Consumer Bankruptcy

An Instruction Booklet for Clients

Part 1

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Outline

Chapter 1
Introduction

This text originally began as an attempt to put in one place the answers to the author's client's most commonly asked questions. Later the text was expanded to include warnings regarding common problems experienced by bankruptcy clients as well as disclosures to protect the attorney from clients who did not want to remember the information provided to them regarding the consequences of filing bankruptcy (such as losing certain items of property)[1] or engaging in certain conduct (such as failing to make post-petition mortgage or car payments).[2]

Recently Congress enacted major changes in the form of the *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*. As far as can be determined at this point the new law does very little to prevent abuse or protect consumers. The law is anti-judge, anti-attorney, anti-poor to average consumer, pro-rich, and pro-secured creditor. It includes new restrictions on filing and a great deal of additional paper work. Further, it is internally inconsistent. As a result, it will probably be a number of years before the application of it's new provisions are understood with any decree of confidence. In the following pages an attempt will be made to explain some of the changes this law has brought to bankruptcy practice.

The reader is cautioned that the material in this text represents the *authors understanding* of the law at the time of writing. Attorneys as well as judges differ in their interpretation of bankruptcy law and procedure. As a result, this text may contain errors and/or information that may have been superceded by recent changes in the law.[3] The information contained herein is for informational purposes only.

Finally, anyone attempting to file bankruptcy under the new law must understand that it places greater burdens on debtors to supply information and greater burdens on attorneys to verify that information. Attorneys have been instructed that if their clients do not or cannot supply them with the required information *they may not file a bankruptcy for them*. Further, the new law prohibits attorneys from giving advice about certain aspects of the law to their clients.

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[1] See, p. 33-34.

[2] See, pp. 19-23, 30, 54.

[3] Some aspect of bankruptcy practices changes on average every two to three months.

Chapter 2
General Information

1.0 What is Bankruptcy?

Bankruptcy is that system of laws, both state and federal, which govern the relationship between debtors (people who owe debts), and creditors (those to whom the debts are owed); and whose ultimate purpose it is to provide relief in at least some measure to those who are overburdened by debt.

2.0 Why Are Their So Many Different Types of Bankruptcy?

Each type of bankruptcy attempts to address a different type of financial need and is named for the chapter within title 11 of the United States Code where they are found.

Chapter 7 is often called a liquidating bankruptcy. It's intended purpose is to wipe out debt and allow an individual to start over.

Chapter 9's are for cities and municipalities.

Chapter 11 is designed to give an individual or business time to reorganize their financial affairs and repay all or a portion of their debt over time, or to allow the orderly liquidation of assets at a higher value than could be obtained at execution or sheriff sale. The idea is to give creditors more money than they would have received if allowed to pursue their normal collection remedies.

Chapter 12 is for family farmers and fishermen. It is like a cross between chapter 11 and 13.

Chapter 13 is often called a wage earner plan or repayment bankruptcy. In many respects, a chapter 13 is similar to a debt consolidation loan with the payments being made to a bankruptcy trustee who then distributes them according to a set pattern to creditors.

3.0 What Are the Different Types of Debt?

3.1 In General

The court generally divides your debt into different classes, each of which are entitled to different treatment under the law. For simplicity your debts can be divided into four general categories: priority, secured, executory contracts, and unsecured. The chart below lists these four types of debt and gives *some* common examples of each:

General Types of Debt		
Categories		Examples
Priority		Taxes and Loans to Pay Taxes Student Loans Fraudulently Incurred Debt Drunk Driving Accident Debt Government Fines and Penalties Intentional Torts Alimony and Child Support Divorce Decree Debt Recent Consumer Debt over $500 Retirement Plan Loans
Secured	Title	Cars Boats Motorcycles Trailers Airplanes Houses and Office Buildings Mobile Homes Home Equity Lines
	Purchase Money Security Interest	Cars and Other Vehicles Furniture Appliances Electronics
	Consensual Liens	Debt Consolidation Loans SBA Loans Business Equipment Title Loans
	Possessory Liens	Pawn Shop Lay-a-Way Plans Repairmen

EXECUTORY CONTRACTS	APARTMENT RENTAL BOOK AND TAPE CLUBS SPA MEMBERSHIPS UTILITY SERVICE CELL PHONES LEASED CARS RENT-TO-OWN FURNITURE OR ELECTRONICS LEASED BUSINESS EQUIPMENT.
UNSECURED	MEDICAL BILLS UTILITIES MOST CREDIT CARD DEBT SIMPLE PROMISSORY NOTES OPEN LINES OF CREDIT

3.2 What are Priority Debts?

These are debts that are entitled to special treatment under the law. For example, they may have special collection or enforcement rights, or may be non-dischargeable (never go away) in bankruptcy. Examples of this type of debt include: domestic support obligations, unpaid wages, security deposits, taxes, claims for death or personal injury resulting from driving under the influence, student loans, fraudulently incurred debt, debts not listed in a bankruptcy, intentional torts (intentional injuries to individuals or their property), restitution, orders in domestic actions, post-petition association fees, violations of securities laws, or recently incurred consumer debt.[4]

The new law has made a number of changes to the priority debt category. First, recently incurred consumer debt (usually credit card debt) that is non-dischargeable has changed from $1225 or more incurred within 60 days of filing to $500 or more incurred within 90 days of filing. Second, non-dischargeable alimony and support debt appears to have been expanded to include any obligations set forth in a divorce decree. Third, the non-dischargeable student loan provisions have been expanded. Fourth, loans obtained to pay non-dischargeable taxes are now non-dischargeable. Fifth, fines or penalties imposed under Federal Election Laws are non-dischargeable. Sixth, post-petition membership or association fees are non-dischargeable until the debtors ownership interest in the property is terminated. And seventh, loans from a retirement, pension plan, stock bonus, 401k or other

[4]See, 11 U.S.C. Section 507, 523, and 727; Utah Code Annotated Section 78-23-13 (a)(b)(c)(7).

plan are non-dischargeable.

3.3 What are Secured Debts?

3.31 In General

The basic concept behind secured debt is that there is some form of collateral which secures payment of the obligation. Then if the appropriate payments are not made, the secured creditor is entitled to take possession of the property to help satisfy the underlying debt. Secured obligations generally fit into one of four categories: title liens, purchase money security interests, consensual liens, and possessory liens.

3.32 What are Title Liens?

A title lien is a debt that is evidenced by a written document such as a trust deed or certificate of title on a motor vehicle. These documents are recorded, and can be examined by any interested third party. The filing puts them on notice that they cannot purchase the item free and clear of the underlying debt. Typical title lien debt includes: cars, boats, trailers, airplanes, houses, office buildings, and mobile homes.

3.33 What is a Purchase Money Security Interest?

A purchase money security interest exists when a creditor either provides financing for a purchase or the cash needed to purchase a specific item. Purchase money security interests can include: cars, obligations to furniture stores, and purchases of "hard ticket items" such as electronics or appliances with credit cards.

3.34 What is a Consensual Lien?

A consensual lien exists when the lender provides cash in return for an interest in property already owned by the person obtaining the loan. In order for a consensual lien to be valid, there must be a written promise to pay and a written security agreement. In addition, a UCC 1 form must be filed with the Secretary of State's office.

3.35 What is a Possessory Lien?

A possessory lien exists when the lender retains possession of the item until the debt is repaid. For example, a loan with a pawn shop or a mechanic's lien on a car fits into this category.

3.36 What does it mean if a debt is Perfected?

Associated with secured debt is the concept of perfection. Some secured obligation, such as consensual liens or title liens, are not valid until certain documents are signed *and* filed with the appropriate state office. Until this filing occurs, the debt is not said to be perfected. In other words it will probably not be entitled to secured status.

3.37 Why is Priority of debt important?

Another concept you need to be aware of in connection with secured debt is priority. It is possible for more than one creditor to claim an interest in the same collateral. If the value of the collateral is not sufficient to cover all of the debt pledged against it, it can become necessary to determine who is entitled to what share of the proceeds. In other words, who is entitled to be satisfied first if the property were to be sold. Priority is based upon the date of perfection of the obligation. In other words, whoever perfects first is in first place, whoever perfects second has second priority and so on.

3.4 What are Executory Contracts?

An executory contract is simply an agreement under which both sides have continuing obligations to each other. This is where you pay a monthly fee for a service or the use of the other persons property. Typical obligations in this category include: apartment rentals, utilities, book and tape clubs, spa memberships, cell phones, leased cars, rent to own furniture, or leased business equipment.

3.5 What is Unsecured debt?

Unsecured debt includes all of the obligations that do not fit into one of the three categories previously discussed as well as the unsecured portion of any secured obligation. For example, if you owe $5000.00 on a car which is worth $3000.00, $3000.00 of the debt is secured and $2000.00 of the debt is unsecured. Typical unsecured debts include medical and dental bills, credit card debt, open accounts with vendors, and promissory notes.

4.0 What Happens to My Debt in a Bankruptcy?

The answer to this question depends upon the type of debt you have the type of bankruptcy you file. Chapter 5 of this text discusses in detail debt treatment in chapter 7, while Chapter 6 of this text discusses in detail debt treatment in chapter 13.

5.0 What Happens to My Property in a Bankruptcy?

The answer to this question depends upon the type of assets you have, any debt that may be pledged against it, and the type of bankruptcy you file. Chapter 7 of this text discusses in detail debt treatment in chapter 7 Chap 7

6.0 What Will Happen to My Credit If I File Bankruptcy?

The filing of a bankruptcy will typically end up on your credit report for a period of at least 10 years. However, the actual impact of a bankruptcy on your future credit will depend upon a number of factors. The first is the type of bankruptcy you file. It typically takes 1-2 years to re-establish credit after the filing of a chapter 7. On the other hand it may take as long as 6-7 years to establish credit after a chapter 13 (five years of making plan payments and then an additional 1-2 years to re-establish credit). In addition, during the term of your chapter 13 plan, you may not incur any new credit without a judges written permission. A mortgage foreclosure will generally impact your credit for three years and a voluntary debt repayment plan for up to three years after you make the final payment.

The second factor is whether you would qualify for the loan if you had not filed bankruptcy. Most creditors look to a number of things in extending credit. These include your age, your income, your debt/equity ratio (meaning how much money you have left over at the end of each month after the payment of debt), if you own a home, if you have been married for at least 6 months and if you have held the same job for at least 6 months. Many individuals find that the filing of a chapter 7 bankruptcy immediately improves their credit to the point where they begin receiving solicitations for un-secured debt. This is because their debt equity ratio has improved as a result of discharging debt and they may not file a new chapter 7 bankruptcy for at least 8 years.

Assuming you otherwise qualify for the loan, most creditors will ignore your bankruptcy filing after the appropriate length of time. This means you may be able to purchase a new home or car at regular interest rates. Many creditors will actually offer you new credit card and motor vehicle credit as soon as the court issues your discharge notice concluding your case. However, you will pay higher interest rates during that first year or two.

Many individuals wonder why a chapter 13 is harder on your credit than a chapter 7, when the individual is attempting to repay the debt. The answer is quite simple. In a chapter 7, the moment an individual receives their discharge, creditors know that the debts have been wiped out and the clients debt-to-equity ratio has improved. In a chapter 13, the debtor typically repays 5 to 20% of the debt over a three to five year period. This means that 80 to 95% of the debt is never paid. This

debt only goes away if the debtor completes their chapter 13 plan. If the debtor fails to make payments and the 13 is dismissed, all of this debt plus accumulated late charges and interest fall back onto the debtor and is still owed. Thus, a chapter 13 debtor is not a good credit risk until the plan is completed.

7.0 How Often Can I File bankruptcy?

Under the old law you could file a chapter 7 every 6 years. You could file a chapter 13 in a little as one year after filing a chapter 7. And you could file a chapter 7 immediately after completing a chapter 13 plan that returned 70% to unsecured creditors. The new law has dramatically changed the rules on multiple filings. This will be discussed in detail in Chapter 3 and 4.

