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BASIC CONSUMER CHAPTER 7 AND 13 FOR THE NON-BANKRUPTCY ATTORNEY

SCOPE:

This chapter is a practical how-to survey of consumer Chapter 7 and Chapter 13 processes for the non-bankruptcy lawyer involved in a consumer bankruptcy case.

OVERVIEW:

Bankruptcy courts have nationwide jurisdiction to restrain, enjoin, or curtail any action by creditors against debtors who file for relief. Consumer debtors typically have problems with wage garnishments, credit card debts, personal loans, home loans, car loans, repossession and foreclosures, income taxes, and child support. Chapters 7 and 13 cases create an opportunity to discharge and/or restructure these types of consumer debts and allow an individual to obtain a fresh start.

In a Chapter 7 case, the court appoints a Trustee who has the responsibility to examine the debtor's financial circumstances and collect the debtor's nonexempt assets so that creditors can be paid on a pro-rata basis. In most instances, Chapter 7 debtors have little or no nonexempt assets, so there is generally no liquidation. Debtors usually receive a discharge in about five months. Chapter 7 debtors typically discharge credit card debt, personal loans, deficiencies, and other unsecured debts. They generally have car loans and home loans that they either pay directly (reaffirm) or surrender. They may have priority debts, which are not discharged in a Chapter 7.

In Chapter 13 cases, the Court appoints a Trustee to work with the debtor to reorganize and rehabilitate the debtor over a period of time, usually three to five years. Chapter 13 debtors are often looking to stop or postpone a foreclosure or repossession. Many times, they have unpaid property taxes, income taxes, and child support. Chapter 13 can be a workable restructuring of these debts. It can also discharge the same types of debts as a Chapter 7. A typical Chapter 13 debtor restructures home and car loans, discharges unsecured debts either in full or in part, and may have IRS debt also paid by the Chapter 13 Trustee.

The Bankruptcy Code was enacted by the United States Congress to provide a mechanism for dealing with problems caused by debtor/creditor relationships. The Code provides methods for providing debtors with relief while simultaneously giving creditors a way to retrieve or repossess their collateral or to legally protect their interests. Bankruptcy courts are federal courts governed by the Bankruptcy Code, Bankruptcy Rules, Federal Rules of Civil Procedure, and Local Bankruptcy Rules.

WHO MAY BE A CONSUMER DEBTOR? (11 U.S.C. § 109)

Individuals, or married couples (in the case of a joint filing) may file either a Chapter 7 or Chapter 13 case. There are no debt limits for Chapter 7 debtors, but there are debt limits for Chapter 13 debtors.

VENUE: (28 USC § 1408)

For consumer cases, venue is typically based on the debtor's domicile or residential address; that is, the case is filed in the district and division of the debtor's domicile or residence.

OVERVIEW OF CHAPTERS 7 AND 13: (11 USC §701 et seq. or 11 USC §1301 et seq.)

If a client is considering bankruptcy, then the Bankruptcy Code provides a consumer debtor with two forms of relief: Chapters 7 and 13. Choosing which chapter to file is extremely critical for the client.

Chapter 7: A Chapter 7 case, often known as "straight bankruptcy" or "liquidation" is the choice for most consumer debtors who have a large amount of dischargeable unsecured debt. The debtor keeps only property that is considered "exempt" and agrees to turn over to the court-appointed trustee all other property. Most moderate to lower income consumer debtors in Texas and Louisiana own only exempt property or mostly exempt property. All nonexempt property is then sold or liquidated, and the creditors are paid on a pro-rata basis. The debtor obtains a discharge of all debts (i.e., unsecured debts), except those that Congress has expressly made non-dischargeable (i.e., child support, alimony, income taxes, student loans, etc.).

Chapter 13: In this "wage-earner plan," a debtor works out a plan with creditors that permits the debtor to keep most, if not all, of his property while making reduced payments to a trustee over a three to five year period. Chapter 13 proceedings are available only to individuals who have a regular income and owe non-contingent, liquidated, unsecured debts of less than $394,725, and non-contingent, liquidated, secured debts of less than $1,184,200 (adjusted every three years to reflect changes in the Consumer Price Index). 11 U.S.C. §109(e). Typical consumer Chapter 13 debtors are attempting to restructure secured debts due to pending home foreclosure, vehicle repossession, and/or outstanding priority claims such as income tax or child support. It is still possible to discharge unsecured debts in a Chapter 13. A Chapter 13 is typically used by debtors to "cure" mortgage arrears and allow them to resume restructured mortgage payment, and/or to restructure automobile debt.

CLASSIFICATION OF DEBTS IN CONSUMER CASES: (11 U.S.C. §§506 and 507)

Generally, there are three types of debts in consumer bankruptcy cases: (1) priority claims, (2) secured claims, and (3) unsecured claims.

Priority claims are defined by 11 U.S.C. § 507. Typical priority debts for consumer debtors include most income taxes and domestic support obligations. "Domestic support obligation" is a general term that encompasses child support and alimony. Priority claims may be non-dischargeable in a Chapter 7 or 13 proceeding. Priority claims are typically paid in full in Chapter 13 cases. Domestic support obligations may also require the liquidation of non-exempt assets in a Chapter 7.

Secured claims are defined by 11 U.S.C. § 506. Secured consumer debts are typically either a purchase money security interest or a non-purchase security interest. Secured claims are governed by the UCC and state statutes.

A purchase money security interest is created when a creditor loans a debtor money to purchase specific collateral, such as a home or a car. If the debtor stops making payments, the creditor may repossess the collateral. For example, if a person agrees in writing to borrow money from a lender to purchase a specific automobile and grants the lender a security interest in the vehicle, this is a purchase money security interest. If that person files for bankruptcy, he will have several choices: either to pay for the collateral, or surrender

the collateral and seek a discharge of the debt. This will depend on the type of bankruptcy the debtor files and if the creditor's lien is properly perfected.

Another category of secured debt arises when the client gives a security interest in something other than property that the borrowed money is used to purchase. For example, a client borrows money from a finance company that, in exchange, requires him to secure repayment with his household furniture. This is called a non-purchase money security interest. This is because the client owned the furniture before borrowing the money, and did not use the proceeds of the loan to purchase the furniture. In certain instances, the client's pledge of security to the lender can be stricken by filing an appropriate motion in bankruptcy, and the debt will be treated as unsecured. See 11 U.S.C. § 522(f). As a general rule, subject to lien avoidance, all secured claims are either paid and the debtor retains the collateral, or the collateral is surrendered in exchange for a discharge of the debt. Chapter 7 and Chapter 13 differ in how the secured debt is paid. Counsel should be aware that lien avoidance in Louisiana under 11 U.S.C. § 522(f) is limited due to a lack of availability of federal exemptions.

Finally, there is unsecured debt. Unsecured debts occur where the creditor and debtor have no expectation or requirement that the debtor provide any form of security. Examples include credit card debts, medical bills, and personal loans. The typical consumer debtor is attempting to discharge these debts, subject to the limitations of the Bankruptcy Code. As a practice pointer, remember that certain unsecured claims, such as student loans, are non-dischargeable.

WHAT IS THE AUTOMATIC STAY? (11 U.S.C. § 362)

The automatic stay applies in all bankruptcy cases. It is an injunction against the commencement or continuation of all action of any type by creditors to collect a debt. Generally, the stay will prevent any type of collection effort against the debtor, such as sending a bill, telephone calls from collectors, a lawsuit to enforce a debt, a repossession of a car, or foreclosure of a home. Specifically, the stay prevents the following:

1. The commencement or continuation of a lawsuit of any type to recover a claim of any nature.

2. The enforcement against the debtor or property of the debtor of a judgment obtained before the commencement of the case.

3. Any act to obtain possession of property of the estate or to exercise control of the property of the estate.

5. Any setoff of any debt owed by the debtor that arose before the filing of the case. Generally, "setoff" refers to actions by depositories or lending institutions to attempt to charge a debt against property that might be on deposit (e.g., a bank account balance).

6. The commencement or continuation of any proceeding in the United States Tax Court against the debtor.

The automatic stay under Chapter 7 generally does not protect a third party obligated with the debtor. Thus, if a person is obligated with the debtor, a creditor can continue collection actions against that co-debtor. In a Chapter 13, co-debtors are protected by the co-debtor stay with respect to consumer debts. 11 U.S.C. § 1301.

The automatic stay relates only to debts or actions that arose on or before the commencement of the bankruptcy proceeding. Thus, if the debt was incurred subsequent to the filing of the bankruptcy, the automatic stay would offer no protection, nor would that debt be discharged.

In addition, it is important to remember that the automatic stay does not stay certain other defined actions, including, but not limited to the following:

1. Commencement or continuation of any criminal action. (This also can involve action to collect on a "hot check.")

2. Collection of any alimony, maintenance, or support from property that is not property of the estate. Actions for divorce, child support, or modification of custody or child support that do not affect property of the estate are also not stayed. (Practice note: In Chapter 13 cases "property of the estate" includes a debtor's wages. Since most alimony and support is paid out of wages, collection of an alimony or support obligation can sometimes violate the automatic stay in Chapter 13 cases.)

3. Enforcement of a governmental unit's police or regulatory power, including enforcement of a judgment that does not involve the payment of money, such as an injunction or cease and desist order obtained in an action or proceeding by a governmental unit.

4. The issuance of a notice of a tax deficiency.

5. Action by a lessor to obtain possession of leased real property after a court has entered judgment for possession.

There are other provisions relating to the continuation of the automatic stay and qualifications for the automatic stay that may apply in certain business situations; however, these provisions generally cover the ways in which a consumer debtor will be affected by the automatic stay.

A consumer debtor may see a secured creditor file a motion to modify the stay to permit recovery of such property during the term of the bankruptcy proceeding. It is very important for an individual filing under Chapter 7 to understand the options concerning secured claims if payments are not current. If payments are not current, the secured creditor will likely seek to modify the stay.

The Court may grant relief from the stay for cause, including the lack of equity in a creditor's collateral. Motions to Lift the Automatic Stay are "contested matters" that require a motion and notice of hearing. Some courts may require responsive pleadings on a Motion to Lift the Stay, others may be more relaxed. The procedure for filing or responding to a Motion to Lift the Automatic Stay is typically governed by local bankruptcy rules, which will detail the notice, service, and pleading requirements. Courts often have form motions on their websites. Local bankruptcy rules will always be available on the court's website. In consumer cases, the vast majority of motions to lift are settled by a form of agreed order that conditions the automatic stay.

Remember, there is an automatic stay only in the first case filed by a debtor in any given 12 month period. On a second case filed within twelve months of a prior bankruptcy dismissal, the stay only lasts for 30 days unless extended by the Court upon a timely filed motion and signed order. There is no automatic stay in any case where there were two or more bankruptcy cases filed by the debtor in the prior 12 month period. In these cases, the stay can only be imposed after the filing of a motion and a signed order. Forms for both the extension and imposition of the automatic stay are posted on the Court's website. Parties should also reference the Court's "Practice Guide" on its website.

Courts can punish violations of the automatic stay. Section 362(k) of the Code allows a court to award damages to individuals when the automatic stay has been violated. However, a creditor must have received effective notice of the existence of the automatic stay before damages can be awarded. Damages for violations of the automatic stay must be sought by "adversary proceeding." An adversary proceeding is a lawsuit brought in bankruptcy court in connection with a bankruptcy case. The main bankruptcy case involves a debtor and the creditors of that debtor, and has its own separate electronic docket and case number. An adversary proceeding is identical to a lawsuit filed in other courts. In consumer cases, a simpler "turnover motion," which is brought by motion rather than as an adversary proceeding, may be used to recover assets that have been repossessed or must be reclaimed by a debtor due to the automatic stay. This is typically used by debtors in consumer cases to recover a repossessed vehicle.

WHAT IS THE BASIC CONCEPT OF CHAPTER 7? (11 U.S.C. § 701 et seq.)

