________________

________________________________________

A copy of this Order shall be mailed to the attorney for debtor(s), trustee, and the above-named creditor.

Louisville, Kentucky
Dated: ____________

________________________________________
UNITED STATES BANKRUPTCY COURT
I. [3.1] THE AUTOMATIC STAY

A. [3.2] Introduction

In the typical Chapter 7 case, a consumer debtor is seeking relief from creditor attempts to obtain recovery on an outstanding debt, either through non-legal collection methods such as collection letters and telephone calls, or through legal process, a judgment, garnishment, execution and similar collection measures. The automatic stay provided by 11 U.S.C. §362 is one of the most fundamental protections afforded the consumer debtor by the Bankruptcy Code. The stay, which has been called the bane of the creditor in a consumer bankruptcy case, arises immediately and becomes effective automatically without court order upon the filing of the bankruptcy case. The stay is designed to protect the debtor from his or her creditors by providing a "breathing spell" which allows the debtor a break from the financial pressures that drove them into bankruptcy. HR Rep. No. 95-595, 95th Cong., 1st Sess 340-342; S. Rep. No. 95-989, 95th Cong., 2d Sess 49-51 (1978).

The stay stops all collection efforts in their tracks. All collection proceedings (both pre and post judgment) are stayed, including actions against the debtor or any property comprising the debtor's estate. The automatic stay is applicable in cases commenced under all chapters of the bankruptcy code, including Chapters 7 and 13, under which the majority of consumer bankruptcies are filed. See 11 U.S.C. §103(a).

In addition to the relief it affords the debtor, the stay also provides creditor protection. Since it prevents creditors from pursuing collection efforts against the debtor's property, it allows the bankruptcy case trustee to achieve an orderly liquidation of the debtor's assets, preventing creditors from liquidating the debtor's assets in a race of diligence. H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong. 1st Sess. (1977) pp. 340-344.

In the typical consumer Chapter 7 case, the stay only prevents action by creditors against the debtor and the debtor's property which is part of the bankruptcy estate. See MidAtlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection, 474 U.S. 494 (1986). Note that this is different from the protections afforded under Chapter 13, where the stay is made applicable to both the debtor and to "co-debtors" in Chapter 13 by virtue of 11 U.S.C. §1301. Thus, in a consumer bankruptcy filed under Chapter 13, a creditor may not act to collect any part of a consumer debt owed by a debtor in bankruptcy from any individual that is also liable for the debt in conjunction with the debtor (typically friends or relatives that may have co-signed an obligation for the debtor). 11 U.S.C. §1301. In Chapter 7, the co-debtor stay is not applicable and co-debtors and their property are "fair game" through normal state law pre and post judgment remedies.

B. [3.3] Scope Of The Automatic Stay

The stay provided by §362 is extremely broad in its scope, and with certain limited exceptions enumerated by statute or carved out by judicial decision applies to almost any action a creditor might take against the debtor or property of the debtor's estate. In determining what constitutes "property of
the estate" subject to protection from the stay, the practitioner is advised to refer to 11 U.S.C. 541, which provides a comprehensive list of the types of property and property interests that make up the estate, as well as those interests not included as property of the estate. As a rule of thumb, a creditor should consider any action it is contemplating against the debtor or their property post-bankruptcy as off-limits, unless a well recognized exception is applicable or relief from or modification of the automatic stay (discussed below) is granted by the bankruptcy court or agreed to by the debtor.

§362 list those actions which are stayed upon the commencement of a bankruptcy, as follows:

1. [3.4] Litigation

§362(a)(1) provides for a broad stay of litigation against the debtor and prohibits the commencement or continuation of any judicial, administrative or similar "proceedings" against the debtor based upon any claim which arose prior to the filing of the debtor's petition.

2. [3.5] Enforcement of Judgments

§362(a)(2) stays enforcement of any judgment obtained pre-petition against the debtor or against property of the estate. For example, the stay would prohibit actions to commence or continue with wage or non-wage garnishment or attachment, post-judgment replevin of property, pursuing execution against a debtor's real or personal property, and all similar attempts of a creditor to recover on a judgment obtained prior to commencement of the case.


§362(a)(3) prohibits a creditor from taking any action to obtain possession of, or to exercise control over, property of the debtor's estate. For example, a bank violates the automatic stay by applying funds deposited into the debtor's account to repay an unauthorized extension of overdraft credit. In re Garofalo's Finer Foods, Inc., 164 B.R. 955 (Bankr., N.D. Ill. 1994). But see Citizens Bank of Md. v. Strumpf, ___ U.S. ___, 116 S.Ct. 286 (1995), discussed below.

Similarly, a Creditor's post-petition use of self-help repossession remedies authorized under Article 9 of the Uniform Commercial Code, Sec. 9-503 is prohibited by the stay, absent an order annulling, modifying or terminating the stay (discussed below).

4. [3.7] Acts to Create, Perfect or Enforce any Lien Against Property of the Debtor or the Estate of the Debtor

§§362(a)(4) and (a)(5) prevent a creditor from, for example, filing a notice of judgment lien against real property, which would otherwise be authorized under KRS 426.720, filing or recording a mortgage lien or perfecting a lien on a motor vehicle owned by the debtor under Kentucky's title lien statutes.

5. [3.8] Acts to Collect, Assess or Recover Claims Against the Debtor

§362(a)(6), although similar to paragraph (a)(1), prohibits any "act" (as opposed to a "proceeding") by a creditor to collect a pre-petition debt. Under this provision, informal "acts" (such as demand or acceleration on a promissory note) are stayed, in the same manner as formal litigation is prohibited. The practitioner should further refer to the broad definition of the term "claim" set forth at 11 U.S.C. §101.
§362(a)(7) prohibits a creditor's "setoff of any debt owing to a debtor that arose before commencement of the [bankruptcy case] against any claim against the debtor." This section clearly prohibits actions such as the "pure" setoff of a debtor's bank account to pay or satisfy a concurrent obligation of the debtor to the bank. See, e.g., In re Nelson, 6 B.R. 248 (Bankr. D. Kan. 1980).

Prior to 1995, it had also been held by several courts that the placing of an administrative "freeze" or hold on a debtor's bank or similar account by a creditor was also a violation of this section. See, e.g., In re Patterson, 967 F.2d 505 (11th Cir. 1992). However, in Citizens Bank of Md. v. Strumpf, ___ U.S. ___, 116 S.Ct. 286 (1995) the Supreme Court settled this debate by unanimously ruling that the so called "freeze" or administrative hold was not a setoff in violation of the Bankruptcy Code, because the bank's refusal to pay was not permanent and absolute, and was merely a temporary measure to preserve the status quo while it sought relief from the stay in the bankruptcy court to pursue its common law right to set off against the account.

According to the Court in Strumpf, setoff in violation of the automatic stay does not occur until (i) a decision to effectuate it has been made; (ii) some action accomplishing it has been taken; and, (iii) a recording of it has been entered. An important caveat to note here, however, is that the creditor which has placed an administrative hold on an account should be careful to promptly bring the matter to the bankruptcy court's attention through a formal motion for relief from or modification of the stay to allow the set-off under 11 U.S.C. §506 and §553. The language of the Strumpf opinion sanctions only a "temporary", not indefinite, hold on the debtor's funds to allow the creditor to determine how to proceed.

C. Violation Of The Stay; Penalties

A majority of Circuits have held that actions taken in violation of the automatic stay are void ab initio and without effect, regardless of whether the creditor has notice of the stay. See, Raymark Indus., Inc. v. Lai, 973 F.2d 1125, 1132 (3rd Cir. 1992); In re Schwartz, 954 F.2d 569, 571 (9th Cir. 1992); In re Calder, 907 F.2d 953, 956 (10th Cir. 1990); Matthews v. Rosene, 739 F.2d 249, 251 (7th Cir. 1984); Borg Warner Acceptance Corp. v. Hall, 685 F.2d 1306, 1308 (11th Cir. 1982). In fact, until 1993, the Sixth Circuit also followed this majority position. In re Potts, 142 F.2d 883, 888 (6th Cir. 1944), cert. denied, 324 U.S. 868 (1945); In re Dungey, 99 B.R. 814, 816 (Bankr. S.D. Ohio 1989); And see, Raikes v. Langford, Ky. App., 701 S.W. 2d 142 (1986) (civil complaint filed during the pendency of the automatic stay in bankruptcy was a nullity and void; exercise of jurisdiction by the state court over such an action is void and of no effect). It has been held that a creditor which initiates collection activity post-petition, even without knowledge of the bankruptcy, has an affirmative duty to restore the status quo without the debtor having to seek relief from the bankruptcy court. In re Dungey, 99 B.R. at 816. Failure of a creditor to restore the debtor to the status quo voluntarily could lead to a finding that the Creditor has acted in willful violation of the stay. Id.

In 1993, the Sixth Circuit reversed its earlier position and concluded that actions in violation of the stay are merely voidable, rather than void. Easley v. Pettibone Michigan Corp., 990 F.2d 905, 910 (6th Cir. 1993). Thus, under some limited circumstances, such as where a debtor unreasonably withholds notice of the stay and the creditor would be prejudiced as a result, or where the debtor is attempting to use the stay unfairly as a shield to avoid an unfavorable result, the protections afforded by §362 may be unavailable to the debtor. Easley, 990 F.2d at 911.

The distinction between whether actions in violation of the stay are void or voidable can be important in a practical sense for the creditor. For example, suppose in a Chapter 7 case a creditor acts in good faith post-petition to repossess a vehicle in which it holds a security interest, without notice that the bankruptcy has been filed or that the stay is in effect. Such action would clearly constitute a technical violation of the stay. However, because the action may now be considered voidable, rather than void, the creditor may be able to request that the court authorize this conduct post-petition, where the
The debtor has not been harmed or prejudiced, in order to expedite disposition of the collateral where voluntary reaffirmation will not occur.

§362 provides for recovery of actual damages (including out of pocket losses, damages for embarrassment and humiliation), costs and attorneys fees incurred by an individual injured by a willful violation of the stay. In certain cases, punitive damages may also be awarded against a creditor. Of course, where the violation of the stay was inadvertent or unintended, a creditor should not be held in contempt. However, it is important for the creditor to remember that a violation of the stay is considered "willful" where the action violating the stay is undertaken with knowledge that the stay is in effect; willfulness in this context does not require a showing of malice or specific intent to violate the stay. In re Garofalo's Finer Foods, Inc., 164 B.R. 955, 971 (Bankr. N.D. Ill. 1994).


Relief from the automatic stay is controlled by §362(d) of the Bankruptcy Code and Bankruptcy Rule 4001. After notice and a hearing stay relief, modification or annulment may be granted by the Court to a “party in interest” upon request for the following reasons:

(1) cause, which includes but is not limited to a showing of lack of adequate protection of an interest in property of such party in interest (typically collateral held by a secured creditor); or,

(2) where the party in interest (usually the creditor) can demonstrate that (i) the debtor has no equity in the property in which it has an interest and which it seeks to recover; and, (ii) that said property is not necessary for the debtor’s “effective reorganization.”

The party seeking stay relief need not establish both. In re London Tiles, Inc., 35 B.R. 681, 683 (Bankr. N.D. Ohio 1983); In re Cabe, Inc., 41 B.R. 222, 223 (Bankr. M.D. Tenn. 1984). In the vast majority of consumer bankruptcy cases, the “effective reorganization” prong of the test outlined in §362(d)(2) would be an applicable consideration only in Chapter 13. In Chapter 7, the debtor is not seeking to reorganize and establish a payment plan to creditors. Rather, the debtor’s non-exempt assets, if any, will be liquidated and a discharge of the debtor’s obligations entered in court.

It is not proper for a creditor to request the bankruptcy court to authorize a “lift” of the automatic stay. Many practitioners improperly use this term when seeking relief from stay. However, the term is not found in the Code, and is not generally accepted as an appropriate request by the Bankruptcy Courts in Kentucky.

As the legislative history of §362 points out, permitting "an action to proceed to completion in another tribunal" may be sufficient cause, in and of itself, to grant relief from the stay. See H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 340-344. Thus, the pendency of state court litigation related to a creditor’s claim may also be grounds to obtain stay relief. See, e.g., In Marvin Johnson’s Auto Service, Inc., 192 B.R. 1008 (Bankr. N.D. Ala. 1996); In re Reyco, 99 B.R. 768 (Bankr. N.D. Ohio 1989) (relief from stay would be granted to allow state court litigation to proceed, in order to liquidate the claim of the creditor, where the creditor’s claims and the debtor’s claims had been previously filed in state court, discovery was in progress and all issues were based entirely on state law).

In granting a creditor’s motion for relief from stay on these grounds, the bankruptcy court is directed to apply a “balancing of the equities” test. In re Tricare Rehabilitation Systems, Inc., 181 B.R. 569 (Bankr. N.D. Ala. 1994). The court is instructed to consider a variety of factors including but not limited to (1) whether the state court litigation has progressed to trial-readiness, and the likelihood that investment of resources in trial preparation would be wasted if trial were deferred; and whether judicial economy favors continuation of the action in the tribunal in which it was commenced, to fix and liqui-
date the claim which then may be made against the debtor’s estate, to avoid a multiplicity of suits and proceedings involving the same subject matter. Tri care, 181 B.R. at 573 (citing In re Johnson, 115 B.R. 634 (Bankr. D. Minn 1989). The Court should also inquire (1) whether the relief in the state court will result in a partial or complete resolution of the issues; and (2) the impact of the stay on the parties and balance of hurt. In re Curtis, 40 B.R. 795 (Bankr. D. Utah 1984).

The bankruptcy court is in part a court of equity, and will consider the balance of hurt in fashioning relief. In re Phelia Assocs., Inc., 26 B.R. 235, 238 (Bankr. W.D. Ky. 1982). Ultimately, therefore the grant or denial of stay relief by the bankruptcy court will be based on an evaluation and weighing of various factors, depending upon the relative positions of the parties. The following cases are illustrative:

- The automatic stay would be terminated to permit a creditor to exercise rights in the debtor’s automobile following the debtor’s default, where the debtor continued to use the automobile without adequately protecting the creditor and while failing to execute a reaffirmation agreement on the vehicle. In re Smith, 167 B.R. 850 (Bankr. W.D. Ky. 1994).

- A debtor is not entitled to a continuance of the automatic stay to prevent a creditor from enforcing its security interest or mortgage where no equity exists in the property and no offer of adequate protection was forthcoming at the hearing. In re Tinsley & Groom, 38 B.R. 457 (Bankr. W.D. Ky. 1984).

- A Chapter 7 debtor’s auto payment, made seven days late, is not cause for stay relief in order to repossess. In re Nikokyrakis, 109 B.R. 260, 261 (Bankr. N.D. Ohio. 1989).

1. [3.12] Cause Defined

The most common example of “cause” for stay relief under §362, set out by the statute itself, is a lack of “adequate protection” by the creditor in its secured collateral. The concept of adequate protection is discussed in more detail below. It has been repeatedly held that whether cause exists for stay relief must be determined on a case-by-case basis. However, there are other examples of cause which might justify relief from stay.

For example, bad faith on the part of the debtor, as found by examining the totality of the circumstances, may be cause for stay relief. In re Grand Traverse Dev. Co. Ltd. Partnership, 151 B.R. 792, 798-99 (W.D. Mich 1993). The requirement that the debtor come into court with “clean hands” and in “good faith” has been established in Chapter 7 cases (In re Khan, 35 B.R. 718 (Bankr. W.D. Ky 1984), remanded, 751 F.2d 162 (6th Cir. 1984); In re Zick, 931 F.2d 1124, 1126-27 (6th Cir. 1991)), as well as in Chapter 13 (Memphis Bank & Trust Co. v. Whitman, 692 F.2d 427 (6th Cir. 1982)). Although Khan, Zick, and Whitman dealt with the concept of the debtor’s bad faith in the context of the creditors’ request for dismissal of the bankruptcy case, the elements of bad faith constituting the necessary prerequisite for “cause” justifying dismissal would likewise appear applicable in the context of a request for stay relief.

In In re Laguna Assocs. Ltd. Partnership, 30 F.3d 734 (6th Cir. 1995), for example, the Court held that cause for stay relief based upon the debtor’s bad faith in filing the bankruptcy petition might exist where (1) the bankruptcy was a single asset; (2) improper pre-petition conduct by the debtor was proven; (3) the debtor had few unsecured creditors; (4) the debtor’s property had been posted for foreclosure and the debtor was unsuccessful at defending against foreclosure in state court; (5) the debtor and the creditor had proceeded to a standstill in state court; (6) the debtor had to post a bond that it could not afford; (7) filing the bankruptcy petition allowed the debtor to avoid a court order; (8) the debtor had no ongoing business or employees; and, (9) the debtor lacked the possibility of a successful reorganization. These concepts would appear properly adapted to Chapter 7 as well.
Adequate Protection Defined

Adequate protection is an important but illusive concept in the retail consumer bankruptcy context. The term is not defined anywhere in the bankruptcy code, and yet the "lack" of adequate protection is generally considered to be the foremost reason for the grant of stay relief, where the debtor has equity in a creditor's collateral and asserts a need for the collateral in order to accomplish a reorganization plan.

Adequate protection has been defined judicially as:

1. the debtor having equity in the property; or
2. the property is necessary to [the debtor's] performance under the plan and the creditor's security interest will not be impaired by the stay. In re Milo Ridge Resort & Executive Conference Ctr., 26 B.R. 277, 279 (Bankr. W.D. Ky. 1982).

Since exactly what constitutes adequate protection cannot be defined with exactitude, the following case examples are provided to assist the practitioner in determining the existence of adequate protection, or the corresponding lack thereof:

- Where the value of the collateral is equal to or greater than the debt owed to the creditor, the creditor is adequately protected. In re W.L. Mead, Inc., 42 B.R. 57, 60 (Bankr. N.D. Ohio 1984);
- An equity cushion in and of itself suffices as adequate protection from the stay. In re Epstein, 26 B.R. 354, 357 (Bankr. E.D. Tenn. 1982);
- Regular payments to a creditor may serve as adequate protection, where the debtor's equity cushion is inconsequential. In re Shriver, 33 B.R. 176, 181 (Bankr. N.D. Ohio 1983);
- A debtor is not required to provide adequate protection to an undersecured creditor seeking relief from the stay where the value of the creditors' interest in the property has increased. In re Cablehouse, Ltd., 68 B.R. 309, 311 (Bankr. S.D. Ohio 1986); and,
- An undersecured creditor is not entitled to compensation in the form of adequate protection payments for money that it could earn by foreclosing upon its interest and investing the proceeds. In re Pullins, 65 B.R. 560, 562-63 (Bankr. S.D. Ohio 1986).

Although the courts have generally held that the existence of equity in a creditor's collateral constitutes adequate protection, there may be instances where adequate protection is lacking, even where there is an equity cushion. For example, the failure of a debtor to maintain insurance covering property damage to the collateral might be inadequate protection, justifying relief from the stay.

Obtaining Stay Relief: Distinctions Between Chapter 7 And Chapter 13

In the retail or consumer Chapter 7 case, the creditor is faced with the dilemma either of obtaining a reaffirmation agreement from the debtor to avoid discharge of the debtor's obligation to the creditor, or surrender of its collateral from the debtor to allow the creditor to liquidate the collateral and minimize its loss. In Chapter 13, on the other hand, the debtor is interested in retaining the majority of their property, rather than surrendering it to creditors. Therefore, in Chapter 13 the creditor must ensure
The Automatic Stay and Abandonment

adequate protection of its claim and the collateral securing its claim during the pendency of the debtor's reorganization plan, while it obtains payment from the debtor in the plan.

It becomes readily apparent that the grounds asserted by a creditor for stay relief in the retail bankruptcy case will vary considerably depending upon the type of bankruptcy commenced by the debtor. For example as discussed above, in a Chapter 7 proceeding, §362(d)(2) is not applicable to the inquiry, since the debtor does not seek "reorganization", but rather liquidation of assets and discharge of all indebtedness in a Chapter 7. Since reaffirmation is a wholly voluntary process, and the creditor is not obligated to allow reaffirmation, the debtor has little practical choice but to surrender their property secured by a creditor's lien to the creditor when reaffirmation is not agreeable to both parties.

It should be much easier, therefore, for a creditor to obtain relief from the stay in a Chapter 7 proceeding quickly, as opposed to Chapter 13 where the debtor has proposed a re-payment plan and has the intention of retaining the majority of their property. This is why under Local Rule 10 of the Western District Rules, for example, a motion for relief from stay in Chapter 7 is granted automatically within fifteen (15) days following the filing of the motion, unless an objection is filed by the debtor establishing "good cause" for a hearing on the motion.

1. [3.15] Burdens of Proof


2. [3.16] Procedure

The procedure for obtaining relief from the automatic stay is governed by Bankruptcy Rule 4001 and the rules applicable in the Eastern and Western Districts of Kentucky. Under Rule 4001, a request for relief, modification or annulment of the automatic stay is brought by written motion, which must state with particularity the grounds for the motion and the relief sought. In a Chapter 7 or Chapter 13 case, the motion should be served by regular mail service and must be served upon the case trustee and the debtor. See Bankruptcy Rules 9013, 9014 and 7004.

A motion for relief from stay may be made ex parte, but only where it is shown by sworn testimony that immediate and irreparable injury, loss or damage will result to the movant before the adverse party or the attorney for the adverse party can be heard in opposition. The movant’s attorney must further certify to the court in writing his/her efforts to give notice and the reasons why notice should not be required. Bankruptcy Rule 4001(a)(2).

In both the Eastern and Western Districts of Kentucky, a motion for stay relief may not be filed without an accompanying proof of claim with supporting documents establishing the security interest of the movant in the property of the estate that is subject to the motion. See LBR 401, Eastern District of Kentucky; LBR 10, Western District of Kentucky. Notice to all parties in interest is required in both Districts. Note that in the Western District of Kentucky, a request for relief from stay shall not be combined in the same pleading with any other request for relief, and all motions filed must include a proposed order. LBR 10, Western District of Kentucky. A typical motion for relief and accompanying order in Chapter 7 are included at Appendix "A", although the form must be adapted to the specific facts applicable in any given case.

In the Eastern District of Kentucky, all parties to a motion for relief from stay must be given at least ten (10) days notice of the hearing on the motion. LBR 401, Eastern District of Kentucky. In the
Western District in a Chapter 7 case, a hearing on a motion for relief from stay will only be set if the party in opposition to the motion so objects within fifteen (15) days from the date of service of the motion; otherwise, if no objection is filed, stay relief will be granted within fifteen (15) days following the date of service of the motion, without hearing. LBR 10, Western District of Kentucky.

In the Western District of Kentucky, LBR 21 serves as a useful tool for the creditor in a consumer Chapter 7 or Chapter 13 case. The Rule also serves to free up the court’s crowded docket from routine stay relief motions involving disputes over claims secured by motor vehicles.

Under the Rule, whenever a debtor elects to retain possession of a “motor vehicle” which secures an outstanding obligation, either by paying for the vehicle through a Chapter 13 plan, or through reaffirmation or otherwise, the debtor is required to maintain proof of insurance against physical damage on the creditor’s collateral. If the debtor fails to furnish proof of insurance on the vehicle at the Section 341 meeting, the stay shall be deemed terminated. Further, if during the pendency of a case, either before or after the 341 meeting, if insurance lapses on any motor vehicle subject to the provisions of the Rule:

- The creditor may notify the debtor and his/her counsel in writing (with a copy to the court) regarding the lapse of insurance. A copy of a notice which might be used for these purposes is included at Appendix "B";
- The debtor shall be enjoined from using the motor vehicle for so long as it remains uninsured; and,
- If the debtor fails to provide proof of re-insurance for a minimum of ninety (90) days to the creditor within five (5) business days following the mailing of the notice, the stay shall be deemed terminated. LBR 10.

Although not required by the rule, it is recommended that a creditor which has complied with Rule 21’s requirements and has not received proof of insurance within the time specified, notify the Court of the debtor’s failure to comply with the Rule. A standard form notification for these purposes is provided at Appendix "C" to this Chapter.

II. [3.17] ABANDONMENT OF PROPERTY OF THE ESTATE

A. [3.18] Generally

It is a fundamental principal under the Code that as of the commencement of the case under Chapter 7, all of the debtor’s property comprising the debtor’s estate is subject to supervision and control by the trustee in bankruptcy. For example 11 U.S.C. §323(a) provides that the trustee is the representative of the estate. §363(b) provides that the trustee has the authority, after a notice and a hearing, to sell, use, lease and generally to dispose of property of the estate, thus allowing the trustee to generate proceeds for distribution to unsecured creditors. Finally, although title to the debtor’s property no longer “vests” in the trustee as it once did under the former Bankruptcy Act, the trustee has full authority to dispose of the estate’s (debtor’s) property under 11 U.S.C. §541.

The term “abandonment”, therefore, generally refers to the trustee’s right to abandon, or release from his or her control, certain property of the estate that the trustee believes will not generate funds, through sale or disposition, which will benefit the unsecured creditors. The most common example in the consumer bankruptcy of property which is of no benefit to the estate is a vehicle, secured by a valid and perfected lien in favor of a creditor, which is worth less than the outstanding balance on the account secured by the lien. Since there is no equity in such property, the trustee will have little use
The Automatic Stay and Abandonment

for it, as upon sale all proceeds will go first to satisfy the secured creditor's perfected lien, and there will be nothing left for distribution to unsecured creditors.


Although stay relief and abandonment often go hand in hand, a creditor cannot set forth the necessary elements for stay relief simply by reciting the requirements for abandonment. In re Nikokyrikas, 109 B.R. 260, 261 (Bankr. N.D. Ohio 1989). The two concepts are distinct: on the one hand, stay relief refers to the creditor's right, upon proper order of the court terminating or modifying the automatic stay, to enforce a security interest in property vis à vis the debtor. Having cleared this hurdle, however, the creditor must still insure that the trustee has no objection to the creditor's enforcement of its security interest, and obtain the trustee's abandonment of the property before the creditor may dispose of the collateral in an attempt to satisfy the debtor's outstanding obligations. Where there is equity in such property, over and above the lien claimed by the creditor plus any applicable exemption to which the debtor might be entitled, the trustee may not be willing to abandon the property to the creditor at all, but rather may seek to sell it for the benefit of the estate.

C. [3.20] Procedure

§554 of the Code is the applicable rule governing abandonment of property of the estate. Under the statute:

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(c) Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of the case is abandoned to the debtor and administered for purposes of section 350 of this title.

(d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

Thus, abandonment of property under the statute can occur either (1) at the trustee's request; (2) upon the request of a party in interest (usually a creditor); or, (3) by operation of law upon closure of the case. The Code does not specify a time in which the trustee must make a decision regarding abandonment of specific property, however it has been held that the trustee must act within a "reasonable" time to decide whether to retain and dispose of property or to abandon it. In re Ira Haupt & Co., 398 F.2d 607, 613 (2nd Cir. 1968).

Bankruptcy Rule 6007 sets out the procedure for the abandonment of estate property. The trustee is generally required to give notice of a proposed abandonment or disposition of property to the United States Trustee, and all creditors. Thereafter, a party in interest may file and serve an objection within fifteen (15) days of the mailing of the notification, or within a time frame fixed by the court. If a timely objection is made, the court shall set a hearing on the notice. Otherwise, the property is deemed abandoned.
The courts' local rules generally follow the procedure outlined under Rule 6007. Under local practice rules in the Western District of Kentucky, all Section 341 meeting notices state that the trustee, upon the filing of a report of no distribution with the clerk of the court, proposes to abandon all property which is of no value to the estate. LBR 11, Western District of Kentucky. Under LBR 11, the last day for filing on objection to abandonment is thirty (30) days from the date first set for the meeting of creditors (§341 meeting). Thus, in a Chapter 7 case pending in the Western District of Kentucky, all property of the estate will be deemed abandoned if two conditions are met:

1. No objections to the trustee's proposed abandonment are filed within thirty (30) days of the Section 341 meeting; and,

2. A Report of No Distribution is filed by the trustee.

Under LBR 11, a motion for a proposed abandonment by a party in interest must be served on the trustee, the debtor, the debtor's attorney, and any other person claiming an interest in or lien against the property to be abandoned, and certain others. All motions must include a separate notice for filing objections, and a copy of the proof of claim. The last day for filing objections is fifteen (15) days from the date filed. Motions for abandonment must not be included with any other motion. Appendix "D" includes a sample form of the motion generally adapted from the form authorized under LBR 23, Western District of Kentucky.
UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF KENTUCKY

IN RE: ____________________________

DEBTOR

BANKRUPTCY NO. ________________

CHAPTER 7

MOTION FOR RELIEF FROM STAY

---

Comes ________________, a secured creditor ("Creditor"), by counsel, and moves the Court to terminate the stay against this Creditor for cause shown pursuant to Bankruptcy Rule 4001 and Section 362 of the Bankruptcy Code. In support of its Motion, Creditor states as follows:

1. This Creditor is the holder of a certain Note and Security Agreement granting Creditor a security interest in a [description of collateral], which is evidenced and more further described in the Proof of Claim, attached hereto as Exhibit "A".

2. The last payment Creditor received from the Debtor for this indebtedness was on ________, 199__. The account is delinquent for the ___ payment and all subsequent monthly payments thereafter for a total delinquency of $ _____________.

3. Debtor is unable or unwilling to provide adequate protection to this creditor and the automatic stay effectively is resulting in a decrease in the value of this Creditor's interest in said property.

4. The Debtor, under the terms of the aforesaid documents has failed to maintain insurance coverage to protect the property of this Creditor, which subjects this creditor to immediate and irreparable harm.

5. Creditor is not willing to allow this debtor to reaffirm the obligation.

6. Creditor believes that the property in which it holds a security interest has no equity for the benefit of the Debtor or unsecured creditors.

WHEREFORE, the secured Creditor moves the Court to terminate the automatic stay, for cause shown.

Respectfully submitted,

FIRM NAME

BY: ________________________________

ATTORNEY
CERTIFICATE

I hereby certify that a true copy of the foregoing Motion for Relief from Stay was on this __________ day of __________, 199__, mailed to [counsel for Debtor] and to [Trustee], and [service list].

__________________________________________
Attorney
IN RE: ___________________________ BANKRUPTCY NO. ___________________________

DEBTOR CHAPTER 7

ORDER TERMINATING STAY

This matter coming before the Court on Motion of ___________________________ a secured creditor, seeking an Order terminating the automatic stay, and the Court being sufficiently advised; IT IS HEREBY ORDERED that the stay against ___________________________ is terminated to allow it to enforce the security interest in the collateral described in its motion, a certain [collateral description].

____________________________
UNITED STATES BANKRUPTCY JUDGE

DATE: ___________________________

Tendered by:

FIRM NAME
ATTORNEY

*A copy of this Order is to be mailed to all counsel and parties of interest.
B. [3.23] Notice Regarding Lapse of Insurance

RE: Chapter 13 No.:
Our Client:
Account No.:
Our File No.:

Dear __________:

Our client, __________ has been advised that property damage insurance coverage on your __________, VIN __________ has lapsed. Bankruptcy Court Local Rule No. 21, effective on January 1, 1993, stipulates that full coverage insurance must be maintained on vehicles subject to a lien. Further, pursuant to the Rule, you are enjoined and prohibited from using the vehicle as long as it remains uninsured.

You have five (5) business days from the date of this letter to provide us with proof of insurance. Furthermore, the proof of insurance must comply fully with Local Rule 21, provide that [client] is the loss payee, as well as state the amount and type of coverage.

If we do not receive a response within five (5) days, the automatic stay is lifted and we may advise our client to take possession of the vehicle.

Thank you for your time and attention.

Very truly yours,
FIRM NAME

ATTORNEY

cc: Bankruptcy Court File
    Client
    Debtor's Attorney

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

IN RE: ____________________________ BANKRUPTCY NO. __________
DEBTOR

CERTIFICATE OF NONCOMPLIANCE

*** *** *** *** *** *** ***

Comes ____________, a secured creditor ("Court"), by counsel, and certifies to this Court that the Debtor, has failed to provide proof of full coverage insurance on a certain [description of collateral] ("Vehicle").

Pursuant to Local Rule 21, applicable in this Court, full coverage insurance must be maintained on vehicles subject to a lien. Attached hereto as Exhibit "A" is a copy of the letter sent to the Debtor, his/her attorney and others, advising the Debtor to provide proof of full coverage insurance on the Vehicle within five days from receipt of the letter, or the automatic stay will be terminated pursuant to the Rule.

Creditor hereby advises the Court that Debtor has not complied with Local Rule 21 and has not responded to its letter of ________________.

WHEREFORE, the automatic stay is terminated and the Creditor shall proceed to take possession of the Vehicle or otherwise exercise its rights in its collateral.

Respectfully submitted,

FIRM NAME

BY: ____________________________
ATTORNEY

CERTIFICATE

I hereby certify that a true copy of the foregoing Certificate of Non-Compliance was on this _________ day of ________________, mailed to ________________, Counsel for the Debtor, and ________________, Trustee.

_______________________________
ATTORNEY
Motion By Secured Creditor For Abandonment Of Property

UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF KENTUCKY

IN RE: 

________________________

DEBTOR

BANKRUPTCY NO. 

CHAPTER 7

MOTION BY SECURED CREDITOR FOR ABANDONMENT OF PROPERTY

The undersigned secured creditor reports that at the time of the Order of Relief, the above Debtor's estate included the following property which is covered by a valid security interest:

NAME AND ADDRESS OF SECURED CREDITOR:
DESCRIPTION OF PROPERTY:
ESTIMATED VALUE OF PROPERTY:
BALANCE DUE ON ACCOUNT:

EXEMPTION IN THE AMOUNT OF:

Wherefore, the undersigned secured creditor respectfully request that the foregoing property be abandoned as property of the estate in accordance with 11 U.S.C. Section 554, Bankruptcy Rule 6007 and Local Rule 11(b).

FIRM NAME

________________________

ATTORNEY
CERTIFICATE

I hereby certify that a true copy of the foregoing Motion by Secured Creditor for Abandonment of Property was on this __________ day of ____________, mailed to ________________ Counsel for Debtor, to ________________ Trustee, [address], to ________________, U.S. Trustee, and to __________, ________, ____________ [if applicable].

________________________________________
ATTORNEY

*Any objections to this abandonment must be filed within 15 days of the above date. [Rule 6007(a)] If no written request is received, an order approving the abandonment shall be entered.

ORDER APPROVING PROPOSED ABANDONMENT

Upon the motion of the secured creditor for abandonment of property as cited above, and the Court being sufficiently advise,

IT IS ORDERED that said motion and proposal be, and hereby is approved.

Dated: ________________________________

________________________________________
UNITED STATES BANKRUPTCY JUDGE
Chapter 4

EXEMPTIONS, LIEN AVOIDANCE AND OTHER ASPECTS OF DEALING WITH SECURED CREDITORS IN CHAPTER 7 BANKRUPTCIES

Cathy S. Pike

Jan M. West

I. [4.1] EXEMPTIONS

A. [4.2] Introduction

Under 11 U.S.C. Section 541, upon the commencement of a bankruptcy proceeding, all property of the debtor becomes "property of the estate". In order to provide the debtor with a "fresh start", from property of the estate debtors are allowed to claim exemptions to prevent certain property from being liquidated by the trustee, and to protect it from claims of creditors whose claims arose before the commencement of the case. In the words of one court, the exemption statutes were created:

"[f]or the protection of a poor debtor and his helpless family, to give them breath of life, and a pillow whereon to lay the head, to save them from destitution and absolute want."

State to Use of Burt v. Allen, 35 S.E. 990, 993 (W. Va. 1900).

The date for determining exemptions is the date the order for relief is entered. In the event of a conversion from one chapter to another, the date for determining exemptions in the converted case is the date of conversion. In re Butcher, 75 BR 441 (E.D. Tenn. 1987); aff'd. without opinion in 848 F.2d 189 (6th Cir. 1988); In re Dyess, 14 BCD 1379 (Bankr. W.D. La. 1986).

Any waiver of exemptions executed by a debtor in favor of a creditor that holds an unsecured claim against the debtor is unenforceable in bankruptcy with respect to any property which the debtor may exempt. 11 U.S.C Section 522[e].

B. [4.3] Basic Categories Of Exemptions

11 U.S.C. Section 522(d) lists the federal exemptions to which each debtor is entitled, and also provides that an individual debtor may elect to use either federal or state exemptions, unless the state of which it is a resident has "opted out" of the federal exemption scheme. 11 U.S.C. Section 522[b]. Kentucky has "opted out" of the federal exemptions (KRS 427.170); thus, Kentucky law provides that the following property of an individual debtor resident in this state is exempt:

- All household furnishings, jewelry, personal clothing and ornaments not to exceed $3,000 in value;

- Tools, equipment and livestock, including poultry, of a person engaged in farming, not exceeding $3,000 in value;
• One motor vehicle and its necessary accessories, including one spare tire, not exceeding in the aggregate $2,500 in value;

• Professionally-prescribed health aids for the debtor, or a dependent of the debtor;

• Generally, the greater of seventy-five (75%) percent of the aggregate disposable earnings of an individual for any workweek, or the amount by which the debtor’s disposable earnings for any workweek exceed thirty (30) times the federal minimum hourly wage;

• Tools, not exceeding $300 in value, of any individual debtor necessary in its trade, and one motor vehicle not exceeding $2,500 in value and its necessary accessories, including one spare tire, of a mechanic or other skilled artisan primarily engaged in the replacement, repair, or emergency servicing of essential, mechanical, electrical or other equipment in general use;

• The professional library, office equipment, instruments and furnishings of a minister, attorney, physician, surgeon, chiropractor, veterinarian, or dentist, necessary in the practice of such profession, and not exceeding $1,000 in value, and one motor vehicle not exceeding $2,500 in value with necessary accessories, including one spare tire;

• An individual debtor’s aggregate interest, not to exceed $5,000 in value, in real or personal property that such debtor or a dependent of such debtor uses as a permanent residence in this state, or in a burial plot for such debtor or a dependent of such debtor. However, this exemption does not apply if the debt or liability existed prior to the purchase of the property or the erection of the improvements thereon;

• Any money or other benefit to be paid or rendered by any assessment or cooperative life or casualty insurance company, and any money or other benefit to be paid or rendered by any fraternal benefit society;

• An award under a crime victim’s reparation law;

• To the extent reasonably necessary for the support of an individual and his dependents, in addition to the foregoing property which is totally exempt, money or property received and rights to receive money or property for alimony, support or separate maintenance;

• A payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

• A payment, not to exceed $7,500, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent;

• A payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor or any dependent of the debtor; and
Exemptions, Lien Avoidance and Secured Creditors

- Assets held, payments made and amounts payable under pensions exempt pursuant to KRS 61.690, 161.700, 427.120 and 427.125, or the right or interest of a person in an individual retirement account or annuity, deferred compensation account, tax sheltered annuity, simplified employee pension, pension, profit-sharing, stock bonus, or other retirement plan described in the Internal Revenue Code of 1986, as amended, which qualifies for deferral of income tax until the date benefits are distributed. However, this exemption does NOT apply to any amounts contributed to an individual retirement account or annuity, deferred compensation account, a pension, profit-sharing, stock bonus, or other qualified retirement plan or annuity if the contribution occurs within 120 days before the debtor files for bankruptcy.

In addition to the foregoing, every debtor shall have a general exemption not to exceed $1,000 in value to be applied toward any property, real or personal, tangible or intangible, in its estate on the filing date.

KRS 427.005 defines some of the foregoing terms:

(a) The term "earnings" means compensation paid or payable for personal services, whether denominated as wages, salaries, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program;

(b) The term "disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld;

(c) The terms "household furnishings, jewelry, personal clothing, and ornaments" mean clothing, furniture, appliances, linens, china, crockery, kitchenware, and personal effects of an individual and the individual’s dependents, but do not include:

(i) Works of art;

(ii) Electronic entertainment equipment (except to the extent of one television and one radio;

(iii) Antiques; and

(iv) Jewelry other than wedding rings.

C. [4.4] Claiming Exemptions

The debtor is required to list the property claimed as exempt on the schedules which are required to be filed either with the petition or within fifteen (15) days thereafter. In light of the fact that exemptions are claimed in the bankruptcy schedules, the rule for amendment of exemptions is identical to the rule for amendment of the schedules, which is that amendments may be filed any time before the case is closed. Bankruptcy Rules 4003[a], 1007 and 1009.

In the event the debtor fails to claim exemptions to which he is entitled, for example when the debtor has died or is incapacitated, a dependent of the debtor may file the list within thirty (30) days after the schedules are filed. In the event the debtor fails to file its schedules, the deadline begins to run on the date when the schedules were due to be filed. Bankruptcy Rule 4003[a].
The exemptions are listed in Schedule C of Official Form 6 of the debtor's petition. Schedule C requires that the debtor estimate the value of the items claimed as exempt, and indicate the statute under which the exemption is claimed. Typically, a debtor lists the maximum statutory amount allowed for exemption of each category of property, regardless of the amount of equity which the debtor has in the property. The exempted property must be listed with sufficient specificity so as to enable the trustee and creditors to determine its nature and value.

1. **[4.5] Trustee’s and Creditors’ Right to Object to Exemptions**

   The trustee or any creditor may file objections to the list of property claimed as exempt. Bankruptcy Rule 4003[b]. Some of the more common grounds for objections to exemptions include:

   (a) Sloppiness in claiming exemptions;

   (b) Lack of statutory basis;

   (c) Exemption of several items of property whose aggregate value exceeds the statutory exemption;

   (d) Conversion of non-exempt assets into exempt assets, which conversion appears to be fraudulent, Abbott Bank—Hemingford v. Armstrong, 931 F.2d 1233 (8th Cir. 1991); and

   (e) Assets which are concealed and later discovered cannot be exempted.

   In the event that no objections are timely filed to claimed exemptions, “the property claimed as exempt on such list is exempt”. 11 U.S.C. Section 522[1].

a. **[4.6] Burden of Proof**

   Either the trustee or creditors can file objections to exemptions. In any hearing on objections to exemptions, the objecting party has the burden of proving that the exemptions are not properly claimed. Thereafter, the burden shifts to the debtor to show that the claim to exemption has been properly claimed. In re Catli, 999 F.2d 1405 (9th Cir. 1995); In re Lester, 141 BR 157 (Bankr. S.D. Ohio 1991).

   After hearing on notice, the court will determine the issues presented by the objection. Bankruptcy Rule 4003[c].

b. **[4.7] Time Limitations**

   All objections to exemptions must be in writing and must be served on the trustee, the person filing the list of exemptions claimed, and the attorney for such person. Bankruptcy Rule 4003[b]. Because an objection to exemptions is a contested matter, no answer to the objection must be filed, unless otherwise ordered by the court. Bankruptcy Rule 9014.

   The deadline for filing objections to exemptions is normally thirty (30) days after the date on which the first meeting of creditors is actually concluded. In the event an amendment to exemptions is filed after the conclusion of the first meeting of creditors, the deadline for objecting to exemptions claimed by the amendment is extended for an additional thirty (30) days. The time period for objecting to exemptions may be extended by the court only if the extension is granted within the original time period. Bankruptcy Rule 4003[b]. If the time period for filing objections to exemptions expires, due to excusable neglect, it may not be later extended by the court. Bankruptcy Rule 9006[b][3].
In the event no objections to exemptions are timely filed, the exemption claimed by the debtor is finalized, and the valuation of the debtor's interest in the property is approved. The importance of timely objecting to exemptions was emphasized by the United States Supreme Court in Taylor v. Freeland and Kronz, 112 S.Ct. 1644, 118 L.Ed.2d 280, 26 C.B.C.2d 487 (1992), wherein the Court held that there is no "bad faith" exception to the deadline for timely filing objections to exemptions, even where there is no colorable statutory basis for the exemptions claimed. Therefore, although it was apparent that the debtor's claimed exemption was not permitted under the exemption statute, the failure of any party to timely file an objection waived the trustee's right to later challenge the exemption.

However, the Court observed that the Bankruptcy Code contains sufficient safeguards against debtors filing groundless claims, such as the denial of a discharge under 11 U.S.C. Section 727(a), or of civil or criminal sanctions under Bankruptcy Rule 9011 or 18 U.S.C. Section 152, to prevent meritless exemption claims from being routinely filed.

II. [4.8] LIEN AVOIDANCE

A. [4.9] Introduction

Pursuant to 11 U.S.C. Section 522(f), a debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such nonconsensual lien impairs an exemption to which the debtor would have been entitled, if such lien is a:

(a) judicial lien, other than a judicial lien that secures a debt to a spouse, former spouse or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record; and to the extent that such debt is not assigned to another entity, voluntarily, by operation of law or otherwise; and includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support; or

(b) nonpossessory, nonpurchase-money security interest in any household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family or household use of the debtor or a dependent of the debtor; implements, professional books, or tools of the trade of the debtor or the trade of a dependent of a debtor; or professionally-prescribed health aids for the debtor or a dependent of the debtor.

Only a nonconsensual lien can be avoided. In re Fagan, 26 BR 212 (W.O. Ky. 1982); In re Driver, 133 BR 476 (S.D. In. 1991).

11 U.S.C. Section 101(36) defines a "judicial lien" as a lien:

"obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding."

B. [4.10] Bases For Lien Avoidance

In addition to avoidance of a lien which impairs a debtor's exemption, a creditor's lien may be subject to avoidance by either the trustee or debtor under the following provisions of Title 11 of the United States Code.
• §544 ("strong arm" provision);
• §545 (avoidance of statutory liens);
• §547 (avoidance of preferences);
• §548 (avoidance of fraudulent conveyances);
• §549 (avoidance of postpetition transfers); or
• §724(a) (avoidance of liens securing penalties).

Generally, such avoidance preserves the debtor’s exemptions in property secured by the avoided lien, to the extent such exemption is allowed by Kentucky.

1. [4.11] Impairment of Exemption

11 U.S.C. Section 522(f) permits a debtor to avoid certain liens, to the extent that such liens impair an exemption to which the debtor would otherwise be entitled. For purposes of 11 U.S.C. Section 522(f), a lien is considered to impair an exemption to the extent the sum of the lien; all other liens on the property; and the amount of the exemption that the debtor could claim if there were no liens on the property exceeds the value that the debtor’s interest in the property would have in the absence of any liens.

For example, if a debtor has household goods worth $3,000 and claims the household goods exemption provided by statute, and a creditor has a nonpossessor, nonpurchase-money security interest in the household goods, the creditor’s lien may be avoided. The result of such a lien avoidance would convert the creditor’s claim from a secured claim to a general unsecured claim.

Prior to the adoption of the Bankruptcy Reform Act of 1994, the rule adopted by the Sixth Circuit Court of Appeals in In re Dixon, 885 F.2d 327 (1989) was that a homestead exemption applied only in execution sale situations. Thus, the Court ruled that the debtor’s exemption was never impaired in a bankruptcy situation, and consequently a debtor could never avoid liens. As a result of this ruling, Sixth Circuit debtors were confronted with the problem of selling their home after bankruptcy, and being required to pay the lienholder out of the equity which should be been protected as exempt property to provide for their “fresh start”.

However, Kentucky courts found that the holdings of In re Dixon and In re Moreland, 21 F.3d 102 (6th Cir. 1994), a case which reaffirmed Dixon, did not apply in Kentucky due to differences in Kentucky and Ohio law. In re Lynch, 187 B.R. 536 (Bkrtcy E.D. Ky. 1995); In re Powell, 173 B.R. 338 (Bkrtcy E.D. Ky. 1994). These decisions, which have been adopted in the Western District of Kentucky, hold that Dixon was based on an interpretation of Ohio law which was contrary to Kentucky case law.

In re Dixon, supra, was probably overruled by the Bankruptcy Reform Act of 1994, which provides that a debtor may avoid a judicial lien, even when the debtor has no equity in the property over and above a lien which is superior to the junior lien which the debtor is seeking to avoid. Thus, a debtor’s residual interests in property, such as a possessory interest, are protected from a judicial lien. Section-by-Section Description of H.R. 5116, 140 Cong. Rec. H10, 764 [daily ed. October 4, 1994]; H.R. Rep. No. 835, 103d Cong. 2d Sess. 35-37 [1994].

However, Bankruptcy Courts in Kentucky have held that judgement liens are void and need not be released by the Bankruptcy Court.
For example, in *Stidham v. Ford Motor Credit*, Case No. 91-50019, Adversary Proceeding No. 94-5091 (January 11, 1995), the Bankruptcy Court for the Eastern District of Kentucky was presented with a fact situation wherein Ford Motor Credit held a judgement lien encumbering all real estate of the debtors, including the two pieces of real property which the debtors owned at the time they filed bankruptcy. One piece of property was sold by the Chapter 7 bankruptcy trustee and Ford Motor Credit's lien attached to the sales proceeds. A second tract of property was abandoned by the trustee and later sold at a state court foreclosure sale. After they filed bankruptcy but before receiving their discharge, the debtors purchased real estate (the "new property") in the same county where the judgement lien was filed. When the debtors later attempted to refinance the new property, they discovered that Ford Motor Credit's judgment lien was still of record. Ford Motor Credit refused to release its judgment lien, and the debtors sought an order of the Bankruptcy Court removing such lien. The Hon. Joe Lee first determined that the discharge of indebtedness was retroactive to the date of the bankruptcy filing, and that the underlying judgment lien was discharged prior to the debtor's purchase of the new property. The Court then addressed the status of the judgment lien and determined that it was extinguished by the sale of the two pieces of real property. Thus, because there was no longer any indebtedness owned by the debtors on the judgment lien, the underlying judgment is void and did not survive bankruptcy.

Similarly, in *In re William Norvell, III*, Case No. 95-34212(17) (July 31, 1996), the Bankruptcy Court for the Western District of Kentucky agreed with Judge Lee's analysis and held that because the underlying obligation was discharged and no property to which the lien could attach was owned by the debtor at the time of the bankruptcy filing, the judgment lien itself is also void. Consequently, the Court determined that a KRS 426.720 judgment lien will survive bankruptcy ONLY as an *in rem* claim against real estate which the debtor owned at the time the bankruptcy was filed, and will not attach to any real estate acquired by the debtor after the bankruptcy filing.


2. [4.12] Preference

In Kentucky, the trustee has access to two separate sets of law in pursuing preferences—state law and federal bankruptcy law. Some examples of common preferences are the placement of judgment liens on property of the debtor; the late filing of UCC-1 financing statements, or the recordation of real property lien documents within ninety (90) days (11 U.S.C. Section 547) or within six (6) months of the bankruptcy filing. 11 U.S.C. Section 544, incorporating KRS 378.060, *et seq*. In such event, the lien may be avoided under 11 U.S.C. Section 547, discussed infra at [4.15], and any equity which is otherwise exemptible by the debtor may be claimed exempt, free and clear of the creditor’s claim.


Similarly, in Kentucky the trustee has two bodies of law at his disposal in pursuing fraudulent conveyances—state law (11 U.S.C Section 544, incorporating KRS 378.010 *et seq*) and federal bankruptcy law (11 U.S.C. Section 548). Some common examples of fraudulent conveyances are the transfer of property or the grant of a security interest for less than fair consideration and the sale of property by the debtor for less than fair consideration. In such event, the lien may be avoided under either 11 U.S.C. Section 548 or KRS 378.010 *et seq*, discussed *infra*, and any equity which is otherwise exemptible by the debtor may be claimed exempt, free and clear of the creditor’s claim, provided the debtor has not concealed such property, or voluntarily transferred it. *In re Gaines*, 106 BR 1008 (Bankr. W.D. Mo. 1989); *B.K. Medical Sys., Inc. Pension Plan v. Roberts*, 81 BR 354 (Bankr. W.D. Pa. 1987).
4. **[4.14] Lien Defects**

Under 11 U.S.C. Section 544, the trustee has the power to avoid any transfer of property of the debtor, including defective liens, that would be voidable by a judicial lien creditor or a bona fide purchaser of real property from the debtor. 11 U.S.C. Section 544. This power permits the trustee to strike down invalid or "secret" liens (liens which have not been recorded, as required by KRS 382.010):

No deed or deed of trust or mortgage conveying a legal or equitable title to real property shall be valid against a purchaser for valuable consideration, without notice thereof, or against creditors, until such deed or mortgage is acknowledged or proved according to law and lodged for record. As used in this section, "creditors" includes all creditors irrespective of whether or not they have acquired a lien by legal or equitable proceedings or by voluntary conveyance. KRS 382.270.

Kentucky law also specifies the place of recordation of mortgages, by requiring that:

All deeds, mortgages and other instruments required by law to be recorded to be effectual against purchasers without notice, or creditors, shall be recorded in the county clerk's office of the county in which the property was conveyed or the greater part thereof is located. KRS 382.110.

In addition, Kentucky law (KRS 355.9-302) requires that certain liens on personal property must be recorded to be effectual.

In the event that a mortgage or lien on real or certain personal property is unrecorded or improperly filed, it may be avoided by the trustee. Any equity which exists after avoidance of such liens and/or mortgages may be claimed exempt by the debtor, to the extent such exemption is allowed by Kentucky statutes.

C. **[4.15] Procedure For Avoiding Liens**

Lien avoidance under Section 522(f) is done by motion of the debtor, and is a contested matter under Bankruptcy Rule 9014. Bankruptcy Rule 4003[d]. The prerequisites for lien avoidance are:

(a) Existence of property in which the debtor has a valid exemption;

(b) Existence of a lien on such property;

(c) The lien is either a judicial lien or a nonpossessory, non-purchase money security interest in household furnishings or goods, wearing apparel, appliances, books, animals, crops, musical instruments or jewelry, which are held primarily for personal, family or household use of the debtor or his dependents; implements, professional books or tools of the trade of the debtor or his dependents, or professionally-prescribed health aids; and

(d) The lien impairs the debtor's exemption interest.

No deadline for seeking lien avoidance is imposed by either the Bankruptcy Code or the Bankruptcy Rules. Notice of the motion seeking lien avoidance must be given to the creditor whose lien is sought to be avoided. A minimum of five (5) days' notice must be given of any hearing on the motion for lien avoidance, which time may be reduced by the court. Bankruptcy Rule 9006.
D. [4.16] Burden And Standard Of Proof

The debtor bears the initial burden or proof, and the creditor has the burden of rebuttal. In re Streeper, 158 BR 783 (Bankr. N.D. Iowa 1993); In re Maylin, 155 BR 605 (D. Maine 1993); In re Mohring, 142 BR 389 (E.D. Ca. 1992).

The standard of proof in a lien avoidance action is presumably a preponderance of the evidence.

III. [4.17] OTHER ASPECTS OF DEALING WITH SECURED CREDITORS IN CHAPTER 7 BANKRUPTCIES


11 U.S.C. Section 101(50), which is an adaptation of 1-201(37) of the Uniform Commercial Code, defines “security agreement” as an “[A]greement that creates or provides for a security interest”. 11 U.S.C. Section 101(51) defines “security interest” as a “[L]ien created by an agreement”. Consequently, it is clear that a “secured creditor” is a creditor which holds a lien created by agreement, in favor of the creditor.

B. [4.19] Rights And Remedies Of Secured Creditors

A secured creditor has several options in a Chapter 7 bankruptcy:

(a) Take no action, and retain its lien unaffected by the bankruptcy (this is particularly effective where the debtor is current or reaffirms the debt, or where the creditor wishes to proceed against the collateral of a defaulting debtor after the case is closed). 11 U.S.C. Section 524;

(b) Seek relief from the automatic stay, if the debtor’s estate is not providing adequate protection of the creditor’s interest in the collateral, or if the debtor lacks equity in the collateral. 11 U.S.C. Section 362; or

(c) Permit its lien to be redeemed, if its collateral secures a consumer debt. 11 U.S.C. Section 722.

A secured creditor is not required to file a proof of claim in a Chapter 7 proceeding. However, such a creditor, especially an undersecured creditor, may choose to file a proof of claim in order to enable it to share in any dividend to unsecured creditors, to the extent of its unsecured deficiency claim, or to be able to credit bid its lien in any sale of its collateral. 11 U.S.C. Section 363[k].

C. [4.20] Reaffirmation

A debtor can reaffirm continuing personal liability on any debt which arose prepetition. 11 U.S.C. Section 524[c]. The Legislative History to Section 524 discloses some of the reasons why a debtor may wish to reaffirm a debt:

(a) In order to retain the property which serves as collateral for the debt;

(b) To protect credit standing with the creditor, or to retain a credit facility with the creditor;
(c) To avoid the cost of litigating whether or not the debt in question is dischargeable;

(d) To protect co-obligors on the debt.

Because reaffirmation impacts the debtor's ability to obtain a "fresh start", free of debt, 11 U.S.C. Section 524 sets out the prerequisites to a valid reaffirmation:

(a) The reaffirmation agreement must be made before the granting of the discharge under 11 U.S.C. Section 727;

(b) The reaffirmation agreement must contain a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty (60) days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of the claim;

(c) The reaffirmation agreement must contain a clear and conspicuous statement which advises the debtor that such agreement is not required under the Bankruptcy Code, under nonbankruptcy law, or under any agreement not in accordance with the provisions of the Bankruptcy Code; and

(d) Such agreement must be filed with the court and, if applicable, be accompanied by an affidavit of the attorney that represented the debtor during the course of negotiating the reaffirmation agreement which states that the agreement represents a fully-informed and voluntary agreement of the debtor; the agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and the attorney has fully advised the debtor of the legal effect and consequences of the agreement and any default thereunder.

D. [4.21] Adequate Protection

"Adequate protection" is a term of art that appears throughout the Bankruptcy Code provisions concerning relief from the automatic stay; use, sale or lease of property; obtaining credit, and other provisions. Adequate protection concepts were designed to address the problem of the depreciation of assets over time, as well as the time value of money.

Inherent in the principle of adequate protection is the fact that after valuation of the creditor's secured claim as of the date of the filing of bankruptcy, a creditor should be compensated for both the depreciation of its collateral as well as the time value of money. Since the automatic stay imposed upon the bankruptcy filing prevents a creditor from foreclosing on its collateral, the continued use of the collateral should not be permitted to cause the value of the secured creditor's claim to diminish in value due to the passage of time or the use of the collateral.

Adequate protection is not intended to prevent the actual dollar amount of the claim to increase over time, due to accrual of interest, costs and fees by an oversecured creditor. Rather, adequate protection is designed to prevent the value of property which serves as collateral for the secured creditor's claim from declining below the value of the outstanding obligation owing to the creditor, either as a result of depreciation of the collateral or as a result of an increase in the dollar amount of the claim.

The Bankruptcy Code sets out a nonexclusive listing of ways of providing adequate protection to a secured creditor:
(a) A periodic cash payment or periodic cash payments to cover at least depreciation and interest accrual;

(b) The grant of additional or replacement liens on other collateral in which the bankruptcy estate has equity, to the extent of the decrease in the value of the secured creditor’s interest in such property; or

(c) Such other protection so that the secured creditor recognizes the indubitable equivalent of its secured position.

11 U.S.C. Section 361. Other examples of adequate protection include the existence of an equity cushion in the collateral sufficient to safeguard against any depreciation of the collateral or any increase in the outstanding indebtedness; returning to the secured creditor all or a portion of the collateral; or providing personal guaranties by the principal of a corporate debtor.

E. [4.22] Relief From The Automatic Stay

Secured creditors frequently seek relief from the automatic stay to permit them to proceed with foreclosure on their collateral. Upon the obtaining of an order modifying the automatic stay, the property remains property of the bankruptcy estate until the secured creditor actually forecloses on the property. In re Forrest Marbury House Assocs., Ltd. Partnership, 137 BR 554 (Bankr. D. D.C. 1992).

In the context of a Chapter 7, secured creditors can obtain relief from the automatic stay if they can establish the following:

1. [4.23] The Existence of a Valid Secured Claim in an Amount Certain

The fact that a lien exists against property is not dispositive of the issue of the existence of a valid secured claim in an amount certain. For example, problems with the alleged lien may exist by virtue of:

(a) Lack of perfection, improper perfection by the secured creditor or lapse of an otherwise properly-perfected lien;

(b) Lack of consideration or inadequate consideration to support the grant of the lien;

(c) Equitable subordination considerations;

(d) The grant of the alleged lien being susceptible to challenge as a preferential transfer; or

(e) The amount of the claimed lien, which may include late charges and other unenforceable penalty-type charges, being in an incorrect amount.

2. [4.24] The Lack of Adequate Protection of the Secured Creditor’s Interest in the Collateral

The fact that a creditor is undersecured does not necessarily mean that the creditor’s security interest is not adequately protected. Rather, adequate protection requires only that no decrease in the creditor’s interest in the collateral result from the imposition of the automatic stay. Common occurrences which may constitute lack of adequate protection are the nonexistence of insurance on the collateral, or the debtor’s failure to properly maintain the collateral.
3. [4.25] The Debtor's Lack of Equity in the Collateral

Moreover, even where adequate protection is being provided to protect the secured creditor's interest in the collateral, creditors are frequently granted relief from the automatic stay if the debtor has no equity in the property. In order to make a determination as to the debtor's equity or lack thereof, the courts generally utilize a liquidation analysis valuation. In arriving at the liquidation value, the following factors are among those which should be considered:

(a) Condition and location of the property, and the difficulty and expense which would be encountered in removing the property;
(b) Original purchase price and book value;
(c) Recent appraisals;
(d) General market conditions; and
(e) Expenses involved in liquidating the property, such as advertising the property, sales preparation expenses, storage fees if a sale cannot be consummated quickly, and recording and transfer fees.

4. [4.26] Procedure for Obtaining Relief from the Automatic Stay

A preliminary hearing on the motion to terminate, modify, or annul the automatic stay must conclude within thirty (30) days, with the final hearing being commenced within thirty (30) days thereafter, unless extended by the consent of the parties or for a specific time which the court finds is required by compelling circumstances. 11 U.S.C. Section 362(e). Under this rather stringent standard, the debtor could not delay the final determination of a motion to modify stay except for the occurrence of an event beyond the debtor's control, such as, for example, illness of the judge.

Under 11 U.S.C. Section 362(e), the automatic stay terminates thirty (30) days after the filing of the motion for relief from automatic stay, unless the court, after notice and hearing, orders the stay continued pending a final hearing. Under the Bankruptcy Reform Act of 1994, for cases filed after October 21, 1994, the final hearing on a motion for relief from the automatic stay must be concluded within thirty (30) days after the preliminary hearing is commenced. Prior to the passage of the Bankruptcy Reform Act of 1994, many courts interpreted the Bankruptcy Code to read that there was no specific limitation on the time for concluding the final hearing.

F. [4.27] Redemption

A debtor may redeem property by paying the lienholder the amount of its allowed secured claim, as either agreed to by the debtor and creditor, or as established by a valuation hearing. 11 U.S.C. Sections 722 and 506(a). If the creditor is oversecured, the allowed secured claim is equal to the outstanding balance owing at the time of the bankruptcy filing. If the creditor is undersecured, the allowed secured claim is the value of the collateral. In re Breckinridge, 140 B.R. 642 (W.D. Ky. 1992); In re Polk, 76 B.R. 148 (Bankr. 9th Cir. 1987). Such payment must be made as a one-time lump-sum payment, unless the creditor consents to an installment payment schedule. In re Bell, 700 F.2d 1053 (6th Cir. 1983).

Redemption is initiated by the debtor filing a motion to redeem, and is a contested matter. Bankruptcy Rule 6008.
Chapter 5
ADVERSARY PROCEEDINGS TO DETERMINE
DISCHARGEABILITY OF DEBTS AND TO CHALLENGE
DEBTOR'S GENERAL DISCHARGE
Thomas L. Canary, Jr.

I. [5.1] INTRODUCTION AND SCOPE

The scope of this chapter is limited to the most common examples of cases filed to challenge the dischargeability of a specific debt or to challenge the debtor's discharge, generally. This subject is frequently addressed in multi-day seminars and this chapter is but a brief glimpse at the intricacies involved in the litigation of these type cases. For those interested in a more replete examination of this topic, the author recommends *The Fraud Book* by William R. Mapother, Creditors Law Center, 1989 and 1993 Supplement. For information concerning that treatise, contact Creditor Law Center at (502) 587-5451.

II. [5.2] BANKRUPTCY TERMINOLOGY AND CONCEPTS

Before reviewing the specific cases and statutes involved in this area of the law, it is important for the reader to understand some of the basic terminology used by judges and practitioners.

