UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

A GUIDE FOR THE

SELF-REPRESENTED CREDITOR

IN A BANKRUPTCY CASE

June 2014

INTRODUCTION

The Court has always welcomed those individuals who wish to assert their right without the services of an attorney. The term "*pro se*" is a Latin adjective meaning "for self", that is applied to someone who represents himself or herself without a lawyer in a court proceeding, whether as a defendant or a plaintiff and whether the matter is civil or criminal. This status is sometimes known as "*propria persona*" or "*pro per*". This guide is for individual *pro se* or self-represented creditors in bankruptcy cases.

The bankruptcy laws are complex and are continuously evolving. Understanding them can prove difficult, and the decisions that must be made are not always as easy as they might appear. For example, there is the decision of whether to challenge a discharge, or to file an adversary proceeding.

Many of these questions can best be answered by a competent attorney who understands these complexities. A competent bankruptcy attorney can hear all of the facts about your unique situation and can give you advice and counsel you may rely on. Nevertheless, the Court understands that some individuals will choose to "go it alone."

This manual is prepared for that person: the individual who has made the decision to represent themselves in a bankruptcy case without any legal assistance. While neither the Court nor any employee of the Court can provide legal advice,[1] there are a number of procedural steps in a bankruptcy case that can be complicated. The manual is intended to assist the *pro se* creditor in navigating those procedural steps. It should not be cited or relied upon as legal authority. The information in this booklet does not substitute the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, or the Local Rules of this Court.

In addition, the information in this booklet also does not serve as a substitute for the advice of competent legal counsel. It is necessarily limited and is intended only as a guide to some basic aspects of bankruptcy law. It does not include all of the controlling law (such as the entire Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, this Court's Local Bankruptcy Rules, and court decisions).

[1] Courts have adopted the policy that employees of the clerk's office are prohibited from giving legal advice to the public. Courts use 28 U.S.C. § 955 to support this position, reasoning that providing legal advice come within the definition of the "practice" of law prohibited by § 955.

Table of Contents

LEGAL AUTHORITY, STATUTES AND RULES

The letters "U.S.C." refer to the United States Code. The number that precedes "U.S.C." refers to the title of the U.S. Code (e.g., 11 U.S.C.). The numbers following "U.S.C." refer to the section of the title of the U.S. Code (e.g. "11 U.S.C. § 109").

The United States Bankruptcy Code is found in Title 11 of the U.S. Code. Copies of the United States Code are available at public libraries and may also be found on line (links to the Code are found at the U.S. Bankruptcy Court's website: www.mab.uscourts.gov).

In this manual, references only to the section number refer to the section of the Bankruptcy Code (i.e., title 11).

In addition to the U.S. Code, there are Federal and Local Rules that apply to every case. Links to the Federal Rules of Bankruptcy Procedure ("Fed. R. Bankr. P.) as well as the Local Rules for the U.S. Bankruptcy Court for the District of Massachusetts ("Local Rules") are found at the United States Bankruptcy Court's website: www.mab.uscourts.gov., In this manual, they are collectively referred to as the "Rules."

Also on the Bankruptcy Court's website you will find links to Official, Procedural and Local forms If you are a *pro se* creditor you must become acquainted with the duties and obligations imposed by the Code and the Rules.

WHO IS A CREDITOR?

The U.S. Bankruptcy Code defines a creditor as "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;… entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or…..entity that has a community claim." See § 101(10).

The term "claim" means a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured" or a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecure." See § 101(5).

And the term "community claim" means a claim that arose before the commencement of the case concerning the debtor for which property of the kind specified in section 541(a)(2) of this title is liable, whether or not there is any such property at the time of the commencement of the case." § 101(7).

While these definitions are important, most individuals understand that they are a creditor if they are owed money by a person or corporation that has filed a bankruptcy petition in the U.S. Bankruptcy Court.

OVERVIEW OF THE BANKRUPTCY PROCESS FROM THE CREDITOR'S PERSPECTIVE

This section will give you a glimpse into the bankruptcy process, the steps involved in most cases, and what a debtor must do to effectively navigate a case through this Court.

1. Consumer debtors[1] must receive "an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis."11 U.S.C. § 109(h). The briefing must be obtained within 180 days before the petition is filed. The court may excuse this requirement if exigent circumstances exist, or in the case of disability. See 11 U.S.C. § 109(h)(3), (4).

2. All debtors must use official forms, including the Means Test Calculations form (form 22), and they must be completed accurately and filed with the Court.

3. The certificate of credit counseling must be filed with the official forms.

4. All debtors must pay the filing fee in full or
    a. File an Application to Waive the Filing Fee, which must be approved by the Court;
    b. File an application to Pay the Filing Fee in Installments, which must be approved by the Court.

5. At least 7 days before the scheduled meeting of creditors (also referred to as a § 341 meeting), all debtors must send the trustee a copy of their prior year's federal income tax return.[2]

6. In addition to the tax return, at least 7 days before the scheduled meeting of creditors, all debtors must send the trustee copies of all pay stubs and other evidence of income received within the 60 day period prior to the filing of the case.

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[1] "The term 'debtor' means a person ….concerning which a case under this title has been commenced." 11 U.S.C. § 101(13). For other definitions of terms, see § 101 and the Glossary at the end of this Guide.

[2] Debtors may also provide the trustee and/or a creditor with a transcript of the applicable tax return.

7. If a creditor requests a copy of the tax return at least 15 days before the meeting of creditors, the debtor(s) must provide a copy to that creditor at least 7 days before the meeting.

8. At the meeting of creditors, debtors must provide two forms of identification: a photo identification, such as a driver's license or passport, and a proof of social security number (social security card, correspondence from the Social Security Administration, IRS form W-2 or 1099). Corporate debtors must provide proof of ID as well as proof that the person appearing at the Meeting of Creditors has the authority to appear.

9. All debtors must attend the meeting of creditors and be examined under oath by the trustee. Creditors are invited to attend this meeting.

10. All debtors must cooperate with the trustee and respond to all reasonable requests for information and documents.

11. Within 45 days after the first scheduled date of the meeting of creditors, all consumer debtors must complete a Financial Management course approved by the Office of the United States Trustee and file a certificate of completion with the Court. This requirement does not apply to corporations or businesses.

A CREDITOR'S OBLIGATIONS WHEN A PERSON FILES A BANKRUPTCY PETITION

Immediately upon the filing of the bankruptcy petition, an automatic stay is imposed. The scope of that stay is described in detail in § 362 of the Bankruptcy Code. All collection activity must cease. For example, if you are involved in a civil lawsuit with the debtor, the case may not proceed without Bankruptcy Court approval or "relief" from the stay. There are some limitations on the stay, and those limitations are also found in § 362 of the Bankruptcy Code.

LIMITED STAY/NO STAY

Section 362(c)(3), (4) limits the stay for debtors who have filed bankruptcy before. If a debtor has had a pending bankruptcy case in the 12-month period prior to the filing of the new case, the stay will enter upon filing of the new case. However, the stay will extinguish 30 days after the filing of the new case unless the debtor files a motion to extend the stay and that motion is filed, and heard within the 30 day period. If a debtor has had two (2) cases pending in the 12-month period prior to the filing of the new case, no stay will take effect upon the filing of the new case in the absence of an order from the Bankruptcy Court.

Since there can be consequences for violating the stay, it is strongly recommended that you confer with counsel before taking any action against a debtor, the debtor's property (and in some cases, the co-debtor) without first seeking appropriate relief from the Bankruptcy Court.

RELIEF FROM STAY

A creditor is permitted to seek relief from the automatic stay. Section 362 describes the circumstances that a creditor may seek relief from the stay, and the Rules describe the procedural mechanisms that the creditor must use to seek relief from the stay. Motions for Relief from Stay must be accompanied by the appropriate filing fee and filed with the Clerk. The motion must also be accompanied with a Certificate of Service reflecting the date and method by which the motion was served on the appropriate parties. See Local Rule 4001-1 for additional information on Motions for Relief from Stay.

VIOLATIONS OF THE STAY

A creditor who, despite knowing about the filing of the bankruptcy case, continues to engage in collection activity risks being found in violation of the stay. This might result in damages, costs and fees being assessed against the creditor.

A creditor need not have official notice from the Bankruptcy Court that a bankruptcy case has been commenced to be aware of the bankruptcy. In fact, if a debtor verbally informs the creditor that a case has been commenced, that may be sufficient to find that any subsequent collection action was a knowing and intentional violation of the stay. If you have any questions or concerns about whether an activity might be considered a violation of the automatic stay, you are strongly urged to confer with competent counsel.

DISCHARGE

Assuming the debtor receives a discharge, the discharge permanently bars the creditor from collection of the debt.

WORKING WITH PROFESSIONALS

ATTORNEYS

You may work with an attorney who can give you specific legal advice and guidance, tailored to your situation. To lawfully practice law in the U.S. Bankruptcy Court for the District of Massachusetts, the attorney must be a member in good standing of the bar of the U.S. District Court for the District of Massachusetts. In order to be a member of the bar of

the U.S. District Court for the District of Massachusetts, the attorney must be a member of the bar of the Commonwealth of Massachusetts.

To determine whether a person is an attorney licensed to practice law in the Commonwealth of Massachusetts, visit the Board of Bar Overseers webpage: www.massbbo.org. To determine whether a person is an member in good standing of the U.S. District Court for the District of Massachusetts, visit the Court's website at www.mad.uscourts.gov and look under "Attorneys > Admission > MA – Federal Bar Search."

Remember, Court personnel are prohibited from giving you legal advice. Only a licensed attorney can:

- Explain the meaning of a statutory provision or rule;
- Provide an interpretation of case law;
- Explain the result of taking or not taking action in a case;
- Help you complete forms or advise you regarding what is legally required when a form requires you to provide information;
- Advise whether jurisdiction is proper in a case;
- Advise whether a complaint properly presents a claim;
- Advise on the best procedure or strategy to accomplish a particular goal;
- Advise who should receive proper notice or service of papers.

PRO SE

If you plan to represent yourself *pro se* in a bankruptcy case (i.e., without the assistance of an attorney), the first step in the process is to obtain the proper forms. The official forms, authorized by the Judicial Conference of the United States, are available online at www.mab.uscourts.gov. They are available for free. Links to the United States Bankruptcy Code as well as the rules are also found on the Bankruptcy Court's website. It will be your responsibility to know and understand them.

Corporations, partnerships and LLCs may not file papers in a bankruptcy case *pro se* however, there are certain documents that a non-attorney representative (such as a member, officer or employee) may file *pro se* that do not rise to the level of practicing law. They include:

- Request for Notice under Fed. R. Bankr. P. 2002(i)
- Proof of Claim (Official Form B10)
- Withdrawal of a Proof of Claim
- Notice of Transfer of Claim Other than for Security
- Application for Search of Bankruptcy Records
- Request to Recover Unclaimed Funds
- Reaffirmation Agreement and Proposed Order
- Ballot for Voting on the election of a trustee

- Ballot voting on a proposed plan in a chapter 11 case (the plan proponent is responsible for mailing the ballot to the creditor to cast a vote).

If you are encountering difficulty locating a form, or have questions about a form you should contact the Pro Se Law Clerk.

The Bankruptcy Code allows non attorney representatives of corporations, partnerships and LLCs to be present and to participate in the Meeting of Creditors.

If an action or proceeding is brought by or against the corporations, partnerships or LLCs, it must retain an attorney. For example, a corporation, partnership or LLC may not, without an attorney appearing on its behalf:

- File a motion for relief from stay
- Defend against a proceeding against it[3]
- Defend an objection to its proof of claim[4]

PRO SE LAW CLERK

The Court has a Pro se Law Clerk who maintains office hours in all three Divisions: Boston (Eastern), Springfield (Western) and Worcester (Central). The Pro se Law Clerk cannot give you legal advice but may be able to provide you guidance on process and procedure.

Here are some examples of some basic questions that the Pro se Law Clerk may be able to answer for you:

- "What sort of bankruptcy case has the debtor filed?"
- "What do I need to file to object to the bankruptcy?"
- "What do I need to file to respond to a motion?"
- "How do I get notices in the case?"
- "How do I serve a summons?"
- "When is the Meeting of Creditors?" (The Section 341 meeting)
- "What are the deadlines I need to be aware of?"
- "Can I get free legal assistance?"

While the Pro se Law Clerk is an attorney, the Pro se Law Clerk may not practice law. Legal advice can only be obtained from an attorney. The Pro se Law Clerk may be able to direct you to an appropriate lawyer referral agency for legal advice and/or representation.

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[3] This does not prohibit a non-attorney representative from contacting the opposing party's attorney to discuss a settlement of the dispute.

[4] This does not prohibit a creditor from amending its proof of claim *pro se* to cure a defect that was subject to the objection to the proof of claim.

GETTING STARTED

Bankruptcy is a complex legal world that has a vocabulary all its own. Many commonly used definitions are found in § 101 (as well as the Glossary at the end of this Guide). There are some other terms that you come across. Knowing these will help you understand the process. For example:

- Estate: The estate is defined by § 541. Refer to this section to learn what constitutes "property of the estate."
- Prepetition and post-petition: The term "prepetition" means before the bankruptcy petition was filed. The term "post-petition" means after the case was filed.
- Trustee: A trustee is the individual appointed to administer the assets of the estate. A trustee may liquidate or sell assets, or in cases where there is a plan, a trustee may collect payments and disburse the proceeds to creditors.

In addition to understanding terms, it is very important that you protect yourself and your family, and it is also important that you do not disclose personal information concerning the debtor(s). While you must provide truthful and complete information in your filings, you should take care not to disclose highly personal and private information either of you or of the debtor.

In all other you should provide only the last four digits of the debtor's social security number (e.g. XXX-XX-1234). The same applies for all account numbers. You should also never identify minor children by their name. List them only as "minor children" or "minor step children" or the like, and provide their ages. Do not include the full birthdate of the debtor – or anyone else. Only include the year of birth.

In some cases, you may be required to file evidence or additional documents. For example, if you file a proof of claim, you may want to attach a document that contains and account number or other personal identifying information. In those instances, you should redact that information, leaving only the last four digits.

For more information on Privacy Policy and Redaction Requirements, please visit the link under Bankruptcy Information on the Court's website.

FILING DOCUMENTS AND PAPERS

Once all the forms are completed, you should deliver them in hand, or mail them to the U.S. Bankruptcy Court. Filings are accepted between 8:30 a.m. and 4:30 p.m. on business days, but the office is open until 5:00 p.m. The addresses for the Court are:

Eastern Division/Boston:

United States Bankruptcy Court
John W. McCormack Post Office and Court House
5 Post Office Square, Suite 1150
Boston, MA 02109-3945

Central Division/Worcester:

United States Bankruptcy Court
Donohue Federal Building
595 Main Street, Room 211
Worcester, MA 01608-2076

Western Division/Springfield:

United States Bankruptcy Court
United States Courthouse
300 State Street
Springfield, MA 01105

While the Bankruptcy Court holds hearings in Hyannis, the Hyannis location does not accept any pleadings for filing. For cases assigned to the Cape division, all pleadings should be filed in the Boston Court.

To determine which division to mail documents, please refer to the orders you may have received from the Court, or refer to Appendix 5 of the Local Rules for the U.S. Bankruptcy Court for the District of Massachusetts. These rules can be found on the Court's website: www.mab.uscourts.gov.