8.0 How Does the Filing of a Bankruptcy Effect My Creditors?

The filing of a bankruptcy creates something called an "automatic stay". This means that your creditors are not allowed to take any action to collect their debt or improve their financial position in relation to your other creditors. This means that they cannot file legal action against you, continue a foreclosure, continue any legal action that has already been filed, garnish wages, perfect a lien or security interest, or call you on the phone. However, bankruptcy does not stop criminal prosecutions, or actions to collect alimony, maintenance, or support, or an action by a government unit to enforce a police or regulatory power.[5]

The new bankruptcy law has dramatically changed this section of the code, giving creditors many new rights. As a result, this matter will be treated in greater detail in Chapter 4 of this text.

[5]See, 11 USC 362.

Chapter 3
Limitations on Filing

1.0 In General

Any individual who resides in, has a domicile (a home) in, a place of business in or property in the United States may file bankruptcy. Any business operating or owning property in the United States may also be a debtor under the bankruptcy code.[6] Bankruptcy may also be filed on behalf of children, the insane, or individuals with mental handicaps or who are otherwise incompetent. However, there are limitations on what type of bankruptcy may be filed by specific debtors. Those limitations will be discussed in the material which follows.

2.0 Nonprofit Budget and Credit Counseling Agency Briefing

New section 109(h) states that no individual may be a debtor unless they have "received from an approved nonprofit budget and credit counseling agency ... an individual or group briefing ... " in the 180 days prior to filing.[7] This requirement can be waived by a judge after a hearing if it is determined that the person is incapacitated,[8] disabled,[9] or on active duty in a war zone.[10]

3.0 Prior Filings

3.1 In General

The code has limitations on the filing of a new bankruptcy if you have previously filed bankruptcy. For example, section 109(g) states that no individual or family farmer may file a new 7 if in the preceding 180 days (6 months) their prior case was "dismissed by the court for willful failure of the debtor to abide by orders of the court", to appear at any schedules hearing, or to properly move the

[6]11 USC 109(a)

[7]More will be spoken of this requirement and how you can fulfil it later in the text.

[8]11 USC 109(h)(4); ... incapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities ...

[9]11 USC 109(h)(4); ... disability means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing ...

[10]11 USC 109(h)(4)

case forward. The same section prohibits a new filing in the same time period if the debtor "requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay ...".

3.2 Chapter 7

Under former law six years had to elapse from the filing of a chapter 7, 11, or 12 in which the debtor received a discharge to the filing of a new chapter 7. New section 727(a)(8) changes this to eight years.

Section 727(a)(9) has not been changed which states that a debtor must wait six years from the filing of a chapter 12 or 13 in which the debtor received a discharge to the filing of a new chapter 7, unless the debtor repaid at least 70% to unsecured creditors in the prior bankruptcy.

While not a prohibition to filing, new section 727(c)(1) provides that if an individual has been convicted of a "drug trafficking crime" or a "crime of violence" the court can dismiss their case after notice and hearing.

Finally, 727(a)(12) and 522(q)(1) state that a discharge will not be granted to any debtor who owes : (1) a debt from violations of securities laws, (2) fraud in connection with a security, (3) any civil remedy under 18 USC 1964 (racketeering), or (4) serious injury or death to another person in the last 5 years.

3.3 Chapter 13

Under former law only one year had to pass between the filing of a chapter 7 in which a discharge was issued and the filing of a new chapter 13. The new law requires a period of four years to pass between the filing of a chapter 7, 11, or 12 in which a discharge was granted and the filing of a new chapter 13.[11] The new law also adds a provision that two years must pass between the filing of a chapter 13 in which a discharge was granted and the filing of a new chapter 13.[12]

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[11] 11 USC 1328(f)

[12] 11 USC 1328(f)

4.0 Other Limitations

4.1 Chapter 7

Section 109(b) states that railroads, insurance companies, banks, savings banks, cooperative banks, savings and loan associations, building and loan associations, homestead associations, or credit unions except for foreign businesses not engaged in such business in the United States cannot file chapter 7.

4.2 Chapter 9

Chapter 9's are limed to cities and municipalities.[13]

4.3 Chapter 11

While chapter 11's may be filed by anyone, they are primarily for businesses that wish to reorganize their debt or conduct an orderly liquidation of assets.[14]

4.4 Chapter 12

Chapter 12 is only for family farmers and fishermen,[15] where at least 80% of their income comes from farming or fishing.[16] For a family fisherman there is also a debt limit of $1,500,000.

4.5 Chapter 13

Chapter 13 is only available to individuals with regular income whose non-contingent, liquidated, unsecured debt as of the date of filing of bankruptcy is less than $307,675 and whose non-contingent, liquidated secured debt is less than $922,975. Regular income means an income that is sufficiently stable and regular to enable the making of monthly chapter 13 plan payments. Stock brokers and commodity brokers may not file chapter 13's.[17]

[13] 11 USC 109(c)

[14] 11 USC 109(d)

[15] 11 USC 109(f)

[16] 11 USC 109(19A) and (20)

[17] 11 USC 109(e)

5.0 The Means Test

Amendments to section 707(b) further limit the availability of chapter 7 to individual filers with primarily consumer debt in cases where it "would be an abuse" to allow the filing.

> Abuse is always presumed if a debtor has at least $166.67 in net monthly income, or $10,000 projected over five years, available for repaying general unsecured claims. Abuse is never presumed if a debtor's net monthly income is less than $100, or $6,000 projected over five years. Between these two extremes, or "trigger points," abuse is presumed if a debtor's projected monthly income after deductions is sufficient to pay at least 25% of the debtor's general unsecured claims over five years.[18]

The statute sets out a complex two step process for determining abuse that attorneys call the "median income test" and the "means test".[19]

The median income test is used to determine your "disposable income" over the next five years. Disposable income is determined by combining only certain defined sources of income[20] over the last six months, dividing that number by 6, subtracting what the IRS and congress consider to be reasonable monthly expenses, and multiplying the result by 60.

The means test uses the disposable income from the previous test to determine if abuse exists. Abuse is presumed (meaning the debtor may not file a chapter 7) if disposable income is over $10,000 (or 166.67 per month)[21] or if disposable incomes is between $6,000 and $10,000 (or between $166.67 and $100 per month) and is sufficient to return more than 25% to non-priority unsecured debt. This presumption is rebuttable, meaning if special circumstances exist (such as a serious medical condition or military service giving rise to additional justifiable expenses) and a judge agrees the individual might still qualify to file a chapter 7.[22] Abuse is

[18] Williams, Sheila M., *The Bankruptcy Abuse Prevention & Consumer Protection Act of 2005: Law and Explanation* (Aspen/CCH).

[19] See, 11 USC 707(b); The Means Test is sometimes used as a shorthand by attorneys to refer to both tests.

[20] For example: social security income is not included.

[21] 10,000 ÷ 60 = 166.666.

[22] 11 USC 707(b)(2)(B)

not presumed (meaning the debtor "might" be able to file a chapter 7) if disposable income is under $6,000 (or $100 per month) or is insufficient to return 25% to non-priority unsecured debt.

Unfortunately, a result of "no presumption of abuse" is not the end of the story. Any creditor, the court, and the trustee may still file an action under 707(c) if they think it would be an abuse to let a debtor continue in a chapter 7. The law also imposes severe penalties on an attorney who files a chapter 7 if the court ends up determining that such a filing was an "abuse".[23] The purpose of this section may be to encourage attorneys to have their clients file a chapter 13 even if they pass the means test.[24]

It should be noted that the median income and means tests do not use real numbers for portions of the calculations. As a result, your real disposable income (what you have left after paying bills each month) may be higher than the amounts above. If this amount is over $100 you may not be allowed to file a chapter 7.

As a final note, if your "current monthly income" is less than the Utah Median Income for a household of your size, only the court and the trustee may allege abuse.[25] If above that amount, any interested party can allege abuse.[26]

[23] 11 USC 707(b)(4)(B)

[24] This is not the only provision in the new law that restricts an attorney in his ability to "independently" represent his clients.

[25] 11 USC 707(b)(6)

[26] 11 USC 707(b)(4)

Chapter 4
The Automatic Stay

1.0 In General

As indicated previously, the filing of a bankruptcy creates something called an automatic stay. This "stay" limits the actions that creditors can take against you once you have filed for bankruptcy. Some actions are prohibited, some actions are always allowed, and some actions may be allowed. In the material that follows each of these categories will be discussed.

2.0 Prohibited Actions

Subject to the exceptions set forth in 362(b) the automatic stay prevents a creditor from taking any action to collect their debt or improve their financial position in relation to your other creditors. Under the old law this mean that they could not file legal action against you, continue a foreclosure, continue any legal action that has already been filed, garnish wages, perfect a lien or security interest, or call you on the phone. Under the new law these rights still exist but have been modified.

3.0 Allowed Actions

Under former law, bankruptcy did not stop criminal prosecutions, actions to determine paternity, actions to collect alimony, maintenance, or support, or an action by a government unit to enforce a police or regulatory power.[27] Under the amendments to 362(b) this has been expanded to include: (1) all domestic actions, including the filing of a divorce; (2) wage withholding for domestic obligations, (3) suspension of a license under section 466(a)(16) of the Social Security Act, (4) reporting of past due support, (5) the interception or offset of a tax refund, (6) the enforcement of a medical obligation under the Social Security Act, (7) withholding contributions or loan payments on a retirement loan from wages, (8) foreclosure of real property if a stay lift was granted in a prior case in the last two years and such order was recorded, (9) foreclosure of real property if the debtor is ineligible to be a debtor under 109(g)[28] or the case was filed in violation of a court order in a prior case, (10) continuation of an eviction action where the landlord obtained prior to filing an order for possession, (11) an eviction action where the tenant has endangered the property, used controlled substances, or allowed controlled

[27]See, 11 USC 362.

[28]See, Chapter 3, Section 2.1.

substances to be used on the property, (12) a securities action, (13) tax court proceedings, and (14) termination of medicare or other federal health care benefits.

4.0 Actions That May Be Allowed

Under prior law the stay automatically terminated against property of the estate when property was no longer part of the estate and against all other actions when the case was closed, dismissed, or discharged.[29] The stay could also be lifted for cause (such as failure to make the monthly payment on secured property or to prevent irreparable damage).[30]

Under the new law there are additional grounds for lifting (or terminating) the automatic stay. First, the automatic stay terminates automatically 30 days after filing in every case (7, 11, or 13) when a case pending in the last year was dismissed, unless the new case is an 11 or 13 and the prior case was a 7 dismissed under 707(b).[31] Second, there is no stay at all after filing when 2 or more cases pending in the last year were dismissed, not counting a case under 11 or 13 filed after a cased dismissed under 707(b).[32] Third, the stay will be lifted as to any real property after notice and hearing where the creditor proves that the current filing was "part of a scheme to delay, hinder, *and* defraud" involving the transfer of an ownership interest without consent of the secured creditor or multiple bankruptcy filings.[33] Fourth, the stay is lifted as to any secured personal property if the debtor fails to file the statement of intent within 30 days of filing.[34] And, fifth, the stay is listed as to secured or leased personal property 60 days after filing if the debtor fails to reaffirm or accept.[35] It should also be noted that under 521(i) the failure to timely file any required document in any case results in automatic dismissal of the case on the 46th day after filing.

[29]11 USC 362(c)

[30]11 USC 362(d) and (f)

[31]11 USC 362(c)(3)

[32]11 USC 362(c)(4)

[33]11 USC 362(d)(4)

[34]11 USC 362(h)

[35]11 USC 362(h); this appears to be in conflict with the 45 day after the first meeting of creditors period to do the same thing in 521(a)(6).

Chapter 5
Debt Treatment Under Chapter 7

1.0 How is Priority Debt Handled?

1.1 In General

Most priority debt is non-dischargeable, meaning that it does not go away after the filing of a chapter 7. There are some important exceptions, however. These include taxes and student loans.