There is a vast difference between attempting to hold a debt nondischargeable and seeking a denial of the debtor's discharge. The first is specific and the second is general.

A. [5.3] Non-Dischargeable Debt

A "non-dischargeable debt" is one where a creditor seeks to have an individual debt excepted from the discharge provisions of the Bankruptcy Code. This is done by filing an Adversary Proceeding pursuant to §523 of the Bankruptcy Code.

For the purposes of this chapter, the following provisions of §523 will be examined:

- §523(a)(2)(A) - Debts incurred through false pretenses, false misrepresentations or actual fraud;
- §523(a)(2)(B) - Debts incurred through the use of false financial statements;
- §523(a)(5) and (15) - Obligations incident to a divorce;
- §523(a)(6) - Situations where a debtor's collateral is converted by the debtor; and
- §523(a)(8) - Student loans.
In each one of these situations, other than cases predicated upon §523(a)(5), an Adversary Proceeding must be filed.

B. [5.4] Denial Of Debtor's Discharge

When a creditor seeks to have the debtor's discharge denied in its entirety, that Adversary Proceeding must be based upon 11 U.S.C. §727(a) and (c). If a creditor is successful, then he would deprive the debtor of the ultimate relief sought in a Chapter 7 proceeding, that is, relief from all of his debts. Obviously, this is an extreme result, and this issue will be discussed at length later in the chapter at [5.23].

C. [5.5] Adversary Proceedings

Adversary Proceedings are the Complaint filed by a creditor in the Bankruptcy Court seeking to hold a debt nondischargeable or seeking to deny generally the debtor's discharge. Such Adversary Complaints must be filed within sixty (60) days from the date originally set for the first meeting of creditors. This is mandated by Bankruptcy Rules 4004 and 4007.

Note that this is sixty (60) days from the date first set for the meeting of creditors. In other words, if the meeting of creditors is continued, the sixty (60) days is calculated from the original date, not the continued date.

This sixty (60) day deadline is absolute. If an individual files on the 61st day, the Complaint will be dismissed.

Note, however, the Courts are generally liberal about granting an extension of that time period. Such extensions are authorized under Bankruptcy Rules 9006(b), 4004(b) and 4007(c). The Motion for Extension must be filed prior to the expiration of the original sixty (60) day deadline. The Motion should be accompanied by some reason for the extension of time. Generally accepted grounds for such a Motion are the need for additional time to conduct discovery to see whether a Complaint is warranted, availability of records from the debtor or from the creditor, and the unwillingness of a debtor to submit himself to an examination pursuant to Bankruptcy Rule 2004, etc.

While Courts are generally liberal about granting a first extension, practitioners should have ample reason for requesting a second extension. One such example would be if a potential nondischargeability case is settled via the use of a Reaffirmation Agreement.

D. [5.6] Reaffirmation Of Debts

11 U.S.C. §524(c) is the Bankruptcy Code section which allows for the reaffirmation of debts in Chapter 7 proceedings. 11 U.S.C. §524(c)(4) allows the debtor the later of the sixty (60) days from the filing of the Reaffirmation Agreement with the Bankruptcy Court, or the entry of the Discharge Order, to rescind the Reaffirmation Agreement. An unwary creditor’s attorney could fall into the following trap.

Remember, one has only sixty (60) days from the original date set for the first meeting of creditors to file an Adversary Complaint. If the potential nondischargeability case is settled via a Reaffirmation Agreement, the debtor would have, at a minimum, sixty (60) days from the entry of the Reaffirmation Agreement with the Court to rescind that Reaffirmation Agreement.

Say for example the Reaffirmation Agreement used to settle the potential nondischargeability case is filed with the Court on the 45th day after the first date originally set for the meeting of creditors. The creditor would have fifteen (15) days to file the Adversary Complaint. The debtor would have forty-five (45) days after the expiration of the creditor's time to file the nondischargeability suit to re-
scind the Reaffirmation Agreement. The debtor could agree to reaffirm, allow the nondischargeability deadline to run, and then rescind the Reaffirmation Agreement. If there is collateral involved, the lien survives the bankruptcy and the creditor could seek return of the collateral. However, if the potential nondischargeability suit were based upon credit card fraud or some other unsecured type of credit, then this author would suggest placing your malpractice carrier on notice.

E. [5.7] Procedure In Adversary Proceedings

The initiation of an Adversary Proceeding is largely governed by Bankruptcy Rule 7001. It is very similar to civil actions filed in State or Federal Court. The filing fee for an Adversary Proceeding is currently $120.00. Effective December 18, 1996, the filing fee increases to $150.00. Bankruptcy Rule 7003, like Federal Rule of Civil Procedure 3, states that an Adversary Proceeding is commenced by the filing of the Complaint with the Court. Like Federal Rule of Civil Procedure 4, Bankruptcy Rule 7004 dictates the rules on summonses and service of those summonses. This author would recommend that a practitioner new to this area review Official Form 160 on the proper caption for a Adversary Proceeding and Official Form B250, the summons form used by the Bankruptcy Court.

For those practicing in the Western District of Kentucky, a reading of LBR (W.D. Ky.) 8 would be advisable. This is found in the Kentucky Rules of Court, Federal, 1996 published by West Publishing Company. See also the Local Rules Appendix to this monograph.

Practitioners will also find that most of the Federal Rules of Civil Procedure are incorporated into the Bankruptcy Rules many times without change. The author would commit to your reading the Advisory Committee notes to Bankruptcy Rule 7001 which gives a “conversion table” for many of the Federal Rules of Civil Procedure to the Bankruptcy Rules.

After the initial filing of the case, it proceeds forward like a regular civil action. The Judges in both the Eastern and Western Districts of Kentucky have standard pretrial Orders that will issue soon after the initiation of the Adversary Complaint. Practitioners would be well-advised to adhere to the requirements and deadlines of those pretrial Orders to the “tee”. While one would think this would go without saying, the author has seen many an Adversary Proceeding dismissed (recalcitrant creditors counsel) and Judgment entered (dilatory debtor’s counsel) for failure to adhere to these deadlines.

The burden of proof in an Adversary Proceeding is by a preponderance of the evidence. This is made clear in the case of Grogan v. Garner, 111 S.Ct. 654 (1991). This standard was also reiterated in the case of In re McLaren, 983 F.2d 56 (6th Cir. 1993).

Likewise, the burden of persuasion is on the plaintiff. See Bankruptcy Rule 4005.

III. [5.8] BANKRUPTCY CODE §523 - NON-DISCHARGEABILITY

A. [5.9] §523(a)(2)(A) - False Pretense, False Representation or Actual Fraud

11 USC Section 523(a)(2)(A) provides as follows:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt —

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by —

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition.
Any practitioner preparing a Complaint to be filed under §523(a)(2)(A) must read the case of In re Ward, 857 F.2d 1082 (6th Cir. 1988). The Ward court found that a creditor had to prove four elements to be successful in an action under this Code provision.

1. The debtor knowingly made false statements to the creditor, and
2. These representations (false statements) were made with the intent to deceive the creditor, and
3. The financial institution reasonably relied upon these representations, and
4. This reliance was the proximate cause of the creditor’s loss.

The creditor must prove all four of these factors in order to make its case. For guidance, the author would recommend as reading the cases of In re Martin, 761 F.2d 1163 (6th Cir. 1985), and In re Parkey, 790 F.2d 490 (6th Cir. 1986).

The most difficult of these four factors to prove is element number 3, “reasonable reliance”. Fortunately, a recent case from the United States Supreme Court appears to have lessened this standard.

In the case of Field v. Mans, 116 S.Ct. 437 (1995) the Supreme Court of the United States held that the creditor must show, only, that it “justifiably relied” on the false representations made by the debtor.

Unfortunately, “justifiable reliance” was not succinctly defined by the Supreme Court in its opinion. The theory, and thus the definition, was extrapolated from the Restatement (2nd) of Torts (1976). The Court made it clear that the debtor’s conduct need not conform to a “community standard” of a “reasonable man”. In fact, at page 444 of the Field decision, the Supreme Court quoted from Prosser’s Law of Torts (1978), §108 at 717. This is as close to a definition of “justifiable reliance” as can be found in the opinion:

An individual standard of the plaintiff’s own capacity and the knowledge which he has, or which may fairly be charged against him from the facts within his observation in the light of his individual case.

In other words, these matters will be examined on a case-by-case basis. The debtor’s conduct will not be measured against some hypothetical “reasonable man”. The debtor’s conduct will be adjudged by examining his background, education and life experiences to determine whether he knew or should have known that his statements were false and would be relied upon by the financial institution in order to make its credit decision.

This Supreme Court decision will make litigation of these type cases very fact-intensive. Was it reasonable for a creditor to rely upon the statements made by an adult with an 8th-grade education as to whether he had pledged certain pieces of personal property on other loans? Is it reasonable for a creditor to expect an individual with a college degree in finance and 12 years’ experience in his own business to be able to discern between collateral actually belonging to him versus to his corporation? Should a creditor be able to rely on statements made by a debtor as to his annual income without verification from his employer? It is this author’s opinion that these are the issues that will have to be examined by the Court in light of the ruling in Field v. Mans, supra.


The Sixth Circuit has also provided some guidance in cases that fall under §523(a)(2)(A). A case can be made under this section by showing that the debtor was “grossly reckless” in providing the
information to the creditor. In the case of  *In re Phillips*, 804 F.2d 930 (6th Cir. 1986), the debtor provided the creditor a very misleading deed. The Sixth Circuit found that this "statement" was so grossly reckless that it rose to the level of fraud that §523(a)(2)(A) was drafted to remedy.

Likewise, the fraud of one partner can be imputed to another. See  *In re Ledford*, 970 F.2d 1556 (6th Cir. 1992).

Many times, a creditor will initiate a civil action in state or federal court to redress damages incurred by it due to false representation or actual fraud on the defendant's part. The reaction to a judgment favorable to the creditor is the filing of a bankruptcy petition. The Sixth Circuit case of  *In re Batie*, 995 F.2d 85 (6th Cir. 1993) addresses this. If the issue of fraud is properly determined in the civil action, then the debtor could be collaterally estopped from relitigating this case in the bankruptcy arena. A creditor can plead its civil judgment as collateral estoppel against the debtor in the adversary proceeding filed under §523.

Likewise, there are several cases decided by the Bankruptcy Court for the Western District of Kentucky in this area. A debtor's sale of stock that he did not own led to an adverse decision for the debtor in the case of  *In re Pallo*, 65 B.R. 101 (W.D. Ky. 1986). See also the cases of  *In re Sustarich*, 73 B.R. 731 (W.D. Ky. 1983);  *In re Tabers*, 28 B.R. 679 (W.D. Ky. 1983);  *In re Donald*, 26 B.R. 521 (W.D. Ky. 1983); and  *In re Fox*, 13 B.R. 827 (W.D. Ky. 1982).

Note also, that a future promise to turn over a tax return is not a "false representation" or "false pretense".  *In re Roeder*, 61 B.R. 179 (W.D. Ky. 1986). Likewise, a promise to pay and give creditor a lien on a replacement vehicle in the future also does not arise to the level of a nondischargeable debt.  *In re Todd*, 34 B.R. 633 (W.D. Ky. 1983). In both of these cases, note that it was a future promise that was determined not to give rise to a complaint under §523(a)(2)(A).

Two cases from the Eastern District of Kentucky also shed some light on this area of the law. In the case of  *In re O'Bryan*, 190 B.R. 290 (E.D.Ky. 1995), Judge Howard discusses the use of collateral estoppel from a judgment rendered in a state or federal civil action. This case also offers an excellent discussion of the dischargeability of punitive damages. Likewise, see  *In re Parriman*, 190 B.R. 88 (E.D.Ky. 1995), specifically discussing collateral estoppel from a state court judgment.

**B. [5.11] §523(a)(2)(C) – Luxury Goods**

11 USC Section 523(a)(2)(C) provides as follows:

(a) A discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt —(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $1,000 for "luxury goods or services" incurred by an individual debtor on or within sixty (60) days before the order for relief under this title (11 USC Sections 101 et seq.), or cash advances aggregating more than $1,000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within sixty (60) days before the order for relief under this title (11 USC Sections 101 et seq.), are presumed to be nondischargeable; "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act.
1. **Presumption Periods**

Many people have a basic misunderstanding of 11 U.S.C. §523(a)(2)(C). Some creditors feel that if they have a debt that falls within the parameters set forth in this subsection of the Bankruptcy Code that the debt is *per se* nondischargeable. This is a fatal error.

Specifically, this subsection of the Bankruptcy Code states that consumer debts to a single creditor aggregating more than $1,000 for a "luxury" goods or services obtained within sixty (60) days of the filing of the bankruptcy, or cash advances exceeding $1,000 taken on a consumer credit or open-end plan within sixty (60) days of the filing of the Bankruptcy are presumed to be nondischargeable. This does not absolve a creditor from having to file an Adversary Proceeding in order to determine the dischargeability of this debt. The presumption merely shifts the burden to the debtor to prove why the debt should not be discharged.

11 U.S.C. §523(a)(2)(C) also defines luxury goods and services. These are goods and services not reasonably required for the support or maintenance of the debtor or the debtor’s dependents. Such examples would be lavish vacations, a gambling binge, mink coats, travel trailers, etc.

C. **§523(a)(2)(B) – Use Of A False Statement In Writing**

11 USC Section 523(a)(2)(B) provides as follows:

- (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt —
  - (2) for money, property, services or an extension, renewal or refinancing of credit, to the extent by –
  - (B) use of a statement in writing —
    - (i) that is materially false;
    - (ii) respecting the debtor’s or an insider’s financial condition;
    - (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
    - (iv) that the debtor caused to be made or published with intent to deceive.

In order to maintain an action under this provision of the Bankruptcy Code, a creditor must prove five (5) elements:

1. The statement must be in writing,
2. It must be materially false,
3. Respecting a debtor’s or insider’s financial condition,
4. Upon which the creditor extending the credit reasonably relied, and
5. Published by the debtor with the intent to deceive.

Note the material difference now between the cases filed under §523(a)(2)(A) and §523(a)(2)(B). Under §523(a)(2)(A), a creditor can show “justifiable reliance”. Cases filed under §523(a)(2)(B) must show “reasonable reliance”, which is, in the author’s opinion, a higher standard.

Note also that the statement in writing must be materially false. In other words, had the written statement been properly completed, would the creditor have still made the loan to the debtor?
Proof of this element is often difficult. Hopefully, the financial institution has well-written lending policies. Many times, those lending policies dictate certain debt-to-income ratios which must be met before the loan is to be made. Ideally, a creditor could show that if debts omitted from a financial statement had been properly listed, then the ratios would have been exceeded and the loan not made. The author would submit that the creditor has gone a long way towards meeting this burden of proof.

Additionally, was the reliance by the creditor “reasonable”? In other words, did the creditor have another means by which to secure the information omitted from the financial statement?

It is common, almost to the point of being required, that a creditor show that it ran a credit bureau report or Dun & Bradstreet report prior to the extension of credit to an individual. Of course, the credit bureau report must be run at the time of the taking of the application, or soon thereafter, but before the decision to loan the money has been made.

If the debts omitted from the application appear on the credit bureau report, then the creditor’s case will not be persuasive. The Court could hold that creditor had another means to ascertain this information, and it is “reasonable” to expect creditor to do so.

However, creditors would be surprised at the number of financial institutions that do not report to the credit bureau. If the debts were not listed on the application and did not appear on the credit bureau report, then the creditor has gone a long way toward proving this necessary element.

The most difficult of these elements to prove is “intent to deceive”. Any requirement to prove such a “state of mind” makes these cases difficult to prosecute. Such intent must be shown by circumstantial evidence, as it is rare that a debtor will ever admit that he meant to deceive the creditor.

Many times, the false statement comes in the nature of grossly understating living expenses or grossly overstating income. As concerns the living expenses, it is very important for a creditor to conduct the proper discovery to ascertain whether the debtor purposefully understated living expenses in order to meet minimum requirements of the creditor in order to make the loan.

Remember, each debtor must file a Schedule I and J with their petition. Schedule I lists the debtors’ income and Schedule J lists their expenditures. A creditor would be well-advised to review the Schedule J with the debtors to see if their living expenses have changed greatly from the time they made application for credit.

Additionally, see if such a budget were taken at the time of the application for the loan. Compare the two and try to ascertain the nature of any significant differences.

Also examine the Schedule I very closely. Has the debtor suddenly claimed a number of exemptions in order to artificially create a large tax refund at the end of the year? Is there overtime or other income that appeared on the debtor’s original application that do not appear on the Schedule J? Did the debtor’s income depend largely upon commissions and that was not revealed in the application? Does the application reveal a second source of income not listed on the Schedule I?

One point of inquiry from the Court will be whether a creditor attempted to verify a debtor’s employment. In other words, did they ask for a pay stub or contact the debtor’s payroll department upon application for credit? If a creditor simply took the word of a debtor, then the reasonable reliance requirement may not have been met.


Like §523(a)(2)(A), the burden of proof is the preponderance of the evidence. See the Grogan and McLaren cases cited above. There are a number of cases from the Sixth Circuit which provide
examples of what types of false writings have been determined actionable: Coman v. Phillips, 804 F.2d 930 (6th Cir. 1986) [false representation of acreage in deed held reasonable so debt discharged], But see, Knoxville Teachers Credit Union v. Parkey, 790 F.2d 490 (6th Cir. 1986) [misrepresentation of liabilities grossly reckless and debt determined to be nondischargeable].

The case of In re Woollums, 979 F.2d 71 (6th Cir. 1992) is also very instructive. There, an incomplete, unsigned and erroneous financial statement was submitted to a creditor. Later, when the debtor filed bankruptcy, the creditor moved to hold the debt nondischargeable pursuant to §523(a)(2)(B).

The Court found that there was no way that any competent financial institution could reasonably rely upon such a poorly-completed financial statement. The standard to be applied is to safeguard against a creditor acting in bad faith. In other words, it would not be fair for a creditor, on one hand, to accept so deficient a financial statement and then use the same financial statement as grounds for holding the debt nondischargeable. Creditors have to play by the rules.

Another interesting case is that of In re Martin, 761 F.2d 1163 (6th Cir. 1985). Generally, 11 U.S.C. §506(b) will allow a creditor to recover reasonable fees (attorney fees) and costs provided that the creditor is oversecured. The value of its collateral must exceed the debt.

However, the Sixth Circuit found that the creditor was entitled to an award of attorney fees based on its contract only. Here, the contract called for the recovery of attorney fees in the collection of a debt. It was this clause that the Court focused on, not simply §506. The Court allowed for the recovery of the attorney fees despite creditor’s undersecured status. Creditors should use this case when filing any case under §523 for the proposition that it should be allowed to collect its attorney fees.

There are a litany of cases decided under §523(a)(2)(B) from the Western District of Kentucky. Unfortunately, in his search, the author was unable to find any published cases from the Eastern District of Kentucky on this issue.

Note that the holding in some of the cases from the Western District of Kentucky could now be different since the standard of proof has changed. Prior to the Grogan case, the standard of proof was clear and convincing. It would be interesting to try to determine whether the holdings in any of these cases would have changed under the new preponderance of the evidence standard.

In the case of In re Rosel, 63 B.R. 603 (W.D. Ky. 1986), a debtor understated his debts by $20,000 and overstated his income by $21,000. Additionally, his assets were overstated by $20,000 for a total of $61,000. In reviewing the case, the Court found that the reliance on this statement by the creditor was so outrageous that the reliance was not deemed to be “reasonable”. The debt was discharged.

In the case of In re Bridges, 51 B.R. 85 (W.D. Ky. 1985), a creditor was denied the relief it sought in its Adversary Complaint because it failed to verify the information in the written statement (application). This is a lesson well taught and the author would refer the reader to the discussion of this subject above.

Where a bank was actually aware of the debtor’s financial condition, reliance on a financial statement was not reasonable. See In re Duncan, 35 B.R. 323 (W.D. Ky. 1983). Likewise, see In re Whitehouse, 26 B.R. 239 (W.D. Ky. 1982) to again show how a bank failed to show reasonable reliance. The author would also refer the reader to the case of In re Perez, 52 B.R. 824 (W.D. Ky. 1985) and In re Peterson, 49 B.R. 1 (W.D. Ky. 1984).

While not a case out of the Western District or Sixth Circuit, recommended reading would be the case of In re Rickey, 8 B.R. 860 (M.D. Fl. 1981). As stated above, "intent to deceive" is probably the most difficult element to prove when trying to make a case under §523(a)(2)(B). The Rickey Court held that intent can be shown by:
Discharge Litigation

1. False statement made by the debtor with actual knowledge it was false,
2. Made with reckless indifference to the truth,
3. Made by the debtor without checking sources readily available to him, and
4. Made without reasonable grounds to believe it was true.

This sentiment is echoed in the Knoxville Teachers Credit Union v. Parkey case, supra.

D. [5.15] Unjustified 523(a)(2) Claims

Creditors should not loosely file cases under §523(a)(2). §523(d) does allow a debtor to petition the Court for costs and reasonable attorney fees from a creditor if that creditor files an action under §523(a)(2) and loses. To do so, the Court must show that the creditor’s position was not substantially justified unless special circumstances exist that would make the award unjust. See In re Carmen, 723 F.2d 16 (6th Cir. 1983).

This is why the author advocates taking a Bankruptcy Rule 2004 exam prior to the filing of a suit. The evidence adduced at that examination will determine whether your lawsuit is viable. As long as the creditor feels, after that examination, that its position would be substantially justified, an award under §523(d) should not be forthcoming. Unless such an examination is performed or deposition taken, a creditor may find the insult of defeat compounded by the injury of an award of attorney fees and costs against it.

E. [5.16] §523(a)(6) Willful And Malicious Injury [Conversion]

11 USC Section 523(a)(6) provides as follows:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt —

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

A cause of action under this Bankruptcy Code section usually entails the debtor’s conversion of property given as collateral on a creditor’s loan. A small primer on secured transactions (Article 9 of the Uniform Commercial Code) is appropriate at this juncture.

Remember that perfection of a security interest is a notice provision only. In other words, the security interest is still valid as between the creditor and the debtor. Lack of perfection affects third parties only. A Trustee in bankruptcy, a bona fide purchaser for value or an intervening lien creditor may have rights superior to the unperfected lien creditor. However, the creditor’s rights are still superior to the debtor’s. This lack of perfection does not invalidate this separate contract (a security agreement) between the debtor and creditor that the property will stand as collateral for the loan.

If a debtor sells a creditor’s collateral in derogation of a security agreement, what is the measure of damages? The answer in the Western District of Kentucky seems to be the value of the property so converted. See In re Thomas, 36 B.R. 851 (W.D. Ky. 1984) [value of automobile converted]; and In re Stevens, 26 B.R. 389 (W.D. Ky. 1983) [sum for which property was sold].

However, there is another case holding that the entire amount of the debt, not just the value of the collateral converted, is the measure of damages. See Birmingham Trust Nat’l Bank v. Case, 755 F.2d
1474 (11th Cir. 1985). Since the Birmingham Trust case was decided after these two cases from the Western District, the issue of the measure of damages may need to be revisited.

In order to sustain a case under §523(a)(6), a creditor must prove that the injury was both “willful” and “malicious”. Willful has been defined as deliberate and intentional. See In re Thomas, supra at 853; Wheeler v. Laundani, 783 F.2d 610 (6th Cir. 1986); Perkins v. Scharffe, 817 F.2d 392 (6th Cir. 1987); and In re Box, 143 B.R. 835 (E.D. Ky. 1992).

Malicious has been defined as intent to do harm. See In re Thomas, supra at 853, and In re Hawkins, 6 B.R. 97 (W.D. Ky. 1980).


The ability to sustain a case under §523(a)(6) is very fact-intensive. For instance, in In re Hawkins, supra, the Court found no malice since the debtor gave the creditor $188 of the $300 actually received for the sale of the car. The debt was allowed to be discharged.

Likewise, in the case of In re Cline, 52 B.R. 301 (W.D. Ky. 1985), the creditor was found to have expressly or impliedly consented to the sale of the livestock. Since the creditor was charged with this knowledge, there could be no malice since the creditor could not show that the debtor intended to do harm. This debt was allowed to be discharged. For other cases involving cattle, see In re Brame, 23 B.R. 196 (W.D. Ky. 1982), and In re Vance, 43 B.R. 99 (W.D. Ky. 1984).

In re Duncan, 30 B.R. 754 (W.D. Ky. 1983) dealt with another livestock situation. There, a creditor’s loan was secured by a corn crop. The debtor used this corn to feed hogs which stood as security for another creditor’s loan. The Court allowed this debt to be discharged because the debtor received no pecuniary gain from the “conversion”.

The author questions the holding that there was no “pecuniary gain” since the hogs had obviously been “improved” by the use of the feed and the eventual sale of the hogs. Perhaps that may lead to some suit between the respective secured creditors under a quantum meruit theory of law. Perhaps the creditor who had the security interest in the corn could sustain such a suit against the debtor. Reliance upon §523(a)(6) should not be blind. Common law theories such as quantum meruit are valid in these instances.

An adjudication of such willful and malicious injury by the debtor to another entity or to the property of another entity may have been litigated previously and decided in state court. The party prevailing in state court may be able to plead collateral estoppel to any adversary proceeding filed in the Bankruptcy Court. See In re Stillwell, 96 B.R. 102 (W.D. Ky. 1988), and In re Davis, 23 B.R. 633 (W.D. Ky. 1982), both dealing with civil rights judgments.

There is also a line of cases dealing with assault and battery. See In re Kirby, 167 B.R. 91 (E.D. Ky. 1994) [no collateral estoppel effect given to default judgment entered in state court] See also, Spillman v. Harley, 656 F.2d 224 (6th Cir. 1981); In re Bishop, 55 B.R. 687 (W.D. Ky. 1985) [damage sustained by a creditor after being struck in head with hammer by debtor held nondischargeable. See the cases cited at page 688 of that decision]; In re Beach, 39 B.R. 56 (W.D. Ky. 1984) [damages sustained by a waitress shot in bar fight held nondischargeable. See footnote 1 at page 56 of that decision for other cases]; In re Thompson, 39 B.R. 270 (W.D. Ky. 1984) [since no punitive damages were awarded in state court, the Court did not allow collateral estoppel and allowed the debt to be discharged]. Compare In re Cooney, 8 B.R. 76 (W.D. Ky. 1980) [where debt held nondischargeable with no award of punitive damages].

The case of In re Daniels, 130 B.R. 239 (E.D. Ky. 1991) dealt with a reclamation obligation. There, the Court held that obligations requiring an expenditure of money by the creditor were dischargeable. However, damages occasioned by illegal surface coal mining activities were nondischargeable.
The case of *In re Druen*, 121 B.R. 509 (W.D. Ky. 1990) deals with the issue of lapsed automobile insurance. There, the Court held that while a knowing failure to secure automobile insurance could be determined willful, it was not malicious so the debt was allowed to be discharged.

However, the author would remind the reader that any damages resulting from death or personal injury caused by the debtor's operation of a motor vehicle while intoxicated gives rise to a cause of action under §523(a)(9). Unlike causes of action under §523(a)(6), causes of action under (a)(9) are per se nondischargeable. See also, *In re Box*, 143 B.R. 835 (E.D. Ky. 1992) which again found that lack of insurance did not rise to the level of being willful so the debt was allowed to be discharged.

For miscellaneous other causes of action under §523(a)(6), see *In re Smith*, 95 B.R. 473 (W.D. Ky. 1988) [state court jury instruction focused on a “wanton and reckless”, not “willful and malicious”, standard as established in *Perkins v. Scherffe*, supra]; *In re Howard*, 946 F.2d 1226 (6th Cir. 1991) [since guarantor personally participated in conversion, debt held nondischargeable] and *In re Stevens*, 26 B.R. 389 (W.O. Ky. 1983) [sale of musical instruments].

The key in any case filed under §523(a)(6) is to focus on the direction given in the cases cited above to establish that the injury is “willful and malicious”. Bringing your cause of action within the ambit of these definitions is critical.

F. [5.18] §523(a)(8) – Student Loans

11 USC Section 523(a)(8) provides as follows:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt —

(8) for an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit or made under any program funded in whole or in part by a governmental unit or a nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless —

(A) such loan, benefit, scholarship, or stipend overpayment first became due more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

Unlike the other causes of action discussed to this point, this is an Adversary Proceeding filed by the debtor seeking to discharge a student loan. Unless the debtor moves to have the student loan debt declared dischargeable, it is per se nondischargeable.

Since it is the debtor seeking the relief in the Adversary Proceeding, the burden of proof here is on the debtor. See B.R. 4005. The standard of the burden of proof is by the preponderance of the evidence. See *Grogan v. Garner*, supra.

In order to sustain his burden of proof, the debtor must show either:

(a) the loan first became due more than seven years before the date of the filing of the petition. This 7-year period is exclusive of any deferments or other suspensions of payments; or
(b) requiring the debtor to pay this obligation will impose an undue hardship on the debtor or the debtor’s dependents.

Obviously, the majority of the litigation is under (b) above. If there is no question that the debt became due more than 7 years ago, the debt is per se dischargeable.

Note also that the debtor must show that this is an educational loan (a) insured or guaranteed by a governmental unit, or (b) made under a program funded by a governmental unit or nonprofit institution. The definition of nonprofit institution is a subject of discussion when it comes to credit unions.

There was an apparent split of authority over whether a credit union was a “nonprofit organization” and thus whether student loans made by it would enjoy the protection of §523(a)(8). The case of In re Roberts, 149 B.R. 547 (C.D. Ill. 1993) found credit unions to be nonprofit organizations. Two other cases that should be examined are the In re Sinclair-Ganos, 133 B.R. 382 (Bankr. W.D. Mich. 1991) and In re Simmons, 1995 B.R. 624 (Bankr. E.D. Va. 1994), which are both cited in the Roberts opinion.

Coming to the same holding, i.e., student loans made by credit unions enjoy the protections under §523(a)(8), but by a different means, is the case of TJ Federal Credit Union v. Delbonis, 72 F.2d 921 (1st Cir. 1995). Here, the Court found not that the credit union was a nonprofit organization, but was a governmental unit. Note that this holding applies to federal credit unions, only.

Given the apparent split in the Circuits on the issue of what constitutes a “nonprofit organization”, the author surmises that this battle will rage on.


The seminal case on student loans from the Western District of Kentucky is In re Berthiaume, 138 B.R. 516 (W.D. Ky. 1992). The Berthiaume Court examined the dischargeability of a student loan under a tripartite test: (1) the mechanical test, (2) the good faith test, and (3) the policy test.

The mechanical test examines whether the debtor’s financial resources in the foreseeable future are sufficient to allow the debtor to live at a subsistence level while repaying the student loan. Pursuant to Berthiaume, the foreseeable future is 10 years. The debtor must show that his financial condition will not improve over the next 10 years in order to allow some small payment to the creditor.

“Subsistence level” is usually equated with the poverty level. Poverty level statistics for a given year can be obtained in the Federal Register. For 1995, that can be found at the Federal Register, February 9, 1995 at pages 7772 through 7774. For more current figures, you may contact the Federal Information Center at (800) 688-9889 or try the Department of Health and Human Services at (202) 690-6141.

The “good faith test” examines whether the debtor has made a bona fide attempt to find a good-paying job, maximize financial resources and minimize expenses. This should be a point of inquiry by a student loan creditor at the discovery level, both in the form of a Request for Production of Documents and questions to be asked at a Rule 2004 exam or a deposition. The debtor should be examined concerning the Schedules I and J filed with the petition concerning income and expenses. Debtor should also produce copies of any resumes, letters, letters of rejection from potential employers, etc. to sustain the debtor’s burden of proof under this test.

Lastly, the “policy test” examines whether the debtor’s motivation in filing the bankruptcy was the type of abuse that §523(a)(8)(B) was enacted to prevent. Some of the questions that will be asked by the Court are:
Discharge Litigation

(a) How much time expired between the date the loan was taken and the bankruptcy filed?

(b) How much time expired between when the debtor graduated from school and the bankruptcy was filed?

(c) What percentage of overall debt does the educational loan comprise?

(d) What sort of degree did the debtor get?

(e) What benefit did the debtor derive from the education?

While not specifically made a part of the statute, there seems to be a judicial sentiment that the debtor must have received some benefit from the education. That benefit would include not only the education that the debtor received, i.e., did it make the debtor more employable, but also what assistance the school rendered in helping the debtor find employment.

The author has been involved in several Adversary Proceedings dealing with “trade schools”. In those cases where the “trade school” did nothing to make the debtor more employable, nor provided any assistance in order to help the debtor secure employment, the author’s “batting average” has been less than enviable.

The “hardship” that must be endured by the debtor is not the “garden variety hardship” or “unpleasantness”. Berthiaume at 521. In other words, the Court will require the debtors to “tighten up the purse strings” before they will be afforded the relief sought under §523(a)(8). An examination of the debtor’s present financial condition and potential future employability is a requirement for litigation under this Code section.

The case of In re Cheesman, 25 F.3d 356 (6th Cir. 1994) allows the Court to be imaginative in crafting its relief. Here, the Sixth Circuit affirmed the lower Court’s decision to defer final ruling on the dischargeability of the debt for 18 months. This was done to see if the debtor’s circumstances would change and whether undue hardships still existed. It exercised the Court’s equitable powers under §105(a) of the Bankruptcy Code in order to shape this relief.

The latitude evinced by the Sixth Circuit allows the parties to be imaginative in any settlement negotiations. Deferment of payments, “stepped up payments” in recognition of potential increases in income, judicial reexamination of the debtor’s financial condition, etc., are all tools to be used in crafting a settlement of cases filed under §523(a)(8).

G. [5.20] §523(a)(5) And (15) – Obligations Incident To A Divorce

11 USC Section 523(a)(5) provides as follows:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt —

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that —
(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act [42 USCS Section 602(a)(26)], or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

In addition, 11 USC Section 523(a)(15) provides as follows:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt — (15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless —

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

The Bankruptcy Reform Act of 1994 introduced 11 U.S.C. §523(a)(15) into the Bankruptcy Code. The Bankruptcy Courts in Kentucky have not been spared from the furor that this section has caused. For an exhaustive examination of both §523(a)(5) and (a)(15), the author recommends the excellent article authored by C.R. (Chip) Bowles, law clerk to the Honorable Judge Henry Dickinson, Bankruptcy Judge for the Western District of Kentucky. Mr. Bowles analyzes this situation in his usual replete style and would answer many of the questions merely raised by this article. It can be found in 34 U.L.J. Fam. L. 521 (1996). See also Chapter 10.

If an obligation incident to a divorce falls under the mantle of §523(a)(5), it is deemed automatically nondischargeable, that is, no Adversary Proceeding has to be filed. Included in that genre of obligations are debts to a spouse, former spouse or child of a debtor for:

(a) Alimony to,

(b) Maintenance for,

(c) Support of such spouse or child,

(d) In connection with a Separation Agreement, Divorce Decree or other Order of a Court of record, or

(e) A Property Settlement Agreement.

Excepted from this group of automatically nondischargeable debts are any debts to the extent that:
(a) The debt is assigned to another entity, voluntarily, by the operation of law or otherwise unless it is a debt assigned under the Social Security Act, §402(a)(26) or any debt assigned to the federal government, state or any political subdivision of the state.

In other words, the debt actually has to be in the nature of alimony, maintenance or support. The reader should examine the cases of Fitzgerald v. Fitzgerald, 9 F.3d 517 (6th Cir. 1993) and Long v. Calhoun, 715 F.2d 1103 (6th Cir. 1983) for the tests used to determine whether the debt is in the nature of alimony, maintenance or support.

The author would note that the Calhoun decision does represent the minority view by allowing a Bankruptcy Court to inquire into the party’s changed financial conditions. Other courts, including the Second, Eighth and Eleventh Circuits, have specifically rejected the Calhoun analysis. See Forsdick v. Turgeon, 812 F.2d 801 (2nd Cir. 1987); In re Draper, 7790 F.2d 52 (8th Cir. 1986); and In re Harrell, 754 F.2d 902 (11th Cir. 1985).

Calhoun was further explicated by the holding of the case of In re Fitzgerald, 9 F.3d 517 (6th Cir. 1993). At page 520 of its decision, the Court held that:

The applicability of Calhoun, especially the second step’s “present needs” inquiry, to support obligations other than assumptions of debt have been the source of some confusion in the lower courts of this circuit.

This comment is especially pertinent since the author of the Fitzgerald decision was also the author of the Calhoun decision. Specifically, Judge Kennedy stated, again at page 520 of the decision, that:

The writer regrets that it [Calhoun] has been applied more broadly than intended. Fortunately, a majority of courts in other circuits have rejected the “present needs” test when applied to alimony or child support.

Indeed, this seems to overrule that portion of Calhoun that will go behind the divorce decree. Instead, the Court now seems to focus on the intent of the parties at the time of the divorce, and does not focus on the “present needs” at the time of the filing of the bankruptcy. The “present needs” test has been criticized on many grounds opining that it permits undue federal interference with a state Court’s domestic authority.

Additionally, it has been held that the “present needs” analysis punishes a non-debtor’s spouse who has struggled to become self-supporting. It would result in the discharge of an overwhelming high number of support obligations simply because a non-bankrupt, ex-spouse has become self-reliant by the time of the filing of the bankruptcy petition. At page 521 of the decision, Judge Kennedy states:

Calhoun was not intended to intrude into the state’s traditional authority over domestic relations and the risk of injustice to the non-debtor spouse or children.

With that being said, the state of the law in the Sixth Circuit is, generally, that if the divorce decree specifically states that the award was for alimony, maintenance or support, the Court should not go behind that finding to challenge the intent of the parties at the time of the filing of the divorce decree. With all that being said, how does that impact §523(a)(15)?

Section 523(a)(15) of the Bankruptcy Code provides that the debtor will not be allowed to discharge debts of the kind described in §523(a)(5) incurred by the debtor in the course of a divorce or
separation or in connection with a separation agreement, divorce decree or other Order of the Court of record unless the debtor can show one of the following:

a. The debtor does not have the ability to pay the debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or dependent of the debtor. If the debtor is engaged in business, then the debtor must show that paying these debts would endanger the continuation, preservation or operation of such business; or

b. discharging the debt would result in a benefit to the debtor that outweighs the detrimental consequences to the spouse, former spouse or child of the debtor.

1. [5.21] Case Law: §§523(a)(5) and (15)

At the writing of this chapter, the author was able to find only two cases analyzing this section; one from the Western District and one from the Eastern District.

In the case of In re Smither, 194 B.R. 102 (Bankr. W.D. Ky. 1996), Judge Dickinson held that a debtor’s obligation to pay his ex-wife’s attorney fees was dischargeable under §523(a)(15) as being in the nature of support. Additionally, the Court held that the equalization of the debtor’s marital property obligation was also nondischargeable. Any decision under §523(a)(15) is extremely fact-specific, and the author would refer the reader to this opinion for the details surrounding the Court’s holding.

For those in the Eastern District of Kentucky, the Hon. Judge William S. Howard has rendered an opinion in In re Owens, 191 B.R. 669 (Bankr. E.D. Ky., 1996). Here, the Court held that the debtor was required to continue making payments on a loan for a motor vehicle driven by the former spouse as discharging the same would result in a benefit to the debtor that would outweigh the detrimental consequences to the spouse.

Note however that the court held that a debtor’s obligation under a property settlement agreement to pay debts on a note did not come within the discharge exception given the absence of hold-harmless language. This sentiment is common amongst other Courts in examining the situation of the hold-harmless language.

It is interesting to note that in determining whether the debtor had the ability to pay debts owed to his ex-spouse, the Court would not consider payments being made by the debtor on a note secured by the residence of the debtor’s mother. The Court held that these payments were not reasonably necessary to be expended for maintenance or support of the debtor or debtor’s dependent and therefore could not be considered in determining whether the debtor lacked the ability to pay such debts from his own income or property. Attorneys filing §523(a)(15) cases in the Eastern District of Kentucky are advised to read In re Owens as the Court’s analysis under the case is very complete and well-written.

H. [5.22] The Automatic Stay And §523 Judgment Collection

One last aside. The Sixth Circuit held in the case of In re Embry, 10 F 3d 401 (6th Cir. 1993) that it is not necessary for a creditor to seek relief from the §362 Automatic Stay to pursue collection of a judgment entered in a nondischargeability suit pursuant to §523. A determination by the court that the debt is nondischargeable terminates the stay as to that particular debt. This allows a creditor to begin collection actions immediately.
11 USC Section 727(a) provides as follows:

(a) The court shall grant the debtor a discharge, unless —

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title [11 USCA Sections 101 et seq.], has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed —
   (A) property of the debtor, within one year before the date of the filing of the petition; or
   (B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in connection with the case —
   (A) made a false oath or account;
   (B) presented or used a false claim;
   (C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or
   (D) withheld from an officer of the estate entitled to possession under this title [11 USCS Sections 101 et seq.], any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case —
   (A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;
   (B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or
   (C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another
case, under this title [11 USCA Sections 101 et seq.] or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title [11 USCS Section 1141], or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title [11 USCS Sections 1060, 1061], in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least —
   (A) 100 percent of the allowed unsecured claims in such case; or
   (B) (i) 70 percent of such claims; and
   (ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; or

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter. 11 USCS Sections 701 et seq.

An Adversary Proceeding seeking to deny the debtor's discharge must be distinguished from an attempt to dismiss the debtor's bankruptcy petition, in its entirety, under §707. Dismissals under §707 cannot be at the request or suggestion of a creditor. 11 U.S.C. §707(5). Additionally, the legal grounds for these two Code provisions are quite different.

Dismissal of the case is like the petition was never filed at all. Denial of the debtor's discharge, while not dismissing the case, robs the debtor of the ultimate relief that he sought, that is, relief from his non-reaffirmed obligations.

Likewise, an Adversary Proceeding filed under §727 of the Bankruptcy Code is different from an Adversary Proceeding filed under §523. Remember, an Adversary Proceeding filed under §523 seeks to except an individual debt from discharge. Cases filed under §727 seek to deny discharge of all debts, and therefore is a case to the benefit of all creditors.

Also, unlike cases under §523, cases under §727 cannot be settled. In other words, if an Adversary Proceeding predicated upon §727 is filed, it must be taken all the way through trial.

To settle a case under §727 would be considered in violation of 18 U.S.C. §152, that is, a Bankruptcy Crime. It would be an attempt to obtain money, compensation or advantage by agreeing to forebear acting in the case filed under the Bankruptcy Code.

This is distinguished from settling a case under §523. If the debtor is guilty of actions that give rise to a complaint under §727, then the discharge should be denied and no single creditor should be allowed to capitalize on that knowledge. The lesson is do not file an Adversary Proceeding under §727 unless you are willing to take it all the way through trial and that you have a case that falls in one of the 10 enumerated grounds for denying discharge under §727(a).


Despite the rarity of §727 actions, there is some case law authority to give the practitioner guidance in the event that a creditor wishes to pursue this avenue of relief. In re Adams, 31 F.3d 389 (6th Cir. 1984) involved a transfer of accounts receivable which served as collateral for a creditor's loan. The
debtor transferred the accounts receivable into a corporation's operating account rather than into the creditor's dominion account. The monies were then used to pay other suppliers.

The Court denied discharge since the debtor attempted to defraud a creditor by transferring property of the debtor within one year before the date of the filing of a bankruptcy petition. If it had been done postpetition, it would also qualify for denial of discharge under §727(a)(2)(B).

The Adams case also stands for the proposition that the standard of proof of §727 actions is by a preponderance of the evidence.

Interesting reading is the case of In re Krohn, 886 F.2d 123 (6th Cir. 1989). Here, the Court actually dismissed a case where the Court found that the debtor had sufficient future income. The Sixth Circuit opined that the petitioner's seeking relief under the Bankruptcy Code was an abuse of the "fresh start" theory that permeates the Bankruptcy Code. The lavish lifestyle and other excesses evidenced by the debtor postpetition further demonstrated the abuse that §727 was initiated to deter.

Examples from the Western District of Kentucky under §727(a)(2) are In re Terrell, 114 B.R. 907 (W.D. Ky. 1989) [ex-husband's transfer of vehicles to then-girlfriend [now wife] held insufficient to deny discharge. NOTE: that the Court used the clear and convincing standard. See In re Adams, supra; In re Yokley, 61 B.R. 198 (W.D. Ky. 1986) [four large withdrawals of money within three months of filing held to be transfer of property of the debtor with an intent to defraud the creditor]; In re Lineberry, 55 B.R. 510 (W.D. Ky. 1985) [debtor's failure to list one investment account insufficient to deny discharge when debtor's ex-wife admitted she was aware of the account. This case also examines §727(a)(3), (4) and (5)]; In re Hargis, 50 B.R. 698 (W.D. Ky. 1985) [debtor concealed that his wife was a partner in partnership and the wife held partnership assets. Discharge denied. See also, 44 B.R. 225 (W.D. Ky. 1984)].

Quite commonly, the debtor cannot explain a loss of assets. This falls under §727(a)(5) of the Bankruptcy Code. Example of cases litigated under that section are as follows: In re Dolin, 799 F.2d 251 (6th Cir. 1986) [debtor testified that the loss of assets were due to his expenditures for cocaine and gambling addictions. Held: insufficient to overcome presumption and discharge denied. This case also addresses §727(a)(3) concerning failure to keep records]; In re Yokley, 61 B.R. 198 (W.D. Ky. 1986) [debtor was unable to document what two large withdrawals within three months of the filing of the bankruptcy petition were used for. Held: discharge denied]; In re Schermer, 59 B.R. 924 (W.D. Ky. 1986) [the debtor was unable to explain the disappearance of $26,000 in cash, inventories and receivables within two months of the filing of the bankruptcy petition. Held: discharge denied].

Seeking a denial of the debtor's discharge under §727 is an all-or-nothing proposition. Given the severity of the relief requested, creditors should seek this as a last resort and only when they are willing to commit the resources necessary to take a case of this type all the way through litigation.

V. [5.25] PRACTICE TIPS

Listed below are some practice tips used by the author's firm found to be very successful in litigation under §523 and §727. The tips are in no particular order and are simply offered as an aid to the practitioner.

A. [5.26] Rule 2004 Exams

Bankruptcy Code 2004 allows you to examine the debtor much like the taking of a deposition. As had been suggested in this chapter, this exam should be performed prior to the filing of an Adversary Proceeding or a complaint seeking to deny the debtor's discharge. Not only will this allow the creditor to evaluate the case, but may insulate a creditor from an attorney's fee demand under §523(d).
Bankruptcy Rule 7030 and Federal Rule of Civil Procedure 30(b)(4) allow for the taking of a deposition or Rule 2004 exam by non-stenographic means. This author takes the 2004 exams by video tape. This can be done by agreement or Order of the Court. The only expense involved is the cost of the tape and an initial investment of portable video equipment.

The author has found that this procedure provides the creditor’s counsel with a psychological advantage. It is suggested that the television being used as the monitor be positioned so that the debtor can see himself. Many psychological studies have found that a person is much less likely to lie if they can see their own face. The debtor is then caught within the conflict of watching themselves lie or tell the truth. This psychological pressure often results in more truthful testimony.

Conduct a deposition or examination as if it will have to be transcribed. Many courts are not set up to play video. Even if they are, some judges may not be willing to use them. Additionally, opposing counsel may request a transcription of the testimony for use at trial. Using tape to impeach a witness can be cumbersome.

Make sure that all objections are properly preserved for the record. It is also suggested that the practitioner have a backup source in the form of an audio tape. That way, if the videotape were somehow destroyed prior to the transcription being made, there would be a record of the exam.

Practitioners are advised to observe all of the usual strictures of a deposition such as the swearing-in of the witness, identification of the parties and the like. This is often explicated in the Order to take the 2004 exam itself.

B. [5.27] The Subpoena Duces Tecum

In taking a Rule 2004 exam or deposition, the use of a subpoena duces tecum is highly recommended. Items to request under the subpoena are discussed below.

1. [5.28] Checking and Savings Account Records

First, ask for checking and savings account statements and canceled checks for the last 12 to 24 months, looking for preferential or fraudulent transfers. These transfers could be to family, friends, business partners, relatives, creditors, or simply unexplained transfers of money.

The practitioner should also check for extravagant expenditures, especially postpetition. This can be very valuable in a case filed under §523(a)(8) where the debtor is claiming an undue hardship. If the debtor is able to afford luxuries postpetition, then it is unlikely that he or she will be able to convince the Court that the payment of the student loan obligation will work an undue hardship.

If the case was filed under §523(a)(2)(A), the checking account could show that the debtor was using cash advances to support a luxurious lifestyle or simply to pay other creditors. It is amazing how often debtors will take multiple cash advances very shortly before the filing of the bankruptcy petition and deposit that money into the checking account. Possession of these checks and bank statements could show the flow of those funds.

A review of the checking and savings account records can also provide evidence of possible conversion. If collateral was sold, many times the proceeds from the sale will be placed into one of these accounts. Review of the records reveals where the money went, and what it was used for.

Other proceeds, such as insurance proceeds not turned over to a creditor find their way into these accounts. If they were transferred to third parties for “safekeeping” or used for something other than car repairs, the checking account may prove to be the key in a case.
Many times, such proceeds are used to purchase other exemptible assets. Equivalent to "bankruptcy planning for the indigent", such evidence can be used to show fraudulent intent and may convince the Court to impress an equitable lien on the property. A transcript of the deposition or copy of the tape given to the Trustee may give rise to a fraudulent transfer action under §548 of the Bankruptcy Code or a preferential transfer under §547.

2. [5.29] Policies of Property Insurance and Riders

This practitioner often requests policies of property insurance and riders on homeowners' insurance policies. Quite often, this reveals valuable assets either not scheduled or undervalued on the debtor's schedule.

Most homeowners' insurance policies do not cover items such as jewelry, antiques, furs, oriental rugs or the like. They are often covered by separate riders. Many times this will provide the "persuasion" needed to convince the debtors that they should settle the case.

C. [5.30] Use of Written Discovery

If the practitioner has already filed an Adversary Proceeding and is preparing to take a deposition in the matter, the use of written discovery should be considered. Responses to written discovery provides a background to the case and will aid in formulating questions to be asked at the upcoming deposition. Similarly, the use of Requests For Production will often provide materials to review in advance of the deposition. Finally, documents and written responses received in response to written discovery may lead to a request for additional and different documents at the deposition via the subpoena duces tecum.

The use of written discovery will many times yield facts unknown to even the debtor's counsel. Providing evidence to the debtor's counsel that his or her client has not been forthcoming may provide an avenue for potential settlement of the matter.

D. [5.31] Settlement Document

If an Adversary Proceeding has been filed, this author often enters into an Agreed Judgment.

The Judgment should declare that the debt is not discharged. Be specific as to what Bankruptcy Code section led to the Judgment as this may have an impact if the debtor files for relief under the Bankruptcy Code at a future date. This could be considered res judicata or collateral estoppel in state court proceedings as well.

The creditor should also seek a personal judgment against the debtor for the monies due and owing. If the debtor later defaults, the Agreed Judgment could be "localized" by filing suit on the judgment in state or federal court and initiating proceedings supplemental to collect the debt.

If an Adversary Proceeding has not been filed, the creditor should use a combination of a Reaffirmation Agreement and Agreed Order extending time to file a nondischargeability suit.

Recall that the debtor has sixty (60) days from the filing of the Reaffirmation Agreement with the Court, or entry of the Discharge Order within which to rescind the Reaffirmation Agreement. The creditor should get an extension of time past that last day so that he does not fall into the "Catch-22" previously described in this chapter.

There are certain disadvantages of not filing an Adversary Proceeding and getting an Agreed Judgment. The Reaffirmation Agreement does not carry the weight of a Judgment. If a debtor reaffirms and then defaults on the Reaffirmation Agreement, it will be necessary to file suit. The basis of the
lawsuit will not be the original contract, but the Reaffirmation Agreement. Localizing and collecting on a Judgment is much different than on a Reaffirmation Agreement.

Additionally, with the Reaffirmation Agreement, the creditor does not have a personal judgment. This is why the creditor would have to sue on the Reaffirmation Agreement. One cannot immediately move to execute on the Reaffirmation Agreement and it has no res judicata or collateral estoppel effect.

Obviously, there are some advantages to entering into a Reaffirmation Agreement and extension of time over an Agreed Judgment. It is usually quicker. The Reaffirmation Agreement and Agreed Order can often be negotiated at the first meeting of creditors and the case can be over within a few short days.

Secondly, there is less expense involved in negotiating the Reaffirmation Agreement. You do not have the initial outlay of $120 (soon $150) for the court costs, nor the associated attorney time in the litigation of the case.

The Reaffirmation Agreement does “revive” the creditor’s debt. That is, the debt survives discharge and can be collected postpetition. Much like an Agreed Judgment, the terms of repayment can be spelled-out in the Reaffirmation Agreement.

VI. [5.32] CONCLUSION

This has been only a brief examination of common Adversary Proceedings filed both for the discharge of an individual debt and Adversary Proceedings seeking to deny the debtor’s discharge. As has been stated ad nauseam throughout this chapter, each case will turn on its facts and a rereading of the Bankruptcy Code is always suggested prior to the filing of any Adversary Proceeding.
Chapter 6
THE CHAPTER 7 BANKRUPTCY TRUSTEE
AND THE BANKRUPT ESTATE
James D. Lyon
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I. [6.1] PROPERTY OF THE ESTATE

A. [6.2] Estate Property Defined

The commencement of a bankruptcy creates an estate, comprised of all property rights the debtor has in property of every kind and description, legal and equitable, wherever located and by whomever held, as of the date of filing. 11 USC §541. The definition of estate property is extremely broad, but the estate generally can have no greater interest in property than did the debtor at the time of filing. Property of the estate does however include property preserved, recovered or transferred back to the estate. 11 USC §541(a)(4) and (5).

1. [6.3] Property Received Within Six Months of Petition

In addition to property rights held at the commencement of the case, property received by bequest or inheritance, property settlement or divorce decree, or through life insurance benefits within six (6) months of the petition is property of the estate. 11 USC §541(a)(5).

2. [6.4] Proceeds of Estate Property

Proceeds, product, offspring, rent or profits of estate property is estate property. This does not include earning from the debtor’s services after the commencement of the case. Note that post-petition earnings are property of a Chapter 13 and Chapter 12 bankruptcy estate.

3. [6.5] Property Not Part of the Estate

Some property is not held to be part of the bankruptcy estate. These specific, rarely seen exceptions involve property held in trust, expired leases of non-residential property, accreditation as an educational institution, certain interest in hydrocarbons and cash from the sale of certain money orders. Reference should be made to 11 USC §541(b)(1-5).

4. [6.6] Effect of Restrictions on Transfer of Property Interest

The property of the debtor becomes property of the estate despite any agreed restriction on transfer, except for trust restrictions enforceable under state law. 11 USC §541(c)(1)(2).
B. [6.7] Property Of Estate And The Chapter 7 Trustee, Generally

The Chapter 7 trustee has the duty of collecting and reducing to money the property of the estate, and is accountable for the property received. 11 USC § 704 (1)(2).

1. [6.8] Property Exemptions

An individual may exempt property from the estate. 11 USC § 522. Kentucky has opted for a state, rather than Federal exemption scheme. Exemptions are found in Chapter 427, and throughout the Kentucky Revised Statutes, as well as in applicable Federal Statutes. See also, Chapter 4 infra.

2. [6.9] Objections to Exemptions

The trustee has thirty (30) days from the date of the first scheduled first meeting to object to a claim of exemption. Failure of the trustee to object within the time period will prevent the property from being administered, even if the claim of exemption is groundless. Talyor v. Freeland & Kronz, 503 US 638 (1992).

3. [6.10] Abandonment of Property

A trustee may abandon property of the estate that is burdensome to the estate, or that is of inconsequential value and benefit. 11 USC § 554. Abandoned property reverts back to the debtor.

C. [6.11] Reference To State Law

Property rights are determined by reference to the relevant state’s law. But once that determination is made, the federal bankruptcy law determines to what extent the debtor’s interest is property of the estate. In re Omegas Group, Inc., 16 F.3d 1443 (6th Cir. 1994); Bavely v. IRS, 911 F2d 1168 (6th Cir. 1990); Garrott & Sons v. Union Planters National Bank of Memphis, 772 F2d 462 (8th Cir. 1985). State law must be applied in a manner consistent with federal bankruptcy law. Torres v. Eastlick, 767 F. 2d 1573 (9th Cir. 1985).

II. [6.12] PREFERENCE LITIGATION

A. [6.13] Introduction

Section 547 of the Bankruptcy Code, 11 U.S.C. §547, is one of the longer statues in the Bankruptcy Code. No statute so long is simple in either application or interpretation. Yet the premise of the preference statute is very simple. Preferences are transactions that benefit one creditor at the expense of others.

11 U.S.C. §547

(a) In this section—

(1) “inventory” means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;
The Chapter 7 Bankruptcy Trustee and the Bankrupt Estate

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the Trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension.

(b) Except as provided in subsection (c) of this section, the Trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between 90 days and one year before the date of the filing of the petition, if such creditor at the time as such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under Chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The Trustee may not avoid under this section a transfer—

(1) to the extent that such transfer was—

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;
(2) to the extent that such transfer was—

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor—

(A) to the extent such security interest secures new value that was—

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact by the debtor to acquire such property; and

(B) that is perfected on or before 20 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise avoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of—

(A) (i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or
The Chapter 7 Bankruptcy Trustee and the Bankrupt Estate

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title;

(7) to the extent such transfer was a bona fide payment of a debt to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a Court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt—

(A) is assigned to another entity, voluntarily, by operation of law, or otherwise; or

(B) includes a liability designated as alimony, maintenance or support; or

(8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600.00.

(d) The Trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the Trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the Trustee or the amount paid to the Trustee.

(e) (1) For the purpose of this section—

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made—

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time, except as provided in subsection (c)(3)(B);
(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of—

(i) the commencement of the case; or

(ii) 10 days after such transfer takes effect between the transferor and the transferee.

(3) For the purpose of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(g) For the purposes of this section, the Trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.

B. [6.14] Preferences - Purpose

The purpose of the preference statute allows a Trustee (or debtor in possession) to preserve the quality of distribution among unsecured creditors by preventing one creditor from enhancing his position at the expense of all other creditors on the eve of bankruptcy. In re IRFM, Inc., 52 F.3d 228 (9th Cir. 1995). Most importantly, the preference section facilitates an equal distribution of the debtor's assets among creditors. In re Antweil, 931 F.2d 689, (9th Cir.) aff'd sub. nom., Barnhill V. Johnson, 503 U.S. 393, 118 L.Ed 2d 39, 112 S.Ct. 1386 (1992).

C. [6.15] Definitions

1. [6.16] §547(a)

11 U.S.C. §547(a) defines the following terms:

a. [6.17] Inventory

Inventory is defined as that personal property that is either leased or furnished, sold or delivered, including raw materials, crops or live stock and materials that are used or consumed in a business. Inventory is essentially the product that the debtor offers for sale leases or uses in the course of his business.

b. [6.18] New Value

New value is defined as additional money, or new value of goods or services rendered, new credit or release of property previously transferred to the debtor including proceeds of property that is used by the debtor, but does not include an obligation that is substituted for an already existing obligation. This definition, which creditors use as a defense under §547(c), requires a creditor to extend additional credit or material to a debtor rather than simply take the existing property of the debtor. The
The purpose of the new value exception encourages creditors to continue to do business with financially troubled debtors who might otherwise avoid bankruptcy. In re IRFM, Inc., 52 F.3d 228 (9th Cir. 1995).

c. 

[6.19] Receivable

The term receivable means the right to payment whether or not that right has been earned by performance.

d. 

[6.20] Taxes

Taxes are defined in terms of time under §547(a)(4). The parties must use the day that the tax is last payable without penalty, including any extension, rather than the day the tax is actually paid. Therefore, an income tax payment is due on April 15, unless an extension is granted. The tax is due on April 15, even if paid on March 15.

2. 

[6.21] §547(b) – Elements of Preference

The elements constituting a preferential transfer are found at 11 U.S.C. §547(b). This straightforward section defines what a Trustee must assert and prove in order to avoid a preferential transfer. No transfer is void; it is simply voidable. If a Trustee fails to challenge a transaction, it remains valid. Clark v. Pure, 151 B.R. 75 (E.D. Pa. 1993).

In order to avoid a transfer of an interest of the debtor, not necessarily title, the Trustee must assert and prove that the transfer:

1) benefits the creditor;
2) is payment on an antecedent debt;
3) made while the debtor is insolvent;
4) within 90 days of the filing of the bankruptcy, unless the transfer is to an insider, which calls for a one year reach back period, and
5) the result of the transfer allows the creditor to receive more than it would receive in a Chapter 7 distribution.


a. 

[6.22] Transfer of Interest of Debtor

The first element of a preference requires that a transfer of an interest of the debtor must benefit the preferred creditor. What constitutes a transfer and when it is complete, is a matter of Federal Law. Barnhill v. Johnson, 503 U.S. 393, 118 L.Ed 2d 39, 112 S.CT 1386 (1991). However, in the absence of Federal Law, transfer is defined by State law. Barnhill v. Johnson supra. The transfer of an interest of the debtor must benefit a creditor. In the absence of benefit, no preference occurs.

b. 

[6.23] Antecedent Debt

The debt must already have existed at the time that a transfer of property of the debtor occurs. What constitutes an antecedent debt has been the subject of some interesting cases. For example, a
check returned for insufficient funds is a credit transaction. A subsequent payment by the debtor for a dishonored check is a payment on an antecedent debt. A check honored in the ordinary course is a cash transaction and not a payment on an antecedent debt. In re Car Renovators, 946 F.2d 780 (11th Cir. 1991), cert. denied sub. nom., Heart of Dixie Nissan v. Reynolds, 504 U.S. 913, 118 L.Ed. 2d 553, 112 S.Ct. 1949 (1992). Reducing future obligations to a present value and then obtaining cancellation of the debt for payment meets the statutory definition of an antecedent debt. In the case of In re Futornan, 76 F.3d 265 (9th Cir. 1996), a husband reduced his future maintenance obligations to a lump sum and paid that to his wife in exchange for cancellation of the debt. The Court characterized the transaction as payment of an antecedent debt.

c. [6.24] Insolvency

Insolvency is defined in §101 of Title 11, the general definitions section. The presumption of insolvency generally favors the Trustee; in other words the debtor is presumed insolvent for a period of time. However, insolvency is rebuttable. 11 U.S.C. §101(32), defines insolvency as a balance sheet test. The Court will find the debtor insolvent if it determines the debtor’s liabilities exceed his assets. In re Bluegrass Ford-Mercury, Inc., 942 F.2d 381 (6th Cir. 1991). Insolvency is presumed for the ninety (90) days immediately prior to bankruptcy. The Trustee need put no proof into evidence on the issue of insolvency unless a creditor rebuts the presumption with evidence; or if the transfer of the interest of the debtor occurred outside the ninety (90) day period immediately prior to bankruptcy. The Trustee always bears the burden of persuasion to prove each element of a preferential transfer.

d. [6.25] 90-Day Rule

Except with regard to transfers to insiders, the reach back period is ninety (90) days. The Trustee will review the period of the ninety (90) days immediately preceding the filing of the bankruptcy petition and determine whether transfers that have occurred in that time frame are preferential, with the knowledge that the debtor is presumed insolvent during those ninety (90) days. 11 U.S.C. §547(f). An affected creditor may challenge the presumption by competent evidence.

