Bankruptcy Basics

I. Introduction

A. Consumer Bankruptcy Policy

1. The traditional legal view put a high value on the full repayment of debts. Modern rules recognize that the repayment of debts can sometimes be difficult. Bankruptcy is the release valve of our economic system. The U.S. Bankruptcy Courts are a fully federal system. State law may substantially impact a bankruptcy case, but the prevailing law is based on federal jurisprudence. In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). These amendments were meant to cut down on perceived abuses, but in reality have just made the process more expensive and difficult for debtors who properly try to enter the system. This course is designed to guide new practitioners who wish to file simple Chapter 7 and Chapter 13 cases on behalf of consumer debtors. The main topics include the initial interview of clients; filing requirements; the means test; automatic stay issues; redemption and reaffirmation; and a crash course on drafting effective Chapter 13 Plans.

II. Starting Points

A. Getting Admitted to the District Court.

1. The Bankruptcy Courts are not Article III Courts. The bankruptcy Court is established under Art. I, Sec. 8 of the constitution which mandates that Congress pass, "uniform laws on the subject of bankruptcies throughout the United States." The District Courts in each state oversee the Bankruptcy Courts and the process of getting admitted to practice is similar.

a. PACER and CM/ECF Training Requirements

1. The federal courts have instituted electronic filing requirements in every district court in the U.S, including bankruptcy court. The first step to filing a case is that a practitioner must be admitted to practice in the district. Typically, a motion, a letter of good standing from the ARDC, and an application fee are all that are required for admittance to the District Court. In Illinois, the District Courts offer reciprocity, but still require an application fee for each district.

i. http://www.ilnd.uscourts.gov/home/GeneralBarAdmission.aspx

2. Authorization to file cases in bankruptcy court requires additional Electronic Case Filing ("ECF") training. Your log in information for the District Court will not allow you access to the Bankruptcy Court until you complete this training. The training courses are designed to teach both debtors and creditors counsel how to file the basic forms required in a bankruptcy case. Typically, you can complete the training within a couple of hours and get your log in within 24 hours.

    i. https://tdi.ilnb.uscourts.gov/training/

        1. Be aware that to file documents in the Federal Court you must convert your documents to .pdf format. Investing in Adobe Acrobat or eCopy, as well as a good quality scanner, will be invaluable.

3. CM/ECF allows you to file new documents with the court. In order to view docket histories and access other information from the court, you will also need a PACER ("Public Access to Court Electronic Records") registration. PACER bills monthly, but the fees are pretty nominal, typically $0.10 per page with a maximum charge of 40 pages per document.

    i. http://www.pacer.gov/reg_dcbk.html

B. Bankruptcy Attorneys as Debt Relief Agencies

1. The bankruptcy process is governed primarily by Title 11 of the United States Code. The Code defines who can provide bankruptcy assistance and under what conditions.

    a. The term "debt relief agency" means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110. See, 11 U.S.C. 101(12A)This definition also applies to lawyers who practice in the area of bankruptcy law. See *Milavetz v. U.S.*, 130 S. Ct. 1324 (2010).

        1. The term "assisted person" means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000. See 11 U.S.C. 101(3).

b. Restrictions. 11 U.S.C. 526(a)

1. A debt relief agency shall not—

i. fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under this title;

ii. make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue or misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading;

iii. misrepresent to any assisted person or prospective assisted person, directly or indirectly, affirmatively or by material omission, with respect to—

1. the services that such agency will provide to such person; or

2. the benefits and risks that may result if such person becomes a debtor in a case under this title; or

iv. advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer a fee or charge for services performed as part of preparing for or representing a debtor in a case under this title

1. In *Milavetz*, the Court construed this subsection very narrowly to restrict a lawyer from advising "a debtor to incur more debt because the debtor is filing for bankruptcy rather than for a valid purpose." *Milavetz v. U.S.*, 130 S. Ct. 1324 at 1336.

a. A debtor's attorney should never counsel a client to go run up credit cards or take on any other debt merely because the debtor will soon obtain the benefits of a discharge. Other sections of the Code provide for the non-dischargeability of debts incurred 90-days (or more) prior to bankruptcy when possible abuse or fraud is perceived.

b. However, this restriction might not limit a good practitioner from discussing the possibility of purchasing a new vehicle or

other secured debt for a valid purpose (i.e.; the debtor is currently driving a 12-year-old vehicle with 175,000 miles), as well as the impact of incurring that kind of debt on a bankruptcy case.

c. Liability, 11 U.S.C. 526(c)

1. Any contract for bankruptcy assistance between a debt relief agency and an assisted person that does not comply with the material requirements of this section, section 527, or section 528 shall be void and may not be enforced by any Federal or State court or by any other person, other than such assisted person.

2. Any debt relief agency shall be liable to an assisted person in the amount of any fees or charges in connection with providing bankruptcy assistance to such person that such debt relief agency has received, for actual damages, and for reasonable attorneys' fees and costs if such agency is found, after notice and a hearing, to have—

i. intentionally or negligently failed to comply with any provision of this section, section 527, or section 528 with respect to a case or proceeding under this title for such assisted person;

ii. provided bankruptcy assistance to an assisted person in a case or proceeding under this title that is dismissed or converted to a case under another chapter of this title because of such agency's intentional or negligent failure to file any required document including those specified in section 521; or

iii. intentionally or negligently disregarded the material requirements of this title or the Federal Rules of Bankruptcy Procedure applicable to such agency

d. Required Disclosures

1. As a debt relief agency you will be required to make several disclosures within three days of the initial interview. Practically, it's much easier to provide these disclosures at the conclusion of your first meeting with a potential client. See 11 U.S.C. 527.

i. See Appendix A for copies of the required disclosures and acknowledgment of receipt. These notices talk about the difference between Chapter 7 and 13, what bankruptcy can and cannot do for a

debtor; and most importantly, the debtor's rights and duties under the code.

C. Advising clients

1. The Initial Interview

a. The initial meeting is your opportunity to gather information about these potential clients' particular circumstances. As with most areas of the law, each case is slightly different and the information you need to discover and the advice you might give could vary greatly.

b. Some initial intake information can be put together prior to your first meeting. A copy of the intake form used by our firm is attached as Appendix B. Use this form to get quick answers to pertinent interview questions. Our practice is to direct our clients to our website where they can download this form to fill out at home prior to their first appointment. You may also consider emailing the form to a potential client with a checklist of the information below so they can begin gathering the required information.

c. Information the Client should bring to the first meeting

1. Income Information. Verification of Income is possibly the most important information needed for the first meeting.

i. 60-days worth of pay stubs, at a minimum. You will need to gather the last 6 months worth of pay advices, but at the initial meeting 60-day should be sufficient to get an idea of normal income.

ii. If the client is self-employed, ask them to prepare 6 months worth of Profit-and-Loss statements. In this case, it's best to have all 6 months at the initial interview to get a better idea of average income.

iii. Social Security or Pension Income. This may be reflected on a bank statement. Since the amounts don't typically change, one month's bank statement is sufficient.

iv. The most recent tax return

1. Note: one prerequisite for filing a case in the bankruptcy court is to have all of one's tax returns filed to date. The obvious exception is where an individual is not required to file (i.e.; Soc. Sec. Benefits). If your client has not filed, advise them to do so and let them know

they cannot proceed with a bankruptcy case until they have submitted their tax returns.

v. A list of creditors and amounts owed

1. You do not need to statements at this stage, just a list of names and approximate amounts owed are sufficient to get an idea of the client's debt load.

vi. A household budget.

