

**CHAPTER 1**  
**BANKRUPTCY IN LOUISIANA**

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### **About The Authors**

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## 1. INTRODUCTION

The goal of bankruptcy is to give debtors a “fresh start.” The U.S. Supreme Court has said of bankruptcy that “[i]t gives to the honest but unfortunate debtor...a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.”<sup>1</sup> For the poorest of poor debtors, bankruptcy can mean the difference between homeless and hungry, and having enough money to buy food for their children and keep a roof over their heads.

Louisiana bankruptcy attorneys charge attorneys fees starting at \$700 for a Chapter 7 bankruptcy and \$2,400 for a Chapter 13 bankruptcy. Many attorneys also require at least some of their fee to be paid upfront, along with the bankruptcy court filing fee, which is impossible for the poorest of the poor. With this manual, we encourage additional pro bono and legal aid attorneys to handle bankruptcies. Many attorneys think of bankruptcy as daunting and complicated. In fact, bankruptcy law is fairly straightforward and can provide the ultimate debt relief to clients who can move forward with a clean slate.

This manual will focus exclusively on bankruptcies under Chapter 7 and Chapter 13 of the Bankruptcy Code, which are meant for individuals with consumer debts. Moreover, this manual focuses on bankruptcy for low-income debtors. This manual does not cover bankruptcy for debtors who file with incomes above the Louisiana median income.<sup>2</sup>

For more information, please see *Bankruptcy Basics*, a publication of the Bankruptcy Judges Division of the Administrative Office of the U.S. Courts, available at: [www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics.aspx](http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics.aspx) or the National Consumer Law Center’s comprehensive guides for consumer bankruptcy attorneys: *Bankruptcy Basics*, ISBN 978-1-60248-009-4; and *Consumer Bankruptcy Law and Practice*, ISBN 978-1-60248-057-5.

## 2. WHO CAN FILE BANKRUPTCY?

### 2.1 WHO MAY BE A BANKRUPTCY DEBTOR?

11 U.S.C. § 109 governs eligibility for bankruptcy. Just about anyone can file bankruptcy. Anyone who resides, has a domicile, property or a place of business in the United States may file a Chapter 7 or Chapter 13 bankruptcy. A debtor does not have to be insolvent. Unmarried couples must file separate bankruptcy petitions, which will increase the filing fees.

11 U.S.C. § 109(g) establishes a 180 day waiting period between bankruptcies. If the debtors have been in any bankruptcy at any time within the prior 180 days, they will be ineligible for bankruptcy if:

- (1) the prior case was dismissed for *willful* failure to abide by orders of the court, or to appear before the court for proper prosecution of the case; or
- (2) they requested and obtained a voluntary dismissal after the filing of a request for relief from the § 362 automatic stay.

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<sup>1</sup> *Marama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 367 (2007).

<sup>2</sup> Legal aid programs generally limit representation to families under 200% of federal poverty. As of November 10, 2011, the median incomes for Louisiana families for means testing under the 2005 bankruptcy legislation were all considerably above 200% of federal poverty, to wit: 1 earner-\$37,931, 2 person family-\$46,169, 3 person family-\$54,638, 4 person family-\$65,778. Add \$7,500 for each person above 4. If a debtor is above these median incomes, she is subject to the “means test” formula to determine whether she is presumed ineligible for a Chapter 7 discharge.

To be eligible for bankruptcy, a debtor must, with some exceptions, complete a credit counseling briefing from an approved nonprofit counseling agency within the 180 days before filing the bankruptcy petition.<sup>3</sup> Some credit counseling agencies will waive their fees and provide free pre-bankruptcy credit counseling for low-income debtors.

For a Chapter 13 bankruptcy, a debtor must have sufficient “regular income” to cover basic living expenses, their mortgage and the required payments to the trustee.<sup>4</sup> “Regular income” is not limited to wages.<sup>5</sup> It also includes government benefits, spousal or child support and other types of regular income. The court may consider a relative’s income when evaluating whether the debtor has “regular income” or whether the plan is feasible, provided the relatives have a substantial interest in the plan’s success.<sup>6</sup> Also, Chapter 13 debtors can’t have more than \$360,475 in non-contingent, liquidated, unsecured debt and \$1,081,400 in non-contingent, liquidated, secured debt.

## 2.2 WAITING PERIODS BETWEEN BANKRUPTCY DISCHARGES

The Bankruptcy Code establishes minimum waiting periods between discharges. These waiting periods are not eligibility provisions. However, they determine whether a debtor may receive a discharge in a bankruptcy. Generally, a Chapter 7 bankruptcy serves no purpose if the debtor can’t get a discharge. However, a debtor may file and benefit from a Chapter 13 even if she is barred from a discharge under 11 U.S.C. §1328(f).<sup>7</sup> A Chapter 13 without a discharge may provide a stay from collection and an opportunity to cure arrearages.

Under 11 U.S.C. § 727(a)(8)-(9), Chapter 7 debtors may not obtain (1) a Chapter 7 discharge if they received a Chapter 7 discharge in a case filed within 8 years of the new bankruptcy, or (2) a Chapter 13 discharge within 6 years of the new bankruptcy unless the statutorily defined payout was met.<sup>8</sup> Thus, a Chapter 13 debtor with a 5 year plan could qualify for a discharge in a new Chapter 7 bankruptcy filed 1 year after completion of her Chapter 13 plan.<sup>9</sup> The 8 year § 727(a)(8) look back period is not tolled by an intervening Chapter 13 bankruptcy that did not result in a discharge.<sup>10</sup> However, there is a Louisiana bankruptcy case that applies tolling to another § 727(a) look back provision.<sup>11</sup> So, you may face a tolling issue in Louisiana.

Under 11 U.S.C. § 1328(f)(1)-(2), Chapter 13 debtors may not obtain a discharge if they received a discharge in (1) a Chapter 7 bankruptcy during a 4 year period before the “date of the order for relief” or (2) a Chapter 13 bankruptcy during a 2 year period before the “date of the order for relief.” The majority of courts

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<sup>3</sup> A list of approved bankruptcy credit counseling agencies is available at:<http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyResources/ApprovedCreditAndDebtCounselors.aspx>.

<sup>4</sup> 11 U.S.C. §§ 109(e); 101(30). An unemployed or self-employed person may face challenges on the “regular income” requirement. See e.g., *In re Henley*, 350 B.R. 716, 721-22 (Bankr. W.D. La. 2006).

<sup>5</sup> *In re Hammonds*, 729 F.2d 1391 (11<sup>th</sup> Cir. 1984) (public assistance may be used to fund a Chapter 13 plan); *In re Antoine*, 208 B.R. 17 (Bankr. E.D.N.Y. 1997) (Chapter 13 eligibility turns on regularity of income, not the type of income).

<sup>6</sup> *In re Mullins*, 360 B.R. 493 (Bankr. W.D.Va. 2007); *In re Murphy*, 226 B.R. 601 (Bankr. M.D. Tenn. 1998); *In re Campbell*, 38 B.R. 193 (Bankr. E.D.N.Y. 1984).

<sup>7</sup> *In re Bateman*, 515 F.3d 272 (4<sup>th</sup> Cir. 2008); *In re Lewis*, 339 B.R. 814 (Bankr. S.D.Ga. 2006).

<sup>8</sup> *Tidewater Finance Co. v. Williams*, 498 F.3d 249, 252-53, n. 2 (4<sup>th</sup> Cir. 2007).

<sup>9</sup> See *In re Myers*, 2008 WL 2783455 (Bankr. M.D.Ala. 2008). If the statutory pay out was met in the Chapter 13 bankruptcy, the debtor could qualify for a discharge in a Chapter 7 bankruptcy filed 1 day after completion of the Chapter 13 plan. *Id.*

<sup>10</sup> *Tidewater Finance Co. v. Williams*, 498 F.3d 249 (4<sup>th</sup> Cir. 2007).

<sup>11</sup> *In re Seeber*, 2005 WL 4677823 (Bankr. E.D. La. 2005).

have held that these § 1382 (f) waiting periods run from filing date to filing date, and not from discharge date to filing date.<sup>12</sup> Under the majority “filing date to filing date” interpretation, § 1382 (f) (2) would rarely prohibit a discharge in a second Chapter 13 bankruptcy.<sup>13</sup>

In a prior bankruptcy, a debtor may have filed a Chapter 7, converted to Chapter 13 and received a Chapter 13 discharge. Or the debtor may have filed a Chapter 13, converted to Chapter 7 and received a Chapter 7 discharge. How are the § 1382(f) look back or waiting periods between bankruptcy discharges calculated in converted cases? The filing date of the converted case for purposes of determining the § 1382(f) waiting period relates back to the filing date of the bankruptcy, not the date the case was converted. The issue is whether the “case filed under” trigger in §1382(f) means the Chapter under which the case was filed, or the Chapter to which it was converted. The vast majority of courts have held that the “case filed under” means the Chapter to which the case was converted.<sup>14</sup> Thus, for example, the §1382(f)(1) four year look back or waiting period would apply when the prior bankruptcy was filed as a Chapter 13, but converted to a Chapter 7. One court has held that the relevant look back period is determined by the Chapter that the case was originally filed under.<sup>15</sup>

### 2.3 THE CHAPTER 13 “GOOD FAITH” REQUIREMENT AND PRIOR BANKRUPTCIES

The Bankruptcy Code does not restrict the right to file a Chapter 13 bankruptcy after a prior Chapter 7 or Chapter 13 bankruptcy.<sup>16</sup> The only eligibility bar to the filing of a new Chapter 13 bankruptcy is if the 180 day waiting period in § 109(g) applies, e.g., the case was dismissed for willful failure to abide by a lawful order of the court or to appear before the court for proper prosecution of the case. Simple failure to pay filing fees or plan payments in a prior Chapter 13 case, without more, should not be considered willful so as to preclude another filing within 180 days.<sup>17</sup> A failure to attend the creditors’ meeting may or may not be viewed as a willful failure to appear before the court for proper prosecution of the case.<sup>18</sup> The issue of § 109(g) willful malfeasance is generally not litigated in the first case. Therefore, this issue would normally be raised and litigated by motion in the second case, and the debtor will have the opportunity to present evidence on the willfulness issue.

A court must confirm a Chapter 13 plan if the statutory requirements are met.<sup>19</sup> Good faith is a requirement for confirmation.<sup>20</sup> Good faith is determined on the “totality of circumstances” and on a case-by-case basis.<sup>21</sup> Good faith may exist when there have been repetitive Chapter 13 bankruptcies or dismissal of prior bankruptcies for failure to make plan payments.<sup>22</sup> Filing of a bankruptcy on the

<sup>12</sup> *In re Sanders*, 551 F.3d 397 (6<sup>th</sup> Cir. 2008); *In re Bateman*, 515 F.3d 272 (4<sup>th</sup> Cir. 2008); *In re Knighten*, 355 B.R. 922 (Bankr. M.D. Ga. 2006) (filing constitutes an “order for relief”). It appears that there are no reported bankruptcy court cases in the Fifth Circuit on this issue.

<sup>13</sup> *In re Bateman*, 515 F.3d 272 (4<sup>th</sup> Cir. 2008).

<sup>14</sup> See e.g. *In re Ybarra*, 359 B.R. 702, 709 (Bankr. S.D. Ill.2007).

<sup>15</sup> *In re Hamilton*, 383 B.R. 469 (Bankr. W.D. Ark. 2008).

<sup>16</sup> 11 U.S.C. § 109(g); *Johnson v Home State Bank*, 501 U.S. 78 (1991).

<sup>17</sup> See e.g., *In re Howard*, 134 B.R. 225 (Bankr. E.D. Ky. 1991).

<sup>18</sup> Compare *In re Dodge*, 86 B.R. 535 (Bankr. S.D. Ohio 1988) with *In re Wen Hua Xu*, 386 B.R. 451 (Bankr. S.D. N.Y. 2008).

<sup>19</sup> *Matter of Chaffin*, 816 F.2d 1070, 1073 (5<sup>th</sup> Cir. 1987).

<sup>20</sup> 11 U.S.C. § 1325 (a) (3).

<sup>21</sup> *Beard v. U.S. Trustee*, 188 B.R. 220 (W.D. La., 1995) *aff’d* 84 F/3d 431 (5<sup>th</sup> Cir. 1987).

<sup>22</sup> See e.g., *In re Eisen*, 14 F.3d 469 (9<sup>th</sup> Cir. 1994); *In re Smith*, 43 B.R. 319 (Bankr. E.D. N.C. 1984) (good faith found despite dismissal of 3 prior Chapter 13 bankruptcies for failure to make plan payments).

eve of a state court trial is not sufficient evidence of bad faith.<sup>23</sup> Good faith has been found when the unsecured creditors were unpaid by the plan, and the only plan payments were for the debtor's attorney fees.<sup>24</sup> Even where the new Chapter 13 bankruptcy can't result in a discharge due to the application of the § 1382(f)(1) look back period, good faith may exist for the new Chapter 13 bankruptcy.<sup>25</sup>

### **3. WHERE DO I FILE BANKRUPTCY?**

Generally, a debtor may file in the judicial district in which he has resided for 180 days prior to filing the bankruptcy, or for a longer portion of that 180 day period than any other judicial district.<sup>26</sup>

There are three U.S. District Bankruptcy Courts in Louisiana: the Eastern District; the Middle District; and the Western District, whose jurisdiction is as follows:

**Eastern District:** Assumption, Jefferson, Lafourche, Orleans, Plaquemines, St. Bernard, St. Charles, St. James, St. John the Baptist, St. Tammany, Tangipahoa, Terrebonne, and Washington parishes.

Court location: 500 Poydras Street, New Orleans, Louisiana.

**Middle District:** Ascension, East Baton Rouge, East Feliciana, Iberville, Livingston, Point Coupee, St. Helena, West Baton Rouge and West Feliciana parishes.

Court location: 707 Florida Street, Baton Rouge, Louisiana.

**Western District:** Avoyelles, Acadia, Allen, Beauregard, Bienville, Bossier, Caddo, Calcasieu, Caldwell, Cameron, Catahoula, Claiborne, Concordia, DeSoto, East Carroll, Evangeline, Franklin, Grant, Iberia, Jackson, Jefferson Davis, Lafayette, LaSalle, St. Landry, Lincoln, St. Martin, Madison, St. Mary, Morehouse, Natchitoches, Ouachita, Red River, Rapides, Richland, Sabine, Tensas, Union, Vernon, Vermillion, Webster, West Carroll and Winn parishes.

Court location: 300 Fannin Street, Shreveport, Louisiana.

### **4. WHO SHOULD FILE BANKRUPTCY?**

Many clients will tell you that they need to file bankruptcy when they realize they can't pay their debts. But even if this is the case, bankruptcy is not necessarily the answer.

The first rule of thumb is that *bankruptcy is for people who have something to lose*. There are generally three things to lose: your income (through a garnishment or levy), your property (through a seizure or sale), and your peace of mind. Bankruptcy can address each of these losses. Also, bankruptcy can preserve valuable rights, such as a driver's license, which may have otherwise been suspended or seized for failure to post a financial responsibility bond following an accident, the right to a school transcript or, in many states, prevent eviction from public housing.<sup>27</sup>

<sup>23</sup> *In re Stanley*, 224 Fed. Appx. 434 (5<sup>th</sup> Cir. 2007); *Matter of Little Creek Development Co.*, 799 F.2d 1068 (5<sup>th</sup> Cir. 1986).

<sup>24</sup> *In re Crager*, 691 F.3d 671 (5<sup>th</sup> Cir. 2012).

<sup>25</sup> *In re Bateman*, 515 F.3d 272 (4<sup>th</sup> Cir. 2008).

<sup>26</sup> 28 U.S.C. § 1408.

<sup>27</sup> See *Perez v. Campbell*, 402 U.S. 637 (1971) (bankruptcy prohibits state from revoking driver's license for failure to pay discharged debt); *In re Kuehn*, 563 F.3d 289 (7<sup>th</sup> Cir. 2009) (school transcript); *Loyola University v. McClarty*, 234 B.R. 386 (E.D. La. 1999) (school transcript); *In re Stoltz*, 315 F.3d 80 (2d Cir. 2002) (bankruptcy prohibits public housing authority from evicting tenant for failure to pay discharged rent).

The second rule of thumb is that *bankruptcy is for people who are deeply in debt and who anticipate the future acquisition of income or property*. In other words, a person who is deeply in debt and currently “judgment-proof,” but who is about to become gainfully employed, may wish to consider bankruptcy in order to avoid a garnishment or seizure of hard-earned future savings or property. The term “judgment proof” refers to a person who is insolvent and their creditors are unable satisfy judgments or potential judgments against them. Typically, a person who is judgment-proof has no savings, does not earn wages and does not have any property that creditors are able to seize.

Moreover, clients may want to think twice about filing a bankruptcy if they anticipate receipt of an inheritance or a civil suit settlement or judgment. In Louisiana, these future assets would be seized by the trustee (either Chapter 7 or Chapter 13) and used to pay creditors. In those cases, the client should be made aware of her other options, including “workouts” with her aggressive creditors until she comes into possession of the lawsuit, insurance or inheritance funds. Also, some debtors may lose the right to discharge older income taxes if they file bankruptcy prematurely.<sup>28</sup> Debtors currently without auto or health insurance may want to consider delay in filing a bankruptcy until they secure insurance coverage.

Clients who have debts, including but not limited to student loans, most taxes, government fines, criminal restitution, marital debt and past due child or spousal support, should be advised that such debts generally can’t be discharged in bankruptcy. Debtors with substantial non-dischargeable tax debts may want to consider an offer in compromise with the IRS in lieu of a bankruptcy.<sup>29</sup> See 11 U.S.C. § 523(a) for a full list of exceptions to discharge.

Student loans can’t be discharged in bankruptcy “unless excepting such debt from discharge . . . will impose an undue hardship on the debtor and the debtor’s dependents.” 11 U.S.C. § 523(a)(8). Many circuit courts, including the Fifth Circuit, have adopted “the Brunner test” for the dischargeability of student loans.<sup>30</sup> The *Brunner* test has three parts which the court must consider before deciding whether to except a student loan from discharge. The debtor must prove:

- (1) That she cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her dependents if forced to repay the loans;
- (2) That additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
- (3) That the debtor has made good faith efforts to repay the loans.

The main point here is that you evaluate the client’s situation and advise her of both bankruptcy and non-bankruptcy options. The client must be informed of what it means to be “judgment-proof”, if that description applies. If so, the client must also be made aware of when bankruptcy may become advisable in the future. Likewise, the client with something to lose must weigh the non-bankruptcy options, including negotiating extended pay-backs with creditors, litigation if applicable, and delaying filing to await other contingencies or to do some pre-bankruptcy planning.