Basically, a Chapter 7 bankruptcy is the voluntary surrender by a debtor to a Chapter 7 Trustee of all non-exempt assets in exchange for a discharge of debts. State and federal statutes set forth certain property interests that shall be free and clear of creditor claims. All of the possible exemptions are in statutes, but some of them are antiquated and seldom used. In order for property to be exempt, it must be listed in a statute. Any property not exempted by statute is non-exempt.

Debtors' creditors, the trustee, or any party in interest may file an objection to a debtor's claim of exemption. Such objection is generally time sensitive and must be brought within 30 days of the date first set for a debtor's meeting of creditors, unless the Court has granted an extension of time. Should an objection be brought by a party in interest, a hearing will be held to determine the asset's exempt status. Any asset that the Court rules is non-exempt is subject to liquidation by a Chapter 7 Trustee. Objections are governed by Federal Rule of Bankruptcy Procedure 4003.

Only people are entitled to exemptions; corporations receive no exemptions. When a corporation files a Chapter 7, it gives up all of its assets and ceases to be, since it does not receive a discharge from its debts. Bankruptcy laws do not permit corporations to obtain a discharge in a Chapter 7.

Individuals can select either state exemptions or federal exemptions. The choice is governed by how long the debtor has lived in his state of domicile and how long the debtor has owned his home (for real estate only). In Texas, homestead exemptions are in Article 16 §§ 50 and 51 of the Constitution, and in the Texas Property Code §§ 41.001 et seq. The federal homestead exemption is found in 11 U.S.C. § 522. Louisiana exemptions can be found in La. R.S. 20:1 and 13:3881. There is no federal exemption scheme in Louisiana.

If the debtor has been domiciled in Texas for the last 30 months, he may claim a Texas or a federal exemption. If the debtor has been domiciled in Louisiana for the last 30 months, he may claim only claim a Louisiana exemption. If the debtor has lived in Texas or Louisiana less than 30 months, his choice of exemption is more complicated and is determined by the state(s) of his domicile during the 24 through 30 month period prior to filing and that state's applicable state law. In simple terms, his choice of exemption is provided by state law of the state that he has been domiciled in for the greater portion of the 180 days (six months) between the 24th to 30th month prior to his bankruptcy filing. For example, if the client has lived in Texas for two years but in the six months prior to the two years he had been a resident of California, then his exemption choices would be governed by California law. This may include his choice of that state's exemption or federal exemption. It could also provide for no choice; that is, just that state's exemption or just a federal exemption, but the client would always be allowed at least some exemption choice. Please remember that domicile and residence are not the same. The client may be in the armed forces or travel for work and be a resident of Iraq, but his domicile will still be the state to which he will return. 11 U.S.C. § 522(b)(3). Should the client not qualify for a Texas or Louisiana exemption, then other state exemptions or the federal exemption will always apply.

The Louisiana exemptions exempt the following: $35,000 in equity in the home in which the debtor lives and the land on which it sits, property necessary to the exercise of a trade, calling or profession, one firearm worth less than $500, clothing, bedding and household goods, family portraits, military accoutrements, poultry and fowl and a cow for use of the family, dogs, cats and household pets, a wedding ring worth less than $5,000, any earned income tax credit, up to $7,500 equity in one vehicle, up to $7,500 of equity in an additional motor vehicle which is modified or fitted to assist you or a family member with a physical disability, insurance proceeds from a declared disaster, pensions, annuity contracts and tax deferred plans, if contributions were made outside one year of the bankruptcy filing, 75% of disposable earnings or 30 times the federal minimum wage, whichever is greater. Married couples filing a joint bankruptcy in Louisiana can double the exemption amounts because each spouse can claim the full exemption amount for any property the spouse owns.

In summary, the Texas exemptions exempt the following: a home, regardless of value (but only if he has owned the property for 1,215 days or rolled over equity from a prior home and combined ownership totals 1,215 days), that is located on ten acres or less of land in a city, town, or village, or urban area (an area which is not necessarily a part of the city but which receives city services and effectively operates as if it were in a city) or in a rural area (generally in an area where agriculture, mining, timber operations, farming, ranching, etc., are carried out) the debtor is entitled to a homestead exemption of 100 acres if not married and 200 acres if married. In addition, an exemption is allowed for burial lots for the client and his family. There is a limit of $136,875.00 per debtor; $273,750.00 in a case with a husband and wife, if they have owned the real property for less than 1,215 days. Note, this is an equity interest which is the difference between value and what is owed and not the value of the property. For example, a property worth $400,000.00 that has a $350,000.00 mortgage has equity of $50,000.00. 11 U.S.C. § 522(p)(1).

In addition to the real property exemption, a debtor who is single is entitled to a personal property exemption for <u>things</u> used by the debtor and or members of the debtor's family, as long as the aggregate fair market value at disposal (i.e., price the items could be sold for) is no more than $30,000.00. If the debtor is a married person, the limit is $60,000.00. These assets include the following: home furnishings, provisions for consumption, farming or ranching vehicles and implements, tools, equipment, books, apparatus used in a profession or trade, wearing apparel, jewelry not to exceed 25% of the allowed exemption, two firearms, athletic and sporting equipment, a motor vehicle for each person who holds a license, two horses, 12 head of cattle, 60 head of other livestock, 120 fowl, and household pets. In addition, retirement plans, including most every type of plan which includes but is not limited to 401(k), IRA, Roth IRA, 403b, are exempt. Annuities are exempt, as well.

The primary benefit of the federal exemption package is that it allows the debtor to partially exempt some cash or liquid assets. While the state exemptions do not permit a cash asset exemption, it is possible to exempt cash or other liquid assets under federal exemptions up to a maximum of $13,100 if the individual is not married, or up to a maximum of $26,200 if married and filing jointly. The debtor's aggregate interest in any property, not to exceed in value $1,250 plus up to $11,850 of any unused exemption for real property used as a residence. 11 U.S.C. § 522(d)(5).

The federal exemptions are otherwise limited. They are limited to the following (these exemptions can be <u>doubled</u> for a couple filing a joint petition ***<u>and cannot be taken in Louisiana, which has opted out of the federal exemptions</u>***):

1. The debtor's equity interest in real property used as a residence not to exceed $ 23,675.

2. The federal exemptions consist of the following items kept primarily for personal or family use:

- Motor vehicles (limited to $ 3,775 per debtor)
- Real property (house and/or land limited to $ 23,675 per debtor)
- Household goods and furnishings (*limited to $ 12,625 per debtor for all assets so marked, with a per item limit of $600)
- Clothing (*limited to $ 12,625 per debtor for all assets so marked)
- Books and musical instruments (*limited to $ 12,625 per debtor for all assets so marked)
- Pets and animals producing family use products (*limited to $ 12,625 per debtor for all assets so marked)
- Crops such as garden produce (*limited to $ 12,625 per debtor for all assets so marked)
- Burial plots (included in the $23,675 per debtor limit for real estate)
- Jewelry held primarily for the personal, family, or household use limited to $1,600
- Tools or books necessary to make a living (limited to $2,025.00 per debtor)
- Cash value on life insurance policies
- Social security, unemployment, public assistance, veterans or disability benefits
- Pension, profit sharing, 401(K), IRA or other similar plan
- Alimony or child support necessary for support
- Certain personal injury settlements (limited to $23,675 per debtor)

Note, most of the federal limits in the Bankruptcy Code are adjusted every three years to reflect changes in the Consumer Price Index.

Any non-exempt asset, except assets that are of no consequential value, must be turned over to the Chapter 7 Trustee. To determine what must turned over, one must look very carefully at the exemptions and determine what may be claimed as exempt. Any asset which is not exempt can be liquidated for the benefit of the debtor's creditors.

In the event that there is a question by a creditor, trustee, or interested party, the bankruptcy judge (in a hearing) will determine the value of the assets the client is claiming as exempt. Of course, in such a hearing, evidence on value will be considered from other sources, as well as those presented by the debtor. The objecting party will file an objection to exemption. Any objection not made within 30 days of the conclusion of the first meeting of creditors is waived. Fed. R. Bankr. P. 4003.

About 90% of consumer debtors who file Chapter 7 have no property interest that must be liquidated or surrendered. Those debtors with assets above the homestead exemption can file a Chapter 13 and, typically, retain these non-exempt assets.

WHAT IS MEANS TESTING IN A CHAPTER 7? (11 U.S.C. §707)

Means testing is an income test monitored by the United States Trustee in a Chapter 7. Should the debtor fail the "means test," the filing will be presumed abusive and the United States Trustee will file a motion to dismiss. The ability of a consumer debtor to file a Chapter 7 with no presumed abuse is determined and controlled by the means test, which is official bankruptcy form B122A-2. The means test attempts to determine a debtor's ability to pay by looking at the debtor's income history. The higher the debtor's income in the last six months, the less likely he is to "pass" the means test. Debtors who would otherwise be good Chapter 7 clients can be forced to file a Chapter 13 if they "fail" the means test. Means testing can be complicated and is comparable to completing a tax return, as it calculates gross income and allowed deductions. The means test applies to all consumer debtors, but if the debtor has business debt and that debt is at least 51% in total amount attributable to business debts, then the means test is not applicable and the debtor may file a Chapter 7 without concern for the means test.

The means test requires an examination of a debtor's gross income and expenses during the six months prior to filing. To determine if a debtor can file a Chapter 7, the attorney must first determine if the client's current monthly income (called CMI) is above or below median income as defined by the federal government. CMI is not necessarily current or actual income. Instead, CMI is a six month average ending the month before filing the bankruptcy case of most funds derived from all sources that the client has received. Most commonly this includes gross pay from the debtor's employment and net income (after business expenses) for self-employed clients. However, it does not include Social Security or payments income, and it does not include sporadic income, such as gifts from parents or loans from a retirement plan. If the debtor's CMI is below median income, then the client qualifies to file a Chapter 7. If debtor's CMI is above median income, he can still qualify to file a Chapter 7 if, after deduction of allowed expenses from monthly income, the debtor is left with less than $128.33 per month. These expenses are ones allowed by the Internal Revenue Code, as well as actual expenses for secured debt and other expenses enumerated by the Bankruptcy Code. Examples include health care, child care, life and health insurance, support of elderly parents, charitable giving, and cell phone bills. These deductions are available on the Bankruptcy Form 122A-2, and a chart for current median income is shown below. If, after deducting these allowed expenses from debtor's CMI, the debtor has more than $128.33 per month but less than $214.17 per month left, he will qualify to file Chapter 7 as long as unsecured debts total more than $51,400 or if the means test result times 60 is less than 25% of the unsecured debt total. If a debtor's means test result is above $214.17 and he does not have special circumstances, such as a serious medical condition, then the debtor does not qualify to be in a Chapter 7.

A step by step evaluation the means test is shown below. The form and allowances are available at the United States Trustee website. Most lawyers who routinely conduct means testing invest in a software package[1] to aid in these calculations.

1. If debts are primarily consumer debts, (i.e., 51% of the total value of debts are consumer debts, meaning not business debts), then calculate CMI pursuant to § 101(10A) of the Bankruptcy Code. If debts are not primarily consumer debts (i.e., debts are primarily business debts, as defined by the Bankruptcy Code), then the means test does not apply.

2. Compare CMI to Median State Income (MSI). If CMI is above MSI, go to step 3. If not, the client has passed the means test and can file a Chapter 7.

Current (8/23/2017 and subject to adjustment) median state income numbers for the state of Louisiana and Texas are as follows:

MEDIAN FAMILY INCOME
LOUISIANA
Cases Filed On or After 5/1/17

	Annual	6 Month	Monthly
1 earner	43,063	21,532	3,589
2-person families	53,080	26,540	4,423
3-person families	59,303	29,652	4,942
4-person families	71,957	35,979	5,996

Add $8,400 for each individual in excess of 4 annually.

[1] While the Court does not endorse software providers, the following are providers of such software: LegalPro www.legal-pro.com, Best Case www.bestcase.com, and NextChapter www.nextchapterbk.com.