CASE NUMBER

All cases filed with the Court are assigned a case number, sometimes also referred to as a docket number. The case number is broken down into sections. For example, case number 11-22665 FJB: the "11" is the year that the case was filed. In this case, it was filed in 2011. The "22665" is the number assigned to the case. "FJB" indicates the judge to whom the case was assigned. In this example, it was assigned to Chief Judge Frank J. Bailey.

All pleadings and documents filed with the Court must have the case docket number of the case. When speaking to any Court Clerk personnel, including the Pro Se Law Clerk, be sure you have this information readily available.

ELECTRONIC FILING ACCESS FOR CREDITORS

Individual *pro* se creditors in a bankruptcy case are not permitted to file documents electronically. The Pro Se Law Clerk has an email address. However, pleadings and other documents may not be filed via email and the Pro Se Law Clerk will not accept any pleadings sent by email.

An added benefit of having competent legal counsel is that all attorneys practicing before the bankruptcy court are required to file legal documents and pleadings electronically. This avoids traveling to the court to file documents, and alleviates concerns

with mailing or sending documents via courier, as well as serving other parties who are represented and participate in Electronic Case Filing.

While *pro se* creditors may not file documents electronically, you may view all Court filings in a case on the public computer terminals located in the Clerk's office in each Division. You may also obtain a PACER login and password, which would enable you to view documents from any computer. To obtain a PACER login and password, you must visit www.pacer.gov and click the link for Case Search Only Registration, and complete the on-line registration form. This service is not free; there is a charge of $.10 for every page that you view.

DEADLINES

The bankruptcy process can move very quickly, particularly in chapter 7 cases. There are a number of deadlines that apply to creditors in a bankruptcy case and many of these deadlines are established at the very moment that the case is filed.

The most important deadlines are to object to discharge, to object to a debtor's claim of exemptions and to file a proof of claim. You must strictly adhere to deadlines. In the event you need additional time to file a document, or comply with an order of Court, you must seek an extension – by filing a Motion to Extend Time – before the expiration of the deadline.

Please remember this: if you miss a deadline, and you may, and in many cases will forfeit your rights.

Deadlines are also found throughout the Rules and the Code. Remember, if you choose to be *pro se* you are responsible for knowing and adhering to all applicable deadlines.

THE BANKRUPTCY PROCESS

RECEIVING NOTICES

While you might be listed on the creditor matrix, that alone will not ensure that you receive notice of every document filed in a bankruptcy case. To receive copies of documents, you must file a request for notice. In Appendix A you will find an example of a request for notice. The notice must be prepared, printed, signed and then filed with the Court.

If you file a notice with the Court, or any other pleading, or if you receive notice from the Bankruptcy Court that you are a creditor in a case, it is very important that you notify the Court if you move or your contact information in any way changes. Bankruptcy cases

can take months and sometimes years to reach a conclusion, and the Court will have no way of notifying you without an updated address.

You may also view all Court filings in the case free of charge on the public computer terminals located in the Clerk's office in each Division. For added convenience, you may wish to obtain a PACER login and password, which would enable you to view documents from any computer.

THE TRUSTEE

In a chapter 7 case, the trustee has a number of responsibilities which may be found in § 704. The chapter 13 trustee's responsibilities are found in § 1302. The responsibilities of chapter 11 trustees in small business cases may be found in § 1116, and for chapter 12 trustees, it is in § 1202.

While the trustee may share some common interests with creditors, bankruptcy trustees may not be representative of any creditor, but must represent all creditors without partiality. Therefore, creditors cannot rely on the trustee for legal advice and counsel. For specific questions, creditors must consult with their own attorney.

MEETING OF CREDITORS PURSUANT TO § 341(A)

Shortly after a bankruptcy case is filed, the Court will send you along with the other creditors listed on the creditor matrix a "Notice of Chapter ___ Case, Meeting of Creditors, and Deadlines." This is also commonly referred to as a "341 meeting" or "meeting of creditors." In the space after chapter, the notice will indicate which chapter that was filed: 7, 11, 12 or 13. This notice alerts you that the debtor has filed a bankruptcy petition and that you as well as other creditors may be prohibited from taking certain actions against the debtor or the debtor's property. This notice also informs you of key deadlines, such as:

- The time within which they have to file a Proof of Claim, <u>if</u> it appears that there would be assets that can be liquidated to pay creditors;[5]
- The time within which to file a complaint objecting to the discharge under 523(a) or objecting to the discharge of all debtors under 727(a); and
- The time within which to object to the property the debtor claims as exempt on Schedule C.[6]

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[5] If it does not appear that there are assets to pay claims, the Notice will state "Please Do Not File a Proof of Claim Unless You Receive a Notice To Do So." If it is later determined that there are assets to pay claims, another notice will be sent advising of the deadline to file proofs of claim.

[6] This deadline is not expressly set forth on the notice. However, the deadline to object to exemptions is set forth in Fed. R. Bank. P. 4003. At least one determinative factor as to when that deadline is indicated by this notice. Rule 4003 provides, in pertinent part: "…a

The reverse side of this notice has important information that you should read.

The notice of the meeting provides the specific date, time and location for the meeting, which creditors are invited to attend. The notice also informs everyone that a trustee has been assigned to the case, and the name, address and other contact information for the trustee. It is the trustee's role to examine the debtor at the meeting of creditors regarding their financial situation, and to determine if there are any assets that the debtors has that may not be exempt and that he or she could liquidate (i.e., sell) that he or she could generate cash to pay creditors.

PREPARING FOR THE MEETING OF CREDITORS

All § 341 Meetings are recorded on audio tape or by digital recorder. After the debtor or its representative is administered an oath, the trustee will then ask the debtor to verify that they completed the petition and schedules and that they are truthful and accurate. You will then be given an opportunity to ask questions. The trustee has the right to limit questions based on the time allotted and the other creditors who may be present. The trustee may also suggest that you seek additional information via an examination under Fed. R. Bankr. P. 2004.[7]

ABOUT THE MEETING OF CREDITORS

The Meeting of Creditors is presided over by the trustee appointed to the case. The Bankruptcy Court does not preside at or attend the Meeting of Creditors. See § 341 (c). The meeting is not a hearing by which any party may request that a case may be dismissed. That request may only be made in writing to the Court via a Motion to Dismiss.

If you cannot attend a Meeting of Creditors, you should contact the trustee assigned to the case for guidance on what steps you are able to take to participate in the meeting.

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party in interest may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later." Fed. R. Bankr. P. 4003(b).

[7] Rule 2004 provides, in pertinent part: "[o]n motion of any party in interest, the court may order the examination of any entity." Fed. R. Bankr. P. 2004(a). "The examination of an entity under this rule or of the debtor …may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge." Fed. R. Bankr. P. 2004 (b). Before requesting a Rule 2004 examination of the debtor or any other entity, it is strongly recommended that you confer with an attorney.

Except in rare circumstances, Meetings of Creditors are held in conjunction with other meetings of creditors, and often in the presence of others who are waiting for their meeting to be called.

AFTER THE MEETING OF CREDITORS

Creditors and the trustee have a deadline of 30 days following the conclusion of the Meeting of Creditors to object to the debtor's claim of exemptions. See Fed. R. Bankr. P. 4003. If the debtor amends Schedule C (the Debtor's Schedule of Property Claimed as Exempt) after the Meeting of Creditors, a new 30 day deadline is triggered.

Creditors and the trustee have a deadline of 60 days following the date of the first scheduled creditor's meeting to file a complaint objecting to discharge.

Certain debts are not dischargeable. Those exceptions to discharge are found in § 523 (a) of the Bankruptcy Code. In some instances, to except a claim from discharge the debtor must commence an adversary proceeding by filing a complaint with the Court. See e.g., § 523 (a)(8). In other instances, it is the creditor that must timely file the complaint challenging the discharge. See e.g., § 523 (c)(1). The Clerk's Office cannot advise you whether a debt you may be owed is dischargeable. If you have questions about whether the debt you are owed is dischargeable, you are strongly urged to contact an attorney.

The exact deadline to file a Complaint Objecting to a Debtor's Discharge is stated on the creditor's meeting notice sent to you shortly after filing. Extensions of that deadline may be allowed by filing a timely motion with the Court. A document is filed timely if it is filed on or before the deadline. If that deadline passes, and there is no complaint objecting to the discharge, and no extension of time has been allowed, the court will enter a discharge. Simply stated, the discharge relieves the debtor of any personal liability for all dischargeable debts listed in the debtor's bankruptcy schedules.

ADVERSARY PROCEEDINGS

Adversary proceedings are a separate procedural process in a bankruptcy. In a bankruptcy case, there is a debtor and there are creditors, but in an adversary proceeding there is a plaintiff and there is a defendant. The plaintiff initiates the adversary proceeding, and the defendant is the responding or defending party.

The adversary proceeding is initiated by the plaintiff who files a complaint. After the defendant has been served with a summons issued by the court along with a copy of the complaint, the defendant files an answer. The defendant may, but is not required to, file a motion to dismiss or use other procedural mechanisms, such as requesting that another party join the case. The case then moves into discovery, where parties exchange information and obtain evidence to support their respective claims.

The rules that govern adversary proceedings are found in Part VII of the Federal Rules of Bankruptcy Procedure. Fed. R. Bankr. P. 7001 identifies the types of actions that would be considered adversary proceedings.

A creditor may find itself as a defendant in an adversary proceeding if it received a preferential payment, or if the a debtor seeks to determine whether a particular debt is discharged. A creditor may also be a plaintiff in an adversary proceeding if the creditor seeks a determination of nondischargeability of the debt owed.

Whether you are bringing an adversary proceeding, or find yourself defending an adversary proceeding it is important to know that adversary proceedings can be exceptionally complicated. The procedural rules are identical in most respects to the Federal Rules of Civil Procedure. Discovery mechanisms such as depositions and requests for production might be utilized.

The Court's final decisions will be based on evidence. Those final decisions may be based on motions (see e.g. Fed. R. Bankr. P. 7056) or following a trial, where witnesses are examined and cross examined and documents are admitted into evidence. The rules relating to evidence admissibility are found in the Federal Rules of Evidence. If you are contemplating bringing an adversary proceeding, or if you find yourself as a party in an adversary proceeding, you are strongly encouraged to confer with legal counsel or the Pro se Law Clerk. However, remember that the Clerk's Office (and this includes the Pro se Law Clerk) cannot give you legal advice.

THE CLAIMS PROCESS

PROOF OF CLAIM

In most bankruptcy cases, creditors are paid by the trustee from the estate. However, the majority of individual chapter 7 cases filed are considered "no asset." This means that the debtor has no unexempt assets to liquidate to pay creditors. In those cases, unsecured creditors will receive no payment on their claims, and those claims will be discharged unless an objection to discharge is sustained.

Additionally, no creditor will be paid from the estate if the creditor has not filed a proof of claim.[8] To file a claim, creditors must use official form B 10. See Appendix B. When completing a proof of claim, creditors should never include the full account number of the debtor's account, and should never include the debtor's full social security number. Proofs of claim must be filed by the deadline established by the Court. The failure to file a claim timely may result in it being disallowed.

Creditors filing claims should pay special attention to Part III of Fed. R. Bankr. P. 3001 through 3022, as well as Local Rule 3001-1; Appendix 1, Chapter 13 Rule 13-13.

[8] In certain circumstances, debtors and trustees may file proofs of claim on behalf of creditors, however, they are not required to.

Simply filing a claim does not automatically result in it being allowed and paid. Creditors should be mindful that parties in interest (namely trustees and debtors) may object to proofs of claim. A party objecting to a claim must file a written objection with the Clerk. If the creditor disputes the objection, the creditor who is the subject of the claim objection must file a written response with the clerk. If the parties are unable to reach agreement on the issues raised by the claims objection, the Court will schedule a hearing. Additional information concerning the claims objection process may be found in Local Rule 3007-1; Appendix 1, Chapter 13 Rule 13-13.

In addition, filing a claim does not ensure that you will receive notices of the case. If you want to receive notices and papers filed in the case, please refer to the prior section "Receiving Notices." In addition, if you file a proof of claim, please be sure you notify the Court and the trustee of any change in contact information (mailing address, telephone number, etc.).

Finally, but no less importantly, the Court requires an <u>original signed</u> proof of claim by the deadline established by the Court.

-Types of Claims

On Official Form B 10, you will be required to identify whether your claim is secured, unsecured priority or unsecured. Page 3 of the Official Form contains definitions that may help you determine the nature of your claim. Remember, no one at the Clerk's office, including the Pro se Law Clerk can analyze your claim and determine what type of claim you have. If you are not sure what type of claim you have, you should consult with an attorney.

-Unclaimed Funds

There is no set time when creditors can expect to receive checks from a trustee. Therefore, you must notify the Court and the trustee if your address changes to avoid your payments being unclaimed. An unclaimed dividend arises when the trustee mails a check to your address of record, but the check is returned because of a bad address (or alternatively, it is never cashed for whatever reason). Under chapter 7, 12 and 13, ninety days after the final distribution of assets, the trustee will stop payment on any non-negotiated checks and deposit the funds with the Court as unclaimed. The Court then becomes the Custodian of the funds until the person entitled to them files an application/petition with the Court for payment.

The funds cannot be released without a Court order. To apply for such an order, the claimant entitled to payment must petition the Court for payment, provide notice of the request to the United States Attorney and other relevant parties and, after providing full proof of their right to the funds, an order providing for distribution will issue. A sample

petition for payment of unclaimed funds form is attached as Exhibit B and also available on the Court's website.

OBJECTIONS TO CLAIMS

A filed claim may be the subject of an objection by the debtor and/or the trustee or other party in interest. If your claim is objected to, you must file a timely response. If you do not file a response, the objection may be sustained which means that your claim may be disallowed, in whole or in part.

Assuming your claim has been objected to and a response has been filed, the Local Rules establishes a framework which is found in Rule 3007-1. However, in chapter 13 cases, the procedure is found in Local Rule, Appendix 1, Chapter 13 Rule 13-13.

In that process, the parties are obligated to confer to attempt to narrow the issues of dispute. If an agreement on all issues cannot be resolved, the objecting party will file a notice. As a creditor, you are obligated to participate in the conference and the rule provides that sanctions may be awarded, including sustaining or overruling the objection in addition to monetary sanctions. See Chapter 13 Rule 13-13(d).

MOTIONS, HEARINGS AND COURT APPEARANCES

During a bankruptcy case, circumstances may call for you to obtain an order from the Court. This is accomplished by a motion.

A motion is a formal written request to the judge for relief, or for a decision on a particular matter or issue. The party filing the motion is generally referred to as the "moving party" or the "movant." Some motions or requests may be made orally in open court, but in bankruptcy, most motions must be made in writing with notice given to all appropriate parties. See Local Rules 9013-1 and 9013-3 for additional guidance.

In the written motion, the moving party makes the request and then explains to the court why the relief is requested. Under appropriate circumstances, the Court may act on the motion without a hearing.

The Federal Rules of Bankruptcy Procedure as well as the Local Rules of the United States Bankruptcy Court for the District of Massachusetts have a variety provisions dealing with motions, as well as provisions on how to respond to motions. If you need to file a motion, or if you need to respond to a motion, it is very important that you become acquainted with those rules. If you have substantive questions about how to prepare your motion, you must obtain advice from an attorney. The Clerk's office cannot offer you substantive legal advice.