Weekends and holidays do not extend the preference period beyond ninety (90) calendar days. Unlike the holding of In re Butcher, 829 F.2d 596 (6th Cir. 1987), which held that the statute of limitation for filing a preference action was jurisdictional, the ninety (90)-day reach back period for preferences are deemed substantive rather than procedural. See In re Bergel, 185 B.R. 338 (9th Cir. B.A.P. 1995).

e. [6.26] One Year Rule

With regard to transfers to insiders, as defined in §101(31) of the Bankruptcy Code, a Trustee may challenge transfers for one (1) year. The ninety (90)-day insolvency presumption still applies. The Trustee must prove insolvency in cases where the transfer occurs more than ninety (90) days prior to filing the bankruptcy. See In re Perry, 158 B.R. 694 (Bkrtcy. N.D. Oh. 1993). Even though the definition of “insiders” in §101(31) does not include the debtor’s girlfriend, in certain circumstances when a long term close relationship has been established, a girlfriend of a Chapter 7 debtor can be deemed an insider. See In re Levy, 185 B.R. 378 (Bkrtcy.S.D. FLA. 1995).

f. [6.27] Liquidation Test

The last element that a Trustee must prove to establish a preferential transfer is called the liquidation analysis. Section 547(b)(5) sets forth a tri-partite test. The Trustee must show that the preferred creditor (1) received more than he would have received if the case were liquidated under Chapter 7; (2) if the transfer had not been made to the preferred creditor; and (3) that such creditor received payment of such debt to the extent provided by the provisions of Title II. The Trustee will generally prevail and carry his burden of persuasion if he proves that the transfer of an interest of the debtor that occurred prepetition would have been property of the bankruptcy estate upon filing of the bankruptcy petition if
the transfer had not occurred. Therefore, the issue in these cases concerns whether the asset transferred would have been property of the bankruptcy estate.

A debtor's payment prepetition of trust fund taxes does not constitute a transfer of property of the estate. Hence, the Internal Revenue Service did not receive more than it would receive in a Chapter 7 distribution. Bieger v. Internal Revenue Service, 496 U.S. 53, 110 L.Ed.2d 46, 110 S.Ct. 2258 (1991). Transfers of trust assets do not constitute preferential transfers. See In re Unicom Computer Corporation, 13 F.3d 321 (9th Cir. 1994).

Funds "ear marked" or clearly designated for the benefit of a party other than the debtor constitutes a transfer outside the scope of the preference section. Yet, a debtor who kites checks does not create an "earmarking" situation for the affected bank or creditor to utilize as a defense. See In re Montgomery, 983 F.2d 1389 (6th Cir. 1983).

Funds of the debtor held for safekeeping purposes only in an escrow account does constitute property of the estate. A payment of said funds prepetition can result in a voidable preferential transfer. In re Winters, 182 B.R. 26 (Bkrtcy. E.D.Ky. 1995).

However, when a general building contractor filed bankruptcy, and the owner paid the subcontractor directly to avoid the timely filing of a mechanics lien, a Court held that said transfer did not constitute a transfer of property of the estate, even though the payment reduced the general contractor's interest. The payment to the subcontractor by the owner was held "ear marked". In re Steele Vest, Inc., 112 B.R. 852 (Bkrtcy. W.D.Ky. 1990).

Prepetition payments to fully secured creditors are not avoidable preferential transfers because a Trustee must pay in full a secured creditor if the Trustee sells the collateral. Thus, the liquidation test fails since that creditor received the same it would receive in a Chapter 7 liquidation. In re C-L Cartage, Inc., 899 F.2d 1490 (6th Cir. 1990).

Normally, a Trustee need only offer as proof a mathematical analysis that reveals the preferred creditor benefited to a greater degree than its pro rata share of distribution of the claims actually filed in a Chapter 7 case. When a creditor receives a beneficial transfer prepetition, however received, he better his position over other unsecured creditors. Often, the only asset recovered in a case will be the preferred transfer.

The exceptions to the rule include two fact patterns. The first leaves the preferred creditor as the only creditor. The second pattern is the rare case in which the Trustee recovers other assets that allow the Trustee to pay other creditors more than the preferred creditor received.

The preferred creditor receives no distribution from the estate until it repays to the Trustee the value of the avoided transfer. 11 U.S.C. §502 (d).

D. [6.28] Defenses Of Creditors

11 U.S.C. §547(c) enumerates the defenses of a creditor to preference claims raised by the Trustee. These defenses supplement any claim that the Trustee has not met its burden in proving one of the elements of §547(b). Section 547 (c) assumes that the transfers sought to be avoided have met the required elements of §547 (b). In addition, section 547 (c) allows for certain transfers and prohibits recovery by the Trustee for the benefit of all creditors. The enumerated defenses are as follows:

1. [6.29] Contemporaneous Exchange for New Value

The Trustee may not avoid a transfer to a creditor that was (1) meant to be a transfer contemporaneous for new value; and (2) was in fact a substantially contemporaneous exchange. Many cases have
discussed what constitutes a contemporaneous exchange.

A check given to a creditor at the time that services or goods are provided is in fact a contemporaneous exchange, so long as the drawer’s bank honors the check. In re Transport Associates, Inc., 171 B.R. 232 (Bkrtcy. W.D. Ky. 1994). Contrast the use of the phrase “date of transfer” between §§547(b) and §§547(c) as it applies to checks. The date of transfer of checks under §547(b) relates to the date the drawer’s bank honors the check. Barnhill V. Johnson, supra. However, the date a creditor receives the check establishes the date of transfer pursuant to §547(c), so long as the drawer’s bank subsequently honors the check. In re Transport, Associates, Inc., supra.

New value requires the creditor to provide the debtor with some benefit after payment by the debtor. In re Lee, 179 B.R. 149 (9th Cir. BAP 1995). The purpose of the new value exception protects transfers that do not diminish the bankruptcy estate. In re Cocolat, Inc., 176 B.R. 540 (Bkrtcy. N.D. CA. 1995). One test requires the Court to determine to what extent the debtor’s estate was replenished by the creditor when it provided new services or products. In re Riggs, 129 B.R. 494 (Bkrtcy. S.D. OH. 1991).


2. [6.30] Ordinary Course

A Trustee cannot avoid transfers made by a debtor to a creditor in the ordinary course of business. 11 U.S.C. §§547(c). To meet this exception, a creditor must show three elements. First, the debt must be incurred in the ordinary course of business as between the creditor and the debtor. Second, the payment of the debt must be made in the ordinary course as between the debtor and creditor. Third, the payment of the debt, in addition to being in the ordinary course between the parties, must also be in the ordinary course of the industry involved. The issue of which industry standard applies is an issue of factual proof. A tri-partite test has been adopted by several circuits. In re Midway Airlines, Inc., 69 F.3d. 792 (7th Cir. 1996); In re Rublin Industries, Inc., 78 F.3d 30 (2nd Cir. 1996); In re Fred Hawes Organization, Inc., 957 F.2d 239 (6th Cir. 1992).

The purpose of the exception allows parties who have enjoyed a steady business relationship to continue that relationship, even to the verge of the filing of the bankruptcy. The exception is not available to a creditor who has engaged in only one transaction with the debtor. In re Winters, 182 B.R. 26 (Bkrtcy. E.D. Ky. 1995).


Often times creditors couple the defense of ordinary course with the new value exception discussed supra.

E. [6.31] Security Interests

The mere filing of a security interest can be an avoidable preference. This occurs particularly in cases in which the filing does not encompass an extension of credit for new value or a transfer in the ordinary course. To the extent that a security interest is filed outside the scope of the timely perfection scheme established by the Uniform Commercial Code, or within the time frame specified in §§547(c)(3)B twenty (20) days after the debtor receives possession), the interest can be avoided by the Trustee even if
The Chapter 7 Bankruptcy Trustee and the Bankrupt Estate

the underlying debt is not preferential. Section 547(c) specifies that a creditor has twenty (20) days from the date of transfer of the debtor's interest to perfect its lien on personalty. The perfection then relates back to the date of transfer. When the transfers involve real estate, in the absence of any particular state statute on perfection, §547(c) applies. This section requires that perfection occur within ten (10) days after the transfer. A transfer is perfected when a good faith purchaser for value is put on notice that the interest of the transferee is superior to all others. This requires a filing. See In re Levy, 185 B.R. 378 (Bkrtcy. S.D. Fla. 1995). The transfer must include an interest of the debtor, but may be less than full title. In re Hedged Investments Associates, Inc., 163 B.R. 841 (Bkrtcy. D. Co. 1994). In cases of a garnishment in Kentucky, a transfer occurs on the day the garnishment lien was created, on the day of the filing of the garnishment, and not on the day the garnishment was paid. In re Clark, 171 B.R. 563 (Bkrtcy. W.D. Ky. 1994).

The essential rule on security interests provides that in the absence of any state statute, a creditor must perfect its lien on personalty within twenty (20) days. Perfection then relates back. However, if real estate is involved, a recording must be made within ten (10) days of the date of the transfer. The waiver of a mechanic's lien right in exchange for a voluntary lien is still preferential under Kentucky law. A Court avoided as a preferential transfer the filing of a lien voluntarily given by the debtor in exchange for a waiver by the affected creditor of its mechanic's lien right. In re Rexplore Drilling, Inc., 971 R2d 1219 (6th Cir. 1992).

The primary tenant of this portion of §547(c) provides that a creditor will prevail so long as the creditor files timely. The Trustee will prevail if a creditor files late, even if the creditor has no specific knowledge of the financial plight of the debtor.

F. [6.32] Accounts Receivable And Inventory

Accounts receivable and inventory are discussed in §547(c)(5). Liens on this type of property, the so-called floating liens, are not avoidable to the extent that the debtor's inventory or accounts receivable have been replenished. A recorded financing statement and proof of supply of additional inventory to a debtor is sufficient to defeat a Trustee's claim. A creditor does not receive credit for financing a previous loan. In re Bluegrass Ford-Mercury, Inc., 942 F.2d 381 (6th Cir. 1991). Courts employ a net improvement and position test for floating inventory. Bankruptcy Courts look at the value of the inventory ninety (90) days before the filing of the bankruptcy and the value of the inventory on the date of the petition. To the extent that a Trustee proves more debt was paid by the debtor than inventory supplied by the creditor, the Trustee may recover the net improvement in the creditor's position in the ninety (90) days before the filing of the bankruptcy petition. In re Parker Steel Company, 149 B.R. 834 (Bkrtcy. N.D. Oh. 1992).

G. [6.33] Statutory Liens

A Trustee may not be able to avoid statutory liens under §547. Hence, tax liens are nonavoidable. A Trustee cannot set aside a mechanic's lien timely filed in accordance with KRS 476, even if the mechanic's lien was filed within ninety (90) days before the filing of the bankruptcy petition.

H. [6.34] Domestic Relations

To the extent that a debtor makes a transfer in good faith to a former spouse for alimony, child support, maintenance or pursuant to a valid separation agreement or divorce decree, the payments made by the debtor are not avoidable as a preference. 11 U.S.C. §547(c)(7). The exception does not apply to assignments of payments to another entity, voluntarily or by operation of law, nor does it apply to payments designated as alimony, child support or maintenance unless the payments are actually alimony, maintenance, or child support. However, a separation agreement that called for periodic payments, reduced to a lump some by agreement of parties and paid prior to the filing of the bankruptcy,
was deemed a preferential transfer even though the payment of future maintenance was canceled. *In re Futoran*, 76 F.3d 265 (9th Cir. 1996).

I. [6.35] Consumer Minimum

In cases involving consumer debts, §547(c)(8) allows a creditor to defeat what would otherwise be a preferential transfer if the aggregate value of all of the property of the debtor that is affected by the transfer is less than $600.00. The purpose of this exception was to remove *de minimis* amounts collected by garnishments that occurred immediately preceding the filing of the bankruptcy. Some conflict exists regarding the term “aggregate value” and the amount of $600.00. One case in Kentucky in particular asserts that each garnishment is a separate transaction, and §547 will not apply so long as each garnishment collected totals less than $600.00, even if the aggregate of several garnishments that occurred within the ninety (90) days before the filing of the bankruptcy exceeds the $600.00 minimum. *In re Clark*, 171 B.R. 563 (Bkrtcy. W.D. Ky. 1994).

J. [6.36] Sureties

In the event that a debtor transfers property to a surety in order to secure reimbursement of a bond or makes other application in order to dissolve a judicial lien, such as a mechanic’s lien, the transfer of property to secure that bond can be set aside as a preferential transfer. To the extent that the Trustee recovers property, the amount of the obligation insured by the surety can be reduced by the recovery made by the estate. *See 11 U.S.C. §547(d).*

K. [6.37] Real Property Rules

A transfer of an interest in real estate occurs when the instrument is recorded. *In re Levy*, 185 B.R. 378 (Bkrtcy. S.D. Fla. 1995). If a creditor records a mortgage outside the ten (10) day limit of §547(e), the transfer of the interest of the debtor occurs when the mortgage is perfected, i.e. the date of the filing. The creditor also loses the new value and ordinary course exceptions as defenses. *In re Moran*, 188 B.R. 492 (Bkrtcy. E.D. NY. 1995). The same rules apply with regard to the filing of security interest on fixtures. Kentucky law requires that to perfect an interest in a fixture, a creditor must file a fixture filing in the County Clerk’s office. The transfer is not perfected until the filing occurs. Hence, Kentucky law applies the same rule with reference to fixture filings as it does to the filing of other interests in the real estate of the debtor, including mortgages. If an instrument is filed within ten (10) days, the transfer relates back and the defenses of §547(c) may apply.

L. [6.38] Presumption Of Insolvency

11 U.S.C. §547(f) states that the debtor is presumed to be insolvent for the ninety (90) days immediately proceeding the filing of the petition. The presumption is rebuttable. The test for determining insolvency is called a balance sheet test. The balance sheet test requires a Court to find that the liabilities of the debtor exceed the assets of the debtor to hold that the debtor is insolvent. *In re Bluegrass Ford-Mercury, Inc.*, 942 F.2d 381 (6th Cir. 1991). Outside of the ninety (90) day period, for insider transactions, the Trustee must prove insolvency as a necessary element under §547(b). *See In re Perry*, 158 B.R. 694 (Bkrtcy. N.D. Oh. 1993).

M. [6.39] Burdens Of Proof

The Trustee bears the burden of proof by a preponderance of evidence to establish each and every element under §547(b). *See In re U.S.A. Inns of Eureka Springs, Arkansas, Inc.*, 9 F.3d 680 (8th Cir. 1993). The burden of proof falls on a creditor to establish one of the exceptions under §547(c). *See In re Fred Hawes Organization, Inc.*, 957 F.2d 239 (6th Cir. 1992).
N. [6.40] Parties

Normally the Trustee brings any action under §547. The Trustee alone holds the avoiding power. The Trustee is specifically so authorized under the wording of the statute of §547(b) which states that "the Trustee may avoid any transfer and interest of the debtor in property". The debtor assumes the role of the Trustee in cases under Chapter 11. Pursuant to 11 U.S.C. §1107(a) the debtor-in-possession has all of the powers and standing of a Trustee to bring a preference action.

A debtor may bring a preference action to the extent that it preserves an exemption which it holds specific in property. See 11 U.S.C. §522(g) and (h).

Additionally, in certain circumstances, an individual creditor may bring a preference action. A creditor has standing to do so if certain conditions are met. First, the creditor must show that a colorable claim exists which will benefit the estate. Second, the creditor must have demanded that the Trustee or the debtor-in-possession bring the action. Third, the fiduciary involved must have refused to bring the action. Fourth, the Court must find that the refusal to bring the action is unjustifiable in light of the statutory and fiduciary responsibilities placed upon the Trustee or debtor in possession. After a creditor satisfies the Bankruptcy Court by meeting these conditions, the burden of proof shifts to the Trustee or debtor in possession to rebut why the preference action should not be brought. This type of issue arises more often in Chapter 11 than in Chapter 7 cases. See In re The Gibson Group, Inc., 66 F.3d 1436 (6th Cir. 1995).

O. [6.41] Venue

Venue is governed by 28 U.S.C. §1409. Subsection (a) allows a Trustee to file a preference action in the Bankruptcy Court in which the case arose. The action can be brought regardless of where the defendant resides. The only limitation is set forth in 28 U.S.C. §1409(b), which limits the Trustee to bring an action for an amount less than $1,000.00 or a consumer debt of less than $5,000.00 only in the District Court in the district where the defendant resides. Controversies which do not exceed these amounts often place the defendant at a decided disadvantage where the defendant resides a substantial distance from the Court in which the bankruptcy case if filed. Venue often provides an effective weapon to the Trustee in obtaining a preference judgment equal to the merits of the action itself.

P. [6.42] Statute Of Limitations

The statute of limitations applicable to actions under §547 of the Bankruptcy Code is governed by 11 U.S.C. §546(a). This Code section allows the Trustee the later of either two (2) years from the day the bankruptcy was filed or one (1) year after the appointment or election of the first Trustee under either Chapter 7 or 11 U.S.C. §1104, Chapter 12 or Chapter 13, if the appointment or election occurs before the expiration of two (2) years from the filing of the bankruptcy.

A preference action may not be commenced after the case is closed or dismissed. Hence, the period begins to run the day the bankruptcy case is filed. Be aware that the 6th Circuit has ruled in an often criticized case that the two (2) year statute of limitations is a jurisdictional prerequisite. In other words, the clerk's office is always open. Thus, Saturdays, Sundays and holidays do not extend the statute of limitations until the next working day. In re Butcher, 829 F.2d 596 (6th Cir. 1987).

III. [6.43] FRAUDULENT CONVEYANCE LITIGATION

The Trustee can avoid fraudulent conveyances which occur within one (1) year of the filing of the bankruptcy petition. 11 U.S.C. §548 sets forth the terms and conditions under which a Trustee may avoid a transfer on the grounds of fraudulent conveyance. The purpose of the fraudulent conveyance
statute is to enhance the pool of funds from which creditors can recover by setting aside gratuitous transfers made on the eve of the filing of the bankruptcy.

11 U.S.C. §548

§548  Fraudulent transfers and obligations.

(a) The Trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

1. made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

2. (A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

   (B) (i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

   (ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

   (iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor’s ability to pay as such debts matured.

(b) The Trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d) (1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the
The Chapter 7 Bankruptcy Trustee and the Bankrupt Estate

transferee, but if such transfer is not so perfected before the commencement of
the case, such transfer is made immediately before the date of the filing of the
petition.

(2) In this section—

(A) “value” means property, or satisfaction or securing of a present antecedent
debt of the debtor, but does not include an unperformed promise to furnish
support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial
institution, or securities clearing agency that receives a margin payment,
as defined in section 101, 741, or 761 of this title, or settlement payment, as
defined in section 101 or 741 of this title, takes for value to the extent of
such payment;

(C) a repo participant that receives a margin payment, as defined in section
741 or 761 of this title, or settlement payment, as defined in section 741 of
this title, in connection with a repurchase agreement, takes for value to
the extent of such payment; and

(D) a swap participant that receives a transfer in connection with a swap
agreement takes for value to the extent of such transfer.

A. [6.44] Definitions Under §548

1. [6.45] Transfer

Section 548(a) of the Bankruptcy Code allows a Trustee to avoid any transfer of an interest of the
debtor in property or any obligation incurred by the debtor that is incurred either voluntarily or invol­
untarily within one (1) year of the filing of the bankruptcy. In determining what constitutes a transfer,
1386 (1992). However, frequently federal law is silent on what constitutes a transfer. In that instance,
the Trustee must look to the interest in property as defined by State law. In re FBN Food Services, Inc.,
185 B.R. 265 (N.D. Ill. 1995). Courts will examine transfers of interests in real estate according to the date
of recording of the controlling instrument. See In re Leyy, 185 B.R. 378 (Bkrtcy. S.D. Florida 1995). The
transfer must necessarily involve an interest of the debtor, but the debtor may hold less than full title. In
untary severance of the title of the debtor. Prior to 1994, the validity of a foreclosure sale of real estate for
less than seventy percent of its value was open to question. See Durrett v. Washington National Insur­
ance Company, 621 F.2d 201 (5th Cir. 1980). The so called Durrett Rule was abrogated at least with
reference to real estate foreclosure sales in B.F.P. v. Resolution Trust Corporation, ____ U.S. ____ 128
L.ED2d 556, 114 S.Ct 1757 (1994). The Supreme Court in B.F.P. held that, in the absence of evidence of
collusion, the sale price derived from a foreclosure sale properly advertised and conducted pursuant to
state law is reasonably equivalent value as a matter of law. As such, a valid foreclosure sale is sufficient
to defeat a fraudulent conveyance action regardless of the price brought at the forced sale.

2. [6.46] Incur Obligation

The transfer of an interest of the debtor encompasses more than simply the debtor transferring
title. For example, a debtor who subjects property to a mortgage in favor of a relative within one (1)
year of the filing of the bankruptcy has made a fraudulent conveyance. The issue of tithing, which is incurring an obligation in furtherance of worship in one's religion, has created much concern. A Chapter 7 Trustee recently attacked tithing and brought an action against the religious institution that received the contributions. In re Tessier, 190 B.R. 396 (Bkrtcy. D.Mont. 1995). However, while finding that tithing was a fraudulent conveyance as defined in §548 of the Bankruptcy Code, the Eighth Circuit recently held that recovery of religious contributions otherwise recoverable under §548 violated the Religious Freedom Restoration Act, 42 U.S.C. §2000b-b. In re Young, 82 F.3d 1407 (8th Cir. 1996).

3. [6.47] Intent to Defraud

For purposes of 11 U.S.C. §548, the Trustee must prove either actual intent to defraud or constructive fraud. Actual fraud is found if the Trustee proves that the transfer of the interest of the debtor was made with actual intent to hinder, delay or defraud any entity to which the debtor was already obligated to or became obligated by the debtor within one (1) year of the filing of the bankruptcy. Actual harm is not an element necessary to prove a fraudulent conveyance. The Trustee only must show that the debtor acted with intent to hinder or delay creditors. In re Sherman, 67 F.3d 1348 (8th Cir. 1995).

a. [6.48] Actual Fraud

Actual intent to defraud on the part of the debtor may be inferred from the badges of fraud in a subjective evaluation of the debtor’s intent. Badges of fraud that a Court may evaluate include threatened or actual litigation existing at the time of the transfer, the degree of the transfer of the interest of the debtor of the property, the state of the debtor’s finances at the time of the transfer, the special relationship held by the debtor with regard to the transferee and the retention of property by the debtor despite the transfer.

b. [6.49] Constructive Fraud

The Trustee may also set aside transfers of interest of the debtor if the debtor received less than a reasonably equivalent value in exchange for the transfer or obligation and was either insolvent on that date or was rendered insolvent by such transfer or obligation. The phrase reasonably equivalent value does not require a finding that the debtor possessed actual intent to defraud. In re Young, 82 F.3d 1407 (8th Cir. 1996). The Trustee can avoid a transfer simply if the debtor received less than reasonably equivalent value. In re McDonnell, 934 F.2d 662 (5th Cir. 1991). The issue in reasonably equivalent value cases is normally whether a creditor paid sufficient consideration. For purposes of real estate foreclosure sales, the Supreme Court ruled that in the absence of collusion, and so long as the State statutes which prescribe the procedure for selling real estate and foreclosure were followed, the sales price was as a matter of law reasonably equivalent value. B.F.P. v. Resolution Trust Corporation, _ U.S. 128 L.Ed2d 556, 114 S.Ct. 1757 (1994). The current trend of cases avoids a specific numerical percentage or formula. Rather the Court must factor fair market value and the extent of the lack of interest between the parties and transaction. The closer or more special the relationship is between the parties, the less of an arms length transaction, the more scrutiny the Court renders the transfer to ensure that the creditor paid fair market value. See In re Morris Communications, NC, Inc., 914 F.2d 458 (4th Cir. 1990).

4. [6.50] Insolvency

Insolvency is determined as of the time of the transfer using a so-called balance sheet test. In re Taubman, 160 B.R. 964 (Bkrtcy. S.D. Oh. 1993). The Trustee bears the burden of proof on the issue of insolvency. In re McConnell, 934 F.2d 662 (5th Cir. 1991). The Trustee also prevails in a fraudulent conveyance case if he shows that the result of the transaction or transfer of the debtor reveals that the debtor was unreasonably undercapitalized or that the debtor would be unable to pay his debts as they matured.
B. [6.51] Partnership Transfers

If a partnership files bankruptcy, a Trustee is required to liquidate the assets of the partnership and then pursue the individual partners for the unpaid bills of the partnership. 11 U.S.C. §723. If the partnership files bankruptcy, the Trustee of the partnership may avoid transfers that have occurred with individual partners within one (1) year of the filing of the bankruptcy if the debtor partnership was either insolvent on the date of the transfer or became insolvent as a result of the transfer. The Trustee of the partnership debtor is not required to show any intent or that the transfer was for less than an reasonably equivalent value.

C. [6.52] Rights Of Transferees

Initial transferees are those parties who receive property transferred in the fraudulent conveyance. The initial transferee, if the Trustee succeeds, loses the avoided conveyance, and the subject property is restored to its status prior to the transfer, subject to the Bankruptcy. A subsequent transferee who qualifies as a bonafide purchaser will be able to defeat a Trustee’s claim under 11 U.S.C. §548, to the extent that the B.F.P. actually gave value in exchange for the transfer. See In re Coutee, 984 F.2d 138 (5th Cir. 1993). The transferee bears the burden of proof on the element of good faith, a basic prerequisite to being a B.F.P. U.S. v. Nordic Village, Inc., 503 U.S. 30, 117 L.Ed.2d 181, 112 S.Ct. 1011 (1992). To the extent that new value was paid by the transferee in an avoided transfer, the Trustee must reimburse the transferee. 11 U.S.C. §548(c).

D. [6.53] Transfer

Section 548(d)(1) of the Bankruptcy Code defines the term "transfer" and its application in cases of fraudulent conveyance. Contrast the definition with section 547, the preference section, which fails to define the term "transfer". 11 U.S.C. 548(d)(1) defines "transfer" in terms of perfection of the conveyance by the creditor and notice to other parties of the change in character of the subject property. The date of recording the instrument places all parties on notice of the transfer of the debtor’s interest. That filing perfects the interest of the transferee. At that point in time, a B.F.P., a role the Trustee can assume pursuant to 11 U.S.C. §544(a)(3), cannot defeat the interest of the transferee.

If the transferee fails to perfect its interest until after the filing of the bankruptcy petition, section 548(d)(1) deems the perfection to have occurred on the day before the filing of the bankruptcy. The date of transfer is the key date relating to the date of the bankruptcy petition, because the transfer must occur within one (1) year of filing of the bankruptcy petition. Thus, a Court held that the transfer of realty occurred on the day the girlfriend of the debtor recorded her deed, which occurred within one (1) year of the filing of her boyfriend’s bankruptcy, not withstanding the fact that the debtor executed the deed several years prior to the filing of the bankruptcy. In re Levy, 185 B.R. 371 (S.D. Fla. 1995).

A creditor perfects his lien on personalty normally by filing a UCC-1 although no filing is required for most consumer purchases.

E. [6.54] Value Defined

11 U.S.C. §548(d)(2) defines value as property, or the securing of a present or antecedent debt of the debtor. Value does not include an unperformed promise to furnish support to the debtor or a relative of the debtor. The definition of value differs slightly for fraudulent conveyance purposes than for preferences or other Bankruptcy Code sections. Commodity brokers, stock brokers, and financial institutions, or other parties who deal with securities have special rules for dealing with margin payments.
or swap agreements. The securities party is entitled to the bonafide purchaser defense to the extent that he has taken payment or value to the extent of a margin or swap agreement.

F. [6.55] Parties – Plaintiffs

As in preference actions, normally the Trustee or debtor in possession alone has standing to bring a fraudulent conveyance action. The statute plainly states that the Trustee is the party authorized to bring the action. The debtor is also authorized to bring a fraudulent conveyance action pursuant to 11 U.S.C. §522(g) or (h) to the extent that the debtor protects an exemption he claimed in his property. However, the debtor is not allowed to take advantage of the transfer of either a preference or a fraudulent conveyance action to the extent that a lien avoided is preserved for the benefit of the bankruptcy estate against the debtor. 11 U.S.C. §551. The debtor cannot take advantage through his exemptions when he previously agreed to subordinate his exempt interest in property to a creditor. The effect of lien preservation is that the Trustee replaces the avoided party as a secured creditor. The exemption of the debtor remains subordinate to the lien interest of the bankruptcy estate. The lien against the interest of the debtor remains.

The Sixth Circuit has also addressed whether an individual creditor has standing to bring a fraudulent conveyance action. In the case of In re The Gibson Group, Inc., 66 F.3d 1436 (6th Cir. 1995), the Court allowed a creditor to bring a §548 action since the creditor alleged a colorable claim that benefited the estate. The Court agreed with the analysis of the creditor that the fraudulent conveyance action benefited the estate. The Court must find that the creditor demanded that either the Trustee or the debtor in possession bring the fraudulent conveyance action and that the Trustee or debtor in possession refused to bring the action. The Court must find that the refusal of the Trustee or debtor in possession to bring the fraudulent conveyance action was unjustifiable in light of its statutory and fiduciary responsibilities. While the initial burden is on the individual creditor to show that it has met these elements, once established, the burden of proof shifts to the Trustee or debtor in possession to show why the fraudulent conveyance action should not be brought.

G. [6.56] Venue

Venue is governed by 28 U.S.C. §1409. Venue normally lies in the Court in which the bankruptcy case is filed. In the event that the fraudulent conveyance action seeks to recover a money judgment of less than $1,000.00 or a consumer debt of less than $5,000.00, the action must be brought only in the District where the defendant resides.

H. [6.57] Statute Of Limitations

Statute of limitations applicable to fraudulent conveyance actions are defined in 11 U.S.C. §546(a). This section allows an action to be brought either the later of two (2) years from the date the bankruptcy petition is filed, or one (1) year after the appointment of the first Trustee if such appointment occurs before the expiration of two (2) years after the case is originally filed. If the case is closed or dismissed, there is no standing to bring a fraudulent conveyance action.

I. [6.58] State Law

11 U.S.C. §544(b) empowers a Trustee to utilize the state law fraudulent conveyance scheme. Kentucky Revised Statutes 378.010 allows for a reach back of five (5) years rather than the one (1) year of 11 U.S.C. §548. The Trustee under state law must establish that a debt existed on the date of transfer and that the transfer was made with intent to defraud creditors. KRS 378.010. A Trustee may also employ KRS 378.020 to set aside a transfer made by the debtor when he received no consideration rather than the standard of reasonably equivalent value pursuant to 11 U.S.C. §548.
A Trustee may utilize the state statutes because he possesses a five (5) year statute of limitations under KRS 413.120 rather than two (2) under 11 U.S.C. §546. Arguably, a Trustee can extend the five (5) year statute of limitations to seven (7) years. 11 U.S.C. §108(a) extends a statute of limitations if it otherwise expires before the end of two (2) years after the filing of the bankruptcy petition.

IV. [6.59] "STRONG-ARM" POWERS OF A CHAPTER 7 TRUSTEE

A. [6.60] General Analysis Of A Trustee's Powers

Section 544(a) of the Bankruptcy Code, often referred to as the “strong-arm clause,” provides the Trustee with the power and status of a hypothetical judicial lien creditor, a hypothetical bona fide purchaser, a creditor that extends credit at the time the bankruptcy case was commenced and an actual unsecured creditor. Although bankruptcy law confers upon the Trustee the rights of hypothetical creditors, the Trustee must look to relevant state law to determine what rights and remedies a creditor would have to avoid transfers of property. Section 544 of the Code confers no greater rights or powers on the Trustee than the applicable state law affords a creditor occupying the position assumed by the Trustee.

Since state law governs the powers of the Trustee under § 544, one necessary question is which state’s laws control. If the property of the estate is located in more than one jurisdiction or affected by contracts of more than one jurisdiction, the tendency of the courts is to utilize the law of the situs of the property at the commencement of the case. However, courts are not in consistent agreement regarding the manner in which the choice of law rules are applied.

B. [6.61] Trustee’s Status As A Lien Creditor

1. [6.62] § 544(a)

Section 544 confers upon the Trustee the rights of certain hypothetical creditors, specifically:

(a) a creditor that extends credit to the debtor at the time of the commence-
mence of the case, and that obtains, at such time and with respect to such
credit, a judicial lien on all property on which a creditor on a simple con-
tact could have obtained such a judicial lien, whether or not such a credi-
tor exists;

(b) a creditor that extends credit to the debtor at the time of the commence-
mence of the case, and obtains, at such time and with respect to such time,
whether or not such a creditor exists; or

(c) a bona fide purchaser of real property, other than fixtures, from the debtor,
against whom applicable law permits such transfer to be perfected, that
obtains the status of a bona fide purchaser at the time of the commence-
mence of the case, whether or not such a purchaser exists [and has perfected
such transfer].

The rights of these hypothetical creditors, and thus the Trustee, is dependent upon state law.

While, obviously, there is a variety of state statutory laws to apply, many of the actions brought by the Trustee will be based upon the Uniform Commercial Code. Section 9-301 specifies that “an unperfected security interest is subordinate to the rights of . . . a person who becomes a lien creditor before the security interest is perfected . . .” Therefore, in his/her position as a hypothetical lien credi-
tor, the Trustee has rights superior to any creditor that is unperfected as of the date of filing for any of
the number of reasons. For goods, the security interest must be perfected by the filing of a financing statement, pursuant U.C.C. § 9-302. The Trustee gains priority over any creditor that did not file a perfected security interest, whose filing has lapsed, who filed in the wrong location or in an inappropriate manner, who did not identify the security interest properly, or who failed to amend the filing to reflect subsequent changes.

Since the Trustee does not obtain rights greater than a lien creditor under § 544(a), creditors with a purchase money security interest perfected after the filing but in the time allowed by statute (twenty (20) days in Kentucky) are not subordinate to the interest of the Trustee. It is not a violation of the automatic stay for a creditor to file to perfect such a lien within twenty (20) days from the date the debtor received possession of the goods.

In addition to the filing requirements for holders of security interests in goods, the Uniform Commercial Code also sets forth certain notice provisions for a consignment seller under § 2-326(3). To the extent these notice requirements are not met, the Trustee may avoid the transfer and recover goods held on consignment.

Although the Uniform Commercial Code sets forth specific rights of the Trustee as to holders of security interests in goods of a hypothetical lien creditor, this status also provides the Trustee with power over creditors holding non-Code interests such as unrecorded real estate mortgages or conveyances.

As a hypothetical bona fide purchaser for real estate pursuant to § 544(a)(3), the Trustee holds rights greater than those of a hypothetical lien creditor. As well as the unrecorded interest that the Trustee could set aside as a hypothetical lien creditor, a hypothetical bona fide purchaser may avoid an unrecorded equitable interest, equitable claims under constructive or implied trust, or interest of a transferee claiming under recorded instruments with minor defects in form or content.

The status of a bona fide purchaser gives the Trustee some specific power of actions against the state government in Kentucky. Kentucky law provides that the state, county, city or other taxing districts shall have a lien on property assessed for taxes for five (5) years following the date when the taxes became delinquent. The lien may not be defeated by gift, devise, sale, alienation or other means except by sale to a bona fide purchaser.

Where the Commonwealth has seized property related to the trafficking in controlled substances, the seizure of said property may be set aside only by a subsequent bona fide purchaser.

2. § 544(b)

While the trustee is given the status of a hypothetical creditor under §544(a), regardless of the existence of any such creditor, §544(b) somewhat broadens the trustee's standing further by providing,

The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

For the trustee to avoid a transfer pursuant to this subsection there must exist an actual creditor with an appropriate claim. This creditor must hold an allowed claim or one that is not allowable only because of §502(e), which disallows certain claims by co-debtors or sureties. Once it is established that there is such a creditor, the trustee acts not for the benefit of that creditor but as trustee for the estate.

Under section 544(b), the Trustee is able to set aside fraudulent transfers or other voidable transfers under state law. In a case out of the Eastern District of Kentucky, for example, the trustee was able
to utilize the Kentucky preferential transfer law, KRS §378.060, to set aside a transfer between the debtor and a third party where the trustee may not have been able to show that the transfer was a preference under 11 U.S.C. §547(b).10

Since the trustee’s rights to pursue a cause of action is derivative of a specific creditor, it is generally accepted that any defenses, including estoppel or statute of limitations, good against the creditor are good against the trustee.11 Therefore, where the creditor has taken some action prior to the filing of the bankruptcy that would deem the transfer valid, the trustee will be foreclosed from avoiding the transfer. When the statute of limitations has run before the filing of the bankruptcy, the trustee is likewise prevented from avoiding the transfer.

When the statute of limitations has not run on the date of filing of the petition, there is some disagreement among the courts regarding whether to apply the state law statute or the limitation set forth in §546(a) which provides a two (2) year limitation period for actions under §544. The view that has been adopted by the Bankruptcy Courts in Kentucky is that if the statute of limitations had not run on the date of filing, the trustee must bring the action to avoid the transfer within the two (2) year period set forth in §546(a).12

C. [6.64] Trustee’s Power to Avoid Statutory Liens

Section 545 of the Bankruptcy Code provides that the Trustee may avoid certain statutory liens. Section 545 states as follows:

The Trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien —

1. First becomes effective against the debtor —
   (A) when a case under this title concerning the debtor is commenced;
   (B) when an insolvency proceeding other than under this title concerning the debtor is commenced;
   (C) when a custodian is appointed or authorized to take possession;
   (D) when the debtor becomes insolvent;
   (E) when the debtor’s financial condition fails to meet a specified standard; or
   (F) at the time of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien;

2. is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists;

3. is for rent; or

4. is a lien of distress for rent.

Section 545 can be generally divided into three categories of statutory liens. First, those triggered by the insolvency of the debtor; second, those not valid against a bona fide purchaser; and third, a lien for rent.
The statutory liens referenced in § 545(1)(A)-(F), allows the Trustee to avoid any lien which arises solely because the debtor has become insolvent. "Insolvent" is a defined term under § 101 of the Code, which utilizes the traditional balance sheet definition of insolvency where the debtor is considered insolvent when his liabilities exceed his assets. This traditional definition of insolvency is modified by the Code by adding a provision that the debtor’s non-exempt assets are excluded from calculation. However, since the applicable lien is a creature of state law, the state law definition of insolvency that applies will generally prevail in determining whether such a lien exists. It is possible, therefore, for the debtor to be insolvent for purposes of the Code but not insolvent under state law.

Section 545(2) provides the Trustee with the status of a hypothetical bona fide purchaser similar to § 544(a)(3). However, § 545(2) does not limit the Trustee to the position of a bona fide purchaser of real property.

The avoidability of a statutory lien under § 545(2) will typically turn on whether the creditor has taken the sufficient steps to perfect its interest under state law. Although most interests must be perfected at the time the case is filed, some interests may be perfected at a later date. Section 546(b) provides that the Trustee’s rights under § 545 are subject to any state law that permits perfection, post-filing, to relate back to a pre-filing date. For instance, in Kentucky, notice of a mechanic’s and materialman’s lien must be filed within a certain time of the work being performed. If the notice is filed within this time, the lien will relate back to the date that the service was performed. Therefore, under § 545, the Trustee cannot avoid a mechanic’s and materialman’s lien where the work was performed prior to filing but the creditor perfected its interest within the statutory time period although post-filing.

Much litigation under § 545(2) involves federal tax liens. The Internal Revenue Code creates a lien in favor of the United States on all property by a person liable to pay taxes upon the assessment that that tax is made. However, that same statute provides that the lien imposed upon assessment is not valid against "any purchaser, holder of a security interest, mechanic’s lien or judgment lien creditor, until notice thereof which meets the requirements of sub-section (f) has been filed by the secretary or his delegate." Therefore, to the extent the Internal Revenue Service has not filed the requisite notice, the Trustee in his position as hypothetical bona fide purchaser may avoid the lien in favor of the Internal Revenue Service.

D. [6.65] Statute Of Limitations

Section 546(a) sets forth the statute of limitations applicable to the Trustee when taking an action to avoid a transfer or lien under §§ 544, 545, 547, 548, and 553. Under § 546, the Trustee may not commence an action after the earlier of:

1. the later of —
   A. Two years after the entry of the order for the relief; or
   B. One year after the appointment or election of the first Trustee under §§ 702, 1104, 1163, 1202, or 1302, if such appointment of election occurs before the expiration of the period specified in sub-paragraph (A); or

2. the case is closed or dismissed.

Section 546(a) as described above, is as amended by the Bankruptcy Reform Act of 1994. Prior to the amendment, avoidance actions were barred after the earlier of two dates: two (2) years after the Trustee’s appointment, or the time the case was closed or dismissed. By amending the statute, the limitation period has generally been reduced to two (2) years from the entry of order for relief as op-
The Chapter 7 Bankruptcy Trustee and the Bankrupt Estate

posed to two (2) years from the appointment of the Trustee. While an action may be brought one (1) year from the appointment or election of the Trustee, this provision does not take effect if the two (2) year time limit from the order of relief has expired. If no Trustee is appointed during the first two (2) years, the statute is not revived upon the appointment of a Trustee.

V. [6.66] OTHER ISSUES RELATING TO TRUSTEE’S ADMINISTRATION OF THE BANKRUPTCY ESTATE

A. [6.67] Post-Petition Transfers

In general, post-petition transfers are avoidable by the Trustee under § 549 if they are not authorized by the Court or by some provision of the Bankruptcy Code. Upon the filing of a Chapter 7 petition, the debtor is not authorized to sell or transfer property, or operate its business. Any entity taking title from a Chapter 7 debtor does so at his or her own peril. A Chapter 11, 12, or 13 debtor is authorized to continue operating its own business; therefore, in those cases a post-petition transfer will not be avoidable.

Two kinds of unauthorized post-petition transfers are, saved from avoidance under §549. First, until constructive knowledge of the bankruptcy is given by recordation of a copy of notice of the petition in the appropriate land records office, a good faith transferee of real estate who had no knowledge of the pending bankruptcy is protected to the extent he gave fair, equivalent value. Second, in the interim between the filing of an involuntary petition and the Order of Relief, referred to as the “gap period”, a transferee is protected in any dealings with the debtor to the extent he gave value for the transfer. Finally, under §542(c), one who owes money to the debtor or holds property of the estate is not liable to the Trustee if, after bankruptcy, that person in good faith and without knowledge of the filing of the case pays the debtor or transfers the property to someone other than the transferee. The transferee will bear the burden of proof to establish a valid post-petition transfer. The Trustee must commence the adversary proceeding to avoid these transfers within two (2) years of the transfer or the time the case is closed or dismissed, whichever is earlier.

B. [6.68] Trustee’s Power To Compel Turnover Of Property

Section 704 charges the Trustee with the responsibility to collect and liquidate property of the estate. The Bankruptcy Code, in two separate sections, gives the Trustee the power to compel turnover of property which is in the possession of third parties, including court-appointed custodians.

1. [6.69] §542 Turnover of Property of the Estate

Section 542 requires any entity, other than a custodian, who comes into possession of property of the estate which “the Trustee may use, sell or lease under § 363” to surrender such property to the Trustee upon demand. If the third party refuses to surrender possession, the Trustee should commence an adversary proceeding to obtain an appropriate court order.

The property for which the Trustee can compel turnover is limited to property which the Trustee can “use, sell or lease under §363.” As a result, if the property is subject to a valid claim of set-off such as a bank account, the Trustee cannot compel the bank to surrender the proceeds of the account and defeat the bank’s right of set-off. If a creditor has a valid security interest in property and if the creditor has received relief from the automatic stay, the Trustee will not be entitled to turnover. In addition, property which is of “inconsequential value or benefit to the estate” cannot be compelled through turnover.
If a Trustee commences an adversary proceeding, it will be the Trustee’s burden to prove: (a) possession and control of property by the entity; (b) that the property can be utilized by the estate under § 363; and (c) that the property’s value is more than inconsequential.26

This section will also authorize the Trustee to compel turnover of records and documents regarding the debtor’s property and financial affairs from the debtor’s attorney, accountants, or other third parties. This turnover is subject to any applicable privilege.27 The attorney/client privilege of a corporate debtor is held, however, by the Trustee who has the power to waive as to pre-petition communications.28

2. [6.70] §543 Turnover of Property by Custodian

In addition to the powers of turnover set forth in § 542, the Trustee has the power to compel turnover of property from a “custodian.” A “custodian” is defined by the Bankruptcy Code to mean:

(A) receiver or Trustee of any of the property of the debtor, appointed in a case or proceeding not under this title; (B) assignee under a general assignment for the benefit of the debtor’s creditors, or (C) Trustee receiver or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor’s creditors.

Once a custodian has knowledge of the bankruptcy, the custodian is prohibited from making any disbursements of property of the estate or take any action in the administration of that property except as may be necessary for its preservation.29 This statute affirmatively directs the custodian to deliver to the Trustee all of the property of the debtor and its proceeds and to provide the Trustee with an accounting of all the property which came into the custodian's possession.30

The property which is to be turned over by the custodian is not limited, as in the case of §542, to property which the Trustee could use, sell, or lease as no such limitation exists in §543.

In the appropriate case, the Bankruptcy Court can allow the custodian to remain in possession of the property of the estate if it would be in the best interest of the creditors. Special circumstances may exist if the custodian had been charged with liquidating the property of the debtor and it would be in the best interest of the creditor for the custodian to continue with the liquidation process.

If a custodian is directed to turn over property of the estate, the Bankruptcy Court, after notice and hearing, is empowered to provide for the payment of the custodian’s expenses and fees. The Court can also provide for the payment of any third party or entity to which the custodian has become obligated.

C. [6.71] Trustee’s Standing To Object To Or Revoke Discharge

Although seldom used, the Trustee has standing under the Code to oppose the grant of a discharge or within the time limits seek a revocation of that discharge. Section 727 outlines specific circumstances in which a debtor can be denied a discharge. For example, a discharge can be denied if the debtor has concealed, destroyed, mutilated, falsified or failed to keep or preserve books or records concerning his or her financial condition or business transactions, knowingly and fraudulently gave a false oath, failed to adequately explain loss of assets or deficiency of assets or with the intent to hinder, delay, or defraud a creditor, has transferred or concealed property within one year before the filing of the petition. Under certain circumstances, a Trustee or creditor may seek to revoke a discharge previously granted if the discharge was obtained through fraud or if the debtor acquired property of the estate and fraudulently failed to report the acquisition of the property or failed to surrender such prop-

144
The Chapter 7 Bankruptcy Trustee and the Bankrupt Estate

property to the Trustee.\(^{31}\) The Trustee in that circumstance could file an adversary proceeding seeking the revocation of the discharge in the case of fraud within one (1) year after the discharge is granted, or in the circumstance in which property of the estate is acquired by the debtor which is not surrendered, one (1) year after the granting of the discharge or one (1) year after the date the case is closed whichever is later.

D. [6.72] Operation Of The Debtor’s Business

In most Chapter 7 proceedings, upon the filing of the petition for relief, any business operations of the debtor must immediately cease, and the Trustee is charged to take possession of the business assets and begin liquidating those assets for future distribution to the creditors. In some limited circumstances, it may be in the best interest of the creditors for the debtor’s business to continue operating on at least a temporary basis. For example, it may be in the creditors’ interest for the Trustee to sell the business as a going concern as opposed to liquidating its individual assets. Section 721 authorizes the Trustee, with Court approval, “to operate the business of the debtor for a limited period.” If the Court, after notice and opportunity for hearing, authorizes the temporary operation of the business, the Trustee may use, lease or sell property of the estate consistent with the requirements of §363, or obtain credit pursuant to the terms of §364. Like a debtor-in-possession in a reorganization proceeding, the Trustee is prohibited from using cash collateral without Court approval or creditor consent.\(^{32}\) Section 704(8) will require that the Trustee file periodic reports and summaries of the operation and provide those reports to the Court, the U.S. Trustee, and all governmental units responsible for the collection of taxes.

E. [6.73] General Duties And Responsibilities Of A Trustee

Upon his or her appointment or election, the Trustee is charged with certain responsibilities to the creditors, the estate, and the Court. The Trustee will owe a fiduciary duty to the estate and the creditors in the performance of these duties. In order to fulfill this responsibility, the bankruptcy Trustee will have standing to bring certain causes of action and will have the power to avoid certain transfers. The Trustee is required to exercise due diligence and act in the best interest of the creditors.\(^{33}\)

This section will examine the general responsibilities of a Trustee as set forth by §704 of the Code.

1. [6.74] Control Property of the Estate

The Bankruptcy Code vests exclusive control of the property of the estate in the Trustee. Section 704(a) requires that the Trustee collect and reduce to money the property of the estate and to be accountable for the property received. The powers given the Trustee to avoid transfers and compel turnover of property are to be exercised to fulfill this duty. In addition, the Trustee should give notice to all banks, utility companies, landlords, and insurance companies issuing a policy with cash surrender value payable to the debtor.\(^{34}\)

Once the property is collected, if it has value over and above the mortgages or security interests, and the debtors’ exemptions, then the Trustee is to liquidate the property in a manner so as to produce the best dividend for the unsecured creditor. This sale typically will be conducted pursuant to §363 free and clear of all liens. If the property has no value to the unsecured creditors, the Trustee should abandon his interest. Upon abandonment, title to the property re-vests in the debtor.\(^{35}\)

After his or her appointment, the Trustee is to file a physical inventory of the property of the debtor. This inventory is to be based upon the Trustee’s review of the debtors’ petition as well as the Trustee’s own investigation.\(^{36}\) As the Trustee administers the estate, the Trustee is to maintain appropriate books and records showing all receipts and disbursements.\(^{37}\)
Since the Trustee is vested with exclusive control of the property during the administration of the estate, the Trustee is also accountable for all property. To satisfy the Trustee's fiduciary duties, the Trustee may need to obtain insurance protecting the property and the estate from any loss or damage.

2. [6.75] Insure Debtor's Performance of §521 Intentions

In 1984, the Bankruptcy Code was amended to require that the debtor file within thirty (30) days of the date of filing the petition a statement of his or her intent with respect to the retention or surrender of property. The debtor is required to specify whether the property is exempt, whether the debtor intends to redeem the property, or reaffirm the debt secured by such property. Within forty-five (45) days after the filing of the notice of intent, the debtor is directed to perform his or her intentions.

Section 704(3) charges the Trustee with responsibility for insuring that the debtor performs his intentions concerning the retention or surrender of property. The Trustee can inquire of the debtor at the §341 meeting, but unfortunately in many cases the §341 meeting will be conducted prior to the expiration of the time period set forth in §521. It may be appropriate for the Trustee to continue the §341 first meeting of creditors in order to give the debtor the opportunity to complete his or her intentions, or for the Trustee to have follow-up contact with debtor's counsel.

3. [6.76] Duty to Examine Debtor Concerning Knowledge of the Bankruptcy Proceedings

In the 1994 amendments to the Bankruptcy Code, §341 regarding the first meeting of the creditors was amended to require that the Trustee question the debtor to insure that the debtor understands:

1. The potential consequences of seeking a discharge in bankruptcy, including the effects on credit histories;

2. The debtors' ability to file a petition under a different chapter of this title;

3. The effect of receiving a discharge of debts under this title;

4. The effect of reaffirming a debt, including the debtors' knowledge of the provisions of §524(d) . . .

Section 524 regarding reaffirmation agreements was also amended so that a court hearing approving the reaffirmation agreement is no longer necessary if the debtor was represented by counsel in the known negotiation of the agreement. Since no court hearing will be held to approve the reaffirmation agreement, the Bankruptcy Code has charged the Trustee with responsibility to insure that the debtors understand the legal effect and consequences of a reaffirmation agreement and a default under that agreement as well as to insure that the debtor understands that the reaffirmation agreement is a voluntary agreement.


In order to fulfill his or her fiduciary duties and to collect all the property of the estate available, the Trustee cannot rely solely upon the debtors' bankruptcy petition and schedule of assets and liabilities. The Trustee must perform his or her own independent investigation. This investigation can be performed informally through a review of the debtors' books and records. The Trustee will have the opportunity to question the debtor at the §341 first meeting of creditors. If a more extensive questioning is required, the Trustee is authorized to conduct such examinations pursuant to Rule 2004 which allows for an examination in a manner substantially equivalent to a civil discovery deposition. Rule 2004 is not limited to debtors. Under this Rule, the Court can order an examination of "any entity". This rule would allow the Trustee to depose the debtor, any creditor, any transferee of property, the accountant of the debtor or any other person who has knowledge concerning the assets, liabilities, or financial affairs.
The Chapter 7 Bankruptcy Trustee and the Bankrupt Estate

and transactions of the debtors. As part of this examination, the debtor, or any party in interest, has the right to compel production of documents.

The debtor is charged with the duty to cooperate with the Trustee to enable the Trustee to perform his or her duties. Should the debtor fail to cooperate, such failure may be a basis to oppose the discharge of the debtor pursuant to §727.

5. [6.78] Examination of Proof of Claims

In order to have an allowed claim for purposes of distribution of proceeds of the estate, a creditor, or some entity on behalf of the creditor, must file a proof of claim setting forth the nature of the claim, the amount of the debt, and appropriate documentation of the claim. Upon receipt of the proof of claims, and before making disbursements of the proceeds of the estate, the Trustee must examine each of the proof of claims and if appropriate, object to any improper claim. The objection should be in a form consistent with Bankruptcy Rule 3007.

6. [6.79] Duty to Furnish Information

Section 704 imposes upon the Trustee the duty to “furnish such information concerning the estate and the estate’s administration as is requested by a party in interest.” Often the Trustee will receive requests for information from creditors or even the debtor concerning liquidation of assets, filing of claims, and more often, the likelihood of a distribution to the unsecured creditors. The Trustee should respond to these requests if the information is available to the Trustee. Certainly the Trustee is under no obligation to incur substantial expense on behalf of the estate in order to obtain information on behalf of a creditor.

The duty to provide information is limited to “a party in interest.” The Trustee is therefore not obligated to provide information to the media.

7. [6.80] Duty to File a Final Account

The Trustee is to either liquidate or abandon the property. Upon completion of the administration of all assets, §704(9) requires that the Trustee file a final report and an account of his or her administration of the assets. This report will set forth all property and monies received and disbursed by the Trustee. Upon approval by the Court of this final report, the Trustee will then disburse all final dividends to the unsecured creditors. Ninety (90) days after making the final disbursement, if any check is remaining unpaid, the Trustee will place a stop order on that check and pay over to the Bankruptcy Court clerk all unclaimed funds. At that time, the Trustee is required by Bankruptcy Rule 3011 to file a statement setting forth that he or she has complied with the provisions of § 347. Upon filing such report, the Court should discharge the Trustee from further service and obligation and release the Trustee’s bond.
VI. [6.81] ENDNOTES


2 There appear to be three major approaches. First, the situs is the property, second is who buys the property at the time a lien came into existence, and third, a broad range of inquire with a substantial discretion in the reviewing court. In re Cuff, 54 Bankr. 424 (W.D. Mass. 1985). Where the property in question is real estate with a fixed situs, the first approach has been primarily used. Id. Where the property is highly mobile, the situs of the property at the time the lien arose has been primarily used. Where the assets in question are contract claims, the more flexible approach formulated under the Restatement of Conflicts of Laws, is available to the courts. Id. Where the parties to a contract have included a choice of law clause in the contract, this choice carries little weight with the court as the party to the action, the Trustee, would not have been a party to the contract and therefore, not subject to the clause. Ferrari v. Barclays Business Credit, Inc., In re Morris Tool, Inc., 108 Bankr. 384 (D. Mass. 1989).

3 U.C.C. 9-403.

4 U.C.C. 9-401.

5 U.C.C. 9-403.

6 U.C.C. 9-403.

7 Peck v. Trail, 251 Ky. 377, 65 S.W.2d 83 (1933).

8 KRS 134-420.

9 KRS 218A.450.


14 Id.

15 KRS 376.010.


17 Internal Revenue Code, §6321 and § 6322.

18 Internal Revenue Code, §6323.


20 §549(a)
§549(c); In re Allen, 816 F.2d 325 (7th Cir. 1987)

§549(b); Atwood v. Atwood, 124 B.R. 402 (Bankr. S.D. Ga. 1991)

Rule 6001

§549(d)

§542(a)

In re Matheney, 138 B.R. 541 (Bankr. S.D. Ohio 1962)

§542(c)


§543(a)

§543(b); Rule 6002(a)

§727(d)

§363(c)(2)

In re Rigdon, 795 F.2d 727 (9th Cir. 1986); In re Slack, 30 C.B.C.2d 1316 (Bankr. N.D. N.Y. 1994).

Bankruptcy Rule 2015(4)

§554; Rule 6007(a)

Rule 2015(a)(1)

Rule 2015(a)(2)

§704(2)

§521(2)(a)(b)

§521(3); Rule 4002(4)

§501; Rule 3001, 3002
Chapter 7

BASIC CREDITOR ISSUES IN CHAPTER 7 BANKRUPTCIES

Andrea Fried Neichter

I. [7.1] CREDITOR ISSUES

A. [7.2] Types Of Claims Against A Bankruptcy Estate

Bankruptcy Rule 3001 provides the form and content needed for a proof of claim which is a written statement detailing the creditor's claim. The proof of claim should include documentation which is the basis of the claim and should give an accounting of how the amount of the claim was determined.

Secured claims should provide a copy of the instrument evidencing a security interest or lien and proof of perfection or recording information. If a secured creditor is seeking relief from the automatic stay, a proof of claim must be filed in conjunction with a Motion for Relief in both the Eastern and Western Districts of Kentucky. L.B.R. 401 (E.D.Ky.), L.B.R. 10 (W.D.Ky.).

If the notice of the Meeting of Creditors states that assets are available for distribution, an unsecured creditor needs to file a proof of claim. Should the notice state that no assets are available, then an unsecured creditor is not required to proof of claim. Most of the time, assets will be discovered by the trustee after the notice of the meeting of creditors is sent. In these situations, a supplemental notice pursuant to Bankruptcy Rule 3002 will be sent to the creditors and creditors have ninety (90) days after notice in which to file a claim.

If a proof of claim needs to be filed in a Chapter 7 case, the claim should be filed within ninety (90) days of the first scheduled meeting of creditors. By following this guideline, you will avoid the problematic issue of whether the failure to timely file the claim was a result of "excusable neglect." See Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. Partnership, 113 S.Ct. 1489 (1993).

"Claim" is defined in §101(5) as the following: right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or right to an equitable remedy for breach of performance if such a breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

Pursuant to §502(a), a proof of claim is deemed allowed unless a party in interest objects. §502(b) limits the allowance of certain claims. Some of the claims which could be disallowed or limited are claims which are unenforceable (for example: usurious, unconscionable or ones lacking in consideration), for unmatured interest, unmatured non-dischargeable support, lease termination or employment termination. A claim which has been disallowed by the Court may be reconsidered for "cause." (If the term "cause" seems vague, then also consider that part of §502(j) also states that a reconsidered claim may be allowed or disallowed according to the "equities of the case!")

There are three types of claims: secured, priority and unsecured. Generally, practitioners do not have a problem distinguishing between secured and unsecured claims. This drafter will not offend your intelligence by dealing with the distinction. Whether a claim is a priority sometimes troubles
§507 discusses priority claims which have priority above general unsecured claims but do not have priority over secured claims. The following claims have priority in the following order:

1. administrative expenses;
2. claims arising out of involuntary bankruptcies filed but before an order of relief is granted;
3. wages, salaries or commission, including vacation, severance and sick leave pay earned by an individual within ninety (90) days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, to the extent of $4,000.00;
4. allowed unsecured claims for contribution to an employee benefit plan with certain limitations.
5. allowed unsecured claims of persons in the grain production business or against a debtor who owns or operates a grain storage facility or a United States fisherman;
6. allowed unsecured claims of individuals to the extent of $1,800.00 arising from the deposit for the commencement of a case of money in connection with the purchase, lease or rental of property, or the purchase of services, for the personal, family or household use of such individuals, that were not delivered or provided;
7. support claims in connection with a divorce proceeding; and
8. certain governmental taxes.

B. [7.3] Leases And Executory Contracts

§365(a) authorizes a trustee, subject to Court approval, to assume or reject any executory contract or unexpired lease of the debtor. An executory contract generally includes contracts in which performance remains due to some extent from both sides. A note would generally not be deemed an executory contract if the only performance that remained is repayment since performance on one side of the contract would have been completed.

If the debtor defaulted before bankruptcy, the trustee may assume only if the trustee does the following:

1. cures or provides adequate assurances that the trustee will promptly cure the default;
2. compensates or provides adequate assurance that the trustee will promptly compensate the non-defaulting party for any actual pecuniary loss to such party resulting from such default; and
3. provides adequate assurances of future performance.

Pursuant to §365(2), "default" does not include a breach of a provision of the contract which relates to any of the following: the debtor's insolvency or financial condition at any time before the closing of the case; the commencement of a bankruptcy case; the appointment of a receiver; or the
satisfaction of any penalty right or provision relating to a default arising from any failure by the debtor to perform non-monetary obligations under the executory contract or unexpired lease.

Pursuant to §365(c), the trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract release prohibits or restricts assignment of rights or delegation of duties, if:

(1) applicable law excuses a party, other than the debtor, to the contract or lease from accepting performance from or rendering performance to an entity other than the debtor or debtor in possession whether or not the contract or lease restricts assignment of rights or delegation of duties and such party does not consent to the proposed assignment or assumption; or

(2) the contract is to make a loan or extend debt to or for debtor's benefit or to issue a security of the debtor; or

(3) such lease is of non-residential real property and has been terminated under applicable non-bankruptcy law before the case is filed.

If the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within sixty (60) days after the order for relief, or within such additional time as the Court, for cause, within such sixty (60) day period, fixes, then such contract or lease is deemed rejected. See §365(d)(1).

For unexpired leases of non-residential real property, if the debtor is the lessee, the trustee must assume or reject within sixty (60) days. If he/she fails to do so, it is deemed rejected and the trustee must immediately surrender the non-residential real property to the lessor. See §365(d)(4).

If the practitioner is dealing with a non-residential lease, then §365(d)(3) should be reviewed for special rules regarding requirements for the trustee to perform certain obligations including payment of rent, limitations of the assignment of the shopping center lease, and providing adequate assurances to the assignee of the lease, permitting security deposits and clarifying that any assignments are subject to the lease provisions.

C. [7.4] Involuntary Bankruptcy Proceedings

§303 covers the law on involuntary bankruptcy cases. An involuntary case may be commenced under Chapter 7, liquidation, or Chapter 11, reorganization. An involuntary case then may be commenced against a person, business or commercial corporation that would qualify as the debtor under Chapter 7.

Involuntary cases are not permitted for municipalities because to do so may constitute an invasion of state sovereignty contrary to the Tenth Amendment and also is not permitted under Chapter 13 since to do so would constitute bad policy because Chapter 13 requires a willing debtor that wants to repay his creditors. Farmers and ranchers are also not included as an involuntary bankrupt because of the cyclical nature of their business.

If the debtor has more than twelve (12) creditors, three (3) creditors must join in the involuntary petition. Claims must aggregate at least $10,000.00 more than the value of any lien on property of the debtor securing such claims held by the holder of such claims. If the involuntary debtor is a partnership, then the trustee of the single general partner may file an involuntary petition against the partnership.
§303(c) permits a creditor holding an unsecured claim that is not contingent to join in the petition with the same effect as if the joining creditor had been one of the original petitioning creditors.

Subsection (d) of §303 permits the debtor to file an answer to an involuntary petition. This subsection also permits a general partner and a partnership debtor to answer an involuntary petition against the partnership if he did not join in the petition.

The Court may, under §303(e), require the petitioners to file a bond to indemnify the debtor for such amounts as the Court may later allow. Subsection (i) provides for costs, attorney's fees and damages in certain circumstances. Subsection (f) allows the debtor to continue to operate any business of the debtor and to dispose of property as if the case had not been commenced. The Court may also under subsection (g) appoint an interim trustee to take possession of the debtor's property and to operate any business of the debtor, pending trial on the involuntary petition.

Section 303(h) provides that if the petition is not timely controverted, the Court shall order relief against the debtor. The Court may order relief against the debtor after trial only if the debtor is generally not paying such debtor's debts as such debts become due or within 120 days before the filing of the petition, a custodian (other than a trustee or receiver) was appointed or took possession.

§303(i) allows the Court to award costs, reasonable attorney's fees or damages (proximately caused by such filing or punitive) if the Court dismisses the petition without the consent of all petitioners and the debtor. Only after notice to all creditors and a hearing may the Court dismiss the petition filed under this section on the motion of a petitioner, on consent of all petitioners and the debtor, or for want of prosecution.

Joint involuntary petitions may not be filed against a debtor and spouse. Collier's on Bankruptcy, §303.07, Who Mayor May Not Be Subject to an Involuntary Petition Under the Code; §303(a), (1995). Creditors desiring to file separate involuntary cases against the debtor and spouse must find the requisite number of creditors for each debtor and must be able to allege and prove in each case the grounds for relief against that debtor. Id.