MEDIAN FAMILY INCOME
TEXAS
Cases Filed On or After 5/1/17

	Annual	6 Month	Monthly
1 earner	46,709	23,355	3,892
2-person families	61,704	30,852	5,142
3-person families	65,713	32,857	5,476
4-person families	76,842	38,421	6,404

Add $8,400 for each individual in excess of 4 annually.

3. Subtract monthly expenses per the Bankruptcy Code from CMI; again, this is current monthly income. These expenses are limited by IRS national standards for allowable living expenses, allowable living expenses for transportation, and IRS local standards for housing and utilities. These expenses differ by family size, income, and number of cars and may be supplemented or adjusted due to payments on secured debts, like a house or car. Exact numbers are available at the United States Trustee's website for National Standard for Living Expenses, for the Local Housing and Utilities Expenses, and Local Transportation Expenses. If what is left after subtracting monthly expenses from CMI is under $128.33, the debtor has passed the means test and can file a Chapter 7. If the remainder is $128.33 to $214.17, then proceed to number 5. If the remainder is over $214.17, then under means testing, the debtor probably does not qualify for a Chapter 7, unless step 6 applies.

5. If Monthly Disposable Income (MDI) is $128.33 to $214.17, does the means test result times 60 pay 25% of his general unsecured claims? If no, the debtor passes the means test and can file a Chapter 7. If yes, the debtor probably does not qualify for a Chapter 7, unless step 6 applies.

6. Are there special circumstances? If yes and the United States Trustee agrees, means testing does not apply and the debtor can file a Chapter 7. If not, the debtor probably does not qualify for a Chapter 7. But debtors are entitled to a hearing to prove that they should be exempt from means testing based on special circumstances.

Links to all of the National Forms, including the "means test" forms referenced herein, are linked on the Court's webpage.

WHAT ARE THE ADVANTAGES OF CHAPTER 7?

There are really two advantages in a Chapter 7. First is the imposition of the automatic stay, which has already been discussed. This stay is perpetual, if the client is discharged; however, upon earlier order of the Court or upon validation of a lien on certain property that the debtor holds (such as an automobile, computer, home, or the like), a creditor may exercise that lien and recover that property, if payments are not made. Please note, however, that the automatic stay is limited as noted before in the discussion of the extension and imposition of the automatic stay for debtors who have filed prior cases. There are exceptions to the automatic stay. These include divorces, child support matters, and landlords who have obtained a judgment for possession. In addition, the automatic stay does not stay criminal prosecution at any stage. Thus, if someone is charged with a crime because of some act occurring before or after filing a bankruptcy Code, the bankruptcy does not stop or stay such prosecution. The most frequent type of prosecution involves "hot checks."

Second is the advantage of a fresh financial start for the debtor. Fresh financial start means that the client will not be burdened by oppressive debts. This begins with the automatic stay and concludes with the discharge.

WHAT IS CREDIT COUNSELING AND WHAT DO CLIENTS NEED TO DO BEFORE THEY FILE? (11 U.S.C. § 109(h))

All consumer debtors who file any type of bankruptcy must obtain a credit counseling certificate during the 180-day period preceding the date of filing. It is imperative to know some courts have ruled that one cannot obtain credit counseling on the day of filing. A receipt of credit counseling completion is called the credit counseling certificate. This receipt of certification must come from an approved credit counseling agency. Failure to obtain credit counseling prior to filing bankruptcy is grounds for dismissal.

The list of approved agencies is available at the United States Trustee's website. The credit counseling certificate typically costs about $25.00, and the session typically lasts 90 minutes. The required class is offered via internet, telephone, and in person. Most consumer bankruptcy lawyers develop a working relationship with one or more credit counseling agencies to which they recommend clients. Often these agencies will offer billing privileges to counsel for the debtor.

A second round of credit counseling called the financial management course must be completed prior to discharge. A list of approved debtor education courses is also listed at the United States Trustee's website. This education course typically takes 60 minutes and has a typical cost of between $17.50 and $50.00. Unlike the initial credit counseling, which is routinely the same price among all credit counseling agencies, there is a wide disparity in pricing of the debtor education courses. The required class is offered by internet, telephone, and in person. Again, most consumer bankruptcy lawyers develop a working relationship with one or more credit counseling agencies to which they recommend clients. Often these agencies will offer billing privileges to counsel for the debtor. In Chapter 13 cases, many Chapter 13 Trustee's offer the debtor this course at no cost.

WHAT DOCUMENTS MUST BE FILED WHEN FILING A CHAPTER 7? (11 U.S.C. § 521)

There are a number of documents which must be filed and signed by the client. These documents are generally referred to as disclosure documents, or documents which are designed to provide information to the Court concerning a particular case. All official forms are available at the U.S. Court's website. Generally, these documents are: (available at http://www.uscourts.gov/forms/bankruptcy-forms)

1. A credit counseling certificate and a copy of the debt repayment plan, if any.

2. A petition requesting relief under Chapter 7. Official Form B 101.

3. A Declaration about an Individual Debtor's Schedules. Official Form B 106 Declaration.

4. A statement as to attorney's fees, Rule 2016(b) disclosure. Official Form B 203.

5. A Summary of Schedules and Declaration of Schedules. Official Form B 106 Summary.

6. A list of assets, Schedules A and B. Official Forms B106A/B.

7. A claim of exemptions, Schedule C. Official Form B 106C.

8. A list of all debts, Schedules D (secured debts), E (priority debts), and F (unsecured debts). Official Forms B 106D and B 106E.

9. A list of co-debtors and of executor contracts, Schedules G and H. Official Forms B 106G and B 106H.

10. A list of monthly expenses and income, Schedules I and J. Official Forms B 106I and B106J.

11. A Statement of Financial Affairs. Official Form B 107.

12. Statement of Intent. Official Form B 108.

13. A means test calculation. Official Form B 122A-2.

14. Pay remittances for the last sixty days.

15. The debtor(s) last filed tax return or provide a copy to the Chapter 7 Trustee no later than seven days prior to the first meeting of creditors.

16. The debtor(s) bank statements for the sixty days prior to filing or provide a copy to the Chapter 7 Trustee no later than seven days prior to the first meeting of creditors.

17. Chapter 7 Trustees often have individual (i.e. differing) requirements for documentation, including a debtor questionnaire that is required for a debtor's meeting of creditors. You should check with the Chapter 7 Trustee prior to the scheduled creditors meeting to fulfil these requirements. Debtors across all Chapters have a duty to cooperate with the Trustee. 11 U.S.C. § 521(a)(3).

Copies of all documents that are filed with the Court should be forwarded to the Chapter 7 Trustee at least seven days prior to the scheduled first meeting of creditors. Again, most attorneys routinely filing Chapter 7 or 13 cases invest in software to assist with form drafting.

TYPICAL "NO ASSET" CHAPTER 7 TIMELINE

Prior to a case filing, a debtor obtains a credit counseling certificate and, if applicable, a debt repayment plan. 11 U.S.C. § 521(b)(1) and (2)

Day 1	Case filed, filing fee paid or file Application to Pay Filing Fee in Installments or Application to Have Filing Fee Waived. (Official Forms B103A Installments, B103B Waiver)
Day 14	Completed Schedules filed, comply with debtor's duties under 11 USC 521 or seek extension by motion. (Bankruptcy Rule 1007)
Day 14 to 21	Court mails Notice of Bankruptcy with first meeting of creditor date, and 11 U.S.C. § 523 and § 727 complaint deadline of 60 days after the date first set for a creditors meeting.
Day 30	Deadline to file Statement of Intentions as to Secured Debt and Unexpired Leases 11 U.S.C. § 521(a)(2)(A)). (Official Form B 108)
Day 45	Automatic dismissal if debtor's pay records for the 60 days before case filing have not been filed by this date. 11 U.S.C. § 521(i)(1).

Seven days before the date set for the first meeting of creditors, the debtor's most recent federal tax return must be provided to the trustee. 11 U.S.C. § 521(e)(2)(A)

The first meeting of creditors typically occurs between 40 to 60 days after case filing.

Ten days after the creditors meeting is the deadline for the United States Trustee to file the § 707(b) statement of presumed abuse under the means test. 11 U.S.C. § 704(b)(1)(A)

Within 30 days of the date of the United States Trustee filing the statement of presumed abuse, the United States Trustee must file either a motion to dismiss or convert under § 707(b) or file a statement setting forth the reasons such motion is not appropriate. 11 U.S.C. § 704(b)(1)(B)

45 days *after* the creditors meeting, the deadline to perform under the Statement of Intention for the debtor expires. Stay lifts on any property on which the intentions have not been performed.

60 days *after* the date first set for the meeting of creditors, the deadlines for filing creditor § 523 and § 727 complaints expire. Under Bankruptcy Rule 4007(c) and 4004(a)), the deadline to file Personal Financial Management Course expires and under Bankruptcy Rule 1007(c), the deadline for the United States Trustee to file a motion to dismiss under § 707(b)(1) or (b)(3) expires. Further, this is the deadline under Rule 1007(e)(1) for all reaffirmation agreements to be filed (Rule 4008), and motions to redeem must be filed or extensions must be timely sought by motion.

Debtor typically receives a discharge within 30 days of the § 727 complaint deadline, unless a § 727 complaint is filed.

The case is administratively closed shortly thereafter unless it is an "asset" case. Asset cases remain open until such time as the assets are administered by the trustee.

<u>I REPRESENT A CREDITOR IN A CHAPTER 7 BANKRUPTCY, WHAT DO I DO NOW?</u>

Creditor activity in Chapter 7 cases can be limited. Be aware of the automatic stay and cease collection efforts against the debtor. Proofs of claim are not filed in "No Asset" Chapter 7 cases. Claims will only be required if there are assets to liquidate and a distribution is to be made to creditors. If a notice of assets is filed, then file a proof of claim (Official Form B 410). A proof of claim must be filed or your client will not be paid. Be sure and file your documentary evidence as part of the proof of claim. The claim is filed with the Clerk of the Bankruptcy Court. There are strict deadlines in Chapter 7 cases and you should be aware of them. The deadline for filing a proof of claim typically is 90 days after the date of the notice of assets. Bankruptcy Rule 3002(c)(5).

Activity by unsecured creditors in consumer Chapter 7 cases is unusual unless there has been some type of reprehensible conduct by the debtor. Of course, if you believe the debtor has committed fraud, has hid income or assets, or is acting in bad faith, options are available to the unsecured creditor including objecting to discharge, objection to dischargeability of the creditor's debt, and objecting to the debtor's claim of exemptions. Any nefarious activity should be disclosed to the Chapter 7 Trustee and to the United States Trustee. Strict time deadlines are in place for these objections.

Under certain circumstances, secured creditors may move to lift the automatic stay in Chapter 7 cases. In Chapter 7 cases, debtors are required to reaffirm, redeem, or surrender collateral on a secured debt within certain time limits. If they fail to do so, the creditor will have the ability to lift the automatic stay and exercise their rights under state law. Generally, a secured creditor is entitled to continue to receive monthly

installment payments and be protected by insurance and escrow, if required (reaffirmation), entitled to a lump sum payment of fair market value of their collateral (redemption), or to recover possession of the collateral (surrender). Relief from the automatic stay for creditors is available on motion and notice, for cause, including the lack of adequate protection of an interest in property. Forms for stay relief are available on the Court's website.

Certain debts, such as certain taxes, domestic support obligations, fines and penalties owed to governmental agencies, student loans (with some exceptions) will pass through a bankruptcy unaffected. Other types of debts are non-dischargeable if a creditor successfully objects through an adversary proceeding. These include, but are not limited to, debts incurred by fraud or false pretenses and by willful and malicious injury to another or the property of another. A set of exceptions to discharge are based on the debt's importance to society, such as taxes, child support or alimony. These generally do not require a creditor filed adversary proceeding. Another set of exceptions to discharge are based on the "bad" conduct of a debtor such as larceny, embezzlement or fraud, and do require a timely filed adversary proceeding or they are discharged.