1. Again, no need for statements. Just a list of the amounts paid for normal living expenses and common monthly expenses.

d. The Initial Interview. See Appendix C for an interview form.

1. Determining the debtor's income at the first stage of the meeting is crucial. There are two options for most consumer debtors, Chapter 7 and Chapter 13. Gross income is used to determine eligibility to file Ch.7, and this stage of the interview lets you know what kind of case you may be dealing with. Further discussion of Ch. 7 eligibility and the Means Test is found below.

i. How often a debtor gets paid is important. There is a very important distinction between getting paid Bi-weekly (every two weeks [every other Friday]) and Semi-monthly (twice per month [i.e.; the 1st and 15th]).

1. For debtor's who get paid weekly, multiply their gross income by 4.333 to get a monthly average.

2. Debtor's who are paid bi-weekly, multiply by 2.166 for a monthly average. Debtor's who are paid twice a month can just be multiplied by 2.

ii. The interview form is used to determine normal income, per pay period. For purposes of the bankruptcy court, you are only allowed to take into account certain deductions from income at this stage. This includes taxes; insurance; union dues; involuntary retirement deductions such as IPERS, but not a voluntary 401(k); and involuntary deductions for child support or maintenance.

iii. Using gross income as a starting point, you will need to verify if your client is above or below the median income limits set by the office of the United States Trustee. Using monthly gross income, multiply by twelve to get an annualized average income. See the UST website for median income levels for your state and your client's family size. More discussion at Sec. III, D, below.

1. http://www.justice.gov/ust/eo/bapcpa/20120501/bci_data/median_income_table.htm

iv. Once you have determined gross monthly income, use the pay advices to determine net income after deducting the taxes insurance and other items from the debtor's pay check.

1. Remember, for the purposes of building this budget you cannot take into account voluntary deductions such as a 401(k), but you can take into account involuntary deductions such as an IPERS.

2. Multiply the net income amount by the frequency of checks to get an estimate of monthly take home pay. So, for a debtor who is paid weekly, multiply his weekly net pay by 4.33 to get a monthly estimate.

2. Building a Budget

i. Verifying monthly living expenses is important for two reasons. First it helps you, as attorney, determine whether your client can afford a chapter 13 payment, if necessary. Secondly, it will give you insight as to whether your client can afford to continue making payments on existing monthly expenses in a Chapter 7.

1. Typically, under Chapter 7, a debtor must be able to show that he can afford to continue to pay for secured debts (i.e.; house and car payments) if he wishes to reaffirm those debts. See more about Reaffirmations in Sec. III, F, below.

ii. At this stage you need not worry about credit card or other unsecured payments. Once you have filled in these typical living expenses, subtract the total expenses from the total income from all sources to get an estimated Disposable Monthly Income.

1. Don't forget to ask about any additional payments that may have not shown up on the list. Student Loans, additional vehicles, rent-

to-owns, storage garage, etc.

3. Types of Debt.

    i. The next section is to determine what kind of debts your client has. Under the bankruptcy code, different debts have different priorities and rights and will be affected by the discharge in different ways. At this stage, you merely want to classify the debts. Further discussion of priorities and non-dischargeability can be found at Sec. III, G, below.

        1. Priority and Non-dischargeable Debts.

            a. These include both state and federal tax liabilities (sometimes); fines or other debts owed to governmental units; child support and maintenance;

                1. Child support and maintenance are never discharged; student loans are rarely (read: basically never) discharged; taxes less than three years old are non-dischargeable, but older than 3-years might be discharged under certain circumstances.

        2. Secured Debts

            a. Here you should list anything that was financed. Typically, you will find a mortgage and car loan. But don't forget to ask about furniture or appliances that may have been financed as well.

                1. In my experience, places like Best Buy and American TV will always claim a security interest. Lowe's and Home Depot occasionally do. Sears never does.

            b. It is also important to note if, and how much, a debtor is behind on secured loan payments. Generally, creditors will not reaffirm on a debt that is behind in payments. So unless your client can bring those accounts current, they may want to consider a Chapter 13 to save a house or car.

        3. Co-signed loans

            a. Non-client co-signers may be impacted by your client's bankruptcy. Be sure to advise your client that she will no longer be obligated to pay a co-signed debt, but that the other party will remain liable.

1. In Chapter 13 cases, some protection may be given to non-filing co-signers, but only if the debt is going to be paid in the plan.

4. Executory Contracts and Unexpired Leases

   a. Executory contracts and leases become part of the estate. It is rare that these types of agreements impact a case, but occasionally a Trustee may step into the debtor's shoes and assume or reject these agreements should there be a potential value to the estate.

      1. Ex. Debtor signs a 10-year lease agreement for a store front for $500.00 per month. In year 7, the debtor files for Chapter 7 bankruptcy, intending to close his business. The going rate for a store front rental has increased to $1,000.00. The Trustee has the power to step into the debtor's shoes as to the lease and effectively "sublet" the store front at the higher rate in order to claim some value for the benefit of creditors.

   b. In practice, there is rarely any value to these agreements and it is in the best interest of your client to merely reject them to get out of a bad agreement. Rentals and Time-shares are the most common examples. Leases and Rent-to-owns for furniture or appliances may also occur. If this is the case, the question is whether the client can afford to continue pay for them.

5. Unsecured Debts.

   a. At the initial interview, you merely need to get an approximate total of unsecured debts. These include credit cards, medical bills, cash advance loans, deficiency balances, old cell phone bills, etc.

   b. Most individually acquired debts remain individual obligations. However, under state law, some debts become joint debts by operation of law. See 750 ILCS 65/1, et. seq., The Rights of Married Persons Act.

      1. Medical bills are the most common examples of the creation joint debt under the Rights of Married Persons Act. Be sure

to verify if your client is married and if either one of the spouses has a large amount a medical bills. The Bankruptcy Code does not require that married persons file jointly, but it is certainly recommended if there are large medical bills owed by one of the spouses.

c. The Bankruptcy Code contains limitations on debt amounts for Chapter 13 debtors. See 11 U.S.C. 109(c), the sum of all unsecured debts cannot be more that $336,900.00. This is rare, but may happen. Issues may arise when your client is above median and ineligible for Chapter 7, but has an unsecured debt load greater than $336, 900.00, making her ineligible for Chapter 13 as well. In rare cases like this Chapter 11 may be an option, but that discussion is beyond the scope of this manual.

4. Property of the Debtor

i. It is important to gather as much information about any and all property owned by the debtor. When a bankruptcy case is filed nearly everything the debtor owns becomes part of the bankruptcy "estate." You must counsel your client to be open and honest here. Concealing property from the bankruptcy court is a serious matter that can jeopardize the debtor's discharge.