1.2 What is the Effect of a Chapter 7 on My Tax Liability?

All business taxes are non-dischargeable as are unfiled tax liabilities and timely filed tax obligations that are less than three years old. In the event that you owe personal income taxes on returns that have been filed, and more than three years have passed since the filing and assessment of your tax liability, you have not signed a voluntary extension of the collection period with the IRS, and the IRS has not filed a lien; those taxes *may* be discharged.[36]

1.3 Is it Possible to Discharge Student Loans?

The general rule is that student loans are non-dischargeable. However, if you can prove to the bankruptcy court that repayment of the loan would create an "undue hardship" your student loans may be discharged. It is very difficult to show undue hardship. You must prove that you lack the physical or mental ability to earn sufficient funds to repay the debt. The discharge of student loans in a chapter 7 requires a special addition legal proceeding called an adversary proceeding that must be filed separate and apart from the bankruptcy. Our office does not handle adversary proceedings.

It may be possible for you to seek discharge of your student loans outside of bankruptcy. In limited situations which may include: the closure of the school you were attending while still enrolled, the school's false certification of your eligibility, the schools failure to pay a refund owed to you, or your permanent and total disability; it may be possible to have the debt forgiven or discharged. If you think you might qualify under one of these grounds you should visit the department of educations web site at www.ed.gov and download the appropriate application forms.

[36] 11 USC 523(a)(1)

It should also be noted that under the new law it appears that all student loans are non-dischargeable.[37] Under prior law loans that were not "made, insured or guaranteed by a governmental unity" or funded in "whole or in part by a governmental unit or nonprofit institution" were dischargeable.[38]

1.4 Are Post-Dated Check Loans Priority Debts?

Most Post-Dated Check Loan agreements have language in them stating that you may not file bankruptcy on them. This is incorrect. You must list all of your debts on your bankruptcy including check loans. Further, these loans are usually considered to be unsecured and will be discharged unless they were made or renewed in the last 90 days and the balance was over $500.00.

1.5 Consumer Debt

If you have made large credit charges in the six months prior to filing and have made very small payments or no payments, the credit card company may ask that these debts be declared non-dischargeable because of a demonstrated lack of intent to repay.[39] If you are in this situation, you can minimize your chances of being sued by making the regular monthly payments for at least three months. The longer you make regular payments the less your chances of being sued. The larger the single charge the longer the time which must pass.

2.0 What Happens to Secured Debt?

2.1 In General

Debtors generally have three options in connection with secured debt. They are surrender, reaffirmation, and redemption.

[37] See, 11 USC § 523(a)(8).

[38] 11 USC 523(a)(8)

[39] Credit card companies are becoming much more sophisticated in these matters and are filing more objections to discharge than ever before. If you wish to minimize your liability for this type of problem, you should make no charges on your credit cards during the two months prior to filing. In addition, you should continue to make the regular monthly payment on any credit card with a large balance transfer or large charges in the last six months. The longer the period of time that passes with regular payments the less likely the creditor is to demand repayment in your Bankruptcy.

2.2 What is Surrender?

Surrender occurs when you return to a creditor the property which secures its claim. If you surrender property to a secured creditor, the entire debt is discharged. There is no deficiency as in the case of a repossession or foreclosure.

In cases where you surrender the collateral, the creditor will eventually dispose of it. They will often send you letters indicating an intent to sell the collateral and/or that they have sold the collateral. These letters will often indicate that you are responsible for the balance. If the collateral was timely returned to the creditor and was not damaged post petition prior to repossession, you can ignore these documents. You are not responsible for any deficiency after sale. The one exception being Federally Guaranteed Mortgages, where you will receive a 1099 that shows amounts (the deficiency) that must be included on your next years taxes as income.

2.3 When Should I Surrender Property?

It is generally better to surrender property to a creditor after the filing of a bankruptcy. If the property is surrendered prior to filing, an adverse notation such as a repossession will be added to your credit report. Such notations are usually not added to your credit report if the property is surrendered post filing. Although some creditors will report post filing seizures as repossessions.

A creditor is not allowed to retake their collateral under State Law without a court Order of Replevin unless (a) you voluntarily allow them to take the property or (b) they can repossess it without "breaching the peace" (meaning quietly or without injury to person or property). If you are concerned about a repossession you should not leave the vehicle where it can be taken without your knowledge. Further, if a creditor asks you to voluntarily allow repossession you are not required to consent. You should call the police if they become belligerent. If a creditor provides you with a Writ and Order of Replevin you must immediately give them the motor vehicle.

If you are delinquent in payments on a motor vehicle you should immediately remove all of your personal items from the vehicle so they are not lost in a repossession. The creditor is supposed to contact you and allow you to collect your items, but many do not. If you leave your work tools in a vehicle it may be several days or months before you can recover them. Sometimes you will never get them back.

As a final note, bankruptcy should not be used as a tool to unnecessarily delay the return of secured property to a creditor when you are behind in your payments.

If you wish to retain the collateral after bankruptcy you must be current on your payments. A creditor may not be willing to reaffirm if you (a) have intentionally avoided repossession when behind or (b) have a very poor payment history.

After the filing of a Bankruptcy you should immediately return any property that you intend to surrender. Under the new law, you must surrender the property within 30 days of your first meeting of creditors).[40] If you retain property after the date of filing you should maintain insurance on it since you will be responsible for any damages that take place between the date of filing and when the creditor takes possession.

2.4 What is Reaffirmation?

Reaffirmation is an agreement with a creditor that you wish to retain the collateral and continue making your regular monthly payments.[41] Reaffirmation most often occurs in connection with homes and cars. In each case in which a client indicates a desire to retain an item of secured property a letter is sent by the attorney to the creditor requesting a reaffirmation agreement. Under 524(c) the reaffirmation agreement must be signed (by debtor and creditor) and filed with the court before the case is discharged (usually 60 days after the first meeting of creditors). Unfortunately, many creditors do not respond. In fact, many creditors (including those you wish to continue to pay) will not send you monthly statements after you file.

This creates a dilemma under the new law. New section 521(a) states that you must reaffirm on *all* property within 30 days of the first meeting of creditors, which is contrary to the 60 day limit of 524(c). Further, section 362(h) states (with one limitation that will be mentioned below) that if a debt on *personal* property is not reaffirmed within 30 days of the first meeting of creditors the stay is automatically lifted[42] as to that property. A third date is found in new section 521(a)(6) which requires a debtor to surrender *personal* property that has not been reaffirmed or redeemed within 45 days of filing. The same section indicates that if you have not complied with this provision the stay is lifted and "the creditor may take whatever

[40] 11 USC 521(a)(2)

[41] See, 11 USC 524(c)

[42] See, Chapter 2, Section 9.

action ... is permitted by applicable nonbankruptcy law ..."[43] Nonbankruptcy law says that a creditor cannot repossess or foreclose property unless (1) you are behind in your payments, (2) the contract includes a "bankruptcy" termination clause, or (3) the contract includes an "insolvency" termination clause. Under the old law you could retain the collateral without a formal reaffirmation as long as you continued to make your payments since "bankruptcy" and "insolvency" clauses were deemed void.[44] The new law over rules the *Lowry* case. Thus a creditor can refuse reaffirmation and take back collateral if you are current on payments but your contract includes a "bankruptcy" or "insolvency" clause. Section 362(h) seems to state that the stay is not lifted if a debtor attempts to reaffirm before the 30 day deadline "on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms." However, only sections 521(a) and 524(c) apply to real property.[45]

If you find yourself in this situation post-filing with an uncooperative creditor who will not prepare or sign a reaffirmation agreement and you wish to retain the collateral, you should continue to make your regular monthly payments. However, you must be very careful. If you ever get behind on your payments or your insurance lapses they can immediately take back the property. They will not work with you to catch up payments if you get behind and they may actually refuse to speak to you about your account.

As an additional barrier to reaffirmation, if you are represented by counsel, section 524(c)(3) requires the attorney to certify that the repayment "does not impose an undue hardship" on the debtor *or* a dependent of the debtor. What this means is that if your post-filing budget does not show sufficient funds to pay the normal and recommended living expenses of a family your size (including alimony or support obligations), the debt you wish to reaffirm, and any debt that is non-dischargeable; the attorney cannot sign it.[46]

[43]It appears that no such provision exists with respect to real property and such creditors must file motions for relief from the stay or wait for the case to be discharged before taking action.

[44]In Re Lowry, 882 F.2d 1543 (10th Cir. 1989).

[45]It should be noted that there are those who hold a contrary opinion. See, Joel Marker, *Get Ready for the Bankruptcy Amendments of 2005*, p. 15, Utah Bar Journal 18:4; Jul/Aug 2005; which argues that *Lowry* has been over ruled.

[46]Some creditors like RC Willey are developing agreements that will let you enter a new agreement to re-purchase the same collateral post filing without an attorneys signature. According to one of our local Judges these agreements are valid.

The new law in 524(k) provides new disclosures that must be given to debtors who reaffirm. For example, the agreement must disclose (1) the amount being reaffirmed, (2) any costs and fees accrued as part of the debt being reaffirmed, (3) that additional amounts may come due after signing, (4) the annual and simple interest rate(s) you are being charged, (5) if you have a variable rate the fact that your interest rate may go up or down, (6) each of the items that exist as collateral for the reaffirmation, and (7)a statement of your repayment schedule. In addition, you must be provided the following disclosures:

> Note: When this disclosure refers to what a creditor 'may' do, it does not use the word 'may' to give the creditor specific permission. The word 'may' is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. ...[47]

> Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.
>
> 1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. The , if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).
>
> 2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.
>
> 3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C. ...
>
> 5. The original of this disclosure must be filed with the court by you or your creditor. If a separate reaffirmation agreement (other than the one in Part B) has been signed, it must be attached.
>
> 6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court ...
>
> [8] Your right to rescind (cancel) your reaffirmation agreement. You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court,

[47]11 USC 524(3)(I)

whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

[9] What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

[10] Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

[11] What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A 'lien' is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the security property if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State's law or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you make a single payment to the creditor equal to the current value of the security property, as agreed by the parties or determined by the court.[48]

Next, you must make either of the following statements as part of the reaffirmation agreement:

I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is $_____, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total $_____, leaving $_____ to make the required payments on this reaffirmed debt. I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue

[48]11 USC 524(k)(3)(J)

hardship on me ... [49]

I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.[50]

It is also important to understand that if you reaffirm a debt and later default on your payments, the bankruptcy will offer you no protection and the creditor will be entitled to sue you to collect the balance of the loan after disposing of the collateral.

2.5 What is Redemption?

Some creditors, such as those selling household furnishings and consumer electronics, know that the value of their collateral is substantially less than the amount you owe them. As a result many may allow you to make payment on a reduced balance. The bankruptcy code also provides that if you can make a lump sum payment to a creditor of the current fair market value of their collateral they must give you clear title to the property.[51] This is also called redemption. Redemption is subject to the same time limits as reaffirmation. Redemption may also be affect by changes to section 506(a) which states that the secured value of personal property is it's "replacement value" or the amount you would pay a "retail merchant" for the same item "without deduction for costs of sale or marketing" rather than it's "fair market value".

Some creditors such as RC Willey, will allow you to pay the redemption amount in installment payments.[52] Other companies will require you to pay it in a lump sum. If a creditor will not voluntarily enter into a lump sum redemption , a court hearing can be scheduled before a judge to force them to do so. If you elect to do this, you should be prepared to hire an expert witness to testify as to the properties value. While the court will base its decision on whatever evidence is presented to it, it will prefer competent testimony by a professional. Hearsay or your own

[49]You will need to bring your copies of your bankruptcy papers to court with you since you will need the information on schedule I and J to complete this portion of the reaffirmation agreement.

[50]11 USC 524(k)(4)

[51]11 USC 722.

[52]RC Willey has agents that come to the first meeting of creditors to take care of this matter.

personal opinion may be objected to by the opposing side during a valuation hearing. You should be aware, that there will be an additional charge for such a motion. Further, if the motion is granted you must pay in cash the amount determined by the judge within 48 hours of the hearing.

2.6 Cross Collateralized Debts

A concept that you need to understand in connection with reaffirmation is cross collateralization. Most Credit Union's have you sign an agreement pledging any collateral they may have for any debt as collateral or all other debts that you may have with their institution. What this means in practical terms is that if you wish to reaffirm on a car loan with a Credit Union, you will also have to reaffirm on any credit cards, overdraft accounts, or unsecured notes that you have with them.

2.7 Cosigned Debt

If you do not reaffirm on cosigned debt your cosigner remains liable for the debt. If you redeem your cosigner will owe the difference.

