

**WARNING!**  
**DO NOT FILE A BANKRUPTCY  
CASE WITHOUT FIRST RECEIVING  
BUDGET AND CREDIT COUNSELING**  
*(current as of July 9, 2008)*

1. If you are considering filing a bankruptcy case, you should know that Bankruptcy law requires you to receive budget and credit counseling during the 180-day period **before** you file your petition.
2. Also, as evidence of compliance with Bankruptcy law, you are required to file a certificate of completion of budget and credit counseling **with** the petition. If you have received the counseling but do not have the certificate, the Bankruptcy rules give you a grace period of 15 days after you file the petition to file the certificate - but only if you received the counseling before you file the petition, as described in paragraph 1 above.
3. If you do not receive the briefing **before you file your petition** and if you do not file the certificate **with** the petition (or within 15 days after filing the petition, as described in paragraph 2 above), your case may be dismissed.

If your case is dismissed:

- you will lose the filing fee you paid
- your creditors will be able to resume collection activities against you
- and if you later file another bankruptcy case
  - you will have to pay a second filing fee
  - you may have to take extra steps to stop creditors' collection activities, and
  - the automatic stay terminates after 30 days unless the court grants a motion for extension of the stay.

For details on this law and how to get the required budget and credit counseling briefing, please ask for our self-represented debtor packet and also visit the court's website at <http://www.nmcourt.fed.us/usbc/>.

United States Bankruptcy Court  
in the District of New Mexico

**CREDIT COUNSELING REQUIREMENTS FOR PERSONS**  
(This document is current as of July 9, 2008)

If you file a bankruptcy petition with or without a lawyer, you must obey the credit counseling requirements of 11 U.S.C. section 109(h). Carefully read this document which

- (1) states the law,
- (2) gives the Court's explanation of the law, and
- (3) tells you what you should do and what forms you should complete to comply with the law. These forms are available on the Court's website at [www.nmcourt.fed.us/usbc](http://www.nmcourt.fed.us/usbc).

**FAILURE TO FOLLOW THESE PROCEDURES AND SUBMIT THE REQUIRED FORMS MAY RESULT IN DISMISSAL OF YOUR CASE.**

**Title 11, United States Code, Section 109. Who may be a debtor.** The text of applicable paragraphs in sections 109 (h) (1), (3), and (4)<sup>1</sup> follows:

**I. YOU MUST RECEIVE CREDIT COUNSELING BEFORE YOU FILE YOUR BANKRUPTCY PETITION.**

**THE LAW:**

**Section (h)(1)** Subject to paragraphs (2) and (3) [below] and notwithstanding any other provision of this section, an individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) 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.

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<sup>1</sup>The United States trustee has approved several non-profit budget and credit counseling agencies who can provide counseling services in the District of New Mexico. Because these services are available, section 109(h)(2) does not apply in New Mexico.

**COURT'S EXPLANATION:**

If you file a bankruptcy case, you must complete budget and credit counseling during the 180 days **before you file your petition.**

The list of approved credit counseling agencies in New Mexico is available on the United States trustee's website: [www.usdoj.gov/ust/eo/bapcpa/ccde/cc\\_approved.htm](http://www.usdoj.gov/ust/eo/bapcpa/ccde/cc_approved.htm). These approved agencies provide counseling services in person, by telephone or via the Internet. If you and your spouse intend to file a joint petition, each of you must receive budget and credit counseling. The counseling agency should provide a certificate of completion of credit counseling to each person who completes the counseling.

**WHAT YOU SHOULD DO:**

**COMPLETE CREDIT COUNSELING BEFORE YOU FILE.** Ask the counseling agency to give you a certificate of completion of credit counseling.

If the agency provides you with a certificate of completion of credit counseling so that you are able to submit it with your petition, complete Exhibit D to the petition (official form 1) by checking box #1, attach the certificate to Exhibit D, and file with the petition.

If the agency does not provide you with a certificate of completion of credit counseling before you have to file your petition, complete Exhibit D to the petition (official form 1) by checking box #2. You will have 15 days from the date of the filing of the petition to file the certificate of completion of credit counseling with the court. Attach the certificate of completion of credit counseling to local NM Form 503 and file it with the court.

**IF YOU DO NOT SUBMIT THE CERTIFICATE WITH YOUR PETITION OR WITHIN 15 DAYS OF FILING YOUR PETITION, YOUR CASE MAY BE DISMISSED.**

**II. Under very limited conditions, you may ask for a waiver of the "pre-filing" requirement to receive credit counseling.**

This is not a waiver of the requirement that you obtain the counseling, but a waiver of the requirement that you obtain the counseling before filing.

**THE LAW:**

**Section (h)(3)(A)** Subject to subparagraph (B), the requirements of paragraph (1) [above] shall not apply with respect to a debtor who submits to the court a certification

(i) that describes exigent circumstances that merit a waiver of the requirements of paragraph (1);

(ii) that states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 5-day period beginning on the date on which the debtor made that request; and

(iii) that is satisfactory to the court.

**Section (h)(3)(B)** With respect to a debtor, an exemption under subparagraph (A) shall cease to apply to that debtor on the date on which the debtor meets the requirements of paragraph (1) but in no case may the exemption apply to that debtor after the date that is 30 days after the debtor files a petition, except that the court, for cause, may order an additional 15 days.

**COURT'S EXPLANATION:**

If you need to file a bankruptcy case before you have received budget and credit counseling, **you must have "exigent circumstances" and you must have asked for but were not able to obtain credit counseling services within five (5) days from the date you first made the request.**

**Exigent circumstances:** A situation that demands unusual or immediate action and that may allow people to circumvent usual procedures, as when a neighbor breaks through a window of a burning house to save someone inside. BLACK'S LAW DICTIONARY 236 (7th ed. 1999).

If the judge approves your excuse, you must obtain credit counseling no later than 30 days after you file your case, unless the court orders an extension for an additional 15 days. If you need an extension, you must file a motion for extension of time to obtain credit counseling ***within the 30-day period.***

IF YOU DO NOT OBTAIN CREDIT COUNSELING, OR IF YOU DO NOT TIMELY FILE A MOTION FOR EXTENSION OF TIME, YOUR CASE MAY BE DISMISSED.

**WHAT YOU SHOULD DO:**

If you have "exigent circumstances" and you have NOT obtained budget and credit counseling PRIOR to filing your case, contact one of the approved budget and credit counseling services NOW. If you are not able to obtain counseling within 5 days of the date you first request counseling, complete Exhibit D to the petition (official form 1) by checking box 3 and providing an explanation of your exigent circumstances. You must also file local NM Form 504 (motion) with the petition. THEN, obtain the counseling no later than 30 days after you file the petition. Once you obtain the counseling, submit NM Form 503 with the certificate of completion of counseling attached.

IF YOU HAVE THIS SITUATION AND YOU DO NOT SUBMIT NM FORM 504 WITH YOUR PETITION, YOUR CASE MAY BE DISMISSED. FAILURE TO OBTAIN CREDIT COUNSELING WITHIN 30 DAYS OF FILING YOUR PETITION MAY RESULT IN DISMISSAL OF YOUR CASE.

III. The credit counseling requirement does not apply IF the court determines that you are unable to receive counseling because you are incapacitated, disabled, or on active military duty in a military combat zone.

**THE LAW:**

**Section (h)(4)** The requirements of paragraph (1) shall not apply with respect to a debtor whom the court determines, after notice and hearing, is unable to complete those requirements because of incapacity, disability, or active military duty in a military combat zone. For the purposes of this paragraph, incapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; and disability means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing.

**COURT'S EXPLANATION:**

If the court determines that you are **incapacitated** (for example, you are impaired by reason of mental illness or mental

deficiency so that you are incapable of realizing and making rational decisions with respect to your financial responsibilities) or **disabled** (for example, you are so physically impaired as to be unable, after reasonable effort, to participate in an in-person, telephone, or Internet briefing regarding budget and credit counseling) or **on active military duty in a military combat zone**, the court will enter an order confirming the determination and exempting you from the credit counseling requirement.

**WHAT YOU SHOULD DO:**

**If you are incapacitated, disabled, or on active military duty in a military combat zone**, complete Exhibit D to the petition (official form 1) by checking box 4 and the appropriate box regarding incapacity, disability, or military duty. You must also file local NM Form 505 (motion) with the petition. You may wish to attach supporting documentation to the form.

The court will hold a hearing on your request for a determination. If the court determines that you should be exempt from taking the credit counseling, the court will enter an order confirming the determination and exempting you from the credit counseling requirement.

If the court determines that you are not exempt from the requirement to receive credit counseling, the court will give you a time period by which you must obtain the counseling. Once you obtain the counseling, submit NM Form 503 with the certificate of completion of counseling attached.