1. Real Property

a. Get a list of all real property owned by the debtor, including both the legal description (i.e.; Lot 1 in block 2 of Smith's Addition) and the physical description (i.e.; 2 story, 3 bed, 2 bath, single family home).

b. Valuation is important. An appraisal done in 2008, doesn't mean too much in 2012; check the local county assessors website for the assessed value. You can also visit www.eppraisal.com to get market analysis valuations.

2. Motor Vehicle

a. This includes motor vehicles of all kinds. Cars, motorcycles, campers, trailers, RV's, other recreational equipment, snowmobiles, 4-wheelers, wave runners, etc. Try to get the year, make and model of each vehicle, as well as any special designation (i.e.; LS, GT, GXE); mileage, if applicable; and

current Fair Market Value.

1. NADA and Blue Book both have online listings in order to determine FMV.

3. Personal Property

   a. This is the "stuff" the client has at home. Ask about any antiques or art work, typically looking for any items at or above $500 is value; collections of any sort, stamps, coins, or baseball cards; firearms; musical equipment; sometimes it is helpful to get an itemization and an appraisal by a local auction company. For most clients, it is unlikely that they have anything individually of high value and we usually just apply a $2,000.00 value to "usual household goods and furnishings." Check with your local trustees and bankruptcy practitioners to see how specific you should be.

4. Jewelry

   a. Wedding sets are typically exempt, however if your client does have several pieces of expensive jewelry you must list it and it may become property of the estate unless otherwise exempted.

5. Bank Accounts

   a. Get the name of every institution where your client has an account as well as account balances. Note that sometimes a client may be listed on an account even though they do not use it. Legally, they may still have an ownership interest in the account that might be subject to the bankruptcy process. Typical examples include convenience accounts for elderly parents or account for minor children. It is usually not an issue, but in some cases it is necessary to advise your clients to have their names removed from those account prior to filing a case.

6. Misc. Property

   a. Ask about retirement savings accounts; IPERS, 401(k), IRA, other ERISA qualified accounts; Stocks, bonds, money market accounts, trading accounts; Certificates of Deposit, savings bonds.

7. Tools of the Trade

    a. Anything that the debtor owns personally but is required to have for work or business; typically tools or equipment (i.e.; a mechanic or carpenter); could be books or a computer as well.

8. Medical Equipment

    a. Does the client have an adjustable bed; wheelchair; breathing machine; this must be equipment that was prescribed by a doctor for on-going treatment.

9. Life Insurance Policies

    a. List the owners and beneficiaries of term life policies; get the cash surrender value of whole life policies; make certain to ask who the beneficiaries of each policy, and their relationship to the debtor.

10. Right to Receive Payment

    a. civil suits, Personal Injury claims; Worker's Comp claims; Receiving life insurance as a beneficiary; expected inheritances

        1. Should the debtor come into an inheritance within 6-months after filing a case, they are required by law to report that to the Court. Life insurance proceeds and inheritances are not exempt from the bankruptcy estate.

5. Statement of Financial Affairs is a short financial history for this client. It is basic background information for the Trustee to determine if there are any improprieties or preferential transfers. Each item has its own description in the forms to assist you in gathering the necessary information. This form will be duplicated in the final paperwork you submit to the court on behalf of your client.

i. Income from employment

    1. Rely on the most recent pay stubs to get YTD information; look to W-2's to get past years' income.

ii. Other income

    1. This includes SSI, SSD, retirement, pensions, public assistance, worker's comp, unemployment compensation, etc.

iii. Payments to creditors within 90-days of filing

    1. The trustee is looking for preferential transfers here; no need to include payments to secured creditors (i.e.; a regular house payment of $900 would not be listed); ask if debtor has made any large payments in excess of their minimum monthly payments to credit cards.

        a. It is also important to ask the debtor whether they owe any money to friends or family members and have made any large or continuous payments to those individuals over the last 12 months. The Trustee has the power to require those creditors who have received large amounts of payments prior to the filing of a bankruptcy to return those funds to the estate for more equitable disbursement.

iv. lawsuits, garnishments

    1. Has your client been sued by anyone; any one going after a bank account or paycheck; be sure to find out when a garnishment or bank levy occurred and how much has been garnished.

v. repossessions, foreclosures and returns

    1. repossessions in the last 12 months; any completed foreclosures, if the debtor owned any other real estate in the last 12 months; any voluntary returns, such as if the debtor purchased a car, decided he couldn't pay for it and took it back to the dealership.

vi. Gifts

    1. make sure to ask if the debtor has made any gifts or money or property in that last 12 months; again, the Trustee has the power to

reclaim these transfers for the benefit of the estate.

vii. Losses

1. has the debtor suffered any losses of property, such as a fire or storm damage, where the debtor was required to make repairs or replacement out-of-pocket (i.e.; no insurance coverage); has anyone broken in, stolen anything; any losses of income due to gambling in the last 12 months.

    a. Gambling may pose a specific non-dischargeability issue if the debtor has taken cash advances on credit cards for gambling use; see 11 U.S.C. 523(a)(2)(A), 523(a)(2)(C)

viii. payments for bankruptcy services

1. Be sure to include any monies paid to you, as debtor's counsel; any monies paid to a credit counseling agency or into a debt consolidation program in the last 12 months.

ix. Other transfers

1. has the debtor sold a house or sold a car; transferred anything by deed or title; put any property into someone else's name name in the last 12 months.

x. Closed bank accounts

1. Has the debtor closed any bank account in the last 12 months; what was the date of closing and ending balance; where did those funds go?

xi. safe deposit box

1. Location of safe deposit box; list contents

xii. Set-offs

1. Does the debtor owe any debts to a place where they have deposit accounts (i.e.; checking and savings); a bank holding funds for a debtor may have special rights over those funds; if the bank has off set a debt with funds held in deposit, they may be required to disgorge those funds for the benefit of the estate.

xiii. Property held for another

1. Is the debtor holding any property that technically belongs to someone else; something the debtor is using themselves or is holding in storage; typical examples occur when a debtor is using (and sometimes paying for) a car that is titled in another family member's name.

xiv. Prior addresses

1. List all prior address for the previous 3 years; jurisdictional rules require the debtor be a resident of the District in which the case is filed for more than 90-days (91); Use of proper exemptions may depend on which State I which the debtor has lived for the majority of the last 2 years. Further discussion of exemptions can be found at Sec. III, D, below.

xv. Spouses and former spouses.

1. This is sometimes an issue in Illinois, because Wisconsin is a community property state; When a debtor is new to Illinois, be sure to determine whether they lived in a community property state in the last 8 years.

xvi. Business interests

1. Does the Debtor own a business; corporations; even closely held corps must be listed; this will also need to be listed as personal property on Schedule B.

2. Initial Consultation Agreement

a. 11 U.S.C. 528 requires that within five days of providing any bankruptcy assistance and also prior to filing any pleadings, a debt relief agency must enter into a written contract with the assisted person. You can enter into an agreement with the client in regards to the first meeting only, recognizing that they may change their mind at any time. You must discuss fees and services at this time. A copy of the initial consultation agreement is attached to this form as Appendix D.