As previously stated, §303(b) and (h)(1) state that if a debtor is not paying its debts as they become due and an involuntary case is commenced by three or more entities holding non-contingent claims aggregating at least $10,000.00 more than the value of liens on property of the debtor, an order for relief may be entered against such debtor. What happens if the debtor only has one creditor? Can an order for relief be entered against a debtor in an involuntary case? It appears that if the debtor is not paying a single debt then the case should be dismissed since the creditor cannot prove the debtor is generally not paying its open "debts" as they become due. Id.

This outcome would not hold true if the creditor could not find an adequate remedy under non-bankruptcy law or if the creditor could show special circumstances including trick, fraud or scam. In those two instances, an order for relief might be granted. Id.

D. [7.5] Utility Service In Bankruptcy Cases

§366 grants debtors protection from a cutoff of service by a utility because of the filing of the bankruptcy. A utility may not alter, refuse or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the filing of a bankruptcy case or on a debt which will be discharged in the bankruptcy case. Pursuant to §366(b), a utility may alter, refuse or discontinue service if neither the trustee nor the debtor in twenty (20) days after the filing of the bankruptcy furnishes adequate assurances of payment (in the form of a deposit or other security) for service after the filing of the bankruptcy.
§366 is intended to cover utilities with respect to a debtor who could not easily obtain comparable service from another utility, i.e., electric company or telephone company. In the case of In re Kentec Corporation, 36 B.R. 552 (W.D.Ky. 1983), a Chapter 11 debtor moved the Court for an Order directing a creditor to continue furnishing cable television wire service or signal for the debtor's customer pursuant to §366. The Court in Kentec sidestepped the issue of whether the provider of the cable television service was in fact a "utility" by relying on subsection (b) of §366 and stated that the debtor did not timely invoke the relief allowed under subsection (b) and had "officially rejected the Executory Contract of the creditor." Id. at 554.


Bankruptcy Rule 2004 allows for the examination of a debtor on the motion of any party in interest. This examination, much like a deposition, may relate only to the acts, conduct or property or to the liabilities and financial condition of the debtor or to any matter which may affect the administration of the debtor's estate or to the debtor's right to discharge. The debtor can be compelled to appear at a 2004 Examination pursuant to Bankruptcy Rule 9016. Interestingly, the Court may for cause shown order the debtor to attend the 2004 Examination at any time or place it designates whether within or out of the District where the case is pending.

An entity other than the debtor may also be examined under Bankruptcy Rule 2004 and shall not be required to attend as a witness unless lawful mileage and witness fees for one day's attendance are first tendered. The lawful mileage and fee for attendance at a United States Court as a witness are prescribed by 28 U.S.C. §1821.

Not only is the 2004 Examination an ultimate discovery tool, but it is a fantastic settlement tool in litigation under §523 and §727.

Chapter 5 of this book more fully discusses the use of Rule 2004 Examinations and how they can be utilized in insulating a creditor from a possible attorney's fee demand under subsection (d) of §523 and how the use of video equipment versus a court reporter places the creditor's counsel at an advantage both economically (much less than a court stenographer) and psychologically (many debtor's counsel and debtors are not ready to face themselves in a deposition!).

F. [7.7] Working With A Bankruptcy Trustee

Pursuant to §701, the Court is required to appoint an interim trustee from the panel of private trustees promptly after the bankruptcy is filed. The duties of a trustee, found in §704, include collecting and reducing to money the property of the estate; investigating the financial affairs of the debtor; examining and objecting to the allowance of any claim that is improper; and, if advisable, opposing the discharge of the debtor.

Even though a debtor's creditors are usually more familiar with the debtor's financial condition and affairs than the trustee, with the filing of a bankruptcy petition, the creditor is stayed from proceeding against that debtor. However, the creditor does have the ability to educate the trustee regarding those financial conditions and affairs.

The best way to educate the trustee of the debtor's possible undisclosed financial condition (hidden or concealed assets) or questionable financial conditions and affairs is to extensively interrogate the debtor at the meeting of creditors. On more than one occasion through this author's interrogation, the trustee's interest has been peaked which has led to more extensive questioning. In some cases, the trustee called for a 2004 Examination and the creditor was able to reap the benefit of the educated trustee.
These examinations and investigations have prompted trustees to locate valuable assets which have not been included in the bankruptcy petition and which could be sold to benefit the creditors. Possibly without the creditor's educating the trustee, the trustee may not have located that unencumbered valuable asset that the debtor listed on a two-year-old application with the creditor but failed to list on the petition!

The trustee also has the power under §707 to move to dismiss a bankruptcy for cause including substantial abuse of the bankruptcy provisions. Creditors and their counsel should be aware, though, that if they believe the debtor's obtaining relief would be cause for substantial abuse, they may not request or suggest to the trustee to move to dismiss the case. Of course, some strategically planned questions for the debtor at the meeting of creditors might prompt the trustee to further investigate.

Practitioners should not confuse dismissal under §707 with the ability of a trustee or creditor to object to the granting of a discharge under §727(a) which is discussed in more detail in Chapter 5.

While the trustee represents the interest of the creditors, practitioners and creditors should understand that the trustee is not counsel for creditors. Thus, if the creditor wishes the trustee to abandon interest in property in which the creditor holds a security interest and the debtor has no equity, the creditor should not expect the trustee to file the appropriate abandonment but should see that its attorney files the appropriate Motion or Agreed Order for Abandonment.

Furthermore, if the creditor intends to obtain relief from the automatic stay, then it should rely upon its counsel to obtain it either by agreement through an Agreed Order Terminating Stay or by filing the appropriate Motion for Relief and requesting the Court to enter an Order terminating the stay.

Relief from stay, so the creditor may enforce its lien on secured property, must have the trustee's cooperation since it is the duty of the trustee to insure that the liens are properly perfected. Again, the burden falls upon the creditor's counsel to insure that the proof necessary to evidence perfection of the creditor's lien on secured property is included with the filing of the Motion for Relief.

Practitioners must understand that the majority of Chapter 7 bankruptcy cases have no assets and, should no money be paid out to creditors through the selling of found assets, the trustee will only receive a flat fee of $60.00 per bankruptcy case. Therefore, while all creditors and counsel for creditors hope for a trustee who is aggressive and willing to investigate, the cold truth is that the majority of the time it is not economically feasible for the trustee to pursue a matter.
Chapter 8

BANKRUPTCY ETHICS:
A DIFFERENT WORLD?

C. R. Bowles, Jr.

I. [8.1] INTRODUCTION

As a general rule, Bankruptcy law is truly a different world from the rest of "normal legal practice". The Bankruptcy Code's detailed and complex provisions, the mass of technical opinions from the specialized Bankruptcy courts and the broad equity powers of courts under the Bankruptcy Code make bankruptcy an extremely difficult area of the law in which to practice. However, as noted by a leading commentator in the field of bankruptcy ethics, there is some good news because: "if you know anything about the rules governing lawyer professional responsibility (aka 'legal ethics'), then you know most of what you need to know about bankruptcy ethics".1

This general observation, while correct, does not mean that there are only a few "special" Bankruptcy ethics issues. Indeed, legal ethics may play a greater role in bankruptcy proceedings than any other area of the law due to four general factors which arise from the unique nature of practice under the Bankruptcy Code.

First, it is important to note that unlike most tribunals, courts overseeing Bankruptcy proceedings have to approve the retention of counsel for bankruptcy estates under Chapter 11 and Chapter 122, creditors committees in Chapter 11 cases3 and Bankruptcy trustees4. Therefore, there is an open judicial review of an attorney's decision to take a client in the majority of bankruptcy cases, which is normally a private matter in most other litigation settings.

Second, there is extensive judicial review of legal fees in Bankruptcy cases. While most cases involve fee requests of counsel for debtors-in-possession, unsecured creditors committees, and trustees, a Bankruptcy Court will review any legal fees for which a party is seeking reimbursement from the Bankruptcy estate5. This judicial review and the fact that payment of bankruptcy professionals reduces the "pot of money" available for distribution to a debtor's creditors means that any fee application in a bankruptcy proceeding must be prepared with care, and in general accordance with certain guidelines set forth by the Office of The United States Trustee under the provisions of 28 U.S.C. § 5866.

A third reason why legal ethics are more complex in a bankruptcy setting is the unusual nature of the parties to a bankruptcy case. In a lawsuit or the purchase or sale of a business, there are generally a small number of legal interests which must be considered by an attorney in the representation of a particular client. However, in a Bankruptcy case you have a debtor, upwards of thousands of creditors as well as other interested parties, each of whom have wildly differing interests vis-a-vis the debtor, and most, if not all, other interested parties7. Indeed even doing a simple conflict check can be a nightmare in a large case where an attorney would have to cross check thousands of creditors and other interest holders to see if he or she can accept the representation of any party in a bankruptcy case8.

A final factor which also complicates bankruptcy ethical considerations is the seemingly simple issue of "who is your client"? As noted throughout this Chapter, situations involving closely held busi-
nesses where attorneys outside of bankruptcy may have no problem in representing both the business, the primary shareholders and/or the corporate officers, become conflict ridden dilemmas, due to the "differing" interests of the bankruptcy estate (i.e. collecting the most money for creditors) and the individuals who have the fiduciary duty to operate the business of the estate.

It is the purpose of this Chapter to review in detail some of the most important ethical considerations which an attorney must deal with when representing a debtor, bankruptcy estate, or creditor's committee. While attorneys who are representing creditors in bankruptcy also have ethical issues arise, these issues are almost always issues which would also arise in a non-bankruptcy context and are therefore beyond the scope of this chapter. Therefore, in the alleged words of the great Yogi Berra, "Let's begin at the beginning!"


11 U.S.C. §327(a) governs the employment of all professionals, including attorneys, who are to be hired by trustees or debtors-in-possession. Under this provision, an attorney can be employed as the "general counsel" for a bankruptcy estate only if: 1) the attorney is "disinterested"; and 2) the attorney neither represents nor holds an interest which is adverse to the bankruptcy estate. While these tests are somewhat similar in nature, they are independent tests, each of which must be met by prospective attorneys, if they wish to be employed as counsel for a Bankruptcy estate. For an excellent discussion of these two requirements, see In re Omegas Group, Inc., 195 B.R. 875 (Bkrtcy W.D. Ky. 1996).

In the Sixth Circuit, the two-part test of 11 U.S.C.§ 327(a) is applied both literally and strictly by courts in reviewing whether a professional can be employed by a bankruptcy estate. The Sixth Circuit has refused to allow either a broad reading of 11 U.S.C.§ 1107(b), which provides that an attorney will not be disqualified from representing a debtor solely because of the attorney's pre-petition representation of the debtor, or the general powers of 11 U.S.C.§ 105 to override the plain language of section 327. Therefore, if an attorney does not fall within the literal definition of a disinterested person then there is no chance that his or her employment will be approved.

Other than failing to meet the statutory definition of disinterestedness, there are two broad classes of "situations" which could prevent a law firm from being able to represent a bankruptcy estate under 11 U.S.C.§ 327(a), (1) multiple representation of related entities by the proposed attorney, and (2) conflicts between the debtor and the attorney due to interests, unrelated to the debtor, which the attorney either holds or represents.

1. [8.4] Multiple Representation of Related Parties

The problems related to a law firm's representation of related parties probably causes more disqualifications or rejections of proposed counsel under 11 U.S.C.§ 327(a) than any other ethical problem. While, representation of multiple related entities does not require a per se disqualification of a law firm seeking to represent a bankruptcy estate under 11 U.S.C.§ 327(a), a law firm's employment should not be approved under section 327(a) if there is even "the appearance of conflict irrespective of the integrity of the firm or person under consideration". Among the situations which can give rise to either the appearance of impropriety or an actual conflict warranting a rejection of a law firm's employment application are:

a. Representation of a partnership and its partners

b. Representation of a corporation and related corporations
Bankruptcy Ethics

c. Representation of a corporation and its owners

d. Representation of a corporation and its officers or directors

e. Representation of an individual's bankruptcy estate and the individual

f. Representation of related bankruptcy estates for the same bankruptcy trustee

The leading test on whether a law firm should either be refused employment or removed as counsel for a bankruptcy estate can be found in the Third Circuit's decision in In re BH & P, Inc. In that case the court was faced with the question of whether a bankruptcy trustee and his attorneys, who served as a Chapter 7 trustee in the Chapter 7 cases of a corporation and each of its two principals had to be disqualified due to the fact that the three Chapter 7 bankruptcy estates held claims against each other. The Third Circuit noted that there were two separate situations under section 327(a) where counsel for a bankruptcy estate could be disqualified: 1) where the professional had an actual conflict of interest; and 2) where there is only a "potential" conflict of interest. In the former case, courts have no discretion and must refuse to approve a professional's employment under section 327(a). However, in the latter case a court could approve the retention of the professional, even in light of the potential conflict, if such an appointment would be appropriate under the facts and circumstances of the case.

2. [8.5] Conflicts Between the Debtor and its Attorney

There are a number of situations which prevent an attorney from representing a debtor under the provisions of 11 U.S.C.§ 327(a) that do not involve the representation of entities related to the debtor. While such conflicts are rather uncommon, they can be broadly grouped into 4 categories.

a. [8.6] Representation of Third Parties

As noted by the Bankruptcy court in Matter of Allied Artists Pictures Corp.: [The ABA's] Code of Professional Responsibility provides[s] that the professional judgment of a lawyer must be exercised solely for the benefit of this client, free of compromising influences and loyalties, and precludes [his or her] acceptance of employment that will adversely affect his judgment or dilute his loyalty. In bankruptcy cases, this means that the debtor's or the trustee's counsel can generally not represent creditors of the debtor's estate, although some exceptions have been made in large Chapter 11 cases where law firms represent creditors in "small" matters not related to the bankruptcy case. Further, counsel cannot also represent noncreditor parties who may be targets of a lawsuit by a bankruptcy estate.

b. [8.7] Business and Financial Ties Between the Debtor and the Proposed Attorneys

As a general rule, Bankruptcy Courts have refused to allow the employment of attorneys to represent the estate where the attorneys, their law firms or some member of their law firms have a direct financial or business tie to the debtor or the debtor's principals. While this obviously includes attorneys who are disqualified because they are not disinterested under the express terms of 11 U.S.C.§ 101(14) as they had an ownership interest in the debtor, it also includes cases where members of an attorney's law firm have served as officers or directors of a debtor corporation, co-owned property with the debtor, possibly owed money to the debtor or has some other connection to the debtor. Therefore, a law firm should carefully examine all of its ties and its attorneys' ties to a debtor before applying to be counsel for a Bankruptcy estate.

c. [8.8] Retainer and Pre-Petition Payment Problems

One of the oldest and most critical problems facing attorneys in representing a bankruptcy estate is "How do you get paid"? The problem of getting paid for representing the debtor in a bank-
The initial problem, of pre-petition payments to law firms, is bankruptcy’s version of the famous “catch 22”. As noted by the Bankruptcy court in the case of In re Decor Corporation:

Regarding the issue of the pre-petition payments, but for [the debtor paying its attorney’s pre-petition legal bills, the debtor’s attorney] would have been a creditor of the estate and subject to the statutory disqualification mandated by section 101(14)(A). In absence of a waiver of its unsecured claim - the ultimate “curative” measure - [the debtor’s attorneys] would have been non-disinterested. Here, creditor status has been avoided by receiving payment within ninety(90) days prior to the filing, and such transfers may well constitute preferential payments. This role as a prospective defendant may constitute a disqualifying adverse interest and render the [debtor’s attorneys] ineligible to claim the designation of a “disinterested” professional....

The best advice which can be given in this situation is to review the case law in this area and make a careful judgment as to whether it would be practical to perform the ultimate curative measure and waive any pre-petition claim which the law firm may have against the debtor.

The second major problem facing law firms is whether a law firm can take a retainer in the form of a lien against the debtor’s property? In the Sixth Circuit, such retainers do not automatically disqualify an attorney from being employed under section 327(a). In the Ohio case of In re Watson, the court adopted a ten (10) element test to determine whether under the facts of a particular case such a retainer would cause the disqualification of an attorney from employment as counsel for a bankruptcy estate under section 327. Therefore, while it is risky to take a lien as a retainer, it is not per se improper and could be approved by a court under appropriate circumstances.

d. [8.9] Other Problems

Finally, there are some situations, which are beyond characterization, that prevent an attorney from being employed as Counsel for the estate. These situations generally involve ethical considerations which will not be discussed in detail here. Perhaps, the most famous of these cases is In re Philadelphia Athletic Club, Inc. where the court refused to appoint a law firm to represent a Chapter 11 trustee where the law firm represented two of the debtor’s three partners against the third partner in bitter litigation.


Under 11 U.S.C. §327(e) an attorney can be hired for a “specified special purpose”, if the attorney does not represent or hold any interest adverse to the estate. This provision cannot be used to “end run” section 327(a)’s requirements by appointing a de facto general counsel in the guise of a “special counsel”. The leading case from courts in the Sixth Circuit discussing this issue is Matter of F & C Intern., Inc. from the Southern District of Ohio. In a well reasoned opinion, the court held that counsel who had been jointly representing the debtor and several of the debtor’s directors in securities litigation had an actual conflict of interest, as opposed to merely being disinterested, and refused to expand the special counsel’s role in the bankruptcy proceedings. The court also held, on it’s own motion, that in order for the law firm to continue as special counsel for the bankruptcy estate, it would have to withdraw as counsel for the directors.
Bankruptcy Ethics


Under section 1103(b), a committee of creditors may retain attorneys and have them compensated by the debtor’s bankruptcy estate, if the attorneys do not hold or represent having an adverse interest to the interests represented by the committee. Merely representing individual creditors of the same class as the creditors represented by the committee does not, per se constitute representation on an adverse interest.

In the Sixth Circuit, there are two recent appellate decisions, National Liquidators and Daido Steel which recently addressed what constituted an adverse interest under section 1103(b). In National Liquidators, the U.S. District Court for the Southern District of Ohio reversed and remanded a decision of the Bankruptcy Court where the Bankruptcy court had denied all fees to counsel for the unsecured creditor’s committee due to an undisclosed representation of certain committee members in a related SEC investigation of the debtor which the Bankruptcy court held was the representation of an adverse interest due to the committee members’ possible “exposure” to preference and or fraudulent conveyance actions by the debtor.

The District Court carefully reviewed the requirements of Section 1103(b) and found that the adverse interest rule was clearly designed to prevent “attorney conflicts of interest.” It found that while there was a slight potential for a conflict of interest in the case, there was no actual conflict of interest and that disallowance of the entire fee was unwarranted. It remanded the case to the bankruptcy court for a reduction in fees due to the lack of appropriate disclosure concerning the related representation.

In Daido Steel, the District Court affirmed the Bankruptcy Court’s order allowing the committee’s counsel to remain employed under Section 1103(b) even though one of the law firm’s clients became interested in purchasing the debtor’s assets. One of the key elements to this decision was the fact that the committee’s attorneys promptly notified the Bankruptcy Court of their representation of the prospective purchaser in other matters unrelated to the bankruptcy. The District Court specifically found that this representation did not constitute an “adverse interest” for purposes of Section 1103(b) and that disqualification was not warranted.


An issue which is often overlooked in the discussion of conflicts of interest is whether the attorney made a full disclosure of any potential conflict at the beginning of the case. There seems to be an erroneous view in some quarters that ignoring “minor” potential conflict matters in the disclosure is appropriate as it may avoid “needless litigation”. Such a view not only conflicts with the requirements of the Bankruptcy Code concerning the employment of counsel but also is a very dangerous tactic as courts are almost universally more offended by the nondisclosure than they are with the underlying conflict.

Perhaps the leading case concerning the problem with failing to make full disclosure is In re National Liquidators, Inc. In that case, the District Court reviewed a Bankruptcy court decision which had denied all fees to counsel for the unsecured creditors committee due to the committee’s undisclosed representation of one of the members of the committee in SEC investigations related to the debtor’s business. The Bankruptcy Court found this representation to be an actual conflict of interest.

The District Court, after a detailed review of the facts surrounding the representation, found that there was no conflict of interest in the law firm’s representation of the committee and one of its members under these circumstances and held that denial of all fees was inappropriate. However, the District Court did find that the law firm did fail to make an appropriate disclosure and that a reduced amount of sanctions was appropriate and remanded the case to the bankruptcy court for further proceedings.
It is therefore clear that any representation or connection which a law firm has which might possibly be a problem in being approved as counsel for a bankruptcy estate or creditor's committee must be disclosed in the initial employment application. The worst that can happen is that the application may not be approved and you will not work “for free” during the bankruptcy. When in doubt, disclose.


As discussed in detail above, an attorney's employment must be approved prior to being eligible to have fees awarded in a bankruptcy proceeding. However, in far too many cases, attorneys fail to make timely applications for employment and must request retroactive, or “nunc pro tunc” approval of their employment by the court. In 1984, the Sixth Circuit seemingly approved the practice of retroactive employment in the Georgetown of Kettering decision where the court noted that such employment could be approved in appropriate circumstances, but overruled the lower court's decisions to approve employment in this case due to a massive conflict of interest on the part of debtor's counsel.

Courts in the Sixth Circuit have generally used two tests to determine whether retroactive employment should be approved. The court in In re Vlachos employed a four part test, centering on parties' knowledge of the services being provided and the lack of an otherwise valid objection to the employment, to determine whether an attorney should be employed as a professional under section 327(a). Other courts have used the nine part facts and circumstances test of In re Twinton Properties when considering this issue.

It is important to note that the general “rule” of Georgetown of Kettering is now in some doubt in light of the Sixth Circuit's recent Federated decision. In Federated, the Sixth Circuit stated: “Accordingly, we hold that a valid appointment under §327(a) is a condition precedent to the decision to grant or deny compensation under §330(a) or §328(c).” While this language does not expressly overrule the dicta of Georgetown of Kettering, it does cast some doubt on the strength of that decision as to the issue of nunc pro tunc employment of professionals.


While only attorneys who seek to be employed by a bankruptcy estate or creditors committee need to formally apply to the court to have their employment approved, all attorneys including attorneys for Chapter 7 and Chapter 13 debtors must make the disclosures required by Section 329(a) of the Bankruptcy Code. Under Section 329(a), all attorneys who represent debtors must file a statement of all compensation paid or agreed to by the debtors for services in connection with the bankruptcy case. This statement must also disclose the source of these payments. One Sixth Circuit and several Bankruptcy Court decisions discuss the ease of compliance with this provision and the many problems which can arise if it is ignored.


While the collection of legal fees is not directly an ethical issue, the relationship of fee awards to an attorney's “employability” and the court's control over fees, makes section 330 an important ethical section under the Bankruptcy Code. Section 330 is often involved in key ethical decisions due to the fact that many objections to fee awards involve requests for an attorney disqualification as counsel for a bankruptcy estate under the provisions discussed above. These issues have been reviewed above and will not be addressed in this section.
As a general rule, an attorney's fees and expenses are governed by the "Lodestar" standard of compensation which states that a reasonable attorney fee in a given matter is determined by multiplying a reasonable hourly rate by the reasonable number of hours expended on the matter. While a detailed discussion of this standard is beyond the scope of this chapter below is a listing of cases which in general discuss lodestar and fee application requirements in Kentucky:

1. In re Boddy, 950 F.2d 334 (6th Cir. 1991)

Recently, the Office of the United States Trustee announced new technical requirements for fee applications under 11 U.S.C.§ 330. These guidelines have not yet be adopted by Kentucky courts in bankruptcy cases, but should be followed, if nothing else, to prevent an objection to your fee application by the U.S. Trustee's Office. The U.S. Trustee guidelines are in line with the requirements of In re I.F. Wagner's Sons Co., the leading Kentucky case on what information a fee application should contain.

V. [8.16] BANKRUPTCY RULE OF PROCEDURE 9011

While an attorney is under an ethical obligation to "zealously" represent his or her client, Bankruptcy Rule of Procedure ("BRP") 9011 places limitations on how far those actions may go. As explained by the Honorable Guy Cole in In re R. and D. Group, Inc.: "Rule 9011 delineates two types of sanctionable conduct: One, 'where the papers are frivolous, legally unreasonable, or without factual foundation', and two, 'where the pleading is filed for an improper purpose.' The first type of proscribed conduct under Rule 9011 addresses whether a party and/or its attorney's conduct were objectively reasonable, while the second form of improper conduct goes to issues primarily related to subjective "good faith." In Kentucky, the standard for imposing Rule 11 sanctions is whether "the individual's conduct was reasonable under the circumstances." In determining whether an attorney's conduct is objectively reasonable, the Sixth Circuit has indicated that factors such as: 1) the time available to the attorney for investigation of the claims; 2) whether the attorney had to rely on a client for information as to the facts underlying the pleading in question; 3) whether the pleading was based on a plausible view of the law; and 4) whether the attorney relied upon another attorney's investigation in filing the pleading, must be considered. In determining whether the pleading was filed for an improper purpose, the court must examine the facts and circumstances surrounding the case.

Two unpublished decisions, In re Dixon and In re Braun address the method of determining damages under Rule 9011 and the procedural requirements for putting a party on notice of a request for such damages. These opinions, along with R. and D. Group are required reading for any party which is serious about pursuing a Rule 9011 motion in a bankruptcy matter.
28 U.S.C. § 1927 is a provision which predates both Federal Rule of Procedure 11 and BRP 9011 and permits a court to impose costs, attorney fees and expenses on any attorney who "so multiplies the proceedings in any case unreasonably and vexatiously...". As 28 U.S.C. § 1927 is much more limited in scope that Rule 9011, it is no longer used frequently in bankruptcy proceedings. Its main use is for those few situations where an attorney pursues a non-frivolous claim through the use of "multiplicative litigation tactics that are harassing...[or] dilatory" which are not covered by Rule 9011. For a discussion of the relationship between Rule 9011 and 28 U.S.C. § 1927 the Tennessee case of In re Southern Industrial Banking Corp., 91 B.R. 463 (Bkrtcy. E.D. Tenn. 1988) provides the best treatment of the topic of any published decision from the Sixth Circuit.

DUTY TO THE BANKRUPTCY ESTATE: WHO IS YOUR CLIENT?

In the typical nonbankruptcy case, it is fairly easy to identify your client. As more than one legal sage has expressed it, "your client is the guy [or gal] who pays you!". However, when representing a debtor in a reorganization proceeding under Chapter 11 or Chapter 12 such a generalization just does not work. To understand this problem we must first discuss the difference between a bankruptcy estate (i.e. the actual entity undergoing bankruptcy reorganization and which is paying your bills) and the individuals who are managing the estate (and are signing the checks).

In simple, non-technical terms the bankruptcy estate is an entity which arises upon the filing of a bankruptcy and consists of the non-exempt assets which were owned by the debtor prior to the filing of a bankruptcy reorganization. It is the "purpose" of the bankruptcy estate to obtain the highest possible return for the estate’s creditors and, in certain limited circumstances, other interest holders. The individuals who manage the bankruptcy estate’s affairs in a reorganization proceeding are usually either the debtor-in-possession ("DIP") or a Chapter 11 trustee. DIPs are generally either the management of a business entity debtor or an individual or couple in a so-called "individual" Chapter 11. Problems in identifying your client arise in reorganization cases when the interests of the DIP conflicts with the interests of the bankruptcy estate. Several cases serve to illustrate this point.

One of the leading cases in this emerging area of bankruptcy legal ethics is In re United Utensils Corp.. In this case the court was confronted with the question of whether a law firm which represented a bankruptcy estate in a Chapter 11 proceeding could represent a subsequently appointed bankruptcy trustee, in actions against the debtor's former officers and shareholders. The court in considering the objection of a former officer to the employment on the grounds that it violated his individual attorney client privilege with the proposed counsel held that the law firm did not individually represent the individual officer and sole shareholder through its representation of the debtor corporation during the Chapter 11. The court held that the firm could be employed as special counsel to the trustee under Section 327(e) unless the officer/shareholder could produce specific evidence of an attorney client relationship independent of the attorney client relationship between the debtor and the law firm.

The case of In re Love shows the special problems an attorney for a bankruptcy estate faces in an individual Chapter 11 case. In Love the court was reviewing the attorney’s fee application in a complex Chapter 11 proceeding. In the Chapter 11 proceeding the attorneys for the estate, at the direction of the individual DIP, resisted efforts of a major creditor to force the DIP to repay unauthorized draws from various businesses owned by the bankruptcy estate, and opposed the unsecured creditor's committee's efforts to prevent the debtor from settling estate claims against the debtor's children and wife. The court found that the attorneys breached their duty to the Chapter 11 estate by assisting the DIP in his efforts to protect his family and ultimately denied their fee application in full.
Bankruptcy Ethics

The full extent of this problem can best be seen, however, in the case of In re DeVlieg Inc. Here, counsel for a Chapter 11 bankruptcy estate were fired by the DIP, after the debtor’s counsel filed suit against several insiders of the debtor, including the debtor’s sole officer. However this firing did not go unnoticed and the DIP was quickly replaced by a Chapter 11 trustee who sought to hire the Chapter 11 estate’s former attorneys as the trustee’s special counsel to pursue the lawsuit which got them fired. Not surprisingly some of the insiders who fired the attorneys in the first place objected to this employment. The Bankruptcy Court approved the employment and the insider appealed. After reviewing 11 U.S.C.§ 327(e) the District Court ruled that the attorneys neither held or represented an adverse interest to the estate and that their employment should be authorized. However in a footnote to the opinion the court noted:

The concern with former counsel for the debtor is that they will not be in a position [to be objective in advising a trustee]. 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, [the attorneys] may actually have begun acting in the interest of the estate (and, in doing so, not necessarily following the directions of its then-client, the debtor) even before a chapter 11 trustee had been appointed. Thus the usual concern with the 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.

This footnote shows the confusion this situation can generate for even federal courts in this area. To the extent that DeVlieg suggests that counsel for Chapter 11 bankruptcy estates have an ethical duty other than to the bankruptcy estate as their client, such a ruling is clearly wrong and against the weight of authority.

VIII. [8.19] DUTY TO THE COURT

One of the most unusual and least explored aspects of legal ethics in the bankruptcy context concerns the duty of attorneys, to the court, to disclose information about the misconduct of the individuals who control the bankruptcy estate. Due to the expansive nature of the financial disclosures required in a bankruptcy proceeding this duty of disclosure must be balanced against an attorney’s duty of loyalty to his client. In this respect, state ethical duties can come into some conflict with a bankruptcy attorney’s duty to the Bankruptcy Court as an officer of the Court and a Court appointed Counsel for a bankruptcy estate.

In Chapter 7 cases, it is clear that an attorney cannot counsel or assist his or her client in filing false bankruptcy schedules or concealing estate assets for the same reasons an attorney cannot allow his client to commit perjury in a criminal case without protest. These ethical issues are beyond the scope of this Chapter and will not be reviewed in detail.

However, attorneys in a reorganization proceeding, have a far higher burden. In reorganization cases, attorneys are representing clients in a continuing judicial proceeding, not merely counseling clients about past misconduct or legal problems. In such proceedings, attorneys for the estate are considered officers of the court, and are fiduciaries to the Bankruptcy Estate. As noted by the Bankruptcy Court in In re Sky Valley, Inc.:

The unique circumstances which surround insolvency and the filing 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 the bankruptcy court than
to his client. In fact, the status of the client and the attorney often overlap in a Chapter 11 case, as the debtor’s attorney must take conceptual control of the case and provide guidance for management of the debtor, not only to discern what measures are necessary to achieve a successful reorganization, but to assure that, in so doing, compliance with the Bankruptcy Code and Rules is sought rather than avoided. Debtor’s attorney duty as fiduciary of the estate requires an active concern for the interests of the estate and its beneficiaries.

Recently, several Bankruptcy Courts have held that counsel for bankruptcy estates have a duty to the courts to inform them if the individuals operating a bankruptcy estate’s affairs are acting against the best interests of the estate. The Bankruptcy Court in In re United Utensils Corp. clearly articulated this duty by holding: “If the debtor is not fulfilling its obligation to the estate, it is the responsibility and duty of Debtor’s counsel to bring such matters to the attention of the court.”

This developing duty was discussed in detail by the U.S. Bankruptcy Court for Utah in In re Bonneville Pacific Corp., 196 B.R. 868 (Bkrtcy. D. Utah 1996). This opinion is, without a doubt, the strongest statement of a court appointed counsel’s duty to the bankruptcy estate and Bankruptcy Court in a Chapter 11 proceeding. Bonneville was a complex Chapter 11 case, involving numerous related business entities, which was heavily involved in a series of classic “land flips”(i.e. insider sales of property designed to artificially inflate the value of the property in order to defraud third party investors and lenders). After a stormy reorganization attempt, a Chapter 11 trustee was appointed, and evidence of serious fraud was uncovered by the trustee. This Bonneville opinion arose in the context of a motion to reconsider the Bankruptcy Court’s earlier denial of the entire fee application of the debtor’s Chapter 11 counsel.

In this long and harshly worded opinion, the Utah Bankruptcy Court made it clear that all counsel who are retained with court approval in a bankruptcy proceeding have a fiduciary duty to the bankruptcy estate and the Bankruptcy Court to disclose suspected wrong doing by the insiders of a corporate debtor. 196 B.R. at 885. While this opinion arose in a large Chapter 11 proceeding, it is still advised reading for any attorney who may find him or herself representing a “less-than-honest” debtor in a Bankruptcy case.

This trend toward imposing a fiduciary duty on debtor’s counsel and counsel for the various committees will require all counsel retained with court approval to carefully monitor the activities of the person or persons running the debtor’s affairs or run the risk of being disqualified or having the Bankruptcy Court deny their fee applications, due to their failure to fulfill their fiduciary obligations.

IX. [8.20] CRIMINAL BANKRUPTCY ATTORNEYS

This case sadly illustrates the peril of practicing law in an unfamiliar subject area, for, as one attorney has learned, ignorance of the law does not excuse an offense. U.S. v. Parkhill

The ultimate “rules” of bankruptcy ethics can be found at 18 U.S.C.§§ 152 - 157 which are the federal statutes directly relating to bankruptcy crimes. 18 U.S.C.§ 157 relating to “Bankruptcy Fraud” is a recent addition to the federal criminal statutes and is especially broad and should be read by any attorney who plans to represent a debtor in bankruptcy.

The problem of “criminal” bankruptcy attorneys in not a new issue. See U.S. v. Switzer, 252 F. 2d 139 (2d Cir. 1958); Coghlan v. U.S., 147 F.2d 235 (8th Cir. 1945). Nor is it confined to inexperienced or “poor” practioners. See U.S. v. Goodstein, 883 F. 2d 1326 (7th Cir. 1989)(Attorney with 40 years of bankruptcy experience). While there is not a large number of reported cases involving attorneys who have
been convicted of "bankruptcy crimes" there are several instructive Court of Appeal cases which address the troubling aspect of this topic.

By far the largest class of "bankruptcy crimes" for which attorneys have been convicted, involve the concealment of assets of the bankruptcy estate. In the cases of U.S. v. Smithson102, U.S. v. Center103 and U.S. v. Parkhill104 attorneys were convicted of assisting their clients in concealing assets from the bankruptcy estate through a variety of means. A brief review of these cases shows that the attorneys in question were actively involved in the fraud and their convictions were not unexpected.

Far more troubling is the case of U.S. v. Zimmerman105. There an attorney was charged, along with clients of his law firm, his law firm, his law partner and one of his associate attorneys, with conspiracy to commit criminal fraud in connection with the hiding of a client's assets from its creditors through the use of the law firm's trust account. The attorney in this case had only minimal connections with the debtor or the debtor's representation in the bankruptcy case, but was nevertheless indicted and ultimately convicted on the strength of two Bankruptcy Court opinions which found the attorney's law firm probably was conspireing with the debtor to hide assets. The attorney's conviction was overturned and the case remanded for a new trial due to the improper use of the Bankruptcy Court opinions, but the case still emphasizes the danger in this area even when you are not directly overseeing a bankruptcy case for your firm.

Perhaps the most blatant case of defrauding a bankruptcy estate of its assets is U.S. v. Edgar106. 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 paper work 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 trace107. Needless to say the bankruptcy court was not informed of the debtor's president's excellent salesmanship until seven months after the completion of the sale. The Court of Appeals upheld the conviction but remanded this case for resentencing.

The strangest bankruptcy related crime an attorney has been convicted of is undoubtedly the crime of circumventing the blind case draw system of assigning judges to bankruptcy cases found in the case of U.S. v. August108. 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 attorney fees. While the crime in August is unlikely to be repeated, it does illustrate that any attempt to manipulate the bankruptcy system in a questionable manner could lead to federal criminal charges.

X. [8.21] KENTUCKY CASES ON BANKRUPTCY ETHICS

As discussed at the beginning of this article, the basic concepts of state ethics law form the core of Bankruptcy ethics law. Therefore, it is not surprising that Kentucky's state bar association and the Kentucky Supreme Court have a great interest in enforcing their ethical standards against attorneys who engage in unethical conduct in bankruptcy proceedings. While a detailed discussion of Kentucky's ethical rules and enforcement procedures is beyond the scope of this Chapter, below is a brief list of cases dealing with various types of ethical problems.

1. Failure to Timely Perform Duties: KBA v. Reeves, 851 S.W. 2d 478 (Ky. 1993); KBA v. Goodrich, 851 S.W. 2d 479 (Ky. 1993).

2. Bankruptcy of an attorney is not, in and of itself, grounds for disbarment: See Greene v. KBA, 904 S.W. 2d 233 (Ky. 1995). However, repayment of discharged debts could be a condition of reinstatement: Barrett v. KBA, 819 S.W.2d 316 (Ky. 1991).
3). Attorneys may not prosecute individuals who they represented in bankruptcy proceedings: Nunn v. Commonwealth, 896 S.W.2d 911 (Ky. 1995).

4). Giving the Bankruptcy Court a NSF check for bankruptcy filing fee, which the client has prepaid, is an ethical violation: KBA v. Watson, 867 S.W. 2d 191 (Ky. 1993).

5). Taking payment of attorney fees, prior to paying the bankruptcy filing fee, in violation of Bankruptcy Rule 1006, is an ethical violation: KBA v. Wharton, 810 S.W.2d 832 (Ky. 1991).

6). Aiding in a fraudulent conveyance is an ethical violation: Roberts v. KBA, 771 S.W. 2d 46 (Ky. 1989).

7). Making false financial statements to lenders is an ethical violation: Evans v. KBA, 764 S.W.2d 61 (Ky. 1989).

8). Bankruptcy Trustee stealing money from a Bankruptcy estate is an ethical violation: In re Shumate, 382 S.W. 2d 405 (Ky. 1964).

XI. [8.22] CONCLUSION

Understanding the principals of ethics in the practice of bankruptcy law is, in many ways, a far simpler task than understanding the intricacies of the Bankruptcy Code. What makes bankruptcy ethics somewhat different from the traditional rule of ethics, is not a different set of rules regulating professional conduct, but the unusual nature of the underlying bankruptcy proceedings themselves. It is the hope of this author that the preceding Chapter provides a useful guide to all attorneys who wish to practice bankruptcy law and prevents them from falling prey to some of the unusual ethical considerations which must be addressed in this field.
ENDNOTES

1 Ayer, PROFESSIONAL RESPONSIBILITY IN BANKRUPTCY CASES, (January 1993).

2 See 11 U.S.C.§ 327, a copy of which is included in the statutory appendix and notes 11-51, infra and accompanying text.

3 See 11 U.S.C.§ 1103(b), a copy of which is included in the statutory appendix, and notes 52-56, infra and accompanying text.

4 See 11 U.S.C.§ 327(a) and notes 11-48, infra, and accompanying text.

5 See generally 11 U.S.C.§ 506(4) which allows creditor’s attorneys to have their fees paid from the bankruptcy estate in certain circumstances.

6 A copy of the official U. S. Trustee guidelines for reviewing Bankruptcy fee applications is located as an attachment to Chapter 5 of Consumer Bankruptcy in Kentucky, Chapter 13 Practice (UK/CLE).

7 See Ayer, BANKRUPTCY ETHICS, at p.2.


9 This chapter will not address certain important bankruptcy issues, such as pre-bankruptcy exemption planning, which only have indirect ethical overtones as such subjects, are in the opinion of the author beyond the scope of this Chapter. See generally, Wolfe, Prefiling Engineering and Denial of Discharge: Who should Slaughter the Hog?, 96 COM. L.J. 189 (1991).

10 See SLC LTD. v. Bradford Group West, Inc., 147 B.R. 596 (D. Utah 1992) (Law firm representing large secured creditor disqualified from representing said creditor in bankruptcy proceeding due to the prior representation of the debtor’s general partner and principals by a member of the law firm prior to the time he joined the firm). See also In re Highway Drivers and Helpers Local No. 107, 17 BCD 803 (Bkrtcy. E.D. Pa. 1992) (Law firm disqualified from representing a major creditor in a bankruptcy proceeding where law firm had a prebankruptcy consultation with the debtor concerning the possibility of the debtor filing bankruptcy).


13 11 U.S.C.§ 327(a). The term “adverse interest” has been defined as “any economic interest that would tend to lessen the value of the bankruptcy estate or that would create an actual or potential dispute” In re American Printers & Lithographers, Inc., 28 CBC 2d 242,245 (Bkrtcy. N.D. Ill. 1992).

14 See In re Eagle-Picher Industries, Inc., 999 F.2d 969,972 (6th Cir. 1993).
See In re Federated Department Stores, 44 F.3d 1310 (6th Cir. 1995); In re Eagle-Picher Industries, Inc., 999 F.2d 969 (6th Cir. 1993); In re Middleton Arms, L.P., 934 F.2d 723 (6th Cir. 1991); In re Georgetown of Kettering, Ltd., 750 F.2d 536 (6th Cir. 1984).

See In re Federated Department Stores, 44 F.3d at 1318. A copy of 11 U.S.C. § 1107 is included in the statutory appendix.

In re Middleton Arms, L.P., 750 F.2d at 536.

See generally In re Eagle-Picher Industries, Inc., 999 F.2d at 972 (“Although it may make little sense to the bankruptcy court and the debtors- or, for that matter, to this court- that Goldman Sachs is not permitted to serve as financial adviser, the statute requires that result. This court is bound to apply the plain meaning of the statute even when the application apparently results in an apparent anomaly”).


See In re Alcala, 918 F. 2d 99 (9th Cir. 1990).


949 F.2d at 1300.

Id. at 1317.

Id. See also In re Hurst Lincoln Mercury, Inc., 80 B.R. 894 (Bankr. S.D. Ohio 1989).


Bankruptcy Ethics

34. See In re Decor Corp., 171 B.R. 277 (Bkrtcy. S.D. Ohio 1994) for a detailed discussion of this issue and other issues related to possible problems under 327(a) a firm may face in filing a large Chapter 11 case. See also In re Lee Way Holding, Co., 102 B.R. 616 (S.D. Ohio 1989).


39. See In re Thompson, 116 B.R. 679 (Bkrtcy. W.D. Ark. 1990) (The enterprising counsel for the debtor in this case was the subject of a potential pre-petition legal malpractice action by the debtor and compromised the "claim" during his client's bankruptcy. When the Bankruptcy court discovered this clever piece of lawyering, it denied the debtor’s counsel all requested fees and referred the case to the state Supreme Court for further disciplinary action.). See also In re 419 Company, 133 B.R. 867 (Bkrtcy. N.D. Ohio 1991) (Debtor's prepetition counsel received prepetition payments which could be preferences: Held, employment application had to be denied.).

40. In re McGinty, 119 B.R. 289 (Bkrtcy. M.D. Fla. 1990) (Debtor tried to hire the law firm of which he was a member as his bankruptcy counsel. Court refused to approve the employment.).

41. See Matter of Arlan's Department Stores, Inc., 615 F. 2d 925 (2d Cir. 1979) (For an interesting discussion of the problems relating to the payment of a retainer.).


44. 171 B.R. at 283 (citations omitted).

45. See also In re American Thrift & Loan Ass'n, 137 B.R. 381 (Bkrtcy. S.D. Cal. 1992); In re 419 Co., 133 B.R. 867 (Bkrtcy. N.D. Ohio 1991).


47. See In re Goldsby, 167 B.R. 851 (Bkrtcy. N.D. Ohio 1994) (An employee of the federal court system cannot be hired as a professional by a trustee).


49. In re Servico, Inc., 149 B.R. 1009 (Bkrtcy S.D. Fla. 1993) (Holding a potential preference does not prevent law firm from being approved for employment under section 327(e)).

51 159 B.R. at 224.


53 182 B.R. at 186

54 178 B.R. at 129.

55 182 B.R. at 192.

56 Id. at 196. This opinion is worth noting for its discussion of what constituted notice at the committee's law firm of the conflict.


58 See In re The Leslie Fay Companies, 175 B.R. 525 (Bkrtcy. S.D.N.Y. 1994) (One of the leading bankruptcy law firms in the country ordered to disgorge over $800,000 in fees due primarily to nondisclosure of what it though were minor issue related to potential conflicts)

59 182 B.R. at 186.


61 In re Federated Dept. Stores, Inc., 44 F.3d at 1320.

62 750 F.2d 536 (6th Cir. 1984).


64 27 B.R. 817 (Bkrtcy M.D. Tenn. 1983).

65 44 F.3d at 1320.

66 See 11 U.S.C.§ 329, a copy of which is included in the statutory appendix.

67 In re Lucas, 827 F.2d 770 (6th Cir. 1987).


69 See generally In re Boddy, 950 F.2d 334 (6th Cir. 1991); In re A & A Energy Properties, Ltd., 865 F.2d 256 (6th Cir. 1988).

70 See Chapter 5 of Consumer Bankruptcy in Kentucky, Chapter 13 Practice (UK/CLE) for the full text of the U.S. Trustee's Fee guidelines.

71 See BRP 9011. See also In re Cascade Energy & Metals Corp., _ F.3d __, 1996 WL 354680 (10th Cir. 1996) for a general discussion of Rule 11 in a Bankruptcy context.

172
Bankruptcy Ethics

73 Id. at 165.
80 See 28 U.S.C.§ 1927, a copy of which is included in the statutory appendix.
82 See Jones v. Continental Corp., 789 F.2d 1225 (6th Cir. 1986).
83 In Chapter 7 proceedings there is little problem in this area as the attorney who filed the Chapter 7 petition on behalf of the debtor, clearly represents the debtor’s interests throughout the bankruptcy, while the Chapter 7 trustee’s counsel represents the bankruptcy estate’s interests.
84 For a brief discussion of the problems related to what interests a bankruptcy estate represents, See Ayer, BANKRUPTCY ETHICS, at pp 7-10.
85 See generally In re Central Ice Cream, 836 F.2d 1068 (7th Cir. 1987).
87 See also In re Central Ice Cream Co., 114 B.R. 956 (N.D. Ill. 1989) (Contains a detailed discussion of possible conflicts which can arise in attempting global settlements of claims involving both debtors and nondebtors).
89 See also In re Alcala, 918 F.2d 99 (9th Cir. 1990); In re Granite Sheet Metal Works, Inc., 159 B.R. 840 (Bkrtcy. S. D. Ill. 1993) (Similar situation in a corporate bankruptcy).
90 174 B.R. 497 (N.D. Ill. 1994).
91 Id. at 502 n.7.
92 See notes 93-99, infra, and accompanying text.
93 Ayer, BANKRUPTCY ETHICS at p.17. See also notes 100-108, infra, and accompanying text concerning an attorney’s criminal liability.

However, see In re Ward, 894 F.2d 771 (5th Cir. 1990) for a discussion of the duties of a debtor's attorneys in a Chapter 7 proceeding. See also FDIC v. O'Melveny & Meyers, 1995 U.S. App. LEXIS 19609 (9th Cir. July 26, 1995) (Discussing the responsibility of attorneys for their client's conduct in nonbankruptcy cases).

Ayer, BANKRUPTCY ETHICS at p.17.


Id. at 939(citations omitted).


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

See 18 U.S.C. §§ 152, 153, 154, 155, 156, and 157, which are set forth in the statutory appendix.

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

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

775 F. 2d at 612.

943 F. 2d 1204 (10th Cir. 1991).

971 F. 2d 89 (8th Cir. 1992).

Id. at 91.

745 F. 2d 400 (6th Cir. 1984).
Chapter 9

OFFICE OF THE UNITED STATES TRUSTEE

Joseph J. Golden

I. [9.1] INTRODUCTION

The "Bankruptcy Judges, United States Trustees, and Family Farmer Act of 1986" enacted on October 27, 1986, paved the way for the creation of United States Trustee’s office which began operating in Kentucky on September 7, 1988. While two states—North Carolina and Alabama—are currently not a part of the United States Trustee system, all other states are. The offices are grouped according to geographical considerations into regions which total twenty-one. Kentucky and Tennessee make up Region 8. The headquarters for Region 8 is located in Memphis, Tennessee, the largest city in the region.

The United States Trustee supervises and maintains chapter 11, 12, and 13 trustees, and a panel of chapter 7 trustees. This section will focus only on the chapter 7 aspects of the United States Trustee’s duties as they relate to consumer bankruptcy matters.

A. [9.2] Statutory Authority

Those laws involving the establishment of the United States Trustee program are not to be found in Title 11, The Bankruptcy Code, but are located in Title 28, Part II, Department of Justice. The duties of the United States Trustee are set forth at 28 U.S.C. §586. The duties of the United States Trustee most salient to chapter 7 consumer bankruptcy cases are set forth below:

1. The duty to establish, maintain, and supervise a panel of private trustees that are eligible and available to serve as trustees in cases under chapter 7 of Title 11 (28 U.S.C. §586(a)(1));

2. The duty to supervise the administration of cases and trustees in cases under Title 11, whenever the United States Trustee deems it appropriate by:


   b. Taking such action to ensure that all reports, schedules, and fees are properly and timely filed (28 U.S.C. §586(a)(3)(D));

   c. Notifying the United States Attorney of matters that may constitute crimes under the laws of the United States and assisting the United States Attorney in carrying out prosecutions based on such actions (28 U.S.C. §586(a)(3)(F));

   d. Monitoring the progress of cases and taking such actions as are deemed to be appropriate to prevent undue delay in such progress (28 U.S.C. §586(a)(3)(G));
e. Monitoring employment applications filed under section 327 of Title 11 (28 U.S.C. §586(a)(3)(H); and

f. Performing the duties prescribed for the United States Trustee under Title 11 and such duties consistent with Title 11.

The last of these duties (found at 28 U.S.C. §586(a)(5)) incorporates the many duties found in Title 11 (the Bankruptcy Code) which the United States Trustee may be either required to perform or may be required to see that other parties perform. The United States Trustee is not a judicial officer, but is an officer under the Executive Branch of government. However, many of the duties now required of the United States Trustee were previously performed by the Judicial Branch of government. For example, appointments of trustees were previously made by judges.

Some major rights and responsibilities of the United States Trustee as they relate to consumer bankruptcy cases that are mentioned in Title 11 (the Bankruptcy Code) follow:

1. Pointing out abuses to the court with respect to bankruptcy petition preparers (11 U.S.C. §110(h)(3);

2. Raising and being heard on any issue in any case or proceeding under Title 11 (11 U.S.C. §307);

3. Serving as the chapter 7 trustee in a case when necessary (11 U.S.C. §321);

4. Determining the amount of a trustee’s bond and the sufficiency of the trustee’s surety (11 U.S.C. §322);

5. Convening the creditors’ meetings and presiding over such meetings (11 U.S.C. §341);

6. Questioning the debtor and administering the oath (11 U.S.C. §343);

7. Appointing an interim trustee to serve in the case who becomes the trustee if no election is held (11 U.S.C. §701);

8. Examining the reports and accounts of trustees (11 U.S.C. §704(8), (9));

9. Seeking the dismissal of cases by reason of debtors’ substantial abuse (11 U.S.C. §707(b)); and


As can be seen, Congress intended the United States Trustee to be an important party in the consumer bankruptcy process.


The United States Trustee’s Mission Statement is set forth below:

“The United States Trustee Program acts in the public interest to promote the efficiency and to protect and preserve the integrity of the bankruptcy system. It works to secure the just, speedy, and economical resolution of bankruptcy cases; monitors the conduct of parties and takes action to ensure compliance
with applicable laws and procedures; identifies and investigates bankruptcy fraud and abuse; and oversees administrative functions in bankruptcy cases."

The Mission Statement incorporates the concept set forth in Rule 1001 of the Federal Rules of Bankruptcy Procedure as promulgated by the Supreme Court of the United States, which states:

"These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding."

Many of the day-to-day goals of the United States Trustee are aimed at speedy and fair case treatment, reasonable fees for those professionals involved in cases, and increased distribution of dividends to creditors.

II. [9.4] CASE ADMINISTRATION

The United States Trustee has the responsibility for monitoring the progress of cases in bankruptcy and taking appropriate actions to prevent undue delay. Accompanying the duty to prevent undue delay is the United States Trustee’s duty to know (or be in a position to learn) about each case.

A. [9.5] Review Of Schedules

It is estimated that as many as fifteen thousand Chapter 7 consumer bankruptcy cases will be filed in Kentucky in the year 1996. In an ideal environment, the United States Trustee would make a cursory examination of each case and review the schedules, statements and lists of each debtor. Currently, spot checks are randomly conducted. If a case requires special attention, a file is assembled and a monitoring process begins.

One area of United States Trustee concern is the amount of attorney fees charged consumer debtors. Since most consumer cases involve credit card debt and medical expense debt and involve virtually no unencumbered or nonexemptible assets, the skill level of the debtors’ attorneys are not particularly taxed. In this regard, when the United States Trustee identifies cases in which fees appear excessive, the normal course is to call or write the debtors’ attorney and request an explanation. Recourse to the court is permitted by 11 U.S.C. §329. This section governs the debtor’s transactions with the debtor’s attorney and permits an exploration of the fee issue. Section 329 also codifies the court’s authority to govern the reasonableness of the fees charged by attorneys for debtors, and if fees are found excessive, the court has the power to cancel the fee agreement or make other determinations.

Another area of concern in dealing with the debtors’ schedules, is whether or not the schedules provide creditors with a sufficiently clear picture of the debtors’ financial condition in order to explain the debtors’ inability to satisfy debts or determine the cause of bankruptcy. On occasion, when debtors’ schedules are unclear, the United States Trustee has moved the court to require amendments. Therefore, a reading of the schedules by the United States Trustee staff is an important function of the office.

B. [9.6] Substantial Abuse

“Substantial abuse” is a concept intended by Congress to deny a debtor the use of the bankruptcy system in order to discharge debts and achieve a “fresh start”. Section 707(b) is set forth as follows:

“(b) 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 any party in interest, may dismiss a case filed by an individual debtor under this chapter
whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.”


In essence and stripped to the barest essentials, if a debtor records sufficient disposable income, as reflected in debtors' Schedules I and J, to make a meaningful payback to creditors over a period of time, the United States Trustee is placed in the posture of considering moving for dismissal of a case. Numerous factors play into the scenario. It may be that the debtor has lost a good job, been involved in a divorce proceeding, suffered serious illness, and the income stream will be interrupted with a corresponding increase in expenses. Efforts are made to communicate with debtors prior to making a motion to dismiss.

This statute is geared strictly to consumer debts. In interpreting the statute, the Sixth Circuit in In Re Krohn, 886 F.2d 123 (1989), ruled that the honest debtor and/or the needy debtor could make use of the bankruptcy system, but denied the “fresh start” to those debtors who weren’t needy or who weren’t honest.

The United States Trustee examines each situation in light of the facts of the case in determining whether to move forward or not. It is suggested that debtors' counsel carefully prepare Schedule I and point out anticipated changes in income of more than ten percent (10%) on the face of the schedule.

C. [9.7] Criminal Referrals

Section 586(a)(3)(F) of Title 28 requires the United States Trustee to notify the United States Attorney of the occurrence of any action which may constitute a crime under the laws of the United States. This corresponds to the duties of other parties in the bankruptcy process—judges and trustees—to report potential criminal matters to the United States Attorney as is required by Title 18 Section 3057, which states:

“§ 3057. Bankruptcy investigations

(a) Any judge, receiver, or trustee having reasonable grounds for believing that any violation under chapter 9 of this title or other laws of the United States relating to insolvent debtors, receiverships or reorganization plans has been committed, or that an investigation should be had in connection therewith, shall report to the appropriate United States attorney all the facts and circumstances of the case, the names of the witnesses and the offense or offenses believed to have been committed. Where one of such officers has made such report, the others need not do so.

(b) The United States attorney thereupon shall inquire into the facts and report thereon to the judge, and if it appears probable that any such offense has been committed, shall without delay, present the matter to the grand jury, unless upon inquiry and examination he decides that the ends of public justice do no require investigation or prosecution, in which case he shall report the facts to the Attorney General for his direction.”

The United States Trustee has taken a very aggressive role in seeking to uncover situations involving fraudulent schemes, concealed assets, perjury, false proofs of claims, and such other activities which destroy the integrity of the bankruptcy system. United States Trustee personnel have conducted extensive investigations and reconstructions of records, appeared as both fact and expert witnesses in
federal trials, lectured other governmental agencies, including the Federal Bureau of Investigation—all with the purpose of advancing integrity within the Bankruptcy system.

Consumer bankruptcy cases normally do not generate the sophisticated schemes seen in business bankruptcies. However, there is no statistical information on the amount of fraud that occurs in consumer bankruptcy cases. Information about consumer bankruptcy fraud matters is most frequently generated in the form of tips from ex-spouses, relatives, and friends who are either co-makers or guarantors of debts.

The policy of the United States Trustee, prior to making a criminal referral, is to request a written statement from the person with information about the debtors’ alleged fraud. Personnel from the United States Trustee’s office will conduct an investigation, and if satisfied, will then make the referral. Referrals are made without publicity and United States Trustee personnel will rarely discuss referrals with anyone other than federal law enforcement officials. The lack of public knowledge on this subject belies the weight and emphasis the United States Trustee places on this function.

D. [9.8] Employment Of Professionals

Consumer debtors choose their own counsel. Counsel is required to set forth in a Rule 2016(b) statement the terms of counsel’s employment. This disclosure is attached to the petition, filed with the Court, and also transmitted to the United States Trustee. Usually, this is the last and only matter in which consumer debtors are involved with respect to professionals.

However, about three per cent (3%) of the anticipated thirteen thousand chapter 7 consumer cases for 1996—or perhaps four hundred cases—will be denominated as asset cases. Asset cases involve considerably more work than the no-asset cases. Assets for distribution to unsecured creditors need to be collected, liquidated, and disposed of. The panel trustee may hire auctioneers, attorneys, accountants, appraisers, and other types of professionals in order to assist in the handling of the case.

Section 327 of the Code and Rule 2014 govern the procedures involved in the hiring of professionals. The United States Trustee plays a major role in pointing out conflicts to the court with respect to the employment of professionals.

The “disinterestedness” of the professional in the case (defined at section 101) is a determining factor in whether or not a professional may be permitted by the court to be involved in the bankruptcy process. This process places high regard on fiduciary concepts and fiduciary relationships.

III. [9.9] PANEL TRUSTEE

Panel trustees are the backbone of the consumer chapter 7 process. The consumer debtors’ contact with a bankruptcy system “authority figure” is almost exclusively only the panel trustee, not United States Trustee personnel, the bankruptcy court clerk personnel, or judicial officers. It is the panel trustee who is responsible to the creditor body for making sure their positions are protected when necessary and for determining whether or not the case should be denominated as an “asset” case or a “no asset” case. Since about ninety-seven percent (97%) of the cases will be declared “no asset” cases in 1996, the panel trustee is the consumer debtors’ only brush with the bankruptcy system.

A. [9.10] Appointment To The Case

Section 701 requires the United States Trustee to promptly, after a case filing, appoint one of the panel trustees to serve as interim trustee until the first meeting of creditors about thirty (30) days later. If no trustee is elected, then the interim trustee becomes the permanent trustee. Section 702(d). Rarely,
if ever, is there an election for a trustee in a consumer bankruptcy case. Therefore, as a practical matter, once the United States Trustee appoints an interim trustee, that trustee knows he or she will serve continuously in the case.

The panel trustee qualifies by filing a bond in favor of the United States in an amount determined by the United States Trustee and conditioned upon the faithful performance of the trustee's official duties. The United States Trustee also determines the sufficiency of the surety on such a bond. The trustee's bond is a broad instrument and not one that merely guarantees payment if the trustee should abscond with money. The acceptance of the appointment by the panel trustee is an assumption of a number of fiduciary duties owed by the trustee to the estate. A determination by a bankruptcy court that the trustee has breached a duty owed to the estate calls into question the trustee's lack of faithful performance and liability under the surety bond.

In accepting the appointment, the trustee must carefully determine whether or not conflicts are evident from the schedules as between the trustee and the consumer debtor. Likewise, the trustee should decline accepting a case in which one of the trustee's clients has a claim against the debtor.

If a trustee declines or rejects a case at or near the time of appointment, the United States Trustee must appoint another interim trustee.


The meeting of creditors calls for the debtor to be placed under oath and examined by the United States Trustee and other interested parties. §§341, 343. By statute, the United States Trustee presides over this meeting. The Court may neither preside over the meeting nor attend. The United States Trustee has delegated the authority to preside over meetings of creditors to the panel trustee. At the meeting, the debtor is examined by the panel trustee and other interested parties. The proceedings are tape recorded and the tapes are turned over to the United States Trustee which maintains custody of them for two (2) years. Anyone can obtain a copy by writing the United States Trustee and providing the United States Trustee with blank tapes.

Meeting places in the Eastern District of Kentucky are held in Lexington, Covington, Ashland, Pikeville, Corbin and Frankfort. In the Western District they are held in Louisville, Bowling Green, Paducah and Owensboro. Louisville and Lexington meeting places are located in spaces provided by the United States Trustee. All other places in Kentucky make use of facilities where bankruptcy courts are located.

The meeting of creditors not only provides for debtors' examinations, but also operates as a clearinghouse for debtors and creditors to work out reaffirmation agreements, arrange to surrender property, as well as working out other matters. In almost every case the meeting venue provides the only face-to-face contact among the parties to the process—debtors, creditors, their representatives, and panel trustees.

Congress has stepped up its desire to make consumer debtors aware of alternatives to filing a Chapter 7 bankruptcy case. For example, Section 342 requires the clerk to notify the debtors of the availability of other chapters. As seen on the face of the petition, debtors must acknowledge that they are aware of the availability of other chapters. In addition, attorneys for debtors must declare that they have informed debtors of the availability of other chapters.

Recently, Congress enacted 11 U.S.C. section 341(d) requiring the trustee to ensure the Chapter 7 debtor is aware of the availability of relief under other chapters as well as the effects of discharge and reaffirmation. This new law requires the panel trustee to question the debtor about the debtors' knowledge of the impact of bankruptcy and its effects on future actions of the debtors.
C. [9.12] Trustee Oversight

By statute (28 U.S.C. §586), the United States Trustee is required to establish, maintain, and supervise the panel of private trustees. Private trustees are regarded as independent contractors, not employees. "Establishment of the panel" requires the United States Trustee to be involved in recruitment, background investigations by the Federal Bureau of Investigation, hiring practices, including equal opportunity and diversity issues. "Maintaining the panel" requires the United States Trustee to engage in periodic training, one-on-one training, review of reports, review of bank deposits, other reviews, and to provide trustees with a handbook on policy and procedure. "Supervision" requires the United States Trustee to discuss issues in cases, visit the trustees regularly, and sample the trustee's legal and accounting practices to ensure that these practices comport with sound fiscal and fiduciary practices. The United States Trustee makes policy, and also litigates with and against panel trustees, creditors, and debtors. Because of these numerous contacts and relationships, the United States Trustee attempts to be forthright in the positions taken, both in policy-making and litigation, and attempts to deal with panel trustees in an even-handed fashion with respect to the United States Trustee's oversight powers.


In the consumer bankruptcy setting the primary function of the United States Trustee is to see that the panel trustee presides at the meeting of creditors, taping the proceedings, files a memorandum of the proceedings, and submits a final report, referred to as an "NDR" (No Distribution Report) as required by Rule 5009. This permits the case closing process to begin.

Additionally, the panel trustee must ensure that the debtor performs those intentions as specified in section 521(2)(B). For example, surrendering assets to creditors who hold security interests.