<sup>28</sup> See e.g., *In re Loving*, 2011 WL 3800042 (Bankr. S.D. Ala. 2011) (right to discharge taxes lost because debtor filed bankruptcy a few days early).

<sup>29</sup> See *Effectively Representing Your Client Before the IRS*, Ch. 21 (ABA 5<sup>th</sup> ed. 2011).

<sup>30</sup> *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987); see also *In re Gerhardt*, 348 F.3d 89 (5<sup>th</sup> Cir. 2003); *In re Salyer*, 348 B.R. 66 (Bankr. M.D. La. 2006); *In re McMullin*, 316 B.R. 70 (Bankr. E.D. La. 2004).

Also consider whether a husband and wife should file a joint petition or individual petitions or whether just one spouse should file if that spouse has “separate debts.” A husband and wife may file a joint petition or individual petitions.<sup>31</sup> Generally, I encourage married clients to file jointly, for the ease of case administration. I also encourage both spouses to file if they have been married for at least a few years even if they believe the debts are separate and the creditors are going after just one spouse. In Louisiana, most debts are community debts. Having both spouses file bankruptcy and receive a discharge protects them from further litigation, and/or having to file another bankruptcy, in the future.

In Louisiana, an obligation incurred by a spouse before or during the community may be satisfied from the property of the community and from the separate property of the spouse who incurred the obligation.<sup>32</sup> A spouse may have a spousal reimbursement claim against his former spouse if (1) community property is used to acquire or improve the other spouse’s separate property<sup>33</sup> or (2) his separate property was used to satisfy a community obligation or the other spouse’s separate obligation.<sup>34</sup> Spousal reimbursement claims prescribe in 10 years.<sup>35</sup>

There may be some situations where only one spouse should file.<sup>36</sup> For example, a spouse with significant § 507 priority debt such as premarital child support or taxes may render a Chapter 13 plan infeasible if both spouses jointly file bankruptcy. However, the non-debtor spouse may qualify for a Chapter 13 plan if she files as an individual since her spouse’s premarital debts will not have to be paid in full in her individual bankruptcy.<sup>37</sup> The 11 U.S.C. § 524(b)(3) discharge injunction can protect both spouses’ interests (including those of the non-filing spouse) in community property acquired after the bankruptcy.<sup>38</sup>

Finally, if bankruptcy is the chosen option, consumer clients must choose between Chapter 7 and Chapter 13. An informed choice will require an analysis of all debts (past, present and future), income level, budgetary expenses, and assets.

## **5. CHAPTER 7 LIQUIDATION OR CHAPTER 13 REORGANIZATION?**

A Chapter 7 bankruptcy is designed for debtors with significant debts, who do not have assets like real estate, or at least no equity in any real estate that they own, and do not have enough income to repay all of their debts. In a Chapter 7 bankruptcy, the Trustee wants to liquidate or sell the debtor’s non-exempt assets and use the proceeds to pay debts. In most Chapter 7 consumer bankruptcies, most of the debtor’s assets are exempt and may not be liquidated. Generally, the remaining debts are discharged, i.e., personal liability on discharged debts is forgiven. But, pre-petition liens survive a bankruptcy discharge unless voided. Some

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<sup>31</sup> 11 U.S.C. § 302(a).

<sup>32</sup> La. Civ. Code art. 2357.

<sup>33</sup> La. Civ. Code art. 2366.

<sup>34</sup> La. Civ. Code art. 2367-2367.3.

<sup>35</sup> *Birch v. Birch*, 55 So.3d 796 (La. App. 2 Cir. 2010).

<sup>36</sup> For further discussion of this issue, see National Consumer Law Center, *Consumer Bankruptcy Law and Practice*, § 6.4 (9<sup>th</sup> ed. 2009).

<sup>37</sup> *In re Pfalzgraf*, 236 B.R. 390 (Bankr. E.D. Wisc. 1999).

<sup>38</sup> *In re Kaye*, 2012 WL 364092 (Bankr. E.D. La. 2012); *In re Dyson*, 277 B.R. 84 (Bankr. M.D. La. 2002).

debts, e.g., most student loans and taxes, are non-dischargeable and also survive the bankruptcy.

A bankruptcy filed under Chapter 13 is called “reorganization.” Unless provided for in the plan, the debtor does not surrender or give up assets in a Chapter 13. In a Chapter 13 bankruptcy, the debtor will fully or partially pay her creditors over time. A Chapter 13 bankruptcy is used most often by debtors to prevent home foreclosure or repossession of a vehicle.

In a Chapter 13 bankruptcy, the debtor proposes a repayment plan to be reviewed by Chapter 13 Trustee and confirmed by the judge. The debtor’s Chapter 13 Plan states a proposal to repay creditors over a period of 3 or 5 years, either at 100 cents on the dollar or less, so long as the creditors are paid at least what they would have received in a Chapter 7 liquidation. This is known as the “liquidation test” for Chapter 13 eligibility.

In Louisiana, homeowners often fail to meet the liquidation test because they don’t have a homestead exemption or their net equity in their home is too high.<sup>39</sup> Also, to qualify for a Chapter 13 bankruptcy, a debtor’s plan must fully pay secured and priority creditors over the plan period.<sup>40</sup> Judgment creditors become “secured creditors.” Therefore, bankruptcy should be filed before a creditor obtains a judgment in a collection lawsuit.<sup>41</sup> If possible, secure an extension to plead in collection lawsuits and file the bankruptcy before a default or other judgment is entered.

The Chapter 13 debtor must have enough documented “regular income” to show that she can cover her regular household expenses, including her mortgage and any car payments, as well as the additional monthly payment to the Chapter 13 Trustee, which the plan requires for the creditors.

In a Chapter 13 bankruptcy, priority unsecured debts, which include but are not limited to child support and taxes, must be paid fully by the debtor within 3-5 years through the repayment plan. Therefore, if a debtor owes \$24,000 in past due priority taxes to the IRS, the whole \$24,000 must be paid through their Chapter 13 bankruptcy within 3 to 5 years. *See* 11 U.S.C. § 507(a) for a full list of unsecured priority debts that must be paid in a Chapter 13 bankruptcy plan. At the end of a Chapter 13 bankruptcy, the debtor receives a discharge of any eligible unsecured debts.<sup>42</sup> Thus, the debtor may be left with a mortgage, but her mortgage will be current and all other debts will be paid off and/or discharged.

Debtors who are in foreclosure or at risk of having property repossessed, and have enough documented income to pay for all household expenses, their monthly mortgage payment and the required payment to the Trustee, should consider filing a Chapter 13 bankruptcy. Debtors who have significant debts, imminent risk of wage garnishment, and no real estate ownership, should consider filing a Chapter 7 bankruptcy.

If a debtor files a Chapter 13 but then later decides she no longer wishes to keep her home, or she can no longer make her payments under the plan, she can convert her Chapter 13 bankruptcy to a Chapter 7 pursuant to 11 U.S.C. §

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<sup>39</sup> The unusually low homestead exemption in Louisiana, compared to other Southern states, makes it more difficult for homeowners to save their homes through Chapter 13 bankruptcy reorganization.

<sup>40</sup> 11 U.S.C. §§ 1325(a)(5)(B)(secured creditors), 1322(a)(2)(priority creditors).

<sup>41</sup> Filing the bankruptcy before a judgment also prevents the creation of a lien or the need to file a separate motion in the bankruptcy action to void the lien. Liens survive bankruptcy as to pre-petition property.

<sup>42</sup> 11 U.S.C. § 1328(a); *United Student Aid Funds, Inc. v. Espinosa*, 130 S.Ct. 1367 (2010).

1307(a).<sup>43</sup> No reason must be given for converting from a Chapter 13 to a Chapter 7. A debtor may also convert from a Chapter 7 to a Chapter 13 under 11 U.S.C. § 706. However, this conversion right is no longer absolute. It may be forfeited for pre-petition bad faith.<sup>44</sup> The court may dismiss a Chapter 7 bankruptcy, or convert the Chapter 7 bankruptcy to a Chapter 13 bankruptcy, where the debtor's income is so great that the debtor should have filed a Chapter 13 under 11 U.S.C. § 707.

If a debtor can't complete her Chapter 13 plan, she may also seek a modification of the plan or a hardship discharge. Proposed modifications are decided under 11 U.S.C. § 1329.<sup>45</sup> A hardship discharge may be an option if:

- a debtor's problems are caused by circumstances for which she "should not justly be held accountable"
- a modification of the plan is not practical, and
- payments to unsecured creditors are not less what they would have received under Chapter 7.<sup>4</sup>

## **6. THE AUTOMATIC STAY**

An *automatic stay* goes into effect immediately upon the filing of any bankruptcy. It is the cornerstone of Bankruptcy Code relief. Found at 11 U.S.C. § 362, the automatic stay has a sweeping scope, stopping practically every non-criminal proceeding that could possibly face a consumer debtor. The types of proceedings stayed are listed at 11 U.S.C. § 362(a), and those proceedings that are not stayed are set forth at 11 U.S.C. § 362(b). Lawsuits are put on hold, foreclosure proceedings are stopped, and even the Internal Revenue Service has to stop most collection activity. If your client faces garnishment or foreclosure, you should immediately notify the sheriff, creditor or his attorney of the stay.

One noteworthy exception to the automatic stay is the collection of past due alimony or support from property that is not property of the estate. 11 U.S.C. § 362(b)(2)(B). Property of the estate is defined at 11 U.S.C. § 541 and basically includes everything the debtor owns at the moment the bankruptcy petition is first filed. Because, in Chapter 7 cases, wages earned after the bankruptcy petition are not considered property of the estate under 11 U.S.C. § 541, proceedings to collect past due alimony or support in state court may go forward, to the extent the claimant seeks only to garnish the debtor's post-petition wages.

In Chapter 13 cases, however, the definition of "property of the estate" is enhanced by the provisions of 11 U.S.C. § 1306 to include post-petition wages. Accordingly, if the debtor files a Chapter 13, all alimony or support enforcement proceedings are generally stayed and the plan must provide for payment.

Evictions are automatically stayed by the filing of a bankruptcy petition.<sup>47</sup> There are two exceptions to a § 362 bankruptcy stay of evictions: (1) the eviction

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<sup>43</sup> However, a creditor may seek to oppose the Chapter 7 discharge under 11 U.S.C. § 727 for refusal to obey a lawful order in the Chapter 13 bankruptcy. See e.g., *In re Dorsey*, 505 F.3d 395 (5<sup>th</sup> Cir. 2007); *Standiford v. U.S. Trustee*, 641 F.3d 1209 (10<sup>th</sup> Cir. 2011).

<sup>44</sup> *Marama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007) abrogating *Matter of Martin*, 880 F.2d 857 (5<sup>th</sup> Cir. 1989); see also *In re Jacobsen*, 609 F.3d 647 (5<sup>th</sup> Cir. 2010).

<sup>45</sup> See e.g., *In re Meza*, 467 F.3d 874 (5<sup>th</sup> Cir. 2006); *In re Mendoza*, 111 F.3d 1264 (5<sup>th</sup> Cir. 1997).

<sup>46</sup> 11 U.S.C. § 1328(b).

<sup>47</sup> 11 U.S.C. § 362 (a)(3); *In re Smith Corset Shops, Inc.*, 696 F.2d 971, 976 (1<sup>st</sup> Cir. 1982); *In re Burch*, 401 B.R. 153 (Bankr. E.D. Pa. 2008).

judgment was obtained prior to bankruptcy filing and (2) an eviction based on “endangerment” of property and illegal drug use on the property if it occurred within 30 days prior to the filing of the bankruptcy.<sup>48</sup> A complaint to enforce the stay should be filed with the bankruptcy court in order to bar any attempted state court eviction. If your client is a public or subsidized housing tenant who is behind in his rent, a bankruptcy, particularly a Chapter 13 reorganization, can delay or stop the eviction.<sup>49</sup> As stated above, it is imperative that the bankruptcy be filed before the landlord obtains an eviction judgment. The landlord’s efforts to evict, seize tenant property or collect rent after the tenant has filed a petition in bankruptcy violates the automatic stay and justifies the award of damages and attorney’s fees.<sup>50</sup>

The automatic stay, although applicable to all types of bankruptcies, only provides temporary protection against secured creditors. For example, a Chapter 7 debtor who files a bankruptcy petition on the eve of a foreclosure sale on his home will have a temporary reprieve, in that notice of filing of the bankruptcy will prevent the sale from going forward on the scheduled day. However, the foreclosing lender can then file a *motion to lift stay* and the judge is likely to grant the motion, allowing the foreclosing lender to set a sale and have the home sold within 30 to 60 days.

In Chapter 13 cases, the automatic stay remains in force throughout the life of the confirmed plan, or up to 5 years. In a Chapter 13 case, the stay also prohibits creditors from taking action against co-debtors who have not filed for bankruptcy if the debt is paid in the Chapter 13 plan.<sup>51</sup> In Chapter 13 cases, foreclosing lenders whose arrearages are to be *cured* through the plan must accept resumption of regular ongoing monthly installment payments, as long as their arrearages are fully paid through the plan. However, if the debtor falls behind on their post-petition monthly payments to the mortgage lender, which are often paid outside the plan, the lender may file a motion to lift stay. The court will likely lift the stay unless the debtor files a motion to modify the plan (see more on the motion to modify below) or can show that he was not in fact behind on his payments.

In the Fifth Circuit, creditor action in violation of a §362 stay is not void but voidable.<sup>52</sup> Actions in violation of the stay may be voidable even if the creditor did not have notice of the stay.<sup>53</sup> Willful violation of the stay subjects the violator to actual damages, punitive damages and attorney fees.<sup>54</sup> Failure to rectify a violation of a bankruptcy stay will make a violation willful and provide the debtor with a private cause of action for damages.<sup>55</sup> Upon demand, many creditors will voluntarily void actions taken in violation of the stay.

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<sup>48</sup> 11 U.S.C. § 362(b)(2)-(3).

<sup>49</sup> *In re Stoltz*, 315 F.3d 80 (2d Cir. 2002); *contra Housing Authority v. Eason*, 12 So.3d 970 (La. 2009) *rev'g* 9 So.2d 269 (La. App. 4 Cir. 2009); *see* M. Moreau, *State Appellate Court Recognizes Bankruptcy as Public Housing Defense*, 39 Housing Law Bulletin 137 (June 2009). Due to the *Eason* case, a Chapter 13 bankruptcy would be the recommended option for a public or subsidized housing tenant in Louisiana.

<sup>50</sup> *In re Ozenne*, 337 B.R. 214 (9<sup>th</sup> Cir. BAP 2006).

<sup>51</sup> 11 U.S.C. § 1301.

<sup>52</sup> *Jones v. Garcia*, 63 F.3d 411 (5th Cir. 1995) *cert. denied* 517 U.S. 1167 (1996).

<sup>53</sup> *In re Smith*, 876 F.2d 524 (5<sup>th</sup> Cir. 1989).

<sup>54</sup> *In re Walker*, 168 B.R. 114 (E.D. La. 1994), *aff'd* 51 F.3d 562 (5th Cir. 1995); *In re Crawford*, 388 B.R. 506 (Bankr. S.D.N.Y. 2008) (\$60,000 punitive damages award).

<sup>55</sup> *In re Repine*, 536 F.3d 874 (5<sup>th</sup> Cir. 2008); *Pettite v. Baker*, 876 F.2d 456 (5<sup>th</sup> Cir. 1989).

## **7. THE DISCHARGE, DISCHARGE INJUNCTION, ANTI-DISCRIMINATION AND SET-OFF**

### **7.1 THE DISCHARGE**

The successful Chapter 7 and Chapter 13 cases end with the entry of a *discharge*.<sup>56</sup> At discharge, the automatic stay is terminated and a permanent *discharge injunction* goes into effect.<sup>57</sup> Because the discharge injunction does not affect valid mortgages and liens, secured lenders may then proceed with foreclosure remedies against their collateral, if the loan is in default. Obviously, if the loan is up to date, either because the Chapter 7 debtor never fell behind on his mortgage or the Chapter 13 debtor successfully cured his arrearage, there is no default situation.

### **7.2 DENIAL OR REVOCATION OF DISCHARGE**

The court may deny debtors a discharge if the debtor fails to keep or produce adequate books or financial records, fails to explain satisfactorily any loss of assets, acts in bad faith, violates a lawful order or commits a bankruptcy crime such as perjury, etc.<sup>58</sup>

The court may also revoke a discharge in bankruptcy. This can happen when the court finds the discharge was obtained through fraud, the debtor acquired property that is property of the estate and knowingly and fraudulently failed to report the acquisition of such property or to surrender the property to the trustee, or if the debtor makes a material misstatement or fails to provide documents or other information in connection with an audit of the debtor's case.<sup>59</sup> In the Middle District of Louisiana, creditors often file adversary complaints to oppose discharges under § 523(a)(2) for alleged fraud in the loan process, e.g., falsification of loan applications, failure to disclose other loans or liens, etc. The debts will be found dischargeable if the creditor did not reasonably or justifiably rely on the alleged misrepresentations or if the debtor error is inadvertent.<sup>60</sup> Attorney fees may be awarded against the losing creditor unless its opposition to discharge under 11 U.S.C. § 523(a)(2) was "substantially justified."<sup>61</sup>

### **7.3 CREDITOR CLAIMS THAT SPECIFIC DEBT IS NON-DISCHARGEABLE**

A bankruptcy court has the authority to declare a debt non-dischargeable.<sup>62</sup> Legal aid clients may be creditors of a bankruptcy debtor. For example, they may have been ripped off by a home improvement contractor, landlord, ex-spouse or criminal who later files bankruptcy. When may they oppose the discharge of a debt?

Consumer claims may be non-dischargeable for fraud, breach of fiduciary duty or willful and malicious injury under §§ 523(a)(2), (a)(4) and (a)(6). Many courts have held that a claim against an unlicensed home improvement contractor is non-dischargeable under § 523(a)(2) if he falsely represented that he was a

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<sup>56</sup> See 11 U.S.C. § 727 and § 1328.

<sup>57</sup> See 11 U.S.C. § 524.

<sup>58</sup> For a full list, see 11 U.S.C. § 727; Bankruptcy Rule 4005.

<sup>59</sup> 11 U.S.C. § 727.

<sup>60</sup> See e.g., *In re Weber*, 450 B.R. 595 (Bankr. M.D. La. 2011); *In re Davis*, 2011 WL 1396851 (Bankr. M.D. La. 2011); *In re Smith*, 2010 WL 5101160 (Bankr. M.D. La. 2010); *In re Williams*, 431 B.R. 150 (Bankr. M.D. La. 2010).