1. Remember, this initial consultation agreement is separate from the requirement of a subsequent engagement letter and attorney services

contract. Always send a separate agreement once the client has agreed to retain your services.

3. It is always prudent to be repetitive when communicating with your clients. Sometimes, when you ask a question it may not come across as clear as you would like and sometimes you may not have followed up as much as you need to at the initial interview. See Appendix E for a list of important things to think about when planning to file bankruptcy.

D. Follow Up Appointments and Additional Documentation

1. You will want your client to follow up on the initial interview with a second appointment. Once you have determined the kind of case to file you can advise the client on what additional documentation you will need.

    a. You may also take this opportunity to run a credit report for your client. Using a service such as Credit Info Net to pull a consolidated credit report will assist in your due diligence as well as give your client peace of mind to know you have all the creditor information out there.

        1. https://www.cingroup.com/companies/cinlegal/clr/

    b. Your client will also need to bring in the last 7 months worth of pay advices; and at least 2 years, and possibly up to 4 years, worth of tax returns and supporting schedules.

        1. See Appendix E for a list of additional documentation you should request from your client.

E. Credit Counseling and Debtor Education Classes

1. Both Ch.7 and Ch.13 consumer bankruptcies require that the individual debtors complete pre- and post- petition credit counseling classes; See 11 U.S.C. §§ 109, 521; note, this requirement does not apply to business bankruptcies, or where 51% of the individual debtor's debts are due to a business (i.e.; a sole proprietor).

    a. Pre-filing counseling must be completed no more than 180-days prior to filing; post-filing debtor education must be completed before the court will enter a discharge order.

        1. The vast majority of cases require the counseling classes, however there are three exceptions that must be raised by motion at the time of filing;

these exceptions include:

i. Incompetency;

ii. Disability;

iii. Active military duty in a combat zone.

b. For a list of approved credit counseling providers see:

1. http://www.justice.gov/ust/eo/bapcpa/ccde/CC_Files/CC_Approved_Agencies_HTML/cc_illinois/cc_illinois.htm

F. Software

1. There are several different bankruptcy preparation programs out there. The author's firm uses Best Case Bankruptcy, by Wolters Kluer. You can download the common forms (Petition and Schedules) from the Court website. But if you plan to add bankruptcy as a major practice area, getting software for the preparation of cases in invaluable. Assistance for the Means Test alone is worth the price.

a. http://www.bestcase.com/

b. http://www.ezfiling.com/

c. http://www.ilnb.uscourts.gov/Forms/

G. Knowing your Judges and Trustees

1. The judge in your division tends to set policy in the area of bankruptcy law; the Judge may be pro-debtor or pro-creditor and an attorney must be aware on how the judge will decide issues based on those preconceived notions.

2. Trustees are charged with the proper administration of cases; in practice, virtually all trustees recognize that the bankruptcy process is meant to provide a fresh start to debtors and their families and want to help your client successfully complete this process; however, there are still rules and requirements to follow. Contact your trustee for a list of documents that Trustee requires to administer the case; these usually include copies of recent pay stubs, tax returns, copies of titles, etc.

III. Chapter 7

A. Filing the case

1. Generally, a Chapter 7 case is a "liquidation" bankruptcy. Chapter 7 applies to both consumers and businesses. In a Chapter 7, the Court will take any non-exempt assets of the debtor, sells them to pay off creditors at least a portion of their debt, and discharges the remaining balances. Nearly all cases are "no assets" cases and there is never a distribution to any creditors.

2. Once your case has been uploaded via ECF and filed with the Court the administration of the case begins. 11 U.S.C. 341 requires a Meeting of Creditors "within a reasonable time" after the commencement of a case. Typically this is approximately 30-days after the date of filing, depending on the court calendar.

3. Meeting of creditors.

    a. At least 2 weeks before the hearing, be sure to forward any required documentation to the Trustee for his or her review. This ensures compliance with 11 U.S.C. 521 and gives the Trustee time to review and let you know if any further information is required. Get to know your trustee and verify what information they would like to see prior to the meeting.

    b. Prior to the conclusion of the meeting of creditors or equity security holders, the trustee shall orally examine the debtor to ensure that the debtor in a case under chapter 7 of this title is aware of—

        1. the potential consequences of seeking a discharge in bankruptcy, including the effects on credit history;

        2. the debtor's ability to file a petition under a different chapter of this title;

        3. the effect of receiving a discharge of debts under this title; and

        4. the effect of reaffirming a debt, including the debtor's knowledge of the provisions of section 524(d) of this title.

    c. While legally called the "Meeting of Creditors", it is quite rare that any creditors actually appear; typically, the only time a creditor will appear is when they are a local bank or finance company on a secured debt, such as a local bank with a mortgage. They generally want to know whether the debtor wants to reaffirm, whether they still possess the collateral, and whether the collateral is insured.

d. Prepare your client for their hearing. Whether they admit it or not, most debtors are naturally nervous going into the 341 hearing. Remind your clients that the questions the Trustee will asked has already been asked of them by you. "I don't know" is an acceptable answer and oftentimes, any missing information can be provided to the trustee after the hearing.

    1. Reassure your clients that no one is going to point fingers or demand they explain why they are in bankruptcy court. The trustees also recognize that entering the bankruptcy system is a difficult decision and most often due to events outside of the debtor's control. While the hearing is a formal proceeding, it is not meant to put your client on the spot.

e. Typically, the only documentation your client needs to bring is a picture ID and verification of Social Security Number. These MUST be two separate items. These can be a driver's license and S.S. Card. It could also be a W-2, a Medicare card or military ID. Just be certain the any identification is currently valid.

    1. Occasionally, the Trustee may ask for documentation that your client does not have until shortly before the hearing. Oftentimes this may be a pay stub or bank statement. Be sure you keep track of what documents your client needs to provide and whether you have received it prior to the hearing.

f. Discuss with your client, and provide them with a copy of, the questions typically asked by the Trustee. They are all very straight forward questions. If you, as attorney, have done your job right, the trustee will have very few questions and rarely any surprise questions. A copy of typical questions asked by the Trustee is found at Appendix G.

B. Elements Common to All Bankruptcy Cases

1. The Automatic Stay

a. 11 U.S.C 362 provides for an Automatic Stay Order to be entered upon the filing of any case in bankruptcy court. This is effectively an injunction, preventing creditors from collecting a debt in any way, shape, or form.

b. However, there are several exceptions to the automatic stay, including the prosecution of criminal cases, continuance of family law cases, and the collection of maintenance or child support.

c. The Auto Stay is one of the most powerful protections available to your client. If a debtor is under a garnishment order or under threat of repossession, the Auto Stay prevents the continued enforcement of those claims.

    1. As debtor's counsel, you have the obligation to provide notice to the debtor's employer in order to get a garnishment stopped. Depending on timing, wages may still be garnished even after the case has been filed. If this happens, the funds should be forwarded to the Trustee, but you, as attorney, are responsible for making certain this happens.