The trustee must investigate the financial affairs of the debtor. As a practical matter, panel trustees satisfy this from an examination of the schedules, statements, and lists as well as the interrogation of the debtor at the meeting of creditors.

E. [9.14] Asset Collection And Liquidation

In the event the case is an asset case, the panel trustee must collect and reduce to money property of the estate. Section 704(1). One of the primary goals of the United States Trustee is to check the conduct of the panel trustee to ensure that all assets have been identified, that they are physically collected or taken into custody, and timely liquidated.

The practice in Kentucky, as is the case in other jurisdictions, has been for debtors to maintain control of estate assets until the panel trustee requests them. A reading of section 521(4) is clearly contrary to the practice. However, in today's setting, with consumer bankruptcies at a near all-time high, practicalities seem to take precedence.

The United States Trustee gauges the panel trustee's efforts at taking possession of estate assets and encourages trustees to quickly liquidate assets. Statistical information is collected from cases in order to determine how much of the assets' values go toward fees and expenses and how much is distributed to creditors. Since panel trustees represent the interests of unsecured creditors primarily, the United States Trustee encourages diligence and aggressiveness from the panel trustees in order to maximize dividends to creditors.

F. [9.15] Investment Of Funds

The result of asset liquidation is cash proceeds. The United States Trustee requires the panel trustee to carefully safeguard funds by placing funds in a federally insured depository as set forth in 11
U.S.C. §345. The money is kept in accounts clearly identified as trust accounts. Panel trustees are required to invest funds in interest-bearing accounts when doing so would promote meaningful distributions to creditors.

Since the limit of a federally insured depository is $100,000, the United States Trustee has agreements with authorized banks and the appropriate Federal Reserve branches, that when funds on hand exceed $100,000 the depository bank will pledge its own assets as collateral to guarantee the funds of creditors in the event of a bank failure.

Various documents relative to this collateralization are maintained by the United States Trustee for each panel trustee and each case.

G. [9.16] Submission Of Reports

Trustees as fiduciaries are required to make periodic reports to the United States Trustee. The United States Trustee examines these reports and makes use of them as a management tool.

A key report is the 180 Day Report. In this report, which the panel trustee is required to submit to the United States Trustee each six (6) months, the trustee records the number of cases to which he or she was appointed during that time period. Also, the trustee reports the number of cases closed. Total funds on hand and total funds for each case are reported. This assists the United States Trustee in determining changes in the trustee's bond amounts. It also provides a mechanism for the panel trustee to control his or her inventory of cases because the United States Trustee maintains its own data base and can also request the court clerk to provide a listing of cases. All these lists are used by the United States Trustee to ensure cases do not "fall through the cracks" but move along steadily.

For each case the panel trustee must submit a report listing each asset whether the debtor listed it or not.

A form that reflects a checkbook entry process must be filed with the United States Trustee in each case in which the trustee holds cash funds. This permits cross-checking between other reports such as auctioneer reports or bank reports, in order to determine the movement of assets through the liquidation process.

H. [9.17] Case Closings

The United States Trustee must examine the case closing documents prepared by the panel trustee prior to their submission to court for approval in cases where assets are to be distributed to creditors. These documents include a request by the trustee for his statutory compensation as well as his out-of-pocket expenses incurred during the administration of the estate. Before an asset case can be closed, all professional fee applications must be submitted to the Court for approval and all creditors' proofs of claim examined for objections by the panel trustee.

While asset collection and distribution occur in only a small percentage of bankruptcy cases, debtors are anxious to see if priority creditors will be satisfied. Generally, priority creditors are federal, state, and sometimes local taxing agencies whose debts are not normally extinguished by bankruptcy. Since these debts will survive bankruptcy, the more the trustee is able to pay to satisfy them, the less the debtor will have to pay postpetition. Unsecured creditors take the balance of funds held by the trustee. In some unusual situations there will be sufficient funds to pay all administrative, priority and unsecured creditors in full with interest. On occasion, the debtors will receive a refund of sums left remaining after all claims have been satisfied in full.

The distribution scheme in bankruptcy is complex. Trustees are required to strictly follow that scheme in making lawful distributions of dividends to creditors. The United States Trustee's function is
to doublecheck the trustee’s distribution proposals and assist the trustee in ensuring that the statutory scheme of payments to creditors is carried out.

The panel trustee disburses estate funds in accordance with the court approved order of distribution. As soon as all checks have cleared the account, the trustee submits a final account along with all cancelled checks and bank statements to the United States Trustee for review. If the United States Trustee determines that the funds have been properly disbursed by the panel trustee, the final account is sent to the court for approval and the case is administratively closed.
I. [10.1] INTRODUCTION

As the divorce rate rises, attempts to bankrupt obligations between ex-spouses have also increased. The Bankruptcy Code's policy of affording equal treatment to creditors has produced some harsh results when the creditor is an ex-spouse and/or the debtor's children. To the extent that one believes the "domestic" creditor warrants more protection from a debtor's strategic bankruptcy filing, the Bankruptcy Code has been particularly inept at providing such protection for domestic obligations. While Congress has sought to enhance protections for non-debtor ex-spouses and children as detailed below, this effort promises to produce more litigation between the parties. In many instances, the bankruptcy filing will result in a re-trial of the divorce in the bankruptcy court, unencumbered by the protection of state family laws. The bankruptcy practitioner with a client with a family law obligation or receivable must be able to carefully direct the client through the litigation hurdles outlined below.

II. [10.2] SUPPORT OBLIGATIONS

The Bankruptcy Code has long recognized exceptions to discharge for a debtor's support obligations. 11 U.S.C. §523(a)(5) provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt— ...

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that—

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.
Although a simple concept—support obligations are not dischargeable—the application of this provision has spawned volumes of litigation. The statute allows/compels an inquiry by the reviewing Court as to whether the obligation sought to be discharged is “actually in the nature of alimony, maintenance or support.” Non-support obligations, i.e., debts relating to or constituting property division have traditionally been dischargeable in bankruptcy subject to certain conditions described infra at Section [10.11].


The determination of whether an obligation is in the nature of support is made by reviewing the substance of the obligation, not its form within the separation agreement or decree. This inquiry is to be determined by federal bankruptcy law, not state law. In re: Calhoun, 715 F.2d 1103 (6th Cir. 1983). In Calhoun, the Sixth Circuit developed a three prong inquiry for determining whether an obligation is in the nature of support:

(a) Whether the state court or the parties intended to create an obligation to provide support through the assumption of joint debt;

(b) Whether the assumption has the effect of providing the support necessary to ensure that the daily needs of the former spouse/children are satisfied; and

(c) Whether the amount of support represented by the assumption is so excessive that it is manifestly unreasonable under traditional concepts of support. If unreasonable, the obligation is dischargeable to the extent necessary to serve the purposes of federal bankruptcy law. Id. at 1109-10.

If either (a) or (b) is answered in the negative, the inquiry stops there and the debt will be dischargeable subject to the provisions of §523(a)(15) discussed infra. In determining (b), the Sixth Circuit has held that whether the assumption has the “effect” of providing support is to be determined not as of the divorce decree; but rather, at the time of the nondischargeability request. Likewise, element (c) allows the Court wide latitude in fashioning an equitable remedy and essentially “redoing” the divorce. Contra, Calhoun, supra at 1110, n. 12. Specifically, the Court can attempt to balance the debtor’s entitlement to a fresh start against the support needs of a family and can review not only the circumstances as they existed at the time of the divorce, but any change of circumstances, including the relative earning power of the parties, their financial resources, prior work experience or abilities and other facts.

B. [10.4] Refining Calhoun

Ten years after the Calhoun decision, the Sixth Circuit again commented on the nature and dischargeability of support obligations in In re: Fitzgerald, 9 F.3d 517 (6th Cir. 1993). In Fitzgerald, the Sixth Circuit clarified that Calhoun’s “present needs” test is not applicable to an obligation denominated as support in the divorce decree. The Court reasoned that unlike Calhoun in which the debtor’s obligation to assume a debt was at issue; the obligation sought to be discharged in Fitzgerald was a monthly support payment to be made by the debtor directly to the non-debtor spouse and was designated “alimony” in the separation agreement. Accordingly where a payment is to the non-debtor spouse and designated as support, “the only question is whether something denominated as alimony is really alimony and not, for example, a property settlement in disguise.” Id. at 521.

1. [10.5] Practice Pointer

To insure protection for the spouse receiving support payments, drafters should clearly articulate that the payment is a support obligation and intended for the support of the payee. Traditional state law characteristics of support payments should be retained (e.g., termination upon remarriage/
death/tax consequences). On the other hand, the payor spouse will want any payments made pursuant to a separation agreement to be property settlement.

C. [10.6] Procedure

1. [10.7] Jurisdiction

Bankruptcy courts and state courts have concurrent jurisdiction to determine the dischargeability of support obligations. In most instances, the debtor will want a determination of discharge to be made by the Bankruptcy Court whereas the spouse entitled to the support will probably view the state court as the more favorable forum.

2. [10.8] Adversary Proceeding

In bankruptcy court, a nondischargeability action is an adversary proceeding commenced by the filing of a complaint and governed by Bankruptcy Rule 7001 et seq. Rule 4007(e). A complaint to determine the dischargeability of a support obligation may be filed at any time and a case may be reopened for this purpose without payment of an additional fee. A sample debtor’s nondischargeability complaint is set forth infra at [10.31].

3. [10.9] Burden of Proof

The spouse contesting the discharge of the debt has the burden of proof. In re: Calhoun, supra, 715 F.2d at 1111, n. 15.

4. [10.10] Standard of Proof


III. [10.11] DISCHARGEABILITY OF NON-SUPPORT (PROPERTY) OBLIGATIONS

A. [10.12] Exception To Discharge

Amendments to the Bankruptcy Code effective for cases filed on or after October 22, 1994 enacted new protective provisions for spouses whose ex-spouses file bankruptcy. An amendment to Section 523 deems certain non-support (property) obligations nondischargeable. 11 U.S.C. §523(a)(15) provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt—

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless—...

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment
of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor;

The section is intended to provide an opportunity for a “hold harmless” agreement between spouses to be enforceable notwithstanding one spouse’s bankruptcy; for example, where a spouse has agreed to pay the joint mortgage obligation of the parties in lieu of alimony or in consideration of reduced alimony. Although the debtor’s obligation to the third party creditor will be discharged (unless other provisions of §523 apply), this section focuses on whether the debtor’s obligation to the former spouse will be discharged.

B. [10.13] Elements


First, the debt must be one owed to a former spouse (not a third party creditor) incurred in the course of a divorce. The Court in In re: Finaly, 190 B.R. 312 (Bkrtcy. S.D. Ohio 1995) dismissed those portions of a §523(a)(15) nondischargeability action which sought to declare the debtor’s debts to the spouse’s parents and mortgage company nondischargable. Thus, it is important for the separation agreement or decree to create an obligation between the spouses in the event one spouse defaults on his/her obligation to pay a joint debt which is assigned to that spouse for payment in a separation agreement or decree.

2. [10.15] When Debtor is Entitled to Relief/Burdens of Proof

Unlike most other sub-parts of Section 523, a non-support obligation is deemed nondischargeable unless certain elements are proved. (Other sub-parts assume the debt is discharged unless elements are proved; see e.g., 11 U.S.C. §§ 523(a)(2) [false representation/fraud], (a)(4) [fraud], (a)(6) [willful and malicious injury].) Because of the “triple negatives”, a key issue becomes which party has the burden of proof. As noted above, traditionally the creditor seeking to except the debt from discharge has the burden of proof; however in the context of Section 523(a)(15), courts have reached different conclusions.

Specifically, some courts reason that because the debt will be nondischargeable unless the debtor has an inability to pay or that dischargeability has a greater benefit to the debtor, that the burden of proof should be on the debtor. “If the burden is placed on the plaintiff to show the debtor does not have the ability to pay, the plaintiff would want to fail to meet the burden.... Thus, by the very nature of §523(a)(15), the burden of the exceptions must shift to the debtor.” In re: Hill, 184 B.R. 750, 753-54 (Bkrtcy. N.D. Ill. 1995). Thus, the majority of courts have placed the initial burden of establishing that the debt is one owed to the spouse and incurred in the course of a divorce or separation on the non-debtor spouse. See In re: Florio, 187 B.R. 654 (Bkrtcy. W.D. Mo. 1995); In re: Anthony, 190 B.R. 429 (Bkrtcy. N.D. Ala. 1995); In re: Carroll, 187 B.R. 197 (Bkrtcy. S.D. Ohio 1995); In re: Becker, 185 B.R. 567 (Bkrtcy. W.D. Mo. 1995); In re: Comisky, 183 B.R. 883 (Bkrtcy. N.D. Cal. 1995); contra In re: Butler, 186 B.R. 371 (Bkrtcy. D.Vt. 1995). Upon meeting that burden, the burden of going forward will shift to the Debtor to prove, by a preponderance of the evidence, the affirmative defenses set forth in subparts (A) or (B). As the affirmative defenses are set forth in the disjunctive, proof of either by the debtor will result in the debt being deemed dischargeable. In In re: Hessen, the bankruptcy court ruled that as to the affirmative defenses, there is a bifurcated burden of proof; the burden of going forward is on the debtor to prove the first affirmative defense (subsection “A”—inability to pay) and the creditor has the burden on the second affirmative defense (subsection “B”—detriment to creditor outweighs benefit to debtor), In re: Hessen, 190 B.R. 229 (Bkrtcy D.Md. 1995).
3. **[10.16]** Affirmative Defense: The Debtor Lacks the Ability to Pay the Debt from Property or Disposable Income

Legislative history suggests that the debtor prevail on this element if:

...paying the debt would reduce the debtor’s income below that necessary for the support of debtor and debtor’s dependents. The Committee believes that payment of support needs must take precedence over property settlement debts.... H.Rep.No. 103-835, 103rd Cong., 2nd Sess. 54, reprinted in 1994 U.S. Code Cong. & Admin. News 3363.

The use of the “disposable income” language has led several courts to use Chapter 13’s “disposable income test” (11 U.S.C. § 1325(b)) to make this determination. *See, e.g.*, *In re: Hessen*, 190 B.R. 229, 237 (Bkrtcy. D.Md. 1995). If the debtor has no disposable income to fund payment of the obligation, the debtor prevails. *Id.* Other courts have looked not only to the debtor’s income, but have considered such additional factors as (a) income of debtor’s new wife (*In re: Comisky*, *supra* at 883-884) and (b) family assistance (*In re: Woodworth*, 187 B.R. 174, 177, n. 1 (Bkrtcy. N.D. Ohio 1995)).

4. **[10.17]** Affirmative Defense: Discharge Results in a Benefit to the Debtor that Outweighs Detrimental Consequences to Spouse (Creditor)

This defense to nondischargeability requires a balancing of the relevant detriments between the spouses. The legislative history provides:

The debt will also be discharged if the benefit to the debtor of discharging it outweighs the harm to the obligee. For example, if a non-debtor spouse would suffer little detriment from the debtor’s nonpayment of an obligation required to be paid under a hold harmless agreement (perhaps because it could not be collected from the non-debtor spouse or because the non-debtor spouse could easily pay it) the obligation would be discharged. The benefits of the debtor’s discharge should be sacrificed only if there would be substantial detriment to the non-debtor spouse that outweighs the debtor’s need for a fresh start. H.Rep.No. 103-835, 103rd Cong., 2nd Sess. 54, reprinted in 1994 U.S. Code Cong. & Admin. News 3363.

At least one court has concluded that where neither spouse could pay the debt, the debt is deemed dischargeable. *In re: Woodworth*, *supra* at 177-78. One case has authorized partial nondischargeability and limited the extent of the nondischargeable debt by analogizing the balancing defense to the “undue hardship” defense relating to the dischargeability of student loans under Section 523(a)(8). *In re: Comisky*, *supra* at 884; *see also* *In re: Hessen*, *supra* at 241. In general, the cases go through a very fact specific inquiry of the parties’ respective incomes and expenses and the result, in large part, has been driven by the assignment of the burden of proof. *For example, compare In re: Anthony*, 190 B.R. 429 (Bkrtcy. N.D. Ala. 1995) [burden is on debtor to prove benefit to him outweighed detriment to non-debtor ex-wife—debt is nondischargeable] *with In re: Butler*, 186 B.R. 375 (Bkrtcy. D.N.J. 1994) [burden on non-debtor to prove that debtor had ability to pay and that discharge is more detrimental to her—debt is discharged].

5. **[10.18]** Time of Measurement

Courts differ concerning at what date the facts which comprise either the ability to pay or the balancing of the benefits/detriments should occur. All cases appear to agree that the inquiry is *not* made as of the date of the divorce. However, there does not appear to be any consensus as to whether the inquiries should be conducted as of (a) the date of bankruptcy (*Becher, Carroll, supra*); (b) the date of the non-dischargeability complaint (*Hill, supra*); or (c) the date of the trial on the complaint (*Hessen, supra*). *See discussion infra, Kentucky Rulings, [10.21].
C. [10.19] Procedure

1. [10.20] Statute of Limitations for Determinations Pursuant to Section 523(a)(15)

In order for non-support obligations to be excepted from a debtor’s discharge, a request for nondischargeability must be *timely* made by the non-debtor spouse. 11 U.S.C. § 523(c)(1). Federal Bankruptcy Rule of Procedure 4007 provides that a complaint to determine nondischargeability of a non-support divorce debt can only be filed in the bankruptcy court and must be filed within sixty (60) days following the first date set for the meeting of creditors. Note that this is the first date set, not when the meeting actually occurs. The sixty (60) day filing period may be extended, for cause, *only* on motion filed within the sixty (60) day period.

D. [10.21] Kentucky Rulings

The bankruptcy courts in both the Eastern and Western Districts of Kentucky have published opinions concerning the nondischargeability of non-support obligations pursuant to Section 523(a)(15). In re: Owens, 191 B.R. 669 (Bkrtc. E.D. Ky. 1996), In re: Smither, 194 B.R. 102 (Bkrtcy. W.D. 1996). In both cases, it appears the courts adopted the majority approach and placed the initial burden of proof of whether the debt falls within the parameters of Section 523(a)(15) on the non-debtor spouse and the burden of the affirmative defenses on the debtor. Likewise both courts begin their review of the parties’ financial circumstances at the time of the trial and consider the impact of a new spouses’ income as part of the affirmative defenses’ analysis. The Smither opinion, reasoning that manipulation of income/expenses and hardship could occur if only one date is examined concluded:

We therefore hold that a Court may consider facts and circumstances concerning a debtor’s future earning potential, as well as his or her income as of the date of the 11 U.S.C. §523(a)(15) action in determining his ability to pay. Smither, *supra* at 108.

The Smither court further adopted the approach in Comisky, *supra*, and ruled that a partial discharge of a debt could occur as a result of a Section 523(a)(15) ruling. Smither, *supra* at 109. Both districts adopt a balancing of standards of living test to balance the “hardships” pursuant to Section 523(a)(15)(B):

This Court believes that the best way to apply the 11 U.S.C. § 523(a)(15)(B) balancing test is to review the financial status of the debtor and the creditor and compare their relative standards of living to determine the true benefit of the debtor’s possible discharge against any hardship the spouse, former spouse and/or children would suffer as a result of the debtor’s discharge. If, after making this analysis, the debtor’s standard of living will be greater than or approximately equal to the creditor’s if the debt is not discharged, then the debt should be nondischargeable under the 523(a)(15)(B) test. However, if the debtor’s standard of living will fall materially below the creditor’s standard of living if the debt is not discharged, then the debt should be discharged under 11 U.S.C. §523(a)(15)(B). *Id.* at 111.

The Smither opinion is notable for the factors it enunciates to determine the relative hardships of the parties. See Smither, *supra* at 111. In fact, the Western District requires the filing of pre-trial affidavits designed to collect the relevant data from the parties. See *infra* at [10.32].
IV. [10.22] PRACTICE POINTERS

A. [10.23] Representing The Debtor

The debtor will want to insure that s/he lists in the bankruptcy petition not only his ex-spouse, but all creditors (joint or assigned) which existed at the time of the divorce decree unless s/he knows the debt has been paid in full. The debtor should take no action with regard to the ex-spouse in the first sixty (60) days following the date first set for the meeting of creditors. Once that date has passed the ex-spouse will be precluded from raising any issue of nondischargeability of non-support obligations under Section 523(a)(15). Following the sixty (60) day period, the debtor may bring an action in bankruptcy court to determine whether obligations to the ex-spouse are really property division and thus dischargeable.

B. [10.24] Representing The Creditor Non-Debtor Spouse

Upon a debtor’s bankruptcy filing an ex-spouse needs to immediately evaluate whether any obligations owed by the debtor are in the nature of property division (as opposed to support) and if so, evaluate the factual basis for filing a Section 523(a)(15) action. Because the affirmative defenses in that section are so fact-specific, a creditor ex-spouse may wish to extend the time for filing the complaint by filing a motion to extend before the sixty (60) day period expires and conducting the debtor’s deposition pursuant to Federal Bankruptcy Rule of Procedure 2004.

If it appears there are no property debts and only support obligations, the creditor may wish to request the divorce court to determine that the subject obligations are in the nature of support (presumably the court that ordered the obligation in the first instance will be more inclined to honor its prior orders).

Alternatively, an ex-spouse may proceed in the divorce court and seek a support award or modification of a support award based on the fact of the debtor’s bankruptcy filing. See e.g., Low v. Low, Ky., 777 S.W.2d 936 (1989) (Husband’s bankruptcy and retention of exempt property constituted grounds to modify lump sum maintenance award to non-debtor wife); cf McDonald v. McDonald, Ky., 882 S.W.2d 134 (1994) (ex-wife’s motion to be awarded maintenance to cover debt which debtor husband was supposed to have paid to a creditor was premature where creditor had not attempted collection from the ex-wife). With the right fact pattern, this may be a creditor ex-spouse’s strongest avenue. As discussed infra at Section V, the automatic stay no longer applies to establishing or modifying support awards so such actions can be taken immediately.

V. [10.25] THE AUTOMATIC STAY – EXCEPTION FOR SUPPORT OBLIGATIONS

Section 362 of the Code generally provides that actions commenced (or which could have been commenced) prior to bankruptcy and the enforcement of claims and judgments against the debtor or his/her property are stayed by a bankruptcy filing. 11 U.S.C. § 362(a). Actions taken in violation of the stay are void (Smith v. First America Bank, N.A., 876 F.2d 524 (6th Cir. 1989)) and may be punishable by sanctions. 11 U.S.C. § 362(h). The Code has long recognized an exception to the automatic stay for the collection of alimony, maintenance and support from non-estate property. Many questions arose concerning the scope of this exception which was broadened somewhat by the 1994 Amendments and now provides:

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay....
(2) under subsection (a) of this section—

(A) of the commencement or continuance of an action or proceeding for—
   (i) the establishment of paternity; or
   (ii) the establishment or modification of an order for alimony, maintenance, or support; or

(B) of the collection of alimony, maintenance, or support from property that is not property of the estate.


A. [10.26] Practice Pointers

Congress believed these provisions would enhance the Code's protection for support obligations. While the exception appears straightforward, its application can be difficult. First, the exception applies only to the enumerated items and does not apply to such things as finalizing the divorce (obtaining the decree) and property division. Thus, an Order modifying the stay may still be necessary to give validity to these acts. See In re: White, 851 F.2d 170 (6th Cir. 1988); Raikes v. Langford, 701 S.W.2d 142 (Ky. Ct. App. 1986).

If the debt is a support obligation, it may only be collected from property that is not property of the estate. Property of the estate is defined in 11 U.S.C. §541 which is applicable to all types of bankruptcy filings. Generally, estate property includes all interests of the debtor in property as of the date of bankruptcy and is construed very broadly. Estate property does not include earnings or wages of an individual debtor for post-bankruptcy services in a Chapter 7 or 11 proceeding. 11 U.S.C. §541(a)(6). However, such post-petition wages are estate property in Chapter 12 and 13 proceedings. 11 U.S.C. §§1207, 1306.

Accordingly, if the Debtor is in a Chapter 7 or 11 proceeding, his/her post-petition income can be subject to collection actions (e.g., garnishment) for support obligations without bankruptcy court order and without violating the stay. In a Chapter 12 or 13 proceeding, pre-petition alimony or support may only be collected pursuant to the Plan until such time as the Plan is completed and the discharge entered (or until the case is converted to a Chapter 7, Chapter 11 or dismissed). Another amendment to the Code has removed the harshness of this in these chapters. Section 507 has been amended to provide that prepetition alimony and support claims are now priority claims in a bankruptcy proceeding and accordingly must be paid in full as part of a Chapter 13 Plan. 11 U.S.C. §1322. The new priority section provides:

(7) Seventh, allowed claims for debts to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt—

   (A) is assigned to another entity, voluntarily, by operation of law, or otherwise; or

   (B) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.
Thus, support claims have priority and will be paid before tax claims which are the eighth priority. Note that if the state court orders the support claim to be retroactive, one could argue that this qualifies the claim as a prepetition, priority claim.

Support claims which become due after the bankruptcy filing may not be paid from the estate. 11 U.S.C. §502(b)(5) provides:

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in a lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title.

Thus, non-dischargeable post-bankruptcy support claims may be paid in the ordinary course as they accrue. This applies to all chapters of bankruptcy. In Chapters 12 and 13, the ongoing support obligation is considered an ordinary and necessary expense of Debtor’s monthly budget in calculating “disposable income” for plan purposes. 11 U.S.C. §1325(b)(2)(A).

VI. [10.27] TRANSFERS TO SPOUSES – EXCEPTIONS TO PREFERENCES

11 U.S.C. §547(b) and 550 generally allow a bankruptcy trustee to avoid and recover transfers of a debtor’s property made on an antecedent debt during the ninety (90) days before bankruptcy (the reach back period is extended to one (1) year for insiders). Subsection (c) of §547 sets forth certain exceptions to avoidance, including an exception for transfers for support obligations:

(c) The trustee may not avoid under this section a transfer—

(7) to the extent such transfer was a bona fide payment of a debt to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt—

(A) is assigned to another entity, voluntarily, by operation of law, or otherwise; or

(B) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support; or

Accordingly, a debtor’s support payments to an ex-spouse or child during the preference period will not be subject to avoidance by the Trustee as a preference. This exception does not apply to other types of transfers to a spouse (such as property division payments) which may still be avoided by the Trustee if the elements of §547(b) are met. (Of course, the transferee may still raise the other exceptions to
avoidance, 11 U.S.C. §547(c), if they apply.) Moreover, this provision will not protect challenges to a spousal transfer as a fraudulent conveyance pursuant to 11 U.S.C. §548, 11 U.S.C. §544 and applicable state law (KRS 378.010 et seq.).


11 U.S.C. §522(f)(1)(A) authorizes a debtor to avoid judicial liens which impair a debtor’s exemption. Consequently, in situations where a spouse has been awarded a sum of money to be paid over time secured by a lien on the property retained by the paying (debtor) spouse, avoidance of the lien has been sought by the debtor upon debtor’s bankruptcy filing. See e.g., Farrey v. Sanderfoot, 111 S.Ct. 1825, 114 L.Ed.2d 337 (1991). The Amendments likewise sought to add greater protection in this context for non-debtor spouses.

11 U.S.C. §522(f)(1)(A) now provides:

(f)(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section. If such lien is—

(A) a judicial lien, other than a judicial lien that secures a debt—

(i) to a spouse, former spouse, a child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement; and

(ii) to the extent that such debt—

(I) is not assigned to another entity, voluntarily, by operation of law, or otherwise; and

(II) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support, [sic]; or...

As with the exceptions to preference liability (Section [10.27] supra), this exception to lien avoidance applies only to judicial liens which secure support obligations—not property division. Of course, if liens to secure property (non-support) awards are consensual (as opposed to judicially ordered), they will not be avoidable pursuant to §522(f). Thus, every effort should be made by the payee spouse to secure the payor spouse’s property obligations with consensual liens. To avoid preference challenges, the granting and perfection of such liens should occur contemporaneously with the entry of the divorce decree. 11 U.S.C. §547(c)(1), (3).

VII. [10.29] CONCLUSION

The best protection against a spouse’s bankruptcy can be afforded by treating the division of property and support awards as secured transactions. If bankruptcy intervenes before, during or after a divorce, the relative rights/claims and potential claims of the parties must be evaluated in connection
Special Issues for Cases Involving Domestic Relations Issues

with the issues outlined herein. In many instances, practical cost considerations may override the academic exercises which the clash between the Bankruptcy Code and domestic relations law will require.
UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF KENTUCKY  
LEXINGTON DIVISION

IN RE:  

CASE NO. __________  

DEBTOR  

DEBTOR  

* * * * *  

DEBTOR  

PLAINTIFF  

VS.  

ADVERSARY NO. __________  

COMPLAINT TO DETERMINE  

DISCHARGEABILITY OF DEBT  

EX-SPOUSE  

DEFENDANT

Comes the Plaintiff, by and through counsel, and for his Complaint, states as follows:

1. This is an action to determine the dischargeability of a debt pursuant to 11 U.S.C. §523(a)(5) and is a core proceeding pursuant to 28 U.S.C. §157, this Court has jurisdiction herein pursuant to 28 U.S.C. §1334 and venue is proper pursuant to 28 U.S.C. §1409.

2. Plaintiff is the debtor in the above-captioned Chapter 7 proceeding which was filed on ________________.

3. Defendant is the former spouse of the Debtor who holds an alleged claim against the Debtor.
4. That in connection with the parties' dissolution proceeding, the ____________ Circuit Court entered a Decree of Dissolution on ____________, which Decree incorporated the terms of the parties' Separation Agreement dated ____________, true and accurate copies of which are attached hereto as Exhibit "1".

5. That said Agreement divided certain property of the parties and in connection therewith imposed certain financial obligations on the Debtor pursuant to paragraphs 1, 2, 3, 4, 6, and 7 (hereinafter "the financial Obligations").

6. That the Financial Obligations constitute property division, which obligations are dischargeable debts pursuant to 11 U.S.C. §523(a)(5).

7. That the Financial Obligations were not intended to be for the support of Defendant, do not have the effect of providing support necessary for Defendant and said Financial Obligations are excessive and unreasonable under traditional concepts of support.

WHEREFORE, Plaintiff respectfully requests a determination that the Financial Obligations described herein are dischargeable debts pursuant to 11 U.S.C. §523(a)(5).

Respectfully submitted,

WISE, WARNECKE & WISE

BY: ___________________________

TRACEY N. WISE, ESQ.
212 North Upper Street
Lexington, KY 40507
Telephone: (606) 231-5800
Facsimile: (606) 281-1179
ATTORNEYS FOR DEBTOR

198
SCHEDULING ORDER

Pursuant to Bankruptcy Rule 7001, IT IS HEREBY ORDERED:

(A) That a telephonic pretrial hearing is scheduled for ___ at ___. Motions for continuance of the pretrial
must be filed at least ten (10) days prior to the hearing.

(B) That within thirty (30) days from the issuance of the attached Summons, the defendant shall serve the
plaintiff with an answer and file the answer with the Court.

(C) That if the defendant fails to file an answer, the plaintiff shall within ten (10) days after the last day for filing the answer, file a Motion for Default Judgment together with an affidavit stating that the defendant is not incompetent, an infant or soldier/sailor serving overseas. IN THE EVENT THE PLAINTIFF SHOULD FAIL TO FILE SAID MOTION FOR DEFAULT JUDGMENT AND AFFIDAVIT WITHIN TEN (10) DAYS, THIS ACTION SHALL BE DISMISSED BY THE COURT.

(D) That within fifteen (15) days after the date the answer is filed, the attorneys and any unrepresented party shall:

1. in compliance with Bankruptcy Rule 7026(f), meet to discuss (a) the nature and basis of their claims and defenses; (b) the possibilities for a prompt settlement or resolution of the case; (c) to make or arrange for the required disclosures and (d) to develop a proposed discovery plan,

2. in compliance with Bankruptcy Rule 7026(f)(1) - (4), file a Settlement Conference Report (a) outlining the prospects of settlement or the reason settlement cannot be reached; (b) stating the issues remaining between the parties; (c) stating whether discovery is necessary and (d) the report shall be signed by the attorneys and any unrepresented party.

(E) That within ten (10) days after filing the settlement conference report, the parties shall complete and sign the Rule 7026(a) disclosures. Pursuant to Rule 7026(a)(1), the parties are directed to exchange the following information, along with the disclosures mandated by the provisions of subsections (A) through (D) of Rule 7026(a)(1):

1. a statement of the amount of debt in controversy under 11 U.S.C. 523(a)(15), including the rate of interest the obligations in question are accruing and any payment terms.

2. an affidavit by each party setting forth:

   a. a detailed schedule of the party's current monthly income. The debtor may update the schedule of current income filed with his or her petition. This schedule should include the current monthly income of any current spouse of the debtor.

   b. a detailed schedule of the current monthly expenses of the party. The debtor may update the schedule of current expenses filed with his or her bankruptcy petition. This schedule should include the expenses of all dependents that the party is supporting.

   c. a summary of the assets, including fair market values, owned by the party and his or her spouse. This summary should not include those assets which are property of the bankruptcy estate, but should include property which has either been abandoned by the trustee or claimed as exempt by the debtor.

   d. a summary of the current liabilities, owed by the party and his or her spouse excluding
Special Issues for Cases Involving Domestic Relations Issues

those which have been discharged in the current bankruptcy.

(e) a brief narrative of the current age, health, educational background, job skills and special training of the party and his or her respective spouse.

(f) a list of the dependents of the party, their ages, general health and a brief discussion of any special needs which they may have.

(g) a summary of the job histories of the parties and their respective spouses for the past five years. This summary should include a statement of the monthly salary earned in connection with these jobs.

(h) a brief narrative of the financial changes, if any, which the party has experienced since the commencement of the divorce action.

(i) [For the debtor only] A summary of the amount of debt which has been discharged, or will be discharged, in the bankruptcy proceeding and the amount of debt reaffirmed in the course of the debtor’s bankruptcy.

(j) [For the objecting creditor only] A statement of whether the party is eligible for relief under the provisions of the Bankruptcy Code.

(F) That within forty-five (45) days after filing the answer, the parties shall complete discovery. (NOTE: This is a total of forty-five (45) days, not forty-five (45) days for plaintiff followed by forty-five (45) days for defendant.) For good cause, the Court will consider a motion to extend the time for completing discovery.

IT IS FINALLY ORDERED that failure to comply with this Order may result in dismissal of the case and/or other appropriate sanctions.

A copy of this Order shall be served with the summons on all defendants by plaintiff’s agent.

ENTERED BY ORDER OF THE COURT
UNITED STATES BANKRUPTCY JUDGE
BY: ________________________________

Deputy Clerk

Louisville, Kentucky
August 15, 1996
I. OFFICIAL BANKRUPTCY FORMS

- Form 1: Voluntary Petition
- Form 3: Application And Order To Pay Filing Fee In Installments
- Form 6: Schedule E: Creditors Holding Unsecured Priority Claims
- Form 6: Declaration Concerning Debtor's Schedules
- Form 7: Statement Of Financial Affairs
- Form 8: Individual Debtor's Statement Of Intention
- Form 9A: Chapter 7, Individual/Joint, No-Asset Case
- Form 9C: Chapter 7, Individual/Joint, Asset Case
- Form 9D: Chapter 7, Corporation/Partnership, Asset Case
- Form 9E: Chapter 11, Individual/Joint
- Form 9E(Alt): Chapter 11, Individual/Joint
- Form 9F(Alt): Chapter 11, Corporation/Partnership
- Form 9G: Chapter 12, Individual/Joint
- Form 9H: Chapter 12, Corporation/Partnership
- Form 9I: Chapter 13, Individual/Joint
- Form 10: Proof Of Claim
- Form 16A: Caption (Full)
- Form 16 B: Caption (Short Title)
- Form 16C: Caption Of Complaint In Adversary Proceeding Filed By A Debtor
- Form 16D: Caption For Use In Adversary Proceeding Other Than For A Complaint Filed By A Debtor
- Form 17: Notice Of Appeal Under 28 U.S.C. §158(a) or (b) From A Judgment, Order, Or Decree Of A Bankruptcy Court
- Form 18: Discharge Of Debtor
- Form 19: Certification And Signature Of Non-Attorney Bankruptcy Petition Preparer (See 11 U.S.C. §110)

[NOTE: These official forms should be observed and used with such alterations as may be appropriate to suit the circumstances. See Rule 9009.]

II. STATUTORY PROVISIONS

III. LOCAL BANKRUPTCY RULES AND FORMS

- Western District Of Kentucky
- Eastern District Of Kentucky
APPENDIX I

OFFICIAL BANKRUPTCY FORMS
## FORM 1. VOLUNTARY PETITION

### United States Bankruptcy Court

**District of ____________________________**

<table>
<thead>
<tr>
<th>IN RE (Name of debtor—If individual, enter Last, First, Middle)</th>
<th>NAME OF JOINT DEBTOR (Spouse) (Last, First, Middle)</th>
</tr>
</thead>
<tbody>
<tr>
<td>ALL OTHER NAMES used by the debtor in the last 6 years (include married, maiden, and trade names)</td>
<td>ALL OTHER NAMES used by the joint debtor in the last 6 years (include married, maiden, and trade names)</td>
</tr>
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<tr>
<th>SOC. SEC./TAX I.D. NO. (If more than one, state all)</th>
<th>SOC. SEC./TAX I.D. NO. (If more than one, state all)</th>
</tr>
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<tr>
<th>STREET ADDRESS OF DEBTOR (No. and street, city, state, and zip code)</th>
<th>STREET ADDRESS OF JOINT DEBTOR (No. and street, city, state, and zip code)</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS</th>
<th>COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>MAILING ADDRESS OF DEBTOR (if different from street address)</th>
<th>MAILING ADDRESS OF JOINT DEBTOR (if different from street address)</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>LOCATION OF PRINCIPAL ASSETS OF BUSINESS DEBTOR (If different from addresses listed above)</th>
<th>VENUE (Check one box)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.</td>
</tr>
<tr>
<td></td>
<td>There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.</td>
</tr>
</tbody>
</table>

### INFORMATION REGARDING DEBTOR (Check applicable boxes)

<table>
<thead>
<tr>
<th>TYPE OF DEBTOR (Check one box):</th>
<th>CHAPTER OR SECTION OF BANKRUPTCY CODE UNDER WHICH THE PETITION IS FILED (Check one box)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual</td>
<td>Chapter 7</td>
</tr>
<tr>
<td>Joint (Husband &amp; Wife)</td>
<td>Chapter 11</td>
</tr>
<tr>
<td>Partnership</td>
<td>Chapter 13</td>
</tr>
<tr>
<td>Other</td>
<td>Section 304—Case Ancillary to Foreign Proceedings</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>SMALL BUSINESS (Chapter 11 only):</th>
<th>BUSINESS—Complete A &amp; B below</th>
</tr>
</thead>
<tbody>
<tr>
<td>Debtor is a small business as defined in 11 U.S.C. § 101.</td>
<td></td>
</tr>
<tr>
<td>Debtor is and seeks to be considered a small business under 11 U.S.C. § 1121(a) (Optional)</td>
<td></td>
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<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### BRIEFLY DESCRIBE NATURE OF BUSINESS

<table>
<thead>
<tr>
<th>NATURE OF DEBT (Check one box):</th>
<th>CHAPTER OR SECTION OF BANKRUPTCY CODE UNDER WHICH THE PETITION IS FILED (Check one box)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-Business/Consumer</td>
<td>Chapter 7</td>
</tr>
<tr>
<td>Business</td>
<td>Chapter 11</td>
</tr>
</tbody>
</table>

### TYPE OF DEBTOR (Check one box): (Print or Type Names)

<table>
<thead>
<tr>
<th>NAME(S) OF ATTORNEY(S) DESIGNATED TO REPRESENT THE DEBTOR</th>
<th>Telephone No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Declarant is not represented by an attorney. Telephone No:</td>
<td></td>
</tr>
</tbody>
</table>

### STATISTICAL/ADMINISTRATIVE INFORMATION (28 U.S.C. § 804)

<table>
<thead>
<tr>
<th>ESTIMATED NUMBER OF CREDITORS</th>
<th>ESTIMATED ASSETS (in thousands of dollars)</th>
<th>ESTIMATED LIABILITIES (in thousands of dollars)</th>
<th>EST. NO. OF EMPLOYEES—CH. 11 &amp; 12 ONLY</th>
<th>EST. NO. OF EQUITY SECURITY HOLDERS—CH. 11 &amp; 12 ONLY</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-15</td>
<td>50-99</td>
<td>100-199</td>
<td>100-999</td>
<td>1000-Over</td>
</tr>
<tr>
<td>16-49</td>
<td>50-99</td>
<td>100-199</td>
<td>100-999</td>
<td>1000-Over</td>
</tr>
<tr>
<td>50-99</td>
<td>50-99</td>
<td>100-199</td>
<td>100-999</td>
<td>1000-Over</td>
</tr>
<tr>
<td>100-199</td>
<td>100-199</td>
<td>100-199</td>
<td>100-999</td>
<td>1000-Over</td>
</tr>
<tr>
<td>200-999</td>
<td>100-999</td>
<td>100-199</td>
<td>100-999</td>
<td>1000-Over</td>
</tr>
<tr>
<td>1000-Over</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

| UNDER 50                      | 50-99                                      | 100-199                                         | 100-999                                 | 1000-Over                                       |
| 50-99                         | 100-999                                    | 100-999                                         | 100-999                                 | 1000-Over                                       |
| 500-999                       | 1000-999                                   | 1000-999                                        | 1000-999                                | 1000-Over                                       |
| 1000-999                      |                                            |                                                |                                        |                                                |
| 10,000-99,000                 |                                            |                                                |                                        |                                                |
| 100,000-over                  |                                            |                                                |                                        |                                                |

| UNDER 50                      |                                            |                                                |                                        |                                                |
| 50-99                         | 100-999                                    | 100-999                                         | 100-999                                 | 1000-Over                                       |
| 50-99                         | 100-999                                    | 100-999                                         | 100-999                                 | 1000-Over                                       |
| 500-999                       | 1000-999                                   | 1000-999                                        | 1000-999                                | 1000-Over                                       |
| 1000-999                      |                                            |                                                |                                        |                                                |
| 10,000-99,000                 |                                            |                                                |                                        |                                                |
| 100,000-over                  |                                            |                                                |                                        |                                                |

<table>
<thead>
<tr>
<th>EST. NO. OF EMPLOYEES—CH. 11 &amp; 12 ONLY</th>
<th>EST. NO. OF EQUITY SECURITY HOLDERS—CH. 11 &amp; 12 ONLY</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td></td>
</tr>
<tr>
<td>1-19</td>
<td></td>
</tr>
<tr>
<td>20-99</td>
<td></td>
</tr>
<tr>
<td>100-999</td>
<td></td>
</tr>
<tr>
<td>1000-over</td>
<td></td>
</tr>
</tbody>
</table>

This SPACE FOR COURT USE ONLY.
FILING OF PLAN

For Chapter 9, 11, 12 and 13 cases only. Check appropriate box.

☐ A copy of debtor's proposed plan dated is attached
☐ Debtor intends to file a plan within the time allowed by statute, rule, or order of the court.

<p>| PRIOR BANKRUPTCY CASE FILED WITHIN LAST 6 YEARS (If no more than one, attach additional sheet) |</p>
<table>
<thead>
<tr>
<th>Location Where Filed</th>
<th>Case Number</th>
<th>Date Filed</th>
</tr>
</thead>
</table>

<p>| PENDING BANKRUPTCY CASE FILED BY ANY SPOUSE, PARTNER, OR AFFILIATE OF THIS DEBTOR (If more than one, attach additional sheet.) |</p>
<table>
<thead>
<tr>
<th>Name of Debtor</th>
<th>Case Number</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Relationship</td>
<td>District</td>
<td>Judge</td>
</tr>
</tbody>
</table>

REQUEST FOR RELIEF

Debtor is eligible for and requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

SIGNATURES

ATTORNEY

X

Signature Date

INDIVIDUAL/JOINT DEBTOR(S)

I declare under penalty of perjury that the information provided in this petition is true and correct.

X

Signature of Debtor Date

X

Signature of Joint Debtor Date

CERTIFICATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

Printed or Typed Name of Bankruptcy Petition Preparer

Social Security Number

Address Tel. No.

EXHIBIT "B"

(To be completed by attorney for individual chapter 7 debtor(s) with primarily consumer debts.)

I, the attorney for the debtor(s) named in the foregoing petition, declare that I have informed the debtor(s) that (he, she, or they) may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under such chapter.

X

Signature of Attorney Date

TO BE COMPLETED BY INDIVIDUAL CHAPTER 7 DEBTOR WITH PRIMARILY CONSUMER DEBTS (See P.L. 99-353 § 322)

I am aware that I may proceed under chapter 7, 11, or 12, or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7 of such title.

If I am represented by an attorney, exhibit "B" has been completed.

X

Signature of Debtor Date

X

Signature of Joint Debtor Date
Form 3. APPLICATION AND ORDER TO PAY FILING FEE IN INSTALLMENTS

[Caption as in Form 16B]

APPLICATION TO PAY FILING FEES IN INSTALLMENTS

In accordance with Fed. R. Bankr. P. 1006, application is made for permission to pay the filing fee on the following terms:

$ __________________ with the filing of the petition, and the balance of

$ __________________ in ___ installments, as follows:

$ __________________ on or before ____________________________

$ __________________ on or before ____________________________

$ __________________ on or before ____________________________

$ __________________ on or before ____________________________

I certify that I am unable to pay the filing fee except in installments. I further certify that I have not paid any money or transferred any property to an attorney or any other person for services in connection with this case or in connection with any other pending bankruptcy case and that I will not make any payment or transfer any property for services in connection with the case until the filing fee is paid in full.

Date: ____________________________

Applicant

Attorney for Applicant

CERTIFICATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

__________________________________________________________

Printed or Typed Name of Bankruptcy Petition Preparer

__________________________________________________________

Social Security No.

__________________________________________________________

Address

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

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

X ____________________________________________________________

Signature of Bankruptcy Petition Preparer

Date

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. § 15A.

ORDER

IT IS ORDERED that the debtor pay the filing fee in installments on the terms set forth in the foregoing application.

IT IS FURTHER ORDERED that until the filing fee is paid in full the debtor shall not pay, and no person shall accept, any money for services in connection with this case, and the debtor shall not relinquish, and no person shall accept, any property as payment for services in connection with this case.

BY THE COURT

Date: ____________________________

United States Bankruptcy Judge
SCHEDULE E - CREDITORS HOLDING UNSECURED PRIORITY CLAIMS

A complete list of claims entitled to priority, listed separately by type of priority, is to be set forth on the sheets provided. Only holders of unsecured claims entitled to priority should be listed in this schedule. In the boxes provided on the attached sheets, state the name and mailing address, including zip code, and account number, if any, of all entities holding priority claims against the debtor or the property of the debtor, as of the date of the filing of the petition.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor." Include the entity on the appropriate schedule of creditor, and complete Schedule H-Codebtor. If a joint petition is filed, state whether husband, wife, both of them, or the marital community may be liable on each claim by placing an "H", "W", "J", or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report the total of claims listed on each sheet in the box labeled "Subtotal" on each sheet. Report the total of all claims listed on this Schedule E in the box labeled "Total" on the last sheet of the completed schedule. Repeat this total also on the Summary of Schedules.

☐ Check this box if debtor has no creditors holding unsecured priority claims to report on this Schedule E.

TYPES OF PRIORITY CLAIMS (Check the appropriate box(es) below if claims in that category are listed on the attached sheets)

☐ Extensions of credit in an involuntary case

Claims 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 or the order for relief. 11 U.S.C. § 507(a)(2).

☐ Wages, salaries, and commissions

Wages, salaries, and commissions, including vacation, severance, and sick leave pay owing to employees and commissions owing to qualifying independent sales representatives up to $4000 per person earned within 90 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(3).

☐ Contributions to employee benefit plans

Money owed to employee benefit plans for services rendered within 180 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(4).

☐ Certain farmers and fishermen

Claims of certain farmers and fishermen, up to $4000 per farmer or fisherman, against the debtor, as provided in 11 U.S.C. § 507(a)(5).

☐ Deposits by individuals

Claims of individuals up to $1,800 for deposits for the purchase, lease, or rental of property or services for personal, family, or household use, that were not delivered or provided. 11 U.S.C. § 507(a)(6).
In Re ____________________________  
Debtor  

Case No. _________________________  
(if known)

☐ Alimony, Maintenance, or Support

Claims of a spouse, former spouse, or child of the debtor for alimony, maintenance, or support, to the extent provided in 11 U.S.C. § 507(a)(7).

☐ Taxes and Certain Other Debts Owed to Governmental Units

Taxes, customs duties, and penalties owing to federal, state, and local governmental units as set forth in 11 U.S.C. § 507(a)(8).

☐ Commitments to Maintain the Capital of an Insured Depository Institution

Claims based on commitments to the FDIC, RTC, Director of the Office of Thrift Supervision, Comptroller of the Currency, or Board of Governors of the Federal Reserve System, or their predecessors or successors, to maintain the capital of an insured depository institution. 11 U.S.C. § 507(a)(9):

* Amounts are subject to adjustment on April 1, 1998, and every three years thereafter with respect to cases commenced on or after the date of adjustment.

___ continuation sheets attached
DECLARATION CONCERNING DEBTOR'S SCHEDULES

DECLARATION UNDER PENALTY OF PERJURY BY INDIVIDUAL DEBTOR

I declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of sheets, and that they are true and correct to the best of my knowledge, information, and belief. (Total shown on summary page plus 1.)

Date ________________________________ Signature: ________________________________

Debtor

Date ________________________________ Signature: ________________________________

(Joint Debtor, if any)

[If joint case, both spouses must sign.]

CERTIFICATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

Printed or Typed Name of Bankruptcy Petition Preparer ________________________________

Social Security No. ________________________________

Address ________________________________

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

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

X ________________________________

Signature of Bankruptcy Petition Preparer ________________________________

Date ________________________________

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.

DECLARATION UNDER PENALTY OF PERJURY ON BEHALF OF A CORPORATION OR PARTNERSHIP

I, the [the president or other officer or an authorized agent of the corporation or a member or an authorized agent of the partnership] of the [corporation or partnership] named as debtor in this case, declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of sheets, and that they are true and correct to the best of my knowledge, information, and belief. (Total shown on summary page plus 1.)

Date ________________________________ Signature: ________________________________

[Print or type name of individual signing on behalf of debtor.]

[An individual signing on behalf of a partnership or corporation must indicate position or relationship to debtor.]

Penalty for making a false statement or concealing property: Fines of up to $500,000 or imprisonment for up to 5 years or both. 18 U.S.C. §§ 152 and 3571.
FORM 7. STATEMENT OF FINANCIAL AFFAIRS

UNITED STATES BANKRUPTCY COURT

DISTRICT OF _____________________________

In re: _________________________________.

(Name)  Case No. __________________________ (if known)

Debtor

STATEMENT OF FINANCIAL AFFAIRS

This statement is to be completed by every debtor. Spouses filing a joint petition may file a single statement on which the information for both spouses is combined. If the case is filed under chapter 12 or chapter 13, a married debtor must furnish information for both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional, should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs.

Questions 1 - 15 are to be completed by all debtors. Debtors that are or have been in business, as defined below, also must complete Questions 16 - 21. If the answer to any question is "None," or the question is not applicable, mark the box labeled "None." If additional space is needed for the answer to any question, use and attach a separate sheet properly identified with the case name, case number (if known), and the number of the question.

This is a multi-page form. The only amendments are to the final, or signature, page. Accordingly, the body of the form is omitted here.

1. Income from employment or operation of business

State the gross amount of income the debtor has received from employment, trade, or profession, or from operation of the debtor's business from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the two years immediately preceding this calendar year. (A debtor that maintains, or has maintained, financial records on the basis of a fiscal rather than a calendar year may report fiscal year income. Identify the beginning and ending dates of the debtor's fiscal year.) If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

<table>
<thead>
<tr>
<th>AMOUNT</th>
<th>SOURCE (if more than one)</th>
</tr>
</thead>
</table>

None
[If completed by an individual or individual and spouse]

I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct.

Date __________________________ Signature __________________________

of Debtor

Date __________________________ Signature __________________________

of Joint Debtor
(if any)

________________________________________

CERTIFICATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARE (See 11 U.S.C. § 10)

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

Printed or Typed Name of Bankruptcy Petition Preparer __________________________

Social Security No. __________________________

Address __________________________

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

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

X __________________________

Signature of Bankruptcy Petition Preparer __________________________

Date __________________________

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. § 156.

____________________________________________________________________

[If completed on behalf of a partnership or corporation]

I, declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct to the best of my knowledge, information and belief.

Date __________________________ Signature __________________________

Print Name and Title __________________________

[An individual signing on behalf of a partnership or corporation must indicate position or relationship to debtor.]

___ continuation sheets attached

Penalty for making a false statement: Fines of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. § 152 and 3571

216
CHAPTER 7 INDIVIDUAL DEBTOR'S STATEMENT OF INTENTION

1. I, the debtor, have filed a schedule of assets and liabilities which includes consumer debts secured by property of the estate.

2. My intention with respect to the property of the estate which secures those consumer debts is as follows:
   a. Property to Be Surrendered.

<table>
<thead>
<tr>
<th>Description of Property</th>
<th>Creditor's name</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td></td>
</tr>
<tr>
<td>2.</td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td></td>
</tr>
</tbody>
</table>
   b. Property to Be Retained. [Check applicable statement of debtor's intention concerning reaffirmation, redemption, or lien avoidance.]

<table>
<thead>
<tr>
<th>Description of property</th>
<th>Creditor's name</th>
<th>Debt will be reaffirmed pursuant to § 524(e)</th>
<th>Property is claimed as exempt and will be redeemed pursuant to § 722</th>
<th>Lien will be avoided pursuant to § 522(f) and property will be claimed as exempt</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
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<td></td>
</tr>
<tr>
<td>2.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

3. I understand that § 521(2)(B) of the Bankruptcy Code requires that I perform the above stated intention within 45 days of the filing of this statement with the court, or within such additional time as the court, for cause, within such 45-day period fixes.

Date: ____________________________

Signature of Debtor

CERTIFICATION OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

Pristed or Typed Name of Bankruptcy Petition Preparer   Social Security No.   

Address

Names and Social Security Numbers of all other individuals who prepared or assisted in preparing this document.

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

Signature of Bankruptcy Petition Preparer   Date  

A bankruptcy petition preparer's failure to comply with the provision 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. § 15A.
Notice of Commencement of Case Under Chapter 7 of the Bankruptcy Code.
Meeting of Creditors, and Fixing Dates
(Individual or Joint Debtor No Asset Case)

In re (Name of Debtor)  
Address of Debtor  
Soc. Sec./Tax Id. Nos.  

Date Case Filed (or Converted)  

Name and Address of Attorney for Debtor  
Name and Address of Trustee  

Telephone Number  

☐ This is a converted case originally filed under chapter _____ on __________________________ (date).

Date, Time, and Location of Meeting of Creditors

Discharge of Debts

Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Types of Debts:

At this time there appear to be no assets available from which payment may be made to unsecured creditors. Do not file a proof of claim until you receive notice to do so.

Commencement of Case. A petition for liquidation under chapter 7 of the Bankruptcy Code has been filed in this court by or against the person or persons named above as the debtor, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All other persons are permitted to inspect the court, including lists of the debtor's property, debts, and property claimed as exempt, are available for inspection at the office of the clerk of the bankruptcy court.

Creditors May Not Take Certain Actions. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors.

Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions, repossession, or wage deductions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review 522 of the Bankruptcy Code and may wish to seek legal advice. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

Meeting of Creditors. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may elect a trustee other than the one named above, elect a committee of creditors, examine the debtor, and transact such other business as may properly come before the meeting.

The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

Liquidation of the Debtor's Property. The trustee will collect the debtor's property and turn any that is not exempt into money. At this time, however, it appears from the schedules of the debtor that there are no assets from which any distribution can be paid to creditors. If a later date is appears that there are assets from which a distribution may be paid, the creditors will be notified and given an opportunity to file claims.

Exempt Property. Under state and federal law, the debtor is permitted to keep certain money or property as exempt. If a creditor believes that an exemption of money or property is not authorized by law, the creditor may file an objection. An objection must be filed not later than 30 days after the conclusion of the meeting of creditors.

Discharge of Debts. The debtor is seeking discharge of debts. A discharge means that certain debts are made unenforceable against the debtor personally. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes that the debtor should not receive any discharge of debts under § 727 of the Bankruptcy Code or that a debt owed to the creditor is not dischargeable under § 523(a) (2), (4), (6), or (13) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debts." Creditors considering taking such action may wish to seek legal advice.

Do not file a proof of claim unless you receive a court notice to do so.

Address of the Clerk of the Bankruptcy Court  
For the Court:  

Clerk of the Bankruptcy Court  

Date  

219
United States Bankruptcy Court

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 7 OF THE BANKRUPTCY CODE.
MEETING OF CREDITORS, AND FIXING DATES
(Individual or Joint Asset Case)

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<thead>
<tr>
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<th>Soc. Sec./Tax Id. Nos.</th>
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<tr>
<th>Date Case Filed (or Converted)</th>
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Name and Address of Attorney for Debtor

Name and Address of Trustee

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<th>Telephone Number</th>
<th>Telephone Number</th>
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☐ This is a converted case originally filed under chapter ____ on __________ (date).

DEADLINE TO FILE A PROOF OF CLAIM

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

DISCHARGE OF DEBTS

Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Types of Debts:

COMMENCEMENT OF CASE: A petition for liquidation under chapter 7 of the Bankruptcy Code has been filed in this court by or against the person or persons named above as the debtor, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor’s property, debts, and property claimed as exempt are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions, repossessions, or wage deductions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize the creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may elect a trustee other than the one named above, elected a committee of creditors, examine the debtor, and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

LIQUIDATION OF THE DEBTOR’S PROPERTY. The trustee will collect the debtor’s property and turn any that is not exempt into money. If the trustee can collect enough money and property from the debtor, creditors may be paid some or all of the debts owed to them.

EXEMPT PROPERTY. Under state and federal law, the debtor is permitted to keep certain money or property as exempt. If a creditor believes that an exemption of money or property is not authorized by law, the creditor may file an objection. An objection must be filed not later than 30 days after the conclusion of the meeting of creditors.

DISCHARGE OF DEBTS. The debtor is seeking a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor personally. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes that the debtor should not receive any discharge of debts under § 727 of the Bankruptcy Code or that a debt owed to the creditor is not dischargeable under § 523(a)(2), (4), (6), or (13) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled “Discharge of Debts.” Creditors considering taking such action may wish to seek legal advice.

PROOF OF CLAIM. Except as otherwise provided by law, in order to share in any payment from the estate, a creditor must file a proof of claim by the date set forth above in the box labeled “Deadline to File a Proof of Claim.” The place to file the proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk’s office of any bankruptcy court.

Address of the Clerk of the Bankruptcy Court

For the Court:

Clerk of the Bankruptcy Court

Date

220
NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 7 OF THE BANKRUPTCY CODE
MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership Asset Case)

In re (Name of Debtor)  
Address of Debtor  
Date Case Filed (or Converted)  

Soc. Sec./Tax Id. Nos.  

Name and Address of Attorney for Debtor  
Name and Address of Trustee  

Corporation  
Partnership  

This is a converted case originally filed under chapter ___ on __________ (date).  

DEADLINE TO FILE A PROOF OF CLAIM

For creditors other than governmental units:  
For governmental units:  

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

COMMENCEMENT OF CASE. A petition for liquidation under chapter 7 of the Bankruptcy Code has been filed in this court by or against the debtor named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions or repossessions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the commencement of this partnership case. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5), is required to appear at the meeting of the creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may elect a trustee other than the one named above, elect a committee of creditors, examine the debtor, and transact such as other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to the creditors.

LIQUIDATION OF THE DEBTOR'S PROPERTY. The trustee will collect the debtor's property, if any, and turn it into money. If the trustee can collect enough money and property from the debtor, creditors may be paid some or all of the debts owed to them.

PROOF OF CLAIM. Except as otherwise provided by law, in order to share in any payment from the estate, a creditor must file a proof of claim by the date set forth above in the box labeled "Deadline to File a Proof of Claim." The place to file the proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

Address of the Clerk of the Bankruptcy Court  

For the Court:  

Clerk of the Bankruptcy Court  

Date
NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 11 OF THE BANKRUPTCY CODE.
MEETING OF CREDITORS, AND FIXING DATES
(Individual or Joint Debtor Case)

In re (Name of Debtor) | Address of Debtor | Soc. Sec./Tax Id. Nos.
--- | --- | ---

Date Case Filed (or Converted)

Name and Address of Attorney for Debtor | Name and Address of Trustee
--- | ---

Telephone Number | Telephone Number

☐ This is a converted case originally filed under chapter ______ on ______________ (date).

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

DISCHARGE OF DEBTS

Deadline to File a Complaint to Determine Dischargeability of Certain Types of Debts:

COMMENCEMENT OF CASE: A petition for reorganization under chapter 11 of the Bankruptcy Code has been filed in this court by or against the person or persons named above as the debtor, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property, debts, and property claimed as exempt are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions, repossessions, or wage deductions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 365 of the Bankruptcy Code and may wish to seek legal advice. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

EXEMPT PROPERTY. Under state and federal law, the debtor is permitted to keep certain money or property as exempt. If a creditor believes that an exemption of money or property is not authorized by law, the creditor may file an objection. An objection must be filed not later than 30 days after the conclusion of the meeting of creditors.

DISCHARGE OF DEBTS. The debtor may seek a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor personally. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes that the debtor should not receive a discharge under § 1141(d)(3)(C) of the Bankruptcy Code, timely action must be taken in the bankruptcy court in accordance with Bankruptcy Rule 4004(a). If a creditor believes that a debt owed to the creditor is not dischargeable under § 523(a)(2), (4), (6), or (15) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debts." Creditors considering taking such action may wish to seek legal advice.

PROOF OF CLAIM. Schedules of creditors have been or will be filed pursuant to Bankruptcy Rule 1007. Any creditor holding a scheduled claim which is not listed as disputed, contingent, or unliquidated as to amount may, but is not required to, file a proof of claim in this case. Creditors whose claims are not scheduled or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim. A creditor who desires to rely on the schedules of creditors has the responsibility for determining that the claim is listed accurately. If the court sets a deadline for filing a proof of claim, you will be notified. The place to file a proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF CHAPTER 11 FILING. Chapter 11 of the Bankruptcy Code enables a debtor to reorganize pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. Creditors will be given notice concerning any plan, or in the event the case is dismissed or converted to another chapter of the Bankruptcy Code. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

Address of the Clerk of the Bankruptcy Court | For the Court:
--- | ---

Clerk of the Bankruptcy Court

Date

222
United States Bankruptcy Court

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 11 OF THE BANKRUPTCY CODE
MEETING OF CREDITORS, AND FIXING OF DATES
(Individual or Joint Debtor Case)

In re (Name of Debtor)  
Address of Debtor  
Soc. Sec./ Tax Id. No.  
Date Filed (or Converted)  

Addresser:  
Address of the Clerk of the Bankruptcy Court  

Name and Address of Attorney for Debtor  
Name and Address of Trustee  

Telephone Number  

This is a converted case originally filed under chapter ___ on ___.

DEADLINE TO FILE A PROOF OF CLAIM
For creditors other than governmental units: ___
For governmental units: ___
(if the court sets a deadline, creditors will be notified)

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

DISCHARGE OF DEBTS

COMMENCEMENT OF CASE. A petition for reorganization under chapter 11 of the Bankruptcy Code has been filed in this court by or against the person or persons named above as the debtor, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property, debts, and property claimed as exempt are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions, repossessions, or wage deductions. If unauthorized actions are taken by a creditor against the debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

EXEMPT PROPERTY. Under state and federal law, the debtor is permitted to keep certain money or property as exempt. If a creditor believes that an exemption of money or property is not authorized by law, the creditor may file an objection. An objection must be filed not later than 10 days after the conclusion of the meeting of creditors.