Creditors and their representatives have the right to appear at the meeting of creditors and question the debtor under oath. Should the debtor's schedules or testimony be inconsistent with the facts, especially if the debtor has omitted assets or income from the schedules, you should give notice to the Chapter 7 Trustee and the United States Trustee. You may also have grounds to object to the debtor's discharge.

Objections to discharge or to dischargeability are time sensitive; they must be filed within 60 days from the date first set for a debtor's creditors meeting. The deadline for filing an objection to the debtor's claim of exemptions is 30 days from the date first set for a debtor's creditors meeting. Do not miss any deadlines. Discovery is available in a Chapter 7 as to the debtor or any other party, on motion, and they can be forced to appear and give testimony under oath in a Rule 2004 examination and the Court may extend these deadlines on motion and order filed prior to the deadline expiring.

WHAT OPTIONS EXIST AS TO SECURED DEBT?

Secured debts are where a security interest has been retained by a creditor to permit that creditor to foreclose on certain described property or to recover possession if payments are not made. Generally, the bankruptcy attorney must determine whether it is real property (land and buildings) or personal property (things and/or cash on deposit of some nature).

As to real property, there are three possibilities that exist under Chapter 7. The debtor may:

1. Agree to surrender the property and thus seek a discharge.

   The surrender, or loss, of the property should usually be contemplated within 90 to 120 days after filing the bankruptcy action and involves giving back the property. A creditor may ask that the period of time to give it back be shortened, but the filing of the Chapter 7 gives to the debtor a minimum period of time in order to make arrangements to substitute some other property for that being surrendered. Even if the motion to lift stay is filed immediately after the debtor's petition, the minimum period of post-petition use of the property should still be about 45 days.

   If the creditor holding the lien does not file a motion to modify the stay, possession of the property can be maintained until discharge (four to five months after filing).

2. Reaffirm the debt and obligation. 11 U.S.C. § 524(c).

On the date of filing a Chapter 7, debts and obligations generally come to an end and are not revived unless the debts are non-dischargeable automatically under law (child support, alimony, etc.) or the Court enters an order denying discharge of a certain debt or permits reaffirmation by order.

The process of reaffirmation came into the Bankruptcy Code in 1979. It involves the Court entering an order that gives "new life" through the process of reaffirmation to the debt that existed prior to bankruptcy. Reaffirmation is a process that grants to creditors the right to sue for any post bankruptcy deficiency. Deficiency means the amount of debt remaining after the collateral or property has been sold and applied against it, and thus reaffirmation is sought by many creditors to accomplish that objective.

Requirements for reaffirmation include that the agreement be made prior to discharge, that required notices contained in § 524(c) be given, that the agreement be filed with the Court and be accompanied by a declaration or affidavit signed by the attorney representing the debtor, and that the agreement is fully informed, voluntary, and not an undue hardship on the debtor(s). Reaffirmation agreements are part of the official bankruptcy forms and can be found via the National Forms link on the Court's webpage. Official Bankruptcy Forms B 427, B 2400A, B 2400A/B ALT, B 2400B, B 2400C and B 2400C ALT.

3. Redeem the property (discussed further below). 11 U.S.C. § 722. A sample Motion to Redeem and Order are available on the Court's website.

As to personal property (i.e., a property interest that is mortgaged or pledged to secure the payment of the debt), the options are basically the same, with one additional option added. The options are as follows:

1. To surrender the property and seek a discharge.

2. To reaffirm the debt (discussion as set out above). National Forms for reaffirmation are available on the Court's website.

3. Redeem the property. 11 U.S.C. § 722.

The process of redemption provides a debtor the right to pay to the creditor the fair market value of the property at the date the bankruptcy action was filed. The fair market value is paid in one lump sum. Therefore, where the property is of value of more than several hundred dollars, it may be difficult for redemption to be used because the funds to redeem the property interest must be available.

Redemption should only be contemplated when there is sufficient cash on hand to compensate the creditor for the value of the property without otherwise endangering the debtor(s)' economic stability. Upon filing of a motion to redeem, the redemption value can be agreed to by the debtor and creditor (i.e., lien holder); however, if they cannot agree, then the Court can determine the redemption value. It is payable in the one lump sum, as soon as the process is brought to an end. Redemption is a powerful tool for dealing with credit cards that claim a secured interest in durable goods, such as furniture, appliances, and the like. As a practice pointer, these creditors are not bank credit cards, such as Visa or Mastercard, but, typically, specialty retailers with their own credit plans. Redemption must also be evaluated in light of the lien holder's actual intent to repossess, because often there is no such intent and redemption is not actually needed.

4. Avoid the lien. (11 U.S.C. § 522(f))

Judicial liens (judicial mortgages in Louisiana) can be avoided under 11 U.S.C. § 522(f) if the lien impairs the debtor's homestead exemption. A motion and order is required. A form of motion is available on this Court's website. For example, if a creditor has sued the debtor, obtained a judgment, and perfected a lien via real (immovable) property recordation, this lien may be avoided in either a Chapter 7 or Chapter 13 if the debtor has claimed a homestead exemption. It is not uncommon for these liens to go unnoticed during a bankruptcy and to come to light when a debtor later attempts to sell the homestead. Courts are typically not averse to reopening a bankruptcy case after discharge to allow these liens to be avoided. A motion to reopen is required the case is required. After a case is reopened, a debtor may file a Motion to Avoid a Judicial Lien Pursuant to 11 USC § 522(f), which are generally not contested.

There is an additional special provision relating to non-purchase money security interest in personal property. Again, this provision is not available in Louisiana. It is found under Section 522(f) of the Bankruptcy Code. It provides that the debtor may avoid a lien that impairs an exemption, if the lien is a lien growing out of a note and security agreement and if it is non-possessory, non-purchase money security interest, in any household furnishing, wearing apparel, books, animals, crops, musical instruments, or jewelry primarily used by the family for personal or household use as well as any implements, professional books or tools of the trade of the debtor, or professionally prescribed health aids for the debtor or a dependent of the debtor. In order to avoid such a lien, it must be non-purchase money (i.e., proceeds of loan not being used to buy the property) and must necessarily relate to a lien which was granted to secure the payment of a debt, such as an individual borrowing money on household goods and furnishings and/or jewelry. A separate motion with accompanying notice to the creditor and a court order must be sought in order to avoid such lien. In many cases, a finance company taking a lien upon household goods and furnishings does so with little intention to secure the return of this property, and a formal lien and validation process may not be necessary. However, care should be taken to determine whether or not the lien is truly non-possessory, non-purchase money.

WHO IS THE CHAPTER 7 TRUSTEE AND WHAT DOES THE TRUSTEE DO? (11 U.S.C. § 704)

The Trustee is an individual, not necessarily an attorney, who is charged by the court to basically do three things:

1. Examine the statements, schedules, and documents filed by the debtor to determine if the rules have been followed.

   The trustee determines, primarily from the debtor's testimony and information received from any interested creditors, that the statements and schedules have been properly prepared and that the debtor's duties have been discharged. If there are any additions, corrections, or deletions that are deemed necessary, the trustee can request such amendments be made.

2. Sell and dispose of non-exempt property for the benefit of creditors.

   In the event there is property which is not exempt, or property which cannot be exempted under the applicable federal or state statute, the Trustee will accumulate that property and sell and dispose of it for the benefit of the client's creditors by taking the proceeds from the sale and, after depositing them in a special trust bank account at the conclusion of the case, paying it in equal shares, depending upon the amount of their claim, to creditors who have timely filed a proof of claim.

3. Determine if any third parties have received unfair advantage and, if so, take action to set aside such advantage.

   Such action usually falls into two categories: 11 U.S.C. §§ 547 and 548.

   a. Transfers to third parties within certain time periods (usually one year prior to filing the petition).

      Transfers that can be avoided are limited to transfers for no or inadequate consideration, such as giving to a friend, relative, or even a creditor a property interest prior to filing bankruptcy which would otherwise be available for sale with the proceeds distributed to creditors.

   b. Recovery of preferential payments to creditors prior to filing bankruptcy.

      The regular, recurring monthly payments on prior debts or payments on the monthly utility bills are not the type or debt to consider. Preferential payments in the consumer sense usually relate to payments on past due antecedent debts which were made by the debtor at a time of insolvency or which rendered the debtor insolvent and were made within one year of filing the petition or within one year of filing, if the beneficiary is someone defined as an insider. The definition of insider is difficult, but it generally relates to someone who, because of a particular circumstance, bears a different or close relationship to the debtor.

The trustee has little or no discretion. However, a trustee is required to do certain things or take certain action if, upon investigation, facts and circumstances warrant it. The judge is the only individual with discretion under the law. Trustees are frequently criticized for taking action or not taking action; however, a trustee's decision to act or not act is based solely upon the information discovered. For example, in a case where the trustee's investigation reveals only "exempt assets," creditors may have a hunch or strong belief that other assets are present; however, the trustee cannot proceed unless such hunch can be supported by a "willing witness" who stands ready to give evidence. On the other hand, if a third party comes forward supported by the opinion of competent counsel, the trustee must pursue the claim, regardless of his or her personal reservation and/or friendship with any of the individuals who may be involved.

Once a claim has commenced, the settlement of the claim must be approved by the court. If a trustee wishes to settle a pending claim, this is accomplished by court hearing and order. All the trustee can do is make a recommendation.

WHAT IS THE UNITED STATES TRUSTEE AND WHAT DOES IT DO? (28 U.S.C. § 581, *et seq.*)

The United States Trustee is part of the Department of Justice and was created by Congress to have administrative oversight of the bankruptcy process. The United States Trustee can appear in any case and take any legal action necessary for the preservation of the Bankruptcy Code or to stop abuse in the bankruptcy process. The United States Trustee is the main gatekeeper of the bankruptcy means test and can bring action against any debtor who fails that test to dismiss the case. The United States Trustee can take action to stop fraudulent activity and oversee the audit process. One in every 250 Chapter 7 or 13 cases filed is audited. These audits assure compliance with the Bankruptcy Code, just like tax audits assure compliance with the Tax Code. While there is no stated remedy for failing a bankruptcy audit, it is expected and has been seen that the United States Trustee will either object to dischargeability or attempt to revoke discharge, should the auditors find material misstatements.

WHAT IS THE MEETING OF CREDITORS AND WHAT HAPPENS IN THE MEETING? (11 U.S.C. § 341)

"Section 341 Meeting," or "First Meeting of Creditors," is a term that has come into bankruptcy law over the last several years. It is a result of the provisions of the Bankruptcy Code of 1978, which became official in 1979. It provides that all debtors shall attend a meeting of creditors and provides, generally, the procedure of such a meeting. From there came the reference to the § 341 Meeting.

As noted before, a meeting of creditors is a somewhat misleading name. It is not an occasion where creditors get together for a meeting. It relates primarily to a session between the debtor and the trustee, where the trustee must determine whether the debtor has followed all of the applicable rules, regulations, and statutory provisions.

The meeting will generally occur within 30 to 40 days after the case is filed. Both the debtor and attorney will receive notification of the meeting of creditors, usually at the same time, as will all of the parties in interest listed in the Chapter 7 bankruptcy papers who are creditors or parties holding a claim against the debtor.

The notice that is sent out invites all interested parties to attend; however, on average, less than 10% of all creditors ever attend. Generally, the trustee will ask only those questions which are designed to allow the trustee to perform his or her statutory obligations.

Creditors who appear may only ask questions to:

1. Establish that they have the right debtor by reviewing identity documents.

   Debtors are required to produce a governmental picture identification, driver's license, passport, military I.D, and proof of social security number.

2. Present information or evidence to the trustee concerning certain assets that the debtor had an interest in at some prior time, such as at the time a financial statement would have been given. This is generally referred to as asset investigation.