    2. Additionally, it takes time for notice to go out to creditors and for it to reach the proper department. Advise you clients at the time of filing that if any creditors continue to contact them, to tell those creditors that they have filed a case in bankruptcy court and any continued contact is a violation of federal law. This tends to empower your clients and they will feel much better about the whole process.

2. The Estate

    a. Under 11 U.S.C. 541, in every bankruptcy case ALL of the debtor's property owned at the time of filing becomes part of the bankruptcy estate. This includes contingent and unmatured property. The Estate includes both exempt and non-exempt property, and the exempt property revests in the debtor at discharge. Further discussion of Exemptions can be found at Sec. III, D.

        1. Anything acquired post-filing remains property of the debtor and does not transfer to the estate. This includes post-filing wages in a Chapter 7 case.

        2. However, tax refunds, wages, or bonuses, will become part of the estate if the debtor has a non-contingent right to the property and the property does not accrue until after filing.

            i. 11 U.S.C. 541(a)(5) applies to unexpected interests in property that accrue within 180-days of filing including from inheritance, insurance proceeds, and divorce decree. It is rare that this happens, but be certain to advise your clients of the possibility.

3. The Trustee

    a. All consumer cases have a Trustee appointed to oversee and administer the estate. Bankruptcy Trustees are appointed by the U.S. Trustee in each district.

b. The Trustee is charged with holding the Sec. 341 meeting and assessing the assets of the debtor. Recall, most Chapter 7 cases are no-asset cases, and therefore there is nothing to administer.

C. The Means Test: Eligibility Requirements

1. The primary hurdle for Chapter 7 eligibility is the Form 22 Means Test. The 2005 BAPCPA amendments created Form 22 with the intention to prevent substantial abuse by debtors who are unfairly trying to take advantage of bankruptcy. This is a presumptive test and the Debtor either "passes" of "fails."

2. Ostensibly, the purpose of the Means Test is to determine the debtor's ability to pay back creditors. If a debtor "fails" the threshold test, they are more likely, but not necessarily required, to file a Chapter 13 case.

   a. Even where the debtor fails the means test, the vast majority of Ch. 13 Plans do not provide for payments to unsecured creditors. Neither is a debtor who passes the means test precluded from voluntarily filing a Ch.13 case.

      1. Oftentimes, even when a debtor passes the means test, if she is behind on a mortgage or car payment, a Ch.13 may be the best option to help catch up the arrears.

3. There are 2 parts to the Means Test.

   a. Part One: Median Family Income Test – The Threshold Test

      1. The attorney must determine Current Monthly Income ("CMI") by taking the average of income for the six months prior to filing the case. Note, the six-month period is counted as six months prior to the month in which the case is filed. This means for a case filed in September, 2012, you must use the income information for the six month period of March 1, through August 31.

      2. The Code states that ALL income must be used to calculate CMI. This includes wages, pensions, unemployment, support or maintenance (if actually received).

         i. However, this will NEVER include Social Security income.

         ii. A CMI calculator is attached to this form as Appendix I. Note, this is a spreadsheet file, and should be included in the electronic version of the materials.

3. You must calculate the annualized income of the debtor by taking the six-month average and multiplying by 12. Compare this total to the IRS/Census Bureau Median Household Income for the state in which the debtor resides; if the debtor's CMI is below the median income level, then the debtor "passes" the means test and is eligible for Ch. 7.

    i. http://www.justice.gov/ust/eo/bapcpa/20120501/bci_data/median_income_table.htm for info on Median Income for the debtor's family size. These amounts are updated about every 6 months. Be sure to check the UST website periodically for updated info.

4. Keep in mind that the 6-month CMI calculation is meant to be a "snap shot" of the debtor's income. However, when circumstances arise where a debtor has just recently been laid-off or has otherwise lost employment, those last 6-months are not indicative of current monthly income. It may be advisable to have your client wait 2 or 3 (or more) months before filing to order to bring down the CMI levels on the means test.

    i. *HAMILTON v. LANNING*, 545 F. 3d 1269 (U.S. 2010)

5. Approximately 95% of consumer debtors fall below the median income levels. If the debtor passes this threshold test, you need not complete the rest of Form 22. If the debtor's CMI is above the Median Income levels, he is deemed to have failed the Means Test and the presumption of abuse arises. You must complete the rest of Form 22.

b. Part 2: Form 22 Expense Deductions – The Long Form Test

1. Step 1: A debtor may subtract his expenses on Form 22 to reduce his CMI and overcome the presumption of abuse. The IRS creates national, local, and other Necessary Expense limits which are used to deduct payments out of the debtor's CMI.

    1. See http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm for more information on national and local expense limits.

    ii. For determining Ch.7 eligibility, a debtor may deduct taxes, insurance, and other involuntary items (including mandatory retirement plans, such as IPERS) taken out of his paycheck, but not voluntary deductions (such as a 401(k)).

iii. A debtor's secured debts, such as a car or mortgage, are deductible without limit. A house payment is deductible in it's full amount.

1. Rent payments (as opposed to mortgage payments) can only be deducted up to the IRS local standards for rent, regardless of the the debtor's actual rent is.

2. A car payment should generally be calculated as though it will be paid over 60 months from the day of filing, paid at 5.25% interest. See the discussion of Chapter 13 Plans, below, as well as *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).

3. Many debt's are deducted based on a 60 month payment estimate. Even unsecured priority debts can be deducted. For example, the a debtor owes $5,000.00 in past-due child support, the amount can be divided by 60 and an additional $83.33 can be deducted from the means test.

2. Step 2: The final calculation is determined after Form 22 is completed. For this calculation, it is necessary to know:

i. the total deductions (line 49) subtracted from the debtors CMI (line 18) to find the debtor's Disposable Monthly Income ("DMI") (line 50);

ii. The amount of DMI is then multiplied by 60 and inserted into line 51, to show the total amount that could be paid into a Ch.13 plan over 5 years (60 months).

3. Step 3: Statutory Presumptions under 11 U.S.C. 707(b)(2)

1. If the total 60-month DMI amount is below $6,575.00 the the debtor "passes" the long form Means Test and is eligible for a Ch.7. If the total is greater than $10,950.00, then the debtor "fails" the means test and must file a Ch.13

2. If the 60-month DMI total is somewhere between $6,575.00 and $10, 950.00, then you must calculate a potential minimum payment.

a. Determine the total of unsecured, non-priority debt and insert into line 53.

1. The total amount is then multiplied by .25 and inserted into line 54; this is the minimum amount the debtor must contribute over 60-months to avoid abuse.

2. Compare the total DMI (line 51) to the minimum payment amount (line 54); if line 51 is less than line 54, then the presumption of abuse does not arise and the debtor "passes" the means test.

3. If line 51 is GREATER than line 54, the debtor will fail the Means Test, and be required to file under Ch.13.

4. Short hand version: Abuse = {DMI $\geq$ [(total unsecured x 0.25) $\div$ 60]}

5. If the debtor fails under the 25%-Test, he must file a 5-year Ch.13 plan with a payment equal to DMI.

6. Be aware that if your calculation reaches this point and a debtor passes under the 25%-Test, he may be eligible to file Ch.7, but if he elects to file Ch.13 he will be required to stay in the Plan for the full 60-months.