To avoid delay of the relief being granted, or to avoid the motion being denied, it is very important to ensure that your motion was appropriately served on the parties and you file a certificate of service with the Clerk.

HEARINGS

From time to time, the Court will schedule a hearing on a motion. When that occurs, the Court will notify you. If you are the moving party, you will receive a notice of hearing in the mail. In most circumstances, the notice of hearing will direct you as the moving party to serve a copy of the notice on all parties and to file a certificate of service demonstrating that you complied.

In rare circumstances, the Court may schedule an emergency or expedited hearing. You will want to ensure that any document you file with the Court, in addition to your name and mailing address also includes a working telephone number that the Clerk' s office can reach you.

In general, hearings are scheduled days and sometimes weeks in advance. If you have a conflict, you should immediately request a new date by filing a Motion to Continue Hearing and serving all parties (and whenever possible, obtain an agreement from the other parties in the case). If you have not heard back from the Court prior to the scheduled hearing date, you are then encouraged to call the Clerk's Office to determine if your Motion to Continue Hearing was allowed or denied. If the motion was denied, you will need to appear at the hearing.

Creditors are not required to attend every hearing in a bankruptcy case, nor are they required to respond to every motion filed. However, any documents you receive should be read carefully. If you are the moving party or the responding or defending party, your presence at the hearing will be required.

Hearings may be evidentiary or nonevidentiary, the court will issue a notice identifying which is applicable to the hearing. A nonevidentiary hearing is one where there is no evidence shown to the Court. Alternatively, it can be where the parties agree on the facts and evidence, and the Court can rule on the parties arguments. Most matters requiring a hearing in the Bankruptcy Court start with a nonevidentiary hearing, h owever, if there is a dispute of a material issue of fact, a nonevidentiary hearing will be scheduled.

At an evidentiary hearing, the Court accepts evidence through documents and/or testimony, and the opposing party is permitted to file its own evidence and testimony. Both parties will have an opportunity to cross-examine witnesses. Before appearing *pro se* at an evidentiary hearing, it is strongly urged that you consult with a competent bankruptcy attorney.

TELEPHONIC OR VIDEOCONFERENCE APPEARANCES

For good cause shown, a party may appear in a court proceeding by telephone or by video conference. This process is governed by Local Rule 9074-1.

CERTIFICATES OF SERVICE

A certificate of service is a written statement filed with the Court indicating that you mailed copies of a particular pleading, notice or motion to all appropriate parties. To determine who are the appropriate parties, you should determine (1) who has filed an appearance in your case; (2) who are the trustees assigned to your case; (3) who has requested notice in your case; and (4) what the Federal Rules of Bankruptcy Procedure and the Local Rules for the U.S. Bankruptcy Court for the District of Massachusetts state are the necessary and appropriate parties to serve.

Certificates of service are very important. They provide the Court with clear proof that service has been accomplished in the manner that you describe in the Certificate, and that the parties have been notified of their right and their opportunity to be heard. Motions can be denied, and hearings may be delayed if a certificate of service is deficient or was never filed.

The certificate of service needs to be included with the pleading you are filing and it must be signed by you. The certificate must state the following:

- The date of service
- The method of service (mail, overnight courier, fax, email, by hand, etc.)
- The names and addresses of the parties served

For additional reading on Certificates of Service, please see Local Rule 9013-3 and Fed. R. Bankr. P. 2002.

COURT APPEARANCES

Whenever you are scheduled to appear in court, arrive on time. Be sure you dress appropriately: your hearing will be in a United States Bankruptcy Court, and the decision made by a United States Bankruptcy Judge. Consider wearing what you might wear if you were to attend a religious service on a holiday, or if you were to attend an important job interview.

Please plan accordingly for traffic, public transportation and parking. Consider making alternative child care arrangements so your attention can be focused exclusively on the legal and factual issues that are scheduled to be heard. All court buildings have security, and in Boston, you will need to go through two security screenings: one for the

Federal Building, and one for the court. Because others might also be coming into the building at the same time, you should anticipate delays getting through security and therefore plan accordingly. *Pro se* creditors who are not members of the bar are not permitted to carry cell phones into Court and you will be required to leave them with security.

If you arrive in the courtroom and the judge has not yet taken the bench, you may want to speak to the Courtroom Deputy (who may be sitting at a desk in front of the judge's bench) to check in. If the judge sitting on the bench, court is in session and you should quietly take a seat and wait for the case to be called.

In federal courts, parties speak from a podium which is usually located between two tables in the courtoom. Parties should speak only from the podium, and into the microphone.

The court uses digital audiop technology. It is very important that you identify yourself before speaking for the first time (for example, "John Smith, creditor") and you speak clearly.

Be prepared to answer the Court's questions and to respond to any arguments or statements made by other parties. Be courteous and respectful at all times. Do not interrupt other parties. If you wish to respond to a statement made by the opposing party after you have already spoken, ask the court for an opportunity to be heard after the opposing party finishes their statement.

While you may be representing yourself, you are expected to comport to the level of dignity and decorum expected of anyone appearing before the Court. As a *pro se* party, you are also expected to have an understanding of the law and facts concerning the issue that is before the Court.

What Creditors Should Know About Chapter 7: Liquidation under the Bankruptcy Code

The chapter of the Bankruptcy Code providing for "liquidation," (i.e., the sale of a debtor's nonexempt property and the distribution of the proceeds to creditors.)

Background

A chapter 7 bankruptcy case does not involve the filing of a plan of repayment as in chapter 13. Instead, the bankruptcy trustee gathers and sells the debtor's nonexempt assets and uses the proceeds of such assets to pay holders of claims (creditors) in accordance with the provisions of the Bankruptcy Code. Part of the debtor's property may be subject to liens and mortgages that pledge the property to other creditors. In addition, the Bankruptcy Code will allow the debtor to keep certain "exempt" property; but a trustee will liquidate the debtor's remaining assets. In chapter 7, debtors may lose property (but that is not always the case).

Eligibility

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

In addition, no individual may be a debtor under chapter 7 or any chapter of the Bankruptcy Code unless he or she has, within 180 days before filing, received credit counseling from an approved credit counseling agency either in an individual or group briefing. 11 U.S.C. §§ 109, 111. There are exceptions in emergency situations or where the U.S. trustee (or bankruptcy administrator) has determined that there are insufficient approved agencies to provide the required counseling. If a debt management plan is developed during required credit counseling, it must be filed with the court.

One of the primary purposes of bankruptcy is to discharge certain debts to give an honest individual debtor a "fresh start." The debtor has no liability for discharged debts. In a chapter 7 case, however, a discharge is only available to individual debtors, not to partnerships or corporations. 11 U.S.C. § 727(a)(1). Although an individual chapter 7 case usually results in a discharge of debts, the right to a discharge is not absolute, and some types of debts are not discharged. Moreover, a bankruptcy discharge does not extinguish a lien on property.

How Chapter 7 Works

A chapter 7 case begins with the debtor filing a petition with the bankruptcy court

serving the area where the individual lives or where the business debtor is organized or has its principal place of business or principal assets.[1] In addition to the petition, the debtor must also file with the court: (1) schedules of assets and liabilities; (2) a schedule of current income and expenditures; (3) a statement of financial affairs; and (4) a schedule of executory contracts and unexpired leases. Fed. R. Bankr. P. 1007(b). Debtors must also provide the assigned case trustee with a copy of the tax return or transcripts for the most recent tax year as well as tax returns filed during the case (including tax returns for prior years that had not been filed when the case began). 11 U.S.C. § 521. Creditors may request tax returns or transcripts. See § 521(e)(2)(A).

Individual debtors with primarily consumer debts have additional document filing requirements. They must file: a certificate of credit counseling and a copy of any debt repayment plan developed through credit counseling; evidence of payment from employers, if any, received 60 days before filing;[2] a statement of monthly net income and any anticipated increase in income or expenses after filing; and a record of any interest the debtor has in federal or state qualified education or tuition accounts. Id. Married debtors may file a petition jointly or individually. 11 U.S.C. § 302(a). Even if filing jointly, both spouses are subject to all the document filing requirements of individual debtors. (The Official Forms may be obtained from the internet at www.uscourts.gov/bkforms/index.html. Forms are also available at the Court.)

The courts must charge a filing fee. Information about the filing fees may be found on the court's website. Normally, the fees must be paid to the clerk of the court upon filing. With the court's permission, however, individual debtors may request to pay in installments. 28 U.S.C. § 1930(a); Fed. R. Bankr. P. 1006(b); Local Rules 1006-1, 1006-2; Bankruptcy Court Miscellaneous Fee Schedule, Item 8. The number of installments is limited to four, and the debtor must make the final installment no later than 120 days after filing the petition. Fed. R. Bankr. P. 1006. For cause shown, the court may extend the time of any installment, provided that the last installment is paid not later than 180 days after filing the petition. Id. If a joint petition is filed, only one filing fee, one administrative fee, and one trustee surcharge are charged. Debtors should be aware that failure to pay these fees may result in dismissal of the case. 11 U.S.C. § 707(a).

If the debtor's income is less than 150% of the poverty level (as defined in the Bankruptcy Code), and the debtor is unable to pay the chapter 7 fees even in installments, the court may waive the requirement that the fees be paid. 28 U.S.C. § 1930(f).

In order to complete the Official Bankruptcy Forms that make up the petition, statement of financial affairs, and schedules, the debtor must provide the following information:

- A list of all creditors and the amount and nature of their claims;
- The source, amount, and frequency of the debtor's income;

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

[2] Please see Local Rule 4002-1.

- A list of all of the debtor's property; and
- A detailed list of the debtor's monthly living expenses, i.e., food, clothing, shelter, utilities, taxes, transportation, medicine, etc.

Married individuals must gather this information for their spouse regardless of whether they are filing a joint petition, separate individual petitions, or even if only one spouse is filing. In a situation where only one spouse files, the income and expenses of the non-filing spouse are required so that the court, the trustee and creditors can evaluate the household's financial position.

Among the schedules that an individual debtor will file is a schedule of "exempt" property. The Bankruptcy Code allows an individual debtor[3] to protect some property from the claims of creditors because it is exempt under federal bankruptcy law or under the laws of the debtor's applicable home state. See 11 U.S.C. § 522(b). Many states have taken advantage of a provision in the Bankruptcy Code that permits each state to adopt its own exemption law in place of the federal exemptions. In other jurisdictions, the individual debtor has the option of choosing between a federal package of exemptions or the exemptions available under state law. Thus, whether certain property is exempt and may be kept by the debtor is often a question of state law.

Filing a petition under chapter 7 "automatically stays" (stops) most collection actions against the debtor or the debtor's property. 11 U.S.C. § 362. But filing the petition does not stay certain types of actions listed under 11 U.S.C. § 362(b), and the stay may be effective only for a short time in some situations. See 11 U.S.C. § 362(c). The stay arises by operation of law and requires no judicial action. As long as the stay is in effect, creditors generally may not initiate or continue lawsuits, wage garnishments, or even telephone calls demanding payments. The bankruptcy clerk gives notice of the bankruptcy case to all creditors whose names and addresses are provided by the debtor.

Between 20 and 40 days after the petition is filed, the case trustee (described below) will hold a meeting of creditors. If the U.S. trustee or bankruptcy administrator schedules the meeting at a place that does not have regular U.S. trustee or bankruptcy administrator staffing, the meeting may be held no more than 60 days after the order for relief. Fed. R. Bankr. P. 2003(a). During this meeting, the trustee places the debtor under oath, and both the trustee and creditors may ask questions. The debtor must attend the meeting and answer questions regarding the debtor's financial affairs and property. 11 U.S.C. § 343. If a joint petition bas been filed, both spouses must attend the creditors' meeting and answer questions. Within 10 days of the creditors' meeting, the U.S. trustee will report to the court whether the case should be presumed to be an abuse under the means test described in 11 U.S.C. § 704(b).

The debtor must cooperate with the trustee and to provide any financial records or documents that the trustee requests. The Bankruptcy Code requires the trustee to ask the debtor questions at the meeting of creditors to ensure that the debtor is aware of the potential

[3] Each debtor in a joint case (married spouses) can claim exemptions under the federal bankruptcy laws. 11 U.S.C. § 522(m).

consequences of seeking a discharge in bankruptcy such as the effect on credit history, the ability to file a petition under a different chapter, the effect of receiving a discharge, and the effect of reaffirming a debt. Some trustees provide written information on these topics at or before the meeting to ensure that the debtor is aware of this information. In order to preserve their independent judgment, bankruptcy judges are prohibited from attending the meeting of creditors. 11 U.S.C. § 341(c).

In order to accord the debtor complete relief, the Bankruptcy Code allows the debtor to convert a chapter 7 case to a case under chapter 11, 12, or 13[5] as long as the debtor is eligible to be a debtor under the new chapter. However, a condition of the debtor's voluntary conversion is that the case has not previously been converted to chapter 7 from another chapter. 11 U.S.C. § 706(a). Thus, the debtor will not be permitted to convert the case repeatedly from one chapter to another.

The Role of the Chapter 7 Trustee

When a chapter 7 petition is filed, the U.S. trustee (or the bankruptcy court in Alabama and North Carolina) appoints an impartial case trustee to administer the case and liquidate the debtor's nonexempt assets. 11 U.S.C. §§ 701, 704. If all the debtor's assets are exempt or subject to valid liens, the trustee will normally file a "no asset" report with the court, and there will be no distribution to unsecured creditors. Most chapter 7 cases involving individual debtors are no asset cases. But if the case appears to be an "asset" case at the outset, unsecured creditors[6] must file their claims with the court within 90 days after the first date set for the meeting of creditors. Fed. R. Bankr. P. 3002(c). A governmental unit, however, has 180 days from the date the case is filed to file a claim. 11 U.S.C. § 502(b)(9).

In the typical no asset chapter 7 case, there is no need for creditors to file proofs of claim because there will be no distribution. If the trustee later recovers assets for distribution to unsecured creditors, the Bankruptcy Court will provide notice to creditors and will allow additional time to file proofs of claim. Although a secured creditor does not need to file a proof of claim in a chapter 7 case to preserve its security interest or lien, there may be other reasons to file a claim. A creditor in a chapter 7 case who has a lien on the debtor's property should consult an attorney for advice.

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

[5] A fee is charged for converting, on request of the debtor, a case under chapter 7 to a case under chapter 11. The fee charged is the difference between the filing fee for a chapter 7 and the filing fee for a chapter 11. 28 U.S.C. § 1930(a). Additional information concerning fees is found on the court's website.

[6] Unsecured debts generally may be defined as those for which the extension of credit was based purely upon an evaluation by the creditor of the debtor's ability to pay, as opposed to secured debts, for which the extension of credit was based upon the creditor's right to seize collateral on default, in addition to the debtor's ability to pay.

speaking, the debtor's creditors are paid from nonexempt property of the estate.

The primary role of a chapter 7 trustee in an asset case is to liquidate the debtor's nonexempt assets in a manner that maximizes the return to the debtor's unsecured creditors. The trustee accomplishes this by selling the debtor's property if it is free and clear of liens (as long as the property is not exempt) or if it is worth more than any security interest or lien attached to the property and any exemption that the debtor holds in the property.