**IF YOU HAVE THIS SITUATION AND YOU DO NOT SUBMIT NM FORM 505 WITH YOUR PETITION, YOUR CASE MAY BE DISMISSED.**

**Please note:** It is possible in a joint case (where husband and wife are both debtors on the petition) that one debtor is able to and does obtain credit counseling and submits the certificate of counseling with the petition while the other debtor cannot obtain credit counseling and needs to request a determination as provided in section 109(h)(4), and thus submits NM Form 505.

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**IMPORTANT NOTICE TO INDIVIDUAL DEBTORS**  
**Regarding Individual Debtor's Duty to Provide Documentation**

The Clerk's Office of the United States Bankruptcy Court for the District of New Mexico provides this notice to individual debtors. Failure to follow the directions in this notice to provide the required documentation is grounds for dismissal of your case. If you are an individual debtor (and this applies to both debtors in a joint petition), you must provide the following to your case trustee as directed by law.

**(1) Copies of Payment Advices.** Pursuant to court order,<sup>1</sup> you shall provide to your case trustee copies of all payment advices or other evidence of payments you received from any employer within 60 days before the date of the filing of the petition [11 U. S. C. § 521(a)(1)(B)(iv); Fed R Bankr. P. 4002(b)(2)(A)]. In a joint petition, this requirement applies to each debtor. **Copies of payment advices must be delivered to your case trustee not later than 7 days before the date first set for your meeting of creditors. DO NOT FILE THESE DOCUMENTS WITH THE COURT.**

**(2) Copy of Federal Income Tax Return.** Pursuant to 11 U. S. C. § 521(e)(2)(A)(ii) and Fed R. Bankr. P. 4002(b)(3), you shall provide to your case trustee a copy of your most recent Federal income tax return or a transcript of your most recent federal income tax return or a written statement that the document does not exist. In a joint petition, this requirement applies to each debtor. **The copy or transcript of the tax return or the statement that the tax return does not exist must be delivered to your case trustee not later than 7 days before the first date set your meeting of creditors. DO NOT FILE THESE DOCUMENTS WITH THE COURT.**

**FAILURE TO TIMELY PROVIDE COPIES OF THESE DOCUMENTS TO YOUR CASE TRUSTEE MAY RESULT IN DISMISSAL OF YOUR CASE.**

If your case is dismissed, you will lose the filing fee you paid, and your creditors will be able to resume collection activities against you. If you later file another bankruptcy case, you will have to pay a second filing fee, you may have to take extra steps to stop creditors' collection activities, and the automatic stay terminates after 30 days unless the court grants a motion for extension of the stay.

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<sup>1</sup>Order Directing That Payment Advices Not be Filed With the Court But Instead be Provided to Trustee and, Upon Timely Request, to Creditors, entered October 4, 2005, in Misc. Case No. 05-00001, Court Administrative Matters. The order is available for viewing at <http://www.nmcourt.fed.us/usbc>.

**IMPORTANT NOTICE TO INDIVIDUAL DEBTORS**  
**Regarding Individual Debtor's Duty to Provide Documentation**

**(3) Requirements of the United States Trustee. You are required to bring the following with you to the meeting of creditors** [Fed. R. Bankr. P. 4002(b)(1) and (2)]. In a joint petition, these requirements apply to each debtor.

- a. A picture ID issued by a governmental unit, or other personal identifying information that establishes the debtor's identity;
- b. Evidence of social security number(s), or a written statement that such documentation does not exist;
- c. Statements for each of the debtor's depository and investment accounts including checking, savings, and money market accounts, mutual funds and brokerage accounts for the time period that includes the date of filing of the petition; and
- d. Documentation of monthly expenses claimed by the debtor when required by § 707(b)(2)(A) or (B). The documentation referred to here are your records of monthly expenses which you use to complete certain sections of the Chapter 7 and Chapter 13 statements of income, specifically:

**For chapter 7 case:**

*Part V, Calculation of Deductions Allowed Under § 707(b)(2), Part VI, Determination of § 707 (b)(2) Presumption, and Part VII, Additional Expense Claims on the Statement of Current Income and Means Test Calculation, Form B22A, if you are required to complete that section based on your answer in Line 15 of that form.*

**For chapter 13 case:**

*Part IV, Calculation of Deductions Allowed Under § 707(b)(2), Part V, Determination of Disposable Income Under § 1325(b)(2), and Part VI, Additional Expense Claims, on the Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income, Form B22C, if you are required to complete that section based on your answer in Line 23 of that form.*

You are also required to provide any additional information requested by the trustee.

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September 20, 2005

**Director's Interim Guidance  
Regarding Tax Information  
Under 11 U.S.C. § 521**

Section 315(c) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the Act) mandates that the Director of the Administrative Office of the United States Courts establish procedures for safeguarding the confidentiality of tax information required to be provided under 11 U.S.C. § 521.<sup>1</sup> In accordance with the Act, the Director provides the following guidance on procedures to protect a debtor's tax information.<sup>2</sup>

**I. No tax information filed with the bankruptcy court or otherwise provided by the debtor will be available to the public via the Internet, PACER, or CM/ECF.**

In order for tax information to be electronically entered into a court's CM/ECF system, the "tax information" event must be selected from the CM/ECF event list. The "tax information" event limits access to the filed tax information to those users assigned "court" log-ins (*i.e.*, judicial officers and court employees). All other users (including PACER users) will be limited to viewing a docket event on the docket report indicating that tax information has been filed. These other users will not be able to open and view the tax information.

**II. Debtors providing tax information under 11 U.S.C. § 521 should redact personal information as set forth in the Judicial Conference's Policy on Privacy and Public Access to Electronic Case Files.**

All tax information provided in accordance with section 521 of the Bankruptcy Code is subject to the Judicial Conference of the United States Policy on Privacy and Public Access to Electronic Case Files <http://www.privacy.uscourts.gov/Policy.htm> ("JCUS policy") (JCUS-SEP/OCT 01, pp. 49-50). In accordance with the JCUS policy, the debtor should take the following steps to redact personal identifiers in any tax information filed with the court or provided to the trustee or creditor(s), in either electronic or paper form:

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<sup>1</sup> For purposes of the Director's Interim Guidance Regarding Tax Information Under 11 U.S.C. § 521 ("Interim Guidance"), the term "tax information" includes tax returns, transcripts of returns, amendments to returns and any other document containing tax information provided by the debtor under section 521 of title 11, United States Code.

<sup>2</sup> Interim Bankruptcy Rule 4002 (b)(5) provides that the debtor's obligation to provide tax information to the trustee or a copy of the information submitted to the trustee provided to a requesting creditor pursuant to 11 U.S.C. § 521(e)(2) is subject to the Interim Guidance. In addition, section 315(c)(1) of the Act authorizes the Director to promulgate guidance to protect the "confidentiality of any tax information required to be provided under this section," which encompasses information provided under section 521(e) and (f) of the Bankruptcy Code. Thus, except where expressly limited to tax information filed with the court, this Interim Guidance applies to any other document containing tax information required to be filed with the court or otherwise provided by the debtor under section 521 of the Bankruptcy Code.

- **Social Security numbers.** If an individual's social security number is included, only the last four digits of that number should appear;
- **Names of minor children.** If a minor child(ren) is/are identified by name, only the child(ren)'s initials should appear;
- **Dates of birth.** If an individual's date of birth is included, only the year should appear; and
- **Financial account numbers.** If financial account numbers are provided, only the last four digits of these numbers should appear.

Court employees are not responsible for redacting any of the personal identifying information. The responsibility for redacting personal identifiers rests solely with the debtor.

The court should make this Interim Guidance, implementing the JCUS policy, available to the public and members of the local bar.

### **III. Procedure for requesting and obtaining access to tax information filed with the bankruptcy court under 11 U.S.C. § 521(f).**

To gain access to a debtor's tax information under 11 U.S.C. § 521(f), the United States trustee (or a bankruptcy administrator, if any), trustee, or party in interest, including a creditor, must follow the procedures set forth below.

A written request that a debtor file copies of tax returns with the court pursuant to 11 U.S.C. § 521(f) shall be filed with the court and served on the debtor and debtor's counsel, if any.

In order to obtain access to debtor's tax information that is filed with the bankruptcy court, the movant must file a motion with the court, which should include:

- a description of the movant's status in the case, to allow the court to ascertain whether the movant may properly be given access to the requested tax information;
- a description of the specific tax information sought;
- a statement indicating that the information cannot be obtained by the movant from any other sources; and
- a statement showing a demonstrated need for the tax information.

An order granting a motion for access to tax information should include language advising the movant that the tax information obtained is confidential and should condition dissemination of the tax information as appropriate under the circumstances of the particular case. At the discretion of the court, the order may state that sanctions may be imposed for improper use, disclosure, or dissemination of the tax information.

#### **IV. Access to tax information when a motion for access has been granted.**

Local courts have authority to determine procedures, the details of which are within the discretion of the court, for transmitting the tax information to the movant when access has been granted.<sup>3</sup> Possible methods include mailing a hard copy, or developing procedures to view tax information at the clerk's office.