4. Business Cases: The Means Test only applies to ***individual consumer debtors*** but not to businesses. If more than 50% of a client's personal debt is business related (i.e.; sole proprietor or closely held corp.)then he will be exempt from the Means Test.

   i. Note: Tax liabilities are not considered consumer debts, therefore if a client's debt load is more than 50% taxes dues, the means test will not apply.

5. A note about software: It cannot be stressed enough how important a software package will be for the bankruptcy practitioner. For the purpose of filling in the Means Test form as well being confident that your math is correct, some sort of software program is invaluable.

D. Exemptions – Basics

1. All of the debtor's property becomes part of the Bankruptcy Estate from the moment the Voluntary Petition if filed. Only then will you apply the exemption statutes to the property of the estate to protect them from liquidation.

a. The Bankruptcy Code establishes uniform federal exemptions, but states are allowed to opt-out of those exemptions. 35 of 50 states have completely opted-out of the federal exemption scheme. The remaining 15 states give the debtor the option and generally have more liberal exemptions, so the state lists will be chosen any way.

2. Illinois has elected to rely on state statute to exempt certain property judgment, attachment, or distress from rent. In many cases this may make some debtor's judgment-proof. Property defined as exempt under state law, means general creditors cannot seize it to satisfy their judgments.

    a. See 735 ILCS 5/12-1001 et. seq., for the applicable Illinois exemptions.

3. The purpose behind these exemptions was to leave a debtor with enough property to be able to get the "fresh start" promised by the bankruptcy Code and not become a ward of the state.

4. Exemptions do not apply to property subject to a security interest, only to unsecured/unencumbered property. As part of granting a security interest, the debtor waives the exemptions as to those creditors. However, any equity interest in this property will be covered by the exemptions.

5. Due to the typical nature of the common debtor's property, there is typically no non-exempt property remaining in the bankruptcy estate. This means that nearly all cases are "no asset" cases with a complete discharge of unsecured creditors.

6. Exemption statutes are often written to exempt specific types of property; this may be a homestead, a car, home furnishings, tools of the trade, etc.

7. Valuation of exempt property is important. Over valuing specific items may mean there is an non-exempt portion to that property.

    a. The value applied to exempt property is Fair Market Value. For bankruptcy purposes, this it typically liquidation value. That is "pawn shop" prices, or "garage sale" prices.

8. It is customary to check N.A.D.A. for vehicle prices, taking into account the mileage and condition of the car. Note that the ILCS provides for a $2,400.00 exemption for a motor vehicle, up to $4,400, if owned by a married couple.

E. Exemptions – Advanced

1. Homestead Exemption: 735 ILCS 901.

    a. The value of a homestead is especially important since the ILCS allows an exemption of only $15,000 per individual, with a maximum of $30,000 for a married couple.

        1. Widow's Exemption: where a widow(er) owned property with a spouse at the time of the spouse's death, the widow(er) can claim both shares.

    b. A useful resource is www.eppraisal.com, this website takes a market analysis of nearby properties to give you an estimated value of the debtor's property. Taken in conjunction with the assessed value from the county, it is possible to get a reasonable valuation of real estate.

    c. Not many homeowners in bankruptcy need to rely on the homestead exemption. When a mortgage is as large as the total value of the property, the debtor will have no equity to protect. But for those debtors who do have equity in their homes, the exemption code may be determinant of whether they can keep their home or be force to give it up.

        1. The Best-Interest-of-Creditors-Test ("BICT") will help determine how much, if any, equity exists in a property that could be liquidated under the Code. See Appendix K for a spreadsheet file used to determine the BICT.

            i. Start with the FMV of the house.

            ii. Subtract a 7% realtor commission, $1,000 estimated costs, and the total of any mortgage(s) on the property to yield the net proceeds from a potential sale.

            iii. From these net proceeds, subtract the applicable exemption amount. $15k for an individual, $30k for a married couple. This will yield the gross non-exempt equity.

            iv. From the gross equity, subtract an initial Ch.7 trustee's commission of $1,250.00. Subtract $5,000.00 from the total equity, then apply a 10% commission not to exceed $5,000.00.

            v. The remaining balance must be paid into the estate for the benefit of unsecured creditors. This may require a debtor who is otherwise eligible for a Ch.7, to file a Ch.13 to protect this equity.

vi. However, even where equity exists, if the sale of the property will not yield more than what is owed on the house, along with the costs of sale, the trustee will not bother forcing the sale.

2. Exemption Planning

   a. 11 U.S.C. 522(b)(3) provides that where a debtor has resided in his current state for the last 2 years, he may apply the exemption statutes of that state.

   b. If the debtor has moved between states within the last 2 years, he must apply the exemptions of the state where he was domiciled for the majority (91-days) of the 180-days preceding the 2 year period prior to filing.

      1. Count back 2 years, plus 180 days from the date of filing. Apply the exemptions of the state where the debtor resided for the majority of that 180-day period.

   c. Many state exemption codes only protect real or personal property held within the state. This may cause problems for a debtor who has moved frequently because he will hold no property in the state under which exemption code he is eligible to use. In these situations, the Code requires the debtor to apply the federal exemptions, regardless of whether the state has opted out.

F. Claims and Distributions

1. Once the Trustee has determined what property belongs to the estate, she will sell any non-exempt property and the proceeds will be distributed pro rate among unsecured creditors.

2. Creditors must file a Proof of Claim form, attaching any writing (contract) that evidences the claim. A Proof of Claim must be filed within 90-days after the 341 Meeting or from the date of notice of distribution, or else the creditor will waive any claim to the distribution.

   a. 11 U.S.C. 502, provides that a Proof of Claim include a calculation of the amount owed, including principle and pre-petition interest or any other pre-petition claims.

   b. Equity is Equality. Since all unsecured creditors are paid pro rata, no post-petition interest will accrue on any unsecured claims. Attorney's fees, collection costs, etc., that are incurred prior to the filing date are treated the same as interest.

3. Secured Creditors are subject to §502 as well as §506, which spells out the special post-petition rights for secured creditors.

    a. Under §506, secured creditors get paid first. They will receive payment up to the value of the collateral, not necessarily the amount due. Remember "value" means liquidation value.

    b. Partially secured claims will be paid only up to the value of the collateral, with any remaining balance treated as a general unsecured claim. This is known as a "cram down" or bifurcation. This provision does not apply if a debtor reaffirms on the loan.

    c. A fully secured creditor is a creditor whose claim is less than, or at least equal to, the value of the collateral. A fully secured creditor is entitled to post-petition interest, typically paid at 5.25%.

4. Priorities Among Unsecured Creditors.

    a. 11 U.S.C. §507 determines the order and amount of payout to unsecured creditors. Unsecured creditors divide the remaining assets, pro rata, only after the secured creditors have been paid. Unsecured creditors are paid based on statutory priority. The list below are highlights, but not exhaustive:

        1. Domestic Support Obligations;

        2. Administrative Expenses (i.e.; post-petition debts incurred by the Trustee);

        3. Income taxes that accrued during the three years prior to filing, or property taxes due during the one year before the date of filing;

            i. Past due property taxes become statutory liens on the property and are treated as secured creditors. Income taxes accruing more than 3 years prior to the date of filing are deemed general unsecured creditors and paid/discharged as such.