3. Determine the position of the debtor regarding the debt or to determine whether the debtor will reaffirm an otherwise secured debt.

   Remember that a secured creditor can never impose one of the three options on the debtor; it is the debtor's choice. However, the creditor is likely to want to determine which choice the debtor will pursue.

4. Determine relevant facts to object to discharge or to the dischargeability of a debt.

   Inquiries relating to discharge and dischargeability primarily involve detailed questioning concerning property values on financial statements.

5. Present information to the trustee as to transactions concerning the debtor's property that might aid in recovering property of the estate, either through preference recovery or securing the return of property transferred by the debtor pre-petition without consideration (money flowing to the debtor) or inadequate consideration.

6. Determine relevant facts to determine compliance on the means test and to verify any numbers contained therein.

The appearance of a creditor at a meeting of creditors should not be viewed by the debtor as something that is bad or ominous. Frequently, such visits are only to obtain information, with little other impact related to them. In the unusual case, the creditor may appear for the purpose of obtaining information leading to a decision as to whether or not to file an objection to the discharge of the debtor or dischargeability of the debt.

WHAT DEBTS ARE NOT DISCHARGEABLE IN A CHAPTER 7? (11 U.S.C. § 523)

Debts that are not dischargeable are different from cases where a debtor may be denied a discharge of all his or her debts. Generally, the exceptions to discharge that are set out in 11 U.S.C. § 523 of the Bankruptcy Code are as follows:

1. Taxes for a tax period less than three years old where returns were properly filed when due. Additionally, taxes due for tax periods in excess of three years old where the return was not timely filed.

   For example, if contemplating filing bankruptcy on April 25, 2007, and the debtor owes taxes for 2003 (note: a return would have been due on April 15, 2004), assuming that the return was properly filed, no tax lien has been filed, and no extension agreements had been arranged or agreed to, then taxes would generally be dischargeable. There are exceptions, if tax liens have not been filed or if the taxes are due to a fraudulent return.

2. Taxes that are for trust fund payments are never discharged.

   For example, the debtor had operated a business and had withheld taxes from employees' pay and never paid those to the IRS. Such an obligation is never dischargeable. No matter what Chapter might be filed, the debtor would always owe those taxes. All that could occur would be a plan for repayment under Chapter 11 and Chapter 13. The same would apply in situations involving sales taxes withheld from sales and not remitted to the comptroller of public accounts. Of course, any fraudulent tax reporting is generally never dischargeable.

3. False statements when credit was obtained.

   False statements when credit was obtained, such as in the case of false pretenses, false representations or fraud and/or the use of a statement in writing that is materially false to obtain credit constitute an exception to discharge.

4. Purchases or incurring of debt in contemplation of bankruptcy.

   Generally, purchases or incurring of debt in contemplation of bankruptcy may not be discharged. For example, one runs up substantial debt with the intent in mind of "getting the creditor" or "getting a free ride" with no intention of repaying the debt. Such debts are non-dischargeable. These are generally called charge ups.

5. Consumer debts owed to a single creditor and aggregating more than $550.00 for "luxury goods or services" including cash advances incurred by an individual debtor on or within 90 days before filing are presumed not to be dischargeable. Purchases of "non-luxury or ordinary goods and

services" aggregating more than $825.00 on or within 70 days before filing are presumed not to be dischargeable.

6. Creditors whose names and addresses are not listed in the schedules or whose names and addresses are listed inaccurately.

7. Fraudulent acts by a person acting in a fiduciary capacity, such as through embezzlement or larceny.

8. Alimony or child support due to a separation agreement, divorce or order of a Court, as well as debts incurred during a divorce or separation or due to a marital property division.

9. For willful and malicious injury by the debtor to another entity.

10. A debt for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit.

11. An educational loan unless there is a showing of "undue hardship."

12. A debt that arises from a judgment or consent decree entered in a Court of record against the debtor, wherein liability was incurred by such debtor's operation of a motor vehicle, vessel, or aircraft while legally intoxicated is not dischargeable.

13. There is a provision that prevents a debt from being discharged, if the debtor has been denied a discharge in a prior case within eight full years.

If a creditor believes that its debt should not be discharged, it can file a complaint in bankruptcy (called an adversary proceeding) and ask the judge to declare the debt non-dischargeable. It is impossible in these few pages to provide all of the legal intricacies of such issues. This is designed as a general guide and must be treated as such. There is no substitute for detailed legal research. If you recognize in your particular situation with your client the existence of any debt that might be subject to the dischargeability rules, you are urged to do further research. It is extremely important to note that the time deadline for filing a complaint under 11 U.S.C. § 523 is 60 days from the date first set for the meeting of creditors. A creditor who misses a deadline for filing an adversary proceeding or seeking to extend the deadline to determine the dischargeability of a debt may be without further recourse.

While most adversary proceedings to determine dischargeability are creditor initiated, a debtor may also file a dischargeability complaint. A complaint other than those brought under 11 U.S.C. 523(c) may be filed at any time. 11 U.S.C. § 523(c) concerns dischargeability actions based on § 523(a)(2), (4), and (6), (i.e., fraud, breach of fiduciary duty and willful and malicious harm to a person). These actions are subject to a 60 day limit. A typical adversary case brought against a consumer debtor brought by a creditor must be brought within the 60 day time limit and is typically to determine that a debt is non-dischargeable (i.e. will survive the bankruptcy) due to fraud or willful and malicious injury. Conversely, a debtor may file at any time an adversary for a determination that one of his debts, such as a tax claim to the IRS, was actually discharged by the discharge order or to prevent collection activity of a discharged debt.

Generally, a debt is incurred through fraud if at the time the debt was incurred the debtor made a material misrepresentation that induced a creditor to grant credit or issue credit or a loan, and the creditor would not have done so but for the misrepresentation. This is a general description of fraud that is delineated in § 523(a)(2)(A) and (B), and involves a transaction between the debtor and a creditor. Additionally, under certain circumstances, a debt can be fraudulent if, at the time the debt was incurred, the debtor had no intention of repaying it.

Breach of fiduciary duty includes but is not limited to fraud or defalcation while acting in a fiduciary capacity, embezzlement, and larceny.

Willful and malicious injury includes but is not limited to most intentional torts that produce a deliberate or intentional injury; however, negligent torts where the harm that is the result of mere negligence are neither willful nor malicious.

WHEN MAY A DEBTOR BE DENIED A DISCHARGE IN A CHAPTER 7? (11 U.S.C. § 727)

Generally, there are limited situations when a consumer debtor may be denied a discharge. An individual consumer may be denied a discharge if any of the following conditions exist:

1. Debtor, with intent to hinder, delay, or defraud a creditor, has transferred, removed, destroyed, or mutilated property of the estate within one year after filing.

2. Debtor has failed to maintain or has mutilated records that are necessary to determine the debtor's financial condition or business transactions.

3. Debtor knowingly made a false oath or account, presented a false claim, or gave, offered, or received or attempted to obtain money or property for acting or failing to act as the code requires, including withholding from any officer of the Court (Trustee or other appointed individual) any recorded information, including books, documents, records and papers relating to the debtor's property or financial affairs.

4. Debtor has failed to explain satisfactorily the loss of any asset or deficiencies in assets.

5. Debtor has refused to obey any lawful order of the Court or to respond to any material question.

6. Debtor has been granted a discharge under Chapter 7 within the last eight years.

7. Debtor has been granted a discharge under Chapter 13 within the last six years.

It is important to note, however, that in the case of discharge or dischargeability, these are issues to be determined by courts. Issues concerning discharge or dischargeablity must be brought by adversary proceeding. If a person wishes to object to the dischargeability of the debt or the discharge of the debtor, the court must first conduct a trial and determine whether the discharge or dischargeability of the debt as sought against the debtor has been proven by a preponderance of the evidence. The time deadline for filing a complaint under 11 U.S.C. § 727 is typically 60 days from the date first set for the meeting of creditors.

The number of discharge or dischargeability objections filed annually is a very small percentage of the number of bankruptcy cases filed. Unless you are aware of some particular circumstance or some particular factor that would lead you to believe that someone has cause to object to the discharge or dischargeability of a debt, such a complaint is unlikely.

WHEN WILL THE CLIENT RECEIVE A DISCHARGE AND DOES THE DEBTOR NEED TO TAKE FURTHER ACTION?

A debtor must take the debtor education course, and file the accompanying certificate, prior to discharge. This education course typically takes 60 minutes and has a cost of between $17.50 and $50.00. The certificate obtained by the debtor is filed with the Court. Discharges are usually entered by the court, assuming no objection to discharge or dischargeability has been filed, and the required debtor education

certificate has been filed. It can be anticipated that such an order of discharge will be entered 90 days after the date of the creditors' meeting. Therefore, unless other factors become apparent, a discharge can be contemplated within 90 days. Other than possible clerical or mechanical errors that could conceivably occur in the bankruptcy clerk's office, there are limited factors or circumstances that could delay a discharge other than a formal objection.

CAN A CHAPTER 7 BE CONVERTED TO A CHAPTER 13? (11 U.S.C. § 706)

Yes, prior to dismissal or discharge a Chapter 7 can be converted to a Chapter 13, as long as the debtor is eligible for relief under Chapter 13 of the Bankruptcy Code. Conversion to Chapter 13 is a matter of right. A Motion to Convert to Chapter 13 from Chapter 7 is typically filed *ex parte*. If a case has previously been converted to a Chapter 11, 12 or 13 then conversion is not a matter of right and notice and hearing is required in order to convert a case a second time.

CAN A CHAPTER 7 BE VOLUNTARILY DISMISSED? (11 U.S.C. § 707)

It depends. The Court can only dismiss a case filed under Chapter 7 for cause and only after notice and hearing. The debtor has no absolute right to dismiss a Chapter 7. Motions to dismiss Chapter 7 cases may not be filed *ex parte*. Typically, but not always, dismissal motions in "no asset" Chapter 7 cases are uncontested; however, asset cases as well as cases where there are claims of debtor malfeasance can lead to creditor objections and the inability to dismiss a Chapter 7.

WHAT IS THE EFFECT OF THE CLIENT'S CHAPTER 7 DISCHARGE? (11 U.S.C. § 524)

The discharge order acts as an injunction to ensure protection against collection activity. A discharge under Chapter 7 voids any judgment, to the extent that such judgment is a determination of the personal liability of the discharged debt. It also operates as an injunction against the commencement or continuation of an action, the employment of process, or an act to collect, recover or offset discharged debts. It is the typical conclusion of a consumer Chapter 7 case. The discharge injunction is enforceable by civil contempt.

WHAT IS THE BASIC CONCEPT OF CHAPTER 13?

The Bankruptcy Code calls Chapter 13 an adjustment of debt of an individual with regular income. This requires that the debtor file a Chapter 13 plan to pay his secured and/or priority debts, typically by a wage order thru a court-appointed trustee who distributes the funds to his creditors in small installments until the debts are paid. The judge will confirm a repayment plan that his creditors must accept. There is no voting by creditors on a Chapter 13 plan. A Chapter 13 plan typically lasts from three to five years, depending on the required commitment period. Secured creditors are paid either partially or in full, or their collateral is surrendered to them. Priority unsecured creditors are always fully paid, and general unsecured creditors receive a distribution based on either the liquidation test or disposable income test, whichever test requires a higher payment to unsecured creditors. As a practice pointer, many Chapter 13 debtors are not required to make any payment to unsecured creditors given either test, but some courts will require a nominal distribution to unsecured creditors. This typically requires a minimum distribution of between one and three percent of unsecured claims.

WHAT IS THE LIQUIDATION TEST AND HOW DOES IT AFFECT A CHAPTER 13 PLAN?