<sup>61</sup> 11 U.S.C. § 523(d); *In re Talbot*, 16 B.R. 50 (Bankr. M.D. La. 1981). Attorney fees are available to pro bono counsel. *In re Hunt*, 238 1098 (9<sup>th</sup> Cir. 2003).

<sup>62</sup> *In re Morrison*, 555 F.3d 473 (5<sup>th</sup> Cir. 2009).

licensed contractor and the homeowner reasonably relied on that representation.<sup>63</sup> Fraud in entering a contract with no intent to comply with the contract terms may be non-dischargeable.<sup>64</sup> False promise to complete home repairs in return for final payment is a misrepresentation that can preclude discharge.<sup>65</sup> Charging a tenant rent more than allowed by law may constitute non-dischargeable debt under the fraud exception to discharge.<sup>66</sup> A violation of a consumer protection statute may be non-dischargeable under § 523(a)(2)(A) or § 523 (a)(6).<sup>67</sup> Breach of a fiduciary duty may also make a debt non-dischargeable. A landlord's conversion of a security deposit may be non-dischargeable as a breach of fiduciary duty or conversion.<sup>68</sup>

Debts incurred through fraud, breach of fiduciary duty and conversion may also be non-dischargeable in a Chapter 13 bankruptcy.<sup>69</sup> A consumer creditor may also have grounds to oppose confirmation of a Chapter 13 bankruptcy or object to a Chapter 13 plan that lists a particular debt as dischargeable.<sup>70</sup> Be sure to comply with local court rules on deadlines for objections to confirmation of a plan.<sup>71</sup>

Marital debt incurred in a divorce or marital property settlement is non-dischargeable.<sup>72</sup>

A creditor should use Official Form 10 to file a proof of claim with the bankruptcy court. The proof of claim must be filed within 90 days after the first date set for the § 341 meeting of the creditors.<sup>73</sup> If the claim is a priority claim that fact should be noted. A proof of claim is allowed unless objected to.

A creditor must raise a non-dischargeability issue by an adversary proceeding in bankruptcy court.<sup>74</sup> The deadline for filing an adversary complaint is 60 days after the first date set for the § 341 meeting of creditors, regardless of when the meeting is actually held.<sup>75</sup> Note that the deadline for an adversary complaint to challenge dischargeability is 30 days before the deadline for a proof of claim. Determination that a debt is non-dischargeable without notice and hearing constitutes an abuse of discretion.<sup>76</sup>

## **7.4 THE DISCHARGE INJUNCTION**

The § 524 discharge injunction is self-effectuating and protects the discharge. Its express language "voids" certain judgments and enjoins the commencement or continuation of actions against the debtor.<sup>77</sup> No creditor with notice of the bankruptcy should commence or continue any legal proceedings against the debtor as that would violate the § 524 permanent discharge injunction or the § 362 stay.

<sup>63</sup> *In re Hebert*, 2011 WL 351667 (Bankr. E.D. La. 2010); *In re Ellis*, 2007 WL 2463317 (Bankr. E.D. La. 2007); *In re Fuselier*, 211 B.R. 540, 545 (Bankr. W.D. La. 1997); *In re Grenier*, 2009 WL 763352 (Bankr. D. Mass. 2009) (collecting cases); *but see In re Sabban*, 600 F.3d 1219 (9<sup>th</sup> Cir. 2010).

<sup>64</sup> *In re Fenninger*, 49 B.R. 307, 308 (Bankr. E.D. Pa. 1985).

<sup>65</sup> *In re Pitts*, 2004 WL 3244479 (Bankr. M.D. La. 2004).

<sup>66</sup> *Cohen v. de la Cruz*, 523 U.S. 213, 215 (1998) (rent greater than allowed by rent control dischargeable).

<sup>67</sup> *In re Stokes*, 995 F.2d 76 (5<sup>th</sup> Cir. 1993); *In re Nangle*, 274 F.3d 481 (8<sup>th</sup> Cir. 2001); *Piccicato v. Dwyer*, 37 (1<sup>st</sup> Cir. 1994).

<sup>68</sup> *In re Alomari*, 2011 WL 3648630 (Bankr. N.D. Ill. 2011) (breach of fiduciary debt); *In re Ardolino*, 298 B.R. 541 (Bankr. W.D. Pa. 2003) (deposit debt non-dischargeable as conversion under § 523(a)(4)).

<sup>69</sup> 11 U.S.C. § 1324-25.

<sup>70</sup> *In re Andersen*, 170 F.3d 1253 (10<sup>th</sup> Cir. 1999).

<sup>71</sup> See *e.g.*, Middle District of Louisiana, Local Rule 3015-2 (15 days prior to confirmation hearing); Eastern District of Louisiana, Local Rule 3015-1 (7 days prior to confirmation hearing); Western District of Louisiana, Local Rule 3015(b)-1 (7 days prior to confirmation hearing).

<sup>72</sup> See 11 U.S.C. §§ 523(a)(15), (5); *In re Kincaide*, \_\_ F.3d \_\_ (5<sup>th</sup> Cir. 2013), 2013, WL 450976.

<sup>73</sup> Bankruptcy Rule 3002(b), 5005(a).

<sup>74</sup> Bankruptcy Rule 7001.

<sup>75</sup> Bankruptcy Rule 4007(c).

<sup>76</sup> *In re Case*, 937 F.2d 1014 (5<sup>th</sup> Cir. 1014).

<sup>77</sup> The statute uses "void" rather than voidable. See also *In re Meadows*, 428 B.R.894 (Bankr. N.D. Ga. 2010); *In re Gurrola*, 328 B.R. 158 (9<sup>th</sup> Cir. BAP 2005).

Other creditor actions may violate the injunction. Creditor counterclaims in a debtor's suit, which are based on a discharged debt, also violate the discharge injunction.<sup>78</sup> Selling the discharged debt to a debt buyer violates the discharge injunction.<sup>79</sup> Repossession of property violates the discharge injunction.<sup>80</sup>

Clients should be advised not to ignore any future lawsuits based on debts discharged in their bankruptcy or laws or stayed by bankruptcy. Under § 524, the bankruptcy discharge is no longer an affirmative defense and a debtor may not waive this defense.<sup>81</sup> However, failure to defend or remove the state court action to bankruptcy court or seek enforcement of the § 524 injunction in bankruptcy court can cause wrongful garnishment and unnecessary expense and hardship to the debtor.<sup>82</sup>

11 U.S.C. § 524(e) provides that a discharge under § 524 does not affect the liability of any co-debtor. Thus, a co-debtor or surety who did not also file bankruptcy would still be liable on an outstanding debt that was discharged by a debtor. However, the 11 U.S.C. § 524(b)(3) discharge injunction can protect both spouses' interests (including those of the non-filing spouse) in community property acquired after the bankruptcy.<sup>83</sup>

A debtor may enforce a violation of the § 524 discharge injunction by filing a motion or adversary complaint in bankruptcy court.<sup>84</sup> A proceeding to enforce a discharge injunction is a core proceeding. Bankruptcy courts have jurisdiction over such cases and may even re-open a closed case to enforce a discharge injunction.<sup>85</sup> A bankruptcy court may hold a creditor in contempt for violation of a discharge injunction and award damages, attorney fees and other relief.<sup>86</sup> A state court judgment that violates the discharge injunction or order may be voided or vacated.<sup>87</sup> No filing fees are required for a debtor's motion to reopen a closed case based on an alleged violation of the discharge injunction.<sup>88</sup>

When a client comes to you about a lawsuit filed by a creditor after a debt has been discharged in bankruptcy (or another collection action), you should also advise them as to potential monetary claims under the federal Fair Debt Collections Act, federal Fair Credit Reporting Act, the Louisiana unfair trade practices act and contempt of court.<sup>89</sup>

<sup>78</sup> *In re Javar*, 422 B.R. 242 (Bankr. D. Mont. 2009).

<sup>79</sup> *In re Laboy*, 2010 WL 427780 (Bankr. D. P.R. 2010).

<sup>80</sup> *In re Walker*, 180 B.R. 834 (Bankr. W.D. La. 1995).

<sup>81</sup> In 2008, the Louisiana legislature amended La. Code Civ. Proc. art. 1005 and 927 to eliminate bankruptcy as an affirmative defense and make it a peremptory exception. Act 824 of 2008. Old Louisiana state jurisprudence that holds that a valid judgment can be entered against a debtor on a debt that has been discharged in bankruptcy is no longer good law after the 1970 amendments to 11 U.S.C. § 524. See e.g., *Beneficial Fin. Co. v. Kramer*, 270 So.2d 283 (La. App. 3 Cir. 1972).

<sup>82</sup> In some cases, state court actions can be removed to federal court. 28 U.S.C. § 1452; Bankruptcy Rule 9027.

<sup>83</sup> *In re Kaye*, 2012 WL 364092 (Bankr. E.D. La. 2012); *In re Dyson*, 277 B.R. 84 (Bankr. M.D. La. 2002); *In re Strickland*, 153 B.R. 909 (Bankr. D. N.M. 1993).

<sup>84</sup> The Ninth Circuit has held that enforcement of a discharge injunction must be by motion, rather than adversary complaint. *Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186 (9<sup>th</sup> Cir. 2011) (interpreting Bankruptcy Rules 9020 & 9014 to require use of motion procedure). The Second Circuit has held that discharge injunction enforcement is proper by motion. *In re Kalkow*, 602 F.3d 93 (2d Cir. 2010).

<sup>85</sup> *In re Gerwin*, 300 Fed. Appx. 293 (5<sup>th</sup> Cir. 2008).

<sup>86</sup> *Matter of Terrebonne Fuel & Labs, Inc.*, 108 F.3d 609, 613 (5<sup>th</sup> Cir. 1997); *In re Batiste*, 2009 WL 2849077 (Bankr. E.D. La. 2009); *In re Ellzey*, 2009 WL 2848664 (Bankr. E.D. La. 2009), *In re Walker*, 180 B.R. 834 (Bankr. W.D. La. 1995).

<sup>87</sup> *In re Bayhi*, 528 F.3d 393, 402 (5<sup>th</sup> Cir. 2008) (Rooker-Feldman doctrine does not bar vacatur of state court judgment that violates discharge order).

<sup>88</sup> Bankruptcy Court Miscellaneous Fee Schedule (28 U.S.C. § 1930).

<sup>89</sup> *Randolph v. IMBS, Inc.* 368 F.3d 726 (7<sup>th</sup> Cir. 2004); *In re Rogers*, 391 B.R. 317 (Bankr. M.D. La. 2008) (FDCPA remedy for Bankruptcy Code violations); *In re Walker*, 180 B.R. 834 (Bankr. W.D. La. 1995) (Louisiana unfair trade practices act violated); but contra, *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510 (9<sup>th</sup> Cir. 2002) (no FDCPA remedies for violations of Bankruptcy Code).

## **7.5 BANKRUPTCY DISCRIMINATION CLAIMS**

Also, 11 U.S.C. § 525 (a), entitled “Protection against discriminatory treatment”, prohibits certain actions by government units solely because of a debtor’s bankruptcy.<sup>90</sup> A debtor may enjoin conduct prohibited by § 525(a) even if the § 362 automatic stay does not apply or is no longer in effect.<sup>91</sup> 11 U.S.C. § 525(b) prohibits private employers from firing employees due to a bankruptcy, but does not apply to hiring decisions.<sup>92</sup> Section 525 claims may be litigated in federal or state court.<sup>93</sup>

## **7.6 SET-OFFS**

Non-fraudulent government overpayments may be discharged in bankruptcy. Recoupment of these pre-petition discharged debts from the debtor’s future government payments, e.g., Social Security benefits, would not be a permissible offset under 11 U.S.C. § 553.<sup>94</sup> However, several courts have allowed recoupment of a discharged pre-petition VA benefits overpayment from post-petition VA benefits.<sup>95</sup>

## **8. THE FILING FEE**

The full filing fee for a Chapter 7 bankruptcy is \$306 and for a Chapter 13 bankruptcy it is \$281. These fees can change, so check the clerk of court’s website for current fee rates. In a Chapter 7 bankruptcy, debtors whose income is below 150% of the Federal Poverty Income Guidelines, can apply for a waiver of the filing fee or to pay the fee in installments (Form B-3B). However, despite the new laws, these Chapter 7 initial filing fee waivers are rarely granted in some jurisdictions. Also, paupers may be able to qualify for 28 U.S.C. § 1915 pauper status for fees other than the initial filing fee, e.g., an appeal or creditor’s adversary complaint.<sup>96</sup> A debtor does not have to pay a filing fee for an adversary complaint.<sup>97</sup>

In a Chapter 13 bankruptcy, the debtor must pay the full filing fee, but can pay the filing fee in installments. To do this, the debtor must pay at least \$61 towards the bankruptcy court filing fee upon filing the petition. If the debtor plans to pay just \$61 with the petition, an Application and Order to Pay Fee in Installments (Official Form B-3A) needs to be filed. The Application to Pay Fee in Installments should allow for the full fee to be paid within 30 days of filing the emergency petition or else the judge may not sign the order.

## **9. THE EMERGENCY BANKRUPTCY PETITION**

Bankruptcy attorneys are often confronted with a new client whose property is going to sheriff’s sale the next day or possibly in the next two hours. There is no time to prepare a complete set of bankruptcy forms. For this situation, an emergency bankruptcy petition may be filed. The client may file this pro se and the attorney may be appointed as counsel of record later. The client must file the

<sup>90</sup> *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003).

<sup>91</sup> *NextWave Personal Communications v. FCC*, 254 F.3d 130, 143 (D.C. Cir. 2011) *aff’d* 537 U.S. 293 (2003).

<sup>92</sup> *Compare Robinette v. WESTconsin Credit Union*, 686 F.Supp.2d 1206 (W.D. Wis. 2010) with *In re Burnett*, 635 F.3d 169 (5<sup>th</sup> Cir. 2011).

<sup>93</sup> *In re Morrow*, 189 B.R. 793, 804 (Bankr. C.D. Cal. 1995).

<sup>94</sup> *Rowan v. Morgan*, 747 F.2d 1052 (6<sup>th</sup> Cir. 1984).

<sup>95</sup> *See e.g., In re Beaumont*, 586 F.3d 776 (10<sup>th</sup> Cir. 2009).

<sup>96</sup> *In re Richmond*, 247 Fed. Appx. 831 (7<sup>th</sup> Cir. 2007)(adversary proceeding); *In re Ravida*, 296 B.R. 278 (1<sup>st</sup> Cir. BAP 2003)(appeal).

<sup>97</sup> Also, certain child support creditors may not have to pay filing fees for an adversary complaint.

2 page “Voluntary Petition” (Official Form B-1), Statement of Compliance with Credit Counseling Requirement (Official Form B-1 Exhibit D), Statement of Social Security Number (Official Form B-21), an initial list of creditors, and Notice to Individual Consumer Debtor and Certificate of Notice to Individual Consumer Debtor (Official Forms B-201A and B-201B).<sup>98</sup>

Once the emergency petition is filed, the automatic stay will go into effect, staying the sale, assuming the petition was filed prior to the commencement of the sale. The remaining schedules and other forms must be filed within 14 days.<sup>99</sup> That time may be further extended by filing a motion for extension of time.

It is vital to check with the bankruptcy court’s clerk to determine whether the forms required by local rule and custom differ than those outlined above. In the event you can’t get to the courthouse before it closes and the sale is going forward first thing in the morning, the bankruptcy court clerk has someone on 24 hour call that you may call to arrange an after-hours filing. Be sure that the date and time of the filing is recorded on the petition.

The file stamped petition should then be faxed to the foreclosing lender and the Sheriff’s office. A follow-up phone call should be made to verify receipt. In these situations, there may be insufficient time to collect the information to perform a complete analysis and therefore you may not be able to give the client a fully informed assessment of options. If that is the case, you may want to have the client file the emergency petition pro se and put it in writing to the client that you may not be able to file the remaining forms and petitions on their behalf depending on your the investigation and whether or not they provide the information that you need.

## **10. INTRODUCTION TO THE VOLUNTARY PETITION AND SCHEDULES**

The Petition (Official Form B-1) is the central form required to file bankruptcy and only requires basic information. Ten schedules, Schedules A through J, are designed for the disclosure of all of the debtor’s assets and liabilities, claimed exemptions, and budget. These disclosures are intended to be comprehensive in nature and are to be taken quite seriously. The debtor is required to sign a Declaration Concerning Debtor’s Schedules (Official Form B-6), attesting to the truth of these schedules, under penalties of perjury and bankruptcy fraud, both criminal offenses which could require jail time.

More and more, creditors oppose a Chapter 13 Plan or seek to oppose or revoke a debtor’s Chapter 7 bankruptcy discharge for failure to disclose all assets and debts.<sup>100</sup> Your clients must be advised of the importance of complete disclosure. You may need to help your client by asking the proper questions to make sure they have disclosed all asset and debts. For example, clients do not always understand succession property, claims to life insurance policies, and co-signing for debt. It is your duty as the attorney to make sure that you explain all the nuances of assets and debts. Instead of relying on broad questions like “What real property do you own?” ask specific questions like “Are your mother and father

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<sup>98</sup> All of these bankruptcy forms are available at: <http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx>  
<sup>99</sup> Bankruptcy Rule 1007(c).

<sup>100</sup> See e.g. *In re Duncan*, 562 F.3d 688 (5th Cir. 2009); *In the Matter of Beauboeuf*, 966 F.2d 174 (5th Cir. 1992). Note: if your client is a creditor, an adversary proceeding may be filed to contest a discharge in appropriate cases. The creditor has the burden of proof that the schedule of assets was false.

still alive? If not, did they own any real estate when they passed away?" to get the information that you need. The National Consumer Law Center's Bankruptcy Basics book has a good sample questionnaire that can be used to tease all assets and debts out of your client. It is a good idea to start with that questionnaire and then design your own once you are comfortable with the process.

It is also very important to view the clients' credit reports and tax transcripts before filing bankruptcy. Your client may pull their credit reports from Equifax, Experian and Transunion for free at [www.annualcreditreport.com](http://www.annualcreditreport.com). You may need to assist them in pulling the credit reports offline, but the client needs to be there to verify his or her personal information, because the website asks very specific questions like "which type of car did you own in 1999?" which need to be answered and you will not know the answers. If you answer the questions wrong, then the credit report will not be available online. A tax transcript will help you determine what taxes are owed, whether they are dischargeable and what tax returns have not been filed. A tax transcript can be ordered by an IRS Form 4506-T or electronically by the IRS or attorneys who have electronic access to these records.