The trustee may also attempt to recover money or property under the trustee's "avoiding powers." The trustee's avoiding powers include the power to: set aside preferential transfers made to creditors within 90 days before the petition; undo security interests and other prepetition transfers of property that were not properly perfected under nonbankruptcy law at the time of the petition; and pursue nonbankruptcy claims such as fraudulent conveyance and bulk transfer remedies available under state law. In addition, if the debtor is a business, the bankruptcy court may authorize the trustee to operate the business for a limited period of time, if such operation will benefit creditors and enhance the liquidation of the estate. 11 U.S.C. § 721.

Section 726 of the Bankruptcy Code governs the distribution of the property of the estate. Under § 726, there are six classes of claims; and each class must be paid in full before the next lower class is paid anything. The debtor is only paid if all other classes of claims have been paid in full. Accordingly, the debtor is not particularly interested in the trustee's disposition of the estate assets, except with respect to the payment of those debts which for some reason are not dischargeable in the bankruptcy case. The individual debtor's primary concerns in a chapter 7 case are to retain exempt property and to receive a discharge that covers as many debts as possible.

The Chapter 7 Discharge

A discharge releases individual debtors from personal liability for most debts and prevents the creditors owed those debts from taking any collection actions against the debtor. Because a chapter 7 discharge is subject to many exceptions, debtors should consult competent legal counsel before filing to discuss the scope of the discharge. Generally, excluding cases that are dismissed or converted, individual debtors receive a discharge in more than 99 percent of chapter 7 cases. In most cases, unless a party in interest files timely a complaint objecting to the discharge or a motion to extend the time to object, the bankruptcy court will issue a discharge order relatively early in the case – generally, 60 to 90 days after the date first set for the meeting of creditors. Fed. R. Bankr. P. 4004(c).

The grounds for denying an individual debtor a discharge in a chapter 7 case are narrow and are construed against the moving party. Among other reasons, the court may deny the debtor a discharge if it finds that the debtor: failed to keep or produce adequate books or financial records; failed to explain satisfactorily any loss of assets; committed a bankruptcy crime such as perjury; failed to obey a lawful order of the bankruptcy court; fraudulently transferred, concealed, or destroyed property that would have become property of the estate; or failed to complete an approved

instructional course concerning financial management. 11 U.S.C. § 727; Fed. R. Bankr. P. 4005.

Secured creditors may retain some rights to seize property securing an underlying debt even after a discharge is granted. Depending on individual circumstances, if a debtor wishes to keep certain secured property (such as an automobile), he or she may decide to "reaffirm" the debt. A reaffirmation is an agreement between the debtor and the creditor that the debtor will remain liable and will pay all or a portion of the money owed, even though the debt would otherwise be discharged in the bankruptcy. In return, the creditor promises that it will not repossess or take back the automobile or other property so long as the debtor continues to pay the debt.

If the debtor decides to reaffirm a debt, he or she must do so before the discharge is entered. The debtor must sign a written reaffirmation agreement and file it with the court. 11 U.S.C. § 524(c). The Bankruptcy Code requires that reaffirmation agreements contain an extensive set of disclosures described in 11 U.S.C. § 524(k); see also Local Rule, Official Local Form 6. Among other things, the disclosures must advise the debtor of the amount of the debt being reaffirmed and how it is calculated and that reaffirmation means that the debtor's personal liability for that debt will not be discharged in the bankruptcy. The disclosures also require the debtor to sign and file a statement of his or her current income and expenses which shows that the balance of income paying expenses is sufficient to pay the reaffirmed debt. If the balance is not enough to pay the debt to be reaffirmed, there is a presumption of undue hardship, and the court may decide not to approve the reaffirmation agreement. Unless the debtor is represented by an attorney, the bankruptcy judge must approve the reaffirmation agreement.

If the debtor was represented by an attorney in connection with the reaffirmation agreement, the attorney must certify in writing that he or she advised the debtor of the legal effect and consequences of the agreement, including a default under the agreement. The attorney must also certify that the debtor was fully informed and voluntarily made the agreement and that reaffirmation of the debt will not create an undue hardship for the debtor or the debtor's dependents. 11 U.S.C. § 524(k). The Bankruptcy Code requires a reaffirmation hearing if the debtor has not been represented by an attorney during the negotiating of the agreement, or if the court disapproves the reaffirmation agreement. 11 U.S.C. § 524(d) and (m). The debtor may repay any debt voluntarily, however, whether or not a reaffirmation agreement exists. 11 U.S.C. § 524(f).

An individual receives a discharge for most of his or her debts in a chapter 7 bankruptcy case. A creditor may no longer initiate or continue any legal or other action against the debtor to collect a discharged debt. But not all of an individual's debts are discharged in chapter 7. Debts not discharged include debts for alimony and child support, certain taxes, debts for certain educational benefit overpayments or loans made or guaranteed by a governmental unit, debts for willful and malicious injury by the debtor to another entity or to the property of another entity, debts for death or personal injury caused

by the debtor's operation of a motor vehicle while the debtor was intoxicated from alcohol or other substances, and debts for certain criminal restitution orders. 11 U.S.C. § 523(a). The debtor will continue to be liable for these types of debts to the extent that they are not paid in the chapter 7 case. Debts for money or property obtained by false pretenses, debts for fraud or defalcation while acting in a fiduciary capacity, and debts for willful and malicious injury by the debtor to another entity or to the property of another entity will be discharged unless a creditor timely files and prevails in an action to have such debts declared nondischargeable. 11 U.S.C. § 523(c); Fed. R. Bankr. P. 4007(c).

The court may revoke a chapter 7 discharge on the request of the trustee, a creditor, or the U.S. trustee if the discharge was obtained through fraud by the debtor, if the debtor acquired property that is property of the estate and knowingly and fraudulently failed to report the acquisition of such property or to surrender the property to the trustee, or if the debtor (without a satisfactory explanation) makes a material misstatement or fails to provide documents or other information in connection with an audit of the debtor's case. 11 U.S.C. § 727(d).

What Creditors Need to Know About Chapter 11: Reorganization under the Bankruptcy Code

The chapter of the Bankruptcy Code providing (generally) for reorganization, usually involving a corporation or partnership. (A chapter 11 debtor usually proposes a plan of reorganization to keep its business alive and pay creditors over time. People in business or individuals can also seek relief in chapter 11.)

Background

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

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

In addition, no individual may be a debtor under chapter 11 or any chapter of the Bankruptcy Code unless he or she has, within 180 days before filing, received credit counseling from an approved credit counseling agency either in an individual or group briefing. 11 U.S.C. §§ 109, 111. There are exceptions in emergency situations or where the U.S. trustee (or bankruptcy administrator) has determined that there are insufficient approved agencies to provide the required counseling. If a debt management plan is developed during required credit counseling, it must be filed with the court.

How Chapter 11 Works

A chapter 11 case begins with the filing of a petition with the bankruptcy court serving the area where the debtor has a domicile or residence. A petition may be a voluntary petition, which is filed by the debtor, or it may be an involuntary petition, which is filed by creditors that meet certain requirements. 11 U.S.C. §§ 301, 303. A voluntary petition must adhere to the format of Form 1 of the Official Forms prescribed by the Judicial Conference of the United States. Unless the court orders otherwise, the debtor also must file with the court: (1) schedules of assets and liabilities; (2) a schedule of current income and expenditures; (3) a schedule of executory contracts and unexpired leases; and (4) a statement of financial affairs. Fed. R. Bankr. P. 1007(b). If the debtor is an individual (or if a joint petition is filed by a married couple), there are additional document filing requirements. Such debtors must file: a certificate of credit counseling and a copy of any debt repayment plan developed through credit counseling; evidence of payment from employers, if any, received 60 days before filing; a statement of monthly net income and any anticipated increase in income or expenses after filing; and a record of any interest the debtor has in federal or state qualified education or tuition accounts.11 U.S.C. § 521. Individuals may file a petition or married couples may file a joint petition . 11 U.S.C. § 302(a). (The

Official Forms are available from the court, may be purchased at legal stationery stores or downloaded from the Internet at www.uscourts.gov/bkforms/index.html.)

The courts are required to charge a filing fee. The fees must be paid to the clerk of the court upon filing or may, upon request and with the court's permission, be paid by individual debtors in installments. 28 U.S.C. § 1930(a); Fed. R. Bankr. P. 1006(b); Bankruptcy Court Miscellaneous Fee Schedule, Item 8. Fed. R. Bankr. P. 1006(b) limits to four the number of installments for the filing fee. The final installment must be paid not later than 120 days after filing the petition. For cause shown, the court may extend the time of any installment, provided that the last installment is paid not later than 180 days after the filing of the petition. Fed. R. Bankr. P. 1006(b). Debtors should be aware that failure to pay these fees may result in dismissal of the case. 11 U.S.C. § 1112(b)(10).

The voluntary petition will include standard information concerning the debtor's name(s), social security number or tax identification number, residence, location of principal assets (if a business), the debtor's plan or intention to file a plan, and a request for relief under the appropriate chapter of the Bankruptcy Code. Upon filing a voluntary petition for relief under chapter 11 or, in an involuntary case, the entry of an order for relief, the debtor automatically assumes an additional identity as the "debtor in possession." 11 U.S.C. § 1101. The term refers to a debtor that keeps possession and control of its assets while undergoing a reorganization under chapter 11, without the appointment of a case trustee. A debtor will remain a debtor in possession until the debtor's plan of reorganization is confirmed, the debtor's case is dismissed or converted to chapter 7, or a chapter 11 trustee is appointed. The appointment or election of a trustee occurs only in a small number of cases. Generally, the debtor, as "debtor in possession," operates the business and performs many of the functions that a trustee performs in cases under other chapters. 11 U.S.C. § 1107(a).

Generally, a written disclosure statement and a plan of reorganization must be filed with the court. 11 U.S.C. §§ 1121, 1125. The disclosure statement is a document that must contain information concerning the assets, liabilities, and business affairs of the debtor sufficient to enable a creditor to make an informed judgment about the debtor's plan of reorganization. 11 U.S.C. § 1125. The information required is governed by judicial discretion and the circumstances of the case. In a "small business case" (discussed below) the debtor may not need to file a separate disclosure statement if the court determines that adequate information is contained in the plan. 11 U.S.C. § 1125(f); see also, Local Rules, Official Local Form 15.

The contents of the plan must include a classification of claims and must specify how each class of claims will be treated under the plan. 11 U.S.C. § 1123. Creditors whose claims are "impaired," i.e., those whose contractual rights are to be modified or who will be paid less than the full value of their claims under the plan, vote on the plan by ballot. 11 U.S.C. § 1126. After the disclosure statement is approved by the court and the ballots are collected and tallied, the court will conduct a confirmation hearing to

determine whether to confirm the plan. 11 U.S.C. § 1128.

In the case of individuals, chapter 11 bears some similarities to chapter 13. For example, property of the estate for an individual debtor includes the debtor's earnings and property acquired by the debtor after filing until the case is closed, dismissed or converted; funding of the plan may be from the debtor's future earnings; and the plan cannot be confirmed over a creditor's objection without committing all of the debtor's disposable income over five years unless the plan pays the claim in full, with interest, over a shorter period of time. 11 U.S.C. §§ 1115, 1123(a)(8), 1129(a)(15).

The Chapter 11 Debtor in Possession

Chapter 11 is typically used to reorganize a business, which may be a corporation, sole proprietorship, or partnership. A corporation exists separate and apart from its owners, the stockholders. The chapter 11 bankruptcy case of a corporation (corporation as debtor) does not put the personal assets of the stockholders at risk other than the value of their investment in the company's stock. A sole proprietorship (owner as debtor), on the other hand, does not have an identity separate and distinct from its owner(s). Accordingly, a bankruptcy case involving a sole proprietorship includes both the business and personal assets of the owners-debtors. Like a corporation, a partnership exists separate and apart from its partners. In a partnership bankruptcy case (partnership as debtor), however, the partners' personal assets may, in some cases, be used to pay creditors in the bankruptcy case or the partners, themselves, may be forced to file for bankruptcy protection.

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

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

The US Trustee or Bankruptcy Administrator

The U.S. trustee plays a major role in monitoring the progress of a chapter 11 case and supervising its administration. The U.S. trustee is responsible for monitoring the debtor in possession's operation of the business and the submission of operating reports and fees. Additionally, the U.S. trustee monitors applications for compensation and reimbursement by professionals, plans and disclosure statements filed with the court, and creditors' committees. The U.S. trustee conducts a meeting of the creditors, often referred to as the "section 341 meeting," in a chapter 11 case. 11 U.S.C. § 341. The U.S. trustee and creditors may question the debtor under oath at the section 341 meeting concerning the debtor's acts, conduct, property, and the administration of the case.

The U.S. trustee also imposes certain requirements on the debtor in possession concerning matters such as reporting its monthly income and operating expenses, establishing new bank accounts, and paying current employee withholding and other taxes. By law, the debtor in possession must pay a quarterly fee to the U.S. trustee for each quarter of a year until the case is converted or dismissed. 28 U.S.C. § 1930(a)(6). The amount of the fee, which may range from $250 to $10,000, depends on the amount of the debtor's disbursements during each quarter. Should a debtor in possession fail to comply with the reporting requirements of the U.S. trustee or orders of the bankruptcy court, or fail to take the appropriate steps to bring the case to confirmation, the U.S. trustee may file a motion with the court to have the debtor's chapter 11 case converted to another chapter of the Bankruptcy Code or to have the case dismissed.

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

Creditors’ Committees

Creditors' committees can play a major role in chapter 11 cases. The committee is appointed by the U.S. trustee and ordinarily consists of unsecured creditors who hold the seven largest unsecured claims against the debtor. 11 U.S.C. § 1102. Among other things, the committee: consults with the debtor in possession on administration of the case; investigates the debtor's conduct and operation of the business; and participates in formulating a plan. 11 U.S.C. § 1103. A creditors' committee may, with the court's approval, hire an attorney or other professionals to assist in the performance of the committee's duties. A creditors' committee can be an important safeguard to the proper management of the business by the debtor in possession.

The Small Business Case and the Small Business Debtor

In some smaller cases the U.S. trustee may be unable to find creditors willing to serve on a creditors' committee, or the committee may not be actively involved

in the case. The Bankruptcy Code addresses this issue by treating a "small business case" somewhat differently than a regular bankruptcy case. A small business case is defined as a case with a "small business debtor." 11 U.S.C. § 101(51C). Determination of whether a debtor is a "small business debtor" requires application of a two-part test. First, the debtor must be engaged in commercial or business activities (other than primarily owning or operating real property) with total non-contingent liquidated secured and unsecured debts of $2,490,925 or less. Second, the debtor's case must be one in which the U.S. trustee has not appointed a creditors' committee, or the court has determined the creditors' committee is insufficiently active and representative to provide oversight of the debtor. 11 U.S.C. § 101(51D).

In a small business case, the debtor in possession must, among other things, attach the most recently prepared balance sheet, statement of operations, cash-flow statement and most recently filed tax return to the petition or provide a statement under oath explaining the absence of such documents and must attend court and the U.S. trustee meeting through senior management personnel and counsel. The small business debtor must make ongoing filings with the court concerning its profitability and projected cash receipts and disbursements, and must report whether it is in compliance with the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure and whether it has paid its taxes and filed its tax returns. 11 U.S.C. §§ 308, 1116.