The transmission of the tax information to the movant, by whatever means the court deems appropriate, should be recorded as a docket event in CM/ECF so that the docket will reflect that the court has taken the action necessary to effect the provisions of its order granting access.

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<sup>3</sup> Administrative Office staff will explore the feasibility of including modifications in a future release of CM/ECF, which will provide access to a particular user that has been granted access to tax information by the court. Until such modifications can be incorporated into CM/ECF, local courts will need to determine how to provide access.

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## Bankruptcy Basics

### The Process

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Article I, Section 8, of the United States Constitution authorizes Congress to enact "uniform Laws on the subject of Bankruptcies." Under this grant of authority, Congress enacted the "Bankruptcy Code" in 1978. The Bankruptcy Code, which is codified as title 11 of the United States Code, has been amended several times since its enactment. It is the uniform federal law that governs all bankruptcy cases.

The procedural aspects of the bankruptcy process are governed by the Federal Rules of Bankruptcy Procedure (often called the "Bankruptcy Rules") and local rules of each bankruptcy court. The Bankruptcy Rules contain a set of official forms for use in bankruptcy cases. The Bankruptcy Code and Bankruptcy Rules (and local rules) set forth the formal legal procedures for dealing with the debt problems of individuals and businesses.

There is a bankruptcy court for each judicial district in the country. Each state has one or more districts. There are 90 bankruptcy districts across the country. The bankruptcy courts generally have their own clerk's offices.

The court official with decision-making power over federal bankruptcy cases is the United States bankruptcy judge, a judicial officer of the United States district court. The bankruptcy judge may decide any matter connected with a bankruptcy case, such as eligibility to file or whether a debtor should receive a discharge of debts. Much of the bankruptcy process is administrative, however, and is conducted away from the courthouse. In cases under chapters 7, 12, or 13, and sometimes in chapter 11 cases, this administrative process is carried out by a trustee who is appointed to oversee the case.

A debtor's involvement with the bankruptcy judge is usually very limited. A typical chapter 7 debtor will not appear in court and will not see the bankruptcy judge unless an objection is raised in the case. A chapter 13 debtor may only have to appear before the bankruptcy judge at a plan confirmation hearing. Usually, the only formal proceeding at which a debtor must appear is the meeting of creditors, which is usually held at the offices of the U.S. trustee. This meeting is informally called a "341 meeting" because section 341 of the Bankruptcy Code requires that the debtor attend this meeting so that creditors can question the debtor about debts and property.

A fundamental goal of the federal bankruptcy laws enacted by Congress is to give debtors a financial "fresh start" from burdensome debts. The Supreme Court made this point about the purpose of the bankruptcy law in a 1934 decision:

[I]t gives to the honest but unfortunate debtor...a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.

*Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). This goal is accomplished through the bankruptcy discharge, which releases debtors from personal liability from specific debts and prohibits creditors from ever taking any action against the debtor to collect those debts. This publication describes the bankruptcy discharge in a question and answer format, discussing the timing of the discharge, the scope of the discharge (what debts are discharged and what debts are not discharged), objections to discharge, and revocation of the discharge. It also describes what a debtor can do if a creditor attempts

to collect a discharged debt after the bankruptcy case is concluded.

Six basic types of bankruptcy cases are provided for under the Bankruptcy Code, each of which is discussed in this publication. The cases are traditionally given the names of the chapters that describe them.

**Chapter 7**, entitled Liquidation, contemplates an orderly, court-supervised procedure by which a trustee takes over the assets of the debtor's estate, reduces them to cash, and makes distributions to creditors, subject to the debtor's right to retain certain exempt property and the rights of secured creditors. Because there is usually little or no nonexempt property in most chapter 7 cases, there may not be an actual liquidation of the debtor's assets. These cases are called "no-asset cases." A creditor holding an unsecured claim will get a distribution from the bankruptcy estate only if the case is an asset case and the creditor files a proof of claim with the bankruptcy court. In most chapter 7 cases, if the debtor is an individual, he or she receives a discharge that releases him or her from personal liability for certain dischargeable debts. The debtor normally receives a discharge just a few months after the petition is filed. Amendments to the Bankruptcy Code enacted in to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 require the application of a "means test" to determine whether individual consumer debtors qualify for relief under chapter 7. If such a debtor's income is in excess of certain thresholds, the debtor may not be eligible for chapter 7 relief.

**Chapter 13**, entitled Adjustment of Debts of an Individual With Regular Income, is designed for an individual debtor who has a regular source of income. Chapter 13 is often preferable to chapter 7 because it enables the debtor to keep a valuable asset, such as a house, and because it allows the debtor to propose a "plan" to repay creditors over time – usually three to five years. Chapter 13 is also used by consumer debtors who do not qualify for chapter 7 relief under the means test. At a confirmation hearing, the court either approves or disapproves the debtor's repayment plan, depending on whether it meets the Bankruptcy Code's requirements for confirmation. Chapter 13 is very different from chapter 7 since the chapter 13 debtor usually remains in possession of the property of the estate and makes payments to creditors, through the trustee, based on the debtor's anticipated income over the life of the plan. Unlike chapter 7, the debtor does not receive an immediate discharge of debts. The debtor must complete the payments required under the plan before the discharge is received. The debtor is protected from lawsuits, garnishments, and other creditor actions while the plan is in effect. The discharge is also somewhat broader (i.e., more debts are eliminated) under chapter 13 than the discharge under chapter 7.

**Chapter 11**, entitled Reorganization, ordinarily is used by commercial enterprises that desire to continue operating a business and repay creditors concurrently through a court-approved plan of reorganization. The chapter 11 debtor usually has the exclusive right to file a plan of reorganization for the first 120 days after it files the case and must provide creditors with a disclosure statement containing information adequate to enable creditors to evaluate the plan. The court ultimately approves (confirms) or disapproves the plan of reorganization. Under the confirmed plan, the debtor can reduce its debts by repaying a portion of its obligations and discharging others. The debtor can also terminate burdensome contracts and leases, recover assets, and rescale its operations in order to return to profitability. Under chapter 11, the debtor normally goes through a period of consolidation and emerges with a reduced debt load and a reorganized business.

**Chapter 12**, entitled Adjustment of Debts of a Family Farmer or Fisherman with Regular Annual Income, provides debt relief to family farmers and fishermen with regular income. The process under chapter 12 is very similar to that of chapter 13, under which the debtor proposes a plan to repay debts over a period of time – no more than three years unless the court approves a longer period, not exceeding five years. There is also a trustee in every chapter 12 case whose duties are very similar to those of a chapter 13 trustee. The chapter 12 trustee's disbursement of payments to creditors under a confirmed plan parallels the procedure under chapter 13. Chapter 12 allows a family farmer or fisherman to continue to operate the business while the plan is being carried out.

[Chapter 9](#), entitled Adjustment of Debts of a Municipality, provides essentially for reorganization, much like a reorganization under chapter 11. Only a "municipality" may file under chapter 9, which includes cities and towns, as well as villages, counties, taxing districts, municipal utilities, and school districts.

The purpose of [Chapter 15](#), entitled Ancillary and Other Cross-Border Cases, is to provide an effective mechanism for dealing with cases of cross-border insolvency. This publication discusses the applicability of Chapter 15 where a debtor or its property is subject to the laws of the United States and one or more foreign countries.

In addition to the basic types of bankruptcy cases, Bankruptcy Basics provides an overview of the [Servicemembers' Civil Relief Act](#), which, among other things, provides protection to members of the military against the entry of default judgments and gives the court the ability to stay proceedings against military debtors.

This publication also contains a description of liquidation proceedings under the [Securities Investor Protection Act](#) ("SIPA"). Although the Bankruptcy Code provides for a stockbroker liquidation proceeding, it is far more likely that a failing brokerage firm will find itself involved in a SIPA proceeding. The purpose of SIPA is to return to investors securities and cash left with failed brokerages. Since being established by Congress in 1970, the Securities Investor Protection Corporation has protected investors who deposit stocks and bonds with brokerage firms by ensuring that every customer's property is protected, up to \$500,000 per customer.

The bankruptcy process is complex and relies on legal concepts like the "[automatic stay](#)," "[discharge](#)," "[exemptions](#)," and "[assume](#)." Therefore, the final chapter of this publication is a [glossary](#) of Bankruptcy Terminology which explains, in layman's terms, most of the legal concepts that apply in cases filed under the Bankruptcy Code.

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## Bankruptcy Basics

### The Discharge in Bankruptcy

The bankruptcy discharge varies depending on the type of case a debtor files: chapter 7, 11, 12, or 13. Bankruptcy Basics attempts to answer some basic questions about the discharge available to *individual debtors* under all four chapters including:

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  - [Chapter 11](#)
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### What is a discharge in bankruptcy?