2.8 Debts That Survive Bankruptcy

There are a number of types of debt which attach to real property. These include mortgage obligations, trust deeds, tax liens, mechanics liens, and judgement liens. Each of these obligations survive bankruptcy and remain an obligation against the real property. Certain creditors may not be able to pursue you individually after the filing of a bankruptcy (such as judgement creditors in a chapter 7) but they are still entitled to pursue the property to satisfy their debt. Thus, if the property is not surrendered you may have to reaffirm the obligation, bear the risk that the creditor will eventually foreclose against the property, or if the property is ever sold, the debt will need to be payed at closing.

There is one exception to the above general rules. In the event that the non-consensual debt (tax liens and judgement liens) interfere with the homestead exemption that you might otherwise be able to claim in the property, the bankruptcy court may be willing to remove or reduce the amount of the lien. For example, lets say that you have a home valued at $100,000, it has a first mortgage of $60,000 dollars, a tax lien of $10,000 and a judgement lien of $5,000 dollars. Further assume that you would be entitled to a $40,000 homestead exemption in that home. Because of the tax lien and the judgement lien, your equity in the home is approximately $25,000 dollars. Without these liens your equity would be $40,000 which is the amount of the homestead exemption. As a result, if the attorney were to file a motion under 11 U.S.C. 522 the judge could set aside the judgement lien. It should also be noted that if a lien is not removed, it continues to

accrue interest and costs.[53]

3.0 What Happens to Executory Contracts?

There are two basic options in connection with executory contracts. You may accept the contract, meaning that you either retain the property (or continue receiving the service) and continue to make each of the regular payments as they come due. Alternately you may reject the executory contract which means you cancel the service and return the property if any. Executory contracts are automatically rejected if they are not accepted within 60 days of bankruptcy filing and the stay is lifted as to the property involved.[54] Under former law you could not force acceptance of an executory contract unless the account was current.

The new law also adds confusion to executory contracts. Section 362(h) states that if the contract is not assumed within 30 days after the first meeting of creditors the stay is lifted. This can be more than 60 days after filing as required by 365(d) and (p)(1). Further 365(p)(2) seems to give the creditor the right to reject an executory contract even if you are current and wish to keep the contract. Finally, 365(p)(2) may require one notice to the creditor of your intent to accept the contract and a second notice within 30 days of the first that "the lease is assumed".[55] The new law also states that it is not a violation of the automatic stay for a creditor to contact you if you are behind on your contract payments in an attempt to negotiate a cure when you wish to reaffirm.

4.0 What Happens to Unsecured Debt?

Unsecured debt is discharged, meaning that you no longer have a legal obligation to pay it. However, many individuals who file chapter 7 have a desire to repay one or more of their unsecured creditors. It is perfectly legal to do so, and making payment on a debt which has been discharged in bankruptcy does not re-obligate you on that debt. The creditor may accept whatever payments you choose to make but may not force you to continue making such payments. This can be extremely helpful in those situations where you wish to repay a debt, begin making payments, but then encounter an unforseen problem which prevents you from continuing to pay.

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[53] For more information se, Booklet 2, pp. 87-88, 90.

[54] 11 USC 365(d) and (p)

[55] 11 USC 365(p)(2)

Chapter 6
Debt Treatment Under Chapter 13

1.0 How is Priority Debt Handled?

1.1 In General

Most priority debt must be paid at 100% plus interest in a Chapter 13. There are some important exceptions, however. These will be discussed in the following material.

1.2 Tax Liabilities

All business taxes, timely filed tax obligations that are less than three years old, and taxes that have not yet been filed must be paid at 100% plus interest over a three (3) year period. In the event that you owe personal income taxes on returns that have been filed, and more than three years have passed since the filing, and , you have not filed a voluntary extension of the collection period, or the IRS has not filed a lien for those taxes are considered to be unsecured.

Interest and penalties on tax obligations were generally considered unsecured under the old law and discharged at the end of the plan. The reform act makes unsecured priority taxes, penalties, and interest non-dischargeable. As a result, even though these debts are treated as unsecured in the plan, any portion of these debts that are not paid as part of the plan will still be due and owing at the end of the plan.[56] A new provision allows interest to be paid on non-dischargeable debt if it will not reduce the amount to which unsecured creditors are entitled.[57]

1.3 Student Loans

The general rule is that student loans are treated as unsecured debt. As a general rule you may not repay 100% of a student loan in a chapter 13 unless you also repay 100% of your unsecured debt. In the event that your plan does not pay 100% of the student loans, after your plan is complete, you will still owe the balance of the student loan plus accumulated interest. Any dischargeable student loan is treated as an unsecured debt and any remaining balance is discharged upon completion of the plan.

[56] Just like student loans used to be paid.

[57] 11 USC 1322(b)(10). This applies to all priority debts not discharged in bankruptcy.

1.4 Fraud and Personal Injury

This debt is generally treated as unsecured debt. However, on occasion, a higher percentage must be repaid to these creditors than normally allowed for unsecured claims. Under a recent change in the law any amounts not paid as part of the chapter 13 plan will still be owed after completion of the plan.[58]

1.5 Government Fines & Penalties

Government fines and penalties are generally not dischargable. In addition, criminal fines may not be paid through a Chapter 13 Bankruptcy Plan. You must pay these obligations directly each month as part of your budget. In some cases it may be possible to pay a percentage of restitution through your plan, but you should seek approval of the Criminal Court Judge before you do so. Any amounts not paid in the plan will not be discharged.

1.6 Domestic Support Orders

On going amounts for alimony and child support must be paid monthly as they come due as part of your regular budget. However, past due amounts for child support and alimony may be paid through the plan at 100%. We do not yet know how the law will impact payment of debts ordered to be paid as part of a divorce decree (such as a credit card or old phone bill). Whatever portion is not paid in the plan will probably be discharged.[59]

1.7 Recent Consumer Debt over $500.

While resent consumer debt over $500 is a priority debt that is non-dischargable in a Chapter 7, these debts are treated as general unsecured claims in a Chapter 13 and are discharged upon completion of the plan.

1.8 401K and Other Retirement Loan

The new law provides that payments on these debts may not be altered. As a result they will continue to be paid each month as a deduction on your paycheck.

[58] See, 11 USC 1328(a)

[59] 11 USC 1328

2.0 What Happens to Secured Debt?

2.1 In General

Debtors generally have two options in connection with secured debt. They may surrender the item,[60] in which case the debt is often extinguished; or they may keep the item, in which case payment is made through the plan on the "allowed" value of the creditor's claim. How this claim is calculated has been changed under the new law and will be discussed below.

2.2 Surrender

If you elect to surrender property, the property should be returned to the creditor as soon after the filing of the Bankruptcy as possible. As a result, if you intend to surrender a motor vehicle, you should not expect to continue driving the vehicle for a substantial period of time. Some creditors will allow you to keep the collateral until the first meeting of creditors. However, you have a legal obligation to surrender the property as soon as possible.

If the property being surrendered is a home, the mortgage creditor will often prefer you remain in the home for a period of time until they can actually take possession. This is to ensure that the property is not damaged or vandalized while it sits vacant. Nonetheless, you should be prepared to move as soon as a request is made to do so by the creditor.

Surrendered property is usually assumed to be "surrendered in full satisfaction of the secured creditors claim." This means, the value of the collateral being surrendered is equal to or greater than the amount of debt, no deficiency is assessed against you, which needs to be paid as part of your Chapter 13 Plan. However, in some cases the collateral will be clearly worth less than is owed on it or the creditor will dispose of the collateral after you surrender it for less than its debt. In these cases, they may file a claim in your Chapter 13 for a deficiency amount. This deficiency is treated as an unsecured claim.

If you have luxury items, such as boats, campers, snow mobiles, wave runners, or vehicles valued in excess of $20,000; the court may require you to surrender these items. The theory is that you should not be allowed to retain expensive property with the assistance of the Court and pay only a small amount to your unsecured creditors. The Court will often allow you to keep these items if you

[60] It should be noted that there are some commentators who believe that under the new law you are not allowed to surrender property. David B. Young, *Consumer Bankruptcy Practice*, Galveston, Texas, June 30 - July 1, 2005.

return 100% plus interest to each of your unsecured creditors as part of your Chapter 13. However, each judge and each Chapter 13 Trustee reviews this matter differently and even with a 100% plan, you may not be able to retain certain luxury items. Some have speculated that under the new law debtors may actually be able to retain luxury items so long as the amount required by 707(b) is paid to unsecured creditors.

2.3 Retaining the Collateral

If you determine, as part of your Chapter 13, to retain a secured creditor's collateral, they are entitled to payment, over the term of the plan in equal monthly installments,[61] of the "secured value" of the property plus interest. On rare occasions, if the value of the collateral exceeds the amount of the debt, you may be allowed to pay the payments directly to the creditor. Otherwise, all payments are made through the Court.

Determining the "secured value" of a secured creditors claim is a bit tricky under the new code. The number used is the "replacement" price of the item,[62] unless it is a vehicle purchased within the last 910 days (2.5 years) or it is any other collateral given within the last year.[63] Then the number used is the actual loan balance.[64]

In the event the collateral is valued at less than the debt, something can occur called a "cram down". This means that the secured creditor receives 100% of the *secured*[65] value of the collateral plus interest on the secured amount of their claim with the balance of the debt being considered unsecured. For example:

Car Fair Market Value:	$7,000
Car Replacement Value	$8,000
Car Debt:	$10,000
Unsecured Portion:	$2,000

[61] 11 USC 1325(a)(5)(B)(iii)

[62] 11 USC 506(a)(2)

[63] 11 USC 1325(a)(9)

[64] 11 USC 1325(a)(5)(i)(I)(aa)

[65] Under former law value was determined as "fair market value" or "private party sales value". The intent of the change is to provide a greater return to secured creditors.

Hypothetical Plan Treatment:

$8,000 @ 100% + 7% interest = ~$10,400
+ $2,000 @ 20% = $400

If you are upside down on a motor vehicle, a cram down can be very beneficial to you.

Because collateral tends to depreciate more rapidly than they may be paid down in a Chapter 13, the secured creditor is entitled to "adequate protection".[66] This means that a certain portion of your monthly plan payment prior to Confirmation is ear marked for the benefit of that creditor. Under the new law, these funds are sent directly to the secured creditor until the plan is confirmed. An adequate protection payment does not increase your monthly payment to the Court.[67] The new law also states that the minimum amount paid on a secured creditors claim must be al least the adequate protection amount.[68]

In the event you have a home mortgage, and you decide to retain the home, you must continue to make the regular monthly payments as they come due. This includes second and third mortgage payments if any. As a general rule, you cannot reduce the amount paid to a mortgage holder in a Chapter 13. If at the time of filing, you were behind on your mortgage payments, these arrearage's have traditionally been paid through the court at 100% over a three year period. No one is sure if they must be paid over this same period under the new law. Usually interest is not paid on mortgage arrearage's, because the mortgage arrearage itself is mostly interest.

2.4 Cross Collateralized Debt

Cross collateralized debt is not as much of a problem in a Chapter 13 as in a Chapter 7. The Court will allow you to pick and choose between the secured debts, and you need only treat as secured the items you are retaining. However, you should be aware that the particular financial institution will close your checking account and will no longer do business with you in the future.

[66] 11 USC 1325(a)(5)(iii)(II) and 11 USC 1326(a)(1)(C).

[67] 11 USC 1326(a)(1)(C)

[68] Traditionally this has been 1% of the debt. See also, 11 USC 1325(a)(5)(B)(ii)

2.5 Co-Signed Debt

Cosigned debt may be treated in a number of ways in a Chapter 13. First you may surrender the property if any, and treat the creditor as unsecured. In this case, the creditor can pursue the co-signer for the different between the debt balance and the amount you are paying through your Chapter 13 Plan. Second, you may keep the property and treat the creditor as secured. Any amount not paid as part of the plan become the liability of the co-signer. Finally, you may be allowed to protect the co-signer by paying 100% of the debt.