If a minor omission is found by the trustee, he or she may ask your client to amend with additional information. A material omission, however, may have dire consequences, including a denial of discharge under 11 U.S.C. § 727(a)(2)-(4) or indictment for bankruptcy fraud.

Most attorneys now pay to use software which automatically fills out the forms, schedules, plan, etc., according to data input and can even automatically file the bankruptcy electronically, e.g., Best Case, E-Z Forms, Standard Legal. These bankruptcy software programs save significant time and often guide you through each of the Louisiana bankruptcy courts' idiosyncratic procedures.

## **11. SCHEDULE A - REAL PROPERTY**

Schedule A (Official Form B-6A) requires the disclosure of all interests in real estate, including a description of the asset, the nature of the interest, the current market value of the interest, and the amount of any claim secured by the interest.

The description should include both the location of the property and its *legal description*. It is sufficient to simply attach a photocopy of the legal description taken from an act of sale or mortgage, or from a mortgage certificate.

The nature of debtor's interest is usually full ownership. Sometimes, the property is co-owned. Sometimes the debtor's interest is a usufruct or a naked ownership subject to another person's usufruct.

When disclosing the *current value of debtor's interest* in the property, a practical approach must be taken. First, the market value of the property must be determined. Clients will tend to have an inflated sense of what their property is worth, and this will not serve them well in bankruptcy. I suggest looking at the tax assessor's value of the property on the parish tax assessor's website, which is usually a low valuation. It is a good idea to also look at online valuation resources like [zillow.com](http://zillow.com), which is usually a high valuation and use a valuation in between for the purposes of schedule A. If there are questions as to the property value, you should get a Broker's Price Opinion (BPO) from a local real estate agent, which only costs about \$75-100, as opposed to a full appraisal that may cost between \$300-400.

Next, you have to determine the value of the debtor's interest in the property. If the debtor solely owns the property, there is no problem. If property is merely co-owned, the percentage of ownership should be indicated, and only the fractional value should be listed under the market value. One could argue, however, that a 50% co-ownership interest in real estate is actually worth less than 50% of the market value of the property as a whole because, if the other co-owner objects to a sale, the interest can only be liquidated by a sheriff's sale following a partition order. Usufructs, naked ownerships and fractional interests are even more difficult. Consult a real estate agent or an attorney who regularly practices real estate law for complicated questions regarding valuation.

Schedule A also asks for the *amount of the secured claim*. Here, the name and rank of the mortgage or lien holder, as well as the amount for each, is listed. More detailed explanations of these secured claims are disclosed in Schedule D.

A parental usufruct may be exempt from seizure by creditors.<sup>101</sup>

## **12. SCHEDULE B - PERSONAL PROPERTY**

Schedule B (Official Form B-6B) contains 35 categories of personal property. Between Schedule A and Schedule B, all property of the debtor (except for rights under leases and executory contracts) must be disclosed.

### **12.1 Cash on hand**

Cash is not exempt in Louisiana.<sup>102</sup> Any cash owned by the debtor on the date of filing is property of the estate and fair game for administration by the trustee. Remember that when filing a Chapter 13, you need to show the Debtor can pay, but that Chapter 13 may be converted to a Chapter 7 later and the trustee may want to administer any cash listed on Schedule B.

For cash, timing is everything. Cash acquired after the filing of the bankruptcy (except from accounts receivable) is not property of the estate. Therefore, plan on filing the petition prior to the next payday, as opposed to immediately afterward.

### **12.2 Checking, savings or other financial accounts, certificates of deposits, or shares in banks, savings and loan, thrift, building and loan, and homestead associations, or credit unions, brokerage houses, or co-operatives.**

The trustee will determine the actual collected balance as of the filing date of the bankruptcy and may ask to see bank statements if there are any questions. If a check had been written pre-petition but had not cleared by the bankruptcy filing date, the trustee will likely consider the funds transferred by that check to be property of the estate and may require your client to pay that over to him, even though the check may have cleared the day after filing. Accordingly, advise clients to clear their checking accounts at least one week prior to filing. Clients can do this by paying for their living expenses with cash or cashier's checks prior to the expected bankruptcy filing date.

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<sup>101</sup> La. R.S. 20: 1; La. Civ. Code art. 223; La. R.S. 13: 3881(A)(3). Other usufructs generally are not exempt. *Keys v. Box*, 476 So.2d 1141 (La. App. 3 Cir. 1977).

<sup>102</sup> *In re Sinclair*, 417 F.3d 527 (5<sup>th</sup> Cir. 2005)(exempt wages deposited into account no longer exempt); *In re Mier*, 2006 WL 1228892 (W.D. La. 2006)(workers compensation deposited into account not protected from seizure).

Clients should also be sure to list joint accounts either here or in the Statement of Financial Affairs, "Property Held for Another." Keep in mind that if joint accounts hold a considerable amount of cash, the trustee may attempt to take it and take his chances litigating any dispute that may arise as to actual ownership. Therefore, the debtor should engage in planning that does not prejudice the true owner of a joint account, usually a relative.

### **12.3 Security deposits with public utilities, telephone companies, landlords, and others.**

In consumer cases these are relatively insignificant. If the debtor has paid them, these security deposits usually are collateral for services provided but not yet billed or paid. In that sense these funds are encumbered. Generally, trustees are not interested in consumers' security deposits.

### **12.4 Household goods and furnishings, including audio, video, and computer equipment.**

Debtors must do their best to list out each piece of furniture and appliances, though some may be aggregated (e.g., kitchen table and 4 chairs). It is best to go through each room with the client and try to get the client to visualize the room and list all belongings in that room. I list DVDs and VHS tapes here and have never had a problem.

The market value must be estimated realistically. For household goods, I ask my clients to estimate what price they could get if goods were sold at a garage sale. The reality is that used furniture is worth only a small fraction of its original cost. In a high profile case where there is valuable antique furniture, it may be worthwhile to obtain an appraisal of what the property could sell for in a liquidation sale.

Most household goods and furnishings are exempt under La. R.S. 13:3881(A)(4).

### **12.5 Books, pictures, and other art objects, antiques, stamp, coin, record, tape, compact disc, and other collections or collectibles.**

Most people have books, pictures, records, tapes, and CDs. Most people do not have "collections" that can be sold for any significant value. Some bankruptcy attorneys write "none" for this category. It is better practice to disclose "Misc. Items" and put down a garage sale value. Trustees are not going to administer routine belongings. On the other hand, signed or numbered artwork, or stamp, coin, or record collections of any significance may be of interest to a trustee, and these need to be precisely disclosed.

"Family portraits" are exempt, as are "arms and military accoutrements" and "musical instruments" that are actually played by a family member.<sup>103</sup>

The term "antiques" is somewhat confusing here, because certain antiques may have already been listed under household furnishings at item 4. One Louisiana bankruptcy court decision held that luxury items, "such as antique furniture, are exempt so long as they are 'used by the debtor or a member of his family' and otherwise fall under the provisions of this section."<sup>104</sup> On the other hand, Louisiana bankruptcy courts have disallowed claimed exemptions for property whose value is mostly "artistic," "ornamental" or "related to prestige and status."<sup>105</sup>

<sup>103</sup> La. R.S. 13:3881(A)(4)(b)-(c).

<sup>104</sup> *Matter of Mmahat*, 110 B.R. 2326, 241 (Bankr. E.D. La. 1990).

<sup>105</sup> *In re Hendrick*, 45 B.R. 965 (Bankr. M.D. La. 1985).

## **12.6 Wearing apparel.**

Everyone has clothing, and it is all exempt. La. R.S. 13:3881(A)(4)(a). Usually I estimate the value of each persons clothing to be around \$200 for children, \$500 for adults.

## **12.7 Furs and jewelry.**

Generally, used furs are not valuable, and even if your client has a valuable fur, one fur is exempt as an article of clothing.<sup>106</sup> If your client has more than one fur, the additional fur(s) may likewise be exempt, if they are “used by” the debtor or a member of his family, as opposed to being held in storage. On the other hand, a claimed exemption on an extra fur may be disallowed under the language contained in *Ward v. Turner*, cautioning that debtors “should refrain from making claims for multiple items with the same function”, and that such claims do not satisfy the purpose of Louisiana’s exemption statute which is “to provide for the subsistence, welfare, and fresh start of a debtor to the end that his family will not be destitute and to the end that the debtor will not become a charge on the state.”<sup>107</sup>

Jewelry is not exempt, except for “any wedding or engagement rings worn by either spouse, provided the value of the ring does not exceed five thousand dollars.” La. R.S. 13:3881(A)(5). Most people have some jewelry, if not costume jewelry, although they probably paid a lot more than they could sell it for. Even if there is no real value, it is good practice to disclose, for example, “miscellaneous items of inexpensive or costume jewelry” with little value. For valuable jewelry, have your client obtain a liquidation sale value from a pawn shop or a respected jeweler if there is a market for the item. A debtor may be able to buy non-exempt jewelry back from the trustee if he decides to administer said jewelry.

Jewelry is often insured on a homeowners’ insurance policy. It is good practice to ask the client to go back several years and determine what jewelry was listed on policy declarations and riders, and reconcile these records with what is being listed in the asset schedules.

## **12.8 Firearms and sports, photographic and other hobby equipment.**

Most debtors forget to list their guns in this section if they are filling out a questionnaire on their own. Be sure to specifically ask clients if they own a gun. Only a person’s “arms and military accoutrements” are exempt. La. R.S. 13:3881(A)(4)(c). This exemption does not exempt a debtor’s personal gun collection which the debtor does not use for any military purpose.<sup>108</sup>

## **12.9 Interests in insurance policies**

All life insurance policies owned by the debtor should be disclosed. Term life insurance policies have no market value. Whole life and universal life policies may have cash surrender values, and this value should be disclosed as the market value.

Life insurance policies are exempt.<sup>109</sup> However, Louisiana limits the exempt amount that may be invested in any policy issued within 9 months prior to filing of a bankruptcy to \$35,000.

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<sup>106</sup> La. R.S. 13:3881(A)(4)(a).

<sup>107</sup> *Ward v. Turner*, 150 B.R.378, 380-381 (1993), *aff’d* 176 B.R. 424 (E.D. La. 1994).

<sup>108</sup> *In re Brown*, 189 B.R. 653 (Bankr. M.D. La. 1996).

<sup>109</sup> La. R.S. 22:912; La. R.S. 22:647(A).

## **12.10 Annuities**

An annuity is created when a person pays a life insurance company a single premium, which is later distributed back to them over time. Most people use annuities to accumulate funds free of income and capital gains taxes. Annuities are exempt.<sup>110</sup> Annuities are also powerful planning tools, but may have less flexibility than life insurance in terms of liquidity.

## **12.11 Interests in IRA, ERISA (including 401(k)), Keogh, or other pension or profit sharing retirement plans**

If your client is the beneficiary of an employer-based pension or profit sharing retirement plan, or a 401k, 403(b) and 454(b) plan, these are excluded from the bankruptcy estate under federal non-bankruptcy law. These retirement plans are covered by the Employee Retirement Income Security Act (ERISA) and do not constitute “property of the estate.” 11 U.S.C. §541(C)(2) (2006).<sup>111</sup> This is because the restrictions that ERISA places on the transfer of a beneficial interest in the pension plan are enforceable in bankruptcy court. *Id.* Therefore, interest in the funds in the 401(k) account, for example, cannot be transferred to creditors or the bankruptcy trustee. The 401(k) account is in effect a spendthrift trust, by virtue of ERISA’s mandated anti-alienation language found at 29 U.S.C. §1056 (d).<sup>112</sup> Thus, you do not need to worry about a state exemption for ERISA plans, nor do you have to worry about La. R.S. 20:33, because the pension funds are not the type of property that can be included in a bankruptcy estate. Nonetheless, these plans should be disclosed at item 11 of Schedule B, with an asterisk explaining they are not property of the estate under 11 U.S.C. §541(C)(2).

For non-ERISA accounts, such as IRAs and some SEPs, SIMPLEs, and Keogh plans, Louisiana law provides for an exemption under La. R.S. 13:3881 (D). As amended in 2010, La. R.S. 13:3881(D)(3) provides for an exemption for “all individual retirement accounts or individual retirement annuities of any variety or name, whether authorized now or in the future in the Internal Revenue Code of 1986, or the corresponding provisions of any future United States income tax law...” [emphasis added]. However, contributions to a non-ERISA account are not exempt if made less than one calendar year from the date of filing for bankruptcy. La. R.S. 13:3881(D)(2). On the other hand, a transfer from one tax-deferred arrangement to another or from one annuity contract to another is not to considered a contribution, and is thus still exempt under La. R.S. 13:3881(D)(3).

One possible issue to keep in mind here is whether the funds have already been taken out of the pension plan, account or trust at the time the bankruptcy is filed.<sup>113</sup>

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<sup>110</sup> La. R.S. 20:33; 13:3881(D); and 22:912.

<sup>111</sup> Please note that interests in an education IRA as defined in 26 U.S.C. § 530(b)(1) or under a qualified State tuition plan as defined in 26 U.S.C. § 529(b)(1), also do not constitute property of the estate under 11 U.S.C. §541(B)(7) (2006). See *Seafort v. Burden (In re Seafort)*, 669 F.3d 662 (6<sup>th</sup> Cir. 2012). Those plans also have restrictions on the transfer of a beneficial interest in the account that are enforceable in bankruptcy court.

<sup>112</sup> David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 245 (2007).

<sup>113</sup> *In re Woodyear*, 162 F.3d 1160 (5<sup>th</sup> Cir. 1998)(savings plan was part of bankruptcy estate and non-exempt because QDRO took the funds out of the pension plan, account or trust).

### **12.12 Stocks and interests in incorporated and unincorporated businesses**

If your client is a sole proprietor of an ongoing business, that should be disclosed here (as well as other places). I would put the value as unknown here. However, the assets and liabilities of the business are the debtor's, and should be listed in the debtor's various asset and liability schedules.

### **12.13 Interests in partnerships and joint ventures**

If the venture or partnership is merely the co-ownership of real estate without anything more, it should be sufficient to disclose this in Schedule A.

### **12.14 Government and corporate bonds and other negotiable and non-negotiable instruments**

In this category, the most common items for consumers are savings bonds. Savings bonds are often held for the benefit, and in the name, of a minor child, and if this is the case, that should be disclosed in the Statement of Financial Affairs and not here.

### **12.15 Accounts receivable**

This can be a problem for sole proprietors. When the bill is not paid immediately after the service is rendered, an account receivable is created. Accounts receivable that exist at the bankruptcy filing are property of the estate.

If your client has accounts receivable, strategic thinking is in order. First of all, is it possible to legitimately time the bankruptcy filing to minimize the accounts receivable at filing date? Second, the receivables should be broken down and analyzed for age and likelihood of collectability, and a discounted amount should be disclosed as the market value. Third, 3/4ths of the gross receivables should be claimed as exempt as wages, especially if the debtor has little or no business expenses.<sup>114</sup> Fourth, if the trustee is interested in administering the receivables, remind him that he must file returns and pay the income and (possibly) self-employment taxes on monies collected.

### **12.16 Alimony, maintenance, support and property settlements to which the debtor is may be entitled**

The right to receive past due alimony, support, or maintenance that has accrued and is due and owing as of the bankruptcy filing date is property of the estate. Past due child support is exempt under La. R.S. 13:3881(A)(1)(a).

The right to receive a property settlement is usually property of the estate, as pre-bankruptcy property settlements are usually vested, the rights are identifiable and non-contingent, and they are in the nature of a receivable or a promissory note.

### **12.17 Other liquidated debts owing debtor including tax refunds**

If the amount of a claim has been ascertained or is readily determinable, it is liquidated—whether contested or not.<sup>115</sup> Therefore, a liquidated debt is one

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<sup>114</sup> A Louisiana bankruptcy court has ruled that La. R.S. 13:3881 exempts earnings by self-employed persons. *In re Graham*, 2010 WL 346372 (Bankr. M.D. La. 2010). See also, *FTC v. National Business Consultants, Inc.*, 2005 WL 2060911 (E.D. La. 2005)(court would rule that a self-employed person's earnings are exempt).

<sup>115</sup> Ready determination turns on whether the amount of the debt can be determined in a simple hearing. *In re Slack*, 187 F.3d 1070 (9<sup>th</sup> Cir. 1999).

which is already determined and is either fixed or objectively capable of calculation at any given time. A good example is a money judgment. The debt is resolved and commemorated in the form of a judgment, although the exact amount owed depends on how much interest has accrued to date and the amount of other recoverable “costs” that may have been tacked on.

### **12.18 Tax refunds**

Tax refunds and earned income credits are tricky and sometimes debtors and their attorneys are caught unaware. There are basically three scenarios to consider.

The first scenario is where the debtor has filed a bankruptcy after having filed a tax return for the previous year, with a refund still due and owing from the government. A tax refund attributable to pre-petition income is property of the bankruptcy estate.<sup>116</sup> Generally, a trustee will pro-rate a tax refund by the days prior to the bankruptcy filing and treat the pro-rated part of a post-petition tax refund as a pre-petition asset available to satisfy pre-petition debts.<sup>117</sup> For example, if the debtor filed his bankruptcy 73% of the way through the year, the trustee will claim 73% of the tax refund under the “pro rata by days” method. If the taxpayer is able to file earlier in a year, he will be able to protect more of a tax refund from the trustee and creditors.

In Louisiana, and many other states, large portions of a low-income taxpayer’s tax refund may be exempt from seizure.<sup>118</sup> For example, in Louisiana, the earned income credit is exempt from seizure. However, the child tax credit is not exempt in Louisiana.<sup>119</sup> Thus, in Louisiana, the issue will be how much of the child tax credit portion of the tax refund (generally about \$1,000) qualifies as pre-petition assets subject to turnover to the trustee.

A child tax credit differs from the earned income credit in several respects. The child tax credit has both refundable and non-refundable portions. The child tax credit may not accrue until the end of the tax year. Bankruptcy courts have held that the refundable portion of the child tax credit is property of the estate, but that the non-refundable portion is not.<sup>120</sup> One court has held that no part of the child tax credit is property of the bankruptcy estate since the earliest accrual date of a child tax credit is January 1 of the next year.<sup>121</sup>

Many bankruptcy courts have standing orders for debtors to turnover tax refunds to the trustee. Entitlement to the refunds can be litigated by motion should the trustee to decide to claim all or part of the refund.

The second scenario is where the debtor recently filed past due tax returns for years past and is owed refunds for those past years. The debtor needs to be aware that all those refunds will have to be turned over to the Trustee, although the exempt portions may be retained by the debtor.