A bankruptcy discharge releases the debtor from personal liability for certain specified types of debts. In other words, the debtor is no longer legally required to pay any debts that are discharged. The discharge is a permanent order prohibiting the creditors of the debtor from taking any form of collection action on discharged debts, including legal action and communications with the debtor, such as telephone calls, letters, and personal contacts.

Although a debtor is not personally liable for discharged debts, a valid lien (*i. e.*, a charge upon specific property to secure payment of a debt) that has not been avoided (*i. e.*, made unenforceable) in the bankruptcy case will remain after the bankruptcy case. Therefore, a secured creditor may enforce the lien to recover the property secured by the lien.

### When does the discharge occur?

The timing of the discharge varies, depending on the chapter under which the case is filed. In a chapter 7 (liquidation) case, for example, the court usually grants the discharge promptly on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case for substantial abuse (60 days following the first date set for the 341 meeting). Typically, this occurs about four months after the date the debtor files the petition with the clerk of the bankruptcy court. In individual chapter 11 cases, and in cases under chapter 12 (adjustment of debts of a family farmer or fisherman) and 13 (adjustment of debts of an individual with regular income), the court generally grants the discharge as soon as practicable after the debtor completes all payments under the plan. Since a chapter 12 or chapter 13 plan may provide for payments to be made over three to five years, the discharge typically occurs about four

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years after the date of filing. The court may deny an individual debtor's discharge in a chapter 7 or 13 case if the debtor fails to complete "an instructional course concerning financial management." The Bankruptcy Code provides limited exceptions to the "financial management" requirement if the U.S. trustee or bankruptcy administrator determines there are inadequate educational programs available, or if the debtor is disabled or incapacitated or on active military duty in a combat zone.

### **How does the debtor get a discharge?**

Unless there is litigation involving objections to the discharge, the debtor will usually automatically receive a discharge. The Federal Rules of Bankruptcy Procedure provide for the clerk of the bankruptcy court to mail a copy of the order of discharge to all creditors, the U.S. trustee, the trustee in the case, and the trustee's attorney, if any. The debtor and the debtor's attorney also receive copies of the discharge order. The notice, which is simply a copy of the final order of discharge, is not specific as to those debts determined by the court to be non-dischargeable, *i.e.*, not covered by the discharge. The notice informs creditors generally that the debts owed to them have been discharged and that they should not attempt any further collection. They are cautioned in the notice that continuing collection efforts could subject them to punishment for contempt. Any inadvertent failure on the part of the clerk to send the debtor or any creditor a copy of the discharge order promptly within the time required by the rules does not affect the validity of the order granting the discharge.

### **Are all of the debtor's debts discharged or only some?**

Not all debts are discharged. The debts discharged vary under each chapter of the Bankruptcy Code. Section 523(a) of the Code specifically excepts various categories of debts from the discharge granted to individual debtors. Therefore, the debtor must still repay those debts after bankruptcy. Congress has determined that these types of debts are not dischargeable for public policy reasons (based either on the nature of the debt or the fact that the debts were incurred due to improper behavior of the debtor, such as the debtor's drunken driving).

There are 19 categories of debt excepted from discharge under chapters 7, 11, and 12. A more limited list of exceptions applies to cases under chapter 13.

Generally speaking, the exceptions to discharge apply automatically if the language prescribed by section 523(a) applies. The most common types of nondischargeable debts are certain types of tax claims, debts not set forth by the debtor on the lists and schedules the debtor must file with the court, debts for spousal or child support or alimony, debts for willful and malicious injuries to person or property, debts to governmental units for fines and penalties, debts for most government funded or guaranteed educational loans or benefit overpayments, debts for personal injury caused by the debtor's operation of a motor vehicle while intoxicated, debts owed to certain tax-advantaged retirement plans, and debts for certain condominium or cooperative housing fees.

The types of debts described in sections 523(a)(2), (4) and (6) (obligations affected by fraud or maliciousness) are not automatically excepted from discharge. Creditors must ask the court to determine that these debts are excepted from discharge. In the absence of an affirmative request by the creditor and the granting of the request by the court, the types of debts set out in sections 523(a)(2), (4) and (6) will be discharged.

A slightly broader discharge of debts is available to a debtor in a chapter 13 case 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, debts incurred to pay non-dischargeable tax obligations, and debts arising from property settlements in divorce or separation proceedings. Although a chapter 13 debtor generally receives a discharge only after completing all payments required by the court-approved (*i.e.*, "confirmed") repayment plan, there are some limited circumstances under which the debtor may request the court to grant a "hardship discharge" even though the debtor has failed to complete plan payments. Such a discharge is available only to a debtor whose failure to complete plan payments is due to circumstances beyond the debtor's control. The scope of a chapter 13 "hardship discharge" is similar to that in a chapter 7 case with regard to the types of debts that are excepted from the discharge. A hardship discharge also is available in chapter 12 if the failure to complete plan payments is due to "circumstances for which the debtor should not justly be held accountable."

### **Does the debtor have the right to a discharge or can creditors object to the discharge?**

In chapter 7 cases, the debtor does not have an absolute right to a discharge. An objection to the debtor's discharge may be filed by a creditor, by the trustee in the case, or by the U.S. trustee. Creditors receive a notice shortly after the case is filed that sets forth much important information, including the deadline for objecting to the discharge. To object to the debtor's discharge, a creditor must file a complaint in the bankruptcy court before the deadline set out in the notice. Filing a complaint starts a lawsuit referred to in bankruptcy as an "adversary proceeding."

The court may deny a chapter 7 discharge for any of the reasons described in section 727(a) of the Bankruptcy Code, including failure to provide requested tax documents; failure to complete a course on personal financial management; transfer or concealment of property with intent to hinder, delay, or defraud creditors; destruction or concealment of books or records; perjury and other fraudulent acts; failure to account for the loss of assets; violation of a court order or an earlier discharge in an earlier case commenced within certain time frames (discussed below) before the date the petition was filed. If the issue of the debtor's right to a discharge goes to trial, the objecting party has the burden of proving all the facts essential to the objection.

In chapter 12 and chapter 13 cases, the debtor is usually entitled to a discharge upon completion of all payments under the plan. As in chapter 7, however, discharge may not occur in chapter 13 if the debtor fails to complete a required course on personal financial management. A debtor is also ineligible for a discharge in chapter 13 if he or she received a prior discharge in another case commenced within time frames discussed the next paragraph. Unlike chapter 7, creditors do not have standing to object to the discharge of a chapter 12 or chapter 13 debtor. Creditors can object to confirmation of the repayment plan, but cannot object to the discharge if the debtor has completed making plan payments.

### **Can a debtor receive a second discharge in a later chapter 7 case?**

The court will deny a discharge in a later chapter 7 case if the debtor received a discharge under chapter 7 or chapter 11 in a case filed within eight years before the second petition is filed. The court will also deny a chapter 7 discharge if the debtor previously received a discharge in a chapter 12 or chapter 13 case filed within six years before the date of the filing of the second case unless (1) the debtor paid all "allowed unsecured" claims in the earlier case in full, or (2) the debtor made payments under the plan in the earlier case totaling at least 70 percent of the allowed unsecured claims and the debtor's plan was proposed in good faith and the payments represented the debtor's best effort. A debtor is ineligible for discharge

under chapter 13 if he or she received a prior discharge in a chapter 7, 11, or 12 case filed four years before the current case or in a chapter 13 case filed two years before the current case.

### **Can the discharge be revoked?**

The court may revoke a discharge under certain circumstances. For example, a trustee, creditor, or the U.S. trustee may request that the court revoke the debtor's discharge in a chapter 7 case based on allegations that the debtor: obtained the discharge fraudulently; failed to disclose the fact that he or she acquired or became entitled to acquire property that would constitute property of the bankruptcy estate; committed one of several acts of impropriety described in section 727(a)(6) of the Bankruptcy Code; or failed to explain any misstatements discovered in an audit of the case or fails to provide documents or information requested in an audit of the case. Typically, a request to revoke the debtor's discharge must be filed within one year of the discharge or, in some cases, before the date that the case is closed. The court will decide whether such allegations are true and, if so, whether to revoke the discharge.

In a chapter 11, 12 and 13 cases, if confirmation of a plan or the discharge is obtained through fraud, the court can revoke the order of confirmation or discharge.

### **May the debtor pay a discharged debt after the bankruptcy case has been concluded?**

A debtor who has received a discharge may voluntarily repay any discharged debt. A debtor may repay a discharged debt even though it can no longer be legally enforced. Sometimes a debtor agrees to repay a debt because it is owed to a family member or because it represents an obligation to an individual for whom the debtor's reputation is important, such as a family doctor.

### **What can the debtor do if a creditor attempts to collect a discharged debt after the case is concluded?**

If a creditor attempts collection efforts on a discharged debt, the debtor can file a motion with the court, reporting the action and asking that the case be reopened to address the matter. The bankruptcy court will often do so to ensure that the discharge is not violated. The discharge constitutes a permanent statutory injunction prohibiting creditors from taking any action, including the filing of a lawsuit, designed to collect a discharged debt. A creditor can be sanctioned by the court for violating the discharge injunction. The normal sanction for violating the discharge injunction is civil contempt, which is often punishable by a fine.