3.0 What Happens to Executory Contracts?

There are two basic options in connection with executory contracts. You may accept the contract, meaning that you either retain the property (or continue receiving the service) and continue to make each of the regular payments as they come due, if you are current on the account. Alternately you may reject the executory contract which means you cancel the service and return the property if any. Acceptance or rejection of each executory contract you have on the date of filing must appear as a term in your plan of repayment. Executory contracts are deemed automatically rejected at the conclusion of the confirmation hearing if they are not assumed in a confirmed plan.[69]

Traditionally the Court would not allow you to accept executory contracts in a Chapter 13 on luxury items. However, under the new law if you can make the minimum required payment to unsecured creditors you may be able to keep such contracts. Further, in the past if your executory contract payment terminated during the term of your plan, your monthly Plan payment then increased by that amount. This provision may have changed as well although that is uncertain. Under the new code you must submit an annual statement of "income and expenditures" and proof of filing of tax returns.[70]

4.0 What Happens to Unsecured Debt in a Chapter 13?

A major change has taken place in how unsecured debt is treated. First, you are required to pay to unsecured creditors as a minimum the amount they would have received if you had filed a chapter 7 and the trustee had liquidated your non-exempt personal property.[71] Second, a series of calculations are made to determine

[69] 11 USC 365(p)

[70] 11 USC 521(f) and (g)

[71] 11 USC 1325(a)(5); this is often called the liquidation analysis.

your disposable income. Sections 1325(b)(2) and 101(10A) are used to determine your income. Then expenses are determined under 1325(b)(2)(A) and (B) plus 707(b)(2)(A) and (B) if your income is over the Utah Median. Expenses are subtracted from income to get disposable income. The percentage paid to unsecured creditors will be the higher of (a) the liquidation analysis amount or (b) disposable income times the length of the repayment period.[72]

At this point in time we are uncertain as to how disposable income is calculated if your income is lower than the Utah Median. There is a split in opinion. Some say expenses should be calculated using 707(b)(2)(A) and (B) which incorporates IRS Guidelines for certain expenses. Others say expenses are the actual out of pocket expenses which may be lower.

Some have also speculated that the court may impose the old good faith rule[73] on debtors under the Utah Median. This rule required debtors to pay the higher of (a) a minimum of 5% (in hardship situations) to 20% (all other cases), (b) the value of their non-exempt property, or (c) their disposable income.

The local OUST and the chapter 13 trustees have indicated that they will consider any budget expenses up to the IRS guidelines to be reasonable; subject to being overruled by the judges. However, the chapter 13 trustees have also indicated that in order to make plans feasible (pay out all the necessary amounts over the correct period of time) the budget amounts entered on schedule J will probably be lower in most cases than those allowed by the IRS guidelines. This is generally good news for those with high income and bad news for those with low incomes.

5.0 Plan Length

Under the old law a debtor had to make payments over a minimum of three years and a maximum of five, unless 100% payment to unsecured creditors could be made over a shorter period of time. Under the new law the minimum and maximum lengths have not changed. However, if your income is over the Utah Median your are required to pay for five years. The option does still exist for early payoff if all unsecured creditors are paid 100% of their claims.[74]

[72]See, section 5.0 below.

[73]New 1325(a)(7) adds: "the action of the debtor in filing the petition was in good faith." It should be noted that this new section applies to the filing not the proposed plan.

[74]11 USC 1325(b)(4)(A)(ii) and 1325(b)(4)(B).

Chapter 7
Asset Treatment

1.0 Under Chapter 7

1.1 In General

Whether you retain or lose property in a bankruptcy depends on the type of property, the nature of the debt against that property, the amount of debt that you have, the trustee who is appointed in your bankruptcy, and the type of bankruptcy that you file.

1.2 What Happens to Under-Secured Property?

In the event that you have property that is pledged as collateral and the debt exceeds the fair market value of the property, you may surrender, reaffirm, or redeem such property. The Court will have no interest in the property because it cannot be sold for more than the debt.

1.3 What Happens to Over-Secured Property?

Over secured property is when the value of the property exceeds the amount of the debt against that property. For example, a vehicle worth $3000 with a debt of $2000. In the case of over secured property the first question which must be asked is if there is an exemption which can be applied to your equity in that property. If there is an exemption which equals or exceeds the amount of equity in the property and you are willing to reaffirm or redeem, you may keep the property. If there is no applicable exemption or you don't wish to claim it, the property could be sold, the underlying debt paid, and the net proceeds used to help pay creditors.

1.4 What Happens to all the other Property?

As to all other items of property, it is necessary to determine whether an exemption exists with regards to that property. If the value of the exemption meets or exceeds the value of the property you may retain that item. In the event that you have an exemption in property which is less than its fair market value, the property could be sold by the court and your exemption provided to you in cash. For example, if you had a $3500 dollar car and an exemption of $2500 dollars; the vehicle could be sold, $2500 paid to you in cash, and the balance of the proceeds used to pay your creditors. It can take a number of months to receive payment of your exemption after you have surrendered the property to the trustee. If there is no exemption in the property, it can be sold and the net proceeds of sale used to pay creditors.

1.5 What are exemptions?

Congress has determined that individuals filing bankruptcy should be able to retain certain items of property. The theory being that you need certain basic items to sustain your life and start over economically. Exemptions typically include items such as clothing, household goods (like beds, dishes, pots and pans), tools of your trade, and equity in a home.

While congress has establish federal exemptions, they have also given each state the right to set the exemptions that apply to bankruptcies filed within their state.[75] In Utah these exemptions are found in Utah Code Annotated 78-23-1 et seq. Some of the exemptions available for a married couple include $40,000 of equity in real property, a washer, dryer, fridge, freezer, stove, microwave, sewing machine, all beds and bedding, all clothing (excepting furs), a 12 months supply of food, up to $1000 of dining/kitchen tables and chairs, up to $1000 of additional household furnishings and appliances, up to $1000 of items with sentimental value, up to $1000 of books, animals, and musical instruments, up to $3500 of the tools of ones trade, and up to $2500 each in a motor vehicle. A husband and wife may combine their separate vehicle exemptions in a single vehicle.

The new law adds a number of addition complications to determining exemptions. Two of them are as follows. First, for the Utah exemptions to apply you must have lived in Utah *continuously* for the last two years. If you lived anywhere other than Utah during that time, you must use the exemptions of the place where you were residing just prior to that time period.[76] Second, the value of your homestead exemption may be reduced if you disposed of property in the last 10 years with the intent to "hinder, delay, *or* defraud" creditors.[77]

2.0 Under Chapter 13?

As a general rule, you will be allowed to retain all of your property in a Chapter 13. This is because you are making repayment on your debt. However, there are exceptions. First, you may voluntarily surrender property to a creditor. Second, you may sell property (with permission of the court) within a six month period after filing and have the proceeds distributed by the trustee to your creditors. Third, the court may require you to surrender luxury items. And fourth, you must surrender to the trustee each year the amount of any tax refund in excess of $1000.

[75] 11 USC 522

[76] 11 USC 522(b)(3)

[77] 11 USC 522(o)

Chapter 8
Choosing Between the Alternatives

1.0 Are There Any Alternatives to Bankruptcy?

1.1 In General

It is not uncommon for individuals to try other options before resorting to bankruptcy. Some of these options are more helpful than others depending upon your circumstances. A number of these will be discussed below.

1.2 Should I Borrow Money To Get Out of Debt?

Unfortunately getting a loan to get out of debt is more likely to compound your problems than to solve them. Usually, debt consolidation loans only delay the inevitable. The main reason being that the interest that you will pay on the new loan is an additional debt that must be repaid in addition to the original obligations. In some circumstances where you have very high interest debt and are able to convert all of the debt to low interest there may actually be a savings. In such a situation obtaining the loan may be advisable if you can make the regular monthly payments and if you do not incur any new debt. Many individuals after paying off high interest credit card debt with a low interest loan cannot resist the temptation to continue using the credit cards. In addition, you should attempt to pay off the low interest loan as quickly as possible by making double or triple payments.[78]

An interesting new practice engaged in by some credit card companies is to send you an application for a new credit card under a different name with the suggestion that you use it for a balance transfer at a lower initial rate when they realize your debt is high enough to cause you trouble. If you accept this offer, you may find that your credit card debt is suddenly non-dischargeable in bankruptcy because you incurred "new debt" exceeding $500 in the 90 days prior to filing by using the new card for a balance transfer.

Another problem often experienced with debt consolidation loans is the problem of collateral. If you are already in financial difficulty, most lenders will not give you a new loan without securing it in your real or personal property. This is to

[78] You should understand that the length of a loan payment will dramatically increase the amount you repay. Getting a long term loan may seem sensible because the monthly payment is so low, however, you will pay 2 or more times the amount borrowed in interest. For example, a $30,000 loan at 9% over 30 years will be $86,900. $56,900 is money that will not be available for other purposes. Making multiple payments can shorten a long term loan by as much as 25 years saving you over $47,000 in interest in the example given.

ensure that if you file bankruptcy later the creditor is in a better position than if they had given you a signature loan. If the debt consolidation loan does not solve your financial difficulties and you end up filing a chapter 7 bankruptcy you must choose between surrender of the collateral, reaffirmation, or redemption. This means that if you have pledged essential property you will end up paying the loan in one way or another to keep the property. Further, if you have "puffed" (exaggerated the value of your property) on the loan application, you will be guilty of fraud which may make the loan non-dischargeable.

If you end up filing a chapter 13, the creditor will be considered secured and thus entitled to greater payment than for an unsecured note. This will make your court plan payment higher than the income you may have available. As a general rule converting unsecured debt into secured debt is a bad idea.[79]

1.3 Should I Get a Second Mortgage on the House?

Many individuals look at a second mortgage or a home equity line as a way of using the equity available in their home to get rid of high interest debt. Unfortunately, most home equity lines or second mortgages are high-interest debt themselves. Not only does this type of debt have the problems indicated above, but it puts the family home at risk and increases the monthly expenditures for basic necessities. Once having obtained a second mortgage, it is not uncommon for individuals to continue the spending patterns which got them in trouble in the first place, and to resort to additional refinancing until such time as the home is lost through an inability to make the mortgage payments. It should also be noted that debts which are attached to real property survive bankruptcy and must be payed unless the property is surrendered. Getting a second mortgage is almost a guarantee that you will be talking to a bankruptcy attorney within 6 months to 2 years.

1.4 Should I Sell Property To Get Out of Debt?

If you are considering using the equity in your home to pay high interest debt, it often makes more sense to actually sell the home and use the proceeds to retire debt. While there are costs associated with the sale of property (usually 7% of the total purchase price) you can negotiate these costs and they will often be less than the interest you will pay on a home equity loan. For example, assume you are borrowing $40,000 dollars against the equity in your home at 14% interest. Your

[79] Lenders will tell you it is a good idea because you can deduct the interest. This is false. First, interest is only deductible is real estate is involved. Second, the actual deduction is only a percentage of the interest you actually pay. Normally less than 21%. So, on your $30,000 loan you will pay $2,800 in interest and get a net deduction of $590.

typical monthly payment will be $473.95 over a period of 30 years this will result in total payments of $170,622.00. Subtracting the original amount of the loan shows that you are paying $130,622.00 in interest payments.

If you have luxury items such as expensive cars, boats, big screen TV's or expensive firearms; it may be wise to sell these items if doing so would eliminate your debt. As indicated above, if you were to file a chapter 7 bankruptcy you would most likely lose these items to the chapter 7 Trustee who would sell them in an attempt to pay off your creditors. In a chapter 13, the court would require you to surrender these items if you are still making payments on them. In some jurisdictions the court may even require you to sell them in an effort to reduce your debt.

In the past, there was something called the "Bulk Sales Act". This allowed debtors to sell an on-going business free and clear of the claims of creditors. This money could then be used to pay the claims of creditors or at least create a reservoir of cash from which negotiations could be made. Currently the only way to sell assets free and clear is in a bankruptcy.

Another alternative is called "An Assignment for the Benefit of Creditors". This is where a third party takes control of property of the debtor and then sells it, using the proceeds to pay the claims of creditors. Unfortunately, unless the property is substantial, there will not be enough money after sale to pay all of the claims of the creditors. In which case, the remaining debt is still owed and creditors can still pursue the debtor.