The third scenario is where the debtor has filed a bankruptcy but has not yet filed a tax return that is past due. A debtor must file his past due tax return from the most recently ended tax year immediately upon filing his petition, if not before.

<sup>116</sup> *Kokoszka v. Belford*, 417 U.S. 642 (1974); *United States v. Michaels*, 840 F.2d 901 (11<sup>th</sup> Cir. 1988).

<sup>117</sup> See e.g., *In re Meyers*, 616 F.3d 626 (7<sup>th</sup> Cir. 2010).

<sup>118</sup> La. R.S. 13: 3881(A)(6), Act 468 of 2004.

<sup>119</sup> *In re Legier*, 2004 WL 4945987 (Bankr. E.D. La. 2004) (child tax credit is not exempt).

<sup>120</sup> *In re Law*, 336 B.R. 780 (8<sup>th</sup> Cir. B.A.P. 2006); *In re Matthews*, 380 B.R. 602 (Bankr. M.D. Fla. 2007); *In re Donnell*, 357 B.R. 386 (Bankr. W.D. Tx. 2006); see also *In re Zingale*, 451 B.R. 412 (6<sup>th</sup> Cir. B.A.P. 2011).

<sup>121</sup> See *In re Schwarz*, 314 B.R. 433 (Bankr. D. Neb. 2004); *contra In re Law*, 336 B.R. 780 (B.A.P. 8<sup>th</sup> Cir. 2006).

Debtors should be referred to tax attorneys for assistance in these cases before filing the bankruptcy. The bankruptcy attorney should work closely with the tax attorney to make sure that tax problems are known, and are capable of being resolved in a timely manner. See Section 27 Dealing with Taxes in Bankruptcies, *infra*.

### **12.19 Contingent and noncontingent interests in estate of a decedent, death benefit plan, life insurance policy, or trust**

This asks for disclosure of inheritances not yet received. Any significant inheritance they will be lost in a Chapter 7. You are not required to disclose potential inheritances because of an expected legacy from someone who has not yet died. However, if someone dies within 180 days after the bankruptcy petition is filed, that legacy or inheritance, whether or not a succession is open or completed, comes into the bankruptcy estate pursuant to 11 U.S.C. § 541(a)(5). Thus, it is always prudent to discuss this with the client and ask if he has any rich relatives near death. A heir may renounce his right to inherit after the decedent dies.<sup>122</sup> A pre-petition renunciation (other than a “donative” renunciation) may prevent a creditor from seizing the renouncing heir’s share.<sup>123</sup> Furthermore, the Fifth Circuit has held that a pre-petition renunciation of an inheritance is not a fraudulent transfer that would deny discharge.<sup>124</sup>

If your client is the beneficiary of, or has an interest in, a trust, that could be disclosed here if it has not been disclosed elsewhere. Likewise for a beneficiary’s interest in an insurance policy or death benefit plan.

### **12.20 Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims. Give estimated value of each**

Contingent and unliquidated assets, as opposed to liquidated assets, go here. Usually, the debtor’s claims as plaintiff or counterclaimant in litigation (or potential litigation for pre-petition injuries or claims) are disclosed here. Also, any potential disaster benefits including Road Home Funds should be listed here.<sup>125</sup> All potential claims in litigation and disaster benefits should be listed here or they may be lost under the judicial estoppel doctrine.<sup>126</sup>

For example, personal injury suits with the debtor as plaintiff must be disclosed here. A debtor’s claim for damages, arising out of a personal injury sustained prior to the filing of the bankruptcy, whether or not pursued, is considered property of the estate.<sup>127</sup> If it is not disclosed, the debtor will probably lack stand-

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<sup>122</sup> La. Civ. Code art. 947, 949, 951.

<sup>123</sup> See e.g., *Matter of Simpson*, 36 F.3d 450 (5<sup>th</sup> Cir. 1994); *In re Brumfield*, 1998 WL 834999 (M.D. La. 1998). One district court has opined that *Simpson* is no longer good law after *Drye v. United States*, 528 U.S. 49, 52 (1999). See e.g., *In re Schmidt*, 362 B.R. 318, 321-23 (Bankr. W.D. Tx. 2007). However, the Fifth Circuit recently considered *Drye* and reaffirmed *Simpson* as to both Louisiana and Texas, holding that a pre-petition renunciation of an inheritance is not a fraudulent transfer that would deny discharge under 11 U.S.C. § 727 (a)(2). See *In re Laughlin*, 602 F.3d 417 (5<sup>th</sup> Cir. 2010).

<sup>124</sup> *In re Laughlin*, 602 F.3d 417 (5<sup>th</sup> Cir. 2010).

<sup>125</sup> Disaster assistance may be part of the bankruptcy estate if the debtor’s right to receive assistance has been established by legislation prior to the filing of bankruptcy. See e.g., *In re Burgess*, 438 F.3d 493 (5<sup>th</sup> Cir. 2006); *In re Bracewell*, 454 F.3d 1234 (11<sup>th</sup> Cir. 2006) cert. denied 549 U.S. 1301 (2007).

<sup>126</sup> *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598 (5<sup>th</sup> Cir. 2005).

<sup>127</sup> *In re Ballard*, 238 B.R. 610 (Bankr. M.D. La. 1999).

ing to pursue that claim after the bankruptcy is finished, as the trustee will not have disclaimed or abandoned it back to the debtor.

While the form instructs you to give the “estimated value”, you should do so in the description of the asset, but my practice is to put “unknown” in the column calling for the market value of the asset.

Louisiana law does not exempt proceeds from personal injury lawsuits.<sup>128</sup>

### **12.21 Automobiles, trucks, trailers, and other vehicles and accessories**

The equity value of a motor vehicle for exemption purposes is based on the NADA retail value. See the NADA “the yellow book” at: [www.nadaguides.com](http://www.nadaguides.com). Traditionally, attorneys use the private party sale value to determine market value.

One motor vehicle per household is exempt up to \$7,500 in value under La. R.S. 13:3881(A)(7). A school bus is exempt as a “motor vehicle.”<sup>129</sup> The only additional vehicle that may be exempted is one which is modified to adapt its use to the physical disability of the debtor or his family and is used for transportation of the disabled person.<sup>130</sup> An additional motor vehicle may not qualify as an exempt tool of the trade.<sup>131</sup>

### **12.22 Other personal property of any kind not already itemized**

I usually add an extra “Misc. Items none worth more than \$50 per item” and put value at \$500 or above to this category, just to cover any items that the debtor may have forgotten to include.

## **13. SCHEDULE C - PROPERTY CLAIMED AS EXEMPT**

Louisiana exemptions apply in bankruptcies as opposed to federal bankruptcy exemptions.<sup>132</sup> Most Louisiana exemptions can be found at La. R.S. 13:3881. Louisiana debtors are also entitled to claim “non-bankruptcy federal exemptions” such as those found in ERISA, the Social Security Act, and veterans benefits, to name a few.<sup>133</sup> If a debtor has recently moved to Louisiana, it is possible that another state’s exemption laws or the § 522 federal exemptions might govern his bankruptcy.<sup>134</sup> A claimed exemption is presumed valid and the objecting party has the burden of proof that the exemption is not properly claimed.<sup>135</sup>

In a Chapter 7, exempt property will be retained by the debtor but non-exempt property of value will be administered by the trustee. Is the debtor willing to part with it or repurchase it from the trustee? This question needs to be asked and answered prior to the filing, because its answer has a direct bearing on whether to proceed by Chapter 7 or Chapter 13, or not at all.

A family home may be exempt from seizure as a homestead. La. R.S. 20:1 grants a homestead exemption up to \$35,000 of net equity in a debtor’s primary home. A mobile home may qualify for a homestead exemption even if its owner

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<sup>128</sup> *Matter of Wischan*, 77 F.3d 875 (5<sup>th</sup> Cir. 1996).

<sup>129</sup> *In re Belsome*, 434 F.3d 774 (5<sup>th</sup> Cir. 2005).

<sup>130</sup> La. R.S. 13: 3881 (A)(8).

<sup>131</sup> *In re Belsome*, 434 F.3d 774 (5<sup>th</sup> Cir. 2005).

<sup>132</sup> Under 11 U.S.C. §522(b), Louisiana has opted out of the federal bankruptcy exemptions. See La. R.S. 13: 3881 (B).

<sup>133</sup> La. R.S. 13: 3881(B) expressly states that property exempt under federal law, other than 11 U.S.C. § 522(d), is exempt.

<sup>134</sup> *In re Fernandez*, 2011 WL 3423373 (Bankr. W.D. Tex. 2011); *In re Arrol*, 170 F.3d 934 (9<sup>th</sup> Cir. 1999); *In re Camp*, 631 F.3d 757 (5<sup>th</sup> Cir. 2011).

<sup>135</sup> *Rousey v. Jacaway*, 544 U.S. 320, 325 (2005).

does not own the underlying land.<sup>136</sup> The homestead exemption is without limit for medical bills for treatment of a catastrophic injury.<sup>137</sup> In addition, a judgment creditor for a credit card debt may not seize or sell a homestead.<sup>138</sup> The La. R.S. 20: 1 homestead exemption may protect the insurance proceeds of a home damaged by a casualty.<sup>139</sup> Under current law, the homestead exemption is not available to co-owners other than spouses and their minor children. A surviving spouse is eligible for a homestead exemption if she has any interest in the property, including a usufruct.<sup>140</sup> Property co-owned by siblings or unrelated persons, such as co-habiting couple, will not be protected by the homestead exemption.<sup>141</sup> A prior judicial mortgage will prime a homestead exemption.<sup>142</sup> Without a homestead exemption, many indigent debtors will lose their home in a Chapter 7 bankruptcy or fail to qualify for a Chapter 13 reorganization because of the liquidation test.<sup>143</sup>

#### **14. INTRODUCTION TO SCHEDULES D, E, AND F.**

Schedules D, E, and F combined comprise a complete list of creditors. All creditors need to be listed on one of these schedules. From the debtor's point of view, the primary importance of these schedules is to identify the debt that is to be eliminated and/or paid off. While the instructions contained in these schedules demand certain detailed information, compliance with these instructions is not a prerequisite to obtaining the discharge of a particular debt. Rather, timely notice of the bankruptcy proceeding is all that is necessary to discharge an obligation to a creditor, assuming that the debt is otherwise dischargeable. The listing of creditors should be complete. Debts that our clients typically overlook are: (1) loans that they have cosigned for another; (2) deficiencies after repossession; and (3) overpayments of public assistance.

From the trustee's point of view, however, these schedules serve several different and important functions. First, correct listing and classification of creditors is necessary for determining the priority of disbursements by the Trustee, if any.

#### **15. SCHEDULE D AND CREDITORS HOLDING SECURED CLAIMS, LIEN STRIPPING, AUTO LOAN CRAM DOWNS**

Examples of creditors holding secured claims include mortgage companies, auto loan companies, a rent-to-own company, bond for deed vendor, a finance company or any other company to which you pledge possessions to receive credit. The "Amount of Claim" needs to include the mortgage balance as well as any arrearages. We suggest getting a current reinstatement quote or a payoff from the mortgage or finance company to make sure you have a good estimate of the arrearages that will be claimed.

<sup>136</sup> *In re Baker*, 71 B.R. 312 (Bankr. W.D. La. 1987).

<sup>137</sup> La. R.S. 20: 1 (A)(2); *In re Collett*, 351 B.R. 395 (Bankr. W.D. La. 2006) (unlimited homestead exemption denied for failure of proof that debt arose from medical expenses).

<sup>138</sup> La. R.S. 13: 3851.1.

<sup>139</sup> La. R.S. 20: 1 (A)(2); La. R.S. 13: 3881 (A)(9); *In re McCollum*, 348 B.R. 377 (Bankr. E.D. La. 2006) *aff'd* 363 B.R. 789 (E.D. La. 2007). The courts have not ruled on whether disaster assistance to rebuild a damaged home is exempt.

<sup>140</sup> La. Const. art. 7 § 20(A)(2); *In re Johnson*, 2009 WL 2848983 (Bankr. E.D. La. 2009) (right of homestead exemption recognized for homestead owned by surviving spouse, children of her marriage and step-children).

<sup>141</sup> See e.g., *Matter of Brocato*, 30 F.3d 641 (5<sup>th</sup> Cir. 1994) (2 unrelated women), *In re Mazoue*, 240 B.R. 878 (E.D. La. 1999); *In re Davis*, 2008 WL 793520 (Bankr. W.D. La. 2008).

<sup>142</sup> *In re Johnson*, 2009 WL 2848983 (Bankr. E.D. La. 2009).

<sup>143</sup> The liquidation test for a Ch. 13 bankruptcy is found at 11 U.S.C. § 1325(a)(4).

Since the downturn in the economy and the foreclosure crisis, real estate values have dropped in some parts of Louisiana and many homes are now “underwater”, meaning there is negative equity in the home and that the value of the property is less than the balance of the mortgage on the home. For example, a home may only be valued now at \$150,000, but the balance of the mortgage on the home is still \$165,000. 11 U.S.C. §1322(b)(2) provides that the rights of creditors with a claim secured by a security interest in real property that is the debtor’s principal residence may not be modified in a Chapter 13 bankruptcy. The majority of courts have found that a mobile home is not a “principal residence” within the meaning of § 1322(b)(2) anti-modification clause unless the mobile home is “real property.”<sup>144</sup> However, a Louisiana court has held that a mortgage on a mobile home can’t be crammed down even if the debtor does not own the underlying real property.<sup>145</sup>

In the above example, the mortgage company’s claim for \$165,000 must be listed on Schedule D and no portion of that claim can be discharged in a Chapter 13. Whereas in a Chapter 7 bankruptcy, where the debt is not reaffirmed, personal liability on the mortgage on the principal residence may be discharged, however the mortgage company can still seize and sell the property in a foreclosure. After a Chapter 7 discharge, the mortgage company would be prohibited from suing the debtor for a deficiency judgment.

In the case where a second mortgage or other lien on the debtor’s principal residence is wholly unsecured, that lien can be stripped off and the debt discharged in a Chapter 13 bankruptcy.<sup>146</sup>

For example, sometimes second mortgages are completely unsecured. If the value of the home is \$150,000 and the primary mortgage balance is \$150,000 and the balance on the second mortgage is \$15,000, the second mortgage is wholly unsecured. That second mortgage should be listed on Schedule F, as an unsecured creditor, not on Schedule D, which is for secured creditors. Upon completion of the Chapter 13 plan and discharge, the whole debt underlying the second mortgage will have been eliminated. The debtor or his attorney then needs to file a Motion to Avoid Lien to obtain a bankruptcy court avoiding the lien. This court order and a lien or mortgage cancellation request should be filed with the mortgage office in the parish where the property at issue is situated.

Unlike liens attached to the debtor’s principal residence, partially unsecured auto loans and mortgages on second homes can be crammed down in a Chapter 13 bankruptcy.<sup>147</sup> The Bankruptcy Code recognizes that a lien is only a secured claim to the extent there is value in the property at issue. Moreover, the Code states that under secured claims can be bifurcated into their secured and unsecured components under 11 U.S.C. § 506(a). For example, the debtor owns a vehicle worth \$12,000 and the balance on the auto loan is still \$16,000. The auto loan company should be listed on Schedule D with a secured claim of \$12,000. The auto loan company should also be listed on Schedule F with an unsecured claim of \$4,000. Upon completion of the Chapter 13 plan and discharge, the balance on the auto loan will be only \$12,000. The \$4,000 unsecured claim will have been eliminated and the auto loan company will be prohibited from collecting on that extra \$4,000.

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<sup>144</sup> *In re Coleman*, 392 B.R. 761 (8<sup>th</sup> Cir. BAP 2008).

<sup>145</sup> *In re Fells*, 2007 WL 3120113 (Bankr. W.D. La. 2007). Note that the *In re Shepherd* case relied upon by the *In re Fells* decision was reversed on appeal. See *In re Shepherd*, 381 B.R. 675 (E.D. Tenn. 2008).

<sup>146</sup> 11 U.S.C. § 506 (a); *In re Bartee*, 212 F.3d 277 (5<sup>th</sup> Cir. 2000); *In re Bourque*, 2007 WL 274971 (Bankr. E.D.La. 2007).

<sup>147</sup> 11 U.S.C. § 1322(b)(1).

To complicate things, if there is an arrearage, or past due payments, owed by the debtor of \$2,000 to the auto loan company, on top of the \$16,000 mortgage balance, that arrearage may be cured inside the Chapter 13 plan. The debtor can then make regular installments on the \$12,000 secured claim outside of the plan, according to the terms of the loan documents.

Or the debtor can attempt to pay off the secured claim of \$12,000 and pay the arrearage of \$2,000 inside the plan. In that case, the debtor could propose in his Chapter 13 plan to pay \$14,000 over five years at the judicial interest rate (usually much, much lower than the contract rate) through his Chapter 13 plan. The creditor may object to the debtor paying off the loan through the Chapter 13 plan, arguing that it is denied adequate protection because collateral's value is diminishing faster than the secured balance is being paid. However, if the debtor is able to make more payments to unsecured creditors by paying the auto loan inside the Plan, the judge may deny the objection and confirm the Chapter 13 plan. If his Chapter 13 plan is confirmed, the debtor would make monthly payments to the Trustee, which would include his payment to the auto loan company and payments to other creditors, and the Trustee would distribute those payments per the confirmed Chapter 13 plan.

Courts may require different procedures for stripping mortgages in a cram down. Some courts require the debtor to file an adversary proceeding.<sup>148</sup> Most courts prefer that a lien strip in a Chapter 13 bankruptcy to be handled as part of the Chapter 13 plan with explicit notice to the creditor of the proposed lien strip.<sup>149</sup>

A bond for deed or lease purchase agreement should be listed as a secured debt on Schedule D. The vendor may argue that it is an executory contract or lease and that the debtor's remedies are limited to assuming or rejecting the contract pursuant to 11 U.S.C. § 365. However, Louisiana bankruptcy courts should allow the bond for deed buyer to treat the bond for deed as a secured debt that can be cured in a Chapter 13 bankruptcy.<sup>150</sup>

## **16. SCHEDULE E - CREDITORS HOLDING UNSECURED PRIORITY CLAIMS**

Schedule E contains creditors whose claims are entitled to priority over the claims of general unsecured creditors. These priorities are listed and ranked at 11 U.S.C. § 507. The priority creditors that generally appear in our bankruptcy cases are (1) taxing authorities for past due taxes; and (2) ex-spouses with alimony and/or child support claims. Student loans are not priority debts.