### **May an employer terminate a debtor's employment solely because the person was a debtor or failed to pay a discharged debt?**

The law provides express prohibitions against discriminatory treatment of debtors by both governmental units and private employers. A governmental unit or private employer may not discriminate against a person solely because the person was a debtor, was insolvent before or during the case, or has not paid a debt that was discharged in the case. The law prohibits the following forms of governmental discrimination: terminating an employee; discriminating with respect to hiring; or denying, revoking, suspending, or declining to renew a license, franchise, or similar privilege. A private employer may not discriminate with respect to employment if the discrimination is based solely upon the bankruptcy filing.

### **How can the Debtor obtain another Copy of the Discharge Order?**

If the debtor loses or misplaces the discharge order, another copy can be obtained by contacting the clerk of the bankruptcy court that entered the order. The clerk will charge a fee for searching the court records and there will be additional fees for making and certifying copies. If the case has been closed and archived there will also be a retrieval fee, and obtaining the copy will take longer.

The discharge order may be available electronically. The PACER system provides the public with electronic access to selected case information through a personal computer located in many clerk's offices. The debtor can also access [PACER](#). Users must set up an account to acquire access to PACER, and must pay a per-page fee to download and copy documents filed electronically.

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## Bankruptcy Basics

### 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.)

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- b. [Background](#)
- c. [Chapter 7 Eligibility](#)
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#### Alternatives to Chapter 7

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

In addition, individual debtors who have regular income may seek an adjustment of debts under chapter 13 of the Bankruptcy Code. A particular advantage of chapter 13 is that it provides individual debtors with an opportunity to save their homes from foreclosure by allowing them to "catch up" past due payments through a payment plan. Moreover, the court may dismiss a chapter 7 case filed by an individual whose debts are primarily consumer rather than business debts if the court finds that the granting of relief would be an abuse of chapter 7. 11 U.S.C. § 707(b).

If the debtor's "current monthly income"<sup>(1)</sup> is more than the state median, the Bankruptcy Code requires application of a "means test" to determine whether the chapter 7 filing is presumptively abusive. Abuse is presumed if the debtor's aggregate current monthly income over 5 years, net of certain statutorily allowed expenses, is more than (i) \$10,000, or (ii) 25% of the debtor's nonpriority unsecured debt, as long as that amount is at least \$6,000. <sup>(2)</sup> The debtor may rebut a presumption of abuse only by a showing of special circumstances that justify additional expenses or adjustments of current monthly income. Unless the debtor overcomes the presumption of abuse, the case will generally be converted to chapter 13 (with the debtor's consent) or will be dismissed. 11 U.S.C. § 707(b)(1).

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

#### Background

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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. Accordingly, potential debtors should realize that the filing of a petition under chapter 7 may result in the loss of property.

### Chapter 7 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. (3) 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. 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; 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.* A husband and wife may file a joint petition or individual petitions. 11 U.S.C. § 302(a). Even if filing jointly, a husband and wife are subject to all the document filing requirements of individual debtors. (The Official Forms may be purchased at legal stationery stores or downloaded from the internet at [www.uscourts.gov/bkforms/index.html](http://www.uscourts.gov/bkforms/index.html). They are not available from the court.)

The courts must charge a \$245 case filing fee, a \$39 miscellaneous administrative fee,

and a \$15 trustee surcharge. Normally, the fees must be paid to the clerk of the court upon filing. With the court's permission, however, individual debtors may pay 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. 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.* The debtor may also pay the \$39 administrative fee and the \$15 trustee surcharge in installments. 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:

1. A list of all creditors and the amount and nature of their claims;
2. The source, amount, and frequency of the debtor's income;
3. A list of all of the debtor's property; and
4. 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.

Among the schedules that an individual debtor will file is a schedule of "exempt" property. The Bankruptcy Code allows an individual debtor (4) 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 home state. 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. The debtor should consult an attorney to determine the exemptions available in the state where the debtor lives.

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. 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 (5) 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 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 property. 11 U.S.C. § 343. If a husband and wife have filed a joint petition, they both 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).

It is important for the debtor to 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 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 case under chapter 11, 12 or 13 (6) 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.

### **Role of the Case 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 (7) 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 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 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, though, 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 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). 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 dependants. 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).

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## NOTES

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). [return to text](#)
2. To determine whether a presumption of abuse arises, all individual debtors with primarily consumer debts who file a chapter 7 case must complete Official Bankruptcy Form B22A, entitled "Statement of Current Monthly Income and Means Test Calculation - For Use in Chapter 7." (The Official Forms may be purchased at legal stationery stores or downloaded from the internet at [www.uscourts.gov/bkforms/index.html](http://www.uscourts.gov/bkforms/index.html). They are not available from the court.) [return to text](#)
3. 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. [return to text](#)
4. Each debtor in a joint case (both husband and wife) can claim exemptions under the federal bankruptcy laws. 11 U.S.C. § 522(m). [return to text](#)
5. In North Carolina and Alabama, [bankruptcy administrators](#) perform similar functions that [U.S. trustees](#) perform in the remaining 48 states. These duties include establishing a panel of private trustees to serve as trustees in chapter 7 cases and supervising the administration of cases and trustees in cases under chapters 7, 11, 12, and 13 of the Bankruptcy Code. 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. [return to text](#)

6. 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). Currently, the difference is \$755. *Id.* There is no fee for converting from chapter 7 to chapter 13. [return to text](#)

7. 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. [return to text](#)

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## Bankruptcy Basics

### 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.)

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#### 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, what may be included in chapter 13 repayment plan and how it is confirmed, 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.

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## 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 \$307,675 and secured debts are less than \$922,975. 11 U.S.C. § 109(e). 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.

### 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 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.* 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](http://www.uscourts.gov/bkforms/index.html). They are not available from the court.)

The courts must charge a \$235 case filing fee and a \$39 miscellaneous administrative fee. 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). 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.* The debtor may also pay the \$39 administrative fee in installments. 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:

1. A list of all creditors and the amounts and nature of their claims;
2. The source, amount, and frequency of the debtor's income;
3. A list of all of the debtor's property; and
4. 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 (2) 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. 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 husband and wife file 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 to file a proof of claim. 11 U.S.C. § 502(b)(9).

After the meeting of creditors, the debtor, the chapter 13 trustee, and those creditors who wish to attend will come to court for a hearing on the debtor's chapter 13 repayment plan.

## The 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 biweekly or monthly. The trustee then distributes the funds to creditors according to the terms of the plan, which may offer creditors less than full payment on their claims.

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. (3) 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.

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.*

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. 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. (4) 11 U.S.C. § 1307(a). If the court declines to confirm the plan or the modified plan and instead dismisses the case, 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). 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.

A debtor may make plan payments through payroll deductions. This practice increases the likelihood that payments will be made on time and that the debtor will complete the plan. In any event, 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 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.

### **The Chapter 13 Discharge**

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

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.

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## NOTES

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). [return to text](#)
2. 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. [return to text](#)
3. Section 507 sets forth 10 categories of unsecured claims which Congress has, for public policy reasons, given priority of distribution over other unsecured claims. [return to text](#)
4. A fee of \$15 is charged for converting a case under chapter 13 to a case under chapter 7. [return to text](#)

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## Glossary

Most debtors who file a bankruptcy petition, and many of their creditors, know very little about the bankruptcy process. Bankruptcy Basics is designed to provide debtors, creditors, judiciary employees, and the general public with a basic explanation of bankruptcy and how it works. This glossary on bankruptcy terminology explains, in layman's terms, many of the legal terms that are used in cases filed under the Bankruptcy Code.

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### A

**adversary proceeding** A lawsuit arising in or related to a bankruptcy case that is commenced by filing a complaint with the court. A nonexclusive list of adversary proceedings is set forth in Fed. R. Bankr. P. 7001.

**assume** An agreement to continue performing duties under a contract or lease.

**automatic stay** An injunction that automatically stops lawsuits, foreclosures, garnishments, and all collection activity against the debtor the moment a bankruptcy petition is filed.

### B

**bankruptcy** A legal procedure for dealing with debt problems of individuals and businesses; specifically, a case filed under one of the chapters of title 11 of the United States Code (the Bankruptcy Code).

**bankruptcy administrator** An officer of the judiciary serving in the judicial districts of Alabama and North Carolina who, like the U.S. trustee, is responsible for supervising the administration of bankruptcy cases, estates, and trustees; monitoring plans and disclosure statements; monitoring creditors' committees; monitoring fee applications; and performing other statutory duties. Compare [U.S. trustee](#).

**Bankruptcy Code** The informal name for title 11 of the United States Code (11 U.S.C. §§ 101-1330), the federal bankruptcy law.