The liquidation test requires that unsecured creditors in a Chapter 13 receive not less than what they would have received had the debtor filed a Chapter 7. As exempt assets are not subject to liquidation in a Chapter 7, the client's claim of and allowance of exemptions determines the liquidation test and a calculation of payments to unsecured creditors. If a debtor has $12,000.00 in non-exempt assets in a Chapter 7 and

proposes a 60 month plan in a Chapter 13, then a monthly payment to unsecured creditors of $200.00 per month will pay these creditors $12,000.00 over time and meet the liquidation test. However, in certain instances, a Chapter 13 estate can be solvent. A solvent estate is one in which the value of the debtor's non-exempt assets exceeds the debtor's total unsecured debts. This could require the payment of interest to unsecured creditors. Additionally, due to the time value of money as well as the costs of sale in a Chapter 7 liquidation, a calculation of liquidation value can be fact intensive. However, an estimated liquidation test calculation, in most consumer cases, can be made by totaling a debtor's positive equity in each asset and then subtracting the value of the debtor's claimed exemptions. Any remaining sum is the estimated liquidation value of a debtor's estate in Chapter 13.

WILL THE DEBTOR LOSE ANY PROPERTY?

Practically speaking, it is rare that a Chapter 13 debtor loses any property or possessions owned on the date of filing. The Chapter 13 Trustee is not in the business of taking a debtor's assets to satisfy creditor claims unlike a Chapter 7 Trustee. When the client promised to pay liquidation value through the Chapter 13 plan, he generally alleviated the need to surrender assets.

WHAT IS MEANS TESTING AND HOW DOES IT EFFECT A CHAPTER 13 PLAN? (11 USC §1322)

In a Chapter 13 Bankruptcy, the debtor must pay his unsecured creditors the higher of his net disposable income or the amount determined by the liquidation test. The Bankruptcy Code has incorporated the means test into the definition of disposable income, so the results of the means test determine the minimum payout to unsecured creditors in a Chapter 13. Remember, that payout is a minimum, and the client could be forced to pay a higher amount, if the liquidation test calls for a higher payment.

There is one major positive difference for debtors between the Chapter 7 means test and the Chapter 13 means test, and that is the ability to deduct in the Chapter 13 means test, "qualified retirement deductions" including both voluntary retirement deductions as well as retirement loan repayments. 11 U.S.C. §§ 541(b)(7) and 362(b) (19). This deduction in a Chapter 13 means test can mean that a debtor fails the Chapter 7 means test but has a negative means test number in a Chapter 13. However, be aware that some courts will impose a "good faith" limit on retirement contributions.

Means testing is determined by a historical look at a debtor's gross income over the last full six months. Attorneys can follow the Form B 122C-1, which is called "Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period" and, if required because your debtor(s) are above median income, the Form B 122C-2 the "Chapter 13 Calculation of Your Disposable Income." Be advised that the means test forms for Chapter 7 (Form B 122A) and Chapter 13 (Form B 122C) are different. First, determine if the client's current monthly income (called CMI) is above or below median income as defined by the federal government. Median income determines the commitment period (plan length) in a Chapter 13. Debtor(s) with below median income must have a 36 month plan but can propose a plan up to 60 months. Any debtor(s) with income above median income must propose a 60 month plan. CMI is a six month average ending at the month before filing a bankruptcy case of most (but not all) funds derived from all sources received in the last six months, most commonly, gross pay from the client's employment and net income (after business expenses) for self-employed clients. However, it does not include Social Security or payments under the social security act, such as unemployment or disability income, and it does not also include sporadic income, such as gifts from parents or loans from a retirement plan. Deduction of allowed expenses include expenses allowed by the Internal Revenue Code, as well as actual expenses for secured debt service and other expenses enumerated by the Bankruptcy Code, such as health care, child care, life and health insurance, support of elderly parents, charitable giving, cell phone bills, qualified retirement deductions and the like. If after these deductions on a step by step basis are funds available on the Bankruptcy Form B22C and they don't have "special circumstances" such as a serious medical

condition or a call or order to active duty in the Army, then he must contribute this amount monthly to payment of his unsecured debts. Remember, this is a minimum and may be higher given the results of the liquidation test. If there are special circumstances and the Chapter 13 Trustee and judge agrees, the client may make a lower payment to unsecured creditors than the amount specified in the "means test." One may never make a lower payment to unsecured creditors than what is required by the liquidation test.

WHAT OPTIONS EXIST AS TO SECURED DEBT IN A CHAPTER 13?

In most consumer Chapter 13 cases, there are three types of secured debts: (1) the homestead claim and claims that attach to the homestead, such as, property taxes and homeowners associations, (2) automobile claims, and (3) secured consumer credit cards, typically for appliances, electronics, and furniture. As to all three classifications, there are three possibilities with some variations.

The debtor may:

1. Agree to surrender the property and seek a discharge of this debt.

   This is the same as surrender in a Chapter 7. The surrender of, or loss, of the property should usually be contemplated within 60 to 90 days after filing the bankruptcy action and involves the debtor giving back the property. A creditor may ask that the period of time to give it back be shortened, but the filing of the Chapter 13 gives to the debtor a minimum period of time in order to make arrangements to substitute some other property for that being surrendered. Even if the motion to modify stay is filed immediately after the debtor's petition, the minimum period of post-petition use of the property should still be 30 to 60 days.

2. Pay the debt direct.

   On most secured debts, simply make the payments as they come due and payable and retain the property. This option exists typically only if the debt is current and not in default.

3. To restructure the debt (typically non-mortgage claims).

   The process of restructuring the entire debt (community property taxes, homeowners association claims, cars with equity or 910 car claims so called because the car was financed in the 910 days prior to the bankruptcy filing or the value of the collateral securing the debt of a creditor whichever is less, called a "cram down" (typically on secured debt like a car, furniture, jewelry or electronics), provides a debtor the right to pay to the creditor the debt at the date the bankruptcy action was filed with interest. The debt is paid in monthly time payments over a period not to exceed sixty months plus interest, typically, at two points over the prime rate as of the day of the bankruptcy filing. Congress has limited the right to "cram down," that is pay value rather than the outstanding debt on automobile debts less than 910 days old. 11 U.S.C. § 1325. On 910 car claims, the creditor must receive payment of the outstanding debt irrespective of the value of the collateral.

   To restructure the debt (typically mortgage claims).

   The debtor may also restructure an arrearage on a home or car over the same plan length. This typically occurs with a house or other real property or any other debt where the restructuring of the debt (as above) would lead to a higher monthly payment then the normal contractual payment amount. These are typically debts payable over a period of greater than 60 months, like a home or mobile home. In addition to curing the arrearage, one must also make the regular monthly

contractual payments to the creditor. In some districts, these direct home payments become part of the Chapter 13 plan and are paid to the Chapter 13 Trustee.

4. Lien Avoidance for certain secured claims is also available in a Chapter 13.

There is a special provision relating to non-purchase money security interest in personal property and is found under Section 522(f) of the Bankruptcy Code. Again, this is not available in Louisiana. It provides that the debtor may avoid a lien that impairs an exemption, if the lien is a lien growing out of a note and security agreement and if it is non-possessory, non-purchase money security interest in any household furnishing, wearing apparel, books, animals, crops, musical instruments, or jewelry primarily used by the family for personal or household use as well as any implements, professional books, or tools of the trade of the debtor, or professionally prescribed health aids for the debtor or a dependent of the debtor.

In order to avoid such a lien, it must be non-purchase money (i.e., proceeds of loan not being used to buy the property) and must necessarily relate to a lien which was granted to secure the payment of a debt, such as an individual borrowing money on household goods and furnishings and/or jewelry.

A separate motion with accompanying notice to the creditor and court order must be sought in order to avoid such lien. In many cases, a finance company taking a lien upon household goods and furnishings does so with little intention to secure the return of this property, and a formal lien and validation process may not be necessary. However, care should be taken to determine whether or not the lien is truly non-possessory, non-purchase money.

WHAT OPTIONS EXIST AS TO PRIORITY DEBT IN A CHAPTER 13? (11 U.S.C. § 1322(a)(2))

Priority debts in a Chapter 13 (typically income taxes and/or child support) must be paid in full. This payment is usually without post-petition interest or penalty. Because priority debts must be paid in full, clients with large priority claims often do not have sufficient income to fund a Chapter 13 plan, if large claims exist. Small or moderate priority claims often can be favorable, paid over 60 months with no interest or penalty.

WHAT HAPPENS IF CIRCUMSTANCE CHANGE OVER THE LIFE OF A CHAPTER 13 PLAN (11 U.S.C. § 1329)

At any time after plan confirmation, but before completion of the payments the debtor, the trustee or the holder of an unsecured claim may seek to modify the plan to increase or reduce plan payments, extend or reduce the time for payments due to changed circumstances. Typically, plan modifications fall into two distinct categories. The first are debtor motions, which are by far the most prevalent, and are filed due to a change in income or expenses such as unemployment or a reduction in pay. It is not uncommon for a debtor's financial condition to worsen once a Chapter 13 is filed. A plan may be modified to surrender a vehicle and lower a debtor's plan payment or to extend the time for plan payments. As is the case with any Chapter 13 plan, modification requires a mathematical calculation so that all required claims are paid within the plan terms. Plan modification forms like Chapter 13 plans are typically a local form available on the local court website.

The less common type of plan modification is filed by a trustee. This typically occurs when a debtor's financial condition improves or when the debtor has a financial windfall such as a large tax refund or inheritance. Counsel in a Chapter 13 should be aware of 11 U.S.C. § 1306, which provides that property of the estate (in a Chapter 13) includes all property that the debtor acquires after the commencement of the

case but before the case is closed, dismissed or converted. If a debtor's financial condition improves, a plan can be modified to actually increase plan payments.

It would be extremely rare for the holder of an unsecured claim to file a Chapter 13 plan modification.

WILL THE COURT REQUIRE A WAGE ORDER OR AUTOMATIC BANK DRAFT OF THE DEBTOR'S PLAN PAYMENT AND MORTGAGE PAYMENT?

The answer is usually yes. In some divisions, plan payments which include mortgage payment (if applicable) are required to be deducted from the client's wages by wage order or deducted directly from his checking account by a preauthorized draft. Preauthorized drafts are required for self-employed debtors or those not paid by an employer.

WHAT ARE THE ADVANTAGES OF CHAPTER 13?

There are really two advantages of a Chapter 13.

First, the imposition of the automatic stay is generally the ability in a Chapter 13 to stop a foreclosure, repossession, tax levy, and lawsuits. It also stays creditor collection efforts including telephone calls. Please note, however, that the automatic stay is limited as previously discussed.

There are exceptions to the automatic stay. These include divorces, child support matters, and landlords who have obtained a judgment for possession. In addition, the automatic stay does not stay criminal prosecution at any stage. Therefore, if someone is charged with a crime because of some act occurring before or after filing a bankruptcy, generally the filing of a petition under any of the chapters of the Bankruptcy Code simply does not stop or stay such prosecution. The most frequent type of prosecution involves hot checks.

The second advantage is the ability of a debtor to restructure debts into a Chapter 13 plan and retain assets. Consumer debtors typically restructure home, car and priority debts in bankruptcy. Debtors are often attempting to stop a car repossession or home foreclosure, pay priority debts, such as income taxes or child support and/or reduce their monthly payments.

WHAT IS CREDIT COUNSELING AND WHAT DO DEBTORS NEED TO DO BEFORE THEY FILE? (11 U.S.C. § 109(h))

All consumer debtors who file any type of bankruptcy must obtain a credit counseling certificate during the 180-day period preceding the date of filing. It is imperative to know some courts have ruled that one cannot obtain credit counseling on the day of filing. A receipt of credit counseling completion is called the credit counseling certificate. This receipt of certification must come from an approved credit counseling agency, which is an individual or group briefing that outlines the opportunities for available credit counseling and assists such individuals in performing a related budget analysis. Failure to obtain credit counseling prior to bankruptcy case is grounds for dismissal.

The list of approved agencies is available at the United States Trustee website. The credit counseling certificate typically costs about $25.00, and the session is typically 90 minutes in length. The required class is offered by internet, telephone, and in person. Most consumer bankruptcy lawyers develop a working relationship with one or more credit counseling agencies to which they recommend clients. Often these agencies will offer billing privileges to counsel for the debtor.