It is important to keep in mind that whatever priority tax claims rightfully appear here are *ipso facto* non-dischargeable under 11 U.S.C. § 523(a)(1)(A). The only good thing to say about priority tax debts is that if there is money in the bankruptcy estate net of administrative expenses, these non-dischargeable taxes will be paid with that money, thus somewhat relieving the client's remaining tax liability after bankruptcy.

For Chapter 13 debtors, Schedule E debts must be paid in full "unless the holder of a particular claim agrees to a different treatment."<sup>151</sup> This requirement, in effect, maintains the non-dischargeability of priority taxes that would be non-

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<sup>148</sup> See e.g., *In re Forrest*, 424 B.R. 831 (Bankr. N.D. Ill. 2009).

<sup>149</sup> See e.g., *In re Millsbaugh*, 302 B.R. 90 (Bankr. D. Idaho 2003).

<sup>150</sup> *In re Johnson*, 75 B.R. 927 (Bankr. N.D. Ohio 1987); cf. *In re Brown*, 325 B.R. 169, 174 (Bankr. E.D. La. 2005); *Auto Leasing Specialists, L.L.C. v. Little*, 392 B.R. 222 (W.D. La. 2008).

<sup>151</sup> 11 U.S.C. 1322(a)(2).

dischargeable in a Chapter 7, except that they will be discharged once they are paid in full through the plan. Indeed, because of 11 U.S.C. § 1322(a)(2), priority debts are paid 100 percent in Chapter 13, while other unsecured debts may be paid on a smaller percentage basis, ending with a 11 U.S.C. § 1328 discharge.

## **17. SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS**

Schedule F is the list of unsecured creditors who enjoy no priority and who have no collateral securing their rights. Most of our clients' creditors fall under this category. These debts include revolving charge cards, signature loans, medical and hospital bills, past due utility bills, and tort liability, to name a few. It is vital to list each and every creditor on the debtor's credit report. If debts are obviously prescribed, I put the value down as "unknown."<sup>152</sup>

It is very important tell clients to list each and every possible creditor the first time around because amendments to these schedules cost \$30, which is a lot of money for most of our clients.

## **18. SCHEDULE G - EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

The term *executory contract* is not defined in the Bankruptcy Code, but refers to "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other."<sup>153</sup>

In Chapter 7 cases, under 11 U.S.C. § 365, the trustee (who steps into the shoes of the debtor) may accept or reject the executory contract. Unless the trustee accepts an executory contract within 60 days of the filing of the bankruptcy petition, it is deemed rejected. 11 U.S.C. § 365(d)(1). In a Chapter 13 case, the trustee can accept or reject an executory contract up until confirmation of the Chapter 13 plan. 11 U.S.C. § 365(d)(1).

## **19. SCHEDULE H – CO-DEBTORS**

This schedule calls for the listing of any person or entity that is also liable as a co-obligor or guarantor of any debts listed on the other schedules. This includes non-debtor spouses or former spouses, co-signers, joint tortfeasors, etc.

Co-debtors are frequently overlooked, with severe consequences down the line if a co-debtor is omitted from the schedules and does not timely receive actual notice of the bankruptcy. Should the creditor collect from the co-debtor, the co-debtor will have a right of contribution against the bankrupt debtor, unless the co-debtor (as creditor) was timely notified of the bankruptcy and his potential claim discharged.<sup>154</sup> A co-debtor should also be listed as a creditor in Schedule F. In a community property state, former spouses may be co-debtors on many of the debts listed in a bankruptcy.

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<sup>152</sup> Debt buyers often sue on prescribed debt. Therefore, list these creditors to make it clear that the debts are discharged.

<sup>153</sup> *In re Murexco Petroleum, Inc.*, 15 F.3d 60 (5th Cir. 1994).

<sup>154</sup> 11 U.S.C. § 1301.

## **20. SCHEDULE I - CURRENT INCOME OF INDIVIDUAL DEBTOR**

While Schedule I is completed by individual debtors in both Chapters 7 and 13, it plays a different role in each.

In Chapter 7, Schedule I's primary function is to protect against abusive filings. Under 11 U.S.C. § 707(b) the United States Trustee, the bankruptcy trustee, or any party in interest, has the right to move that the court dismiss the Chapter 7 if it finds that the granting of relief would be an abuse of the Chapter 7 bankruptcy. 11 U.S.C. § 707(b)(2) lays out when the court should assume abuse.

In Chapter 13 cases, Schedule I is used (along with Schedule J) to determine if the Chapter 13 plan is feasible. The issue is whether the Chapter 13 debtor has enough "disposable income" to pay his regular monthly expenses, like his mortgage, light bill and food, as well as an additional payment to the trustee for payment of creditors under the Chapter 13 plan. Although food stamps and other public assistance may not be "income" for most purposes, they should be listed as income in Schedule I. This information shows how the Chapter 13 debtor can pay his expenses.

## **21. SCHEDULE J - CURRENT EXPENDITURES OF INDIVIDUAL DEBTOR**

Schedule J requires disclosure of all expenses. The Trustee uses the IRS National Standards for Food, Clothing and Other Items.<sup>155</sup> The Trustee will presume "abuse" if the expenses listed on Schedule J are above the IRS standards. The court will scrutinize expenses like private school tuition, car payments for more than one vehicle per family, travel, and any other luxury expense. The court wants as much disposable income as possible to go to the creditors in a Chapter 13 bankruptcy. This means that expenses for non-necessary expenses should be minimized. The court also uses expense information to determine whether the Chapter 13 plan is feasible. In a Chapter 7 bankruptcy, disposable income is scrutinized for "abuse" to determine whether the bankruptcy should be dismissed for "abuse" under 11 U.S.C. § 707(b).

## **22. STATEMENT OF FINANCIAL AFFAIRS**

The Statement of Financial Affairs (Official Form B-7) has questions designed to disclose significant past financial transactions relevant to the bankruptcy and a complete financial picture. The questions on the Statement of Financial Affairs must be answered truthfully and with care, lest the debtor risk denial of discharge or prosecution for perjury or bankruptcy fraud. There are 25 questions in all. Debtors not "in business" (most consumer debtors) are only required to answer questions 1 through 17.

**Questions 1 and 2** request income information for the year of and the two calendar years prior to the bankruptcy filing. Question 1 relates to income from employment or operation of a business, and question 2 relates to any other income including but not limited to social security, retirement benefits, unemployment, tax refunds and food stamps. Be sure to get award letters from social security and the food stamp office to verify amounts from previous years, where possible. This information should come directly from clients' tax returns and award letters.

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<sup>155</sup> See <http://www.irs.gov/businesses/small/article/0,,id=104627,00.html>.

**Question 3a** requests information concerning payments totaling \$600 or more to any given creditor within 90 days prior to filing bankruptcy. The purpose of this question is to give the trustee information on *avoidable transfers* under 11 U.S.C. § 547(b). 11 U.S.C. § 547 allows the trustee to basically undo a payment (made within 90 days of the bankruptcy filing) to an unsecured creditor if that creditor was paid in preference to other similarly situated creditors and if the payment allowed that creditor to recover more than it would have recovered solely through the bankruptcy.

**Question 3c** requests information on all payments made to *insiders* within the year prior to filing bankruptcy. This is because the preference period under 11 U.S.C. § 547 is extended to one year for insiders.

**Questions 4a and 4b** query the debtor for all suits, executions, garnishments and attachments to which she is or was a party within the year prior to the bankruptcy filing, as well as any property attached, garnished or seized during that period of time. The purpose of this information is to enable the trustee to determine what property may have been acquired or may be acquirable by the debtor because of litigation pending in the last year, as well as what property the debtor may have lost in the past year due to litigation. The trustee can then make further investigation to determine whether any of that property can be brought into the bankruptcy estate.

Also, the trustee can require the debtor to account for litigation proceeds she may have received prior to filing bankruptcy, to be sure there is a legitimate explanation for the debtor's spending of the proceeds if that is the case.

The trustee can also avoid *fraudulent conveyances* under 11 U.S.C. § 548. Very generally, an avoidable fraudulent conveyance is a transfer of property, within one year of the bankruptcy filing, with an intent to "hinder, delay, or defraud" a creditor, or a transfer where the debtor received "less than a reasonably equivalent value in exchange for such transfer" and was insolvent at the time of the transfer or became insolvent as a result of the transfer.

**Question 5** requires an itemization of all property that has been repossessed, sold at foreclosure, or returned within a year of the filing, and **Questions 6a and 6b**, requests a listing with assignments and receiverships. These three questions provide additional information for the trustee concerning possible avoidances under 11 U.S.C. §§ 547 and 548.

**Question 7** asks about gifts made within the year prior to bankruptcy filing, again with a view toward 11 U.S.C. § 548. It requires disclosure of all gifts "except ordinary and usual gifts to family members aggregating less than \$200 in value per individual family member and charitable contributions aggregating less than \$100 per recipient." You just cannot give property away if you know you are going bankrupt.<sup>156</sup> If the trustee believes that there was a fraudulent conveyance, she may sue the recipient of the gift under 11 U.S.C. § 548 to get it back, and/or she can seek a denial of the debtor's discharge under 11 U.S.C. § 727(a)(2)(A).

**Question 8** asks for losses from fire, theft, other casualty, or gambling within one year prior to filing. This query provides information to assist in understanding what has happened to the debtor's wealth, as well as giving the trustee more leads on obtaining money for the bankruptcy estate, including insurance proceeds.

<sup>156</sup> There is a safe harbor of 15% of gross income for contributions to a qualified charitable organization. 11 U.S.C. § 548 (a)(2). A Louisiana bankruptcy court found that the 15% limit is applied to each contribution, rather than the aggregate contributions, and that a contribution in excess of 15% of gross income is void in its entirety. See *In re Zohdi*, 234 B.R. 371 (Bankr. M.D. La. 1999). Other courts have disagreed with both these conclusions. *Universal Church v. Geltzer*, 463 F.3d 218 (2d Cir. 2006); *In re McGough*, 4456 B.R. 682 (Bankr. D. Colo. 2011).

**Question 9** requires disclosure of all payments “to any persons, including attorneys”, related to debt counseling or bankruptcy in the year prior to filing. There is a strong interest in protecting debtors from being exploited or overcharged by attorneys and credit consolidation services.

**Question 10** asks for a listing of all other property “transferred either absolutely or as security” within the year prior to filing, except for property transferred in the “ordinary course of the business or financial affairs of the debtor.” In simpler terms, the question asks what property has been sold or given away in the past year that has not already been described. Most frequently, consumer debtors may have sold a car or a house in the past year. If this is the case, your client should be prepared to show what happened to the money realized by the sale, in addition to the other information the question asks for. The trustee will want to be sure your client isn’t hiding the money somewhere, and he will want to be sure that the money was actually paid and received, especially if the transferee was a relative or other insider. It must be an arms-length transaction, or it will be susceptible to avoidance under 11 U.S.C. § 548 and the trustee may object to the debtor’s discharge under 11 U.S.C. § 727.

**Question 13** asks the debtor about “setoffs” within 90 days prior to the case. See 11 U.S.C. § 553 to understand what is meant by the term “setoff” and when a setoff may be avoided. Usually a setoff will not be disturbed. The most common setoff in a consumer context is a bank taking money from its depositor’s account when its depositor is in default on a loan owed to the bank.

**Question 14** requires disclosure of all property held for another person. This will usually be a child’s savings bonds or savings account. It may be necessary to prove that this property is the child’s and not the debtor’s.

### **23. CHAPTER 7 DEBTOR’S STATEMENT OF INTENTION**

Within 30 days of filing his Voluntary Petition, a Chapter 7 debtor must file Debtor’s Statement of Intention (Official Form B-8).<sup>157</sup> For secured debts, the debtor indicates whether he wants to *reaffirm* a debt, *redeem* certain types of collateral by paying a sum equal to the fair market value of the collateral at the time of the filing of the bankruptcy, or *surrender* the collateral to the lender. In cases where the secured debt is greater or equal to the value of the asset it encumbers, the bankruptcy trustee does not *administer*, or sell, the property, since there would be no gain to the trustee. If there is no other non-exempt property (see more below on exemptions in bankruptcy), then creditors are advised by the clerk that the bankruptcy is a *no asset case*, and that there is no need to file claims.

### **24. CHAPTER 13 PLAN**

In Chapter 13 cases, the debtor’s proposed repayment plan will be set in the form Chapter 13 plan. The Chapter 13 plan is the most important document of all in a Chapter 13 case. The plan lays out a proposal for who gets paid, how much and when. The trustee and the creditors may object to the repayment plan and the plan must be confirmed by the judge before the trustee disburses funds to the creditors.

<sup>157</sup> 11 U.S.C. §521(a)(2)(A).

If the debtor can't fully pay all unsecured creditors, the issue is whether he has committed all of his "projected disposable income" to the unsecured creditors over the plan period. The Bankruptcy Code bases disposable income on "current monthly income" minus certain exclusions and reasonably necessary expenses. In determining projected disposable income, a court may consider changes in a debtor's income or expenses that are known or virtually certain at the time of confirmation.<sup>158</sup>

The Chapter 13 plan must be filed within 14 days of the filing of the voluntary petition.<sup>159</sup> Many courts have suggested forms for Chapter 13 plans available on their websites and often judges do not like the form Chapter 13 plan that is prepared by the bankruptcy software programs such as Best Case. You should look at the suggested Chapter 13 plan forms on the bankruptcy court's website and talk to other bankruptcy attorneys to find out what the local culture is for Chapter 13 plans. Whereas 11 U.S.C. § 1322 prescribes the contents of the Chapter 13 plan, local culture will dictate what must be included in the Chapter 13 plan and could mean the difference between getting your plan confirmed or your case dismissed.

The secured, priority and unsecured creditors' treatment (*i.e.*, the percentage to be paid) will be set forth in the plan. 11 U.S.C. § 1322(a)(3). As a general rule, creditors within the same classification must be treated similarly. 11 U.S.C. § 1322(b)(1).

Debtors may propose a 0% plan to unsecured creditors, whereby only secured creditors and priority creditors will be paid. The judge will scrutinize a 0% plan carefully and will only allow such a plan for a "below the means" debtor with a very limited income and limited expenses.

A Liquidation Analysis is required to be filed with the Chapter 13 plan in some jurisdictions, including the Eastern District of Louisiana. The Liquidation Analysis form can be found on the court website or obtained from the Chapter 13 Trustee's office.

## **25. OTHER BANKRUPTCY FORMS TO BE FILED**

### **25.1 PAY ADVICES**

Copies of payment advices or evidence of payment, if any, received by the debtor from an employer within 60 days before the filing of the petition must be filed with the court.<sup>160</sup> This includes pay stubs, social security, pensions, food stamps, etc. Remember to properly redact the pay stubs for filing with the court.

### **25.2 PRE-BANKRUPTCY CREDIT COUNSELING AND PERSONAL FINANCIAL MANAGEMENT COURSE CERTIFICATES.**

Debtors must file a statement of completion of pre-bankruptcy credit counseling when filing their petition and must file a statement of completion of a course in personal financial management before discharge will be entered.<sup>161</sup> Failure to file these documents will lead to either a notice to cure or and order to show cause why the case should not be dismissed.<sup>162</sup>

<sup>158</sup> *Hamilton v. Lanning*, 130 S.Ct. 2464 (2010).

<sup>159</sup> Bankruptcy Rule 1007.

<sup>160</sup> Bankruptcy Rule 1007(b)(1)(E).

<sup>161</sup> Bankruptcy Rule 1007(b)(3),(7).

<sup>162</sup> Some courts view a bankruptcy filed without a certificate of credit counseling as void ab initio and strike the petition as a nullity rather than dismiss the case. *See e.g., In re Wyttenbach*, 382 B.R. 726 (S.D. Tx. 2008) *aff'd* 291 Fed. Appx. 673 (5<sup>th</sup> Cir. 2008); *contra In re Ross*, 338 B.R. 134 (Bankr. N.D. Ga. 2006). The "striking" approach affects the stay in the filed case and future cases. It also results in the case not being counted as a "pending case" for the purposes of the 180 day look back rule of 11 U.S.C. § 109(g).

### **25.3 TAX RETURNS**

The trustee requires that the debtor submit a copy of the tax return for the most recently ended tax year within 7 days of the first meeting of the creditors.<sup>163</sup> Some trustees allow the tax returns to be scanned and emailed.

### **25.4 STATEMENT REGARDING TAX RETURNS FILED**

For Chapter 7 bankruptcies, there is no statutory requirement to file 4 years of tax returns. However, there is a local culture in many jurisdictions, including the Eastern District of Louisiana, which requires the debtor to file a statement with the court that she has filed the last 4 years of tax returns or explain why she is exempt from filing tax returns.

Chapter 13 debtors must file all required tax returns for tax periods ending within 4 years of the debtor's bankruptcy filing. Prior year tax return forms can be found at [www.irs.gov](http://www.irs.gov). The required returns must be filed with the IRS before the first meeting of the creditors. A debtor may request that a trustee hold the creditors meeting open for an additional 120 days to enable the debtor to file the required returns. The failure to file the required returns will prevent confirmation of a Chapter 13 bankruptcy plan and will result in the dismissal of the Chapter 13 case or conversion to Chapter 7.<sup>164</sup>

For all bankruptcies, a debtor must file any tax return that becomes due after the commencement of the bankruptcy case or obtain an extension for filing the return before the due date. If the debtor fails to timely file required returns or extensions, a taxing authority may request that the court dismiss the bankruptcy or convert it to another chapter of the Bankruptcy Code. If the debtor does not file the required return or obtain an extension within 90 days after the taxing authority's request, the court must dismiss or convert the case.<sup>165</sup> You should advise bankruptcy clients of their duties to file tax returns and insure that they comply. Your advice should be documented in writing.

### **25.5 STATEMENT ON SECTION 527 NOTICES**

Attorneys working for nonprofit agencies, including Legal Services, should file a statement with the court stating that they are a non-profit, tax-exempt corporation under Internal Revenue Code § 501(c)(3), that they do not charge their clients for their bankruptcy legal services nor for their petition preparation services. Moreover, that as such, the program is not a "debt relief agency" as defined in 11 U.S.C., § 101(12A)(B). Therefore, they are not required to provide the Notices that a "debt relief agency" is required to provide under 11 U.S.C. §527. I do this preemptively to avoid questions from the clerk of court and the trustee regarding whether or not notices under 11 U.S.C. § 527 were provided.