**bankruptcy court** The bankruptcy judges in regular active service in each district; a unit of the district court.

**bankruptcy estate** All legal or equitable interests of the debtor in property at the time of the bankruptcy filing. (The estate includes all property in which the debtor has an interest, even if it is owned or held by another person.)

**bankruptcy judge** A judicial officer of the United States district court who is the court official with decision-making power over federal bankruptcy cases.

**bankruptcy petition** The document filed by the debtor (in a voluntary case) or by creditors (in an involuntary case) by which opens the bankruptcy case. (There are official forms for bankruptcy petitions.)

**C**

**chapter 7** 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.)

**chapter 9** The chapter of the Bankruptcy Code providing for reorganization of municipalities (which includes cities and towns, as well as villages, counties, taxing districts, municipal utilities, and school districts).

**chapter 11** 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.)

**chapter 12** 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.

**chapter 13** 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.)

**chapter 15** The chapter of the Bankruptcy Code dealing with cases of cross-border insolvency.

**claim** A creditor's assertion of a right to payment from the debtor or the debtor's property.

**confirmation** Bankruptcy judge's approval of a plan of reorganization or liquidation in chapter 11, or payment plan in chapter 12 or 13.

**consumer debtor** A debtor whose debts are primarily consumer debts.

**consumer debts** Debts incurred for personal, as opposed to business, needs.

**contested matter** Those matters, other than objections to claims, that are disputed but are not within the definition of adversary proceeding contained in Rule 7001.

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

**creditor** One to whom the debtor owes money or who claims to be owed money by the debtor.

**credit counseling** Generally refers to two events in individual bankruptcy cases: (1) the "individual or group briefing" from a nonprofit budget and credit counseling agency that individual debtors must attend prior to filing under any chapter of the Bankruptcy Code; and (2) the "instructional course in personal financial management" in chapters 7 and 13 that an individual debtor must complete before a discharge is entered. There are exceptions to both requirements for certain categories of debtors, exigent circumstances, or if the U.S. trustee or bankruptcy administrator have determined that there are insufficient approved credit counseling agencies available to provide the necessary counseling.

**creditors' meeting** see [341 meeting](#)

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

**D**

**debtor** A person who has filed a petition for relief under the Bankruptcy Code.

**debtor education** see [credit counseling](#)

**defendant** An individual (or business) against whom a lawsuit is filed.

**discharge** A release of a debtor from personal liability for certain dischargeable debts set forth in the Bankruptcy Code. (A discharge releases a debtor from personal liability for certain debts known as dischargeable debts and prevents the creditors owed those debts from taking any action against the debtor to collect the debts. The discharge also prohibits creditors from communicating with the debtor regarding the debt, including telephone calls, letters, and personal contact.)

**dischargeable debt** A debt for which the Bankruptcy Code allows the debtor's personal liability to be eliminated.

**disclosure statement** A written document prepared by the chapter 11 debtor or other plan proponent that is designed to provide "adequate information" to creditors to enable them to evaluate the chapter 11 plan of reorganization.

**E**

**equity** The value of a debtor's interest in property that remains after liens and other creditors' interests are considered. (Example: If a house valued at \$100,000 is subject to a \$80,000 mortgage, there is \$20,000 of equity.)

**executory contract or lease** Generally includes contracts or leases under which both parties to the agreement have duties remaining to be performed. (If a contract or lease is executory, a debtor may assume it or reject it.)

**exemptions, exempt property** Certain property owned by an individual debtor that the Bankruptcy Code or applicable state law permits the debtor to keep from unsecured creditors. For example, in some states the debtor may be able to exempt all or a portion of the equity in the debtor's primary residence (homestead exemption), or some or all "tools of the trade" used by the debtor to make a living (*i. e.*, auto tools for an auto mechanic or dental tools for a dentist). The availability and amount of property the debtor may exempt depends on the state the debtor lives in.

**F**

**family farmer or family fisherman** An individual, individual and spouse, corporation, or partnership engaged in a farming or fishing operation that meets certain debt limits and other statutory criteria for filing a petition under chapter 12.

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

**fresh start** The characterization of a debtor's status after bankruptcy, *i. e.*, free of most debts. (Giving debtors a fresh start is one purpose of the Bankruptcy Code.)

**I**

**insider (of individual debtor)** Any relative of the debtor or of a general partner of the debtor; partnership in which the debtor is a general partner; general partner of the debtor; or a corporation of which the debtor is a director, officer, or person in control.

**insider (of corporate debtor)** A director, officer, or person in control of the debtor; a partnership in which the debtor is a general partner; a general partner of the debtor; or a relative of a general partner, director, officer, or person in control of the debtor.

## J

**joint administration** A court-approved mechanism under which two or more cases can be administered together. (Assuming no conflicts of interest, these separate businesses or individuals can pool their resources, hire the same professionals, etc.)

**joint petition** One bankruptcy petition filed by a husband and wife together.

## L

**lien** The right to take and hold or sell the property of a debtor as security or payment for a debt or duty.

**liquidation** A sale of a debtor's property with the proceeds to be used for the benefit of creditors.

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

## M

**means test** Section 707(b)(2) of the Bankruptcy Code applies a "means test" to determine whether an individual debtor's chapter 7 filing is presumed to be an abuse of the Bankruptcy Code requiring dismissal or conversion of the case (generally to chapter 13). Abuse is presumed if the debtor's aggregate current monthly income (see definition above) over 5 years, net of certain statutorily allowed expenses is more than (i) \$10,000, or (ii) 25% of the debtor's nonpriority unsecured debt, as long as that amount is at least \$6,000. The debtor may rebut a presumption of abuse only by a showing of special circumstances that justify additional expenses or adjustments of current monthly income.

**motion to lift the automatic stay** A request by a creditor to allow the creditor to take action against the debtor or the debtor's property that would otherwise be prohibited by the automatic stay.

## N

**no-asset case** A chapter 7 case where there are no assets available to satisfy any portion of the creditors' unsecured claims.

**nondischargeable debt** A debt that cannot be eliminated in bankruptcy. Examples include 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. Some debts, such as debts for money or property obtained by false pretenses and debts for fraud or defalcation while acting in a fiduciary capacity may be declared nondischargeable only if a creditor timely files and prevails in a nondischargeability action.

## O

**objection to dischargeability** A trustee's or creditor's objection to the debtor being released from personal liability for certain dischargeable debts. Common reasons include allegations that the debt to be discharged was incurred by false pretenses or that debt arose because of the debtor's fraud while acting as a fiduciary.

**objection to exemptions** A trustee's or creditor's objection to the debtor's attempt to claim certain property as exempt from liquidation by the trustee to creditors.

## P

**party in interest** A party who has standing to be heard by the court in a matter to be decided in the bankruptcy case. The debtor, the U.S. trustee or bankruptcy administrator, the case trustee and creditors are parties in interest for most matters.

**petition preparer**

A business not authorized to practice law that prepares bankruptcy petitions.

**plan** A debtor's detailed description of how the debtor proposes to pay creditors' claims over a fixed period of time.

**plaintiff** A person or business that files a formal complaint with the court.

**postpetition transfer** A transfer of the debtor's property made after the commencement of the case.

**prebankruptcy planning** The arrangement (or rearrangement) of a debtor's property to allow the debtor to take maximum advantage of exemptions. (Prebankruptcy planning typically includes converting nonexempt assets into exempt assets.)

**preference or preferential debt payment** A debt payment made to a creditor in the 90-day period before a debtor files bankruptcy (or within one year if the creditor was an insider) that gives the creditor more than the creditor would receive in the debtor's chapter 7 case.

**presumption of abuse** see [means test](#)

**priority** The Bankruptcy Code's statutory ranking of unsecured claims that determines the order in which unsecured claims will be paid if there is not enough money to pay all unsecured claims in full. For example, under the Bankruptcy Code's priority scheme, money owed to the case trustee or for prepetition alimony and/or child support must be paid in full before any general unsecured debt (*i.e.* trade debt or credit card debt) is paid.

**priority claim** An unsecured claim that is entitled to be paid ahead of other unsecured claims that are not entitled to priority status. Priority refers to the order in which these unsecured claims are to be paid.

**proof of claim** A written statement and verifying documentation filed by a creditor that describes the reason the debtor owes the creditor money. (There is an official form for this purpose.)

**property of the estate** All legal or equitable interests of the debtor in property as of the commencement of the case.

## R

**reaffirmation agreement** An agreement by a chapter 7 debtor to continue paying a dischargeable debt (such as an auto loan) after the bankruptcy, usually for the purpose of keeping collateral (*i.e.* the car) that would otherwise be subject to repossession.

## S

**schedules** Detailed lists filed by the debtor along with (or shortly after filing) the petition showing the debtor's assets, liabilities, and other financial information. (There are official forms a debtor must use.)

**secured creditor** A creditor holding a claim against the debtor who has the right to take and hold or sell certain property of the debtor in satisfaction of some or all of

the claim.