A second credit counseling course, called the financial management course, must be completed prior to discharge. While a list of approved debtor education courses is listed at the United States Trustee website**,** most Chapter 13 Trustees offer this class to debtor(s) free of charge as part of their integrated debtor(s) education program.

WHAT DOCUMENTS MUST BE FILED WHEN FILING A CHAPTER 13? (11 U.S.C. § 521)

There are a number of documents which must be filed and signed by the client. These documents are generally referred to as disclosure documents, or documents which are designed to provide information to the Court concerning a particular case. All official forms are available at United States Courts website and local division bankruptcy websites. Generally, these documents are:

1. A credit counseling certificate and a copy of the debt repayment plan, if any.

2. A petition requesting relief under Chapter 13. Official Form B 101.

3. A statement as to attorney's fees, Rule 2016(b) disclosure. Official Form B 203.

4. A Declaration about an Individual Debtor's Schedules. Official Form B 106 Declaration A.

5. Summary of Schedules and Declaration of Schedules. Official Form B 106 Summary.

6. Summary of Schedules and Declaration of Schedules. Official Form B 106 Summary.

7. A list of assets, Schedules A and B. Official Forms B 106A and B 106B.

8. A claim of exemptions, Schedule C. Official Form B 106C.

9. A list of all debts, Schedules D (secured debts), E (priority debts), and F (unsecured debts). Official Forms B 106D and B 106E.

10. A list of co-debtors and of executor contracts, Schedules G and H. Official Forms B 106G and B 106H.

11. A list of monthly expenses and income, Schedules I and J. Official Forms B 106I and B 106J. A separate form exists for debtor's with separate households, Official Form B 106J-2, filed in addition to the B 106J.

12. A Statement of Financial Affairs. Official Form B 107.

13. A Chapter 13 Plan. Almost always a local form available on the local Bankruptcy Court website. For those Divisions that do not have a local form plan the National Form Plan (effective 12/1/2017) as of this date has not been numbered. More details are provided below.

14. A means test calculation. Form B 122C-1, "Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period" and, if required because your debtor(s) are above median income the Form B 122C-2 Chapter 13 Calculation of Your Disposable Income.

15. Pay remittances for the last sixty days.

16. The debtor(s) last filed tax return or provide a copy to the Chapter 13 Trustee no later than seven days prior to the first meeting of creditors.

17. The debtors bank statements for the sixty days prior to filing or provide a copy to the Chapter 13 Trustee no later than seven days prior to the first meeting of creditors.

Copies of all documents that are filed with the Court should be forwarded to the Chapter 13 Trustee at least seven days prior to the scheduled first meeting of creditors. Again, any attorney routinely filing Chapter 7 or 13 cases invests in software to assist with form drafting.

National forms for Chapter 13 cases are available on a link on this Court's webpage. Additionally, the Court has drafted suggested forms for some motions in Chapter 13 cases that are also available on the Court's website.

I REPRESENT A CREDITOR IN A CHAPTER 13 BANKRUPTCY, WHAT DO I DO NOW?

First, be aware of the automatic stay and co-debtor stay. Cease collection efforts against the debtor and the co-debtor if your client's debt is a consumer debt. Second, gather your client's documentary evidence of the claim your client holds against the debtor and file a Proof of Claim. (Official Form B 410). A proof of claim must be filed in a Chapter 13 case or your client will not be paid by the Chapter 13 Trustee. Be sure and file your documentary evidence as part of the proof of claim. The claim is filed with the Clerk of the Bankruptcy Court. There are strict deadlines in Chapter 13 cases and you should become aware of them. The deadline for filing a proof of claim typically is 90 days after the date of the creditors meeting. (Bankruptcy Rule 3002(c))

Counsel and client should then determine the financial realities of the debtor's case i.e. the financial ability of the debtor to pay and the nature of the clients claim. This will determine the extent to which your client will recover his claim and the extent to which involvement in the Chapter 13 is financial advantageous. Activity by unsecured creditors in consumer cases other than filing a proof of claim is unusual unless there has been some type of nefarious activity by the debtor. This is due primarily to the cost of representation and the lack of a monetary return. Attorney fees generated by unsecured creditors in a typically consumer Chapter 13 case are not recoverable from the debtor. Spending hundreds or even thousands of dollars on attorney fees to recover pennies of your client's claims is often uneconomical. This is why unsecured creditor involvement in Chapter 13 cases is often limited. Of course if you believe the debtor has committed fraud, has hid income or assets or is acting in bad faith options are available to the unsecured creditor including objecting to confirmation and seeking the dismissal of the debtor's case.

Secured creditors are better protected in Chapter 13 cases. They are always protected to the fair market value of their collateral, plus interest and if over secured i.e. their collateral is worth more than the amount of their debt, they can recover attorney fees from the debtor assuming they choose to retain the collateral. Secured creditors should be aware of the Chapter 13 Plan confirmation process and timely object to the debtor's valuation of the collateral, if it undervalued by the debtor. Secured creditors can always object to not only valuation of their collateral but also the payment terms, including interest offered by the debtor in their Chapter 13 Plan as well as lack of insurance. Secured creditors have a right to be adequately protected by payments, interest at a *Till* rate (typically prime rate plus a positive adjustment) insurance and the ongoing payment of taxes, if applicable, in a Chapter 13 plan. All of the above can be grounds for an objection to confirmation by the secured creditor. It is not uncommon for issues of valuation, payment terms and insurance to be negotiated between creditor and debtor's counsel and then placed into an amended Chapter 13 plan supported by both the debtor and the creditor.

Priority creditors must be fully paid in a Chapter 13 plan. The recovery of attorney's fees or interest is available if allowed under state law. If you represent a priority claimant in a Chapter 13, your client's claim must be paid in full in the debtor's Chapter 13 plan. You can object to the debtor's plan based on the lack of complete payment and the speed in which the debt is repaid over the term of the debtor's plan.

Creditors and their representatives have the right to appear at the meeting of creditors and question the debtor under oath. Should the debtor's schedules or testimony be inconsistent with the facts especially if the debtor has omitted assets or income from the schedules you should object to the debtor's Chapter 13 plan and give notice to the trustee.

Objections to confirmation or to dischargeability are time sensitive. Do not miss any objection deadlines. If your client has financial resources, the debtor or any other party can be forced to appear and give testimony under oath in a Rule 2004 examination.

In addition to objecting to confirmation, a creditor may also seek for the case to be dismissed. Grounds for dismissal include non-payment of the plan payment, unreasonable delay, failure to file a plan, denial of confirmation of a plan, default in the terms of a plan, revocation of confirmation of the plan. 11 U.S.C. § 1307.

An additional remedy available to creditors is relief from the automatic stay. Relief from the automatic stay for creditors is available on motion and notice, for cause, including the lack of adequate protection of an interest in property. Forms for stay relief are available on the Court's website. Typical grounds or reasons for lifting of the automatic stay include: (1) a debtor's intent to surrender collateral, (2) the lack of payment, insurance or the payment of taxes by the debtor (3) the desire to proceed against a debtor's insurance policy (4) a desire to proceed against co-debtors because the debtor has not offered full payment of your client's claim.

TYPICAL CONSUMER CHAPTER 13 TIMELINE

Prior to case filing debtor obtains credit counseling certificate and, if applicable, a debt repayment plan. (11 U.S.C. § 521(b)(1) and (2))

Day 1	Case filed, filing fee paid or file Application to Pay Filing Fee in Installments or Application to Have Filing Fee Waived. (Official Forms B103A Installments, B103B Waiver)
Day 14	Completed Schedules and Chapter 13 Plan filed or an extension to file schedules and plan should be sought, comply with debtor's duties under 11 USC 521. (Bankruptcy Rule 1007) Typically by local rule or practice a wage order may also be required.
Day 14 to 21	Court Mails Notice of Bankruptcy with creditor meeting date, confirmation hearing date and objection deadlines, both to plan confirmation and pursuant to 11 USC § 523.
Day 30	First plan payment is due by the debtor to the Chapter 13 Trustee. (11 USC § 1326(a)(1))
Day 45	Automatic dismissal, if debtor's pay records for the 60 days before filing, have not been filed by this date. (11 U.S.C. § 521(i)(1))

Seven days *before* the date first set for the first meeting of creditors, the most recent tax return must be provided to the trustee. 11 U.S.C. 521(e)(2)(A).

The first meeting of creditors typically occurs within 45 days after filing. The hearing date is noticed by the court, together with objection deadlines.

60 days *after* the date first set for the meeting of creditors, the deadline for filing a creditor complaint under 11 U.S.C. § 523 expires. Bankruptcy Rule 4007(c).

Again, typically 7 days prior to this date, the deadline for a creditor or Chapter 13 filing objections to confirmation will expire. Creditor objections are filed up until the deadline for such objections.

Plan and schedules are amended as required, often due to creditor or Trustee objection. There is an ongoing duty of the debtor to amend the schedules. There may be additional requests from the trustee to which the debtor should comply. The debtor has a duty to cooperate with the trustee. Bankruptcy Rule 4002(a)(4).

Typically, the confirmation hearing is held 20 to 45 days after the date first set for the meeting of creditors. Plan confirmation hearing, uncontested plans i.e. those with no objections are confirmed for a term of 36 to 60 months. Contested hearings are held by the court. It is not unusual for confirmation hearings to be continued or for there to be multiple plan confirmation hearings while schedule or plan amendments are being made.

Month 4 to 36 – 60, the debtor is paying the plan payments. The plan can be modified during this time period as required. 11 U.S.C. § 1329.

At any time after filing, but before plan payments complete, the debtor files the Financial Management Certification (post filing debtor education).

The trustee administratively gives notice to Clerk of the Court that all plan payments have been made, typically by filing a "Chapter 13 Trustee's Notice of Plan Completion." The trustee may also file other appropriate motions.

The debtor is require to make certain certifications or they will not receive a discharge. National Form B2830 "Chapter 13 Debtor's Certifications Regarding Domestic Support Obligations and Section 522(q)" is available via the National Forms link on the Court's website.

Debtor receives a discharge typically within 60 days of the last payment made under the plan or case is closed without discharge if the debtor fails to file the Financial Management Certificate or their certifications

Case is administrative closed shortly after discharge.

<u>WHAT EXACTLY IS A CHAPTER 13 PLAN?</u>

In simple terms it's typically a local form that sets forth how much a debtor will pay each month and where the money will be going. The form plan is typically mandatory and generally available on any Court's website. It is much like a multi-structured loan amortization that must pay in enough money to pay all of the competing claims. A plan that will not pay all claims as required by the Bankruptcy Code is underfunded and cannot be confirmed. Likewise, a plan that does not pay sufficient sums to unsecured creditors to meet the liquidation test also is underfunded and cannot be confirmed because of the underfunding and the requirements that any Chapter 13 plan meet the "best interest of creditors" test. Computer software is typically used for plan calculation and several software vendors provide integrated software for schedule preparation as well as preparation of the Chapter 13 plan. Any serious bankruptcy practitioner will rely heavily on computer software for schedule and Chapter 13 plan preparation. It is

possible, however, with a calculator and an understanding of loan amortizations to manually prepare a Chapter 13 plan. Plans must conform to 11 U.S.C. § 1325 in order to be confirmed.

WHO IS THE CHAPTER 13 TRUSTEE AND WHAT DOES IT DO? (11 U.S.C. § 1302)

The trustee is an individual, generally an attorney, who is charged by the Court to do basically three things:

1. Examine the statements, schedules, and documents filed by the debtor to determine if the debtor has complied with the Bankruptcy Code and Rules.

   The trustee determines, primarily from the debtor's testimony and information received from any interested creditors, that the statements and schedules have been properly prepared and that the debtor's duty has been discharged. If there are any additions, corrections, or deletions that are deemed necessary, the Trustee can request such amendments be made.