### **25.6 STATEMENT OF CURRENT MONTHLY INCOME**

Chapter 7 and 13 debtors are required to file a Statement of Current Monthly Income (Official Form B-22A) and Chapter 13 debtors are required to also file a Statement of Current Monthly Income (Official Form B-22C). In a Chapter 7 case, this statement which helps the judge perform an "abuse" analysis under 11 U.S.C. § 707. In Chapter 13 cases, this statement helps the judge decide whether or not to confirm a Chapter 13 Plan.

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<sup>163</sup> 11 U.S.C. §521 (e)(2)(A)(i).

<sup>164</sup> 11 U.S.C. §§ 1325 (a)(9), 1308.

<sup>165</sup> 11 U.S.C. §§ 1307 (e), 1308.

## **26. CHAPTER 7 REAFFIRMATION**

Reaffirmation of debt in a Chapter 7 bankruptcy is almost never appropriate for legal aid clients. Debt that has been reaffirmed in a Chapter 7 bankruptcy can never be discharged. Most low income clients will have problems paying debts again sometime later in their lives. If they have to file bankruptcy again, unpaid non-dischargeable, reaffirmed debt, will cause great problems and even mean the difference between saving a home in foreclosure or not. The reason that reaffirmation agreements have extensive disclosures, must be filed with the court, require a hearing before the judge and a judge's approval, and require certification from the attorney that the debtor was fully informed and voluntarily made the agreement is because reaffirmation agreements are hardly ever for the debtor's benefit in the long term. More often than not the creditor is manipulating the debtor into a reaffirmation agreement.<sup>166</sup>

## **27. DEALING WITH TAXES IN BANKRUPTCIES**

### **27.1 YOU SHOULD ORDER A TAX TRANSCRIPT FROM THE IRS IN ALL BANKRUPTCIES**

Always order an account record or tax transcript from the IRS. This information will help you to determine what taxes are owed and whether they are dischargeable. Without accurate information on the assessment dates and tax return filing dates, you may file a bankruptcy before a tax becomes dischargeable and saddle the debtor with tax debt that he could have discharged. Also, a tax transcript or account record will enable you to verify that your client has filed all required tax returns.

### **27.2 ALL BANKRUPTCY DEBTORS MUST PROVIDE THE TRUSTEE WITH THEIR MOST RECENT TAX RETURN**

At least 7 days before the first date set for the creditors meeting, the debtor must provide the trustee with a copy of the federal income tax return (or tax transcript) for the most recent year ending before the commencement of the case if a return was required for that year.<sup>167</sup> Also, creditors must be given a copy of the tax return or tax transcript if the creditor makes a timely request, which is defined as 15 days before the first date set for the creditors meeting.<sup>168</sup> If the debtor fails to file a required return or transcript, his bankruptcy may be dismissed.<sup>169</sup> An interested party may move for dismissal. If such a motion is filed, the debtor must show that that his failure was due to circumstances beyond his control.

If a taxpayer has lost his return, he can usually get a copy from his tax preparer. Most low-income taxpayers use professional tax preparation services. Also, low-income tax clinic attorneys have immediate electronic access to IRS tax transcripts provided the client signs a Form 2848 authorizing the low-income tax clinic attorney to represent him in tax matters for the relevant years. If these options are not available, you should immediately file an IRS Form 4506-T to obtain a record of account, tax transcript or "account transcript."

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<sup>166</sup> See 11 U.S.C. § 524.

<sup>167</sup> 11 U.S.C. § 521(e)(2)(a).

<sup>168</sup> 11 U.S.C. § 521(e)(2)(A)(ii); Bankruptcy Rule 4002 (b)(4).

<sup>169</sup> 11 U.S.C. § 521(e)(2)(B).

### **27.3 HOW TO LITIGATE TAX ISSUES WITH THE IRS IN A BANKRUPTCY**

If the debtor owes federal taxes, name the IRS as a creditor. Use the following address for your bankruptcy schedule: Internal Revenue Service, c/o Centralized Insolvency Operations, P.O. Box 7346, Philadelphia, PA 19101-7346. The telephone number for this IRS unit is 800-913-9358.<sup>170</sup>

Be sure to claim the earned income credit portion of any tax refund claim as exempt if this credit is exempt under your state law.<sup>171</sup> List any pending tax refund claims as assets.

Priority tax debt should be listed on Schedule E unless secured by a lien.<sup>172</sup> Non-priority tax debt should be listed on Schedule F. Be careful to list dischargeable non-priority tax debt on Schedule F so as to avoid an admission of non-dischargeability.

An adversary proceeding is not required to discharge a tax debt. However, a debtor can only be certain that a tax has been discharged by filing an adversary proceeding and obtaining a judicial determination of the dischargeability of the debt. Before you file an adversary proceeding, call the IRS attorneys. They may be willing to abate the tax. Adversary proceedings and motions against the IRS should be served on the Attorney General, local United States attorney and the designated IRS office.<sup>173</sup>

If you dispute a proof of claim by the IRS or its “secured” status, first try to resolve the matter with the IRS insolvency advisor. Resolution at this level could obviate the need for litigation of your issue.

A bankruptcy court may also have jurisdiction to determine a tax liability where the taxpayer has not fully paid the tax. For example, you may persuade the bankruptcy court to determine whether the taxpayer should have received an Earned Income Credit. This can be done by filing an 11 U.S.C. § 505 motion to determine tax liability.<sup>174</sup> Tax refund claims may be heard by the bankruptcy court even where the taxpayer has not met the jurisdictional requirements for district court litigation, i.e., full payment of the tax deficiency, and has missed the deadlines for Tax Court review.

Chapter 13 bankruptcy debtors, unlike Chapter 7 debtors, have the right (or standing) to litigate any refund lawsuits in their own names.<sup>175</sup> The trustee will seek to recover tax refunds won by the Chapter 13 debtor as “disposable income” that must be included in the plan. However, there may be challenges to the trustee’s action depending on your jurisdiction and the facts of the debtor’s financial situation.<sup>176</sup>

### **27.4 TAXES THAT MAY BE DISCHARGED IN BANKRUPTCY**

Certain income tax debts may be discharged in bankruptcy. A Chapter 7 or Chapter 13 bankruptcy may provide some tax debt relief. If most of the client’s debt is federal tax, an Offer in Compromise (IRS Form 656) may provide the client with better relief from his tax debt than a bankruptcy. In some cases, an Offer in Compromise may be the only option if the taxpayer filed his tax return after the IRS assessed the tax by a substitute for return.

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<sup>170</sup> The Eastern District of Louisiana web page has a list of address information for all state and local taxing authorities.

<sup>171</sup> In Louisiana, the earned income credit is exempt from seizure under La. R.S. 13: 3881 (A)(6).

<sup>172</sup> See 11 U.S.C. § 507. Secured debt is listed on Schedule D.

<sup>173</sup> Bankruptcy Rule 7004(d)(4).

<sup>174</sup> Bankruptcy Rule 9014, *In re Luongo*, 259 F.3d 323 (5<sup>th</sup> Cir. 2001); *Matter of Taylor*, 132 F.3d 256 (5<sup>th</sup> Cir. 1998).

<sup>175</sup> See e.g., *Cable v. Ivy Tech State College*, 200 F.3d 467, 472-74 (7<sup>th</sup> Cir. 1999).

<sup>176</sup> See e.g., *In re Freeman*, 86 F.3d 478 (6<sup>th</sup> Cir. 1996).

In a bankruptcy, you should always evaluate whether any of the income tax debt can be discharged. The analysis should be done for each tax year. The rules for determining whether an income tax is dischargeable are very complex.<sup>177</sup> Income taxes are only dischargeable if these tests are met:

- **The 11 U.S.C. 523(a) timely filed return test—a new bar to discharge?**

In a 2010 Chief Counsel notice, the IRS held that a late filed tax return would not bar bankruptcy discharge of the related tax unless the return was filed after an assessment pursuant to § 6020(b) substitute for return.<sup>178</sup> However, despite this favorable IRS notice, many courts have held that a late filed return [with the possible exception of a return filed pursuant to I.R.C. § 6020(a)] can never be a “return” for bankruptcy discharge purposes.<sup>179</sup> The IRS notice had rejected the reasoning of several courts that found that a late filed return barred discharge. If you have this issue, you should check to see if the IRS has changed its 2010 position in light of recent court rulings that bar discharge.

- **The 3 year tax return due date test**

Tax return was due at least 3 years before bankruptcy filed.<sup>180</sup> For example, if a 2007 tax return was due on April 15, 2008, the bankruptcy petition must be filed after April 15, 2011, for the 2007 income tax to be dischargeable.<sup>181</sup>

The 3 year look back period may be suspended by bankruptcy and collection due process appeals.<sup>182</sup> Offers in compromise don’t suspend the 3 year period.<sup>183</sup>

- **The 2 year tax return filing date test**

Tax return must have been filed at least 2 years before the bankruptcy was filed. This test will exclude debtors with unfiled returns and certain late filed returns. For example, if a 2007 tax return was not filed until April 15, 2009, the bankruptcy could not be filed until after April 15, 2011, if the debtor seeks to discharge the 2007 income taxes. Note that the “filing date” in the IRS records may be weeks or even months after the debtor mailed the return to the IRS. The only way to know the IRS filing date is to obtain the tax transcript or account record from the IRS.

I.R.C. § 6020 (b) authorizes the IRS to prepare a “substitute for return” for a taxpayer who fails to make or file a return. A substitute for return filed by the IRS without the taxpayer’s participation and consent will not qualify as a tax return for the two year tax return filing date test.<sup>184</sup> Furthermore, the IRS maintains that a tax can’t be discharged if

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<sup>177</sup> See National Consumer Law Center, *Consumer Bankruptcy Law and Practice* (9<sup>th</sup> ed. 2009), § 15.4.3.1; *Effectively Representing your Client Before the New IRS* (ABA 5<sup>th</sup> ed. 2011), Ch. 21; M. King, *Discharging Taxes in Consumer Bankruptcy Cases* (2012).

<sup>178</sup> Chief Counsel Notice, CC 2010-016 (Sept. 2, 2010).

<sup>179</sup> See e.g., *In re McCoy*, 666 F.3d 924 (5<sup>th</sup> Cir. 2012) (interpreting post-2005 language of 11 U.S.C. § 523(a)(1)(B)(i)).

<sup>180</sup> For an example of the interplay between the look back periods, see *Severo v. Comm’r*, 129 T.C. 160 (2007), *aff’d* 586 F.3d 1213 (9<sup>th</sup> Cir. 2009).

<sup>181</sup> See *In re Loving*, 2011 WL 3800042 (Bankr. S.D. Ala. 2011) (taxes not dischargeable because debtor filed on April 8, 3 years after she filed her tax return, but less than 3 years after due date of the return).

<sup>182</sup> 11 U.S.C. § 507(a)(8).

<sup>183</sup> Chief Counsel Advice 2004-04-049 (Jan. 5, 2004).

<sup>184</sup> Rev. Rul. 2005-59, I.R.B. 2005-37; I.R.M. 5.9.2.9.1.2

the taxpayer filed his tax return after the IRS assessed a tax deficiency when the taxpayer failed to respond to the 90 day deficiency letters based on the IRS's preparation of a "substitute for return."<sup>185</sup>

- **The assessment date test (at least 240 days before bankruptcy filed)**

For the assessment date test, the IRS must have assessed the tax against the tax debtor at least 240 days before the bankruptcy petition was filed. You can only determine the assessment date by reviewing the IRS tax transcript or account record.<sup>186</sup> Generally, assessment is made within 3 years of the tax return's due date. You don't want to file a bankruptcy petition before 240 days (with extensions) has run from the assessment.

The 240 day assessment test may be extended if the taxpayer filed a prior bankruptcy. The length of the bankruptcy plus 6 months must be added to the time periods.<sup>187</sup> Offers in Compromise, collection due process appeals and Taxpayer Assistance Orders may also toll or increase the time requirements.<sup>188</sup>

- **No fraud or willful evasion**

A fraudulent return or a willful attempt to evade or defeat tax will deny the debtor the right to discharge the tax debt.<sup>189</sup> The IRS bears the burden of proof on fraud or evasion.<sup>190</sup>

- **Timely notification test**

To discharge a tax, the debtor must notify the IRS of the bankruptcy in time for the IRS to file a timely proof of claim.<sup>191</sup>

## **27.5 WHAT TAXES MUST BE PAID IN A CHAPTER 13 BANKRUPTCY?**

In Chapter 13 bankruptcies, the plan must provide for priority and secured tax debts. Older taxes may be "non-priority" and therefore dischargeable. In some cases, you can prevent a tax debt from becoming "secured" by filing the bankruptcy before the IRS files its lien.

## **27.6 ARE THERE ANY TAX ADVANTAGES TO A CHAPTER 13 BANKRUPTCY?**

For the most part, the 2005 bankruptcy legislation eliminated the so-called Chapter 13 "super discharge" of taxes. However, Chapter 13 can still be used to discharge priority taxes paid with money from loans and credit cards, tax penalties and post-petition interest on certain taxes.

A Chapter 13 bankruptcy may secure a more favorable repayment plan for taxes than an installment agreement.

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<sup>185</sup> Chief Counsel Notice, CC 2010-016 (Sept. 2, 2010) (citing 11 U.S.C. § 523(a)(1)(B)(ii)); *but see, In re Colsen*, 446 F.3d 836 (8<sup>th</sup> Cir. 2006) (under pre-2005 law, return filed after assessment pursuant to "substitute for return" may qualify as a tax return for bankruptcy discharge purposes)

<sup>186</sup> *See Effectively Representing Your Client Before the IRS*, § 17.2 (ABA 5<sup>th</sup> ed. 2011) (information on how to ascertain assessment date).

<sup>187</sup> *Severo v. Comm'r*, 129 T.C. 160 (2007), *aff'd* 586 F.3d 1213 (9<sup>th</sup> Cir. 2009).

<sup>188</sup> I.R.C. § 507 (a)(8)(A)(ii); I.R.M. 5.9.13.19.3(2) (concept of tolling); *see also In re Emerson*, 224 B.R. 577 (Bankr. W.D. La. 1998) (appeal of rejected offer in compromise does not toll the 240 day period in I.R.C. § 507).

<sup>189</sup> *See e.g., Matter of Bruner*, 55 F.3d 195 (5<sup>th</sup> Cir. 1995).

<sup>190</sup> *Grogan v. Garner*, 498 U.S. 279 (1991).

<sup>191</sup> *United States v. Hairopoulos*, 118 F.3d 1240 (8<sup>th</sup> Cir. 1997).

## **27.7 EFFECT OF BANKRUPTCY ON LIENS**

Discharge of a tax debt in bankruptcy will not extinguish a pre-petition lien.<sup>192</sup> It only extinguishes the personal liability. Generally, liens recorded before the bankruptcy will not be canceled.<sup>193</sup> If they survive, the IRS will be able to seize the liened asset. This puts debtors with homes and retirement plans at risk of future tax collection.<sup>194</sup> However, sometimes the IRS does not bother enforcing liens after a bankruptcy. A tax lien will not attach to property acquired after a bankruptcy if the underlying tax liability was discharged in the bankruptcy.

## **27.8 BANKRUPTCY STAYS OF TAX COLLECTIONS AND LITIGATION**

A bankruptcy stay will apply to IRS *collection* actions. A Chapter 7 bankruptcy will even stay nondischargeable taxes for a few months. Generally, collection activity in violation of the stay will be void.<sup>195</sup> A § 362 (a) stay will also stay the commencement or continuation of a Tax Court proceeding.<sup>196</sup>

During a stay, the IRS may take these actions without violating the stay:

- set-off a pre-petition tax refund against pre-petition income tax debt
- intercept an income tax refund against past due child support
- assess the tax
- issue a notice and demand for payment of an assessment
- issue a notice of deficiency while a stay is in effect.<sup>197</sup>
- conduct an audit to determine a tax liability

## **27.9 EFFECT OF BANKRUPTCY ON COLLECTION STATUTE OF LIMITATIONS**

The time period to collect taxes is extended by the filing of a bankruptcy that does not discharge all of the taxes. The balance on the 10 year statute of limitations is extended by the length of the bankruptcy plus 6 months.<sup>198</sup>

## **28. MOTION TO AVOID LIENS**

Until 2006, La. R.S. 9: 5166 provided a cause of action to avoid a lien relative to a discharged in bankruptcy. The legislature repealed R.S. 9: 5166 in 2005, and replaced it with R.S. 9: 5175 and R.S. 44: 114 to provide an action to extinguish judgments discharged in bankruptcy where the creditor has no equity as a result of a judicial mortgage over and above superior liens.<sup>199</sup> A creditor's right to foreclose on a lien survives bankruptcy even though personal liability has been discharged unless the lien is cancelled by bankruptcy court or state court.<sup>200</sup>

A debtor may also seek to cancel a lien in bankruptcy court under the Bankruptcy Code. The debtor has the burden to affirmatively file a motion to avoid a lien. Otherwise, the lien may survive bankruptcy unless it can be extinguished under R.S. 9: 5175 and R.S. 44: 114.

<sup>192</sup> *In the Matter of Orr*, 180 F.3d 656 (5<sup>th</sup> Cir. 1999); *In re Isom*, 901 F.2d 744 (9<sup>th</sup> Cir. 1990).

<sup>193</sup> Generally, a lien will be valid until the 10 year statute of limitations has run. I.R.C. §§ 6322, 6502 (a).

<sup>194</sup> Generally, the IRS will not seek to levy retirement plans unless there has been "flagrant misconduct" by the debtor. I.R.M. 5.9.17.4.3; 5.11.6.2.

<sup>195</sup> *Smith v. Comm'r*, 124 T.C. 36 (2005).

<sup>196</sup> 11 U.S.C. § 362(a)(8); *Prevo v. Comm'r*, 123 T.C. 326 (2004).

<sup>197</sup> 11 U.S.C. § 362(b)(9), *In re Luongo*, 259 F.3d 323 (5<sup>th</sup> Cir. 2001) (IRS right to offset); I.R.M. 5.9.2.5.

<sup>198</sup> I.R.C. § 6503 (h).

<sup>199</sup> Act 169 of 2005.

<sup>200</sup> *Johnson v. Home State Bank*, 501 U.S. 78, 82-83 (1991).

11 U.S.C. § 522(f)(1) allows the debtor to avoid (1) certain judicial liens that impair property claimed as exempt<sup>201</sup> and (2) non-possessory, non-purchase money security interests in household goods and tools of the trade. These liens may be avoided to the extent that they impair the exemption in the property.<sup>202</sup> If a lien is avoided, the creditor becomes an unsecured creditor.