In contrast to other chapter 11 debtors, the small business debtor is subject to additional oversight by the U.S. trustee. Early in the case, the small business debtor must attend an "initial interview" with the U.S. trustee at which time the U.S. trustee will evaluate the debtor's viability, inquire about the debtor's business plan, and explain certain debtor obligations including the debtor's responsibility to file various reports. 28 U.S.C. § 586(a)(7). The U.S. trustee will also monitor the activities of the small business debtor during the case to identify as promptly as possible whether the debtor will be unable to confirm a plan.

Because certain filing deadlines are different and extensions are more difficult to obtain, a case designated as a small business case normally proceeds more quickly than other chapter 11 cases. For example, only the debtor may file a plan during the first 180 days of a small business case. 11 U.S.C. § 1121(e). This "exclusivity period" may be extended by the court, but only to 300 days, and only if the debtor demonstrates by a preponderance of the evidence that the court will confirm a plan within a reasonable period of time. When the case is not a small business case, however, the court may extend the exclusivity period "for cause" up to 18 months.

The Single Asset Real Estate Debtor

Single asset real estate debtors are subject to special provisions of the Bankruptcy Code. The term "single asset real estate" is defined as "a single property or project, other than residential real property with fewer than four residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property

and activities incidental." 11 U.S.C. § 101(51B). The Bankruptcy Code provides circumstances under which creditors of a single asset real estate debtor may obtain relief from the automatic stay which are not available to creditors in ordinary bankruptcy cases. 11 U.S.C. § 362(d). On request of a creditor with a claim secured by the single asset real estate and after notice and a hearing, the court will grant relief from the automatic stay to the creditor unless the debtor files a feasible plan of reorganization or begins making interest payments to the creditor within 90 days from the date of the filing of the case, or within 30 days of the court's determination that the case is a single asset real estate case. The interest payments must be equal to the non-default contract interest rate on the value of the creditor's interest in the real estate. 11 U.S.C. § 362(d)(3).

Appointment or Election of a Case Trustee

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

The case trustee is responsible for management of the property of the estate, operation of the debtor's business, and, if appropriate, the filing of a plan of reorganization. Section 1106 of the Bankruptcy Code requires the trustee to file a plan "as soon as practicable" or, alternatively, to file a report explaining why a plan will not be filed or to recommend that the case be converted to another chapter or dismissed. 11 U.S.C. § 1106(a)(5).

Upon the request of a party in interest or the U.S. trustee, the court may terminate the trustee's appointment and restore the debtor in possession to management of bankruptcy estate at any time before confirmation.11 U.S.C. § 1105.

The Role of an Examiner

The appointment of an examiner in a chapter 11 case is rare. The role of an examiner is generally more limited than that of a trustee. The examiner is authorized to perform the investigatory functions of the trustee and is required to file a statement of any investigation

conducted. If ordered to do so by the court, however, an examiner may carry out any other duties of a trustee that the court orders the debtor in possession not to perform. 11 U.S.C. § 1106. Each court has the authority to determine the duties of an examiner in each particular case. In some cases, the examiner may file a plan of reorganization, negotiate or help the parties negotiate, or review the debtor's schedules to determine whether some of the claims are improperly categorized. Sometimes, the examiner may be directed to determine if objections to any proofs of claim should be filed or whether causes of action have sufficient merit so that further legal action should be taken. The examiner may not subsequently serve as a trustee in the case. 11 U.S.C. § 321.

The Automatic Stay

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

Under specific circumstances, the secured creditor can obtain an order from the court granting relief from the automatic stay. For example, when the debtor has no equity in the property and the property is not necessary for an effective reorganization, the secured creditor can seek an order of the court lifting the stay to permit the creditor to foreclose on the property, sell it, and apply the proceeds to the debt. 11 U.S.C. § 362(d).

The Bankruptcy Code permits applications for fees to be made by certain professionals during the case. Thus, a trustee, a debtor's attorney, or any professional person appointed by the court may apply to the court at intervals of 120 days for interim compensation and reimbursement payments. In very large cases with extensive legal work, the court may permit more frequent applications. Although professional fees may be paid if authorized by the court, the debtor cannot make payments to professional creditors on prepetition obligations, i.e., obligations which arose before the filing of the bankruptcy petition. The ordinary expenses of the ongoing business, however, continue to be paid.

Who Can File a Plan

The debtor (unless a "small business debtor") has a 120-day period during which it has an exclusive right to file a plan. 11 U.S.C. § 1121(b). This exclusivity period may be extended or reduced by the court. But in no event may the exclusivity period, including all extensions, be longer than 18 months. 11 U.S.C. § 1121(d). After the exclusivity period has expired, a creditor or the case trustee may file a competing plan. The U.S. trustee may not file a plan. 11 U.S.C. § 307.

A chapter 11 case may continue for many years unless the court, the U.S. trustee,

the committee, or another party in interest acts to ensure the case's timely resolution. The creditors' right to file a competing plan provides incentive for the debtor to file a plan within the exclusivity period and acts as a check on excessive delay in the case.

Avoidable Transfers

The debtor in possession or the trustee, as the case may be, has what are called "avoiding" powers. These powers may be used to undo a transfer of money or property made during a certain period of time before the filing of the bankruptcy petition. By avoiding a particular transfer of property, the debtor in possession can cancel the transaction and force the return or "disgorgement" of the payments or property, which then are available to pay all creditors. Generally, and subject to various defenses, the power to avoid transfers is effective against transfers made by the debtor within 90 days before filing the petition. But transfers to "insiders" (i.e., relatives, general partners, and directors or officers of the debtor) made up to a year before filing may be avoided. 11 U.S.C. §§ 101(31), 101(54), 547, 548. In addition, under 11 U.S.C. § 544, the trustee is authorized to avoid transfers under applicable state law, which often provides for longer time periods. Avoiding powers prevent unfair prepetition payments to one creditor at the expense of all other creditors.

Cash Collateral, Adequate Protection and Operating Capital

Although the preparation, confirmation, and implementation of a plan of reorganization is at the heart of a chapter 11 case, other issues may arise that must be addressed by the debtor in possession. The debtor in possession may use, sell, or lease property of the estate in the ordinary course of its business, without prior approval, unless the court orders otherwise. 11 U.S.C. § 363(c). If the intended sale or use is outside the ordinary course of its business, the debtor must obtain permission from the court.

A debtor in possession may not use "cash collateral" without the consent of the secured party or authorization by the court, which must first examine whether the interest of the secured party is adequately protected. 11 U.S.C. § 363. Section 363 defines "cash collateral" as cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents, whenever acquired, in which the estate and an entity other than the estate have an interest. It includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a creditor's security interest.

When "cash collateral" is used (spent), the secured creditors are entitled to receive additional protection under section 363 of the Bankruptcy Code. The debtor in possession must file a motion requesting an order from the court authorizing the use of the cash collateral. Pending consent of the secured creditor or court authorization for the debtor in possession's use of cash collateral, the debtor in possession must segregate and account for all cash collateral in its possession. 11 U.S.C. § 363(c)(4). A party with an interest in property being used by the debtor may request that the court

prohibit or condition this use to the extent necessary to provide "adequate protection" to the creditor.

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

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

Motions

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

Adversary Proceedings

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

Claims

The Bankruptcy Code defines a claim as: (1) a right to payment; (2) or a right to an equitable remedy for a failure of performance if the breach gives rise to a right to payment. 11 U.S.C. § 101(5). Generally, any creditor whose claim is not scheduled (i.e., listed by the debtor on the debtor's schedules) or is scheduled as disputed, contingent, or unliquidated must file a proof of claim (and attach evidence documenting the claim) in order to be treated as a creditor for purposes of voting on the plan and distribution under it. Fed. R. Bankr. P. 3003(c)(2). But filing a proof of claim is not necessary if the creditor's claim is scheduled (but is not listed as disputed, contingent, or

unliquidated by the debtor) because the debtor's schedules are deemed to constitute evidence of the validity and amount of those claims. 11 U.S.C. § 1111. If a scheduled creditor chooses to file a claim, a properly filed proof of claim supersedes any scheduling of that claim. Fed. R. Bankr. P. 3003(c)(4). It is the responsibility of the creditor to determine whether the claim is accurately listed on the debtor's schedules. The debtor must provide notification to those creditors whose names are added and whose claims are listed as a result of an amendment to the schedules. The notification also should advise such creditors of their right to file proofs of claim and that their failure to do so may prevent them from voting upon the debtor's plan of reorganization or participating in any distribution under that plan. When a debtor amends the schedule of liabilities to add a creditor or change the status of any claims to disputed, contingent, or unliquidated, the debtor must provide notice of the amendment to any entity affected. Fed. R. Bankr. P. 1009(a).

Equity Security Holders

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

Conversion or Dismissal

A debtor in a case under chapter 11 has a one-time absolute right to convert the chapter 11 case to a case under chapter 7 unless: (1) the debtor is not a debtor in possession; (2) the case originally was commenced as an involuntary case under chapter 11; or (3) the case was converted to a case under chapter 11 other than at the debtor's request. 11 U.S.C. § 1112(a). A debtor in a chapter 11 case does not have an absolute right to have the case dismissed upon request.

A party in interest may file a motion to dismiss or convert a chapter 11 case to a chapter 7 case "for cause." Generally, if cause is established after notice and hearing, the court must convert or dismiss the case (whichever is in the best interests of creditors and the estate) unless it specifically finds that the requested conversion or dismissal is not in the best interest of creditors and the estate. 11 U.S.C. § 1112(b). Alternatively, the court may decide that appointment of a chapter 11 trustee or an examiner is in

the best interests of creditors and the estate. 11 U.S.C. § 1104(a)(3). Section 1112(b)(4) of the Bankruptcy Code sets forth numerous examples of cause that would support dismissal or conversion. For example, the moving party may establish cause by showing that there is substantial or continuing loss to the estate and the absence of a reasonable likelihood of rehabilitation; gross mismanagement of the estate; failure to maintain insurance that poses a risk to the estate or the public; or unauthorized use of cash collateral that is substantially harmful to a creditor.

Cause for dismissal or conversion also includes an unexcused failure to timely compliance with reporting and filing requirements; failure to attend the meeting of creditors or attend an examination without good cause; failure to timely provide information to the U.S. trustee; and failure to timely pay post-petition taxes or timely file post-petition returns Fed. R. Bankr. P. 2004. Additionally, failure to file a disclosure statement or to file and confirm a plan within the time fixed by the Bankruptcy Code or order of the court; inability to effectuate a plan; denial or revocation of confirmation; inability to consummate a confirmed plan represent "cause" for dismissal under the statute. In an individual case, failure of the debtor to pay post-petition domestic support obligations constitutes "cause" for dismissal or conversion.

Section 1112(c) of the Bankruptcy Code provides an important exception to the conversion process in a chapter 11 case. Under this provision, the court is prohibited from converting a case involving a farmer or charitable institution to a liquidation case under chapter 7 unless the debt or requests the conversion.

The Disclosure Statement

Generally, the debtor (or any plan proponent) must file and get court approval of a written disclosure statement before there can be a vote on the plan of reorganization. The disclosure statement must provide "adequate information" concerning the affairs of the debtor to enable the holder of a claim or interest to make an informed judgment about the plan. 11 U.S.C. § 1125. In a small business case, however, the court may determine that the plan itself contains adequate information and that a separate disclosure statement is unnecessary. 11 U.S.C. § 1125(f). After the disclosure statement is filed, the court must hold a hearing to determine whether the disclosure statement should be approved. Acceptance or rejection of a plan usually cannot be solicited until the court has first approved the written disclosure statement. 11 U.S.C. § 1125(b). An exception to this rule exists if the initial solicitation of the party occurred before the bankruptcy filing, as would be the case in so-called "prepackaged" bankruptcy plans (i.e., where the debtor negotiates a plan with significant creditor constituencies before filing for bankruptcy). Continued post-filing solicitation of such parties is not prohibited. After the court approves the disclosure statement, the debtor or proponent of a plan can begin to solicit acceptances of the plan, and creditors may also solicit rejections of the plan.

Upon approval of a disclosure statement, the plan proponent must mail the following to the U.S. trustee and all

creditors and equity security holders: (1) the plan, or a court approved summary of the plan; (2) the disclosure statement approved by the court; (3) notice of the time within which acceptances and rejections of the plan may be filed; and (4) such other information as the court may direct, including any opinion of the court approving the disclosure statement or a court-approved summary of the opinion. Fed. R. Bankr. P. 3017(d). In addition, the debtor must mail to the creditors and equity security holders entitled to vote on the plan or plans: (1) notice of the time fixed for filing objections; (2) notice of the date and time for the hearing on confirmation of the plan; and (3) a ballot for accepting or rejecting the plan and, if appropriate, a designation for the creditors to identify their preference among competing plans. Id. But in a small business case, the court may conditionally approve a disclosure statement subject to final approval after notice and a combined disclosure statement/plan confirmation hearing. 11 U.S.C. § 1125(f).

Acceptance of the Plan of Reorganization

As noted earlier, only the debtor may file a plan of reorganization during the first 120-day period after the petition is filed (or after entry of the order for relief, if an involuntary petition was filed). The court may grant extension of this exclusive period up to 18 months after the petition date. In addition, the debtor has 180 days after the petition date or entry of the order for relief to obtain acceptances of its plan. 11 U.S.C. § 1121. The court may extend (up to 20 months) or reduce this acceptance exclusive period for cause. 11 U.S.C. § 1121(d). In practice, debtors typically seek extensions of both the plan filing and plan acceptance deadlines at the same time so that any order sought from the court allows the debtor two months to seek acceptances after filing a plan before any competing plan can be filed.

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

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

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

priority, general unsecured creditors, and equity security holders.

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

Under section 1127(a) of the Bankruptcy Code, the plan proponent may modify the plan at any time before confirmation, but the plan as modified must meet all the requirements of chapter 11. When there is a proposed modification after balloting has been conducted, and the court finds after a hearing that the proposed modification does not adversely affect the treatment of any creditor who has not accepted the modification in writing, the modification is deemed to have been accepted by all creditors who previously accepted the plan. Fed. R. Bankr. P. 3019. If it is determined that the proposed modification does have an adverse effect on the claims of non-consenting creditors, then another balloting must take place.

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

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

The Discharge

Section 1141(d)(1) generally provides that confirmation of a plan discharges a debtor from any debt that arose before the date of confirmation. After the plan is confirmed, the debtor is required to make plan payments and is bound by the provisions of the plan of reorganization. The confirmed plan creates new

contractual rights, replacing or superseding pre-bankruptcy contracts.

There are, of course, exceptions to the general rule that an order confirming a plan operates as a discharge. Confirmation of a plan of reorganization discharges any type of debtor – corporation, partnership, or individual – from most types of prepetition debts. It does not, however, discharge an individual debtor from any debt made nondischargeable by section 523 of the Bankruptcy Code.[1] Moreover, except in limited circumstances, a discharge is not available to an individual debtor unless and until all payments have been made under the plan. 11 U.S.C. § 1141(d)(5). Confirmation does not discharge the debtor if the plan is a liquidation plan, as opposed to one of reorganization, unless the debtor is an individual. When the debtor is an individual, confirmation of a liquidation plan will result in a discharge (after plan payments are made) unless grounds would exist for denying the debtor a discharge if the case were proceeding under chapter 7 instead of chapter 11. 11 U.S.C. §§ 727(a), 1141(d).