5. Each priority class must be paid 100% of its allowed claims before the next class is paid anything. If there is not enough money to pay a particular class 100%, then they are paid pro rata among the class.

G. Redemption and Reaffirmation

1. Once a debtor has filed under Ch.7, he must provide a Statement of Intentions to apprise any secured creditors of their treatment in this bankruptcy. The debtor must indicate whether he wishes to (1) surrender the collateral to the creditor, (2) Redeem the collateral for its current FMV, or (3) Reaffirm the debt based on the existing agreement.

    a. Redemption

        1. 11 U.S.C. 722 provides that a debtor may "redeem" property from a lien by paying the value to the creditor. In this instance, FMV is defined as ***replacement*** value, rather than liquidation value. Any unsecured portion of the debt will be discharged.

            i. The property must be exempt or abandoned by the Estate. Abandoned property is non-exempt property of the estate that the Trustee feels will not fetch enough money to be worth liquidating.

            ii. The debtor must pay the replacement value of the secured claim in a lump sum. A debtor cannot redeem in installments.

            iii. A redemption is involuntary on the part of the creditor. If the debtor elects to redeem, the creditor must accept payment and release the lien.

                1. Redemptions are not common due to the fact that it is unlikely that a debtor in bankruptcy will be able to come up with a lump sum for replacement value.

    b. Reaffirmation

        1. §524(c) allows a debtor to reaffirm an otherwise dischargeable debt. A reaffirmation is a voluntary agreement between the debtor and creditor. It is the creditor's promise not to repossess the collateral in exchange for the debtor's promise to continue making regular payments.

            i. The debt must be reaffirmed prior to discharge. If a creditor fails to properly file the reaffirmation agreement with the court, then the debtor's liability will be discharged even if it was the debtor's intent to reaffirm.

            ii. The debtor takes on a personal obligation to be paid over time. This creates personal liability for any deficiency balance. It usually just

recapitalizes an arrearage at the end of the note.

iii. The terms of the reaffirmation are based on the desires of the creditor, since a reaffirmation is voluntary for both debtor and creditor, the creditor has the power to dictate the terms. However the debtor is not prohibited from at least trying to negotiate terms different from the original agreement.

1. Where the attorney refuses to sign off on the reaffirmation, a hearing must be held for the judge to review and approve the reaffirmation based on the judge's view of the best interest of the debtor and the debtor's ability to pay.

2. The debtor cannot force a creditor to reaffirm, so the creditor has more leverage in this situation. A reaffirmation is a legally binding agreement to waive the discharge on a given debt.

3. A reaffirmation protects the debt from discharge and makes it fully enforceable in a state court. The debt remains a lien on the property, even after bankruptcy.

H. Discharge and Exceptions

1. Once the discharge order is entered the §362 Automatic Stay is dissolved and the §524 discharge injunction slides into place. The discharge injunction forbids any attempt to collect a discharged debt.

a. Note that §506(d) provides that obligations are discharged, but liens are not. This removes any personal liability for the debtor, but leaves an otherwise enforceable lien on property.

b. The discharge eliminates the personal liability of the debtor, but does not eliminate the debt itself. Therefore a co-signer may still be liable to pay a the debt.

1. Co-signer liability is only an issue under Ch.7 cases, under Ch.13, the automatic stay protects co-signers as well.

2. Exceptions and Denials to Discharge: The Rifle Shot and the Shot Gun

a. The Trustee or a creditor may object to the discharge of a particular debt under §523, or may object to the discharge of all debts under §727.

1. §523 includes a list of 19 separate kinds of non-dischargeable debts; §727 contains 11 separate grounds for the complete denial of discharge.

    i. Common examples include child support and maintenance payments; student loans; and debts incurred by fraud, such as credit card abuse.

    ii. For tax debts less than 3 years old, §523(a)(1)(A) denies discharge as to those tax liabilities. The IRS retains the to satisfy tax debts through the seizure of property or by tax lien, this includes property that is otherwise exempt under state law.

    iii. A complete denial of discharge may occur in serious cases where the debtor has committed fraud on the court by hiding or disposing of assets; or more simply where the debtor has failed to complete the second debtor's education class or has otherwise received a discharge within the last 7 years. See 11 U.S.C 727, for the complete list.

IV. Chpater13

A. Treatment of Secured Creditors Under the Plan

1. Chapter 13 allows a debtor to pay back all of his creditors under a new payment term. For an individual consumer debtor, the plan must be approved by the court, but not by the creditors. However, a creditor may have the right to object to a proposed payment plan if it does not properly reflect the status of the creditor's claim.

2. The Trustee will take a portion of the debtor's income and distributes that money in accordance with the plan.

    a. Statistically, about 66% of Ch.13 plans fail. But the hope is that by the time these plans fail, the debtor has paid off all of the secured claims and will only have unsecured claims left.

3. Chapter 13 is used primarily by debtors facing foreclosure or repossession. A Chapter 13 may be the debtor's only option if they cannot reaffirm or redeem the property in a Ch. 7 case. The Chapter 13 allows the debtor to catch up past payments.

B. Chapter 13 Filing Requirements

1. A debtor who has failed the Means Test is required to file under Ch.13, if at all. However, a debtor who passes the means test may still voluntarily file under

Ch.13.

2. 11 U.S.C. 1306, creates an estate under §541 (just like under Ch.7), and also includes any property and earnings acquired after the commencement of the case, but before the close of the case.

    a. This means that a debtor's future wages are part of the bankruptcy estate, but the debtor will be given an allowance for living expenses. Again, building an accurate budget is very important.

    b. However, the debtor remains in possession of the property of the estate. Once the plan is confirmed, the exempt interest in property vests back in the debtor under §1327. Any unencumbered and non-exempt property remains part of the estate and must be turned over to the Trustee for liquidation for the benefit of unsecured creditors.

        1. Note: any non-exempt property that is also collateral for a secured loan will remain in the debtor's possession so long as he is able to "Cure and Maintain" the payments due under the agreement. Otherwise, the security interest must be surrendered or the Trustee may liquidate to pay off the secured creditor and apply any balance to the general fund.

3. Ch.13 is a repayment plan and is dependent upon the future income of the debtor. The Code requires that the debtor have a relatively stable income in order to support the stream of payments for a Plan. The code also requires that a Plan last for no less than 3, and no more than 5, years.

4. The Trustee's role in Ch.13 is to verify the feasibility of the plan and make disbursements to creditors.

    a. Recall that creditors must file a proof of claim in order to be paid. Failure to do so means they will not receive any payment under the Plan.

    b. The Trustee also has the duty of objecting to improper claims; ensuring that the debtor turn over the required amount of income; assisting the debtor in the performance of his duties under the plan; and objecting to the debtor's discharge if appropriate.

        1. Ch.13 trustees often require a wage withholding order for the submission of plan payments. However, a debtor may sometimes be able to set up an EFT through a checking account as well.