A debtor may avoid a lien by filing a motion.<sup>203</sup> There is no time limit to file a motion to avoid a lien.<sup>204</sup> However, the debtor should file the motion as soon as possible and while the case is still open. This avoids the additional cost of a motion to reopen and also avoids the risk that the bankruptcy court may deny a motion to reopen the bankruptcy.<sup>205</sup> The courts agree that a Chapter 13 debtor may use § 522(f) to avoid liens.<sup>206</sup> A Chapter 13 debtor should file a motion to avoid a lien rather than merely rely on the provisions of the Chapter 13 plan for avoidance of a lien.

## 29. EVENTS IN A CHAPTER 7 “NO-ASSET” CASE

A typical Chapter 7 bankruptcy case is a “no-asset” case, meaning the debtor has no exempt or unsecured property that can be liquidated and sold by the trustee. The debtor and/or the debtor’s attorney files the petition, forms, schedules and other documents described above. The court mails notice of filing of the bankruptcy case, and advising of the date, time, and place of the 11 U.S.C. § 341 meeting of creditors, to the debtor, the debtor’s attorney and all other entities listed on the mailing matrix within 1-2 weeks of the filing of the petition. The meeting of creditors is held about 6 weeks later in a building near the courthouse, but not in a courtroom. Generally speaking, the meeting is an opportunity for the Chapter 7 trustee to confirm the information in the schedules and, if necessary, to question the debtor with respect to his property.<sup>207</sup> The meeting is also an opportunity for the creditors to ask questions of the debtor about the bankruptcy or the debtor’s property. Typically, no creditors show up at these meetings. Though sometimes, creditors with purchase money security interests will attend these meetings to determine whether or not the debtor still owns the collateral, what condition the collateral is in, and what the debtor intends to do with the collateral.

About 9 weeks after the meeting of creditors, the debtor and the debtor’s attorney will receive a copy of the debtor’s discharge notice in the mail. Typically, it is unnecessary for the debtor or the debtor’s attorney to make any court appearances.

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<sup>201</sup> A lien securing a domestic support obligation may not be avoided.

<sup>202</sup> *In re McMorris*, 436 B.R. 359 (Bankr. M.D. La. 2010) (judicial liens based on deficiency judgment in foreclosure *totally* avoided since each lien fully impaired the debtor’s homestead exemption). *See also, Matter of Maddox*, 15 F.3d 1347 (5<sup>th</sup> Cir. 1994).

<sup>203</sup> Bankruptcy Court Rules 4003 (d), 9014. For a sample form, see National Consumer Law Center, *Bankruptcy Basics*, Appx. F, Forms 33-36.

<sup>204</sup> *In re Wilding*, 475 F.3d 428 (1<sup>st</sup> Cir. 2007) (avoided 2 years after discharge); *In re Chiu*, 304 F.3d 905 (9<sup>th</sup> Cir. 2002); *Matter of Bianucci*, 4 F.3d 526 (7<sup>th</sup> Cir. 1993) (motion to reopen to avoid lien should be granted absent prejudice to creditor); *In re Babineau*, 22 B.R. 936 (Bankr. M.D. Fla. 1982) (lien avoided after confirmation of Ch. 13 plan).

<sup>205</sup> The bankruptcy court has broad discretion on whether to reopen a case. Delay in bringing a motion to avoid a lien increases the risk that a motion to reopen a closed case will be denied.

<sup>206</sup> *In re Allred*, 45 B.R. 676 (Bankr. E.D. N.C. 1985) (collecting cases on this issue).

<sup>207</sup> See 11 U.S.C. § 1202 for more on the Trustee’s duties and responsibilities

### 30. EVENTS IN A CHAPTER 13 CASE

A typical Chapter 13 bankruptcy case begins with the debtor's attorney filing the petition, Chapter 13 plan, forms, schedules and other documents described above. Just like in a Chapter 7 bankruptcy, within 1-2 weeks of the filing of the petition, the court mails notice of filing of the bankruptcy and advises the debtor, the debtor's attorney and all those on the mailing matrix of the § 341 meeting of creditors, and for a Chapter 13 case, also advises of the date and time for the hearing on confirmation of the Chapter 13 plan and the last date to file proof of claims.

The debtor must start making his proposed payments to the Trustee and on secured debts he proposed to pay outside of his plan within 30 days of filing the bankruptcy.<sup>208</sup> The meeting of creditors is held about 6 weeks later and the Chapter 13 trustee confirms the information in the schedules and other documents. Again, typically, no creditors show up at these meetings. After the meeting of the creditors and before the confirmation hearing, creditors typically begin filing Proof of Claims and may object to the Chapter 13 Plan as proposed.

The debtor has the opportunity to object to the Proof of Claims where debts are prescribed, the creditor has made calculation errors or has not provided proof that the debt is owed, and for other reasons as well. If the debtor objects to claims that have been filed, the debtor should move to continue the confirmation hearing until after the objections to proof of claims have been resolved. The amounts listed on the proof of claims that have been filed must match the amounts proposed to be paid in the Chapter 13 plan or be below the amounts proposed in the plan. Otherwise, the trustee will object to the Chapter 13 plan and the judge will not confirm the plan. The debtor can modify the Chapter 13 plan at any time before the confirmation hearing without charge.<sup>209</sup> If the secured creditor and/or priority creditors have not submitted proof of claims, the debtor can file a proof of claim on their behalf.<sup>210</sup> Some judges will not confirm the Chapter 13 plan unless all secured and priority proof of claims have been filed.

About 6 weeks after the § 341 meeting of creditors, the confirmation hearing is held before the judge in his or her courtroom. The debtor does not have to attend the confirmation hearing but the debtor's attorney usually has to attend if any objections to the plan have been filed. Sometimes, if no objections to the plan have been filed or all objections to the plan have been resolved through negotiations between the debtor and the creditor, the judge will confirm the Plan without hearing. But each judge has different practices for confirmation hearings and it is best for the debtor's attorney to plan to attend the confirmation hearing.<sup>211</sup>

Once the Chapter 13 Plan is confirmed, the debtor needs to make all of the payments under the Plan as confirmed.<sup>212</sup> If the debtor falls behind on her payments, either to the trustee under the plan or on her payments outside the plan, she can move to modify her Chapter 13 Plan and propose an amended Plan.<sup>213</sup>

After the debtor has completed all of her payments under the Chapter 13 plan, the court will enter a discharge and the debtor and the debtor's attorney will receive a copy of the debtor's discharge notice in the mail.<sup>214</sup>

<sup>208</sup> 11 U.S.C. § 1326.

<sup>209</sup> 11 U.S.C. § 1323.

<sup>210</sup> 11 U.S.C. § 501(c).

<sup>211</sup> 11 U.S.C. §§ 1324-25.

<sup>212</sup> 11 U.S.C. § 1327.

<sup>213</sup> 11 U.S.C. § 1329; *In re Mendoza*, 11 F.3d 1264 (5th Cir. 1997).

<sup>214</sup> The full time proposed does not have to pass under the Chapter 13 plan, but the total payment amount must be made to the trustee.

### 31. MISCELLANEOUS CHAPTER 13 ISSUES

If a creditor does not timely file a proof of claim in a Chapter 13 bankruptcy, its claim will be barred. A confirmed Chapter 13 plan binds a secured creditor that had notice, even if the plan omitted it and failed to provide payment for the secured debt.<sup>215</sup> Similarly, a confirmed Chapter 13 plan binds a creditor whose claim was non-dischargeable.<sup>216</sup> A recent Supreme Court case has abrogated a Fifth Circuit rule that secured creditors were not necessarily bound by a confirmed plan.<sup>217</sup>

In 2005, Congress amended the Bankruptcy Code to make it clear that Social Security benefits are not included in the definition of “current monthly income” for the purposes of Chapter 13 bankruptcies.<sup>218</sup> Therefore, Social Security benefits are not “disposable income” that must be used for a Chapter 13 plan.<sup>219</sup> Failure to include Social Security in proposed plan payments does not constitute bad faith that would require denial of confirmation.

Chapter 13 debtors with child support obligations face special challenges. A Chapter 13 plan may not be confirmed unless the debtor is current in all post-petition “domestic support obligations.”<sup>220</sup> A discharge will not be granted unless a Chapter 13 debtor certifies that his domestic support obligations are current including all pre-petition debt to extent provided for in the plan.<sup>221</sup> Failure to make post-petition support payments is a ground for dismissal or conversion.<sup>222</sup>

Bankruptcy Rule 3002.1, eff. December 1, 2011, requires mortgage creditors to notify the debtor and trustee when a mortgage payment is changing and when fees have been charged to the debtor during a Chapter 13 case. The initial cases have held that the mortgage creditor may not charge the debtor for attorney fees for providing the new information required by Rule 3002.1.<sup>223</sup>

### 32. APPEALS

Bankruptcy court judgments, orders and decrees may be appealed to the district court as permitted by 28 U.S.C. § 158.<sup>224</sup> Local bankruptcy rules may also prescribe rules for appeals.<sup>225</sup> In Louisiana, the appeals go to the district court since appeals to bankruptcy appellate panels have not been authorized. A district court judgment may be appealed to the circuit court of appeal. A motion for rehearing of the district court judgment is available unless the district court rules specify otherwise.<sup>226</sup>

A notice of appeal from a bankruptcy court judgment or order must be filed with the clerk of court for bankruptcy court within 14 days of entry of judgment.<sup>227</sup>

<sup>215</sup> *In re Franklin*, 448 B.R. 744 (Bankr. M.D. La. 2011).

<sup>216</sup> *United Student Aid Funds v. Espinosa*, 130 U.S. 1317 (2010).

<sup>217</sup> *United Student Aid Funds v. Espinosa*, 130 U.S. 1317 (2010). See analysis in *In re Franklin*, *supra*.

<sup>218</sup> 11 U.S.C. § 101(10A).

<sup>219</sup> *In re Ragos*, 700 F. 3d 200 (5th Cir. 2012).

<sup>220</sup> 11 U.S.C. § 1325(a)(8).

<sup>221</sup> 11 U.S.C. § 1328(a).

<sup>222</sup> 11 U.S.C. § 1307(c)(11).

<sup>223</sup> *In re Carr*, 468 B.R. 806 (Bankr. E.D. Va. 2012); *In re Adams*, 2012 WL 1570054 (Bankr. E.D. N.C. 2012).

<sup>224</sup> 28 U.S.C. §158; Bankruptcy Rules 8001-02.

<sup>225</sup> See *e.g.*, Eastern District of Louisiana, Rule 8001-1. The Middle and Western Districts of Louisiana, do not appear to have local rules for appeals.

<sup>226</sup> Bankruptcy Rule 8015.A timely motion for rehearing will extend the time to appeal a district court judgment to the court of appeal. *Id.*

<sup>227</sup> Bankruptcy Rule 8002.

The bankruptcy clerk must receive the notice of appeal within this 14 day period.<sup>228</sup> The 3 day extension for service by mail does not apply to notices of appeals in bankruptcy cases.<sup>229</sup>

The notice of appeal must substantially conform to (1) the appropriate Official Form, (2) contain names of all parties to the judgment, order or decree appealed and the phone numbers of their attorneys, and (3) be accompanied by the filing fee.<sup>230</sup>

The basic steps in a bankruptcy appeal are:

1. A notice of appeal within 14 days of entry of judgment;
2. Payment of fee or motion for leave to proceed in forma pauperis;<sup>231</sup>
3. If the appeal is an *interlocutory* appeal, (rather than an appeal from a final judgment or order), a motion for leave to appeal must also be filed;<sup>232</sup>
4. If a stay is needed, a motion for stay pending appeal, addressed first to the bankruptcy judge;<sup>233</sup>
5. A designation of the record and issues on appeal filed within 14 days after the filing of the notice of appeal or entry of the order granting leave to appeal;<sup>234</sup>
6. If a transcript is designated for the appeal, the party must request the transcript and arrange for payment of the transcript;
7. Unless different time limits are specified, the appellant's brief must be filed within 14 days after entry of the appeal on the docket. (district court clerk's entry of the appeal on the district court docket after receiving the record from the bankruptcy clerk).<sup>235</sup>

The standard for district court review of a bankruptcy court decision depends on whether the matter is a core or non-core proceeding. Most bankruptcy decisions will be core proceedings.<sup>236</sup> A "non-core" proceeding does not depend on the bankruptcy court for existence and can proceed in another court.<sup>237</sup>

Generally, in core proceedings, conclusions of law are subject to de novo review and fact findings are reviewed for "clear error."<sup>238</sup> These standards for review apply for appeals to both the district court and circuit court of appeal.<sup>239</sup> "Clear error" exists for factual findings if a review of the entire evidence leaves the reviewing court with a "definite and firm conviction that a mistake has been made."<sup>240</sup> Given the deferential standard of "clear error" for factual findings, one should consider a motion for reconsideration or new trial with the bankruptcy court in cases that involve erroneous factual findings.<sup>241</sup>

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<sup>228</sup> *In re Bad Bubba Racing Products, Inc.*, 609 F.2d 815 (5<sup>th</sup> Cir. 1980).

<sup>229</sup> *In re Sanders*, 59 B.R., 414 (D. Mont. 1986).

<sup>230</sup> Official Form 17 is used for Notices of Appeal.

<sup>231</sup> 28 U.S.C. §§ 1915, 1930.

<sup>232</sup> Bankruptcy Rules 8001, 8003.

<sup>233</sup> Bankruptcy Rule 8005. In many cases, failure to obtain a stay creates a risk that the appeal will be barred by mootness. See e.g., *In re Manges*, 29 F.3d 1034 (5<sup>th</sup> Cir. 1994) cert. denied 513 U.S. 1152 (1995).

<sup>234</sup> Bankruptcy Rule 8006. Issues not raised in the Rule 8006 designation are waived. *In re GGM, P.C.*, 165 F.3d 1026 (5<sup>th</sup> Cir. 1999).

<sup>235</sup> Bankruptcy Rule 8009. The form of the appeal brief is specified by Bankruptcy Rule 8010. Failure to address an issue in the brief may be considered waived by the appellate court. *In re Grothues*, 226 F.3d 334 (5<sup>th</sup> Cir. 2000).

<sup>236</sup> See 28 U.S.C. §157(b)(2).

<sup>237</sup> *Dunmore v. United States*, 358 F.3d 1107 (5<sup>th</sup> Cir. 2004).

<sup>238</sup> Bankruptcy Rule 8013; *In re Barner*, 597 F.3d 651, 653 (5<sup>th</sup> Cir. 2010); *In re Texas Pig Stands, Inc.*, 610 F.3d 937, 941 (5<sup>th</sup> Cir. 2010).

<sup>239</sup> *In re Ourso*, 258 F.3d 393 (5<sup>th</sup> Cir. 2001).

<sup>240</sup> *In re Williams*, 337 F.3d 504 (5<sup>th</sup> Cir. 2003).

<sup>241</sup> See Bankruptcy Rules 9023, 3008.

In a “non-core” proceeding, the bankruptcy court hears the matter and submits proposed findings of fact and conclusions of law to the district court. The district court reviews the fact findings and conclusions of law de novo in a “non-core” proceeding.<sup>242</sup>

Appeals may be taken from a final order of a bankruptcy court. Leave of the district court is required for an appeal of an interlocutory appeal. A motion for leave to file an interlocutory appeal must be filed if the order appealed is not a final order.<sup>243</sup> A bankruptcy court may not certify an interlocutory order for immediate appeal. The issue of what is a “final order” is not always clear.<sup>244</sup>

### **33. ATTORNEY FEES**

Attorney fees are available to pro bono or legal aid counsel in bankruptcy cases.<sup>245</sup>

Attorney fees may be awarded to the debtor for violations of the § 362 stay or § 524 discharge injunction.<sup>246</sup> A debtor may also be entitled to attorney fees if a creditor loses a motion to oppose a discharge based on § 523(a)(2), false pretenses, fraud or false statements. Attorney fees may be awarded if the creditor’s opposition was not “substantially justified.”<sup>247</sup> Of course, there may be claims for attorney fees based on violation of various consumer protection laws or violations of 11 U.S.C. § 110 by bankruptcy petition preparers. A creditor may obtain attorney fees in a dischargeability action if attorney fees would be recoverable in the underlying action under state or federal non-bankruptcy law.<sup>248</sup> Attorney fees may be available against a state or local government under 42 U.S.C. § 1988 for violations of federal statutory rights established by the Bankruptcy Code in 11 U.S.C. §§ 362, 366, 524 and 525. An additional basis for federal agency violations of Bankruptcy Code statutory rights may be the Equal Access to Justice Act.

### **34. REMEDIES AGAINST NON-ATTORNEY BANKRUPTCY PETITION PREPARERS**

By fraud or incompetence, non-attorney bankruptcy petition preparers may injure their low-income clients. These victims may come to legal aid offices for help after the non-attorney petition preparers are ripped them off or mishandled their bankruptcy cases.

Section 110 of the Bankruptcy Code regulates non-attorney bankruptcy petition preparers. If a non-attorney preparer violated Section 110 or commits any unfair, deceptive or fraudulent act, the debtor may bring an action under Section 110 for actual damages, statutory damages of the greater of \$2,000 or twice the fee charged by the non-attorney preparer, and attorney fees.<sup>249</sup>

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<sup>242</sup> *Copeland v. Merrill Lynch*, 47 F.3d 1415 (5<sup>th</sup> Cir. 1995).

<sup>243</sup> Bankruptcy Rules 8001, 8003.

<sup>244</sup> See National Consumer Law Center, *Consumer Bankruptcy Law and Practice*, § 14.94 (9<sup>th</sup> ed. 2009).

<sup>245</sup> *In re Hunt*, 238 1098 (9<sup>th</sup> Cir. 2003).

<sup>246</sup> 11 U.S.C. § 362(k); *Matter of Terrebonne Fuel & Labs, Inc.*, 108 F.3d 609, 613 (5<sup>th</sup> Cir. 1997); *In re Batiste*, 2009 WL 2849077 (Bankr. E.D. La. 2009); *In re Ellzey*, 2009 WL 2848664 (Bankr. E.D. La. 2009), *In re Walker*, 180 B.R. 834 (Bankr. W.D. La. 1995).

<sup>247</sup> 11 U.S.C. § 523(d); *In re Talbot*, 16 B.R. 50 (Bankr. M.D. La. 1981).

<sup>248</sup> *In re Dinan*, 448 B.R. 775, 784-87 (9<sup>th</sup> Cir. BAP 2011). For example, a consumer could claim attorney fees if he prevailed on his adversary complaint that a state unfair trades practice judgment or claim was non-dischargeable.

<sup>249</sup> 11 U.S.C. §110; National Consumer Law Center, *Consumer Bankruptcy Law and Practice*, § 16.6 (9<sup>th</sup> ed. 2009).