1.5 What About Voluntary Debt Repayment Plans?

While this appears to be an ideal solution, that avoids bankruptcy, voluntary payment plans often do not work. First, they are voluntary. This means that all of your creditors must agree to take monthly payments. If you have even one creditor who will not participate or who later changes their mind, that creditor could obtain a judgement against you, begin garnishing your wages, and then you would not have the ability to make your monthly payment. It should also be noted that the attorney has not seen a voluntary payment plan managed by the debtor actually work since the mid-80's.

Voluntary payment plans managed by a non-profit company have a slightly better track record. However, they have problems that you should be aware of. First, you are at the mercy of the reputation and honesty of the third party handling your plan. Unfortunately, a number of such services are not as reputable as they should be. Some will tell you that they will do things that they are not capable of doing, such as eliminating interest. Some will indicate that all of your creditors

have reached agreement on your repayment plan, when in fact they have not. As a result, you continue to receive billing notices while being told that the debt is being handled by the credit counseling company. Others will simply pocket the money you send to them, tell you that they are paying your creditors when they have not, and then disappear. A reputable company will contact all of your creditors with a form on which the creditor indicates what they are willing to do (reduce interest, reduce principle, waive late payments, etc.). Once all the creditors have responded with a commitment to participate, they will then sit down and determine your monthly payment. If you decide to participate in such a plan, ask to review all the signed forms before making your first payment.

Second, because the plans are voluntary most credit card companies will not reduce interest or waive over limit or non-minimum payment charges, although they will reduce the monthly payment. This means that the debt is accumulating faster than it is being paid off. As a result, the plans almost never pay out within the promised time period. Many clients come in after three to five years in a voluntary payment plan when they discover that their debt is higher than when they originally started.

Third, it should be noted that these companies cannot help with post-dated check loans, secured debts such as mortgage, car, or furniture payments, or many priority obligations like taxes or child support. You will rarely be able to reduce the payments or interest on these kinds of debts.

Fourth, these companies normally report participation in their program to the Credit Bureau. This can impact an individuals credit for up to three years after making the final payment on their program.

And finally, voluntary debt repayment plans generally do not work if your unsecured debt exceeds three to five thousand dollars. This is because the interest is causing your debt to increase faster than you are paying it down. For a plan to work you must be paying all the currently accruing interest plus something towards principle.

1.6 What About Using Lump Sum Settlements?

An effective way of retiring debt can be to negotiate a lump sum settlement with a creditor. Attorneys often call this an accord and satisfaction. This occurs when you pay a creditor less than the full amount of its claim to satisfy the debt. If you have an amount of cash (or can borrow such an amount) totaling between 40-60% of your debt you may be able to negotiate a cash payment with your creditors. There are also a number of services which will do this for you. Typically they charge a percentage of what they have been able to save you.

There are a few problems with settlements. First, most creditors will not negotiate with you unless you are at least three month in arrears on the debt. Second, you must have a source of ready cash that the creditor is not aware of. Third, you will need to make the payment agreed upon within 2 to 5 days. Fourth, these agreement need to be reduced to writing and signed by both parties. Otherwise you will find that the creditor promptly forgets the agreement. Fifth, if you are dealing with a collection agent you will need to obtain proof of their authority to collect the debt. Otherwise you could pay and settle only to find you still owe the balance to the original party. And finally, if you end up filing bankruptcy, the creditor may be required to refund the money to the bankruptcy court trustee if you paid more than $600 in the 90 days prior to filing.

As a final note, if you get behind on your mortgage payments the lender will usually not accept partial payments thereafter. They may even send a payment back to you if it does not bring the mortgage current. If this happens, place the money you do have available and any returned payments in a separate savings account. Do not spend it on something else. If the bank later offers you a workout plan they will require a substantial down payment. The money in savings may make a workout possible. If you have spent the money, you must either file a chapter 13 or lose the home.

2.0 How Can I Tell If I Need to file a Bankruptcy?

If you answer yes to any of the following questions it may be an indicator that you need a bankruptcy.

1. Are you a single individual or a family with one income and more than $8000 in unsecured debt?
2. Are you a two income family with more than $12,000 in unsecured debt?
3. Have you been making only the minimum payments (or less) on your credit cards for six months or more?
4. Is your house more than two payments behind?
5. Are you behind on your utility payments?
6. Are you using a credit card to pay for necessities like food or clothing?
7. Do you have a second mortgage and credit card debt?
8. Has your wife gone to work to pay the interest on your debt?
9. Has your wife gone to work to pay for basic necessities like food and clothing?
10. Are you paying for more than two vehicles?

A yes answer to any of the questions above indicates a serious financial situation in which your monthly expenses exceed your regular income.

In the attorneys experience he has noted that if consumer unsecured debt exceeds 8,000-12,000 dollars, most individuals will *never* be able to pay the debt off. Typical credit card debt is structured so that if you were to make only the minimum payment each month, always pay on time, and never incur new debt, it would take approximately 46 years to repay the obligation. If you miss one payment per year or are late on your payments it can take more than eighty years to repay the debt.

3.0 How Do I Know Which Bankruptcy is Best For Me?

Chapter 7's tend to work best for individuals who are: young, have a large amount of debt, have few assets, have little income, or are elderly. Chapter 13's work best for individuals who have a small amount of debt, who have substantial assets, are delinquent on payments for a home or vehicle that they want to keep, or have debts that they could not discharge in a chapter 7 such as taxes or child support. Chapter 13 is primarily designed for individuals who have suffered a short term reduction in income but are generally able to handle their debt.

4.0 What Are the Ethical Considerations of Filing a Bankruptcy?

The answer to this question is based in large measure upon your own personal circumstances. If you have incurred debt for personal or luxury items without having the intent to pay for those items or you have run up large amounts of consumer debt and file bankruptcy every six years as a life style choice; it is probably not ethical for you to file bankruptcy. However, if you are like most individuals who feel a hesitancy to file for bankruptcy because you feel responsible for the debts that you have incurred or you do not wish to harm your creditors, that very hesitancy indicates that you are not acting unethically. Bankruptcy is designed to help people who get in over their heads whether it be through poor life choices (from which they have learned), or who have had no control over the debt (such as catastrophic medical expenses for a child).

Occasionally individuals have told me that their religious leader has indicated that bankruptcy is contrary to “God’s will”. However, such religious leaders have apparently failed to take into account that God through Moses established a bankruptcy code for the children of Israel. This is found in Deuteronomy Chapter 15. Nor, that religious leaders have filed for bankruptcy relief. It is interesting to note that the time periods in the Biblical bankruptcy code are similar in some respects to the former law.

The real determination that must be made from an ethical standpoint is a balancing of interests. For example, on one side of the ledger is the need of the creditor to receive payment and ones moral obligation to pay debts that one has

incurred. On the other side of the ledger are a number of factors including ones ability to repay, an individual’s obligations to spouse and/or children, and an individuals obligations to society.

If the debt is so large that it would be impossible to repay, such a situation weighs in favor of filing bankruptcy.

Research has shown that the primary cause of divorce is debt. Unfortunately, the inability to pay ones obligations as they come due causes tremendous emotional stress especially for women because of their inherent need for security and for men because of their inherent need to provide for wife and family. The inability to have these needs met often result in divorce with its attendant ills. The filing of a bankruptcy which can keep a family together benefits society as a whole and therefore weighs in favor of filing.

Research has further shown that if a father, through working more than one job, is unable to make a meaningful contribution in the lives of his children or if the mother is working outside of the home, the children will tend to delinquency and criminal activity. This problem is further compounded because women who are employed outside of the home to provide for basic family necessities often tend to feel bitter about doing so, which leads to marital discord. As a result, discharging debt so that the mother can remain in the home taking care of the children and the father through working no more than one full time job can maintain meaningful relationships with his wife and children weighs in favor of filing bankruptcy.

Finally the strength of a society is founded upon the strength of its individual family units, the ability of its citizens to participate in the political process, and the ability of the father to make religious practice an important part of his family’s life. If a husband and father is so burdened by debt that he lacks the emotional ability or time to do these things and the filing of bankruptcy will remedy that lack, society is benefitted by the filing of bankruptcy.

Often, individuals will be concerned because of the perceived moral stigma of having filed bankruptcy. Research has shown that individuals approaching bankruptcy today have the same concerns as those filing in the late 1800's. What has apparently changed is a public acceptance of the consumer debt that naturally leads to bankruptcy. Up until the mid 1900's most of society believed that debt should be avoided at all costs. Unfortunately that situation has changed and more individuals are providing greater amounts of consumer debt to a public more willing to incur it. Research has shown that consumer bankruptcy filings are directly linked to the amount of national consumer debt. As consumer debt rises so do bankruptcy filings. It may also be important to note, that while specific individuals and businesses can in fact be hurt by bankruptcy filings, the economy

at large absorbs the losses from bankruptcy filings and most credit institutions make up for those losses in the form of interest rates, charges, and fees.

5.0 Does My Spouse Need to File Bankruptcy With Me?

It is not always necessary for both spouses to file bankruptcy. The question that must be asked is whether both spouses are responsible for the debt that is being sought to be discharged. Under current law debts are divided into separate and marital obligations. You are not responsible for the separate debts of your spouse. However, you may be responsible for the martial debts incurred by them even though you did not sign the contract. Thus if your spouse has an obligation for food, clothing, shelter, utilities, or medical expenses you will probably be responsible for those debts. If only your spouse files bankruptcy, these creditors are then able to pursue you to collect the debt. Because it is often cheaper and easier to file a joint bankruptcy then to fight the claims of marital debt creditors it may be better to both file bankruptcy.

6.0 Can I Change My Mind After I File?

It is not uncommon for an individual's circumstances to change once they have filed bankruptcy. As a result you may find it desirable to dismiss or convert your bankruptcy proceeding. A chapter 7 will be dismissed automatically if you fail to appear at the first meeting of creditors (unless the trustee or one of the creditors objects) or you may file a motion with the court requesting that your bankruptcy be dismissed. You should be aware, that if you file a chapter 7 you may not actually be able to dismiss the case once you have started if the court determines that it would be in the best interests of your creditors to keep you in a chapter 7. However, a chapter 7 can be converted to a chapter 13.[80]

A chapter 13 will be dismissed if you do not appear at the first meeting of creditors, do not make your first plan payment (or any payment thereafter) or by filing a request with the court that the case be dismissed. In a chapter 13 you have an absolute right to dismiss your bankruptcy (unless it was previously converted from a chapter 7. A chapter 13 can also be converted to chapter 7.[81]

[80] 11 USC 348, 706 and 707

[81] 11 USC 1307

7.0 How Does Bankruptcy Effect My Job Opportunities?

According to federal law you can not be discriminated against for exercising your federal rights. This should mean that no employer could use your bankruptcy filing against you. However, the filing of a bankruptcy can affect your employment if there is a "rational basis" for the employer's decision. For example, you may not be able to obtain a seat on the stock exchange, or work for the state department, or the CIA if you have filed bankruptcy. The idea is that an individual with financial problems may be more likely to mis-manage someone else's money or be susceptible to bribery. Thus, if your current employment requires financial responsibility, the filing of bankruptcy could have an impact upon you.[82]

8.0 Can I Minimize the Consequences of Filing?

8.1 In General

Advance preparation can improve the impact of filing bankruptcy. However, the time between your preparations and the actual filing of bankruptcy can make a big difference. A number of the typical options and their actual impact are discussed below.

8.2 Can I Give Away Property Prior to Filing?

As part of a bankruptcy filing the court requires you to disclose any transfers of property made during the last year. Any transfers made within this time period, if they are substantial (meaning over $600) can be set aside by the court. Thus if you were to give a $2000 car to a relative prior to filing, that transfer would have to be disclosed, and the trustee would have the option of setting aside the transfer, obtaining the vehicle and selling it for the benefit of your creditors. If a transfer occurs more than one year prior to filing, you may still lose the property if you are continuing to use it. The bankruptcy court requires you to disclose any property which you are using that belongs to another person. Thus, if you transferred your $2000 car over a year ago but continue to use it, make repairs on it, and pay for the insurance, the trustee could set aside the transfer and sell the property.[83]

[82] 11 USC 525

[83] 11 USC 547

8.3 Can I Sell Property Prior to Filing?

You can sell any property that you wish prior to the filing of a bankruptcy as long as you sell it for its actual value. If you sell property for less than its fair market value, the bankruptcy trustee can set aside that transaction, obtain the property, and sell it to help pay unsecured creditors. If you sell property and have not yet been fully paid for the property, the payments are an asset that belongs to the court and can be used to pay your creditors.