[1] Debts not discharged include debts for alimony and child support, certain taxes, debts for certain educational benefit overpayments or loans made or guaranteed by a governmental unit, debts for willful and malicious injury by the debtor to another entity or to the property of another entity, debts for death or personal injury caused by the debtor's operation of a motor vehicle while the debtor was intoxicated from alcohol or other substances, and debts for certain criminal restitution orders.11 U.S.C. § 523(a). The debtor will continue to be liable for these types of debts to the extent that they are not paid in the chapter 11 case. Debts for money or property obtained by false pretenses, debts for fraud or defalcation while acting in a fiduciary capacity, and debts for willful and malicious injury by the debtor to another entity or to the property of another entity will be discharged unless a creditor timely files and prevails in an action to have such debts declared nondischargeable. 11 U.S.C. § 523(c); Fed. R. Bankr. P. 4007(c).

Postconfirmation Modification of the Plan

At any time after confirmation and before "substantial consummation" of a plan, the proponent of a plan may modify the plan if the modified plan would meet certain Bankruptcy Code requirements. 11 U.S.C. § 1127(b). This should be distinguished from preconfirmation modification of the plan. A modified postconfirmation plan does not automatically become the plan. A modified postconfirmation plan in a chapter 11 case becomes the plan only "if circumstances warrant such modification" and the court, after notice and hearing, confirms the plan as modified. If the debtor is an individual, the plan may be modified postconfirmation upon the request of the debtor, the trustee, the U.S. trustee, or the holder of an allowed unsecured claim to make adjustments to payments due under the plan. 11 U.S.C. § 1127(e).

Postconfirmation Administration

Notwithstanding the entry of the confirmation order, the court has the authority to issue any other order necessary to administer the estate. Fed. R. Bankr. P. 3020(d). This authority would include the postconfirmation determination of objections to claims or adversary proceedings, which must be resolved before a plan can be fully consummated. Sections 1106(a)(7) and 1107(a) of the Bankruptcy Code require a debtor in possession or a trustee to report on the progress made in implementing a plan after confirmation. A chapter 11

trustee or debtor in possession has a number of responsibilities to perform after confirmation, including consummating the plan, reporting on the status of consummation, and applying for a final decree.

Revocation of Confirmation Order

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

The Final Decree

A final decree closing the case must be entered after the estate has been "fully administered." Fed. R. Bankr. P. 3022. Local bankruptcy court policies generally determine when the final decree is entered and the case closed.

What Creditors Should Know About Chapter 12: Family Farmer or Family Fisherman Bankruptcy

The chapter of the Bankruptcy Code providing for adjustment of debts of a "family farmer," or a "family fisherman" as those terms are defined in the Bankruptcy Code.

Background

Chapter 12 is designed for "family farmers" or "family fishermen" with "regular annual income." It enables financially distressed family farmers and fishermen to propose and carry out a plan to repay all or part of their debts. Under chapter 12, debtors propose a repayment plan to make installments to creditors over three to five years. Generally, the plan must provide for payments over three years unless the court approves a longer period "for cause." But unless the plan proposes to pay 100% of domestic support claims (i.e., child support and alimony) if any exist, it must be for five years and must include all of the debtor's disposable income. In no case may a plan provide for payments over a period longer than five years. 11 U.S.C. § 1222(b)-(c).

In tailoring bankruptcy law to meet the economic realities of family farming and the family fisherman, chapter 12 eliminates many of the barriers such debtors would face if seeking to reorganize under either chapter 11 or 13 of the Bankruptcy Code. For example, chapter 12 is more streamlined, less complicated, and less expensive than chapter 11, which is better suited to large corporate reorganizations. In addition, few family farmers or fishermen find chapter 13 to be advantageous because it is designed for wage earners who have smaller debts than those facing family farmers. In chapter 12, Congress sought to combine the features of the Bankruptcy Code which can provide a framework for successful family farmer and fisherman reorganizations.

The Bankruptcy Code provides that only a family farmer or family fisherman with "regular annual income" may file a petition for relief under chapter 12. 11 U.S.C. §§ 101(18), 101(19A), 109(f). The purpose of this requirement is to ensure that the debtor's annual income is sufficiently stable and regular to permit the debtor to make payments under a chapter 12 plan. But chapter 12 makes allowance for situations in which family farmers or fishermen have income that is seasonal in nature. Relief under chapter 12 is voluntary, and only the debtor may file a petition under the chapter.

Under the Bankruptcy Code, "family farmers" and "family fishermen" fall into two categories: (1) an individual or individual and spouse and (2) a corporation or partnership. Farmers or fishermen falling into the first category must meet each of the following four criteria as of the date the petition is filed in order to qualify for relief under chapter 12:

- The individual or husband and wife must be engaged in a farming operation or a commercial fishing operation.
- The total debts (secured and unsecured) of the operation must not exceed $4,031,575 (if a farming operation) or $1,868,200 (if a commercial fishing operation).

- If a family farmer, at least 50%, and if family fisherman at least 80%, of the total debts that are fixed in amount (exclusive of debt for the debtor's home) must be related to the farming or commercial fishing operation.
- More than 50% of the gross income of the individual or the husband and wife for the preceding tax year (or, for family farmers only, for each of the 2nd and 3rd prior tax years) must have come from the farming or commercial fishing operation.

In order for a corporation or partnership to fall within the second category of debtors eligible to file as family farmers or family fishermen, the corporation or partnership must meet each of the following criteria as of the date of the filing of the petition:

- More than one-half the outstanding stock or equity in the corporation or partnership must be owned by one family or by one family and its relatives.
- The family or the family and its relatives must conduct the farming or commercial fishing operation.
- More than 80% of the value of the corporate or partnership assets must be related to the farming or fishing operation.
- The total indebtedness of the corporation or partnership must not exceed $4,031,575 (if a farming operation) or $1,868,200 (if a commercial fishing operation).
- At least 50% for a farming operation or 80% for a fishing operation of the corporation's or partnership's total debts which are fixed in amount (exclusive of debt for one home occupied by a shareholder) must be related to the farming or fishing operation.
- If the corporation issues stock, the stock cannot be publicly traded.

A debtor cannot file under chapter 12 (or any other chapter) if during the preceding 180 days a prior bankruptcy petition was dismissed due to the debtor's willful failure to appear before the court or comply with orders of the court or was voluntarily dismissed after creditors sought relief from the bankruptcy court to recover property upon which they hold liens. 11 U.S.C. §§ 109(g), 362(d) and (e). In addition, no individual may be a debtor under chapter 12 or any chapter of the Bankruptcy Code unless he or she has, within 180 days before filing, received credit counseling from an approved credit counseling agency either in an individual or group briefing. 11 U.S.C. §§ 109, 111. There are exceptions in emergency situations or where the U.S. trustee (or bankruptcy administrator) has determined that there are insufficient approved agencies to provide the required counseling. If a debt management plan is developed during required credit counseling, it must be filed with the court.

How Chapter 12 Works

A chapter 12 case begins by filing a petition with the bankruptcy court serving the area where the individual lives or where the corporation or partnership debtor has its principal place

of business or principal assets. Unless the court orders otherwise, the debtor also shall file with the court (1) schedules of assets and liabilities, (2) a schedule of current income and expenditures, (3) a schedule of executory contracts and unexpired leases, and (4) a statement of financial affairs. Fed. R. Bankr. P. 1007(b). A husband and wife may file a joint petition or individual petitions. 11 U.S.C. § 302(a). (The Official Forms may be purchased at legal stationery stores or downloaded from the Internet at www.uscourts.gov/bkforms/index.html. They are also available from the court.)

As of October 17, 2005, a filing fee. Information about filing fees may befound on the court's website. Normally the fees should be paid to the clerk of the court upon filing. With the court's permission, however, individual debtors may request to pay the filing fee in installments. 28 U.S.C. § 1930(a); Fed. R. Bankr. P. 1006(b); Bankruptcy Court Miscellaneous Fee Schedule, Item 8. The number of such installments is limited to four and the debtor must make the final installment no later than 120 days after filing the petition. Fed. R. Bankr. P. 1006(b). For cause shown, the court may extend the time of any installment, provided that the last installment is paid not later than 180 days after the filing of the petition. Id. Debtors should be aware that failure to pay these fees may result in dismissal of the case. 11 U.S.C. § 1208(c)(2).

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

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

Married individuals must gather this information for each spouse regardless of whether they are filing a joint petition, separate individual petitions, or even if only one spouse is filing. In a situation where only one spouse files, the income and expenses of the non-filing spouse are required so that the court, the trustee, and the creditors can evaluate the household's financial position.

When a chapter 12 petition is filed, an impartial trustee is appointed to administer the case. 11 U.S.C. § 1202. In some districts, the U.S. trustee appoints a standing trustee to serve in all chapter 12 cases. 28 U.S.C. § 586(b). As in chapter 13, the trustee both evaluates the case and serves as a disbursing agent, collecting payments from the debtor and making distributions to creditors. 11 U.S.C. § 1202.

Filing the petition under chapter 12 "automatically stays" (stops) most collection actions against the debtor or the debtor's property. 11 U.S.C. § 362. Filing the petition does not, however, stay certain types of actions listed under 11 U.S.C. § 362(b). Under certain circumstances, the stay may be limited, or may not take effect at all. 11 U.S.C. § 362(c). The stay arises by operation of

law and requires no judicial action. As long as the stay is in effect, creditors generally cannot initiate or continue any lawsuits, wage garnishments, or even telephone calls demanding payments. The bankruptcy clerk gives notice of the bankruptcy case to all creditors whose names and addresses are provided by the debtor.

Chapter 12 also contains a special automatic stay provision that protects co-debtors. Unless the bankruptcy court authorizes otherwise, a creditor may not seek to collect a "consumer debt" from any individual who is liable with the debtor. 11 U.S.C. § 1201(a). Consumer debts are those incurred by an individual primarily for a personal, family, or household purpose. 11 U.S.C. § 101(8).

Between 20 to 35 days after the petition is filed, the chapter 12 trustee will hold a "meeting of creditors." If the U.S. trustee or bankruptcy administrator schedules the meeting at a place that does not have regular U.S. trustee or bankruptcy administrator staffing, the meeting may be held no more than 60 days after the debtor files. During the meeting the trustee puts the debtor under oath and both the trustee and creditors may ask questions. The debtor must attend the meeting and answer questions regarding the debtor's financial affairs and the proposed terms of the debtor's repayment plan. 11 U.S.C. § 343; Fed. R. Bankr. P. 4002. If a husband and wife have filed a joint petition, they both must attend the creditors' meeting. In order to preserve their independent judgment, bankruptcy judges are prohibited from attending. 11 U.S.C. § 341(c). The parties typically resolve problems with the plan either during or shortly after the creditors' meeting. Generally, the debtor can avoid problems by making sure that the petition and plan are complete and accurate, and by consulting with the trustee prior to the meeting.

In a chapter 12 case, to participate in distributions from the bankruptcy estate, unsecured creditors must file their claims with the court within 90 days after the first date set for the meeting of creditors. Fed. R. Bankr. P. 3002(c). A governmental unit, however, has 180 days from the date the case is filed file a proof of claim. 11 U.S.C. § 502(b)(9).

After the meeting of creditors, the debtor, the chapter 12 trustee, and interested creditors will attend a hearing on confirmation of the debtor's chapter 12 repayment plan.

The Chapter 12 Plan and Confirmation Hearing

Unless the court grants an extension, the debtor must file a plan of repayment with the petition or within 90 days after filing the petition. 11 U.S.C. § 1221. The plan, which must be submitted to the court for approval, provides for payments of fixed amounts to the trustee on a regular basis. The trustee then distributes the funds to creditors according to the terms of the plan, which typically offers creditors less than full payment on their claims.

There are three types of claims: priority, secured, and unsecured. Priority claims are those granted special status by the bankruptcy law, such as most taxes and the costs of bankruptcy proceeding.[2]

[2] Section 507 sets forth 10 categories of unsecured claims which Congress has, for public policy reasons, given priority of distribution over other unsecured claims.

Secured claims are those for which the creditor has the right to liquidate certain property if the debtor does not pay the underlying debt. In contrast to secured claims, unsecured claims are generally those for which the creditor has no special rights to collect against particular property owned by the debtor.

A chapter 12 plan usually lasts three to five years. It must provide for full payment of all priority claims, unless a priority creditor agrees to different treatment of the claim or, in the case of a domestic support obligation, unless the debtor contributes all "disposable income" - discussed below - to a five-year plan. 11 U.S.C. § 1222(a)(2), (4).

Secured creditors must be paid at least as much as the value of the collateral pledged for the debt. One of the features of Chapter 12 is that payments to secured creditors can sometimes continue longer than the three-to-five-year period of the plan. For example, if the debtor's underlying debt obligation was scheduled to be paid over more than five years (i.e., an equipment loan or a mortgage), the debtor may be able to pay the loan off over the original loan repayment schedule as long as any arrearage is made up during the plan.

The plan does not have to pay unsecured claims in full, as long as it commits all of the debtor's projected "disposable income" (or property of equivalent value) to plan payments over a 3 to 5 year period ,and as long as the unsecured creditors are to receive at least as much as they would receive if the debtor's nonexempt assets were liquidated under chapter 7. 11 U.S.C. § 1225. "Disposable income" is defined as income not reasonably necessary for the maintenance or support of the debtor or dependents or for making payments needed to continue, preserve, and operate the debtor's business. 11 U.S.C. § 1225(b)(2).

Within 45 days after filing the plan, the presiding bankruptcy judge decides at a "confirmation hearing" whether the plan is feasible and meets the standards for confirmation under the Bankruptcy Code. 11 U.S.C. §§ 1224, 1225. Creditors, who receive 20 days' notice, may appear at the hearing and object to confirmation. Fed. R. Bankr. P. 2002(a)(8). While a variety of objections may be made, the typical arguments are that payments offered under the plan are less than creditors would receive if the debtor's assets were liquidated, or that the plan does not commit all of the debtor's disposable income for the three-to-five-year period of the plan.

If the court confirms the plan, the chapter 12 trustee will distribute funds received in accordance with the terms of the plan.11 U.S.C. § 1226(a). If the court does not confirm the plan, the debtor may file a modified plan. 11 U.S.C. § 1223. The debtor may also convert the case to a liquidation under chapter 7.[3] 11 U.S.C. § 1208(a). If the debtor fails to confirm a plan and the case is dismissed, the court may authorize the trustee to keep some of the funds for costs, but the trustee must return all remaining funds to the debtor (other than funds already disbursed to creditors). 11 U.S.C. § 1226(a).

On occasion, changed circumstances will affect the debtor's ability to make plan payments. A creditor may object or threaten to object to a plan, or the debtor

[3] There is a fee charged for converting a case under chapter 12 to a case under chapter 7. Information about filing fees may be found on the court's website.

may inadvertently have failed to list all creditors. In such instances, the plan may be modified either before or after confirmation. 11 U.S.C. §§ 1223, 1229. Modification after confirmation is not limited to an initiative by the debtor, but may also be made at the request of the trustee or an unsecured creditor. 11 U.S.C. § 1229(a).

Making the Plan Work

The provisions of a confirmed plan bind the debtor and each creditor. 11 U.S.C. § 1227. Once the court confirms the plan, the debtor must make the plan succeed. The debtor must make regular payments to the trustee, which will require adjustment to living on a fixed budget for a prolonged period. Furthermore, while confirmation of the plan entitles the debtor to retain property as long as payments are made, the debtor may not incur any significant new debt without consulting the trustee, because additional debt may compromise the debtor's ability to complete the plan.11 U.S.C. §§ 1222(a)(1), 1227. In any event, failure to make the plan payments may result in dismissal of the case. 11 U.S.C. § 1208(c). In addition, the court may dismiss the case or convert the case to a liquidation case under chapter 7 of the Bankruptcy Code upon a showing that the debtor has committed fraud in connection with the case. 11 U.S.C. § 1208(d).