**secured debt** Debt backed by a mortgage, pledge of collateral, or other lien; debt for which the creditor has the right to pursue specific pledged property upon default. Examples include home mortgages, auto loans and tax liens.

**small business case** A special type of chapter 11 case in which there is no creditors' committee (or the creditors' committee is deemed inactive by the court) and in which the debtor is subject to more oversight by the U.S. trustee than other chapter 11 debtors. The Bankruptcy Code contains certain provisions designed to reduce the time a small business debtor is in bankruptcy.

**statement of financial affairs** A series of questions the debtor must answer in writing concerning sources of income, transfers of property, lawsuits by creditors, etc. (There is an official form a debtor must use.)

**statement of intention** A declaration made by a chapter 7 debtor concerning plans for dealing with consumer debts that are secured by property of the estate.

**substantive consolidation** Putting the assets and liabilities of two or more related debtors into a single pool to pay creditors. (Courts are reluctant to allow substantive consolidation since the action must not only justify the benefit that one set of creditors receives, but also the harm that other creditors suffer as a result.)

**341 meeting** The meeting of creditors required by section 341 of the Bankruptcy Code at which the debtor is questioned under oath by creditors, a trustee, examiner, or the U.S. trustee about his/her financial affairs. Also called [creditors' meeting](#).

## T

**transfer** Any mode or means by which a debtor disposes of or parts with his/her property.

**trustee** The representative of the bankruptcy estate who exercises statutory powers, principally for the benefit of the unsecured creditors, under the general supervision of the court and the direct supervision of the U.S. trustee or bankruptcy administrator. The trustee is a private individual or corporation appointed in all chapter 7, chapter 12, and chapter 13 cases and some chapter 11 cases. The trustee's responsibilities include reviewing the debtor's petition and schedules and bringing actions against creditors or the debtor to recover property of the bankruptcy estate. In chapter 7, the trustee liquidates property of the estate, and makes distributions to creditors. Trustees in chapter 12 and 13 have similar duties to a chapter 7 trustee and the additional responsibilities of overseeing the debtor's plan, receiving payments from debtors, and disbursing plan payments to creditors.

## U

**U.S. trustee** An officer of the Justice Department responsible for supervising the administration of bankruptcy cases, estates, and trustees; monitoring plans and disclosure statements; monitoring creditors' committees; monitoring fee applications; and performing other statutory duties. Compare, [bankruptcy administrator](#).

**undersecured claim** A debt secured by property that is worth less than the full amount of the debt.

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

**unscheduled debt** A debt that should have been listed by the debtor in the schedules filed with the court but was not. (Depending on the circumstances, an unscheduled debt may or may not be discharged.)

**unsecured claim** A claim or debt for which a creditor holds no special assurance of payment, such as a mortgage or lien; a debt for which credit was extended based solely upon the creditor's assessment of the debtor's future ability to pay.

**V**

**Voluntary transfer** A transfer of a debtor's property with the debtor's consent.



## U.S. Bankruptcy Courts

- [Bankruptcy Administrators](#)
- [Bankruptcy Basics](#)
- [Bankruptcy Resources](#)
- [Approved Credit Counselors](#)
- [Approved Debtor Educators](#)
  
- [Return to Bankruptcy Courts](#)
- [Return to uscourts.gov](#)

## Filing for Bankruptcy Without an Attorney

[Credit Counseling](#) | [Legal Services](#) | [Foreclosure](#) | [Petition Preparers](#)

Corporations and partnerships must have an attorney to file a bankruptcy case. Individuals, however, may represent themselves in bankruptcy court. While individuals can file a bankruptcy case without an attorney or "pro se," it is extremely difficult to do it successfully.

It is very important that a bankruptcy case be filed and handled correctly. The rules are very technical, and a misstep may affect a debtor's rights. For example, a debtor whose case is dismissed for failure to file a required document, such as a credit counseling certificate, may lose the right to file another case or lose protections in a later case, including the benefit of the automatic stay.

**Bankruptcy has long-term financial and legal consequences — hiring a competent attorney is strongly recommended.**

Debtors must list all property and debts in their bankruptcy schedules. If a debt is not listed, it is possible the debt will not be discharged. (Lists of the documents [including schedules] that debtors must file are set out on [Form B200](#), one of the Director's Procedural Forms.) The judge can also deny the discharge of all debts if a debtor does something dishonest in connection with the bankruptcy case, such as destroying or hiding property, falsifying records, or lying. Individual bankruptcy cases are randomly audited to determine the accuracy, truthfulness, and completeness of the information that the debtor is required to provide.

**Please be aware that bankruptcy fraud is a crime.**

*Pro se* litigants, whether debtor or creditor, are expected to follow the rules that govern procedures in the federal courts. *Pro se* litigants should be familiar with the [United States Bankruptcy Code](#), the [Federal Rules of Bankruptcy Procedure](#), and the local rules of the court in which the case is filed. Local rules, along with other useful information, are usually posted on the court's web site and are available at the local court's intake counter.

### **Credit Counseling**

Individual debtors are generally required to obtain [credit counseling from an approved provider](#) within 180 days before filing a case, and to file a statement of compliance and a certificate of credit counseling furnished by the provider. Failure to do so may result in dismissal of the case.

### **Finding an Attorney, including Free Legal Services**

Debtors are strongly encouraged to obtain the services of competent legal counsel. Even if you cannot afford to pay an attorney, you may be able to qualify for free legal services. For information about hiring an attorney, or about free (also known as "pro bono") legal services, contact your state or local bar association. Many law schools have legal clinics that offer free legal services. Court web sites often have contact information for bar associations and pro bono legal service programs, as well as important procedural information.

For information about such legal resources, check the American Bar Association's [Legal Help](#) page, the [Legal Services Corporation](#), or the web site of the [bankruptcy court](#) where you intend to file. If you do not know where you are permitted to file a case, check the [Official Bankruptcy Forms page](#) to see the box on Form B1 (Voluntary Petition) entitled "Information Regarding the Debtor - Venue" and the part of the Instructions relating to that box.

If you are filing or involved in a bankruptcy case and do not have an attorney, the web site of the [bankruptcy court](#) where the case has been or will be filed may be of assistance. The [Bankruptcy Resources](#) page may be of help as well.

## Foreclosure

Homeowners who are having trouble or have fallen behind in making their mortgage payments may have options that would allow them to avoid foreclosure and bankruptcy. For more information, check these [foreclosure](#) resources.

Beware of offers made once your house is in foreclosure — there are a number of fraudulent schemes specifically directed at individuals facing foreclosure. Contact your state attorney general or other state consumer protection agency regarding any suspicious proposal, such as one that requires transferring your property to a third party in order to avoid foreclosure.

## Petition Preparers

Beware of bankruptcy petition preparers who do not comply with all legal requirements. The role of non-attorney petition preparers is solely to type information on [Bankruptcy Forms](#) (available at this link without charge). Petition preparers are barred by law from providing legal advice — they cannot explain how to answer legal questions or assist in bankruptcy court. Petition preparers must sign all documents they prepare; print their name, address, and social security number on such documents; and furnish copies to the debtor. They cannot sign a document on the debtor's behalf or receive payment from the debtor for court fees.

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## **FILING BANKRUPTCY IN NEW MEXICO**

*The decision to file bankruptcy is a serious one. Please consult a lawyer before filing a bankruptcy. Many lawyers who represent bankruptcy filers offer an initial free consultation.*

### **NOTE: A BANKRUPTCY PETITION PREPARER IS NOT AN ATTORNEY.**

The only things that a petition preparer can do for you are to provide you with the bankruptcy forms and then type onto those forms whatever information you provide.

**A bankruptcy petition preparer is not competent to provide legal advice to you, and it is against federal law for a bankruptcy petition preparer to provide legal advice.**

The information in this paper is from the Bankruptcy Law Section of the State Bar of New Mexico, and is published by the State Bar of New Mexico as a public service. Nothing in this paper is intended to provide specific legal advice for a personal financial situation. Bankruptcy is a complicated legal procedure. Every case is unique, and specific questions about bankruptcy should be directed to a lawyer who knows bankruptcy law.

### **The Automatic Stay and Discharge**

When a debtor files a bankruptcy petition, the “automatic stay” kicks in “automatically”. The stay continues in effect until the end of the case, unless the judge grants a creditor's request to end the stay early. The stay immediately stops (“stays”) debt collection actions, including phone calls and letters to the debtor, lawsuits, and wage garnishments. (Collection actions for child support or alimony are not stayed.) The stay also stops, at least for a while, foreclosure of a home and repossession of a vehicle.

At the end of the case the debtor receives a “discharge”, which is a court order which says the debtor does not have to pay her or his listed debts. (This does not apply to “non-dischargeable” debts, described below.) The debtor may voluntarily repay a debt, but a creditor may never ask for or force repayment of a discharged debt. But if the debtor owes a secured debt, such as a mortgage on the home or the title to a vehicle, the debtor must keep making payments on the house or vehicle to the creditor or else the creditor can take the home or the vehicle back. The discharge provides the debtor a financial “fresh start” in life.