An additional consideration in the sale of property is the dollar amount of the proceeds. If you receive more than $1000 the court may require you to account for the use of those funds. If you have retained a share of it in cash the court will take those funds. If you have paid any creditor more than $600 within the 90 days prior to filing, that creditor may be required to refund the money to the court. Further, if you give any of the proceeds to a relative that money may have to be given back to the trustee.

8.4 Can I Pay Off Certain Creditors Prior to Filing?

There are a number of rules in connection with making pre-petition payments to creditors. If these rules are violated the creditor can be required to give the money back to the court so that it may be redistributed pro-rata to your unsecured creditors. First, you may make any payments on regularly scheduled debts as they come due. Therefore if you have a $1200 monthly mortgage payment, you may make your monthly payments without any harm coming to that creditor. Second, you may pay less than $600 on any bill. As long as you do not exceed this amount the bankruptcy court will not require the creditor to give the money back. However, if you pay more than $600 and the debt is an obligation that is past due, the court could ask for return of those funds.[84]

8.5 Can I Give a Security Interest to A Creditor Prior to Filing?

[This section has been deleted because the author is no longer legally allowed to give this advice.]

8.6 Loading Up

Loading up is to when you convert non-exempt assets (such as cash) into exempt assets prior to filing. Since the Court can take any cash in your bank account on the date of filing, the idea is to convert that cash to a possession that is

[84] 11 USC 547

exempt under the Code. While bankruptcy planning makes sense, you should be very careful about the assets you purchase prior to filing. Some of them may be non-exempt.

Loading up also includes the concept of incurring secured debt prior to filing. As indicated above, under the new law attorneys are expressly forbidden to tell you the advantages of such purchases and may not encourage you to incur any debt prior to filing.[85] It should be noted that there is an interesting provision of the new law that 403(b) and 414(d) retirement loans are not classified as debts[86] (although they are non-dischargeable). Thus, an attorney *might* be able to tell you the advantages of incurring 403(b) or 414(d) loans.

8.7 Hiding Assets

A more common problem are debtors who attempt to hide assets from the Court. The Court has extraordinary powers to bring back property that you may have given to another person for less than its fair market value prior to filing. As a result, you should generally not attempt to dispose of assets prior to filing. If you have specific questions about a particular item, you should ask the attorney.

9.0 Do All Creditors Have To Be Listed?

The short answer is yes. All debts must be scheduled with the name and address of the creditor. This is so they can receive notice of the bankruptcy and get their fair share of any money distributed by the trustee. The failure to list a creditor may mean that those creditor's rights are not affected by that bankruptcy. Therefore they may still be entitled to sue and collect their obligation against you. Sometimes you may wish to omit a debt because it is to a relative or you do not wish the party to know you have filed. While the attorney sympathizes with this desire, it should clearly be understood that it is a violation of the law not to list each of your creditors. When you sign the bankruptcy statements and schedules you sign that they are true, accurate, and complete. In addition when you appear for your first meeting of creditors you must assert under oath in answer to the trustee's questions that you have listed all of your creditors and all of you assets.

[85] See, 11 USC 526. However, the attorney can explain the disadvantages of incurring debt (ie. that it may be non-dischargeable).

[86] 11 USC 523(a)(18); ... nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue code of 1986 constitutes a claim or a debt under this title ...

Chapter 9
Case Summary and Outline

1.0 All Cases

1.1 Consultation with Attorney

The first step in a bankruptcy filing with our office is a consultation with the attorney. During this consultation the attorney will review all of the information presented above and discuss the impact of the various types of bankruptcy on your situation.

1.2 Questionnaire Completion

At the end of the initial consultation the attorney will provide you with a questionnaire, a number of disclosure documents, a checklist, and other papers to complete. This questionnaire contains all of the information which is necessary to prepare the bankruptcy pleadings that must be filed in your case. Once you have completed the questionnaire to the best of your ability, made copies of all the documents that it references, and obtained the Credit Counseling Certification, you will make a second appointment to review the material with the attorney.

1.3 Document Review

At your second meeting with the attorney he will review the questionnaire and the documents you have gathered. If the documents are complete the attorney will retain them and collect the initial retainer.[87] If they are incomplete, he will note in red the deficiencies and then return the documents to you. Once they have been completed they should then be returned to the attorney (or one of his staff members) with the initial retainer.

1.4 Pleading Preparation

Once the completed documents and the appropriate fees have been paid, one of the paralegal's in the office will begin the preparation of your actual bankruptcy paperwork (Alie Chlarson for Chapter 7's and Laura Jones for Chapter 13's). Once the papers are completed, which usually takes four to five days (longer in a complex or business case), you will receive a phone call to return for a third appointment to review and sign the papers.

[87]For a discussion of how this amount was calculated please see Chapter 20 in Booklet 2.

1.5 Pleading Review and Signature

During the third meeting with the attorney he will review the pleadings page by page with you. Once the documents have been reviewed they must be signed by both you and the attorney. You may not sign these pleadings for your spouse. They must sign their own original signatures to the pleadings and must sign them in front of the attorney.

1.6 Credit Counseling Certification

Under the new law you must have attended (in person, by phone, or online) a "briefing" from an "approved nonprofit budget and credit counseling agency" that outlines "the opportunities for available credit counseling" and performed "a budget analysis" within the 180 days prior to filing[88] Upon completion you will receive a certificate and a copy of the budget. These documents must be provided to the attorney and are filed with the Court at the time of your bankruptcy filing.

1.7 Filing

Once the papers are signed, they are completed, and then filed with the court. Cases are usually filed at 1 pm on Saturdays. This is to reduce costs to our clients and optimize the scheduling of the attorneys time. If your case needs to be filed quickly to stop a foreclosure, judgement, garnishment, or any other action by a creditor, please note that information for the attorney in writing on your questionnaire.

1.8 Court Notice

The court processes your filing over a period of ten to fourteen days and mails a notice to each of the creditors, to you, and to the Attorney. This notice will indicate that you have filed bankruptcy and sets forth the date of your bankruptcy hearing, which is approximately thirty to forty-five days after your case is filed. You must attend the hearing. The attorney will be there with you.

1.9 Hearing Preparation

Shortly after you receive your notice from the court, you should also receive a notice from the attorney with some basic instructions and a request that you contact his office, so the attorney can meet with you and prepare you for your hearing. At this meeting he will explain how to get there, and explain exactly what will happen.

[88]11 USC 109(h)

Much of what goes on at your hearing depends upon the trustee appointed in your case.

2.0 Chapter 7

2.1 Financial Management Class

New Section 727(a)(11) requires debtors to attend "an instructional course concerning personal financial management" after the filing of their case. If a certification of completion of this course is not filed with the court you cannot receive a discharge. This course should be completed prior to the hearing.

2.2 The Hearing

Your Hearing will follow a standard format that will be explained in Chapter 10 of Booklet 2. The court schedules hearings in one hour blocks of time. You will be scheduled at the same time as 9 to 20 other individuals. Your hearing will be held in the Provo Library.

2.3 Interim Administration

Interim administration might be defined as what occurs between the first meeting of creditors and the obtaining of a discharge. This is usually the time when proofs of claims are filed by creditors, property may be abandoned or turned over to the trustee for liquidation, amendments made, petitions or adversary proceedings filed, and reaffirmations, redemptions, or surrenders completed. About two months will pass between your first meeting and the issuing of your discharge.

2.4 Certification Under 727(a)(12)

New section 727(a)(12) provides that 10 days before the discharge is issued a hearing must be held to determine that each debtor has not been convicted of (nor is there pending an action for) a securities law violation or intentional injury to an individual in the last 5 years.

2.5 Discharge

In a Chapter 7, approximately three months after your hearing the court will issue you a discharge. This notice will come in the mail and in most cases means that your case has been completed.

3.0 Chapter 13

3.1 Financial Management Class

New Section 1328(g) requires debtors to attend "an instructional course concerning personal financial management" after the filing of their case. If a certification of completion of this course is not filed with the court you cannot receive a discharge. This course should be completed prior to the hearing.

3.2 The Hearing

Your Hearing will follow a standard format that will be explained in Chapter 10 of Booklet 2. The court schedules hearing on one hour blocks of time. You will be scheduled at the same time as 9 to 20 other individuals. Your hearing will be held in the Boston Building in Salt Lake.

3.3 Confirmation

Approximately 45 days after your First Meeting of Creditors, a second hearing will be held. At this hearing, the Judge will determine if you qualify for relief under Chapter 13 and if your plan meets all the legal requirements. If so, the Court will enter an Order called a Confirmation Order. After that you continue to make your regular monthly payments for the next three (3) to five (5) years. At the present time it appears that you must attend this hearing in Salt Lake. It is hoped that the court will quickly develop consent procedures (as existed under the old law) so debtors do not have to take time away from work to attend this hearing.

3.4 Claims Review

Under the new law, the claims bar date (the deadline for creditors to file requests for payment) now takes place after the confirmation hearing. This means that your repayment proposal (plan) must be submitted before the actual debts that must be repaid are fixed. This can obviously result in problems. If anyone files a claim that appears to be incorrect, the attorney will file an objection. In some cases valid claims will be filed that are greater in amount than the client disclosed in his or her questionnaire making the plan not longer be feasible (meaning it will not pay out the required percentages to all creditors). This will usually result in the case being dismissed at the trustee's request.

3.5 Interim Administration

Interim administration might be defined as what occurs between the confirmation and the obtaining of your discharge. This is the time when objections

to claims and payments to the trustee are made. Three to five years may pass between confirmation and the issuing of your discharge.

3.6 Discharge

In a Chapter 13, once you have made the final payment on your plan, the Chapter 13 Trustee's office will do an audit of your case. Once that audit is completed, a notice will be sent to the Court and a Discharge will be issued. This notice will come in the mail and a copy will also be sent to each of your creditors.

Chapter 10
Getting Started

1.0 Completing the Questionnaire

1.1 In General

Once you have determined to file bankruptcy, it is necessary to complete the client questionnaire. It is important that you be *as accurate and as complete as possible* in answering each of the questions on the questionnaire. Be sure to *read carefully and follow the instructions* in the questionnaire and provide each of the documents on the checklist.

The questionnaire is confidential, in that it is generally not viewed by the court or the bankruptcy trustee. If in doubt whether you should list certain information, put the information down and let the attorney determine the legal significance of the information and whether it should be included in the final documents presented to the court.

1.2 Typical Problem Areas

1.21 Emergency Filings

If your case needs to be filed quickly to stop a foreclosure, judgement, garnishment, or any other action by a creditor, please note that information on the second page of the Bankruptcy Questionnaire. In addition, you must supply the Attorney with a copy of the Writ of Garnishment, Notice of Sale, or Complaint; and if appropriate, the Name of the individual in your payroll department that handles garnishments and their fax number. Often clients will neglect to complete this portion of the questionnaire and thus the attorney is unable to send out the appropriate notices.

1.22 Incomplete Information

The attorney cannot complete the filing of your bankruptcy without complete information. He has no discretion under the new law. You should understand that you are the primary source of information the attorney has regarding your financial affairs. Please do not tell the attorney that you don't know the information. That will not excuse failing to provide the information. Congress requires you to go out and find it so the attorney can place it on your pleadings. In some instances this may require you to contact your creditors and ask for copies of prior billing statements, or contact your bank and ask for prior monthly statements. You will be given an instruction packet of where to obtain most of the information you will

need.

1.23 Illegible Answers

Please write legibly. If we cannot read your writing we cannot be responsible for errors on your paperwork.

1.24 Omitted Creditors

If you leave off any debts the court will require you to pay an additional filing fee before these debts can be added to your bankruptcy. Until a creditor is listed on your bankruptcy paperwork, those papers are filed with the court, and notice is received by the creditor; the creditor can still pursue you in attempts to collect their debt. Corrections to you paperwork must be requested in writing in a timely fashion.