DISCHARGE OF DEBTS. The debtor may seek a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor personally. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes that the debtor should not receive a discharge under § 1141(d)(3)(C) of the Bankruptcy Code, timely action must be taken in the bankruptcy court in accordance with Bankruptcy Rule 4004(a).

If a creditor believes that a debt owed to the creditor is not dischargeable under § 523(a)(2), (4), (6), or (13) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debt." Creditors considering taking such action may wish to seek legal advice.

PROOF OF CLAIM. Schedules of creditors have been or will be filed pursuant to Bankruptcy Rule 1007. Any creditor holding a scheduled claim which is not listed as disputed, contingent, or unliquidated as to amount may, but is not required to, file a proof of claim in this case. Creditors whose claims are not scheduled or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim. The creditor who desires to rely on the schedule of creditors has the responsibility for determining that the claim is listed accurately. The place to file a proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF CHAPTER 11 FILING. Chapter 11 of the Bankruptcy Code enables a debtor to reorganize pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. Creditors will be given notice concerning any plan, or in the event the case is dismissed or converted to another chapter of the Bankruptcy Code. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

For the Court: ____________________ Date: ____________

Clerk of the Bankruptcy Court
United States Bankruptcy Court

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 11 OF THE BANKRUPTCY CODE. MEETING OF CREDITORS, AND FIXING OF DATES

(Corporation/Partnership Case)

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<th>In re (Name of Debtor)</th>
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<th>Telephone Number</th>
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This is a converted case originally filed under chapter ___ on ____________

DEADLINE TO FILE A PROOF OF CLAIM
For creditors other than governmental units: ___
For governmental units: ___
[or "If the court sets a deadline, creditors will be notified."]

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

COMMENCEMENT OF CASE. A petition for reorganization under chapter 11 of the Bankruptcy Code has been filed in this court by or against the debtor named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Creditorss may not take certain actions. Creditorss may not take certain actions. Creditorss may not take certain actions.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

PROOF OF CLAIM. Schedules of creditors have been or will be filed pursuant to Bankruptcy Rule 1007. Any creditor holding a scheduled claim which is not listed as disputed, contingent, or unliquidated as to amount may, but is not required to, file a proof of claim in this case. Creditors whose claims are not listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proof of claim. A creditor who desires to rely on the schedule of creditors has the responsibility for determining that the claim is listed accurately. The place to file a proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF CHAPTER 11 FILING. Chapter 11 of the Bankruptcy Code enables a debtor to reorganize pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. Creditors will be given notice concerning any plan, or in the event the court does not confirm the plan or approve the plan or another chapter of the Bankruptcy Code. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

For the Court: Clerk of the Bankruptcy Court ____________ Date ____________
United States Bankruptcy Court

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 12 OF THE BANKRUPTCY CODE.
MEETING OF CREDITORS, AND FIXING OF DATES
(Individual or Joint Debtor Family Farmer)

Date Case Filed (or Converted)

Name and Address of Attorney for Debtor

Name and Address of Trustee

Telephone Number

Date

☐ This is a converted case originally filed under chapter on (date).

DEADLINE TO FILE A PROOF OF CLAIM

For creditors other than governmental units: For governmental units:

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

☐ The debtor has filed a plan. The plan or a summary of the plan is enclosed. Hearing on confirmation will be held:

☐ The debtor has filed a plan. The plan or a summary of the plan and notice of the confirmation hearing will be sent separately.

☐ A plan has not been filed as of this date. Creditors will be given separate notice of the hearing on confirmation of the plan.

DISCHARGE OF DEBTS

Deadline to File a Complaint to Determine Dischargeability of Certain Types of Debts:

COMMENCEMENT OF CASE. A family farmer's debt adjustment case under chapter 12 of the Bankruptcy Code has been filed in this court by the family farmer named above as the debtor, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions, repossessions, or wage deductions. Some protection is also given to certain codebtors of consumer debts. If unauthorized actions are taken by a creditor against a debtor, or a protected codebtor, the court may punish that creditor. A creditor who is considering taking action against the debtor or the property of the debtor, or any codebtor, should review §§ 362 and 1201 of the Bankruptcy Code and may wish to seek legal advice. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

EXEMPT PROPERTY. Under state and federal law, the debtor is permitted to keep certain money or property as exempt. If a creditor believes that an exemption of money or property is not authorized by law, the creditor may file an objection. An objection must be filed not later than 30 days after the conclusion of the meeting of creditors.

DISCHARGE OF DEBTS. The debtor may seek a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor personally. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes a specific debt owed to the creditor is not dischargeable under § 523(a)(2), (4), (6), or (15) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debt." Creditors considering taking such action may wish to seek legal advice.

PROOF OF CLAIM. Except as otherwise provided by law, in order to share in any payment from the estate, a creditor must file a proof of claim by the date set forth above in the box labeled "Deadline to File a Proof of Claim." The place to file the proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF A CHAPTER 12 FILING. Chapter 12 of the Bankruptcy Code enables family farmers to reorganize pursuant to a plan. A plan is not effective unless approved by the bankruptcy court at a confirmation hearing. Creditors will be given notice in the event the case is dismissed or converted to another chapter of the Bankruptcy Code.

Address of the Clerk of the Bankruptcy Court

For the Court:

Clerk of the Bankruptcy Court

Date

125
United States Bankruptcy Court

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 12 OF THE BANKRUPTCY CODE.
MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership Family Farmer)

<table>
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<th>Address of Debtor</th>
<th>Soc. Sec./Tax Id Nos</th>
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☑ Corporation ☐ Partnership

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<th>Name and Address of Trustee</th>
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☐ This is a converted case originally filed under chapter __________ on __________ (date).

DEADLINE TO FILE A PROOF OF CLAIM
For creditors other than governmental units: For governmental units:

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

☐ The debtor has filed a plan. The plan or a summary of the plan is enclosed. Hearing on confirmation will be held:

☐ The debtor has filed a plan. The plan or a summary of the plan and notice of the confirmation hearing will be sent separately.

☐ A plan has not been filed as of this date. Creditors will be given separate notice of the hearing on confirmation of the plan.

DISCHARGE OF DEBTS
Deadline to file a Complaint to Determine Dischargeability of Certain Types of Debts:

COMMENCEMENT OF CASE: A family farmer's debt adjustment case under chapter 12 of the Bankruptcy Code has been filed in this court by the family farmer named above as the debtor, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions or repossessions. Some protection is also given to certain codebtors of consumer debts. If unauthorized actions are taken by a creditor against a debtor or a protected codebtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor, the property of the debtor, or a codebtor, should review §§ 362 and 1201 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the commencement of this partnership case. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5), is required to appear at the meeting of creditors on the date and at the place set forth above in the box labeled "Date, Time, and Location of Meeting of Creditors" for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to the creditors.

DISCHARGE OF DEBTS. The debtor may seek a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes a specific debt owed to the creditor is not dischargeable under § 523(a) (2), (4), (6), or (15) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debts." Creditors considering taking such action may wish to seek legal advice.

PROOF OF CLAIM. Except as otherwise provided by law, in order to share in any payment from the estate, a creditor must file a proof of claim by the date set forth above in the box labeled "Deadline to File a Proof of Claim." The place to file the proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of Claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF A CHAPTER 12 FILING. Chapter 12 of the Bankruptcy Code enables family farmers to reorganize pursuant to a plan. A plan is not effective unless approved by the bankruptcy court at a confirmation hearing. Creditors will be given notice in the event the case is dismissed or converted to another chapter of the Bankruptcy Code.

Address of the Clerk of the Bankruptcy Court

For the Court:

Clerk of the Bankruptcy Court

Date

226
# United States Bankruptcy Court

**NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 13 OF THE BANKRUPTCY CODE. MEETING OF CREDITORS, AND FIXING OF DATES**

### In re (Name of Debtor)

- **Address of Debtor**
- **Soc. Sec./Tax Id. Nos.**
- **Date Case Filed (or Converted)**

<table>
<thead>
<tr>
<th>Name and Address of Attorney for Debtor</th>
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<tr>
<td><strong>Telephone Number</strong></td>
<td><strong>Telephone Number</strong></td>
</tr>
</tbody>
</table>

☐ This is a converted case originally filed under chapter [ ] on [Date] (date).

**DEADLINE TO FILE A PROOF OF CLAIM**

**DATE, TIME, AND LOCATION OF MEETING OF CREDITORS**

- ☐ The debtor has filed a plan. The plan or a summary of the plan is enclosed. Hearing on confirmation will be held on [Date] (Date) [Time] (Time) at [Location].
- ☐ The debtor has filed a plan. The plan or a summary of the plan and notice of the confirmation hearing will be sent separately.
- ☐ A plan has not been filed as of this date. Creditors will be given separate notice of the hearing on confirmation of the plan.

**COMMENCEMENT OF CASE.** An individual's debt adjustment case under chapter 13 of the Bankruptcy Code has been filed in this court by the debtor or debtors named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

**CREDITORS MAY NOT TAKE CERTAIN ACTIONS.** A creditor is anyone to whom the debtor owes money. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions, repossessions, or wage garnishments. Some protection is also given to certain debtors of consumer debts. If unauthorized actions are taken by a creditor against a debtor, or a protected codebtor, the court may punish that creditor. A creditor who is considering taking action against the debtor or the property of the debtor, or any codebtor, should review §§ 362 and 1301 of the Bankruptcy Code and may wish to seek legal advice. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

**MEETING OF CREDITORS.** The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above in the box labeled "Date, Time, and Location of Meeting of Creditors" for the purpose of being examined under oath. Attendance by creditors at the meeting is welcome, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time by notice at the meeting, without further written notice to creditors.

**PROOF OF CLAIM.** Except as otherwise provided by law, in order to share in any payment from the estate, a creditor must file a proof of claim by the date set forth above in the box labeled "Deadline to File a Proof of Claim." The place to file the proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of the bankruptcy court.

**PURPOSE OF A CHAPTER 13 FILING.** Chapter 13 of the Bankruptcy Code is designed to enable a debtor to pay debts in full or in part over a period of time pursuant to a plan. A plan is not effective unless approved by the bankruptcy court at a confirmation hearing. Creditors will be given notice in the event the case is dismissed or converted to another chapter of the Bankruptcy Code.

---

**Address of the Clerk of the Bankruptcy Court**

<table>
<thead>
<tr>
<th>For the Court:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clerk of the Bankruptcy Court</td>
</tr>
<tr>
<td>Date</td>
</tr>
</tbody>
</table>

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227
United States Bankruptcy Court

In re (Name of Debtor)

PROOF OF CLAIM

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Name of Creditor
(The person or other entity to whom the debtor owes money or property)

Name and Address Where Notices Should Be Sent

Telephone No.

ACCOUNT OR OTHER NUMBER BY WHICH CREDITOR IDENTIFIES DEBTOR:

Check here if this claim □ replaces □ amends a previously filed claim, dated:

1. BASIS FOR CLAIM

☐ Goods sold
☐ Services performed
☐ Money loaned
☐ Personal injury/wrongful death
☐ Taxes
☐ Other (Describe briefly)

☐ Revert benefits as defined in 11 U.S.C. § 1114(a)
☐ Wages, salaries, and compensation (Fill out below)

Your social security number:

Unpaid compensation for services performed from (date) to (date)

2. DATE DEBT WAS INCURRED

3. IF COURT JUDGMENT, DATE OBTAINED:

☐ Wages, salaries, or commissions (up to $4,000), earned more than 90 days before filing of the bankruptcy petition or cessation of the debtor’s business, whichever is later—11 U.S.C. § 507(a)(3)

☐ Contributions to an employee benefit plan—11 U.S.C. § 507(a)(4)

☐ Up to $1,800 of deposits toward purchase, lease, or rental of property or services for personal, family, or household use—11 U.S.C. § 507(a)(5)

☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child—11 U.S.C. § 507(a)(7)

☐ Taxes or penalties of governmental units—11 U.S.C. § 507(a)(8)

☐ Other—Specify applicable paragraph of 11 U.S.C. § 507(a)

*Amounts are subject to adjustment on 4/1/98 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.

4. CLASSIFICATION OF CLAIM. Under the Bankruptcy Code all claims are classified as one or more of the following: (1) Unsecured nonpriority, (2) Unsecured Priority, (3) Secured. It is possible for part of a claim to be in one category and part in another.

CHECK THE APPROPRIATE BOX OR BOXES that best describe your claim and STATE THE AMOUNT OF THE CLAIM AT TIME CASE FILED.

☐ SECURED CLAIM $ 

Attach evidence of perfection of security interest:

Brief Description of Collateral:

☐ Real Estate
☐ Motor Vehicle
☐ Other (Describe briefly)

Amount of arrearage and other charges at time case filed included in secured claim above, if any $ 

☐ UNSECURED NONPRIORITY CLAIM $ 

A claim is unsecured if there is no collateral or lien on property of the debtor securing the claim or to the extent that the value of such property is less than the amount of the claim.

☐ UNSECURED PRIORITY CLAIM $ 

Specify the priority of the claim.

5. TOTAL AMOUNT OF CLAIM AT TIME CASE FILED: $ (Unsecured) $ (Secured) $ (Priority) $ (Total)

☐ Check this box if claim includes charges in addition to the principal amount of the claim. Attach itemized statement of all additional charges.

6. CREDITS AND SETOFFS: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. In filing this claim, claimant has deducted all amounts that claimant owes to debtor.

7. SUPPORTING DOCUMENTS: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, or evidence of security interests. If the documents are not available, explain. If the documents are voluminous, attach a summary.

8. TIME-STAMPED COPY: To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

Date

Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any) 

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.
In re ____________________________,
    Set forth here all names including married, 
    maiden, and trade names used by debtor within 
    last 6 years.

Debtor

Address ________________________________

______________________________

Chapter ______________

Social Security No(s). ___________ and all 
Employer's Tax Identification No(s). [if any] __________

[Designation of Character of Paper]
FORM 16B. CAPTION (SHORT TITLE)

(May be used if 11 U.S.C. § 342(c) is not applicable)

UNITED STATES BANKRUPTCY COURT
______________________ DISTRICT OF __________________

In re ____________________

Debtor

Case No. __________________

Chapter __________________

[Designation of Character of Paper]
FORM 16C. CAPTION OF COMPLAINT IN ADVERSARY PROCEEDING
FILED BY A DEBTOR

UNITED STATES BANKRUPTCY COURT
_________________________ DISTRICT OF __________________

In re ______________________, )

                  Debtor ) Case No. ______________

Address ______________________ )

                            ) Chapter __________

Social Security No(s)._________________ or
Employer's Tax Identification No(s). [if any] ______

Plaintiff ______________________ )


Defendant ______________________ )

COMPLAINT
Form 16D. CAPTION FOR USE IN ADVERSARY PROCEEDING
OTHER THAN FOR A COMPLAINT FILED BY A DEBTOR:

UNITED STATES BANKRUPTCY COURT
____________________________________ DISTRICT OF ______________________

In re _______________________________ ) ) Case No. ______________
 ) ) Chapter ______________
 ) )
 ) ) Plaintiff ) )
 ) )
 ) ) Defendant

COMPLAINT [or other Designation]

[If used in a Notice of Appeal (see Form 17) or other notice filed and served by a debtor, this
caption must be altered to include the debtor’s address and Employer’s Tax Identification Number(s)
or Social Security Number(s) as in Form 16C.]
FORM 17. NOTICE OF APPEAL UNDER 28 U.S.C. § 158(a) or (b). FROM A JUDGMENT, ORDER, OR DECREE OF A BANKRUPTCY COURT

In re __________________________,
Debtor

Case No. __________________________

Chapter __________________________

NOTICE OF APPEAL

__________________________, the plaintiff [or defendant or other party] appeals under 28 U.S.C. § 158(a) or (b) from the judgment, order, or decree of the bankruptcy court (describe) entered in this adversary proceeding [or other proceeding, describe type] on the __________ day of __________, 19_.

The parties to the order appealed from and the names of their respective attorneys are as follows:

________________________________________________________________________

________________________________________________________________________

Dated: __________________________

Signed: __________________________
Attorney for Appellant

Address: __________________________

________________________________________________________________________

If a Bankruptcy Appellate Panel is authorized to hear this appeal, each party has a right to have the appeal heard by the district court. The appellant may exercise this right only by filing a separate statement of election at the time of the filing of this notice of appeal.
Form 18. DISCHARGE OF DEBTOR

[Caption as in 16A]

DISCHARGE OF DEBTOR

It appears that a petition commencing a case under title 11, United States Code, was filed by or against the person named above on __________________, and that an order for relief was entered under chapter 7, and that no complaint objecting to the discharge of the debtor was filed within the time fixed by the court [or that a complaint objecting to discharge of the debtor was filed and, after due notice and hearing, was not sustained].

IT IS ORDERED THAT:

1. The above-named debtor is released from all dischargeable debts.

2. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any of the following:

   (a) debts dischargeable under 11 U.S.C. § 523;

   (b) unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clauses (2), (4), (6), and (15) of 11 U.S.C. § 523(a);

   (c) debts determined by this court to be discharged.

3. All creditors whose debts are discharged by this order and all creditors whose judgments are declared null and void by paragraph 2 above are enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts as personal liabilities of the above-named debtor.

BY THE COURT

Dated: ____________________________

United States Bankruptcy Judge
Form 19. CERTIFICATION AND SIGNATURE OF NON-ATTORNEY
BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

[Caption as in Form 16B.]

CERTIFICATION AND SIGNATURE OF NON-ATTORNEY
BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

______________________________
Printed or Typed Name of Bankruptcy Petition Preparer

______________________________
Social Security No.

______________________________
Address

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

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

______________________________
Signature of Bankruptcy Petition Preparer

______________________________
Date

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.
APPENDIX II

STATUTORY PROVISIONS
UNITED STATES CODE
(Selected Provisions Only)
-Unofficial Text-

TITLE 11
CHAPTER 1 GENERAL PROVISIONS

§ 101. Definitions

In this title -

(1) "accountant" means accountant authorized under applicable law to practice public accounting, and includes professional accounting association, corporation, or partnership, if so authorized;

(2) "affiliate" means -
   (A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities -
      (i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or
      (ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;
   (B) corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities -
      (i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or
      (ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;
   (C) person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or
   (D) entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement;

(4) "attorney" means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law;

(5) "claim" means -
   (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
   (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

(6) "commodity broker" means futures commission merchant, foreign futures commission merchant, clearing organization, leverage transaction merchant, or commodity options dealer, as defined in section 761 of this title, with respect to which there is a customer, as defined in section 761(9) of this title;

(7) "community claim" means claim that arose before the commencement of the case concerning the debtor for which property of the kind specified in section 541(a)(2) of this title is liable, whether or not there is any such property at the time of the commencement of the case;

(8) "consumer debt" means debt incurred by an individual primarily for a personal, family, or household purpose;

(9) "corporation" -
   (A) includes -
      (i) association having a power or privilege that a private corporation, but not an individual or a partnership, possesses;
      (ii) partnership association organized under a law that makes only the capital subscribed responsible for the debts of such association;
      (iii) joint-stock company;
      (iv) unincorporated company or association; or
      (v) business trust; but
   (B) does not include limited partnership;

(10) "creditor" means -
   (A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;
   (B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or
   (C) entity that has a community claim;

(11) "custodian" means -
   (A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title;
   (B) assignee under a general assignment for the benefit of the debtor's creditors; or
(C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors;

(12) "debt" means liability on a claim;

(12A) "debt for child support" means a debt of a kind specified in section 523(a)(5) of this title for maintenance or support of a child of the debtor;

(13) "debtor" means person or municipality concerning which a case under this title has been commenced;

(14) "disinterested person" means person that -
(A) is not a creditor, an equity security holder, or an insider;
(B) is not and was not an investment banker for any outstanding security of the debtor;
(C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;
(D) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and
(E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason;

(15) "entity" includes person, estate, trust, governmental unit, and United States trustee;

(16) "equity security" means -
(A) share in a corporation, whether or not transferable or denominated "stock", or similar security;
(B) interest of a limited partner in a limited partnership; or
(C) warrant or right, other than a right to convert, to purchase, sell, or subscribe to a share, security, or interest of a kind specified in subparagraph (A) or (B) of this paragraph;

(17) "equity security holder" means holder of an equity security of the debtor;

(18) "family farmer" means -
(A) individual or individual and spouse engaged in a farming operation whose aggregate debts do not exceed $1,500,000 and not less than 80 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, arise out of a farming operation owned or operated by such individual or such individual and spouse, and such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income for the taxable year preceding the taxable year in which the case concerning such individual or such individual and spouse was filed; or
(B) corporation or partnership in which more than 50 percent of the outstanding stock or equity is held by one family, or by one family and the relatives of the members of such family, and such family or such relatives conduct the farming operation, and
   (i) more than 80 percent of the value of its assets consists of assets related to the farming operation;
   (ii) its aggregate debts do not exceed $1,500,000 and not less than 80 percent of its aggregate noncontingent, liquidated debts (excluding a debt for one dwelling which is owned by such corporation or partnership and which a shareholder or partner maintains as a principal residence, unless such debt arises out of a farming operation), on the date the case is filed, arise out of the farming operation owned or operated by such corporation or such partnership; and
   (iii) if such corporation issues stock, such stock is not publicly traded;

(19) "family farmer with regular annual income" means family farmer whose annual income is sufficiently stable and regular to enable such family farmer to make payments under a plan under chapter 12 of this title; 

(20) "farmer" means (except when such term appears in the term "family farmer") person that received more than 80 percent of such person's gross income for the taxable year for the principal residence of such individual or such individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, arise out of a farming operation owned or operated by such corporation or such partnership; and

(21) "farming operation" includes farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state;

(21A) "farmout agreement" means a written agreement in which -
(A) the owner of a right to drill, produce, or operate liquid or gaseous hydrocarbons on property agrees or has agreed to transfer or assign all or a part of such right to another entity; and
(B) such other entity (either directly or through its agents or its assigns), as consideration, agrees to perform drilling, reworking, recompleting, testing, or similar or related operations, to develop or produce liquid or gaseous hydrocarbons on the property;

(21B) "Federal depository institutions regulatory agency" means -
(A) with respect to an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act) for which no conservator or receiver has been appointed, the appropriate Federal banking agency (as defined in section 3(q) of such Act);
(B) with respect to an insured credit union (including an insured credit union for which the National Credit Union Administration has been appointed conservator or liquidating agent), the National Credit Union Administration;
(C) with respect to any insured depository institution for which the Resolution Trust Corporation has been appointed conservator or receiver, the Resolution Trust Corporation; and
(D) with respect to any insured depository institution for which the Federal Deposit Insurance Corporation has been appointed conservator or receiver, the Federal Deposit Insurance Corporation;

(22) "financial institution" means a person that is a commercial or savings bank, industrial savings bank, savings and loan association, or trust company and, when any such person is acting as agent or custodian for a customer in connection with a securities contract, as defined in section 741(7) of this title, such customer;

(23) "foreign proceeding" means proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization;

(24) "foreign representative" means duly selected trustee, administrator, or other representative of an estate in a foreign proceeding;

(25) "forward contract" means a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into, including, but not limited to, a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any combination thereof or option thereon;

(26) "forward contract merchant" means a person whose business consists in whole or in part of entering into forward contracts as or with merchants in a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade;

(27) "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government;

(28) "indenture" means mortgage, deed of trust, or indenture, under which there is outstanding a security, other than a voting-trust certificate, constituting a claim against the debtor, a claim secured by a lien on any of the debtor's property, or an equity security of the debtor;

(29) "indenture trustee" means trustee under an indenture;

(30) "individual with regular income" means individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stockbroker or a commodity broker;

(31) "insider" includes -

(A) if the debtor is an individual -

(i) relative of the debtor or of a general partner of the debtor;

(ii) partnership in which the debtor is a general partner;

(iii) general partner of the debtor; or

(iv) corporation of which the debtor is a director, officer, or person in control;

(B) if the debtor is a corporation -

(i) director of the debtor;

(ii) officer of the debtor;

(iii) person in control of the debtor;

(iv) partnership in which the debtor is a general partner;

(v) general partner of the debtor; or

(vi) relative of a general partner, director, officer, or person in control of the debtor;

(C) if the debtor is a partnership -

(i) general partner in the debtor;

(ii) relative of a general partner in, general partner of, or person in control of the debtor;

(iii) partnership in which the debtor is a general partner;

(iv) general partner of the debtor; or

(v) person in control of the debtor;

(D) if the debtor is a municipality, elected official of the debtor or relative of an elected official of the debtor;

(E) affiliate, or insider of an affiliate as if such affiliate were the debtor; and

(F) managing agent of the debtor;

(32) "insolvent" means -

(A) with reference to an entity other than a partnership and a municipality, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of -

(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and

(ii) property that may be exempted from property of the estate under section 522 of this title;

(B) with reference to a partnership, financial condition such that the sum of such partnership's debts is greater than the aggregate of, at a fair valuation -

(i) all of such partnership's property, exclusive of property of the kind specified in subparagraph (A)(i) of this paragraph; and

(ii) the sum of the excess of the value of each general partner's nonpartnership property, exclusive of property of the kind specified in subparagraph (A) of this paragraph, over such partner's nonpartnership

249
debts; and

(C) with reference to a municipality, financial condition such that the municipality is -
(i) generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute; or
(ii) unable to pay its debts as they become due;

(33) "institution-affiliated party" -
(A) with respect to an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act), has the meaning given it in section 3(u) of the Federal Deposit Insurance Act; and
(B) with respect to an insured credit union, has the meaning given it in section 206(r) of the Federal Credit Union Act;

(34) "insured credit union" has the meaning given it in section 101(7) of the Federal Credit Union;

(35) "insured depository institution" -
(A) has the meaning given it in section 3(c)(2) of the Federal Deposit Insurance Act; and
(B) includes an insured credit union (except in the case of paragraphs (21B) and (33)(A) of this subsection);

(35A) "intellectual property" means --
(A) trade secret;
(B) invention, process, design, or plant protected under title 35;
(C) patent application;
(D) plant variety;
(E) work of authorship protected under title 17; or
(F) mask work protected under chapter 9 of title 17;

to the extent protected by applicable nonbankruptcy law; and

(36) "judicial lien" means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding;

(37) "lien" means charge against or interest in property to secure payment of a debt or performance of an obligation;

(38) "margin payment" means, for purposes of the forward contract provisions of this title, payment or deposit of cash, a security or other property, that is commonly known in the forward contract trade as original margin, initial margin, maintenance margin, or variation margin, including mark-to-market payments, or variation payments;

(39) "mask work" has the meaning given it in section 901(a)(2) of title 17.[;]

(40) "municipality" means political subdivision or public agency or instrumentality of a State;

(41) "person" includes individual, partnership, and corporation, but does not include governmental unit--
(A) acquires an asset from a person --
(i) as a result of the operation of a loan guarantee agreement; or
(ii) as a receiver or liquidating agent of a person;

(B) is a guarantor of a pension benefit payable by or on behalf of the debtor or an affiliate of the debtor; or

(C) is the legal or beneficial owner of an asset of--
(i) an employee pension benefit plan that is a governmental plan, as defined in section 414(d) of the Internal Revenue Code of 1986; or

(ii) an eligible deferred compensation plan, as defined in section 457(b) of the Internal Revenue Code of 1986;

shall be considered, for purposes of section 1102 of this title, to be a person with respect to such asset or such benefit;

(42) "petition" means petition filed under section 301, 302, 303, or 304 of this title, as the case may be, commencing a case under this title;

(42A) "production payment" means a term overriding royalty satisfiable in cash or in kind --
(A) contingent on the production of a liquid or gaseous hydrocarbon from particular real property; and

(B) from a specified volume, or a specified value, from the liquid or gaseous hydrocarbon produced from such property, and determined without regard to production costs;

(43) "purchaser" means transferee of a voluntary transfer, and includes immediate or mediate transferee of such a transferee;

(44) "railroad" means common carrier by railroad engaged in the transportation of individuals or property or owner of trackage facilities leased by such a common carrier;

(45) "relative" means individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such third degree;

(46) "repo participant" means an entity that, on any day during the period beginning 90 days before the date of the filing of the petition, has an outstanding repurchase agreement with the debtor;

(47) "repurchase agreement" (which definition also applies to a reverse repurchase agreement) means an agreement, including related terms, which provides for the transfer of certificates of deposit, eligible bankers' acceptances, or securities that are direct obligations of, or that are fully guaranteed as to principal and interest by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, or securities with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' acceptances, or securities as described above, at a date certain not later than one year after such transfers or on demand, against the transfer of funds;

(48) "Securities clearing agency" means person that is registered as a clearing agency under section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q-1) or whose business is confined to the performance of functions of a clearing agency with respect to exempted securities, as defined in section 3(a)(12) of such Act (15 U.S.C. 78c(12)) for the purposes of such section 17A;
"security" -
(A) includes -
(i) note;
(ii) stock;
(iii) treasury stock;
(iv) bond;
(v) debenture;
(vi) collateral trust certificate;
(vii) pre-organization certificate or subscription;
(viii) transferable share;
(ix) voting trust certificate;
(x) certificate of deposit;
(xi) certificate of deposit for security;
(xii) investment contract or certificate of interest or participation in a profit-sharing agreement or in an oil, gas, or mineral royalty or lease, if such contract or interest is required to be the subject of a registration statement filed with the Securities and Exchange Commission under the provisions of the Securities Act of 1933, or is exempt under section 3(b) of such Act from the requirement to file such a statement;
(xiii) interest of a limited partner in a limited partnership;
(xiv) other claim or interest commonly known as "security"; and
(xv) certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase or sell, a security; but
(B) does not include -
(i) currency, check, draft, bill of exchange, or bank letter of credit;
(ii) leverage transaction, as defined in section 761(13) of this title;
(iii) commodity futures contract or forward contract;
(iv) option, warrant, or right to subscribe to or purchase or sell a commodity futures contract;
(v) option to purchase or sell a commodity;
(vi) contract or certificate of a kind specified in subparagraph (A)(xii) of this paragraph that is not required to be the subject of a registration statement filed with the Securities and Exchange Commission and is not exempt under section 3(b) of the Securities Act of 1933 from the requirement to file such a statement or
(vii) debt or evidence of indebtedness for goods sold and delivered or services rendered;
"security agreement" means agreement that creates or provides for a security interest;
"security interest" means lien created by an agreement;
"settlement payment" means, for purposes of the forward contract provisions of this title, a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, a net settlement payment, or any other similar payment commonly used in the forward contract trade;
"single asset real estate" means real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto having aggregate non-contingent, liquidated secured debts in an amount no more than $4,000,000;
"small business" means a person engaged in commercial or business activities (but does not include a person whose primary activity is the business of owning or operating real property and activities incidental thereto) whose aggregate noncontingent liquidated and unsecured debts as of the date of the petition do not exceed $2,000,000;
"State" includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title;
"statutory lien" means lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute;
"stockbroker" means person -
(A) with respect to which there is a customer, as defined in section 741 of this title; and
(B) that is engaged in the business of effecting transactions in securities -
(i) for the account of others; or
(ii) with members of the general public, from or for such person's own account;
"swap agreement" means -
(A) an agreement (including terms and conditions incorporated by reference therein) which is a rate swap agreement, basis swap, forward rate agreement, commodity swap, interest rate option, forward foreign exchange agreement, rate cap agreement, rate floor agreement, rate collar agreement, currency swap agreement, cross-currency rate swap agreement, currency option, any other similar agreement (including any option to enter into any of the foregoing);
(B) any combination of the foregoing; or
(C) a master agreement for any of the foregoing together with all supplements;
"swap participant" means an entity that, at any time before the filing of the petition, has an
outstanding swap agreement with the debtor;

(53D) "term overriding royalty" means an interest in liquid or gaseous hydrocarbons in place or to be produced from particular real property that entitles the owner thereof to a share of production, or the value thereof, for a term limited by time, quantity, or value realized;

(53E) "timeshare plan" means and shall include that interest purchased in any arrangement, plan, scheme, or similar device, but not including exchange programs, whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, right to use agreement, or by any other means, whereby a purchaser, in exchange for consideration, receives a right to use accommodations, facilities, or recreational sites, whether improved or unimproved, for a specific period of time less than a full year during any given year, but not necessarily for consecutive years, and which extends for a period of more than three years. A "timeshare interest" is that interest purchased in a timeshare plan which grants the purchaser the right to use and occupy accommodations, facilities, or recreational sites, whether improved or unimproved, pursuant to a timeshare plan;

(54) "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption;

(55) "United States", when used in a geographical sense, includes all locations where the judicial jurisdiction of the United States extends, including territories and possessions of the United State.

§ 102. Rules of construction

In this title -

(1) "after notice and a hearing", or a similar phrase -
   (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but
   (B) authorizes an act without an actual hearing if such notice is given properly and if -
      (i) such a hearing is not requested timely by a party in interest; or
      (ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act;

(2) "claim against the debtor" includes claim against property of the debtor;

(3) "includes" and "including" are not limiting;

(4) "may not" is prohibitive, and not permissive;

(5) "or" is not exclusive;

(6) "order for relief" means entry of an order for relief;

(7) the singular includes the plural;

(8) a definition, contained in a section of this title that refers to another section of this title, does not, for the purpose of such reference, affect the meaning of a term used in such other section; and

(9) "United States trustee" includes a designee of the United States trustee.

§ 103. Applicability of chapters

(a) Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title.

(b) Subchapters I and II of chapter 7 of this title apply only in a case under such chapter.

(c) Subchapter III of chapter 7 of this title applies only in a case under such chapter concerning a stockbroker.

(d) Subchapter IV of chapter 7 of this title applies only in a case under such chapter concerning a commodity broker.

(e) Except as provided in section 901 of this title, only chapters 1 and 9 of this title apply in a case under such chapter 9.

(f) Except as provided in section 901 of this title, subchapters I, II, and III of chapter 11 of this title apply only in a case under such chapter.

(g) Subchapter IV of chapter 11 of this title applies only in a case under such chapter concerning a railroad.

(h) Chapter 13 of this title applies only in a case under such chapter.

(i) Chapter 12 of this title applies only in a case under such chapter.

§ 104. Adjustment of dollar amounts

(a) The Judicial Conference of the United States shall transmit to the Congress and to the President before May 1, 1985, and before May 1 of every sixth year after May 1, 1985, a recommendation for the uniform percentage adjustment of each dollar amount in this title and in section 1930 of title 28.

(b)(1) On April 1, 1998, and at each 3-year interval ending on April 1 thereafter, each dollar amount in effect under sections 109(e),
303(b), 507(a), 522(d), and 523(a)(2)(C) immediately before such April 1 shall be adjusted --
(A) to reflect the change in the Consumer Price Index for All Urban Consumers, published by the Department of Labor, for the most recent 3-year period ending immediately before January 1 preceding such April 1, and
(B) to round to the nearest $25 the dollar amount that represents such change.

(2) Not later than March 1, 1998, and at each 3-year interval ending on March 1 thereafter the Judicial Conference of the United States shall publish in the Federal Register the dollar amounts that will become effective on such April 1 under section s 109(e), 303(b), 507(a), 522(d), and 523(a)(2)(C) of this title.

(3) Adjustments made in accordance with paragraph (1) shall not apply with respect to cases commenced before the date of adjustments.

§ 105. Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest, may --
(1) hold a status conference regarding any case or proceeding under this title after notice to the parties in interest; and
(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that --
(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or
(B) in a case under chapter 11 of this title --
(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;
(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;
(iii) sets the date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;
(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;
(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or
(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

§ 106. Waiver of sovereign immunity

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

§ 107. Public access to papers

(a) Except as provided in subsection (b) of this section, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.
(b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may -
(1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or
(2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.
§ 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. two years 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 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, 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. 60 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 small business investment company licensed by the Small Business Administration under section 301 of the Small Business Investment Act of 1958, credit unions, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act; or
3. a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.

(c) An entity may be a debtor under chapter 9 of this title if and only if such entity is-

1. 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 person that may be a debtor under chapter 7 of this title, except a stockbroker or a commodity broker, and a railroad 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 $250,000 and noncontingent, liquidated, secured debts of less than $750,000, 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 $250,000 and noncontingent, liquidated, secured debts of less than $750,000 may be a debtor under chapter 13 of this title.

(f) Only a family farmer 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.

CHAPTER 3 - CASE ADMINISTRATION

Subchapter I - Commencement Of A Case

§ 301. Voluntary cases

A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.

§ 302. Joint cases

(a) A joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual’s spouse. The commencement of a joint case under a chapter of this title constitutes an order for relief under such chapter.
(b) After the commencement of a joint case, the court shall determine the extent, if any, to which the debtors’ estates shall be consolidated.

§ 303. Involuntary cases

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.
(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title -
   (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such a holder, if such claims aggregate at least $5,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;
   (2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $5,000 of such claims;
   (3) if such person is a partnership -
      (A) by fewer than all of the general partners in such partnership; or
      (B) if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership; or
   (4) by a foreign representative of the estate in a foreign proceeding concerning such person.
(c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.
(d) The debtor, or a general partner in a partnership debtor that did not join in the petition, may file an answer to a petition under this section.
(e) After notice and a hearing, and for cause, the court may require the petitioners under this section to file a bond to
indemnify the debtor for such amounts as the court may later allow under subsection (i) of this section.

(f) Notwithstanding section 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.

(g) At any time after the commencement of an involuntary case under chapter 7 of this title but before an order for relief in the case, the court, on request of a party in interest, after notice to the debtor and a hearing, and if necessary to preserve the property of the estate or to prevent loss to the estate, may order the United States trustee to appoint an interim trustee under section 701 of this title to take possession of the property of the estate and to operate any business of the debtor. Before an order for relief, the debtor may regain possession of property in the possession of a trustee ordered appointed under this subsection if the debtor files such bond as the court requires, conditioned on the debtor's accounting for and delivering to the trustee, if there is an order for relief in the case, such property, or the value, as of the date the debtor regains possession, of such property.

(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if -

(1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute; or

(2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

(i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment -

(1) against the petitioners and in favor of the debtor for -

(A) costs; or

(B) a reasonable attorney's fee; or

(2) against any petitioner that filed the petition in bad faith, for -

(A) any damages proximately caused by such filing; or

(B) punitive damages.

(j) Only after notice to all creditors and a hearing may the court dismiss a petition filed under this section -

(1) on the motion of a petitioner;

(2) on consent of all petitioners and the debtor; or

(3) for want of prosecution.

(k) Notwithstanding subsection (a) of this section, an involuntary case may be commenced against a foreign bank that is not engaged in such business in the United States only under chapter 7 of this title and only if a foreign proceeding concerning such bank is pending.

§ 304. Cases ancillary to foreign proceedings

(a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.

(b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may -

(1) enjoin the commencement or continuation of -

(A) any action against -

(i) a debtor with respect to property involved in such foreign proceeding; or

(ii) such property; or

(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

(3) order other appropriate relief.

(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with -

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

256
§ 305. Abstention

(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if -

(1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or

(2)

(A) there is pending a foreign proceeding; and

(B) the factors specified in section 304(c) of this title warrant such dismissal or suspension.

(b) A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section.

(c) An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of title 28 or by the Supreme Court of the United States under section 1254 of title 28.

§ 306. Limited appearance

An appearance in a bankruptcy court by a foreign representative in connection with a petition or request under section 303, 304, or 305 of this title does not submit such foreign representative to the jurisdiction of any court in the United States for any other purpose, but the bankruptcy court may condition any order under section 303, 304, or 305 of this title on compliance by such foreign representative with the orders of such bankruptcy court.

§ 307. United States trustee

The United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title.

Subchapter II - Officers

§ 321. Eligibility to serve as trustee

(a) A person may serve as trustee in a case under this title only if such person is -

(1) an individual that is competent to perform the duties of trustee and, in a case under chapter 7, 12, or 13 of this title, resides or has an office in the judicial district within which the case is pending, or in any judicial district adjacent to such district; or

(2) a corporation authorized by such corporation's charter or bylaws to act as trustee, and, in a case under chapter 7, 12, or 13 of this title, having an office in at least one of such districts.

(b) A person that has served as an examiner in the case may not serve as trustee in the case.

(c) The United States trustee for the judicial district in which the case is pending is eligible to serve as trustee in the case if necessary.

§ 322. Qualification of trustee

(a) Except as provided in subsection (b)(1), a person selected under section 701, 702, 703, 1104, 1163, 1202, or 1302 of this title to serve as trustee in a case under this title qualifies if before five days after such selection, and before beginning official duties, such person has filed with the court a bond in favor of the United States conditioned on the faithful performance of such official duties.

(b)

(1) The United States trustee qualifies wherever such trustee serves as trustee in a case under this title.

(2) The United States trustee shall determine -

(A) the amount of a bond required to be filed under subsection (a) of this section; and

(B) the sufficiency of the surety on such bond.

(c) A trustee is not liable personally or on such trustee's bond in favor of the United States for any penalty or forfeiture incurred by the debtor.

(d) A proceeding on a trustee's bond may not be commenced after two years after the date on which such trustee was discharged.

§ 323. Role and capacity of trustee

(a) The trustee in a case under this title is the representative of the estate.

(b) The trustee in a case under this title has capacity to sue and be sued.
§ 324. Removal of trustee or examiner

(a) The court, after notice and a hearing, may remove a trustee, other than the United States trustee, or an examiner, for cause.
(b) Whenever the court removes a trustee or examiner under subsection (a) in a case under this title, such trustee or examiner shall thereby be removed in all other cases under this title in which such trustee or examiner is then serving unless the court orders otherwise.

§ 325. Effect of vacancy

A vacancy in the office of trustee during a case does not abate any pending action or proceeding, and the successor trustee shall be substituted as a party in such action or proceeding.

§ 326. Limitation on compensation of trustee

(a) In a case under chapter 7 or 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable after the trustee renders such services, not to exceed 25 percent on the first $5,000 or less, 10 percent on any amount in excess of $5,000 but not in excess of $50,000, 5 percent on any amount in excess of $50,000 but not in excess of $1,000,000, and reasonable compensation not to exceed 3 percent of such moneys in excess of $1,000,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.
(b) In a case under chapter 12 or 13 of this title, the court may not allow compensation for services or reimbursement of expenses of the United States trustee or of a standing trustee appointed under section 586(b) of title 28, but may allow reasonable compensation under section 330 of this title of a trustee appointed under section 1202(a) or 1302(a) of this title for the trustee's services, payable after the trustee renders such services, not to exceed five percent upon all payments under the plan.
(c) If more than one person serves as trustee in the case, the aggregate compensation of such persons for such service may not exceed the maximum compensation prescribed for a single trustee by subsection (a) or (b) of this section, as the case may be.
(d) The court may deny allowance of compensation for services or reimbursement of expenses of the trustee if the trustee failed to make diligent inquiry into facts that would permit denial of allowance under section 328(c) of this title or, with knowledge of such facts, employed a professional person under section 327 of this title.

§ 327. Employment of professional persons

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.
(b) If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.
(c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.
(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.
(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.
(f) The trustee may not employ a person that has served as an examiner in the case.

§ 328. Limitation on compensation of professional persons

(a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or
authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

(b) If the court has authorized a trustee to serve as an attorney or accountant for the estate under section 327(d) of this title, the court may allow compensation for the trustee's services as such attorney or accountant only to the extent that the trustee performed services as attorney or accountant for the estate and not for performance of any of the trustee's duties that are generally performed by a trustee without the assistance of an attorney or accountant for the estate.

(c) Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

§ 329. Debtor's transactions with attorneys

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the 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 source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to -

(1) the estate, if the property transferred-
   (A) would have been property of the estate; or
   (B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or
(2) the entity that made such payment.

§ 330. Compensation of officers

(a) (1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103 --
   (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and
   (B) reimbursement for actual, necessary expenses.
(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.
(3)(A) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including --
   (A) the time spent on such services;
   (B) the rates charged for such services;
   (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
   (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and
   (E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.
(4)(A) Except as provided in subparagraph (b), the court shall not allow compensation for --
   (i) unnecessary duplication of services; or
   (ii) services that were not --
      (I) reasonably likely to benefit the debtor's estate; or
      (II) necessary to the administration of the case.
   (B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.
(5) The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.
Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.

[112x705](b) There shall be paid from the filing fee in a case under chapter 7 of this title $45 to the trustee serving in such case, after such trustee’s services are rendered.

(2) The Judicial Conference of the United States --

(A) shall prescribe additional fees of the same kind as prescribed under section 1914(b) of title 28; and

(B) may prescribe notice of appearance fees and fees charged against distributions in cases under this title; to pay $15 to trustees serving in cases after such trustees’ services are rendered. Beginning 1 year after the date of the enactment of the Bankruptcy Reform Act of 1994, such $15 shall be paid in addition to the amount paid under paragraph (1).

(c) Unless the court orders otherwise, in a case under chapter 12 or 13 of this title the compensation paid to the trustee serving in the case shall not be less than $5 per month from any distribution under the plan during the administration of the plan.

(d) In a case in which the United States trustee serves as trustee, the compensation of the trustee under this section shall be paid to the clerk of the bankruptcy court and deposited by the clerk into the United States Trustee System Fund established by section 589a of title 28.

§ 331. Interim compensation

A trustee, an examiner, a debtor's attorney, or any professional person employed under section 327 or 1103 of this title may apply to the court not more than once every 120 days after an order for relief in a case under this title, or more often if the court permits, for such compensation for services rendered before the date of such an application or reimbursement for expenses incurred before such date as is provided under section 330 of this title. After notice and a hearing, the court may allow and disburse to such applicant such compensation or reimbursement.

Subchapter III - Administration

§ 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.

(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.

§ 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 the commencement of a case under this title by an individual whose debts are primarily consumer debts, the clerk shall give written notice to such individual that indicates each chapter of this title under which such individual may proceed.

(c) 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 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.

§ 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.

260
§ 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
      (iii) faithful performance of duties as a depository; or
   (2) the deposit of securities of the kind specified in section 9303 of title 31;

(c) An entity with which such moneys are deposited or invested is authorized to deposit or invest such moneys as may be required under this section.

§ 346. Special tax provisions

(a) Except to the extent otherwise provided in this section, subsections (b), (c), (d), (e), (g), (h), (i), and (j) of this section apply notwithstanding any State or local law imposing a tax, but subject to the Internal Revenue Code of 1986 (26 U.S.C. 1 et seq.).

(b) (1) In a case under chapter 7, 12, or 11 of this title concerning an individual, any income of the estate may be taxed under a State or local law imposing a tax on or measured by income only to the estate, and may not be taxed to such individual. Except as provided in section 728 of this title, if such individual is a partner in a partnership, any gain or loss resulting from a distribution of property from such partnership, or any distributive share of income, gain, loss, deduction, or credit of such individual that is distributed, or considered distributed, from such partnership, after the commencement of the case is gain, loss, income, deduction, or credit, as the case may be, of the estate.

(2) Except as otherwise provided in this section and in section 728 of this title, any income of the estate in such a case, and any State or local tax on or measured by such income, shall be computed in the same manner as the income and the tax of an estate.

(3) The estate in such a case shall use the same accounting method as the debtor used immediately before the commencement of the case.

(c) (1) The commencement of a case under this title concerning a corporation or a partnership does not effect a change in the status of such corporation or partnership for the purposes of any State or local law imposing a tax on or measured by income. Except as otherwise provided in this section and in section 728 of this title, any income of the estate in such case may be taxed only as though such case had not been commenced.

(2) In such a case, except as provided in section 728 of this title, the trustee shall make any tax return otherwise required by State or local law to be filed by or on behalf of such corporation or partnership in the same manner and form as such corporation or partnership, as the case may be, is required to make such return.

(d) In a case under chapter 13 of this title, any income of the estate or the debtor may be taxed under a State or local law imposing a tax on or measured by income only to the debtor, and may not be taxed to the estate.

(e) A claim allowed under section 502(f) or 503 of this title, other than a claim for a tax that is not otherwise deductible or a capital expenditure that is not otherwise deductible, is deductible by the entity to which income of the estate is taxed unless such claim was deducted by another entity, and a deduction for such a claim is deemed to be a deduction attributable to a business.

(f) The trustee shall withhold from any payment of claims for wages, salaries, commissions, dividends, interest, or other payments, or collect, any amount required to be withheld or collected under applicable State or local tax law, and shall pay such withheld or collected amount to the appropriate governmental unit at the time and in the manner required by such tax law, and with the same priority as the claim from which such amount was withheld was paid.

(g) (1) Neither gain nor loss shall be recognized on a transfer -
(A) by operation of law, of property to the estate;
(B) other than a sale, of property from the estate to the debtor; or
(C) in a case under chapter 11 or 12 of this title concerning a corporation, of property from the estate to a corporation that is an affiliate participating in a joint plan with the debtor, or that is a successor to the debtor under the plan, except that gain or loss may be recognized to the same extent that such transfer results in the recognition of gain or loss under section 371 of the Internal Revenue Code of 1986.

(2) The transferee of a transfer of a kind specified in this subsection shall take the property transferred with the same character, and with the transferor's basis, as adjusted under subsection (j)(5) of this section, and holding period.

(h) Notwithstanding sections 728(a) and 1146(a) of this title, for the purpose of determining the number of taxable periods during which the debtor or the estate may use a loss carryover or a loss carryback, the taxable period of the debtor during which the case is commenced is deemed not to have been terminated by such commencement.

(i) (1) In a case under chapter 7, 12, or 11 of this title concerning an individual, the estate shall succeed to the debtor's tax attributes, including -
(A) any investment credit carryover;
(B) any recovery exclusion;
(C) any loss carryover;
(D) any foreign tax credit carryover;
(E) any capital loss carryover; and
(F) any claim of right.

(2) After such a case is closed or dismissed, the debtor shall succeed to any tax attribute to which the estate succeeded under paragraph (1) of this subsection but that was not utilized by the estate. The debtor may utilize such tax attributes as though any applicable time limitations on such utilization by the debtor were suspended during the time during which the case was pending.

(3) In such a case, the estate may carry back any loss of the estate to a taxable period of the debtor that ended before the order for relief under such chapter the same as the debtor could have carried back such loss had the debtor incurred such loss and the case under this title had not been commenced, but the debtor may not carry back any loss of the debtor from a taxable period that ends after such order to any taxable period of the debtor that ended before such order until after the case is closed.

(j) (1) Except as otherwise provided in this subsection, income is not realized by the estate, the debtor, or a successor to the debtor by reason of forgiveness or discharge of indebtedness in a case under this title.

(2) For the purposes of any State or local law imposing a tax on or measured by income, a deduction with respect to a liability may not be allowed for any taxable period during or after which such liability is forgiven or discharged under this title. In this paragraph, "a deduction with respect to a liability" includes a capital loss incurred on the disposition of a capital asset with respect to a liability that was incurred in connection with the acquisition of such asset.

(3) Except as provided in paragraph (4) of this subsection, for the purpose of any State or local law imposing a tax on or measured by income, any net operating loss of an individual or corporate debtor, including a net operating loss carryover to such debtor, shall be reduced by the amount of indebtedness forgiven or discharged in a case under this title, except to the extent that such forgiveness or discharge resulted in a disallowance under paragraph (2) of this subsection.

(4) A reduction of a net operating loss or a net operating loss carryover under paragraph (3) of this subsection or of basis under paragraph (5) of this subsection is not required to the extent that the indebtedness of an individual or corporate debtor forgiven or discharged -
(A) consisted of items of a deductible nature that were not deducted by such debtor; or
(B) resulted in an expired net operating loss carryover or other deduction that -
(i) did not offset income for any taxable period; and
(ii) did not contribute to a net operating loss in or a net operating loss carryover to the taxable period during or after which such indebtedness was discharged.

(5) For the purposes of a State or local law imposing a tax on or measured by income, the basis of the debtor's property or of property transferred to an entity required to use the debtor's basis in whole or in part shall be reduced by the lesser of -
(A) (i) the amount by which the indebtedness of the debtor has been forgiven or discharged in a case under this title; minus
(ii) the total amount of adjustments made under paragraphs (2) and (3) of this subsection; and
(B) the amount by which the total basis of the debtor's assets that were property of the estate before such forgiveness or discharge exceeds the debtor's total liabilities that were liabilities both before and after such forgiveness or discharge.

(6) Notwithstanding paragraph (5) of this subsection, basis is not required to be reduced to the extent that the debtor elects to treat as taxable income, of the taxable period in which indebtedness is forgiven or discharged, the amount of indebtedness forgiven or discharged that otherwise would be applied in reduction of basis under paragraph (5) of this subsection.

(7) For the purposes of this subsection, indebtedness with respect to which an equity security, other than an
interest of a limited partner in a limited partnership, is issued to the creditor to whom such indebtedness was
owed, or that is forgiven as a contribution to capital by an equity security holder other than a limited partner in
the debtor, is not forgiven or discharged in a case under this title -
(A) to any extent that such indebtedness did not consist of items of a deductible nature; or
(B) if the issuance of such equity security has the same consequences under a law imposing a tax on or
measured by income to such creditor as a payment in cash to such creditor in an amount equal to the fair
market value of such equity security, then to the lesser of -
(i) the extent that such issuance has the same such consequences; and
(ii) the extent of such fair market value.

§ 347. Unclaimed property
(a) Ninety days after the final distribution under section 726, 1226, or 1326 of this title in a case under chapter 7, 12,
or 13 of this title, as the case may be, the trustee shall stop payment on any check remaining unpaid, and any remaining
property of the estate shall be paid into the court and disposed of under chapter 129 of title 28.
(b) Any security, money, or other property remaining unclaimed at the expiration of the time allowed in a case under
chapter 9, 11, or 12 of this title for the presentation of a security or the performance of any other act as a condition to
participation in the distribution under any plan confirmed under section 943(b), 1129, 1173, or 1225 of this title, as the
case may be, becomes the property of the debtor or of the entity acquiring the assets of the debtor under the plan, as
the case may be.

§ 348. Effect of conversion
(a) Conversion of a case from a case under one chapter of this title to a case under another chapter of this title
constitutes an order for relief under the chapter to which the case is converted, but, except as provided in subsections
(b) and (c) of this section, does not effect a change in the date of the filing of the petition, the commencement of the
case, or the order for relief.
(b) Unless the court for cause orders otherwise, in sections 701(a), 727(a)(10), 727(b), 728(a), 728(b), 1102(a),
1110(a)(1), 1121(b), 1121(c), 1141(d)(4), 1146(a), 1146(b), 1201(a), 1221, 1228(a), 1301(a), and 1305(a) of this
title, "the order for relief under this chapter" in a chapter to which a case has been converted under section 706, 1112,
11208, or 1307 of this title means the conversion of such case to such chapter.
(c) Sections 342 and 365(d) of this title apply in a case that has been converted under section 706, 1112, 1208, or
1307 of this title, as if the conversion order were the order for relief.
(d) A claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is
converted under section 1112, 1307, or 1208 of this title, other than a claim specified in section 503(b) of this title,
shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition.
(e) Conversion of a case under section 706, 1112, 1307, or 1208 of this title terminates the service of any trustee or
examiner that is serving in the case before such conversion.
(f) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter
under this title --
(A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition,
that remains in the possession of or is under the control of the debtor on the date of conversion; and
(B) valuations of property and of allowed secured claims in the chapter 13 case shall apply in the converted case, with
allowed secured claims reduced to the extent that they have been paid in accordance with the chapter 13 plan.
(2) If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the
property in the converted case shall consist of the property of the estate as of the date of conversion.

§ 349. Effect of dismissal
(a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a
later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under
this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in
section 109(g) of this title.
(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title -
(1) reinstates -
(A) any proceeding or custodianship superseded under section 543 of this title;
(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or
preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and
(C) any lien voided under section 506(d) of this title;
(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

263
(3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

§ 350. Closing and reopening cases

(a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case.
(b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

Subchapter IV - Administrative Powers

§ 361. Adequate protection

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by -

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;
(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or
(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

§ 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of --

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
(4) any act to create, perfect, or enforce any lien against property of the estate;
(5) any act to create, perfect, or enforce against the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay --

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;
(2) under subsection (a) of this section --
(A) of the commencement or continuation of an action or proceeding for --
   (i) the establishment of paternity; or
   (ii) the establishment or modification of an order for alimony, maintenance, or support; or
(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;
(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or
to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of --

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement; or

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition.

(c) Except as provided in subsections (d), (e), and (f) of this section --

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of --

(A) the time the case is closed;
(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay --

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to stay of an act against property under subsection (a) of this section, if --

(A) the debtor does not have an equity in such property;

(B) such property is not necessary to an effective reorganization; or

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) --

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor’s interest in the real estate.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) If any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section --

(1) the party requesting such relief has the burden of proof on the issue of the debtor’s equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.

§ 363. Use, sale, or lease of property

(a) In this section, “cash collateral” means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 363. Use, sale, or lease of property

(b)

(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then -

(A) notwithstanding subsection (a) of such section, such notification shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the tenth day after the date of the receipt of such notification, unless the court, after notice and hearing, orders otherwise.

(c)

(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204 or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless -

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the
debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only to the extent not inconsistent with any relief granted under section 362(c), 362(d), 362(e), or 362(f) of this title.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if -

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if -

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of section 365, trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) In any hearing under this section -

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.
§ 364. Obtaining credit

(a) If the trustee is authorized to operate the business of the debtor under section 721, 1108, 1203, 1204, or 1304 of this title, unless the court orders otherwise, the trustee may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b)(1) of this title as an administrative expense.

(b) The court, after notice and a hearing, may authorize the trustee to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b)(1) of this title as an administrative expense.

(c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt -

(1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;
(2) secured by a lien on property of the estate that is not otherwise subject to a lien; or
(3) secured by a junior lien on property of the estate that is subject to a lien.

(d) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if -

(A) the trustee is unable to obtain such credit otherwise; and
(B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

(e) In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.

(f) Except with respect to an entity that is an underwriter as defined in section 1145(b) of this title, section 5 of the Securities Act of 1933, the Trust Indenture Act of 1939, and any State or local law requiring registration for offer or sale of a security or registration or licensing of an issuer of, underwriter of, or broker or dealer in, a security does not apply to the offer or sale under this section of a security that is not an equity security.

§ 365. Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b) The court, after notice and a hearing, may authorize the trustee to assume an executory contract or unexpired lease of the debtor -

(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee -
(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
(C) provides adequate assurance of future performance under such contract or lease.
(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to -
(A) the insolvency or financial condition of the debtor at any time before the closing of the case;
(B) the commencement of a case under this title;
(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or
(D) the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.
(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance -
(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;
(B) that any percentage rent due under such lease will not decline substantially;
(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and
(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.
(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the
debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if -

(1) 
(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor;

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief; or

(4) such lease is of nonresidential real property under which the debtor is the lessee of an aircraft terminal or aircraft gate at an airport at which the debtor is the lessee under one or more additional nonresidential leases of an aircraft terminal or aircraft gate and the trustee, in connection with such assumption or assignment, does not assume all such leases or does not assume and assign all of such leases to the same person, except that the trustee may assume or assign less than all of such leases with the airport operator's written consent.

(d) 

(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

(5) Notwithstanding paragraphs (1) and (4) of this subsection, in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate before the occurrence of a termination event, then (unless the court orders the trustee to assume such unexpired lease within 5 days after the termination event), at the option of the airport operator, such lease is deemed rejected 5 days after the occurrence of a termination event and the trustee shall immediately surrender possession of the premises to the airport operator; except that the lease shall not be deemed to be rejected unless the airport operator first waives the right to damages related to the rejection. In the event that the lease is deemed to be rejected under this paragraph, the airport operator shall provide the affected air carrier adequate opportunity after the surrender of the premises to remove the fixtures and equipment installed by the affected air carrier.

(6) For the purpose of paragraph (5) of this subsection and paragraph (f)(1) of this section, the occurrence of a termination event means, with respect to a debtor which is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate -

(A) the entry under section 301 or 302 of this title of an order for relief under chapter 7 of this title;

(B) the conversion of a case under any chapter of this title to a case under chapter 7 of this title; or

(C) the granting of relief from the stay provided under section 362(a) of this title with respect to aircraft, aircraft engines, propellers, appliances, or spare parts, as defined in section 101 of section 40102 of title 49, except for property of the debtor found by the court not to be necessary to an effective reorganization.

(7) Any order entered by the court pursuant to paragraph (4) extending the period within which the trustee of an affected air carrier must assume or reject an unexpired lease of nonresidential real property shall be without prejudice to -

(A) the right of the trustee to seek further extensions within such additional time period granted by the court pursuant to paragraph (4); and

269
(B) the right of any lessor or any other party in interest to request, at any time, a shortening or termination of the period within which the trustee must assume or reject an unexpired lease of nonresidential real property.

(B) The burden of proof for establishing cause for an extension by an affected air carrier under paragraph (4) or the maintenance of a previously granted extension under paragraph (7)(A) and (B) shall at all times remain with the trustee.

(9) For purposes of determining cause under paragraph (7) with respect to an unexpired lease of nonresidential real property between the debtor that is an affected air carrier and an airport operator under which such debtor is the lessee of an airport terminal or an airport gate, the court shall consider, among other relevant factors, whether substantial harm will result to the airport operator or airline passengers as a result of the extension or the maintenance of a previously granted extension. In making the determination of substantial harm, the court shall consider, among other relevant factors, the level of actual use of the terminals or gates which are the subject of the lease, the public interest in actual use of such terminals or gates, the existence of competing demands for the use of such terminals or gates, the effect of the court's extension or termination of the period of time to assume or reject the lease on such debtor's ability to successfully reorganize under chapter 11 of this title, and whether the trustee of the affected air carrier is capable of continuing to comply with its obligations under section 365(d)(3) of this title.

(10) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection(b) or (f).

Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(e) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on:

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if:

(A) (i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f) Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection; except that the trustee may not assign an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate if there has occurred a termination event.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if:

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (b)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease:

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title -
For purposes of this section 365 and sections 541 (b) (2) and 362(b)(10), leases of real property shall include any
A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose
Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the
property may require a deposit or other security for the performance of the debtor's obligations under the lease
estate from any liability for any breach of such contract or lease occurring after such assignment.
executory contract to purchase real property from the debtor is rejected and under which such party is not in
possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase
price that such purchaser or party has paid.
If
If such purchaser remains in possession-
(A) such purchaser shall continue to make all payments due under such contract, but may, offset against
such payments any damages occurring after the date of the rejection of such contract caused by the
nonperformance of any obligation of the debtor after such date, but such purchaser does not have any
rights against the estate on account of any damages arising after such date from such rejection, other than
such offset; and
(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but
is relieved of all other obligations to perform under such contract.
A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose
executory contract to purchase real property from the debtor is rejected and under which such party is not in
possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase
price that such purchaser or party has paid.
Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the
property may require a deposit or other security for the performance of the debtor's obligations under the lease
substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.
If the trustee rejects an unexpired lease of real property of the debtor under which the debtor is the lessor,
or a timeshare interest under a timeshare plan under which the lessor is the timeshare interest seller, the lessee
or timeshare interest purchaser under such lease or timeshare plan may treat such lease or timeshare plan as
terminated by such rejection, where the disaffirmance by the trustee amounts to such a breach as would entitle
the lessee or timeshare interest purchaser to treat such lease or timeshare plan as terminated by virtue of its own
terms, applicable nonbankruptcy law, or other agreements the lessee or timeshare interest purchaser has made
with other parties; or, in the alternative, the lessee or timeshare interest purchaser may remain in possession of
the leasehold or timeshare interest under any lease or timeshare plan the term of which has commenced for the
balance of such term and for any renewal or extension of such term that is enforceable by such lessee or
timeshare interest purchaser under applicable nonbankruptcy law.
(2) If such lessee or timeshare interest purchaser remains in possession as provided in paragraph (1) of this
subsection, such lessee or timeshare interest purchaser may offset against the rent reserved under such lease or
monies due for such timeshare interest for the balance of the term after the date of the rejection of such lease or
timeshare interest, and any such renewal or extension thereof, any damages occurring after such date caused by
the nonperformance of any obligation of the debtor under such lease or timeshare plan after such date, but such
lessee or timeshare interest purchaser does not have any rights against the estate on account of any damages
arising after such date from such rejection, other than such offset.
(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a
timeshare plan, under which the purchaser is in possession, such purchaser may treat
such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare
interest.
(2) If such purchaser remains in possession -
(A) such purchaser shall continue to make all payments due under such contract, but may, offset against
such payments any damages occurring after the date of the rejection of such contract caused by the
nonperformance of any obligation of the debtor after such date, but such purchaser does not have any
rights against the estate on account of any damages arising after such date from such rejection, other than
such offset; and
(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but
is relieved of all other obligations to perform under such contract.
(i) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose
executory contract to purchase real property from the debtor is rejected and under which such party is not in
possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase
price that such purchaser or party has paid.
(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the
estate from any liability for any breach of such contract or lease occurring after such assignment.
(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the
property may require a deposit or other security for the performance of the debtor's obligations under the lease
substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.
(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any
rental agreement to use real property.
(n)
(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual
property, the licensee under such contract may elect -
(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such
a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms,
applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or
(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for -
(i) the duration of such contract; and
(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.
(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such
contract -
(A) the trustee shall allow the licensee to exercise such rights;
(B) the licensee shall make all royalty payments due under such contract for the duration of such contract.
and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and
(C) the licensee shall be deemed to waive -
   (i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and
   (ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.
(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall -
   (A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and
   (B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.
(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall -
   (A) to the extent provided in such contract or any agreement supplementary to such contract -
      (i) perform such contract; or
      (ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and
   (B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.
(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency), to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

§ 366. Utility service

(a) Except as provided in subsection (b) of this section, a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.
(b) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. On request of a party in interest and after notice and a hearing, the court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.