Sometimes a creditor or the trustee will object to the debtor getting any of her or his debts discharged. That happens when the creditor or trustee claims that the debtor has lied on the schedules, hidden or given away property before or after the case starts, destroyed or failed to keep records, etc. In particular failure to fully disclose assets is a reason for denying a discharge. Debtors who have something to hide should not file bankruptcy.

## **Non-dischargeable debts**

A debtor cannot get a discharge of certain kinds of debts. These “nondischargeable” debts include certain taxes, debts due to fraud, debts from deliberately harming someone, DWI debts, student loans, and unlisted debts. Child support and alimony are not discharged at all. A debtor must continue paying child support and alimony during the bankruptcy case. For the other types of nondischargeable debts, the debtor must be prepared to pay those after the discharge is granted.

To obtain a judge’s ruling that a debt is nondischargeable or that the debtor will not get a discharge at all, the trustee or the creditor must file a lawsuit in the Bankruptcy Court. A lawsuit in Bankruptcy Court is called an “adversary proceeding”. Discharge and/or dischargeability adversary proceedings are usually complicated lawsuits and require a lawyer. The debtor’s lawyer will charge additional fees for defending the debtor in a discharge or dischargeability lawsuit. Such a lawsuit may delay or prevent the entry of the discharge. Except for nondischargeable debts, creditors may not try to collect any remaining unpaid debts.

## **More Procedures in Chapter 7 and 13 Cases**

A debtor must complete and file in the bankruptcy court certain required forms which include the “Petition”, which starts the case, and the “Schedules” and the “Statement of Financial Affairs” which list and describe all of the debtor’s property (assets), debts, creditors, income and expenses, and financial history. The debtor signs these documents to show, under penalty of perjury, that they are true and complete. Intentionally leaving out or misstating information can result in a federal criminal prosecution for bankruptcy fraud. Or the debtor can be denied a discharge but still have her or his nonexempt property taken by the trustee. When these documents are filed with the Bankruptcy Court, they become public records.

About 45 days after the petition is filed, the debtor will have to attend a meeting with the trustee and creditors. At that meeting the debtor will have to show the trustee a photo ID and evidence of a social security number (if any). The trustee will also ask the debtor about the information she or he has filed. Creditors also may ask the debtor questions about debts, property, etc. The debtor must answer all questions accurately and under oath. In a chapter 13 case the trustee will also ask about the debtor’s proposed repayment plan, and explain the procedures used by the Trustee’s office to handle plan payments.

## **More about Chapter 7 Bankruptcy cases**

In a chapter 7 case, whatever nonexempt property the debtor owns when she or he starts the case is sold to pay what the debtor owes when the case starts. Whatever of those debts are unpaid when the case ends get discharged (go away without being paid) except for nondischargeable debts (see above). With some exceptions, the debtor can keep any income or other property the debtor receives after the case starts. Likewise, the debtor does not get a discharge for any debts incurred after the case starts.

If a debtor has more than the median New Mexico income – for 2008 the median income for a family of four is \$53,516 – the bankruptcy judge may give the debtor a choice of dismissing (getting out of) her or his bankruptcy case, or changing the case over to one under chapter 13 (discussed below).

Most chapter 7 cases last about four or five months. The debtor usually gets her or his discharge within two or three months after the meeting with the trustee and creditors. This is true even in cases that stay open longer to allow the trustee to sell property to pay creditors. Note: A debtor can receive a discharge in chapter 7 only once every eight years.

### **More about Chapter 13 bankruptcy cases**

In a chapter 13 case, the debtor uses her or his income after the case starts to pay the debts he or she incurred before the case started. To be eligible to file a chapter 13 case, the debtor must have regular income, and must have no more than \$336,900 of unsecured debt (such as credit cards, unpaid utility bills, etc.) and \$1,010,650 of secured debt (a house mortgage or a title loan on a vehicle are examples of secured debt). Congress encourages debtors to use chapter 13 to repay at least some of their debts. Additionally, a debtor might change to a chapter 13 case if the bankruptcy judge threatens to dismiss a chapter 7 case when the debtor has enough income to pay some portion of her or his debts.

There are other reasons a debtor might file a chapter 13 case, including to have more time (up to five years) to get caught up on the payments to keep a home or a vehicle, or to pay off tax debt over time without additional penalties or interest. And usually the debtor can hire and pay for a lawyer over time as part of the plan payments instead of having to pay all the lawyer fees up front.

A chapter 13 case is based on a chapter 13 plan which the debtor prepares and which the judge must approve (“confirm”). The plan must be filed at the time the bankruptcy case is started or within 15 days after that. The plan explains to everyone how the debtor will use her or his income to pay monthly living expenses (including making monthly house and vehicle payments) and also make a monthly payment to the chapter 13 trustee to pay back some or all of the debt incurred before the case started. The debtor must begin making the monthly payments to the chapter 13 trustee within 30 days after the chapter 13 case starts, and the payments must be made in certified funds. The chapter 13 trustee accepts the money, takes out a percentage to run her operation (up to 10%), and distributes the remaining funds each month. The law says how the plan must handle different types of debts. The plan must pay unsecured creditors at least what they would get if the case was a chapter 7 case. Unless the debtor has property that would not be exempt in a chapter 7 case, the debtor’s ability to pay controls the amount paid to creditors. Other than these limits, there is no specific minimum amount that the debtor must pay creditors.

The plan may allow a debtor to pay a reduced price, including a lower interest rate, to keep some property (but not home mortgages and certain vehicles). If the debtor is behind on a home mortgage or vehicle loan or other secured debt, the past due amounts

may be paid through the plan so the home or vehicle or other property is not lost. However, particularly with homes, there may be additional fees and expenses that must be paid to the creditor as part of the cost of making up the past due payments. Certain debts must be paid under a plan. These include recent taxes, child support or alimony and if the debtor can afford it, the interest on student loans, DWI debt, criminal restitution and fines, and civil restitution or damages from deliberately harming someone.

Creditors and the trustee can object to the proposed plan. If they do, there will be one or more court hearings. If the judge confirms the plan, either as proposed or as changed to resolve objections, the trustee distributes plan payments to creditors according to what the plan says. If the judge does not confirm the plan, the debtor may get to try again with another plan, or the case may be dismissed or converted to a chapter 7 case (see above).

A debtor may not make credit purchases while in chapter 13 without the judge's permission. The judge can permit the debtor to obtain reasonable and necessary loans (including buying things over time), if the debtor can afford the loan.

If the debtor makes all the plan payments and meets certain other obligations (including being current on child support and alimony), and if the debtor has not received a discharge from a chapter 7 case filed within 4 years before the filing of the chapter 13 case, the debtor receives a discharge.

### **Additional notes for creditors**

In most chapter 7 cases, after the debtor claims exemptions, there is nothing left to pay anything to unsecured creditors. There is usually but not always some payment to unsecured creditors in chapter 13 cases. To get paid anything in a case, a creditor must file a proof of claim. This is especially important in a chapter 13 case. A creditor should read all the notices that are sent by the trustee, the debtor or another creditor, since if someone asks the judge to do something and no one objects, the judge will often do what has been asked for.

The function of the trustee is to help administer the case and to watch out for the interests of the unsecured creditors. So a typical creditor can rely on the trustee to do what is in all the creditors' best interest.

### **Additional information about bankruptcy**

This paper only provides a general summary of bankruptcy, and no decision to file should be based solely on the information contained here. There are many places to get additional information concerning bankruptcy. Apart from general publications that you may find at a library or bookstore, consider using the following resources:

The State Bar of New Mexico conducts a free Consumer Debt Workshop on a monthly basis in Albuquerque, and less frequently in other areas of the state. A volunteer bankruptcy lawyer will present a general one-hour talk. You will have a brief opportunity to

discuss your specific situation privately. The State Bar can also refer you to a qualified lawyer. If you meet certain low income guidelines, *pro bono* (free) services may be available. For more information, call the State Bar at 797-6048.

The United States Bankruptcy Court for the District of New Mexico maintains an excellent website with general bankruptcy information and links to other resources about bankruptcy at [www.nmcourt.fed.us/usbc](http://www.nmcourt.fed.us/usbc).

The New Mexico Legal Specialization Board offers programs that allow lawyers to ask to be recognized as specialists in Consumer Bankruptcy or Business Bankruptcy, or both. If you wish to contact a certified specialist, you may visit the State Bar web site at [www.nmbar.org](http://www.nmbar.org). Click the link at the top of the page for "Find an Attorney". Scroll down to "Specialization" and select from the pick menu.

Posted as <http://www.nmcourt.fed.us/usbc/files/statebarproseinfo.pdf> on March 17, 2008.