2. Review the Chapter 13 plan to determine that it complies with all applicable code sections and can be recommended for confirmation or conversely dismissed or converted to a Chapter 7, if it does not.

   Such action usually falls into three categories:

   a. Review and recalculate the Chapter 13 means test.

      In a Chapter 13, the trustee is the main gatekeeper of the bankruptcy means test. The trustee can only recommend to the Court confirmation of the Chapter 13, if among other requirements, if it meets the means test. The plan must pay to unsecured creditors the monthly amount specified in the means test over the commitment period of the Chapter 13 plan.

   b. Determining that the Chapter 13 plan meets the liquidation test.

      The liquidation test requires that unsecured creditors in a Chapter 13 receive not less than what they would have received had the debtor filed a Chapter 7. As exempt assets are not subject to liquidation in a Chapter 7, the client's claim of and allowance of exemptions determines the liquidation test and a calculation of payments to unsecured creditors. For example, if a debtor has $12,000.00 in non-exempt assets in a Chapter 7 and proposes a 60 month plan in a Chapter 13, then a monthly payment to unsecured creditors of $200.00 per month will pay these creditors $12,000.00 over time.

   c. Determining that the Chapter 13 plan is proposed in good faith.

      Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief of the absence of malice and the absence of design to defraud or seek an unconscionable advantage.

   d. Making a recommendation to the Court to confirm or not confirm a Chapter 13 plan.

      Assuming that the client, with attorney's assistance, has complied with the applicable provisions of 11 U.S.C. § 1325, which includes the liquidation test and good faith requirements, the trustee will recommend the case for confirmation.

3. Administration of the case post confirmation

   After confirmation, the trustee will continue to receive Chapter 13 plan payments as well as disburse funds. Should the client become delinquent, the trustee will file a motion to dismiss. Should claims be filed post confirmation that render the plan deficient, the trustee will bring it to the Court's attention. Should a post confirmation modification be required, the trustee will review the modification and recommend or not recommend its approval to the Court. The trustee will also certify that the payments under the Chapter 13 plan are complete and that the debtor can be discharged.

WHO IS THE UNITED STATES TRUSTEE AND WHAT DOES IT DO IN A CHAPTER 13? (28 U.S.C. § 581, *et seq.*)

Typically, the United States Trustee will do very little in a Chapter 13 case and will generally only appear in the most egregious of Chapter 13 cases or if the case is selected for random audit. As the gatekeeper function is passed in means testing to the Chapter 13 Trustee in Chapter 13 cases, the United States Trustee has little interest in the typical consumer Chapter 13. However, the United States Trustee can take action to stop fraudulent activity and oversee the audit process. Chapter 7 or 13 cases can be audited by the United States Trustee. These audits will ensure compliance with the Bankruptcy Code, just like tax audits ensure compliance with the Tax Code.

WHAT IS EXPECTED TO TAKE PLACE AT THE MEETING OF CREDITORS AND WHAT IS A SECTION 341 MEETING? (11 U.S.C. § 341)

"Section 341 Meeting," or "First Meeting of Creditors," is a term that has come into bankruptcy law over the last several years. It is a result of the provisions of the Bankruptcy Code of 1978, which became official in 1979. It provides that all debtors shall attend a meeting of creditors and provides, generally, the procedure of such a meeting. From there came the reference to the § 341 Meeting.

As noted before, a meeting of creditors is a somewhat misleading name. It is not an occasion where creditors get together for a meeting. It relates primarily to a session between the debtor and the trustee, where the trustee must determine whether the debtor has followed all of the applicable rules, regulations, and statutory provisions.

The meeting will generally occur within 30 to 40 days after the case is filed. Both the debtor and attorney will receive notification of the meeting of creditors, usually at the same time, as will all of the parties in interest listed in the Chapter 7 bankruptcy papers who are creditors or parties holding a claim against the debtor.

The notice that is sent out invites all interested parties to attend; however, on average, less than 10% of all creditors ever attend. Generally, the trustee will ask only those questions which are designed to allow the trustee to perform his or her statutory obligations.

In a Chapter 13, the trustee typically asks questions in the following pattern:

1. Establish that they have the right debtor by reviewing identity documents.

   Debtors are required to produce a governmental picture identification, driver's license, passport, military I.D, and proof of social security number.

2. Establish that the debtor reviewed and signed the schedules and that they are true and accurate to the best of the knowledge and belief of the debtor. Establish that the schedules contain a complete list of all assets and debts of the debtor, current income and expenses, and for the means test a look back of income and expenses over the last full six months prior to the Chapter 13 filing.

3. Establish that the debtor understands and comprehends the plan.

   Trustees are concerned the debtor's attorney has done his job. They want to be aware that the attorney has taken the time and made the effort to educate the client regarding the Chapter 13 process.

4. Determine relevant facts to determine that the debtor has completed the Form 22C means test correctly.

   Any value placed into the means test for which the Chapter 13 Trustee has reason to inquire can be discussed at the creditors meeting.

5. Determine relevant facts to determine that the Chapter 13 plan meets all applicable standards for confirmation.

   This would include any inquiry that the trustee may have as to the liquidation test or good faith

6. Answer questions posed by creditors, if any.

The appearance of a creditor at a meeting of creditors should not be viewed by the debtor as something that is bad or ominous. Frequently, such visits are only to obtain information, with little other impact related to them. In the unusual case, the creditor may appear for the purpose of obtaining information leading to a decision as to whether or not to file an objection to the confirmation of the debtor plan.

WHAT DEBTS ARE NOT DISCHARGEABLE IN A CHAPTER 13? (11 U.S.C. § 1328)

A discharge under Chapter 13 generally discharges all debts except long term mortgages, student loans, criminal fines, criminal restitution, civil restitution for willful or malicious injury, as well as the rare instance where a creditor has timely complained (typically within 60 days of the date of the first meeting of creditors) and had a judicial determination that certain debts are non-dischargeable debts pursuant to 11 U.S.C. § 523(a) paragraph (2), (3), (4), or (9). These debts are as follows:

1. For money, property, services or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud.

   False statements when credit was obtained, such as in the case of false pretenses, false representations, or fraud, and/or the use of a statement in writing that is materially false to obtain credit constitute an exception to discharge.

2. Purchases or incurring of debt in contemplation of bankruptcy.

   Generally, purchases or incurring of debt in contemplation of bankruptcy may not be discharged. For example, one runs up substantial debt with the intent of "getting the creditor" or "getting a free ride" with no intention of repaying the debt. Such debts are non-dischargeable. These are generally called "charge ups."

3. Consumer debts owed to a single creditor and aggregating more than $550.00 for luxury goods or services including cash advances incurred by an individual debtor on or within 90 days before filing are presumed not to be dischargeable. Purchases of non-luxury or ordinary goods and services aggregating more than $825.00 on or within 70 days before filing are presumed not to be dischargeable.

4. Creditors whose names and addresses are not listed in the schedules or whose names and addresses are listed inaccurately.

5. Fraudulent acts by a person acting in a fiduciary capacity, such as through embezzlement or larceny

6. A debt that arises from a judgment or consent decree entered in a court of record against the debtor wherein liability was incurred by such debtor's operation of a motor vehicle, vessel, or aircraft while legally intoxicated is not dischargeable.

Be advised that certain debts such as child support and certain income taxes are also non-dischargeable, but as these debts are paid in full as part of the Chapter 13 plan payment and they typically would not be due after the bankruptcy is complete and discharged. The debts above, however, could survive. It is impossible in these few pages to provide all of the legal intricacies of issues such as discharge. This is designed as a general guide to follow and must be treated as such. There is no substitute for detailed legal research. If you recognize in your particular situation with your client the existence of any debt that might be subject to the dischargeability rules, you should do further research. The time deadline for filing a complaint under 11 U.S.C. § 523 is typically 60 days from the date set for the first meeting of creditors.

CAN A CHAPTER 13 DEBTOR BE DENIED A DISCHARGE?

Generally, a Chapter 13 debtor cannot be denied a discharge. If a Chapter 13 debtor confirms a plan and makes all of the required Chapter 13 plan payments, then he is going to receive a discharge. Typically, any grounds that would have denied a discharge in a Chapter 7 case would be raised by a creditor or party in interest at confirmation of the Chapter 13 plan and, if proven, should have prevented a debtor from confirming a plan. If a debtor is able to confirm a plan and makes all of the required payments, then he will be discharged, unless the debtor has not paid a domestic support obligation that is due on or before the end of the case or if the debtor executes a waiver of discharge. 11 U.S.C. § 1328(a).

However, in extremely limited instances, the debtor cannot be discharged in a Chapter 13 if the Court finds that the debtor owes a debt arising from (a) a violation of state or federal securities laws, regulations or orders, (b) fraud, deceit or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security, (c) a criminal act, intentional tort or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding five years and have claimed an exemption for any residence in an amount in excess of $136,875.00, or (d) is guilty of a felony or may be found guilty of a felony which under the circumstances demonstrates that the filing of the case was an abuse of the Chapter 13 process. 11 U.S.C. § 1328(h).

WHEN WILL THE CLIENT RECEIVE A DISCHARGE AND DOES THE DEBTOR NEED TO TAKE FURTHER ACTION? (11 U.S.C. § 1328(a))

At the completion of the Chapter 13 plan payments, the debtor must file the certification and motion for entry of Chapter 13 discharge and proposed discharge order. A form motion is available on the court's website. A debtor must also take and file the personal financial management instructional course prior to discharge. Typically, this course is provided by the Chapter 13 Trustee as part of his debtor education program. Otherwise, a list of approved debtor education courses is available at the United States Trustee

website**.** Discharges are then usually entered by the Court as soon as practical thereafter. Other than possible clerical or mechanical errors that could conceivably occur in the bankruptcy clerk's office, there are limited factors or circumstances that could delay a discharge.

WHAT IS THE EFFECT OF THE CLIENT'S CHAPTER 13 DISCHARGE? (11 U.S.C. § 1328)

As previously discussed, a discharge under Chapter 13 generally discharges all debts except long term mortgages, student loans, criminal fines, criminal restitution, civil restitution for willful or malicious injury, as well as the rare instance where a creditor has timely complained (typically within 60 days of the date of the first meeting of creditors) and had a judicial determination that certain debts are non-dischargeable pursuant to 11 U.S.C. § 523(a) paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8) or (9). Given the length of time the client will be in a Chapter 13, discharge violations are rare after a Chapter 13; however, the discharge order does act as an injunction to ensure protection against collection activity. A discharge under Chapter 13 voids any judgment to the extent that such judgment is a determination of the personal liability of the discharged debt. It also operates as an injunction against the commencement or continuation of an action, the employment of process or an act, to collect, recover or offset discharged debts. It is the typical conclusion of a consumer Chapter 13 case. The discharge injunction is enforceable by civil contempt.

CAN A CHAPTER 13 BE CONVERTED TO A CHAPTER 7? (11 U.S.C. § 1307(a))

Yes, prior to dismissal or discharge, a Chapter 13 can be converted to a Chapter 7 as long as the debtor is eligible for relief under Chapter 7 of the Bankruptcy Code as a matter of right. A motion to convert to Chapter 7 from Chapter 13 is typically filed *ex parte*. If a case has previously been converted to a Chapter 7, 11 or 12, then conversion is not a matter of right and notice and hearing is required in order to convert a case a second time.

CAN A CHAPTER 13 BE VOLUNTARILY DISMISSED? (11 U.S.C. § 1307(b))

Generally, a Chapter 13 can be voluntarily dismissed unless the case has been previously converted from Chapter 7, 11, or 12. Additionally, it is possible that a debtor may not be able to dismiss a case where there has been malfeasance by the debtor and the court finds a lack of good faith. It is possible that a Chapter 13 case can be converted to a case under Chapter 7 under a court finding of "bad faith." Generally, motions to dismiss a Chapter 13 case that has not been previously converted are filed *ex parte*, and orders dismissing are signed very quickly.