CHAPTER 5 - CREDITORS, THE DEBTOR, AND THE ESTATE

Subchapter II - Debtor's Duties and Benefits

§ 523 Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt --

   (1) for a tax or a customs duty --
      (A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;
      (B) with respect to which a return, if required --
         (i) was not filed; or
         (ii) was filed after the date on which such return was last due, under applicable law or under any
extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by --

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing --

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $1,000 for "luxury goods or services" incurred by an individual debtor on or within 60 days before the order for relief under this title, or cash advances aggregating more than $1,000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 60 days before the order for relief under this title, are presumed to be nondischargeable; "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act;

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit --

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with state or territorial law by a governmental unit, or property settlement agreement, but not to the extent that --

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty --

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless --

(A) such loan, benefit, scholarship, or stipend overpayment first became due more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union; or

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency;

(13) for any payment of an order of restitution issued under title 18, United States Code;

(14) incurred to pay a tax to the United States that would be nondischargeable pursuant to paragraph (1); and

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in
accordance with State or territorial law by a governmental unit unless --

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor;

(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a dwelling unit that has condominium ownership or in a share of a cooperative housing corporation, but only if such fee or assessment is payable for a period during which --

(A) the debtor physically occupied a dwelling unit in the condominium or cooperative project; or

(B) the debtor rented the dwelling unit to a tenant and received payments from the tenant for such period, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;

(17) for a fee imposed by a court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under section 1915(b) or (f) of title 28, or the debtor's status as a prisoner, as defined in section 1915(h) of title 28; or

(18) owed under State law to a State or municipality that is --

(A) in the nature of support, and

(B) enforceable under part D of title IV of the Social Security Act (42 U.S.C. 601 et seq.)

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy act, under section 439A of the Higher Education Act of 1965, or under section 733(g) of the Public Health Service Act in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15), as the case may be, of subsection (a) of this section.

(2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), or (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

(e) Any institution-affiliated party of an insured depository institution shall be considered to be acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).

CHAPTER 7 - LIQUIDATION

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
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.
§ 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 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.

§ 707. Dismissal

(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) 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 any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

Subchapter II - Collection, Liquidation and Distribution of the Estate

§ 721. Authorization to operate business

The court may authorize the trustee to operate the business of the debtor for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate.

§ 722. Redemption

An individual debtor may, whether or not the debtor has waived the right to redeem under this section, redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if such property is exempted under section 522 of this title or has been abandoned under section 554 of this title, by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien.

§ 723. Rights of partnership trustee against general partners

(a) If there is a deficiency of property of the estate to pay in full all claims which are allowed in a case under this chapter concerning a partnership and with respect to which a general partner of the partnership is personally liable, the trustee shall have a claim against such general partner to the extent that under applicable nonbankruptcy law such general partner is personally liable for such deficiency.
(b) To the extent practicable, the trustee shall first seek recovery of such deficiency from any general partner in such partnership that is not a debtor in a case under this title. Pending determination of such deficiency, the court may order
any such partner to provide the estate with indemnity for, or assurance of payment of, any deficiency recoverable from such partner, or not to dispose of property.

c) Notwithstanding section 728(c) of this title, the trustee has a claim against the estate of each general partner in such partnership that is a debtor in a case under this title for the full amount of all claims of creditors allowed in the case concerning such partnership. Notwithstanding section 502 of this title, there shall not be allowed in such partner's case a claim against such partner on which both such partner and such partnership are liable, except to any extent that such claim is secured only by property of such partner and not by property of such partnership. The claim of the trustee under this subsection is entitled to distribution in such partner's case under section 726(a) of this title the same as any other claim of a kind specified in such section.

d) If the aggregate that the trustee recovers from the estates of general partners under subsection (c) of this section is greater than any deficiency not recovered under subsection (b) of this section, the court, after notice and a hearing, shall determine an equitable distribution of the surplus so recovered, and the trustee shall distribute such surplus to the estates of the general partners in such partnership according to such determination.

§ 724. Treatment of certain liens

(a) The trustee may avoid a lien that secures a claim of a kind specified in section 726(a)(4) of this title.
(b) Property in which the estate has an interest and that is subject to a lien that is not avoidable under this title and that secures an allowed claim for a tax, or proceeds of such property, shall be distributed -

(1) first, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is senior to such tax lien;

(2) second, to any holder of a claim of a kind specified in section 507(a)(1), 507(a)(2), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a) of this title, to the extent of the amount of such allowed tax claim that is secured by such tax lien;

(3) third, to the holder of such tax lien, to any extent that such holder's allowed tax claim that is secured by such tax lien exceeds any amount distributed under paragraph (2) of this subsection;

(4) fourth, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is junior to such tax lien;

(5) fifth, to the holder of such tax lien, to the extent that such holder's allowed claim secured by such tax lien is not paid under paragraph (3) of this subsection; and

(6) sixth, to the estate.

c) If more than one holder of a claim is entitled to distribution under a particular paragraph of subsection (b) of this section, distribution to such holders under such paragraph shall be in the same order as distribution to such holders would have been other than under this section.

d) A statutory lien the priority of which is determined in the same manner as the priority of a tax lien under section 6323 of the Internal Revenue Code of 1986 (26 U.S.C. 6323) shall be treated under subsection (b) of this section the same as if such lien were a tax lien.

§ 725. Disposition of certain property

After the commencement of a case under this chapter, but before final distribution of property of the estate under section 726 of this title, the trustee, after notice and a hearing, shall dispose of any property in which an entity other than the estate has an interest, such as a lien, and that has not been disposed of under another section of this title.

§ 726. Distribution of property of the estate

(a) Except as provided in section 510 of this title, property of the estate shall be distributed -

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title, proof of which is timely filed under section 501 of this title or tardily filed before the date on which the trustee commences distribution under this section;

(2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is -

(A) timely filed under section 501(a) of this title;

(B) timely filed under section 501(b) or 501(c) of this title; or

(C) tardily filed under section 501(a) of this title, if -

(i) the creditor holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and

(ii) proof of such claim is filed in time to permit payment of such claim;

(3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection;
(4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim;
(5) fifth, in payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection; and
(6) sixth, to the debtor.

(b) Payment on claims of a kind specified in paragraph (1), (2), (3), (4), (5), (6), (7) or (8) of section 507(a) of this title, or in paragraph (2), (3), (4), or (5) of subsection (a) of this section, shall be made pro rata among claims of the kind specified in each such particular paragraph, except that in a case that has been converted to this chapter under section 1009, 1112, 1208, or 1307 of this title, a claim allowed under section 503(b) of this title incurred under this chapter after such conversion has priority over a claim allowed under section 503(b) of this title incurred under any other chapter of this title or under this chapter before such conversion and over any expenses of a custodian superseded under section 543 of this title.

(c) Notwithstanding subsections (a) and (b) of this section, if there is property of the kind specified in section 541(a)(2) of this title, or proceeds of such property, in the estate, such property or proceeds shall be segregated from other property of the estate, and such property or proceeds and other property of the estate shall be distributed as follows:

(1) Claims allowed under section 503 of this title shall be paid either from property of the kind specified in section 541(a)(2) of this title, or from other property of the estate, as the interest of justice requires.
(2) Allowed claims, other than claims allowed under section 503 of this title, shall be paid in the order specified in subsection (a) of this section, and, with respect to claims of a kind specified in a particular paragraph of section 507 of this title or subsection (a) of this section, in the following order and manner:
   (A) First, community claims against the debtor or the debtor's spouse shall be paid from property of the kind specified in section 541(a)(2) of this title, except to the extent that such property is solely liable for debts of the debtor.
   (B) Second, to the extent that community claims against the debtor are not paid under subparagraph (A) of this paragraph, such community claims shall be paid from property of the kind specified in section 541(a)(2) of this title that is solely liable for debts of the debtor.
   (C) Third, to the extent that all claims against the debtor including community claims against the debtor are not paid under subparagraph (A) or (B) of this paragraph such claims shall be paid from property of the estate other than property of the kind specified in section 541(a)(2) of this title.
   (D) Fourth, to the extent that community claims against the debtor or the debtor's spouse are not paid under subparagraph (A), (B), or (C) of this paragraph, such claims shall be paid from all remaining property of the estate.

§ 727. Discharge

(a) The court shall grant the debtor a discharge, unless -
(1) the debtor is not an individual;
(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed -
   (A) property of the debtor, within one year before the date of the filing of the petition; or
   (B) property of the estate, after the date of the filing of the petition;
(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;
(4) the debtor knowingly and fraudulently, in or in connection with the case -
   (A) made a false oath or account;
   (B) presented or used a false claim;
   (C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or
   (D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;
(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;
(6) the debtor has refused, in the case -
   (A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;
   (B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

278
(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a
material question approved by the court or to testify;
(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or
within one year before the date of the filing of the petition, or during the case, in connection with another case,
under this title or under the Bankruptcy Act, concerning an insider;
(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section
14, 371, or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the
petition;
(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or
661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition,
unless payments under the plan in such case totaled at least -
(A) 100 percent of the allowed unsecured claims in such case; or
(B) (i) 70 percent of such claims; and
(ii) the plan was proposed by the debtor in good faith, and was the debtor’s best effort; or
(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this
chapter.
(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the
debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim
that is determined under section 502 of this title as if such claim had arisen before the commencement of the case,
whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether
or not a claim based on any such debt or liability is allowed under section 502 of this title.
(c) (1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under
subsection (a) of this section.
(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the
debtor to determine whether a ground exists for denial of discharge.
(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall
revoke a discharge granted under subsection (a) of this section if -
(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such
fraud until after the granting of such discharge;
(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that
would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement
to such property, or to deliver or surrender such property to the trustee; or
(3) the debtor committed an act specified in subsection (a)(6) of this section.
(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge -
(1) under subsection (d)(1) of this section within one year after such discharge is granted; or
(2) under subsection (d)(2) or (d)(3) of this section before the later of -
(A) one year after the granting of such discharge; and
(B) the date the case is closed.
§ 728. Special tax provisions

(a) For the purposes of any State or local law imposing a tax on or measured by income, the taxable period of a
debtor that is an individual shall terminate on the date of the order for relief under this chapter, unless the case was
converted under section 1112 or 1208 of this title.
(b) Notwithstanding any State or local law imposing a tax on or measured by income, the trustee shall make tax returns
of income for the estate of an individual debtor in a case under this chapter or for a debtor that is a corporation in a
case under this chapter only if such estate or corporation has net taxable income for the entire period after the order
for relief under this chapter during which the case is pending. If such entity has such income, or if the debtor is a
partnership, then the trustee shall make and file a return of income for each taxable period during which the case was
pending after the order for relief under this chapter.
(c) If there are pending a case under this chapter concerning a partnership and a case under this chapter concerning a
partner in such partnership, a governmental unit’s claim for any unpaid liability of such partner for a State or local tax
on or measured by income, to the extent that such liability arose from the inclusion in such partner’s taxable income of
earnings of such partnership that were not withdrawn by such partner, is a claim only against such partnership.
(d) Notwithstanding section 541 of this title, if there are pending a case under this chapter concerning a partnership and
a case under this chapter concerning a partner in such partnership, then any State or local tax refund or reduction of
tax of such partner that would have otherwise been property of the estate of such partner under section 541 of this title

(1) is property of the estate of such partnership to the extent that such tax refund or reduction of tax is fairly
apportionable to losses sustained by such partnership and not reimbursed by such partner; and
(2) is otherwise property of the estate of such partner.
CHAPTER 11  REORGANIZATION

Subchapter I - Officers and Administration

§ 1103. Powers and duties of committees

(a) At a scheduled meeting of a committee appointed under section 1102 of this title, at which a majority of the members of such committee are present, and with the court's approval, such committee may select and authorize the employment by such committee of one or more attorneys, accountants, or other agents, to represent or perform services for such committee.

(b) An attorney or accountant employed to represent a committee appointed under section 1102 of this title may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case. Representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest.

(c) A committee appointed under section 1102 of this title may -

(1) consult with the trustee or debtor in possession concerning the administration of the case;

(2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(3) participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;

(4) request the appointment of a trustee or examiner under section 1104 of this title; and

(5) perform such other services as are in the interest of those represented.

(d) As soon as practicable after the appointment of a committee under section 1102 of this title, the trustee shall meet with such committee to transact such business as may be necessary and proper.

§ 1107. Rights, powers, and duties of debtor in possession

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

(b) Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case.

CHAPTER 13  ADJUSTMENT OF DEBTS OF AN INDIVIDUAL WITH REGULAR INCOME

Subchapter I - Officers, Administration, and the Estate

§ 1301. Stay of action against codebtor

(a) Except as provided in subsections (b) and (c) of this section, after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless -

(1) such individual became liable on or secured such debt in the ordinary course of such individual's business; or

(2) the case is closed, dismissed, or converted to a case under chapter 7 or 11 of this title.

(b) A creditor may present a negotiable instrument, and may give notice of dishonor of such an instrument.

(c) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided by subsection (a) of this section with respect to a creditor, to the extent that -

(1) as between the debtor and the individual protected under subsection (a) of this section, such individual received the consideration for the claim held by such creditor;

(2) the plan filed by the debtor proposes not to pay such claim; or

(3) such creditor's interest would be irreparably harmed by continuation of such stay.

(d) Twenty days after the filing of a request under subsection (c)(2) of this section for relief from the stay provided by subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless
the debtor or any individual that is liable on such debt with the debtor files and serves upon such party in interest a written objection to the taking of the proposed action.

§ 1302. Trustee

(a) If the United States trustee appoints an individual under section 586(b) of title 28 to serve as standing trustee in cases under this chapter and if such individual qualifies under section 322 of this title, then such individual shall serve as trustee in the case. Otherwise, the United States trustee shall appoint one disinterested person to serve as trustee in the case or the United States trustee may serve as a trustee in the case.

(b) The trustee shall:
   (1) perform the duties specified in sections 704(2), 704(3), 704(4), 704(5), 704(6), 704(7), and 704(9) of this title;
   (2) appear and be heard at any hearing that concerns-
       (A) the value of property subject to a lien;
       (B) confirmation of a plan; or
       (C) modification of the plan after confirmation;
   (3) dispose of, under regulations issued by the Director of the Administrative Office of the United States Courts, moneys received or to be received in a case under chapter XIII of the Bankruptcy Act;
   (4) advise, other than on legal matters, and assist the debtor in performance under the plan; and
   (5) ensure that the debtor commences making timely payments under section 1326 of this title.

(c) If the debtor is engaged in business, then in addition to the duties specified in subsection (b) of this section, the trustee shall perform the duties specified in sections 1106(a)(3) and 1106(a)(4) of this title.

§ 1303. Rights and powers of debtor

Subject to any limitations on a trustee under this chapter, the debtor shall have, exclusive of the trustee, the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l), of this title.

§ 1304. Debtor engaged in business

(a) A debtor that is self-employed and incurs trade credit in the production of income from such employment is engaged in business.
(b) Unless the court orders otherwise, a debtor engaged in business may operate the business of the debtor and, subject to any limitations on a trustee under sections 363(c) and 364 of this title and to such limitations or conditions as the court prescribes, shall have, exclusive of the trustee, the rights and powers of the trustee under such sections.
(c) A debtor engaged in business shall perform the duties of the trustee specified in section 704(8) of this title.

§ 1305. Filing and allowance of postpetition claims

(a) A proof of claim may be filed by any entity that holds a claim against the debtor -
   (1) for taxes that become payable to a governmental unit while the case is pending; or
   (2) that is a consumer debt, that arises after the date of the order for relief under this chapter, and that is for property or services necessary for the debtor's performance under the plan.
(b) Except as provided in subsection (c) of this section, a claim filed under subsection (a) of this section shall be allowed or disallowed under section 502 of this title, but shall be determined as of the date such claim arises, and shall be allowed under section 502(a), 502(b), or 502(c) of this title, or disallowed under section 502(d) or 502(e) of this title, the same as if such claim had arisen before the date of the filing of the petition.
(c) A claim filed under subsection (a)(2) of this section shall be disallowed if the holder of such claim knew or should have known that prior approval by the trustee of the debtor's incurring the obligation was practicable and was not obtained.

§ 1306. Property of the estate

(a) Property of the estate includes, in addition to the property specified in section 541 of this title -
   (1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; and
§ 1307. Conversion or dismissal

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable.

(b) On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

(c) Except as provided in subsection (e) of this section, 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 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including -

1. unreasonable delay by the debtor that is prejudicial to creditors;
2. nonpayment of any fees and charges required under chapter 123 of title 28;
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.

(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) The court may not convert a case under this chapter to a case under chapter 11 or 12 of this title if the debtor is a farmer, unless the debtor requests such conversion.

(f) 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.

Subchapter II - The Plan

§ 1321. Filing of plan

The debtor shall file a plan.

§ 1322. Contents of plan

(a) The plan shall -

1. provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;
2. provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim; and
3. if the plan classifies claims, provide the same treatment for each claim within a particular class.

(b) Subject to subsections (a) and (c) of this section, the plan may -

1. designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated; however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims;
2. modify the rights of holders of secured claims, other than a claim secured only by a security interest in real
property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;
(3) provide for the curing or waiving of any default;
(4) provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim;
(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;
(6) provide for the payment of all or any part of any claim allowed under section 1305 of this title;
(7) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;
(8) provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor;
(9) provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity; and
(10) include any other appropriate provision not inconsistent with this title.

(c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law --
(1) a default with respect to, or that gave rise to, a lien on the debtor’s principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law; and
(2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor’s principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

(d) The plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years.
(e) Notwithstanding subsection (b)(2) of this section and sections 506(b) and 1325(a)(5) of this title, if it is proposed in a plan to cure a default, the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

§ 1323. Modification of plan before confirmation

(a) The debtor may modify the plan at any time before confirmation, but may not modify the plan so that the plan as modified fails to meet the requirements of section 1322 of this title.
(b) After the debtor files a modification under this section, the plan as modified becomes the plan.
(c) Any holder of a secured claim that has accepted or rejected the plan is deemed to have accepted or rejected, as the case may be, the plan as modified, unless the modification provides for a change in the rights of such holder from what such rights were under the plan before modification, and such holder changes such holder’s previous acceptance or rejection.

§ 1324. Confirmation hearing

After notice, the court shall hold a hearing on confirmation of the plan. A party in interest may object to confirmation of the plan.

§ 1325. Confirmation of plan

(a) Except as provided in subsection (b), the court shall confirm a plan if -
(1) The plan complies with the provisions of this chapter and with the other applicable provisions of this title;
(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;
(3) the plan has been proposed in good faith and not by any means forbidden by law;
(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;
(5) with respect to each allowed secured claim provided for by the plan -
(A) the holder of such claim has accepted the plan;
(B) (i) the plan provides that the holder of such claim retain the lien securing such claim; and
(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or
(C) the debtor surrenders the property securing such claim to such holder; and
(6) the debtor will be able to make all payments under the plan and to comply with the plan.

(b)
(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan -
(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
(B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.
(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended -
(A) for the maintenance or support of the debtor or a dependent of the debtor; and
(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.
(c) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.

§ 1326. Payments
(a)
(1) Unless the court orders otherwise, the debtor shall commence making the payments proposed by a plan within 30 days after the plan is filed.
(2) A payment made under this subsection shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as practicable. If a plan is not confirmed, the trustee shall return any such payment to the debtor, after deducting any unpaid claim allowed under section 503(b) of this title.
(b) Before or at the time of each payment to creditors under the plan, there shall be paid -
(1) any unpaid claim of the kind specified in section 507(a)(1) of this title; and
(2) if a standing trustee appointed under section 586(b) of title 28 is serving in the case, the percentage fee fixed for such standing trustee under section 586(e)(1)(B) of title 28.
(c) Except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan.

§ 1327. Effect of confirmation
(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.
(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.
(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

§ 1328. Discharge
(a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt -
(1) provided for under section 1322(b)(5) of this title;
(2) of the kind specified in paragraph (5), (8) or (9) of section 523(a) or 523(a)(9) of this title; or
(3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime.
(b) At any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if -
(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
(2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and
(3) modification of the plan under section 1329 of this title is not practicable.
(c) A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 of this title, except any debt -

(1) provided for under section 1322(b)(5) of this title; or
(2) of a kind specified in section 523(a) of this title.

(d) Notwithstanding any other provision of this section, a discharge granted under this section does not discharge the debtor from any debt based on an allowed claim filed under section 1305(a)(2) of this title if prior approval by the trustee of the debtor's incurring such debt was practicable and was not obtained.

(e) On request of a party in interest before one year after a discharge under this section is granted, and after notice and a hearing, the court may revoke such discharge only if -

(1) such discharge was obtained by the debtor through fraud; and
(2) the requesting party did not know of such fraud until after such discharge was granted.

§ 1329. Modification of plan after confirmation

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to -

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
(2) extend or reduce the time for such payments; or
(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

(b) (1) Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.
(2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.

(c) A plan modified under this section may not provide for payments over a period that expires after three years after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

§ 1330. Revocation of an order of confirmation

(a) On request of a party in interest at any time within 180 days after the date of the entry of an order of confirmation under section 1325 of this title, and after notice and a hearing, the court may revoke such order if such order was procured by fraud.

(b) If the court revokes an order of confirmation under subsection (a) of this section, the court shall dispose of the case under section 1307 of this title, unless, within the time fixed by the court, the debtor proposes and the court confirms a modification of the plan under section 1329 of this title.

TITLE 18

CHAPTER 9 - BANKRUPTCY

§ 152. Concealment of assets; false oaths and claims; bribery

A person who --

(1) knowingly and fraudulently conceals from a custodial, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;
(2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;
(3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;
(4) knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney;
(5) knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11;
(6) knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation,
reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11;
(7) in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;
(8) after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor; or
(9) after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court or a United States Trustee entitled to its possession, any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor,

shall be fined not more than $5,000, imprisoned not more than 5 years, or both.

§ 153. Embezzlement by trustee or officer

(a) OFFENSE. -- A person described in subsection (b) who knowingly and fraudulently appropriates to the person's own use, embezzles, spends, or transfers any property or secretes or destroys any document belonging to the estate of a debtor shall be fined not more than $5,000, imprisoned not more than 5 years, or both.
(b) PERSON TO WHOM SECTION APPLIES. -- A person described in this subsection is one who has access to property or documents belonging to an estate by virtue of the person's participation in the administration of the estate as a trustee, custodian, marshal, attorney, or other officer of the court or as an agent, employee, or other person engaged by such an officer to perform a service with respect to the estate.

§ 154. Adverse interest and conduct of officers

A person who, being a custodian, trustee, marshal, or other officer of the court --
(1) knowingly purchases, directly or indirectly, any property of the estate of which the person is such an officer in a case under title 11;
(2) knowingly refuses to permit a reasonable opportunity for the inspection by parties in interest of the documents and accounts relating to the affairs of estates in the person's charge by parties when directed by the court to do so; or
(3) knowingly refuses to permit a reasonable opportunity for the inspection by the United States Trustee of the documents and accounts relating to the affairs of an estate in the person's charge,

shall be fined not more than $5,000 and shall forfeit the person's office, which shall thereupon become vacant.

§ 155. Fee agreements in cases under title 11 and receiverships

Whoever, being a party in interest, whether as a debtor, creditor, receiver, trustee or representative of any of them, or attorney for any such party in interest, in any receivership or case under title 11 in any United States court or under its supervision, knowingly and fraudulently enters into any agreement, express or implied, with another such party in interest or attorney for another such party in interest, for the purpose of fixing the fees or other compensation to be paid to any party in interest or to any attorney for any party in interest for services rendered in connection therewith, from the assets of the estate, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

§ 156. Knowing disregard of bankruptcy law or rule

(a) DEFINITIONS. -- In this section --
"bankruptcy petition preparer" means a person, other than the debtor's attorney or an employee of such an attorney, who prepares for compensation a document for filing.
"document for filing" means a petition or any other document prepared for filing by a debtor in a United States bankruptcy or a United States district court in connection with a case under this title.
(b) OFFENSE. -- If a bankruptcy case or related proceeding is dismissed because of a knowing attempt by a bankruptcy petition preparer in any manner to disregard the requirements of title 11, United States Code, or the Federal Rules of Bankruptcy Procedure, the bankruptcy petition preparer shall be fined under this title, imprisoned not more than 1 year, or both.
§ 157. Bankruptcy fraud

A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so --

(1) files a petition under title 11;
(2) files a document in a proceeding under title 11; or
(3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title,

shall be fined under this title, imprisoned not more than 5 years, or both.

TITLE 28

Chapter 123 - Fees and Costs

§ 1927. Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.
RULES OF THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

RULE 1 Scope, Effective Date, and Citation of Local Rules
RULE 2 Geographic Divisions
RULE 3 Attorneys
RULE 4 Business Hours and Place of Filing
RULE 5 Petitions: Number of Copies to be Filed in the Bankruptcy Court and Minimum Filing Requirements
RULE 6 Notice to United States
RULE 7 Form of Petitions, Pleadings or Other Matters
RULE 8 Adversary Proceedings
RULE 9 Chapter 13
RULE 10 Relief From Automatic Stay
RULE 11 Abandonments
RULE 12 Proof of Claim
RULE 13 Bond Requirements
RULE 14 Discovery Practice
RULE 15 Motions Practice
RULE 16 Exhibits
RULE 17 Courtroom Decorum
RULE 18 Income Tax Refunds
RULE 19 Continuances
RULE 20 Reopening Cases
RULE 21 Insurance Motor Vehicles Subject to a Lien
RULE 22 Facsimile Notice by Attorneys
RULE 23 Forms

A. Motion to Redeem Property
B. Order to Redeem Property
C. Motion by Secured Creditor for Abandonment of Property
D. Motion to Avoid Lien
E. Order to Avoid Lien
F. Reaffirmation Agreement
G. Amendment to Schedules
H. Certificate of Service and Notice of Amendment to Schedules
I. Order Continuing Section 341 Meeting
J. Schedule of Allowed Claims
RULES OF THE UNITED STATES BANKRUPTCY COURT FOR
THE WESTERN DISTRICT OF KENTUCKY

RULE NO. 1
SCOPE, EFFECTIVE DATE, AND CITATION OF LOCAL RULES

(a) Scope and Construction. These Local Rules of Practice for the United States Bankruptcy Court for the Western District of Kentucky provide standardized procedures for the convenience of the bench and bar. They supplement the FEDERAL RULES OF BANKRUPTCY PROCEDURE and shall be construed to be consistent with those RULES and to secure the just, efficient and economical determination of bankruptcy actions. They supersede all previous local rules and general orders.
(b) References in these Rules to “Court” or the “Clerk” shall mean the United States Bankruptcy Court for the Western District of Kentucky and the Clerk of that court.
(c) Citation of Local Rules. These RULES may be cited as L.B.R. (W.D.Ky.).
(d) Effective Date. These rules shall apply to all cases or proceedings filed on or after January 1, 1993.

RULE NO. 2
GEOGRAPHIC DIVISIONS

The court shall be divided into the following geographic divisions:
Louisville Division By Counties:

| Breckinridge | Meade       |
| Bullitt      | Nelson      |
| Hardin       | Oldham      |
| Jefferson    | Spencer     |
| Larue        | Washington  |
| Marion       |             |

Bowling Green Division By Counties:

| Adair       | Edmonson    |
| Allen       | Green       |
| Barren      | Hart        |
| Butler      | Logan       |
| Casey       | Metcalf     |
| Clinton     | Monroe      |
| Cumberland  | Russell     |
| Simpson     | Todd        |
| Taylor      | Warren      |

Owensboro Division By Counties:

| Daviess     | McLean      |
| Grayson     | Muhlenberg  |
| Hancock     | Ohio        |
| Henderson   | Union       |
| Hopkins     | Webster     |

Paducah Division By Counties:

| Ballard     | Graves      |
| Caldwell    | Hickman     |
| Calloway    | Livingston  |
| Carlisle    | Lyon        |
| Christian   | McCracken   |
| Crittenden  | Marshall    |
| Fulton      | Trigg       |

The assignment of counties to divisions may be changed by RULE or order. Any request for change of venue after assignment shall be made by motion to the Court.
RULE NO. 3
ATTORNEYS

(a) Practice before the Court.

(1) Eligibility of Applicant. An attorney who has been admitted to practice before the United States District Court for the Western district of Kentucky who is in good standing with that Court and who is of good moral and professional character, is eligible to practice before the Court.

(2) Conflicting Engagement. It is the professional responsibility of attorneys to avoid the setting of conflicting engagements in the Courts, to inform the Courts of expected difficulties or conflicts which may arise, and to achieve the resolution of such conflicts or problems at the earliest possible time. Attorneys are expected to carry with them at all times they are in Court a calendar of their future court appearances.

(3) Practice of Law. For purposes of this Local Bankruptcy Rule, "practice of law" includes, but is not limited to, preparing and filing papers, such as complaints, petitions, applications and motions, questioning witnesses in proceedings before the Bankruptcy Judge and pursuing or defending any action of any nature in this court. "Practice of law" does not include questioning debtors at a meeting of creditors or the filing of claims. All partnerships, corporations and other business entities (other than an individual conducting business as a sole proprietorship) that desire to appear in cases or proceedings before this court must be represented by an attorney duly admitted to practice before this court. Licensed attorneys who are not admitted to practice before the District Court may be permitted by the court to appear pro hac vice from time to time in a case or proceedings, upon motion and a certificate of service evidencing service of the motion and order upon counsel for the adverse party, the trustee, and the U.S. Trustee. A motion requesting admission pro hac vice must specifically recite that the movant is familiar and will comply with the Bankruptcy Code, the Bankruptcy Rules, and these Local Bankruptcy Rules. The movant may file an ex parte order with the court allowing the appearance.

The following exceptions apply:

(A) An individual may represent himself, that is an individual may appear pro se.

(B) An individual may represent an unincorporated business if that individual is the sole proprietor of that business.

(C) An individual may represent a creditor or any other entity at a meeting of creditors.

(b) Discipline of Attorneys.

(1) Discipline Generally. Upon a showing to the Court that any attorney permitted to practice before the Court has been subjected to public discipline in any other court of record, or has been guilty of unprofessional conduct, the attorney shall be subject to discipline by the Court. Disbarment from the Bar of the court may be utilized as a sanction.

(2) Discipline in Another Court; Procedure.

(A) Attorney's Duty to Notify of Disciplinary Action. Any attorney permitted to practice before the court shall, upon being subjected to public discipline in any other court of record, promptly inform the Clerk of that action.

(B) Notice to the Attorney. Upon the filing of a certified copy of a judgment or order demonstrating that an attorney has been disciplined by another court, the Court shall immediately issue a notice directed to the attorney containing:

(i) a copy of the judgment or order from the other court; and

(ii) an order to show cause, within thirty (30) days after service of that order upon the attorney, personally or by mail, of any reason, based upon the grounds hereafter stated in subsection (b)(2)(C), why the imposition of the identical discipline by the Court would be unwarranted and the reasons therefor.

(C) Discipline Imposed; Grounds for Challenge. Upon the expiration of thirty (30) days from service of the notice issued pursuant to the provisions of subsection (b)(2)(B) of this rule, the court shall impose the identical discipline as that imposed by the other court unless the respondent-attorney demonstrates, or the Court finds, that upon the face of the record upon which the discipline in the other court is predicated, it clearly appears:

(i) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or,

(ii) that there was such an infirmity of proof establishing the misconduct as to give rise to a clear conviction that the Court could not, consistent with its duty, accept as final the conclusion on that subject; or,

(iii) that the imposition of the same discipline by the Court would result in grave injustice; or

(iv) that the misconduct established is deemed by the Court to warrant substantially different discipline.

If the court determines that any of the foregoing grounds exist, it shall enter such other order as it deems appropriate.

(D) Finality of the Other Court's Action. Unless the court determines that any of the grounds enumerated in subsection (b)(2)(C) of this rule exist, a final adjudication in another court that an attorney has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in the court. In the event the discipline imposed in the other Court has been stayed or has not become a final decision, any reciprocal discipline imposed by the court shall be deferred until the stay expires or the decision becomes final.

(E) Unprofessional and Improper Conduct. In all cases where it is shown to the Court that any attorney permitted to practice before the court has been guilty of unprofessional conduct within the meaning of the standards of professional responsibility adopted by the Supreme Court of Kentucky or is guilty of other conduct unbecoming an officer of the court, any judge may enter an order directing that attorney to show cause, within a specific time, why the Court should not take disciplinary action against the attorney. Upon the attorney's response to the order to show cause, and if requested, after hearing before the judge, or upon the expiration of the period set forth in the order to show cause, if no response has been made, the Court shall enter an appropriate order. Nothing in this RULE shall limit the power of the court to impose sanctions.
(c) Designation of Counsel. Unless otherwise ordered by the Court, all parties except those appearing pro se shall be represented of record by a member of the Bar of the Court residing or having an office in this state. In cases involving governmental agencies, the requirement of this RULE shall not apply with respect to the necessity of local counsel to represent the agency. For computation of time purposes, service of papers upon local counsel shall constitute service within the meaning of BR 7005(b). A copy of all papers served upon local counsel shall be immediately sent to all other counsel of record. If a pleading is tendered without designation of local counsel, the Clerk shall accept it for filing, but shall advise the party of this RULE. The party shall then have thirty (30) days to designate local counsel. If designation is not made, the clerk shall refuse to accept any further papers for filing, and the Court may strike all pleadings of that party. Local counsel shall be sufficiently informed to answer status queries of the court and to appear and adequately represent the client at any hearings before the Court, even on short notice and in the absence of trial counsel.

(d) Appearance of Counsel. Unless otherwise permitted by Court, an attorney shall be deemed to be an attorney of record in all actions by:

(1) making an in-court appearance on behalf of a party,
(2) filing an entry of appearance,
(3) signing a pleading as attorney for a party, or
(4) having his name listed, other than of counsel, on a pleading as an attorney in the action.

(e) Extent of an Attorney's Duty to Represent. Any attorney who files a bankruptcy petition for or on behalf of a debtor shall remain the responsible attorney of record for all purposes including the representation of the debtor in all proceedings that arise in conjunction with the case. An attorney is automatically deemed relieved of his duties when the debtor's case is closed, or when the attorney is specifically relieved after notice and a hearing upon motion and order of this court. Notice of any debtor's attorney's motion to withdraw from a case or proceeding shall be served upon the matrix by said attorney unless otherwise ordered.

RULE NO. 4
BUSINESS HOURS AND PLACE OF FILING

The Bankruptcy Court shall be open to the public from 8:30 A.M. to 4:30 p.m., prevailing time, Monday through Friday. The Court shall close on all federal holidays unless otherwise ordered by the court. All petitions, pleadings, and claims in bankruptcy proceedings shall be filed with the Clerk of the Bankruptcy Court at 546 Gene Snyder Courthouse and Customs House, 601 West Broadway, Louisville, Kentucky 40202. All proceedings shall be conducted in the division of the residence of the debtor or the division in which the major portion of the assets are located. Emergency filings may be accepted in the divisional offices of the U.S. District Court Clerk in Bowling Green, Owensboro, and Paducah, but only on approval by the Clerk of the Bankruptcy Court or the Clerk's designee.

RULE NO. 5
PETITIONS: NUMBER OF COPIES TO BE FILED IN THE BANKRUPTCY COURT AND MINIMUM FILING REQUIREMENTS

(a) An original and two (2) copies of a petition, lists, schedules and statements under Chapter 7 of the Bankruptcy Code shall be filed. In a Chapter 13 case an original, and three (3) copies of the petition, lists, schedules and statement of affairs shall be filed.

(b) An original and five (5) copies of a petition, lists, schedules and statements under Chapter 9, 11 or 12 of the Bankruptcy Code shall be filed. An original and one (1) copy of the chapter 12 plan shall be filed.

(c) The Clerk of this Court shall refuse to accept for filing any petition, complaint or motion under Title 11 (whether it be under Chapter 7, 11, 12, or 133 which

(1) purports to place more than one entity or person (unless they are husband and wife) under the protection of Title 11; or
(2) is not accompanied by a filing fee or installment application; or
(3) is not properly signed; or
(4) is filed pro se by a corporation/partnership or other business entity (other than an individual conducting business as a sole proprietorship); or
(5) is not accompanied by a mailing matrix.

(d) All petitions, statements of affairs and schedules must be filed within fourteen (14) days of their execution or a properly executed amendment must be filed indicating the changes, if any, that have occurred between the date of execution and the date of filing.

RULE NO. 6
NOTICE TO UNITED STATES

(A)(1) Bankruptcy Rule 2002(j)(4) provides that if the papers in the case disclose a debt to the United States other than for taxes, notice shall be mailed to the United States Attorney for the district in which the case is pending and to the department, agency or instrumentality of the United States through which the Debtor became indebted. Within the Western District of Kentucky, notice shall be served on the United States Attorney at:
(2) Simultaneous service shall be made upon the department, agency or instrumentality of the United States through which the debt arose or with whom the debt is pending. The proper address for simultaneous service is as follows:

<table>
<thead>
<tr>
<th>Federal Agencies/Departments/Instrumentalities</th>
<th>Notices to Be Sent to EACH of the Following Addresses</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Internal Revenue Service</td>
<td>a. Internal Revenue Service Attn: Chief, Special Procedures Function Stop 510, P.O. Box 1706 Louisville, KY 40201</td>
</tr>
</tbody>
</table>
                                        b. County Office where loan originated |
                                        b. U.S. Department of Education Office of Student Financial Assistance 400 S. State Street, 700F Chicago, IL 60605 |
                                        b. County Executive Director’s Office where loan originated |
| 5. U.S. Small Business Administration         | a. U.S. Small Business Administration 600 Dr. Martin Luther King, Jr. Place Room 188 Louisville, KY 40202 |
| 6. Veterans Administration                    | a. Veterans Administration Centralized Accounts Receivable Section P.O. Box 1930 St. Paul, Minnesota 55111 |
(3) For any federal agency not listed, serve the United States Attorney for the Western District of Kentucky and the office of the agency which served the Debtor.

(b) Nothing in the above rule alters the Debtors’ duties under Bankruptcy Rule 2002(j)(4) for service upon the Security and Exchange Commission, the Commodity Futures Trading Commission, the Internal Revenue Service and/or the Secretary of the Treasury as required therein.

(c) The above addresses shall also be used for service as required under Bankruptcy Rules 7004(a)(4) and 5, and 9014, in addition to the required service upon the Attorney General.

RULE NO. 7
FORM OF PETITIONS, PLEADINGS OR OTHER MATTERS

(a) All petitions and pleadings shall be typewritten. Claims are excluded from the requirements of this rule; however, they must be legible.

(b) All pleadings, petitions or other matters filed shall include the address and phone number of the attorney.

(c) All petitions shall include the telephone number of the debtor.

RULE NO. 8
ADVERSARY PROCEEDINGS

(a) The original and one (1) copy of all complaints, answers, motions, other pleadings and briefs shall be filed in all adversary proceedings.

(b) Three (3) copies of the Summons and Scheduling Order shall be issued to the plaintiff’s attorney for service. A copy of the complaint and scheduling order shall be served with the summons within ten (10) days from the date of issue.

(c) A “Bankruptcy Cover Sheet” in the form prescribed by the Administrative Office of the United States courts shall be completed and filed with each complaint; provided, however, the instructions contained therein notwithstanding, more than one block may be checked specifying the nature of the suit.

(d) The caption of all complaints shall indicate the nature of the suit and when the complaint is one objecting to the discharge of the debtor the caption shall specify “Complaint Objecting to Discharge.”
Claim - All secured claims and priority claims of creditors should be filed in the Clerk’s office within three (3) business days preceding the meeting of creditors and shall contain a rebated balance as of the date of filing. The trustee shall pay post-petition interest, to accrue daily at a market rate of interest, to the extent that the claim is secured. However, the parties may by agreement modify the secured creditor’s right to receive post-petition interest.

(b) The Clerk shall mail copies of the plan and a proof of claim form, the copies to be provided by the attorney by the debtor, if sufficient copies of the plan and claim form are filed with the petition. Should the debtor’s attorney fail to provide the plan and claim form on the date the petition is filed or with sufficient copies for each creditor, the attorney shall be responsible for the notice.

(c) Every debtor shall make payments required by 11 U.S.C. Section 1326 to debtor(s) attorney escrow account from the date of filing equal to the proposed plan payments. Said funds shall be paid to the standing Trustee at the Section 341 meeting. Failure to make such payments to the standing Trustee shall be grounds for appropriate sanctions, including denial of confirmation.

(d) All debtors having plans confirmed providing less than full payment to holders of unsecured claims shall:

(1) submit copies of federal and state income tax returns filed during the pendency of the case to the standing Trustee;
(2) deliver federal and state income tax refunds to the standing Trustee for distribution to creditors, in addition to the percentage required by the plan; provided, however, that debtors do not pay over 1005, and,
(3) annually submit a current income and expense statement (substantially the same as the statement accompanying the filing of a case) to the court and to the standing Trustee. The standing Trustee shall determine whether all disposable income is being paid into the plan.

(e) All pleadings filed shall include an affidavit of service on the Chapter 13 Trustee. The copies of federal and state income tax returns and income and expense statement shall be filed no later than April 15 of each year a case is pending. If an extension of time for filing income tax returns is filed in lieu of a tax return, a copy of the extension request shall be filed with the standing Trustee no later than April 15 of each year a case is pending, and a copy of the returns shall be filed with the standing trustee at such time as the same are filed with the taxing authorities. Failure to comply with this Rule shall be considered cause for Court sanctions, including dismissal of the case.

RULE NO. 9
CHAPTER 13

RELIEF FROM AUTOMATIC STAY

(a) Any motion for relief from the automatic stay shall include a proof of claim and specify whether the movant seeks to terminate, annul, modify or condition the stay.

(b) All motions must include a certificate of service and proposed order.

(c) Parties for the purpose of service in connection with relief from stay proceedings shall include, but are not limited to:

(1) the debtor, debtor-in-possession and the debtor or debtor-in-possession’s attorney;
(2) any applicable co-debtor where relief is sought from the co-debtor stay under 11 U.S.C. Section 1201 or Section 1301;
(3) the trustee, if any, appointed in the case;
(4) the chairperson and counsel for any committee appointed in the case;
(5) any party known to the movant holding or claiming an interest in the property.

(d) The movant shall serve the motion seeking relief from stay upon the appropriate parties pursuant to Local Rule 15 and file a certificate of service. The Clerk, if necessary, shall issue notice of the hearing on the motion to the appropriate parties.

(e) In a chapter 7 case, if a response is filed within fifteen (15) days of the date of service of the motion for relief which states good cause for a hearing; a hearing will be scheduled within thirty (30) days of the date of filing of the motion. If no response is filed within fifteen (15) days, the relief requested will be granted.

(f) A motion for relief from stay shall be filed separately, and not combined in the same pleading with any other request for relief.

ABANDONMENTS

(a) The notice of the Section 341 meeting shall state that the trustee, upon the filing of the Report of No Distribution with the clerk, proposes to abandon all property which is of no value to the estate. Pursuant to this rule, the last day for filing an objection to abandonment of property is thirty (30) days from the first date set for the Section 341 meeting. All property of the estate will, therefore, be deemed abandoned if two conditions are met:

(1) No objections are filed within thirty (30) days of the Section 341 meeting; and
(2) A Report of No Distribution is filed by the trustee.

(b) When objections are filed within thirty (30) days of the Section 341 meeting, or when no Report of No Distribution has been filed by the trustee, or when a creditor wishes to move for abandonment of property at an earlier time, these procedures shall be followed:

(1) A motion for a proposed abandonment by a party in interest shall be served on the trustee, the debtor, debtor’s attorney, the debtor-in-possession and debtor-in-possession’s attorney, members of any creditors’ committee and its attorney, and any person or entity claiming an interest in or lien against the property to be abandoned and any creditor requesting specific notice of proposed abandonments. All motions served shall include a separate notice for filing objections and a copy of the proof of claim. The last day for filing objections is fifteen (15) days from the date filed.
(2) Where the trustee or debtor-in-possession proposes the abandonment of property at the request of a party in interest, such party in interest shall give notice as required by paragraph (1) above.

(c) Motions and proposed orders to abandon property shall not be combined with any other motions for relief.

RULE NO. 12
PROOF OF CLAIM

(a) All Proofs of Claim shall disclose as of the date the Order for Relief is granted:
1. Total gross balance due;
2. Amount of unmatured interest rebated;
3. Net balance due;
4. Amount of regular installment payment;
5. The contract rate of interest or the per diem rate at which interest accrues, whichever may apply;
6. A copy of the instrument evidencing a security interest or lien and proof of recording of same;
7. The Federal and State Identification Number of company filing it.
8. A statement of account or other evidence of indebtedness.

(b) Each original proof of claim shall be filed with the clerk and a copy shall be served on the debtor's attorney in Chapter 7, 11, 12 and 13 cases. Creditors shall certify to the court that a copy has been served in accordance with this rule.

RULE NO. 13
BOND REQUIREMENTS

Local rule 9 of the District Court shall govern.

(a) General Requirements. In all bankruptcy actions, the Clerk may accept a surety upon any bond, required by law or ordered by the Court, a surety company approved by the United States Department of Treasury, cash in an amount set by the court, or an individual personal surety secured by acceptable real estate as defined in (b) below. A surety company approved by the Department of the Treasury may have on file with the Clerk, in the division of the Court where the action is pending, a power of attorney, designating an agent doing business in the Commonwealth of Kentucky, to execute bonds. In lieu of filing the power of attorney with the Clerk, a copy of the power of attorney must be appended to each bond executed. The Clerk shall not, however, accept as a personal surety on any bond an attorney, an officer or employee of the Court, or the United States Marshal or any deputy marshal.

(b) Personal Surety Secured by Real Estate. Unless otherwise ordered by the court, the Clerk shall accept a personal surety if the real estate offered as security is land located in the Commonwealth of Kentucky with an unencumbered value of at least 110% of the amount of the bond. Real estate owned by corporations or partnerships is not acceptable. Property held jointly is acceptable provided all joint tenants execute the bond.

(1) Procedure for Posting Real Estate Bond. An affidavit of sureties shall be executed providing the following information:
(A) Name and address of the owners;
(B) Affiant's statement as to assessed vale from the Property Valuation Administrator's Office or, if not available, an appraisal by a licensed appraiser.
(C) A listing of all liens and mortgages on the property, including all but the current year's real estate taxes.

(2) Execution of Bond and Deposit of Deed. All parties to the deed and the bond must execute the bond and take the oath. The deed or certified copy thereof for each tract shall be deposited with the Clerk and a receipt shall be given to the owner. If the bond is not forfeited, the deed will be returned to the property owner in person or by certified mail at the conclusion of the case.

(3) Lis Pendens Notice and Fees. The Clerk shall file a notice of lis pendens against the property in the county Clerk's Office of the county in which the property is located. The required fee for filing a notice and release of lis pendens for each county in which the property is located is required upon execution of the bond.

RULE NO. 14
DISCOVERY PRACTICE

Local Rule 8 of the District Court shall govern discovery practice in conjunction with the Federal Rules of civil Procedures.

(a) Filing Discovery Material. Except as herein provided, all discovery material required to be filed by the federal rules, including but not limited to all answers to interrogatories and responses to requests for production, inspection or for admissions, shall be filed with the Clerk of Court, subject to the conditions and limitations provided in this rule.

(1) Documents Not to be Filed. The following shall not be filed with the Court unless the court orders otherwise:
(A) Interrogatories propounded under FED.R.CIV.P. 33;
(B) Requests for Production or Inspection made under FED.R.CIV.P. 34; and
(C) Requests for Admission propounded under FED.R.CIV.P. 36 unless the time for filing a response thereto has passed, in which event counsel may file the original Requests for Admission previously served. No original Requests for Admission shall be filed pursuant to this provision unless the original Requests for Admission contain an appropriate proof of service bearing the precise date and manner of service upon the party requested to admit and the time provided under the federal rules for responding thereto, including time under FED.R.CIV.P. 6(e), if applicable, has expired.

299
(2) Custodian of Documents. The party responsible for service of the document shall retain the original and become the custodian. The custodian shall provide access to all parties of record during the pendency of the action.

(3) When documents May Be Filed. If a document not filed pursuant to rule 8(a)(1) is to be used at trial, or is necessary to a pretrial or post-trial motion, or is necessary for appeal purposes, the portion of the document to be used shall be filed with the Clerk at the commencement of the trial, or at the time of filing the motion, or at the time of the appeal, if the document's use can be reasonably anticipated.

(b) Repetition of Question or Request Before Answer. When answering interrogatories or requests for production or inspection, or for admissions, or in filing objections thereto, the answering party shall, as a part of his answer or objection and immediately preceding it, set forth the question or the request with respect to which the answer or objection is given.

(c) Limitation on the Number of Interrogatories and Requests to Admit. Each party may propound a maximum of thirty (30) interrogatories and thirty (30) requests for admission to another party; for purposes of this RULE, each subpart of an interrogatory or request shall be counted as a separate interrogatory or request. Interrogatories requesting the following shall not be included in the maximum allowed.

(1) the name and address of the person answering;
(2) the names and addresses of the witnesses; and,
(3) whether the person answering is willing to supplement his answers if information subsequently becomes available.

A party may move the Court for permission to propound interrogatories or requests for admission in excess of thirty (30).

RULE NO. 15
MOTIONS PRACTICE

(a) Motions. All motions shall state precisely the relief requested. No motion or response shall be accepted for filing with the Clerk unless accompanied by a separate proposed order. Redemption Rights cannot be waived in any motion or proposed order. No motion can be combined with any other request for relief.

(b) Proof of Service. All motions and orders filed with the Clerk shall have proof of service by written certification of counsel, except in an instance for which another method of proof of service is prescribed in the Federal Rules of Bankruptcy Procedure. Proof of service shall state the date and manner of service.

RULE NO. 16
EXHIBITS

The provisions below shall be followed unless otherwise ordered by the Court:

(a) Advance Marking. All exhibits and material intended to be used during a trial or hearing shall be marked for identification purposes with labels which are available, upon request, from the Clerk.

(b) Method of Designation. All exhibits shall be marked for identification purposes as follows:

(1) Joint exhibits (JX) shall be identified by numbers and be white;
(2) Plaintiff's exhibits (PX) shall be identified by numbers and be pink;
(3) Defendant's exhibits (DX) shall be identified by numbers and be blue;
(4) Third-party exhibits (TPX) shall be identified by numbers and be green;
(5) In all proceedings involving multiple plaintiffs or multiple defendants, the identification assigned each exhibit shall contain the surname of the individual plaintiff or defendant or the corporate name of the plaintiff or defendant.

(c) Uniform Designation. Proposed exhibits, including those appended to requests for admission, interrogatories and depositions, as well as those to be utilized during trial, or hearing, shall be uniformly identified during all phases of the case.

(d) List of Exhibits. Five (5) days before the trial of an adversary proceeding or other evidentiary hearing, each party's counsel shall file with the clerk's office a list of all exhibits the party then intends to utilize at trial; the list shall contain the pre-marked number and a short description of the exhibit.

(e) Copies for Judge. Except upon cause shown or as provided otherwise in the final pretrial order, an original and two copies of each document or written exhibit to be tendered or entered during trial shall be filed with the Clerk's office five (5) days before the trial or evidentiary hearing.

(f) Disposition of Exhibits. Three (3) months after the entry of a final order or upon filing of a mandate in a case appealed, the clerk may direct counsel of record to retrieve all exhibits filed by them, which are still remaining the Clerk's custody. The Clerk may destroy all exhibits not claimed within two weeks after the notice to counsel of record to retrieve all exhibits filed by them.

RULE NO. 17
COURTROOM DECORUM

(a) Persons Permitted Inside the Bar of the Courtroom. Unless otherwise ordered by the court, in all proceedings held in open Court, only the following persons shall be permitted inside the bar of the courtroom: the parties, the witnesses when actually testifying, attorneys duly admitted to practice before the Court and paralegals working under their direction, the bailiffs, marshals, and other officers and employees of the Court.

(b) Possession and Use of Certain Equipment. The operation or possession of tape recorders, radio or television broadcasting devices, or equipment for the taking of photographs in any courtroom, halls, corridors, or foyer of any building used as a place of holding court whether or not court is actually in session, is prohibited. Cellular phones shall not be operated in the courtroom. The
presiding judge may, however, permit the use of electronic or photographic means for the presentation of evidence or the perpetuation of a record. Any person violating this Rule shall be subject to punishment for contempt. Notice of this rule shall be posted in a conspicuous place in all federal court buildings in Kentucky.

(c) Children. No child under the age of ten (10) years shall be allowed in the courtroom, halls, corridors or foyer of any building used as a place of holding court whether or not court is actually in session.

RULE NO. 18
INCOME TAX REFUNDS

(a) The Internal Revenue Service is authorized to make income tax refunds, in the ordinary course of business, to debtors in Chapter 7 and Chapter 13 cases, unless directed otherwise in writing by the trustee or the court, and the Internal Revenue Service is authorized to offset any refund against any taxes due to the United States.

(b) The Internal Revenue Service shall notify the Bankruptcy Court and the Trustee in letter form, or by amended claim, of any and all offsets made pursuant to the above authorization in all such cases where the Internal Revenue Service has on file with the Bankruptcy Court a Proof of Claim covering tax liabilities of the debtor.

(c) The Internal Revenue Service is authorized in all cases to assess tax liabilities shown due on voluntarily filed tax returns.

(d) The stay afforded by 11 U.S.C. section 362 is modified to the extent provided by this Rule.

RULE NO. 19
CONTINUANCES

(a) All motions to continue hearings shall be in writing and filed at least ten (10) days before the scheduled hearing date. Each motion shall contain an affidavit specifying the reason for the continuance or extension. If the motion filed is to re-schedule a section 341 meeting where the debtor failed to appear, said motion shall be accompanied by an affidavit of the debtor.

(b) Attorneys shall notify all parties in interest of the motion to continue or extend and return a certified copy to the court.

(c) Attorney for the debtor requesting continuances of the Section 341 meetings must serve all parties a copy of any Order continuing same showing the re-scheduled date, place and time of the Section 341 meeting, and certify to the court compliance with these notice requirements.

RULE NO. 20
REOPENING CASES

A motion to reopen a case by a debtor or party in interest pursuant to Section 350(b) of the Code and in accordance with Bankruptcy Rule 5010, shall be considered reopened at the time of filing if accompanied by the required filing fee. The Clerk shall reject all motions to reopen that do not include said fee.

RULE NO. 21
INSURANCE ON MOTOR VEHICLES SUBJECT TO A LIEN

(a) For purposes of this Rule,

(1) “Motor Vehicle” shall include, but is not limited to any automobile, truck, motorcycle, motorbike, mobile home or house trailer designed for travel on the public highways and/or capable of travel on the public highways and any other vehicle licensed by any state for travel on the public highways; and

(2) “Proof of Insurance” shall mean a certificate of insurance or such other written evidence of sufficient reliability from the insurance carrier stating that property damage and liability insurance is in force for a minimum of 90 days (except as stated in Section (b)(1) of this Rule), the amounts and types of coverage, with a maximum deductible of $500, and a notation of the secured party as loss payee.

(b)(1) Whenever a debtor elects, either by making payments through a plan, by making adequate protection payments or by entering into a reaffirmation agreement, to retain a motor vehicle which is subject to the lien of a creditor holding an allowed secured claim. Proof of Insurance against physical damage and loss must be furnished to the trustee and the creditor at or before the Section 341 meeting. Failure to furnish Proof of Insurance shall be presumed to mean no insurance is in effect.

(2) The Proof of Insurance must state that coverage will continue in force for at least ninety (90) days from the date of the Section 341 meeting. If there is already a 90-day policy in effect at the time of the Section 341 meeting, Debtor must ensure that there are 90 days remaining on the policy at time of the 341 meeting. However, if debtor presents proof of paid coverage for the ninety (90) day period immediately preceding the policy in effect at the time of the 341 meeting, as well as proof payment for the 90 day policy currently in effect, the debtor may extend the policy at its normal renewal date.

(3) If the debtor fails to furnish proof of insurance at the Section 341 meeting the stay shall be deemed terminated.

(c) If prior to or subsequent to the Section 341 meeting, but during the pendency of a case, insurance lapses on any motor vehicle subject to the provisions of this rule:

(1) A creditor with an allowed claim secured by the motor vehicle for which insurance has lapsed shall notify, in writing, the debtor and the debtor’s attorney of such lapse of insurance. Service of such notice upon the debtor and the debtor’s attorney shall be in the manner specified in rule 7004(b)(9) of the Bankruptcy Rules.

(2) The debtor shall be enjoined from using the motor vehicle for which insurance has lapsed as long as the motor vehicle...
remains uninsured.

(3) If the debtor fails to provide proof of re-insurance for a minimum period of 90 days to the creditor within five (5) business days following mailing of the notice provided in subsection (1) of this section, the stay shall be deemed terminated.

(d) Notwithstanding the above, the requirement for property damage insurance may be waived by a creditor, but such waiver must be in writing and signed by the creditor or its representative to be effective.

RULE NO. 22
FACSIMILE NOTICE BY ATTORNEYS

Between counsel, delivery of copies of pleadings and all other papers by telephonic facsimile machine shall be considered in all respects equivalent to hand delivery of such copies.

RULE NO. 23
FORMS

The following forms are provided for use by the bar and public. These essential forms are procedurally required. All other forms shall substantially comply with the official forms in the Federal Rules of Bankruptcy Procedure.
IN RE: 

Debtor(s) 

CASE NO. 

MOTION TO REDEEM PROPERTY

Debtor(s) hereby moves the Court pursuant to Section 722 of Title 11, United States Code, for an Order permitting the Debtor to redeem an item of tangible personal property from a lien securing a dischargeable consumer debt.

1.) The item of personal property involved is ________________, which is intended primarily for personal, family or household use.

2.) The debtor originally purchased the property on _________ (give date) and the original purchase price was $ ________________.

3.) The debtor has/has not obtained an appraisal and believes the fair market value of the property to be (put value for each item if more than one).

4.) The debtor represents that the debtor will have cash available to redeem the property within ten (10) days of the entry of the requested Order.

5.) The security interest of _________________ in said property, except to the extent of the amount of the allowed secured claim of said creditor, is a dischargeable consumer debt.

6.) The amount of the allowed secured claim of said creditor has been or should be fixed by court as the sum of $ ________________.

WHEREFORE, the Debtor moves the court for an Order permitting said Debtor to redeem said property by paying said creditor the aforesaid sum, and finding that the remainder of the claim of said creditor is a dischargeable consumer debt.

CERTIFICATE OF SERVICE

I certify that a copy of this motion was served by first class mail upon _________ this day of _______ 19 ___.

ATTOORNEY FOR DEBTOR(S)

Address

Phone No.
No objections having been filed,  
IT IS HEREBY ORDERED that the motion to redeem property be SUSTAINED.  

IT IS FURTHER ORDERED that the debtor shall tender to the Creditor the sum of $_______ which is the amount of the allowed secured claim fixed by this Court within ten (10) days of the entry of this Order.  

Louisville, Kentucky  

ENTERED BY ORDER OF COURT:  

Date: __________  

UNITED STATES BANKRUPTCY JUDGE
MOTION BY SECURED CREDITOR FOR ABANDONMENT OF PROPERTY

The undersigned secured creditor reports that at the time of the Order of Relief, the above Debtor’s estate included the following property which is covered by a valid security interest:

NAME AND ADDRESS OF SECURED CREDITOR: ________________________________

DESCRIPTION OF PROPERTY (attach proof of claim)

________________________________________

ESTIMATED VALUE OF PROPERTY $ ____________________________

BALANCE DUE ON ACCOUNT $ ____________________________

EXEMPTION IN THE AMOUNT OF $ ____________________________

Wherefore, the undersigned secured creditor respectfully requests that the foregoing property be abandoned as property of the estate in accordance with 11 U.S.C. Section 554, Bankruptcy Rule 6007(b), and Local Rule 11(b).

________________________________________
Attorney For Secured Creditor

Address

Phone No.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion and Order to Abandon Property * was mailed by the secured creditor to the trustee, attorney for debtor(s), debtor(s), and all parties as directed by Local Rule #11 this ______ day of _______________________, 19 ___.

________________________________________
Attorney for Secured Creditor

*Any objections to this abandonment must be filed within 15 days of the above date.[Rule 6007] If no written request is received, an order approving the abandonment may be entered.
ORDER APPROVING PROPOSED ABANDONMENT

Upon the motion of the secured creditor for abandonment of property as cited below;
NAME AND ADDRESS OF SECURED CREDITOR:

DESCRIPTION OF PROPERTY

ESTIMATED VALUE OF PROPERTY $________________________
BALANCE DUE ON ACCOUNT $________________________
EXEMPTION IN THE AMOUNT OF $________________________

The Court being sufficiently advised;
IT IS ORDERED that said motion and proposal be, and hereby is approved.

Dated: ________________

United States Bankruptcy Judge

ORDER APPROVING PROPOSED ABANDONMENT

Upon the motion of the secured creditor for abandonment of property as cited above, and the Court being sufficiently advised,
IT IS ORDERED that said motion and proposal be, and hereby is approved.

Dated: ________________

United States Bankruptcy Judge
UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF KENTUCKY

CASE NO.

Debtor(s),

MOTION TO AVOID LIEN

Debtor, by counsel, hereby moves the Court pursuant to Section 522(f) of the Bankruptcy Code to avoid the lien on the following described property:

In support of said Motion, Debtor states:

1. ______________________, a creditor, filed a lien in the Office of the Clerk of ________________ and a copy of the lien is attached.
2. The amount of the claim which the lien secures is $ ________________.
3. The above mentioned lien is a ____________________________ lien.
4. Debtor submits the following information on the value of the property:
   (A). Fair Market Value: $ ________________.
   (B). Value listed in Schedules: $ ________________.
   (C). Value according to records of county Property Valuation Administration: $ ________________.
   (D). Purchase Price: $ ________________.
   (E). Date of Purchase: ________________.
   (F). Appraised Value (if recently appraised):
       $ ________________.
5. The trustee has/has not abandoned the property.
6. The debtor does/does not claim an exemption of $ ________________ in said property.
7. The lien held by the creditor impairs the exemption of the debtor in the property described in the motion.

WHEREFORE, the debtor moves the Court to order the lien void and for such other relief as may be entitled.

CERTIFICATE OF SERVICE

I certify that a copy of this motion was served by first class mail upon, ______________ this ___day of ______________, 199_.

________________________________________
Attorney for Debtor(s)

________________________________________
Address

________________________________________
Phone No.
IN RE: )
) )
) )
) )
) )
) )
) )
Debtor(s) )
______________ )

ORDER

No objections having been filed,
IT IS HEREBY ORDERED that the Motion to Avoid Lien of ______________________ in the
following property be, and is, SUSTAINED.
Property Description:

A copy of this Order shall be mailed to the attorney for debtor(s), trustee, and the above-named
creditor.