The Chapter 12 Discharge

The court may grant a "hardship discharge" to a chapter 12 debtor even though the debtor has failed to complete plan payments. 11 U.S.C. § 1228(b). Generally, a hardship discharge is available only to a debtor whose failure to complete plan payments is due to circumstances beyond the debtor's control and through no fault of the debtor. Creditors must have received at least as much as they would have received in a chapter 7 liquidation case, and the debtor must be unable to modify the plan. For example, injury or illness that precludes employment sufficient to fund even a modified plan may serve as the basis for a hardship discharge. The hardship discharge does not apply to any debts that are nondischargeable in a chapter 7 case. 11 U.S.C. § 523.

What Creditors Should Know About Chapter 13:

Individual Debt Adjustment

The chapter of the Bankruptcy Code providing for adjustment of debts of an individual with regular income. (Chapter 13 allows a debtor to keep property and pay debts over time, usually three to five years.)

Background

A chapter 13 bankruptcy is also called a wage earner's plan. It enables individuals with regular income to develop a plan to repay all or part of their debts. Under this chapter, debtors propose a repayment plan to make installments to creditors over three to five years. If the debtor's current monthly income is less than the applicable state median, the plan will be for three years unless the court approves a longer period "for cause."[1] If the debtor's current monthly income is greater than the applicable state median, the plan generally must be for five years. In no case may a plan provide for payments over a period longer than five years. 11 U.S.C. §1322(d). During this time the law forbids creditors from starting or continuing collection efforts.

This chapter discusses six aspects of a chapter 13 proceeding: the advantages of choosing chapter 13, the chapter 13 eligibility requirements, how a chapter 13 proceeding works, making the plan work, and the special chapter 13 discharge.

Advantages of Chapter 13

Chapter 13 offers individuals a number of advantages over liquidation under chapter 7. Perhaps most significantly, chapter 13 offers individuals an opportunity to save their homes from foreclosure. By filing under this chapter, individuals can stop foreclosure proceedings and may cure delinquent mortgage payments over time. Nevertheless, they must still make all mortgage payments that come due during the chapter 13 plan on time. Another advantage of chapter 13 is that it allows individuals to reschedule secured debts (other than a mortgage for their primary residence) and extend them over the life of the chapter 13 plan. Doing this may lower the payments. Chapter 13 also has a special provision that protects third parties who are liable with the debtor on "consumer debts." This provision may protect co-signers. Finally, chapter 13 acts like a consolidation loan under which the individual makes the plan payments to a chapter 13 trustee who then distributes payments to creditors. Individuals will have no direct contact with creditors while under chapter 13 protection.

[1] The "current monthly income" received by the debtor is a defined term in the Bankruptcy Code and means the average monthly income received over the six calendar months before commencement of the bankruptcy case, including regular contributions to household expenses from nondebtors and including income from the debtor's spouse if the petition is a joint petition, but not including social security income or certain payments made because the debtor is the victim of certain crimes. 11 U.S.C. § 101(10A).

Chapter 13 Eligibility

Any individual, even if self-employed or operating an unincorporated business, is eligible for chapter 13 relief as long as the individual's unsecured debts are less than $383,175 and secured debts are less than $1,149,525. 11 U.S.C. § 109(e).[2] These amounts are adjusted periodically to reflect changes in the consumer price index. A corporation or partnership may not be a chapter 13 debtor. Id.

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

In addition, no individual may be a debtor under chapter 13 or any chapter of the Bankruptcy Code unless he or she has, within 180 days before filing, received credit counseling from an approved credit counseling agency either in an individual or group briefing. 11 U.S.C. §§ 109, 111. There are exceptions in emergency situations or where the U.S. trustee (or bankruptcy administrator) has determined that there are insufficient approved agencies to provide the required counseling. If a debt management plan is developed during required credit counseling, it must be filed with the court.

[2] These dollar amounts are effective for cases filed after April 1, 2013.

How Chapter 13 Works

A chapter 13 case begins by filing a petition with the bankruptcy court serving the area where the debtor has a domicile or residence. Unless the court orders otherwise, the debtor must also file with the court: (1) schedules of assets and liabilities; (2) a schedule of current income and expenditures; (3) a schedule of executory contracts and unexpired leases; and (4) a statement of financial affairs. Fed. R. Bankr. P. 1007(b).

The debtor must also file a certificate of credit counseling and a copy of any debt repayment plan developed through credit counseling; evidence of payment from employers, if any, received 60 days before filing; a statement of monthly net income and any anticipated increase in income or expenses after filing; and a record of any interest the debtor has in federal or state qualified education or tuition accounts. 11 U.S.C. § 521. The debtor must file evidence of current and sufficient liability and property insurance with respect to any real estate or motor vehicle that the debtor has an interest in.[3] This does not include insurance that may have been obtained by a party holding a security interest in the property.

The debtor must provide the chapter 13 case trustee with a copy of the tax return or transcripts for the most recent tax year as well as tax returns filed during the case (including tax returns for prior years that had not been filed when the case began). Id. Creditors may also request this information from the debtor. 11 U.S.C. § 521(e)(2)(A). A married couple may file a joint petition or individual petitions. 11 U.S.C. § 302(a). (The Official Forms may

[3] See Local Rules, Appendix 1, Chapter 13 Rule 13-2.

be purchased at legal stationery stores or downloaded from the Internet at www.uscourts.gov/bkforms/index.html. They are also available from the court.)

The courts must charge a filing fee. Information about filing fees may be found on the court's website. Normally the fees must be paid to the clerk of the court upon filing. With the court's permission, however, they may be paid in installments. 28 U.S.C. § 1930(a); Fed. R. Bankr. P. 1006(b); Bankruptcy Court Miscellaneous Fee Schedule, Item 8. The number of installments is limited to four, and the debtor must make the final installment no later than 120 days after filing the petition. Fed. R. Bankr. P. 1006(b); see also, Local Rule 1006-1, 1006-2. For cause shown, the court may extend the time of any installment, as long as the last installment is paid no later than 180 days after filing the petition. Id. If a joint petition is filed, only one filing fee and one administrative fee are charged. Debtors should be aware that failure to pay these fees may result in dismissal of the case. 11 U.S.C. § 1307(c)(2).

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

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

Married individuals must gather this information for their spouse regardless of whether they are filing a joint petition, separate individual petitions, or even if only one spouse is filing. In a situation where only one spouse files, the income and expenses of the non-filing spouse is required so that the court, the trustee and creditors can evaluate the household's financial position.

When an individual files a chapter 13 petition, an impartial trustee is appointed to administer the case. 11 U.S.C. § 1302. In some districts, the U.S. trustee or bankruptcy administrator appoints a standing trustee to serve in all chapter 13 cases. 28 U.S.C. § 586(b). The chapter 13 trustee both evaluates the case and serves as a disbursing agent, collecting payments from the debtor and making distributions to creditors. 11 U.S.C. § 1302(b).

Filing the petition under chapter 13 "automatically stays" (stops) most collection actions against the debtor or the debtor's property. 11 U.S.C. § 362. Filing the petition does not, however, stay certain types of actions listed under 11 U.S.C. § 362(b), and the stay may be effective only for a short time in some situations. See e.g., 11 U.S.C. § 362(c). The stay arises by operation of law and requires no judicial action. As long as the stay is in effect, creditors generally may not initiate or continue lawsuits, wage garnishments, or even make telephone calls demanding payments. The bankruptcy clerk gives notice of the bankruptcy case to all creditors whose names and addresses are provided by the debtor.

Chapter 13 also contains a special automatic stay provision that protects co-debtors. Unless the bankruptcy court authorizes otherwise, a creditor may not seek to collect a "consumer debt" from any individual who is liable along with the debtor. 11 U.S.C. § 1301(a). Consumer debts are those incurred by an individual primarily for a personal, family, or household purpose. 11 U.S.C. § 101(8).

Individuals may use a chapter 13 proceeding to save their home from foreclosure. The automatic stay stops the foreclosure proceeding as soon as the individual files the chapter 13 petition. The individual may then bring the past-due payments current over a reasonable period of time. Nevertheless, the debtor may still lose the home if the mortgage company completes the foreclosure sale under state law before the debtor files the petition. 11 U.S.C. § 1322(c). The debtor may also lose the home if he or she fails to make the regular mortgage payments that come due after the chapter 13 filing.

Between 20 and 50 days after the debtor files the chapter 13 petition, the chapter 13 trustee will hold a meeting of creditors. If the U.S. trustee or bankruptcy administrator schedules the meeting at a place that does not have regular U.S. trustee or bankruptcy administrator staffing, the meeting may be held no more than 60 days after the debtor files. Fed. R. Bankr. P. 2003(a). During this meeting, the trustee places the debtor under oath, and both the trustee and creditors may ask questions. The debtor must attend the meeting and answer questions regarding his or her financial affairs and the proposed terms of the plan.11 U.S.C. § 343. If a married couple files a joint petition, they both must attend the creditors' meeting and answer questions.

In order to preserve their independent judgment, bankruptcy judges are prohibited from attending the creditors' meeting. 11 U.S.C. § 341(c). The parties typically resolve problems with the plan either during or shortly after the creditors' meeting. Generally, the debtor can avoid problems by making sure that the petition and plan are complete and accurate, and by consulting with the trustee prior to the meeting.

In a chapter 13 case, to participate in distributions from the bankruptcy estate, unsecured creditors must file their claims with the court within 90 days after the first date set for the meeting of creditors. Fed. R. Bankr. P. 3002(c). A governmental unit, however, has 180 days from the date the case is filed file a proof of claim.11 U.S.C. § 502(b)(9). Creditors should consult with counsel to ensure that their proofs of claim satisfy the requirements of the rules and the code. See e.g., Fed. R. Bankr. P. 3001, et seq.; Local Rule, Appendix 1, Chapter 13 Rule 13-13.

Chapter 13 Plan and Confirmation Hearing

Unless the court grants an extension, the debtor must file a repayment plan with the petition or within 15 days after the petition is filed. Fed. R. Bankr. P. 3015. A plan must be submitted for court approval and must provide for payments of fixed amounts to the trustee on a regular basis, typically monthly. The trustee then distributes the funds to creditors according to the terms of the confirmed plan, which may offer creditors less than full payment on their claims.

There are three types of claims: priority, secured, and unsecured. Priority claims are those granted special status by the

bankruptcy law, such as most taxes and the costs of bankruptcy proceeding.[5] Secured claims are those for which the creditor has the right take back certain property (i.e., the collateral) if the debtor does not pay the underlying debt. In contrast to secured claims, unsecured claims are generally those for which the creditor has no special rights to collect against particular property owned by the debtor.

The plan must pay priority claims in full unless a particular priority creditor agrees to different treatment of the claim or, in the case of a domestic support obligation, unless the debtor contributes all "disposable income" - discussed below - to a five-year plan.11 U.S.C. § 1322(a).

If the debtor wants to keep the collateral securing a particular claim, the plan must provide that the holder of the secured claim receive at least the value of the collateral. If the obligation underlying the secured claim was used to buy the collateral (e.g., a car loan), and the debt was incurred within certain time frames before the bankruptcy filing, the plan must provide for full payment of the debt, not just the value of the collateral (which may be less due to depreciation). Payments to certain secured creditors (i.e., the home mortgage lender), may be made over the original loan repayment schedule (which may be longer than the plan) so long as any arrearage is made up during the plan. The debtor should consult an attorney to determine the proper treatment of secured claims in the plan.

[5] Section 507 sets forth 10 categories of unsecured claims which Congress has, for public policy reasons, given priority of distribution over other unsecured claims.

The plan need not pay unsecured claims in full as long it provides that the debtor will pay all projected "disposable income" over an "applicable commitment period," and as long as unsecured creditors receive at least as much under the plan as they would receive if the debtor's assets were liquidated under chapter 7. 11 U.S.C. § 1325. In chapter 13, "disposable income" is income (other than child support payments received by the debtor) less amounts reasonably necessary for the maintenance or support of the debtor or dependents and less charitable contributions up to 15% of the debtor's gross income. If the debtor operates a business, the definition of disposable income excludes those amounts which are necessary for ordinary operating expenses. 11 U.S.C. § 1325(b)(2)(A) and (B).

The "applicable commitment period" depends on the debtor's current monthly income. The applicable commitment period must be three years if current monthly income is less than the state median for a family of the same size - and five years if the current monthly income is greater than a family of the same size. 11 U.S.C. § 1325(d). The plan may be less than the applicable commitment period (three or five years) only if unsecured debt is paid in full over a shorter period.

Within 30 days after filing the bankruptcy case, even if the plan has not yet been approved by the court, the debtor must start making plan payments to the trustee. 11 U.S.C. § 1326(a)(1). If any secured loan payments or lease payments come due before the debtor's plan is confirmed (typically home and automobile payments), the debtor must make adequate protection payments directly to the secured lender or lessor -

deducting the amount paid from the amount that would otherwise be paid to the trustee. Id.

Creditors may object to confirmation of the plan either 30 days after the first date set of the first meeting of creditors, or 30 days after the receipt of an amended plan. The procedure is found in the Local Rules, Appendix 1, Chapter 13 Rule 13-8. No later than 45 days after the meeting of creditors, the bankruptcy judge must hold a confirmation hearing and decide whether the plan is feasible and meets the standards for confirmation set forth in the Bankruptcy Code. 11 U.S.C. §§ 1324, 1325; see also, Local Rule, Appendix 1, Chapter 13 Rule 13-11. Creditors will receive 25 days' notice of the hearing and may object to confirmation. Fed. R. Bankr. P. 2002(b). While a variety of objections may be made, the most frequent ones are that payments offered under the plan are less than creditors would receive if the debtor's assets were liquidated or that the debtor's plan does not commit all of the debtor's projected disposable income for the three or five year applicable commitment period.

If the court confirms the plan, the chapter 13 trustee will distribute funds received under the plan "as soon as is practicable." 11 U.S.C. § 1326(a)(2). If the court declines to confirm the plan, the debtor may file a modified plan. 11 U.S.C. § 1323. The debtor may also convert the case to a liquidation case under chapter 7.[6] 11 U.S.C. § 1307(a). If the court declines to confirm the plan or the modified plan and instead dismisses the case or convert the case to chapter 7, the court may authorize the trustee to keep some funds for costs, but the trustee must return all remaining funds to the debtor (other than funds already disbursed or due to creditors). See 11 U.S.C. § 1326(a)(2).

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

Making the Plan Work

The provisions of a confirmed plan bind the debtor and each creditor. 11 U.S.C. § 1327. Once the court confirms the plan, the debtor must make the plan succeed. The debtor must make regular payments to the trustee either directly or through payroll deduction, which will require adjustment to living on a fixed budget for a prolonged period. Furthermore, while confirmation of the plan entitles the debtor to retain property as long as payments are made, the debtor may not incur new debt without consulting the trustee, because additional debt may compromise the debtor's ability to complete the plan. 11 U.S.C. §§ 1305(c), 1322(a)(1), 1327.