1.25 Omitted Property

It is important that you be accurate in supplying information to the attorney. Many individuals believe that if their possessions are of inconsequential value they need not list them. This often includes things like: jewelry, bedding and linens, dishes, pots, pans and silverware, and small appliances. If you omit property from your schedules you may be subject to sanctions from the court including: confiscation of the jewelry you are wearing at the time of your court hearing, dismissal of your bankruptcy, or you may be subject to criminal prosecution (which can include a $5,000 fine and a 5 year jail sentence). If the attorney knows you have misrepresented information on your bankruptcy papers and does not tell the court he can be subject to criminal sanctions and could lose his license to practice. As a result, do not ask the attorney to lie for you.

1.26 Unanswered Questions

Many clients seem to expect the attorney or his paralegal's to complete the questionnaire for them. As a general rule we cannot do this. The questionnaire is an important document that must be completed by the client for disclosure and liability reasons under the new code. If you have difficulty reading, ask a friend or relative to help you. Most of the questions have been simplified (from the original court documents) so that they can be understood by almost anyone who will take the time to read them. If you do not read the instructions, you will not know how to complete the questionnaire. After you have done your best, call and ask for assistance as set forth in the questionnaire.

In rare instances the attorney or one of his paralegal's may assist you in the actual preparation of the questionnaire. However, you should be prepared to pay extra for this service at the time it is rendered. $190 an hour in the case of the attorney and $80 an hour in the case of a paralegal. You must still bring in all of the supporting information and the assistance will be limited to reading and explaining the questions and writing down the answers you verbally provide. We cannot look in your papers to find the answers for you. We are required to use those papers to make an independent verification of the information you provide after the questionnaire has been completed.[89]

2.0 Meeting with the Attorney

Once you have completed the questionnaire to the best of your ability, you should make an appointment to go over the questionnaire with the attorney. Do not bring children with you to this meeting. He will review it carefully noting any items that are incomplete and any additional information that he may need. If the questionnaire is not complete, he will return it to you. If there are major problems with your questionnaire, you should make a new appointment to meet with the attorney to review the questionnaire a second time. If the questionnaire needs only minor corrections, the attorney will direct you to bring the questionnaire back without the necessity of an additional meeting with him. You may give the questionnaire when it is completed and the balance of the require documents to the appropriate paralegal. She will review it briefly with you before beginning to prepare it. If the questionnaire is still incomplete it will be returned to you. Do not simply drop off a questionnaire. It must be reviewed and accepted by someone.

[89] 11 USC 707(a)(3)

Chapter 11
Typical Pre-Filing Concerns

1.0 The Hearing Date

The attorney has no control over when the court may schedule your case for hearing. Hearings are usually scheduled 30 to 45 days (give or take a week) after the case is filed. If you know that you will be unavailable or out of town during certain times, please note that information in writing for your attorney so that he can properly plan the filing of your case.

2.0 Pending Foreclosure

If there is a foreclosure pending against your property on the day you file, and your bankruptcy gets dismissed for any reason (such as a failure to appear at your first meeting of creditors or to cooperate with the trustee) you may not be allowed to re-file for 180 days. This is to give your creditor time to complete a foreclosure before you can re-file.

3.0 Taxes

If you have any unfiled state or federal tax returns, they must be filed before the attorney can file your case. Any tax refunds that you may be entitled to on the day of filing belong to the Court and may be taken to help satisfy the claims of your creditors. This can include returns that you are not required to file until the following year. For example in November you have already earned 11/12th of the return you may receive the following year. In a chapter 13 you will be required to contribute any refunds in excess of $1,000 to the court each year of your plan.

If you have received a substantial tax refund prior to filing, it is important that at least one month pass for every one to two thousand dollars of the tax refund so that a reasonable amount of time will have passed for the spending of the refund. If the trustee believes that an insufficient amount of time has passed, the trustee can request copies of financial records to determine what was done with the tax refund. This is to ensure that no creditor has received a preferential transfer.

4.0 Mortgage Payments

If you have a home which you wish to retain in bankruptcy you must continue to make all the regular mortgage payments after filing, and you must be current at the time you execute the reaffirmation agreement.

5.0 Utilities

If you list utilities on your bankruptcy, you must post a new deposit within 20 days if you wish to continue service. Your deposit will often be two times the largest monthly bill you have had with that service.

6.0 Non-Exempt Property

It is important to understand that you may lose some property if you file a bankruptcy. Your attorney will do all he can to minimize that possibility. However, if you are concerned about specific items of property you should discuss them with the attorney.

7.0 Large Income or Expenses

If make a large amount of income (above the Utah Median) the court may require you to provide proof of the payments you make towards your monthly expenses. In addition, the court has guidelines on what it considers appropriate. If your expenses exceed these amounts, the court will want to know why your expenses are so high and will require canceled checks showing your actual expenditures over the last three months. If they deem your current budget to be unreasonable, they may request that you convert your chapter 7 to a chapter 13.

8.0 Government I.D.

At your first meeting of creditors you will be required to present original photo ID and original proof of Social Security number. This same ID must also be presented to the attorney and copied prior to the hearing. If you do not currently have such ID you will need to obtain it. If you go to the Social Security Administration (485 N Freedom Blvd [200 W] in Provo) to get a new card, please have them write the social security number on the receipt. If your drivers licence has your social security number on it you do not need a separate social security card for the hearing.

9.0 Bank Accounts

Any money in any bank accounts you have control over may be subject to seizure by the Court. As a result you should have less than $100.00 in the bank on the date of filing. Note that this is the actual balance in the account, not the amount in your check ledger. Uncleared checks do not count.

As soon as possible (or at least on the day prior to filing) you should terminate any automatic withdrawals that are coming out of your account. You should

communicate with the bank directly to terminate any of these arrangements. In addition, it may be appropriate to forward a notice of termination of assignment to the creditor involved. If you need one of these documents you must bring in to the attorney a copy of the original assignment document. He will then prepare the appropriate documents that you can hand deliver to the creditor.

If you have money in a bank account and you owe money to that particular institution, you should remove the money prior to filing. Otherwise the bank will seize the money and your account will be frozen as soon as they learn that you have filed bankruptcy. If you wish to retain a bank account with a creditor, it will be necessary to reaffirm on all obligations you have with that particular financial institution. Once the reaffirmation agreement is signed, the Bank or Credit Union will generally unfreeze your account. If you determine that it is not in your best interest to reaffirm, then you should open a new bank account with another institution prior to the filing of Bankruptcy. In 13's you should always open a new account.

10.0 Payroll Deductions

Prior to filing, you should contact your payroll department to stop all payroll deductions and wage assignments for the benefit of creditors (other than retirement loans) that you intend to discharge in your bankruptcy. It may also be necessary to provide a notice of termination of assignment to particular creditors. In such a case, you must bring in a copy of the original written assignment or wage allotment. The attorney can then prepare the appropriate documents for you to hand deliver to the creditor. If the creditor is out of state, the attorney will mail the notice to them. If you want the notice sent by registered mail, there will be an additional fee.

11.0 Garnishments

It is important for you to understand how Bankruptcy impacts a garnishment. If the Bankruptcy is filed prior to the issuance of the Garnishment and its service upon your employer, the garnishment can be ignored. However, if a garnishment is already in place on the date of filing, the creditor is still entitled to garnish your wages up to the date of the actual filing. The filing of the Bankruptcy then acts as the closing date of your pay period for garnishment purposes.

Sometimes a client will have a friendly employer, who is willing to reject a garnishment if you file Bankruptcy before the end of the pay period. However, this is a very dangerous thing for an employer to do. If the creditor complains, the District Court will order the employer to pay the full amount of the debt, not just the amounts that should have been garnished. This can obviously have an impact

on your employment. Therefore, it is strongly recommended that you not allow your employer to do this.

If you have a garnishment pending at the time you file your bankruptcy you should provide the attorney with that information, a copy of the garnishment, and the name and fax number of someone in your payroll department in writing.

12.0 Supplemental Orders

If you receive a Motion and Order in Supplemental Proceedings before the filing of a bankruptcy, you must attend that hearing even if you file bankruptcy prior to the date of hearing. Some attorneys will excuse you from the hearing if you call them and let them know of the bankruptcy filing. However, you cannot insure that they will properly inform the court of your bankruptcy. As a result, you should appear at those hearings as a precautionary matter.

13.0 Other

Certain other situations give rise to unique problems that should be discussed with the attorney. These include any of the following: you have given away property as gifts that you have not yet fully paid for, you are recently divorced or are anticipating divorce, you are recently married, you are anticipating a major medical expense in the near future, you have co-signers on any of your debts, you have missed payments on any secured debt, you have bad checks that have not been referred to collection, you own real property outside of Utah, you have not lived in Utah for two years, you own and operate or have an interest in any business, you have more than one loan with the individual who financed your vehicle, or you have given the same property as collateral on more than one loan.

Chapter 12
Filing

1.0 In General

Before your case can be filed by the attorney you must meet with him, review your papers, sign them, and pay the balance of the fee. Once the papers are prepared you will be called by one of the paralegal's to set up an interview.

2.0 Meeting with the Attorney

During the attorney's third meeting with you, the pleadings are reviewed page by page and signed by both the client and the attorney. This provides the attorney another opportunity to check the pleadings for errors, request clarification from you, and issue any necessary warnings about the consequences of filing. It is not uncommon for there to be additional corrections that need to be made before the documents are actually complete. As indicated above, if your case is a joint filing both parties must sign the papers. Only original signatures in front of the attorney are acceptable. As a result the attorney cannot accept faxed copies of documents.

3.0 The Briefing

After the second meeting with the attorney, if the documents are complete and you have paid the retainer, a member of the attorney's staff will enter you into the computer and give you the access codes necessary to log into the internet site where you will receive the required credit briefing. You will also be given a copy of your bankruptcy papers. You will need them for the credit briefing. Then you will need to find a computer with internet access so you can obtain the briefing. The Provo and Orem Libraries have computers that can be used for free if you have a library card. If not, there is a charge of $1.00 for one and a half hours of use. The initial briefing takes approximately 90 minutes to complete. You must complete this briefing before the attorney can file your completed papers.

4.0 Preparing the Documents for Filing

Once you have completed the briefing you should contact the attorneys office to relay that information. You should also bring in a copy of the certificate of completion. You should also carefully review the bankruptcy papers to ensure that there are no errors in them. If you find errors, bring them to the attention of the attorney's staff so the appropriate corrections can be made. Cases are usually filed on Saturday afternoons. Once the case has been filed, the Court will issue you a case number. This number can be obtained from our office at your convenience. You may give it to creditors who call you.

Please keep your copies of the bankruptcy documents in a safe place. You will need to bring them with you to the first meeting of creditors and you will need them in the future if you ever apply for a loan.

5.0 Notices to Creditors

Once your case has been filed with the court, the attorney will send notices to each of your secured creditors as well as each creditor with whom you have an executory contract. This is to let these important creditors know immediately what your intent is with regard to their obligations.

It is common for Bankruptcy clients to have questions about their case and/or the decisions that they need to make. Please be aware that while the attorney's employees can help you with many matters, they are not allowed to give you legal advice. Certain matters can ONLY be handled by an attorney. For example, only an attorney can give you advice whether or not it is in your best interest to file Bankruptcy. Whether or not it is in the best interest of your spouse to file Bankruptcy with you. Or, if Bankruptcy filing is advisable, only the Attorney can indicate which Chapter of the Bankruptcy Code you should file under. In short, any *legal advice* requires the assistance of the attorney. A paralegal may not: (1) accept an individual as a client, (2) set fees, (3) give direct legal advice, (4) negotiate legal matters on behalf of a client, or (5) represent clients in court settings. However, subject to these restrictions, a legal assistant or paralegal can do almost anything else that an attorney could do.

If you have a question regarding your case, you should first look for the answer in this booklet. If you do not find the answer, please call our office. Ask for the Paralegal in charge of your type of case. If it is a procedural question (such as wanting to know when your hearing date is or if a reaffirmation agreement has arrived) she will help you with those matters. If it is something she cannot handle, provide her with all of the information, and the attorney will then help you.