Louisville, Kentucky
Dated: _________________

UNITED STATES BANKRUPTCY JUDGE
[FORM F]

UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF KENTUCKY

IN RE: 

) 

) CASE NO. 

) 

Debtor(s) 

) 

__________________________ 

REAFFIRMATION AGREEMENT

The debtor(s) reaffirmation agreement is as follows:
1. REAFFIRMATION -- The debtor(s) reaffirm(s) to pay the above creditor, in accordance with the loan documents, (copies are attached), the sum of $____________ the principal balance due, plus interest at the rate set forth in the instruments from _______________, at the rate of $____________ per month until fully paid, beginning on _______________.

2. This agreement does/does not change the terms of the original contract. Payment is secured by the following property with the value of the secured creditor as indicated:

3. PAST DUE PAYMENTS -- In addition to the monthly payments provided in paragraph one (1) above, the debtor(s) agree(s) to make up payments as follows:

(If applicable)

4. RESCISSION PERIOD -- THE DEBTOR(S) MAY RESCIND THIS AGREEMENT BY GIVING NOTICE TO THE CREDITOR AT ANY TIME PRIOR TO DISCHARGE OR SIXTY (60) DAYS AFTER THIS AGREEMENT HAS BEEN FILED WITH THE COURT, WHICHEVER DATE IS LATER, BY GIVING NOTICE OF RESCISSION TO THE HOLDER OF THE CLAIM.

Executed this __________ day of ______________, 19__. 

Debtor Date 

Debtor Date 

Accepted and Agreed to: 

By: ____________________________ 

Title 

Creditor 

DECLARATION OF ATTORNEY FOR DEBTOR(S)

I, _________________, attorney for the debtor(s) in the above captioned bankruptcy proceeding declare that I represented the debtor(s) during the negotiation of the foregoing Agreement and that said Agreement represents a fully informed and voluntary agreement by the debtor(s) and that the agreement does not impose an undue hardship on the debtor(s) or a dependent of the debtor. 

__________________________ Date 

Attorney for Debtor(s)
AMENDMENT TO SCHEDULES

Comes the debtor and state that through error and inadvertence, debtor failed to list in debtor’s schedule the following:

***

*** If amendment lists you as a Creditor, you have 90 days from the date of certification of mailing of amendment within which to file a proof of claim.
(ONLY IF CASE IS A CHAPTER 13 OR ASSET CHAPTER 7)

The undersigned certifies under penalties of perjury, that I have read the foregoing amendment, and certify that the statements therein contained are true and complete to the best of my knowledge, information and belief.

Executed on ____________________

Debtor’s signature

Debtor’s signature
CERTIFICATE OF SERVICE AND NOTICE OF AMENDMENT TO SCHEDULES

I hereby certify that a copy of the attached Amendment to Schedules was this day of ____________ 19 __ forwarded to:

(List any creditor who has not been previously listed and the trustee. Provide complete addresses).

along with a copy of the Order of Meeting of Creditors by depositing a copy of same in the United States mail, properly addressed and postage prepaid.

NOTE -- Also included is a copy of the Debtor’s Plan and a blank Proof of claim form to each creditor listed above. (Only if case is a Chapter 13).

__________________________
Attorney’s Name

__________________________
Address

__________________________
Phone No.
ORDER CONTINUING SECTION 341 MEETING

The debtor or the debtor's attorney having moved the Court for a continuance of the Section 341 Meeting in this proceeding.

IT IS HEREBY ORDERED and adjudged that the section 341 meeting is continued to ________________, 19__. At ____________________, Kentucky.

IT IS FURTHER ORDERED THAT COUNSEL FOR THE MOVANT IS DIRECTED TO NOTIFY ALL PARTIES IN INTEREST WITHIN TEN (10) DAYS OF THE ENTRY OF THIS ORDER OF THE DATE, TIME AND PLACE OF THIS CONTINUED SECTION 341 MEETING, AND SHALL CERTIFY TO THIS COURT AT LEAST FORTY-EIGHT (48) HOURS PRIOR TO SAID RE-SCHEDULED MEETING THAT NOTICE, PURSUANT TO THE SAID FEDERAL RULES OF CIVIL PROCEDURE, HAS BEEN EFFECTED BY THE MOVANT'S COUNSEL

Louisville, Kentucky

________________________
UNITED STATES BANKRUPTCY JUDGE

Date: ______________

319
[FORM J]

UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF KENTUCKY

IN RE: )
) CHAPTER 13
) CASE NO.
)
)
)
Debtor(s) )
)
)

SCHEDULE OF ALLOWED CLAIMS

Debtor(s), by counsel, state that the following claims have been duly proven and should be allowed as unsecured and paid in accordance with the Order of Confirmation.

__________________________
Attorney for Debtor(s)

__________________________
Address

__________________________
Phone
### RULES OF THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>RULE 1</td>
<td>Citation and Authority</td>
</tr>
<tr>
<td>RULE 2</td>
<td>Organization of Local Rules</td>
</tr>
<tr>
<td>RULE 3</td>
<td>Office Hours</td>
</tr>
<tr>
<td>RULE 4</td>
<td>Court Addresses: When Relief Ordered</td>
</tr>
<tr>
<td>RULE 5</td>
<td>Eastern District of Kentucky Bankruptcy Court Divisions</td>
</tr>
<tr>
<td>RULE 100</td>
<td>Motions that Hearings in a Case be Held in a Division Other than the Division in Which the Case is Pending</td>
</tr>
<tr>
<td>RULE 102</td>
<td>Number of Copies of the Bankruptcy Petition and Schedules Required to be Filed with the Clerk</td>
</tr>
<tr>
<td>RULE 106</td>
<td>Installment Payments of Filing Fee</td>
</tr>
<tr>
<td>RULE 107</td>
<td>Master Address List</td>
</tr>
<tr>
<td>RULE 108</td>
<td>Petition not Accompanied by Schedules and Statements</td>
</tr>
<tr>
<td>RULE 202</td>
<td>Notices of Appearance and Change of Address Requests</td>
</tr>
<tr>
<td>RULE 216</td>
<td>Supplemental Fee Applications</td>
</tr>
<tr>
<td>RULE 301</td>
<td>Proofs of Claim</td>
</tr>
<tr>
<td>RULE 302</td>
<td>Chapter 13 Secured Creditor -- Filing Proof of Claim</td>
</tr>
<tr>
<td>RULE 309</td>
<td>Deadlines for Amending Claims in Chapter 7 Asset Cases</td>
</tr>
<tr>
<td>RULE 315</td>
<td>Chapter 13 Plan</td>
</tr>
<tr>
<td>RULE 320</td>
<td>Confirmation of Chapter 13 Plan</td>
</tr>
<tr>
<td>RULE 400</td>
<td>Agreed Orders for Relief from Stay</td>
</tr>
<tr>
<td>RULE 401</td>
<td>Motion for Relief from Stay</td>
</tr>
<tr>
<td>RULE 402</td>
<td>Designation of Person to Perform Duties of Debtor</td>
</tr>
<tr>
<td>RULE 505</td>
<td>Copies of Court Records</td>
</tr>
<tr>
<td>RULE 508</td>
<td>Registry Fund Fees</td>
</tr>
<tr>
<td>RULE 604</td>
<td>Notice by the Trustee</td>
</tr>
<tr>
<td>RULE 913</td>
<td>Order to Accompany Request for Relief by Motion</td>
</tr>
<tr>
<td>RULE 914</td>
<td>Other Motions</td>
</tr>
</tbody>
</table>

### FORMS

<table>
<thead>
<tr>
<th>No.</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>No. 1</td>
<td>Master Address List Requirements</td>
</tr>
<tr>
<td>No. 2</td>
<td>Debtor's Plan</td>
</tr>
<tr>
<td>No. 3</td>
<td>Certificate of Service of Plan</td>
</tr>
<tr>
<td>No. 4</td>
<td>Order Confirming Chapter 13 Plan</td>
</tr>
<tr>
<td>No. 5(a)</td>
<td>Motion for Order Avoiding Lien on Exempt Property</td>
</tr>
<tr>
<td>No. 5(b)</td>
<td>Motion for Order Avoiding Lien on Exempt Property</td>
</tr>
<tr>
<td>No. 6</td>
<td>Motion for Approval of Reaffirmation Agreement</td>
</tr>
<tr>
<td>No. 7</td>
<td>Motion to Redeem Property</td>
</tr>
</tbody>
</table>
RULES OF THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF KENTUCKY

RULE NO. 1
CITATION AND AUTHORITY

These rules shall be referred to as the Local Rules of the United States Bankruptcy Court for the Eastern District of Kentucky, and may be cited as L.B.R. ___(E.D.Ky.). These rules are adopted pursuant to Rule 9029 of the Rules of Bankruptcy Procedure.

RULE NO. 2
ORGANIZATION OF LOCAL RULES

Rules 1 through 5 of these local rules contain general information. The remaining rules are grouped together in the same manner as the general categories to be found in Parts I through IX of the Federal Rules of Bankruptcy Procedure. Rules numbered in the 100 series deal with and facilitate efficient case commencement by the clerk’s office and the judges. Rules numbered in the 200 series pertain to case administration. Rules numbered in the 3300 series are special provisions relating to claims of creditors and debtor’s plans. Rules numbered in the 400 series pertain to the services of the clerk’s office and court. Rules numbered in the 600 series relate to the collection and liquidation of estate assets. Rules numbered in the 900 series contain other general provisions. Whenever possible, local rules are numbered to correspond with the numbers of the Federal Rules of Bankruptcy Procedure dealing with the same general subject. Thus, the rules are not consecutively numbered.

RULE NO. 3
OFFICE HOURS

The office of the clerk of the U.S. Bankruptcy Court for the Eastern District of Kentucky shall be open to the public from 8:30 a.m. until 5:00 p.m., Monday through Friday. Special arrangements may be made in advance with the clerk for the office to be open after regular business hours. The office will be closed on weekends and on all federal holidays.

RULE NO. 4
COURT ADDRESSES: WHEN RELIEF ORDERED

The address to which documents may be delivered for filing and at which case files are maintained is 200 Merrill Lynch Plaza, 100 East Vine Street, Lexington, Kentucky 40507. The mailing address to which documents may be mailed for filing is U.S. Bankruptcy Court, P.O. Box 1111, Lexington, Kentucky 40588-1111. Relief shall be ordered at 8:30 a.m. on the day a petition is received by the clerk’s office by mail.

RULE NO. 5
EASTERN DISTRICT OF KENTUCKY BANKRUPTCY COURT DIVISIONS

The divisions of the bankruptcy court shall be the same as the jury divisions of the United States District Court for the Eastern District of Kentucky as set out in Rule 2(a) of the Joint Local Rules for the United States District Court for the Eastern and Western Districts of Kentucky, except the division identified therein as the London Division shall be identified as the Corbin Division of the bankruptcy court. Bankruptcy petitions shall be assigned by the clerk to the division of the bankruptcy court which encompasses the county in which the debtor resides at the time of filing. For purposes of this rule the residence of a partnership shall be the county in which the principal business of the partnership is located, and the residence of a corporation shall be the county in which the corporation maintains its registered office.

RULE NO. 100
MOTIONS THAT HEARINGS IN A CASE BE HELD IN A DIVISION OTHER THAN THE DIVISION IN WHICH THE CASE IS PENDING

A motion to hold hearings in a chapter 7 bankruptcy case in a division of the court other than the division in which the case is pending shall be filed with the original petition. Such a motion filed after the date of appointment of a trustee will be granted only for good cause shown, to minimize the inconvenience to the trustee of having to travel to a different division of the court to attend hearings in the case.
RULE NO. 102
NUMBER OF COPIES OF THE BANKRUPTCY PETITION AND SCHEDULES REQUIRED TO BE FILED WITH THE CLERK

The number of copies of the bankruptcy petition and schedules required to be filed with the clerk of the bankruptcy court to initiate a case under the Bankruptcy Code shall be as follows:

(a) An original and three copies of a petition requesting relief under chapter 7, chapter 12 or chapter 13 of the Code shall be filed. An original and four copies of a stockbroker's petition for relief under subchapter III of chapter 7 shall be filed, one copy of which shall be transmitted by the clerk to the Securities Investor Protection Corporation. An original and four copies of a commodity broker's petition for relief under subchapter IV of chapter 7 shall be filed, one copy of which shall be transmitted by the clerk to the Commodity Futures Trading Commission.

(b) An original and six copies of a petition requesting relief under chapter 9 or chapter 11 of the Code shall be filed. The clerk shall transmit one copy to the District Director of the Internal Revenue for the district in which the case is filed, one copy of a chapter 9 petition to the Secretary of State of the state in which the debtor is incorporated, one copy of a chapter 9 petition to the regional office of the Securities and Exchange Commission for the district in which the case is filed and, if a chapter 11 debtor is a corporation, one copy of the chapter 11 petition to the regional office of the Securities and Exchange Commission for the district in which the case is filed. If the petition requests relief for the reorganization of a railroad under subchapter IV of chapter 11 of the Code, two additional copies of the petition shall be filed, and the clerk shall transmit one copy to the Interstate Commerce Commission and one copy to the Secretary of Transportation.

(c) The number of copies of the schedules, statement of financial affairs and any supplement to same, statement of intention, and lists of the 20 largest creditors shall be the same as the number of copies of the petition required to be filed.

(d) The additional copy of the petition, schedules and other documents for the U.S. Trustee's office as required by the Rules of Bankruptcy Procedure is included in the number of copies required by this local rule.

RULE NO. 106
INSTALLMENT PAYMENTS OF FILING FEE

Except as provided in paragraph two of this rule, any filing fee required by 28 U.S.C. Section 1930 and permitted to be paid in installments pursuant to the provisions of Rule 1006 of the Rules of Bankruptcy Procedure, shall be paid in $40.00 installments or in increments of $40.00, unless otherwise ordered by the court.

The fee for filing a chapter 11 case permitted to be paid in installments pursuant to the provisions of Rule 1006 of the Rules of Bankruptcy Procedure, shall be paid in $125.00 installments or in increments of $125.00, unless otherwise ordered by the court.

RULE NO. 107
MASTER ADDRESS LIST

A petition initiating a case under the Bankruptcy Code shall be accompanied by a separate, unattached master address list containing the name, address and zip code of all creditors and parties in interest to be notified of the case. The master address list shall be submitted on 8-1/2 x 11 inch size paper. The debtor is required to obtain from the office of the clerk of court the most current version of the court document entitled SPECIAL REQUIREMENTS FOR MASTER ADDRESS LIST (Local Form #1). The master address list must fully comply with the specifications set forth in Local Form #1. The clerk's office shall not accept for filing any petition which is not accompanied by a master address list in compliance with the specifications set forth in Local Form #1. The master list submitted with a chapter 7, chapter 12 or chapter 13 case shall include the address of the IRS or the Commonwealth of Kentucky, Revenue Cabinet, only if the debtor owes taxes to those entities.

The master address list submitted with a chapter 11 case shall contain the address of the Internal Revenue Service, P.O. Box 1706, Louisville, Kentucky 40201, whether or not the debtor is indebted to such taxing entity. The master address list must be accompanied by a verification in compliance with the form attached to SPECIAL REQUIREMENTS FOR MASTER ADDRESS LIST (Local Form #1, Attachment #1). The clerk's office shall not accept for filing any petition which is not accompanied by a Verification of Master Address List.

In addition to the original master address list, a copy of the master address list (with each page marked "copy") shall be filed with the clerk of the court. The clerk of the court will transmit this copy to the office of the U.S. Trustee.

RULE NO. 108
PETITION NOT ACCOMPANIED BY SCHEDULES AND STATEMENTS

If a petition is accepted for filing without the schedules and statements as permitted by Rule 1007(c) of the Rules of Bankruptcy Procedure, the master address list will suffice as the list of creditors required by that rule only if the petition is accompanied by the unsworn declaration of the debtor incorporating the master address list by reference and certifying under penalty of perjury that to the best of the debtor's knowledge, information and belief the list is a true and correct list of the names and addresses of all the debtor's creditors.
RULE NO. 202
NOTICES OF APPEARANCE AND CHANGE OF ADDRESS REQUESTS

A notice of appearance or request to receive a special notice or a change of address request made by a debtor or creditor shall be accompanied by a separate mailing matrix identifying the name and address of the party to be added to the list of creditors. The mailing matrix shall comply with the specifications set forth in Local Form No. 1. Any such notice or request not accompanied by the proper matrix shall be returned by the clerk’s office, along with a copy of Local Form #1 to ensure compliance.

RULE NO. 216
SUPPLEMENTAL FEE APPLICATIONS

Supplemental fee applications shall, in the same manner as original fee applications, contain all the information required by Rule 2016 of the Rules of Bankruptcy Procedure.

RULE NO. 301
PROOFS OF CLAIM

Proofs of claim submitted for filing shall be in compliance with the instructions set forth in BC 0096 requiring proofs of claim to be filed in duplicate with attached documentation. These instructions are available from the clerk’s office upon request.

RULE NO. 302
CHAPTER 13 SECURED CREDITOR -- FILING PROOF OF CLAIM

In a chapter 13 case, a proof of claim must be filed by or on behalf of a creditor, including a secured creditor, other than a creditor secured by an interest in real estate, before the debtor or trustee may make payments to such creditor in accordance with the plan. A secured claim filed after the expiration of the time for filing claims under Rule 3002(c) of the Rules of Bankruptcy Procedure shall be allowed only to the extent of the value of the collateral securing the claim.

RULE NO. 309
DEADLINES FOR AMENDING CLAIMS IN CHAPTER 7 ASSET CASES

When there is money available for payment of a dividend on allowed unsecured claims in a chapter 7 bankruptcy, the deadline for filing an amended claim for any deficiency remaining after the liquidation of collateral or for requesting an extension of time in which to amend a claim shall be the date of the final hearing on applications for compensation. An amended claim filed after that date by a creditor that has not timely requested an extension will not be considered in the preparation of an order of distribution.

RULE NO. 315
CHAPTER 13 PLAN

(a) Form of Plan. A chapter 13 plan shall conform substantially to Form No. 2 with such alterations as may be appropriate to suit the circumstances.
(b) Service of Plan. Concurrently with the filing of the plan the debtor or his attorney shall cause a copy of the plan to be served by first class mail upon all creditors of the debtor and other parties in interest. The debtor or his attorney shall file with the plan a certificate of mailing in the form prescribed by Form No. 3 certifying that a copy of the plan has been served by first class mail upon all creditors of the debtor and parties in interest.

RULE NO. 320
CONFIRMATION OF CHAPTER 13 PLAN

(a) (1) Objections to Confirmation. An objection to confirmation of a chapter 13 plan is governed by Rule 9014 of the rules of Bankruptcy Procedure. Such objection shall be filed with the court not later than 10 days prior to the hearing on confirmation of the plan, shall be served on the debtor, the attorney for the debtor and the trustee, and shall be noticed for hearing at the hearing on confirmation of the plan. An objection by a creditor to the recommendation of the chapter 13 trustee as to the allowed amount of such creditor’s claim as a secured claim may be presented at the hearing on confirmation of the plan.
(2) Hearing on Confirmation. The court shall rule on confirmation of a chapter 13 plan after hearing on notice to the debtor, the attorney for the debtor, and all creditors including creditors holding secured claims, and any creditor who has timely filed an objection to confirmation of the plan. Notice of the hearing on confirmation of a chapter 13 plan may be combined with the notice of the meeting of creditors given pursuant to Rule 200 of the rules of Bankruptcy Procedure. If no objection is timely filed under this paragraph, the court may find, without hearing evidence, that the plan has been proposed in good faith and not by any means forbidden by law.
(b) Order of confirmation. The order of confirmation of a chapter 13 plan shall conform substantially to Form No. 4 and notice of entry of the order shall be mailed promptly to the debtor, the attorney for the debtor, the trustee, and any creditor who timely filed an objection to confirmation of the plan.

RULE NO. 400
AGREED ORDERS FOR RELIEF FROM STAY

Agreed orders granting relief from stay shall not be signed by the Judges of the court unless the creditor to be accorded relief has filed a proof of claim with supporting documents establishing the security interest or other interest of the creditor in the property of the estate that is the subject of the agreed order.

RULE NO. 401
MOTION FOR RELIEF FROM STAY

(a) A motion requesting relief from stay must include the following:

1. a proof of claim with supporting documents establishing the security interest or other interest of the movant in property of the estate that is the subject of the motion; and

2. a certificate of service indicating (A) that all parties in interest have been served in a manner provided by Rule 7004 of the Rules of Bankruptcy Procedure with a copy of the motion and documented proof of claim, (B) that all parties to the motion including the debtor, the attorney for the debtor, and the trustee have been given at least 10 days' notice of the hearing on the motion.

(b) Motions requesting relief from stay in cases pending in the Lexington division shall be noticed for hearing before the court at Lexington at 1:30 p.m. prevailing time on the first or third Wednesday of each month unless that day is a legal holiday in which event such motions shall be noticed for hearing on the following Wednesday.

(c) Unless otherwise ordered, motions requesting relief from stay in cases pending in the Covington division shall be noticed for hearing before the court at Covington on the first Tuesday of the month at 10:00 a.m. prevailing time; motions requesting relief from stay in cases pending in the Ashland division shall be noticed for hearing before the court at Ashland on the Tuesday following the first Tuesday of the month at 11:00 a.m. prevailing time; motions requesting relief from stay in cases pending in the Pikeville division shall be noticed for hearing before the court at Pikeville on the second Tuesday of the month at 11:00 a.m. prevailing time; motions requesting relief from stay in cases pending in the Corbin division shall be noticed for hearing before the court at Corbin on the Thursday following the second Tuesday of the month at 10:00 a.m. prevailing time, and motions requesting relief from stay in cases pending in the Frankfort division shall be noticed for hearing before the court at Frankfort on the Friday following the second Tuesday of the month at 11:00 a.m. prevailing time.

(d) For cases pending in any division other than the Lexington division, when the requirements of subsection (a)(2)(B) of this rule and section 362(e) of the Bankruptcy Code cannot be met by noticing a motion for relief in the division in which the case is pending at the times stated in subsection (c) of this rule, a motion for relief from stay may be noticed for hearing before the court at Lexington on the fourth Tuesday of the month at 10:00 a.m. prevailing time.

RULE NO. 402
DESIGNATION OF PERSON TO PERFORM DUTIES OF DEBTOR

In a case involving a corporate or partnership debtor, the debtor shall, within 10 days of the order for relief, file with the court a notice stating the name and address of the officer, shareholder or partner that the debtor has designated to perform the duties of the debtor in the pending bankruptcy case. The individual so designated shall be responsible for ensuring that the debtor performs the duties of the debtor required by the court, the Bankruptcy Code, and the Rules of Bankruptcy Procedure.

RULE NO. 505
COPIES OF COURT RECORDS

A party seeking the return by mail of an uncertified copy of an order, pleading, or other paper shall submit an additional copy of the document requested at the same time as the original document is submitted, together with a stamped, self-addressed envelope.

RULE NO. 508
REGISTRY FUND FEES

(a) Any order presented by a party or parties to an action that directs the clerk to invest in an interest-bearing account or instrument funds deposited in the registry of the court pursuant to 28 U.S.C. Section 2041, shall include the following:

1. the amount to be invested;

2. the name of the depository approved by the Treasurer of the United States as a depository in which funds may be deposited;
(3) a designation of the type of account or instrument in which the funds shall be invested;
(4) wording which directs the clerk to deduct from the income earned on the investment a fee, not exceeding that authorized by the Judicial Conference of the United States and set by the Director of the Administrative Office at 10% of the income earned while funds are held in the court’s registry, whenever such income becomes available for deduction and without further order of the court.

(b) The fee assessed under subsection (a) of this rule shall be deducted periodically, without further orders of the court, either at the time income is credited to the account, or prior to any other distribution. Investments having a maturity date greater than one year will be assessed the fee at the time the investment instrument matures.

(c) Sample orders in conformity with this rule may be obtained upon request from the Financial Deputy of the clerk’s office.

RULE NO. 604
NOTICE BY THE TRUSTEE

Whenever the trustee, or the debtor in possession, proposes to use, sell or lease property not in the ordinary course of business, such trustee or debtor in possession shall give the notice required by Rule 2002 and Rule 6004 of the Rules of Bankruptcy Procedure. The notice shall specify whether the property is to be sold free and clear or subject to liens and encumbrances.

RULE NO. 913
ORDER TO ACCOMPANY REQUEST FOR RELIEF BY MOTION

When matters are raised before the Court by motion, the motion and any response thereto, shall be accompanied by a separate and unattached proposed order.

RULE NO. 914
OTHER MOTIONS

(a) Unless otherwise ordered, a motion in an adversary proceeding pending in the Lexington division may be noticed for hearing before the court on the first or third Wednesday of each month at 9:30 a.m. prevailing time at 200 Merrill Lynch Plaza, 100 East Vine Street, Lexington, Kentucky. If the first or third Wednesday is a holiday, a motion may be noticed for hearing on the following Wednesday. A motion shall include a certificate indicating that each party to the motion has been given at least 10 days’ notice of the hearing on the motion by service of the motion in a manner permitted by Rule 7005 of the Rules of Bankruptcy Procedure. Motions for a pretrial conference or trial date need not be noticed for hearing and, unless objection is made, will be acted on by the court without a hearing.

(b) A motion to avoid a judicial lien or a nonpossessory, nonpurchase money lien on exempt property pursuant to section 522(f) of the Bankruptcy code, or to redeem tangible personal property from a lien securing a dischargeable consumer debt pursuant to section 722 of the Bankruptcy Code, ordinarily shall be noticed for hearing at the discharge hearing as fixed in the notice of the meeting of creditors called pursuant to Rule 2002 of the Rules of Bankruptcy Procedure. After the discharge hearing a motion requesting such relief may be noticed for hearing on any subsequent discharge hearing day for the division of court in which the case is pending at a time set for discharge hearings. Any such motion may be served by mail as provided in Rule 7005 of the Rules of Bankruptcy Procedure and shall include a certification of the mailing by the person who made the service. Reasonable notice and opportunity for hearing shall be afforded to any party against whom relief is sought or who may be affected by the motion. After a case is closed, a request for relief under any provisions of the Code referred to in this subsection shall not be considered until the court has granted a motion to reopen the case pursuant to section 350 of the code and Rule 5010 of the Rules of Bankruptcy Procedure.

(c) Unless otherwise ordered, for cases pending in the Ashland, Corbin, Covington, Frankfort and Pikeville divisions, any motion other than a motion for relief from stay or a motion of the type described in subsection (b) of this rule shall be noticed for hearing in the division in which the case is pending at the following times: motions in cases in the Ashland division shall be noticed for hearing at Ashland on the Thursday following the first Tuesday of the month at 1:30 p.m. prevailing time; motions in the cases in the Corbin division shall be noticed for hearing at Corbin on the Thursday following the first Tuesday of the month at 1:30 p.m. prevailing time; motions in cases in the Covington division shall be noticed for hearing at Covington on the first Tuesday of the month at 1:30 p.m. prevailing time; motions in cases in the Frankfort division shall be noticed for hearing at Frankfort on the Friday following the first Tuesday of the month at 10:00 a.m. prevailing time, and motions in cases in the Pikeville division shall be noticed for hearing at Pikeville on the second Tuesday of the month at 1:30 p.m. prevailing time.

In the event there is insufficient time to hear a motion scheduled at the above time, the motion shall be reset for hearing at the court’s convenience. Motions which are expected to require more than 15 minutes of court time may be scheduled by contacting the judge’s chambers.

Any such motion may be served by mail as provided in Rule 7005 of the Rules of Bankruptcy Procedure and shall include a certification of the mailing by the person who made the service. Reasonable notice and opportunity for hearing shall be afforded to any party against whom relief is sought or who may be affected by the motion.

(d) A motion to avoid a judicial lien or a nonpossessory, nonpurchase-money lien on exempt property pursuant to section 522(f) of the Bankruptcy Code shall conform substantially to Form No. 5(a) or 5(b), with such alterations as may be appropriate to suit the
circumstances.
(e) A motion for court approval pursuant to title 11 U.S.C. Section 524(c)(6)(A) of a reaffirmation agreement entered into by an individual who was not represented by an attorney during the course of negotiating the agreement shall conform substantially to Form No. 6, with such alterations as may be appropriate to suit the circumstances.
(f) A motion to redeem tangible personal property from a lien securing a dischargeable consumer debt pursuant to section 22 of the Bankruptcy Code shall conform substantially to Form No. 7, with such alterations as may be appropriate to suit the circumstances.
FORM NO. 1 (1/28/91)

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY

SPECIAL REQUIREMENTS FOR MASTER ADDRESS LIST
(See BLR 107)

TO THE DEBTOR(S) AND THE ATTORNEY FOR DEBTOR(S), IF ANY:

The debtor shall prepare and submit to the Court, at the time the petition is filed, a mailing matrix which complies with the computerized noticing guidelines contained herein. The accuracy and completeness of this creditor listing shall be the total responsibility of the debtor and the debtor's attorney. The court shall rely upon it for all mailings. Failure to comply will cause the petition to be rejected. This mailing matrix is required in addition to the various schedules required by Bankruptcy Rule 1007.

In order to ensure that the creditor matrix or amendments you file can be properly read by the Optical Character Reader (OCR) currently used by the court, we ask that you observe the following guidelines. Your cooperation is essential in helping us make improvements in our existing system and to better serve you -- the public.

1.0 FORMAT AND REQUIREMENTS FOR CREDITOR(S) MATRIX

(A) Filing Requirements -- A creditors matrix (see Attachment #1) accompanied by a Verification of Creditor Matrix, (see Attachment #2) is required whenever the following occurs:
   (1) A new chapter 7, 11, 12 or 13 petition is filed.
   (2) A case is converted to a chapter 7, 11, 12 or 13 after August 1, 1991. (See Section C on conversions to determine if a partial or complete matrix is required.)
   (3) An amendment to a case under chapter 7, 11, 12 or 13 is filed after August 1, 1991, which adds, deletes or changes creditor address information on the debtor’s Schedule of Debts and/or Schedule of Equity Security Holders.

(B) Matrix Format Requirements -- All matrices must comply with the following:
   (1) Lists must be typed in one of the following standard typefaces or print styles:
      * Courier 10 pitch
      * Prestige Elite
      * Letter Gothic
   (2) Lists shall be typed in a single column on the page rather than in two or three columns. See Attachment #1. Lists must be typed so that no address is closer than 2" from any edge of the paper (top, bottom, left or right).
   (3) Each name/address must consist of no more than four (4) total lines, with at least three (3) blank lines between each of the name/address blocks. ZIP codes must be located on the same line as city and state.
   (4) All states must be two-letter abbreviations. Example: correct =KY; wrong = Kentucky.
   (5) Each line must be 30 characters or less in length.
   (6) ALL CREDITORS ARE TO BE ALPHABETIZED. DO NOT DUPLICATE NAMES AND ADDRESSES. Entities with more than one (1) address may be listed as many times as necessary to assure proper notice.
   (7) DO NOT include the following entities since they will be retrieved automatically by the computer for noticing:

331
* Debtor
* Joint Debtor
* Attorney for the Debtor(s).

(C) Converted Cases
(1) For cases filed prior to June 1, 1983, and subsequently converted after August 1, 1991 to a chapter 7, 11, 12 or 13, ALL creditors must be listed on the mailing matrix.
(2) For cases filed after June 1, 1983, and then converted after August 1, 1991, to a chapter 7, 11, 12 or 13, only postpetition creditors need be listed on the mailing matrix. The matrix and verification must be filed with the conversion petition.

(D) Amendment to Schedule of Debts and/or Schedule of Equity Security Holders
(1) A separate matrix page is required for creditors being “added”, a separate page for those being “deleted”, and a separate page for those which require “correction”. Indicate on the REVERSE side of each matrix page which category that particular page belongs in.
(2) The matrix with Verification is a document separate from the amended schedules and may not be used to substitute for any portion of the schedules. IT MUST BE SUBMITTED WITH THE AMENDMENT.

(E) Avoiding Problems
Although the court is using sophisticated equipment and software to ensure accuracy in creditor list reading, certain problems may still occur. By following these guidelines, you will avoid delays in the initial processing of your bankruptcy petition.

The problems can result in your lists being improperly read by the optical scanner, requiring you to resubmit your creditor list in an acceptable form. See Attachment #3.
(1) Extra marks on the list -- such as letterhead, dates, debtor name, coffee stains, handwritten marks.
(2) Non-standard paper such as onion skin, half-sized paper, or colored (i.e., yellow, blue, etc.) Paper.
(3) Poor quality type caused by submitting a photocopy or a carbon copy, using an exhausted typewriter ribbon, or using a typewriter with a fabric ribbon.
(4) Unreadable type faces or print types such as proportionally-spaced fonts, dot-matrix printing, or exotic fonts (such as Olde English or Script). Use only Courier 10, Prestige Elite or Letter Gothic.
(5) Misaligned lists caused by removing the paper from the typewriter before completing the list, or inserting the paper into the typewriter crooked.
(6) Incorrect typewriter settings will cause unreadable lists. Make certain that your typewriter is set for 10 pitch if you are using a 10 pitch type style.
(7) Stray marks should be avoided. Do NOT type lines, debtor name, page numbers, or anything else on the front of a creditor list. Any identifying marks you choose to add can be typed on the back of the list.
(8) Upper case only (all capital letters) should be avoided. Type in upper and lower case as you would on a letter.
(9) ZIP codes must be on the last line. Nine-digit ZIP codes should be typed with a hyphen separating the two groups of digits. Do NOT type “attention” lines or account numbers on the last line. If needed, this information must be placed on the second line of the name/address. Account numbers may not exceed 15 characters. (The Zip code must be at the end of the same line as the city and state in order for the U.S. Postal ZIP code sorting equipment to find it.)
(10) Be sure to type the Number “1” rather than the lower case “I” (L) when using numerics.

(F) United States Attorney
When listing an indebtedness to the United States for other than taxes, the debtor shall include
both the United States Attorney and the federal agency through which the debtor became indebted. The name and address of the United States Attorney must include, in parentheses, the name of the federal agency. For example:

United States Attorney  
(For Department of Education)  
110 West Vine Street, 4th Floor  
Lexington, KY 40507

2.0 CHAPTER 11 CASES WITH AN EXCESS OF 999 CREDITORS:

Please contact the Clerk’s Office for specific instructions.

3.0 OTHER CHAPTERS

Please contact the Clerk’s Office for specific instructions when filing stockbroker chapter 7, commodity broker chapter 7, chapter 9 or chapter 11 railroad reorganization petitions.
SUMMARY OF
MATRIX REQUIREMENTS

1. List creditors alphabetically.

2. Use only one column of creditors per page.

3. Use upper and lower case; and Courier 10 pitch, Prestige Elite, or Letter Gothic typestyle.

4. No address can be longer than 30 characters in width and no address can be longer than 4 lines.

5. Leave 3 spaces between addresses.

6. Put no extra marks of any kind on front of the matrix page. Identifying marks such as the debtor's name may be put on the back of the page if you wish.

7. File the original matrix and one copy with each page marked "copy."
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

IN RE: ______________________________________

CASE NO. __________________________

DEBTOR(S)

VERIFICATION OF MASTER ADDRESS LIST

I, ______________________________________, the petitioner(s) in the above-styled
bankruptcy action, declare under penalty of perjury that the attached master address list of
creditors and other parties in interest consisting of ____ pages is true and correct and
complete, to the best of my (our) knowledge.

Dated: __________________________

____________________________________
Debtor

____________________________________
Joint Debtor

I, ______________________________________, counsel for the petitioner(s) in the above-
styled bankruptcy action, declare that the attached master address list consisting of _____
pages has been verified by comparison to Schedules D through H to be complete, to the best of
my knowledge. I further declare that the attached master address list can be relied upon by the
clerk's office to provide notice to all creditors and parties in interest as related to me by the
debtor(s) in the above-styled bankruptcy action until such time as any amendments may be
made.

Dated: __________________________

(Signature of Attorney)
(Name of attorney typed out)
COUNSEL FOR DEBTOR(S)
## ERRORS TO AVOID IN PREPARING CREDITOR LISTS

<table>
<thead>
<tr>
<th>Error Description</th>
<th>Example Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Page Titles</td>
<td>If you want to type title or other identification on lists, type it on the back - never on the front.</td>
</tr>
<tr>
<td>All Upper Case</td>
<td>Use upper and lower case (capital and small letters) as if you were typing a letter.</td>
</tr>
<tr>
<td>Bold Type</td>
<td>Do not use a boldface setting on your typewriter or word processor.</td>
</tr>
<tr>
<td>Wrong Font</td>
<td>You may use Courier 10, Prestige Elite or Letter Gothic. No other font is acceptable.</td>
</tr>
<tr>
<td>Wrong Pitch</td>
<td>If you use a 10-pitch font, make sure typewriter is set to 10 pitch.</td>
</tr>
<tr>
<td>Handwriting</td>
<td>Handwriting is not scannable and will interfere with the reading of the rest of list.</td>
</tr>
<tr>
<td>Page Number</td>
<td>Do not number pages or type anything but creditors on list.</td>
</tr>
</tbody>
</table>

### Address Formatting Examples

**Person:**
- Arctic Expeditions Incorporated
- 455 East 48th Ave.
- Anchorage, AK 99505

**Business:**
- Global Fire Protection, Inc.
- 107-0 CASTLE BUILDING
- NORTH PARKWAY BLVD.
- HOUSTON, TX. 10938

**ZIP Code:**
- SET*IM the two groups with a dash, not a space.

**Attention Line:**
- If you must type an attention line or account number for a creditor, put it on the second line of the address, not at the end.

**Digit Zip Code:**
- Separate the two groups of digits with a dash, not a space.
FORM NO. 2
BCO455

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY

IN RE:

CASE NO. _____________

DEBTOR

DEBTOR’S PLAN

(1) The debtor shall pay to the trustee out of debtor’s future earnings or other income the sum of $____ each _____. The debtor submits all or such portion of debtor’s future earnings or other income as is necessary for the execution of the plan to the control of the trustee. 11 U.S.C. section 1322(a)(1).

(2) All claims entitled to priority under 11 U.S.C. section 507 shall be paid in full in deferred cash payments unless the holder of a particular claim agrees to a different treatment of such claim. 11 U.S.C. section 1322(a) (2).

(3) Creditors holding unsecured claims shall be divided into two classes. 11 U.S.C. section 1322(a) (3).

   Class A. Class A shall consist of creditors holding allowed unsecured claims of $10.00 or less. The claims of such creditors shall be paid in full prior to any payment on unsecured claims in Class B.

   Class B. Class B shall consist of creditors holding allowed unsecured claims for any amount greater than $10.00. The claims of such creditors shall be paid pro rata over the period of the plan.

(4) Creditors holding allowed unsecured claims shall be paid

   ____ In full

   ____ To the extent of ____ cents on the dollar.

   ____ To the greatest extent possible from payments to be made by the debtor as provided by the plan for a period of ____ months.

No interest accruing after the date of the filing of the petition shall be paid on the claims of creditors holding allowed unsecured claims. Unmatured interest shall be rebated in determining the allowed amount of any such claim. 11 U.S.C. section 502(b)(2).

(5) The holder of any allowed secured claim provided for by the plan shall retain a lien securing such claim until the amount for which the claim is allowed as secured is paid in full. 11 U.S.C. sections 1325(a)(5)(B)(i), 1327(c).

(6) the trustee shall make periodic cash payments to the holder of any allowed secured claim at a rate in excess of any decrease in value of any collateral securing the claim. 11 U.S.C. section 361(1).

(7) Each of the following named creditors holds a judicial lien or a nonpossessory, nonpurchase-money security interest encumbering property of a kind specified in 11 U.S.C. section 522(f)(2)(A) (B) or (C), which the debtor is entitled to claim as exempt and has claimed exempt in this case. Unless any such creditor files timely objection to confirmation of the plan and the court after hearing the objection finds the debtor may not avoid the lien of such creditor under 11 U.S.C. section 522(f), then upon confirmation of the plan the property encumbered by the lien of any of such named creditor shall vest in the debtor free and clear of any claim or interest of
any of such creditor as provided by 11 U.S.C. section 1327, and the claim of any such creditor
who has filed a claim shall be allowed as an unsecured claim and paid on a parity with other
allowed unsecured claims.

1.
2.
3.
4.

(8) The debtor hereby rejects as burdensome the following executory contracts of the debtor.

(Give details concerning the other party or parties to the contract and the nature of the
contract.)

Any claim filed by said creditor arising from rejection of such executory contract shall be
allowed as if such claim had arisen before the date of the filing of the petition, subject to the
right of the debtor or the trustee to object to the amount of the claim. 11 U.S.C. section 520(g).

DATED:

__________________________  __________________________
ATTORNEY FOR DEBTOR       DEBTOR

Summary of Debts as Scheduled:
Priority:__________________________
Secured or partially secured
(excluding debts secured by
an interest in real estate)

Unsecured:__________________________

TOTAL:__________________________

BC0455
CERTIFICATE OF SERVICE OF PLAN

I certify that on the date shown below I mailed a copy of the debtor’s plan dated ______________, to all creditors of the debtor at their addresses as shown in the schedules accompanying the debtor’s petition.

Date plan mailed to creditors:

________________________

ATTORNEY FOR DEBTOR

Note

This form is for use in complying with the requirements of Local Rule 315(b) which requires service of a copy of the plan on all creditors of the debtors and parties in interest.

Each plan should be dated to distinguish between plans in the event a substituted or amended plan is filed.
ORDER CONFIRMING CHAPTER 13 PLAN

The plan having been transmitted to creditors; and it having been determined after hearing on notice that --

(1) the plan complies with the provisions of chapter 13 and with other applicable provisions of the Bankruptcy Code;
(2) the filing fee required by 28 U.S.C. section 1930 has been paid;
(3) the plan has been proposed in good faith and not by any means forbidden by law;
(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under 11 U.S.C. chapter 7 on such date;
(5) the debtor will be able to make all payments under the plan and to comply with the plan;
(6) with respect to each allowed secured claim provided for by the plan --
   (A) each holder of such claim has accepted the plan; or
   (B) (i) the plan provides that each holder of such a claim shall retain a lien securing the claim; and
       (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or
   (C) the debtor has surrendered to the holder of such claim the property securing such claim; and
(7) with respect to any pending objections to confirmation filed by the trustee or the holder of an allowed unsecured claim, the standards of 11 U.S.C. section 1325(b) have been met.

IT IS ORDERED that the debtor’s plan should be and hereby is confirmed.

By the court --

Judge

Copies to:
Attorney for Debtor
Trustee
FORM NO. 5(a)

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY

IN RE:

CASE NO. ____________

DEBTOR(S)

MOTION FOR ORDER AVOIDING LIEN ON EXEMPT PROPERTY

Debtor hereby moves the court pursuant to section 522(f) of title 11, United States Code, for an order avoiding the lien of ____________ as a lien that impairs the interest of the debtor in exempt property.

Such lien is a judicial lien.

Such lien impairs the interest of the debtor in property in which the debtor is entitled to claim and has claimed an exemption in this case. Such property is more particularly described as follows:

Wherefore, the debtor requests entry of an order avoiding the lien of ____________ and providing that, unless this case is dismissed, such lien shall not survive this bankruptcy proceeding or affix to or remain enforceable against the interest of the debtor in any of the aforementioned property following the conclusion of this case.

________________________________________
Attorney for Debtor

NOTICE OF HEARING

Notice is hereby given that this motion will be brought on for hearing before the court at ____________ the time and place previously fixed by the court for a discharge hearing for the debtor.

________________________________________
Attorney for Debtor
CERTIFICATE OF MAILING

I certify that a copy of this motion and notice of hearing thereon was served by first class mail upon

________________________________________________________

________________________________________________________

the ___ day of ___ , 19 ___.

________________________
Attorney for Debtor
UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY

IN RE:

CASE NO. _____________

DEBTOR(S)

MOTION FOR ORDER AVOIDING LIEN ON EXEMPT PROPERY

Debtor hereby moves the court pursuant to section 522(f) of title 11, United States Code, for an order avoiding the lien of ______________________ as a lien that impairs the interest of the debtor in exempt property.

Such a lien is a nonpossessory, nonpurchase-money lien.

Such lien impairs the interest of the debtor in property of a kind described in subparagraph (A),(B) or (C) of paragraph (2) of subsection (f) of section 522 of title 11, United States Code, in which the debtor is entitled to claim an exemption and has claimed an exemption in this case. Such property is more particularly described as follows:

Wherefore, the debtor requests entry of an order avoiding the lien of ______________________ and providing that, unless this case is dismissed, such lien shall not survive this bankruptcy proceeding or affix to or remain enforceable against the interest of the debtor in any of the aforementioned property following the conclusion of this case.

______________________________
Attorney for Debtor

NOTICE OF HEARING

Notice is hereby given that this motion will be brought on for hearing before the court at ______________________ the time and place previously fixed by the court for a discharge hearing for the debtor.

______________________________
Attorney for Debtor
CERTIFICATE OF MAILING

I certify that a copy of this motion and notice of hearing thereon was served by first class mail upon

____________________________

this ______ day of ________________, 19__.

__________________________
Attorney for Debtor

BCO055
Debtor hereby moves the court for an order approving an agreement between the debtor and __________________________ for payment of a debt owed by the debtor to said creditor.

The debt owed by the debtor to said creditor is a dischargeable consumer debt that is not secured by real property.

The debtor believes the reaffirmation agreement pursuant to which the debtor proposes to pay said debt is in the best interest of the debtor and will not impose an undue hardship on the debtor or a dependent of the debtor for the following reasons: [Explain (1) the reasons for wanting to reaffirm the debt, and (2) circumstances indicating reaffirmation will not impose an undue hardship on the debtor and dependents]:

________________________________________
Pro Se Debtor

NOTICE OF HEARING

Notice is hereby given that this motion will be brought on for hearing before the court at __________________________ the time and place previously fixed by the court for discharge hearing for the debtor.

________________________________________
Pro Se Debtor

CERTIFICATE OF MAILING

I certify that a copy of this motion and notice of hearing thereon was served by mail upon __________________________

____________ this _________ day of _______________, 19 ___.

________________________________________
Pro Se Debtor
Note: this form should be used when the debtor is not represented by counsel during the course of negotiating the reaffirmation of a dischargeable consumer debt that is not secured by real property.

BCO0500.
UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY

IN RE:

CASE NO. __________

DEBTOR(S)

MOTION TO REDEEM PROPERTY

Debtor hereby moves the court pursuant to section 722 of title 11, United States Code, for an order permitting him to redeem an item of tangible personal property from a lien securing a dischargeable consumer debt.

The item of personal property involved is ________________________________

which is intended primarily for personal, family or household use.

The security interest of ________________________________ in said property, except as to the extent of the amount of the allowed secured claim of said creditor, is a dischargeable consumer debt.

The amount of the allowed claim of said creditor has been or should be fixed by the court as the sum of ________________________________.

Wherefore, the debtor moves the court for an order permitting him to redeem said property by paying said creditor the aforesaid sum, and finding that the remainder of the claim of said creditor is a dischargeable consumer debt.

________________________________________
Attorney for Debtor

NOTICE OF HEARING

Notice is hereby given that this motion will be brought on for hearing before the court at ________________________________ the time and place previously fixed by the court for a discharge hearing for the debtor.

________________________________________
Attorney for Debtor

349
CERTIFICATE OF MAILING

I certify that a copy of this motion and notice of hearing thereon was served by mail upon

__________________________________________________________ this

________ day of ______________________, 19 __.

____________________________________

Attorney for Debtor

BCO510
INDEX

References Are To Monograph Section Numbers

Abandonment
of property of estate, generally, 3.17, 3.18, 6.10
-grounds, 3.19
-procedure, 3.20
no asset cases, 2.46

Adequate Protection
Chapter 7 treatment, 1.3
-defined, 3.13
-secured creditors and, 4.21

Adversary Proceedings See also Litigation
generally, 1.3, 5.1
-defined, 5.5
denial of debtor’s discharge, 5.4, 5.23
-case law treatment, 5.24
-statutory treatment, 5.23
non-dischargeability, 5.8
-automatic stay and judgment collection, 5.22
-false pretenses or fraud, 5.9
-case law treatment, 5.10
-statutory treatment, 5.9
-luxury goods, 5.11
-presumption periods, 5.12
-statutory treatment, 5.11
-obligations incident to divorce, 5.20
-case law treatment, 5.21
-statutory treatment, 5.20
-student loans, 5.18
-case law treatment, 5.19
-statutory treatment, 5.18
-use of false statement in writing, 5.13
-case law treatment, 5.14
-statutory treatment, 5.13
-willful and malicious injury, 5.16
-case law treatment, 5.17
-statutory treatment, 5.16

procedure in, 5.5, 5.7
Rule 2004 examinations, 5.26
settle documentation, 5.31
subpoena duces tecum, 5.27
-checking and savings account records, 5.28
-insurance policies, 5.29
-written discovery, 5.30

Alimony See Domestic Relations

Alternatives
advising clients of, 2.18-.21

Amendment
to petition, 2.49

Appointment
of case trustee, 1.3

Appraisal
debtor’s assets, 2.13

Attorney Fees
and fraudulent transfers, 2.29
-fee agreement, 2.36, 2.56
-fee disclosure statement, 2.37
-discussion during initial interview, 2.29
-phone inquiries concerning, 2.5

Automatic Stay
generally, 1.3, 3.2
-comparison of chapter 13 and chapter 7 relief from stay, 3.14
-branch of proof, 3.15
-procedure, 3.16
-exception for support obligations, 10.25-.26
-relief from, 3.11
-adequate protection, defined, 3.13
-cause, defined, 3.12
-secured creditors and, 4.22-.26
-scope of, 3.3
-acts to obtain property of the estate, 3.6
-collection against debtor, 3.8
-enforcement of judgments, 3.5
-liens against bankrupt estate, 3.7
-litigation, 3.4
-setoff of debt, 3.9
-violation of, 3.10
-penalties for, 3.10
Avoidable Transfers  See  Specific entries
      generally, 1.3

Avoidance
      of liens, 2.33, 2.51
      -bases for, 4.10
      -defects in lien, 4.14
      -fraudulent conveyance, 4.13
      -impairment of exemption, 4.11
      -preference, 4.12
      -procedure for, 4.15
      -trustee's power to avoid statutory liens, 6.64

Bankruptcy Estate
      generally, 3.3
      acts to obtain property of, effect of stay on, 3.6
      estate property, defined, 6.2-.6
      types of claims against, 7.2

Burden Of Proof
      lien avoidance, 4.16
      relief from automatic stay, 3.15
      objections to exemptions, 4.6
      preference litigation, 6.39

Cash Collateral
      generally, 1.3

Cause
      ground for relief from automatic stay,
      defined, 3.12

Chapter 7  See also  Specific entries
      general overview, 1.3, 2.21

Chapter 11  See also  Specific entries
      general overview, 1.3

Chapter 13  See also  Specific entries
      general overview, 1.3, 2.20

Child Support  See  Domestic Relations

Claims  See  Specific entries
      generally, 1.3

Client Interview
      generally, 2.7
      attorney fees, 2.29
      discussion of alternatives, 2.19-.21
      discussion of bankruptcy procedure, 2.22, 2.23
      -reaffirmation of debt, 2.26
      -redemption of property, 2.25
      -surrender of property, 2.24
      -timing of bankruptcy filing, 2.27
      client relations, 2.8
      conflicts of interest, 2.9
      petition information and client
      questionnaire, 2.28
      review of financial statement, 2.11
      -asset appraisal, 2.13
      -existing substantial equity, 2.15
      -jointly owned debts, 2.12
      -mortgages or security interests, 2.17
      -payments to creditors, 2.16
      -tax ramifications, 2.14

Collection
      acts to collect, assess or recover claims
      against debtor, 3.8
      automatic stay and Section 523 judgment
      collection, 5.22

Conflicts Of Interest  See also  Ethics And
      Professional Responsibility
      ascertaining during initial client interview,
      2.9

Conversion
      of matter to another bankruptcy chapter,
      generally, 1.3

Credit Bureau Report
      generally, 2.32

Creditors  See also  Secured Creditor
      dealing with at creditors' meeting, 2.47
      inquiries from, generally, 2.34
      post-petition activity, 2.43
Creditors' Committees  
generally, 1.3

Creditors' Meeting  
generally, 1.3, 2.44  
dealing with creditors at, 2.47  
preparation of client for, 2.45  
trustee report of no assets, 2.46

Criminal Bankruptcy Attorneys  See also Ethics And Professional Responsibility  
generally, 8.20

Debt  See Specific entries  
joint ownership by husband and wife, 2.12

Debtor In Possession  
Chapter 11 treatment, 1.3

Default Judgment  
and bankruptcy filing, 2.43

Defect  
in lien, avoidance, 4.14

Defenses  
defenses of creditors, preference litigation, 6.28  
-contemporaneous exchange for new value, 6.29  
-ordinary course, 6.30

Denial  
of debtor's discharge, 5.4, 5.23  
-case law treatment, 5.24  
-statutory treatment, 5.23

Deposition  See Rule 2004 Examination

Discharge  See also Non-Dischargeability  
Chapter 11 treatment, 1.3  
Chapter 13 treatment, 1.3  
denial of debtor's discharge, 5.4  
trustee's standing to object to discharge, 6.71

Disclosure Statement  
Chapter 11 treatment, 1.3  
fee disclosure statements, 2.37

Discovery  See also Rule 2004 Examination  
-written discovery, use in adversary proceedings, 5.30

Dismissal  
of case, generally, 1.3

Divorce  See Domestic Relations

Domestic Relations  
-automatic stay, exception for support obligations, 10.25-.26  
-dischargeability of non-support obligations, 10.11  
-affirmative defenses, 10.16-.17  
-elements, 10.13  
-burden of proof, 10.15  
-nature of debt, 10.14  
-time of measurement, 10.18  
-when debtor is entitled to relief, 10.15  
-exception to discharge, 10.12  
-Kentucky rulings on, 10.21  
-procedure, 10.19  
-statute of limitations, 10.20  
-obligations incident to divorce, non-dischargeability, 5.20, 10.2  
-case law treatment, 5.21  
-preference litigation, 6.34, 10.27  
-support obligations, 10.2  
-burden of proof, 10.9  
determining, 10.3-.5  
-jurisdiction, 10.7  
-transfers to spouses, exceptions to preferences, 10.27  
-transfers to spouses, protection of liens, 10.28

Election  
of case trustee, 1.3

Emergency Filing  
generally, 2.27
Enforcement
date for determining, 4.2
of judgments, effect of automatic stay, 3.2-5
objections to, 2.15, 4.5, 6.9
- burden of proof, 4.6
- time limitations, 4.7
state law exemptions, 2.15, 4.3
waiver of in favor of creditor, 4.2

Equity Security Holder
generally, 1.3

Estate
definition, 6.2-6
estate property, defined, 6.2-6
types of claims against, 7.2
of bankruptcy debtor, generally, 3.3
- acts to obtain property of, effect of stay, 3.6
- estate property, defined, 6.2-6

Ethics And Professional Responsibility
in bankruptcy matters, generally, 8.1
criminal bankruptcy attorneys, 8.20
debtor’s transactions with counsel, 8.14
duty to the court, 8.19
duty to bankruptcy estate, 8.18
employment of professionals, 8.2, 8.3
- conflicts between debtor and attorney, 8.5
- business and financial ties between debtor and counsel, 8.7
- representation of third parties, 8.6
- retainer and pre-petition payment, 8.8
- counsel for committee of creditors, 8.11
- full disclosure, 8.12
- multiple representation of related parties, 8.4
- nunc pro tunc employment, 8.13
fee awards, 8.15
Kentucky case law treatment, 8.21
special counsel, 8.10
unreasonable behavior by counsel, 8.17
zealous representation, 8.16

Examiner
role in Chapter 11 cases, 1.3

Executory Contracts
generally, 7.3

Exemptions
generally, 4.1, 6.8
categories of, 4.3
claiming exemptions, 4.4
Index

Judgment
  enforcement of, effect of automatic stay, 3.2-5

Jurisdiction
  property rights determined by state law, 6.11

Leases
  creditor’s rights, generally, 7.3

Lien
  against bankruptcy estate, effect of stay, 3.7

Lien Avoidance
  generally, 2.33, 2.51, 4.8-9
  bases for, 4.10
    - defects in lien, 4.14
    - fraudulent conveyance, 4.13
    - impairment of exemption, 4.11
    - preference, 4.12
  burden and standard of proof, 4.16
  procedure for avoiding liens, 4.15
  trustee’s power to avoid statutory liens, 6.64

Lien Search
  generally, 2.33

Liquidation
  under Chapter 7
    - overview, 1.3

Liquidation Test
  preference litigation, 6.27

Litigation
  See also Adversary Proceedings; Fraud; Preference
  effect of automatic stay on, 3.2-4

Luxury Goods
  adversary proceedings and non-dischargeability, 5.11
    - presumption periods, 5.12

Maintenance
  See Domestic Relations
Mortgage
granting of to secure antecedent debt, 2.17

Motions
in Chapter 11 cases, generally, 1.3
to avoid lien, 2.33, 2.51
to redeem property, 2.50

New Value
defined, preference, 6.18

No Asset Cases
trustee report of no assets, 2.46

Non-Dischargeable See also Adversary Proceedings
non-dischargeable debt, defined, 5.3
non-dischargeability grounds, 5.8
-automatic stay and judgment collection, 5.22
-false pretenses or fraud, 5.9
-case law treatment, 5.10
-statutory treatment, 5.9
-luxury goods, 5.11
-presumption periods, 5.12
-statutory treatment, 5.11
-obligations incident to divorce, 5.20
-case law treatment, 5.21
-statutory treatment, 5.20
-student loans, 5.18
-case law treatment, 5.19
-statutory treatment, 5.18
-use of false statement in writing, 5.13
-case law treatment, 5.14
-statutory treatment, 5.13
-willful and malicious injury, 5.16
-case law treatment, 5.17
-statutory treatment, 5.16

Notice See also Automatic Stay; Specific entries
to courts hearing pending litigation, 2.43

Nunc Pro Tunc
professional employment, 8.13

Objection
to exemptions, 4.5, 6.9
-burden of proof, 4.6
-time limitations, 4.7
trustee’s standing to object to discharge, 6.71

Operating Capital
Chapter 7 treatment, 1.3

Penalties
violation of automatic stay, 3.10

Petition
amendments to, 2.49

Preference
generally, 2.16, 2.31, 6.12
accounts receivable and inventory, 6.32
as bases for lien avoidance, 4.12
burdens of proof, 6.39
defenses of creditors, 6.28
-contemporaneous exchange for new value, 6.29
-ordinary course, 6.30
c consumer minimum, 6.35
definitions, 6.15-.16
-inventory, 6.17
-new value, 6.18
-receivable, 6.19
-taxes, 6.20
domestic relations, 6.34
elements of, 6.21
-1 year rule, 6.26
-90 day rule, 6.25
-antecedent debt, 6.23
-insolvency, 6.24
-liquidation test, 6.27
-transfer of interest of debtor, 6.22

parties, 6.40
preference litigation, 6.13
presumption of insolvency, 6.38
purpose, 6.14
real property rules, 6.37
security interests, 6.31
statute of limitations, 6.42
statutory liens, 6.33
sureties, 6.36
transfers to spouses, exceptions to preferences, 10.27-.28
venue, 6.41
**Questionnaire**
sample questionnaire, 2.55
use of client questionnaire, 2.28,

**Reaffirmation**
generally, 2.26, 5.6
reaffirmation agreements, 2.42
secured creditors and, 4.20

**Receivable**
defined, preference, 6.19

**Redemption**
generally, 2.50, 4.27
procedure for, 2.25, 4.27

**Relief**
grounds for relief from automatic stay, 3.11
-adequate protection, defined, 3.13
-cause, defined, 3.12
obtaining stay relief, chapter 7 and 13
distinguished, 3.14
-burdens of proof, 3.15
-procedure, 3.16, 4.26

**Reorganization**
under Chapter 11
-overview, 1.3

**Report Of No Assets**
generally, 2.46

**Report Of No Distribution** See also Abandonment
generally, 3.20

**Repossession**
self-help repossession, effect of stay on, 3.6

**Representation** See also Ethics And Professional Responsibility
of Chapter 7 debtor, 2.1
-creditors' meeting, 2.44
-follow up, 2.48
-information gathering, 2.30

**Revocation**
of confirmation order, Chapter 11 treatment, 1.3
trustee's standing to revoke discharge, 6.71

**Rule 2004 Examination**
generally, 5.26, 7.6

**Secretaries**
role of, generally, 2.3
-basic information and fee schedules, 2.5
-preparation for client interview, 2.6
-specific legal inquiries, 2.4

**Secured Creditor**
adequate protection and, 4.21
defined, 4.18
inquiries from after petition filed, 2.41
reaffirmation and, 4.20
redemption and, 4.27
rights and remedies of, 4.19
stay relief, 4.22, 4.26
-debtor's lack of equity in collateral, 4.25
-existence of valid claim in amount certain, 4.23
-lack of adequate protection, 4.24

**Security Interest**
granting of to secure antecedent debt, 2.17

**Self Incrimination**
protection against at creditors' meeting, 2.45

**Settlement**
settlement documents, adversary proceedings, 5.31

**Setoff**
generally, 3.9
effect of automatic stay on, 3.9

357
Single Asset Real Estate Debtor  
Chapter 7 treatment, 1.3

Skeleton Filings  
generally, 2.6, 2.27

Small Business Debtor  
Chapter 11 treatment, 1.3

Spousal Support  
See Domestic Relations

Statement Of Intent  
generally, 2.41

Statute Of Limitations  
fraudulent conveyance litigation, 6.57  
preference litigation, 6.42  
trustee’s lien avoidance, 6.65

Stay  
See Automatic Stay

Stay Relief  
See Relief

Student Loans  
non-dischargeability, 5.18  
-case law treatment, 5.19

Subpoena Duces Tecum  
use in adversary proceedings, 5.27  
-checking and savings account records, 5.28  
-insurance policies, 5.29

Support  
See Domestic Relations

Surrender  
of property, generally, 2.24

Tax And Taxation  
prior tax returns, use in initial evaluation, 2.6  
tax ramifications of bankruptcy filing, 2.14  
taxes and preference litigation, 6.20

Trustee  
See also United States Trustee  
abandonment and, 3.18-20  
appointment or election of, generally, 1.3  
avoidance of statutory liens, 6.64  
-statute of limitations, 6.65  
compelling turnover of property, 6.68  
-by custodian, 6.70  
-property of estate, 6.69  
creditors and, 7.7  
-duties, generally, 6.73  
-control property of estate, 6.74  
-duty to furnish information, 6.79  
-examination of debtor, 6.76  
-examination of proof of claims, 6.78  
-filing of final account, 6.80  
-insure debtor’s performance of Sec. 521 intentions, 6.75  
-investigation of financial affairs of debtor, 6.77  
-filing of report of no distribution, 3.20  
objection or revocation of discharge, 6.71  
operation of debtor’s business, 6.72  
post-petition transfers, 6.67  
powers of, generally, 6.60  
property of the estate and the trustee, 6.7  
report of no assets, 2.46  
role during creditors’ meeting, 2.45  
status as a lien creditor, 6.61-63

Turnover  
trustee’s power to compel turnover of property, 6.68  
-by custodian, 6.70  
-property of estate, 6.69

United States Trustee  
See also Trustee  
Office of the United States Trustee, generally, 9.1  
-case administration, 9.4  
-criminal referrals, 9.7  
-review of schedules, 9.5  
-substantial abuse, 9.6  
-mission statement of, 9.3  
-panel trustee, 9.9  
-appointment to case, 9.10  
-asset collection and liquidation, 9.14  
-case closings, 9.17  
-duties of, 9.13  
-investment of funds, 9.15  
-meeting of creditors, 9.11  
-submission of reports, 9.16  
-trustee oversight, 9.12
-role in Chapter 11 cases, 1.3
-statutory authority, 9.2

Utility Service
   in bankruptcy cases, 7.5

Venue
   fraudulent conveyance litigation, 6.56
   preference litigation, 6.41

Waiver
   of exemption by debtor in favor of creditor,
      4.2

Willful And Malicious Injury
   non-dischargeability, 5.16
      -case law treatment, 5.17

Zealousness  See also  Ethics And
   Professional Responsibility
   zealous representation by counsel, 8.16