If the debtor fails to make the payments due under the confirmed plan, the court may dismiss the case or convert it to a liquidation case under chapter 7 of the Bankruptcy Code. 11 U.S.C. § 1307(c). The court may also dismiss or convert the

[6] There is a fee charged for converting a case under chapter 13 to a case under chapter 7. Information on fees is available on the court's website.

debtor's case if the debtor fails to pay any post-filing domestic support obligations (i.e., child support, alimony), or fails to make required tax filings during the case. 11 U.S.C. §§ 1307(c) and (e), 1308, 521.

Payments to Creditors

Plan payments are made to the trustee, and the trustee distributes the plan payments pursuant to the terms of the confirmed chapter 13 plan. The Court has not role in the disbursement of payments. Questions about payments should be made directly to the office of the Chapter 13 Trustee assigned to the case.

The Chapter 13 Discharge

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

A chapter 13 debtor is entitled to a discharge upon completion of all payments under the chapter 13 plan so long as the debtor: (1) certifies (if applicable) that all domestic support obligations that came due prior to making such certification have been paid; (2) has not received a discharge in a prior case filed within a certain time frame (two years for prior chapter 13 cases and four years for prior chapter 7, 11 and 12 cases); and (3) has completed an approved course in financial management (if the U.S. trustee or bankruptcy administrator for the debtor's district has determined that such courses are available to the debtor). 11 U.S.C. § 1328.

The court will not enter the discharge, however, until it determines, after notice and a hearing, that there is no reason to believe there is any pending proceeding that might give rise to a limitation on the debtor's homestead exemption. 11 U.S.C. § 1328(h).

The discharge releases the debtor from all debts provided for by the plan or disallowed (under section 502), with limited exceptions. Creditors provided for in full or in part under the chapter 13 plan may no longer initiate or continue any legal or other action against the debtor to collect the discharged obligations.

As a general rule, the discharge releases the debtor from all debts provided for by the plan or disallowed, with the exception of certain debts referenced in 11 U.S.C. § 1328. Debts not discharged in chapter 13 include certain long term obligations (such as a home mortgage), debts for alimony or child support, certain taxes, debts for most government funded or guaranteed educational loans or benefit overpayments, debts arising from death or personal injury caused by driving while intoxicated or under the influence of drugs, and debts for restitution or a criminal fine included in a sentence on the debtor's conviction of a crime. To the extent that they are not fully paid under the chapter 13 plan, the debtor will still be responsible for these debts after the bankruptcy case has concluded. Debts for money or property obtained by false pretenses, debts for fraud or defalcation while acting in a fiduciary capacity, and debts for restitution or damages awarded in a civil case for willful or malicious actions by the debtor that cause personal injury or death to a person will be discharged unless a creditor timely files and prevails in an action to have such

debts declared nondischargeable. 11 U.S.C. §§ 1328, 523(c); Fed. R. Bankr. P. 4007(c).

The discharge in a chapter 13 case is somewhat broader than in a chapter 7 case. Debts dischargeable in a chapter 13, but not in chapter 7, include debts for willful and malicious injury to property (as opposed to a person), debts incurred to pay nondischargeable tax obligations, and debts arising from property settlements in divorce or separation proceedings. 11 U.S.C. § 1328(a).

The Chapter 13 Hardship Discharge

After confirmation of a plan, circumstances may arise that prevent the debtor from completing the plan. In such situations, the debtor may ask the court to grant a "hardship discharge." 11 U.S.C. § 1328(b). Generally, such a discharge is available only if: (1) the debtor's failure to complete plan payments is due to circumstances beyond the debtor's control and through no fault of the debtor; (2) creditors have received at least as much as they would have received in a chapter 7 liquidation case; and (3) modification of the plan is not possible. Injury or illness that precludes employment sufficient to fund even a modified plan may serve as the basis for a hardship discharge. The hardship discharge is more limited than the discharge described above and does not apply to any debts that are nondischargeable in a chapter 7 case. 11 U.S.C. § 523.

GLOSSARY

ADVERSARY PROCEEDING

A lawsuit arising in a bankruptcy case that is commenced by the filing of a complaint in the Bankruptcy Court.

AFFIDAVIT

A written statement of facts, confirmed by the oath taken before an officer having authority to administer such oath (such as a notary public) or affirmation of the partying making it. See also **VERIFICATION.**

ANSWER

A defendant's response to a complaint filed in an adversary proceeding. Since the defendant may be a plaintiff, but also a defendant in counterclaim, the response is also called an *Answer.*

APPELLANT

The party who files and seeks an appeal of a judge's decision.

APPELLEE

The part against whom the appeal has been taken. The appellee is the party who has no interest in objecting to the court's judgment, decision or order.

APPLICATION

A formal request, usually in writing, to the court to grant certain relief. See also, **MOTION.**

BAR DATE

Traditionally the last date set to take a specific action.

CONFIRMATION

Approval of a plan for a debtor to pay creditors provided that the specific criteria are met.

CONTINGENT CLAIM

A claim that may be owed by the debtor under certain circumstances, for example, where the debtor is a cosigner on another person's loan and that person fails to pay.

DISCOVERY

The process where parties exchange and obtain information about their respective positions. See Fed.R. Bankr. P. 7026, et seq.

DISMISSAL

An order or judgment terminating a motion, adversary proceeding or bankruptcy case.

DISMISSAL WITH PREJUDICE

An order or judgment terminating a motion, adversary proceeding or bankruptcy case that prohibits the party from bringing the same case, claim or cause of action again, or for a specific period of time (see e.g. § 109(g)).

EXECUTORY CONTRACT OR LEASE

Contracts or leases under which both parties to the agreement have duties remaining to be performed or have not been fully completed. If a contract or lease is executory, a debtor may continue to fulfill the terms of the contract or lease ("assume" it) or choose to cancel the contract or lease ("reject" it). Examples of an executory contract are: a lease for a residence, car or equipment; an employment agreement; a home improvement contract; a service contract; or a contract for delivery of goods in the future.

FRAUDULENT CONVEYANCE

A transfer of debtor's property made with intent to defraud or for which the debtor receives less than the transferred property's value.

INSIDER

A relative, friend, co-worker or other person of close relation of an individual debtor or a person with a close relationship to the debtor.

JURISDICTION

The legal authority the Court has to hear and decide a case.

LIEN

A charge upon specific property designed to secure payment from a debtor or performance of an obligation.

LIQUIDATE

To convert assets into cash.

LIQUIDATED CLAIM

A creditor's claim for a fixed amount of money.

MOTION

An application for relief or request for an order of the Court presented to the Court. Certain motions have a response deadline by which another party shall respond or object to the relief requested in the motion.

MOTION FOR RELIEF FROM STAY

A request by a creditor for an order terminating and/or limiting the automatic stay to enable the creditor to take an action that would otherwise be prohibited by the automatic stay.

NONDISCHARGEABLE DEBT

A debt that will not be subject to the discharge. See 11 U.S.C. §§ 523(a), 1328(a).

OBJECTION TO DISCHARGE

An objection, filed by a party in interest, to the debtor being released from personal liability for any or all debts. This is brought by an **ADVERSARY PROCEEDING.**

OBJECTION TO EXEMPTION

A trustee's or creditor's objection to a debtor's attempt to claim certain property as exempt.

ORDER

An order is a judicial decree resolving an issue or question raised before the Court that grants relief, denies relief, or directs a party to perform an action or to refrain from taking action.

ORDER FOR RELIEF

An injunction that stops all proceedings against the debtor and the debtor's property. The order for relief, or automatic stay is effective immediately upon the filing of a voluntary petition, subject to the limitations set forth in § 362.

PARTY IN INTEREST

A party who is actually and substantially interested in the subject matter, as distinguished from one who has only a nominal or technical interest in it.

PLEADING

A written document where a party alleges and/or counter alleges facts giving rise to a legal action or request for relief.

PREFERENCE

Certain payments or transfers of a debtor's property to a creditor within 90 days before the filing of the bankruptcy case may be considered preferential, and a trustee may seek to recover those payments on behalf of the estate. See § 547.

PRIORITY CLAIM

A claim that is entitled to be paid before general unsecured claims. See § 507.

PROOF OF CLAIM

A written statement identifying the amount and reason a debtor owes a creditor money. See Official Form 10.

REAFFIRMATION AGREEMENT

An agreement between a debtor and a creditor in which the debtor agrees to pay all or a portion of a debt that would be otherwise dischargeable.

REDEMPTION

Where the debtor pays the creditor the full current or "market value" of property that is secured by a purchase money security agreement. In exchange, the lien on the property is extinguished.

SETOFF

A claim by a debtor that the creditor owes the debtor money which should be subtracted from the amount claimed by creditor. By claiming a setoff the debtor does not necessarily dispute the creditor's claim, but he/she claims the right to prove that the creditor owes him/her an amount of money from some other transaction and that the amount should be deducted from the creditor's claim.

STIPULATION

A voluntary agreement between opposing parties.

SUMMONS

An official court document informing the party served that an action has been filed against them, the court where the summons originated and that the party is required to appear, on the date indicated on the summons, and answer the complaint in such action.

TRANSCRIPT

A written record prepared by the court reporter of the proceedings that occurred in Court.

UNITED STATES TRUSTEE

An officer of the Department of Justice who supervises trustees and the administration of bankruptcy estates. The U.S. Trustee appoints trustees, and monitors plans, disclosure statements, creditors' committees, applications for compensation, and the process of bankruptcy case, in addition to performing other statutory duties (see 28 U.S.C. § 586).

UNDERSECURED CLAIM

A claim secured by property that has a value less than the amount owed.

UNLIQUIDATED CLAIM

A claim for which a specific value has not been determined.

UNSCHEDULED DEBT

A debt that should have been listed in the schedules filed with the Court but was not.

UNSECURED CLAIM

A claim with respect to a debt, the payment of which is not backed up by collateral or a lien on property of the debtor.

UNSECURED DEBT

A financial obligation that is not backed by a security agreement or a lien on property of the debtor.

VACATE

To cancel, annul or render of no effect. If a judgment or order is vacated, it is as if the order or judgment was never entered.

VENUE

The proper locality of a legal proceeding.

VERIFICATION

Confirmation of the correctness, truth, or authenticity of a complaint, statement or document. Federal Rules of Bankruptcy Procedure 1008 requires that bankruptcy petitions, lists, schedules, statements, and amendments to be verified as provided in 28 U.S.C. § 1746.

For additional definitions of terms used in Bankruptcy, please refer to 11 U.S.C. § 101.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

_____

In re:

JOHN AND MARY DOE,

Debtors.

CHAPTER 7
Case no. 13-66233 (ABC)

_____

NOTICE OF APPERANCE AND REQUEST FOR NOTICE

Please take notice that John Smith, Creditor in the above-captioned case, hereby requests that notice of all matters arising in this case of which notice is sent to any creditor, party in interest, creditor's committee or a member of any creditors' committee be sent to:

John Smith
424 Main Street
Boston, MA 02000

DATED:_____

Respectfully submitted:

_____
John Smith
424 Main Street
Boston, MA 02000

B10 (Official Form 10) (04/13)

UNITED STATES BANKRUPTCY COURT		**PROOF OF CLAIM**
Name of Debtor:	Case Number:	
NOTE: *Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.*		
Name of Creditor (the person or other entity to whom the debtor owes money or property):		**COURT USE ONLY**
Name and address where notices should be sent: Telephone number: email:		❒ Check this box if this claim amends a previously filed claim. **Court Claim Number:**_____ (*If known*) Filed on:_____
Name and address where payment should be sent (if different from above): Telephone number: email:		❒ Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.

1. Amount of Claim as of Date Case Filed: $_____

If all or part of the claim is secured, complete item 4.

If all or part of the claim is entitled to priority, complete item 5.

❒Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.

2. Basis for Claim: _____
(See instruction #2)

3. Last four digits of any number by which creditor identifies debtor:	**3a. Debtor may have scheduled account as:** _____ (See instruction #3a)	**3b. Uniform Claim Identifier (optional):** __ (See instruction #3b)

4. Secured Claim (See instruction #4)
Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information.

Nature of property or right of setoff: ❒Real Estate ❒Motor Vehicle ❒Other
Describe:

Value of Property: $_____

Annual Interest Rate_____**%** ❒Fixed or ❒Variable
(when case was filed)

Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any:

$_____

Basis for perfection: _____

Amount of Secured Claim: **$**_____

Amount Unsecured: **$**_____

5. Amount of Claim Entitled to Priority under 11 U.S.C. § 507 (a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.

❒ Domestic support obligations under 11 U.S.C. § 507 (a)(1)(A) or (a)(1)(B).

❒ Wages, salaries, or commissions (up to $12,475*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. § 507 (a)(4).

❒ Contributions to an employee benefit plan – 11 U.S.C. § 507 (a)(5).

Amount entitled to priority:

$_____

❒ Up to $2,775* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. § 507 (a)(7).

❒ Taxes or penalties owed to governmental units – 11 U.S.C. § 507 (a)(8).

❒ Other – Specify applicable paragraph of 11 U.S.C. § 507 (a)(__).

**Amounts are subject to adjustment on 4/01/16 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

6. Credits. The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #6)

7. Documents: Attached are **redacted** copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, security agreements, or, in the case of a claim based on an open-end or revolving consumer credit agreement, a statement providing the information required by FRBP 3001(c)(3)(A). If the claim is secured, box 4 has been completed, and **redacted** copies of documents providing evidence of perfection of a security interest are attached. If the claim is secured by the debtor's principal residence, the Mortgage Proof of Claim Attachment is being filed with this claim. *(See instruction #7, and the definition of "**redacted**".)*

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

8. Signature: (See instruction #8)

Check the appropriate box.

❒ I am the creditor. ❒ I am the creditor's authorized agent. ❒ I am the trustee, or the debtor, or their authorized agent. (See Bankruptcy Rule 3004.) ❒ I am a guarantor, surety, indorser, or other codebtor. (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: _____
Title: _____
Company: _____
Address and telephone number (if different from notice address above):
_____
_____
_____
Telephone number: email:

_____
(Signature) (Date)

Penalty for presenting fraudulent claim Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:
Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

Creditor's Name and Address:
Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:
State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:
State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:
State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:
Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

3b. Uniform Claim Identifier:
If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

4. Secured Claim:
Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. § 507 (a).
If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:
An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:
Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest and documents required by FRBP 3001(c) for claims based on an open-end or revolving consumer credit agreement or secured by a security interest in the debtor's principal residence. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

8. Date and Signature:
The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.

DEFINITIONS

Debtor
A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

Creditor
A creditor is a person, corporation, or other entity to whom debtor owes a debt that was incurred before the date of the bankruptcy filing. See 11 U.S.C. §101 (10).

Claim
A claim is the creditor's right to receive payment for a debt owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Proof of Claim
A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

Secured Claim Under 11 U.S.C. § 506 (a)
A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien. A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

Unsecured Claim
An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

Claim Entitled to Priority Under 11 U.S.C. § 507 (a)
Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

Redacted
A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor must show only the last four digits of any social-security, individual's tax-identification, or financial-account number, only the initials of a minor's name, and only the year of any person's date of birth. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information.

Evidence of Perfection
Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

INFORMATION

Acknowledgment of Filing of Claim
To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system (www.pacer.psc.uscourts.gov) for a small fee to view your filed proof of claim.

Offers to Purchase a Claim
Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq*.), and any applicable orders of the bankruptcy court.