5. Under Ch.13, §§362 and 542, require a creditor to return any repossessed property of the estate, but allows that creditor to get full payment, plus present value, under the plan. The Automatic stay will also stop the foreclosure process if the property has not already been sold.

    a. The deadline for a Sheriff's Sale is a serious matter. If a case is not filed prior to the sale of the real estate, then it is impossible to get that property back.

    b. Don't forget about the pre-filing credit counseling requirements. While these classes can be completed fairly quickly, they may still require a couple of hours. A couple of hours may literally mean the difference between saving and losing the house.

C. Elements of an acceptable Plan

1. The debtor, through his attorney, comes up with a payment plan detailing the amounts to be repaid and the terms of the payments. The trustee must review the Plan to determine the feasibility of the payments, and recommend the plan for the court's approval. See §§1322, 1325 for the necessary elements.

2. Payments must begin no more than 30-days after the filing of the petition.

3. Payments to Secured Creditors

    a. Oftentimes a secured creditor would rather repossess the collateral rather than allow the debtor to keep it. Creditors are concerned about a loss of the collateral or a decline in its value. In order to protect the "present value" of the collateral, Creditors oftentimes request *adequate protection payments* from the trustee prior to the confirmation of the plan. If the court determines that there is a lack of adequate protection the court may lift the automatic stay prohibitions as to that creditor.

        1. Under §362, the debtor must show that the property is necessary to the effective reorganization of the debtor to avoid a lift of stay. Where the debtor has shown that retention is necessary and the plan provides for 100% payment on the allowed claim, with interest, the creditor is deemed to be adequately protected. The debtor must maintain his regular monthly payments under the agreement until the plan is confirmed, as well as insurance.

4. Modifying the Secured Creditors interest

    a. §1325 sets the rules for payments to secured creditors under the plan. Secured creditors are entitled to the same treatment as they would receive under a Ch.7. The must receive payment in full of all allowed claims that the debtor wishes to maintain.

        1. §506(a) requires the court to determine the allowed secured claims of the creditor. Replacement Value, rather than liquidation value, is the standard used for secured creditors under Ch.13. Replacement Value equals "present value."

            i. Since the collateral will continue to depreciate over time, the secured creditor is entitled to receive payments for present value. This is generally determined by adding on interest to the replacement value of the collateral for the time-value of money. Interest is generally placed at 5.25% based on the holding in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).

                1. To determine the payment amount on a secured debt, it is helpful to use an amortization calculator. A useful calculator can be found at http://www.amortization-calc.com/

                2. Remember that the amount paid to protect "present value" will change based on the length of your plan. The same amount paid over 60 months will be more with interest than that amount paid over 36 months.

    b. Cram Down

        1. §1325(a)(5)(B) provides that where an under-secured claim is bifurcated under §506(a), whereby creating both a secured and unsecured claim by the same creditor, a debtor need only pay the secured portion in full under the plan. The unsecured, or deficiency portion, is treated the same as all other unsecured creditors and will receive a pro rata payment only if there is a distribution to those creditors. However, the debtor MUST pay off the value of the collateral during the life of the plan.

            i. This is similar to a redemption under Ch.7, with the benefit of being able to pay over time.

        2. A cram down generally only affects automobile loans, but may be used against any PMSI creditors except mortgages.

3. "910" Car Claims: §1325(a)(9) – The "Hanging Paragraph"

    i. Bifurcation will not occur under §506 where a debtor has purchased a vehicle within 910-days (2.5 years) prior to the date of petition. §1325(a)(9) also covers any PMSI or non-PMSI interest in non-auto collateral if the debt was incurred within one-year of filing. These claims must be paid in full based on the balance of the loan, but may still be modified to the extent that interest might be reduced.

5. Treatment of Mortgages under Ch.13

    a. There are no provisions to affect the duties of obligations under a mortgage. §1322(b)(2) precludes the debtor from modifying the terms of a mortgage through bifurcation.

        1. The cram down does not apply to the debtors homestead, but may be available to non-homestead residential real estate (i.e.; rental or commercial property). However, be sure to recall that to qualify for a "cram down" the debtor must be able to make full payment on the secured portion of the claim within the life of the plan, otherwise the lien cannot be bifurcated and must be paid in full.

    b. §1322(b)(5), (c): Cure and Maintain

        1. Cure: §1322(b)(5) allows the plan to include arrearage payments on the creditors claim. §1322(c) allows the debtor to decelerate and accelerated mortgage, allowing the debtor to turn back the clock and cure the arrears on his loan.

        2. Maintain: the plan may provide for maintenance payments on claims whose last payment is not due until after the completion of the plan, as is common in long term home mortgages. Maintenance payments are typically made "outside" the plan, directly by the debtor.

D. Threshold Eligibility Under Chapter 13

1. The 2005 BAPCPA amendments increased the requirements to be eligible to file Ch.13, as well as the requirements for the proper treatment of unsecured creditors. Means Test eligibility requires that all above-median debtors (those who "fail") must submit a 5-year plan and rely on Form 22(line 50) to determine the debtors required minimum payment.

a. For all debtors who propose a Ch.13 plan, §1325 still requires (1) the Best-Interest-of-Creditors-Test; (2) that all "disposable income" (as determined by Schedule J, or Form 22) must be dedicated to the benefit of unsecured creditors; and, (3) that the plan be proposed in "good faith."

b. Disposable income will not include Social Security retirement income. This also includes SSI and SSD. See *In re Welsh*, 711 F.3d 1120 (9th Cir. 2013) (noting that the statute clearly excludes Social Security income); *In re Ragos*, 700 F.3d 220, 223 (5th Cir. 2012); *In re Cranmer*, 697 F.3d 1314, 1317-18 (10th Cir. 2012); *Baud v. Carroll*, 634 F.3d 327, 347 (6th Cir. 2011), *Carpenter v. Ries (In re Carpenter)*, 614 F.3d 930, 936-37 (8th Cir. 2010).

    1. Note, the 7th Circuit has not directly ruled on this issue. But it seems to be the way the Courts are heading.

2. Who May Be A Debtor: Minimum/Maximum Allowances for Total Indebtedness

    1. §109(e) places additional requirements on Ch.13 eligibility. §109 requires that a debtor be a "natural person" and have regular income in order to make plan payments. The Debtor must make a showing of regularity and stability, the source doesn't matter.

    2. §109 also limits the total amount of debt a consumer may carry and still be eligible for Ch.13.

        i. The eligible debts must be (1) non-contingent; and (2) liquidated;

            1. "Non-contingent" means that liability has fully vested in the debtor; "liquidated" means that a precise amount is readily ascertainable.

        ii. the sum of all unsecured debts can total no more than $336,900.00;

        iii. the sum of all secured debts can total no more than $1.1M.

    3. Failure to show steady income or where the debt limits are exceeded will requires the debtor to file under Ch.7 or Ch.11.

3. Treatment of Unsecured Creditors

    a. Determining Payment Amount for Below Median Debtors

        1. If the debtor "passed" the means test, Form 22 will not apply and DMI must be calculated another way. This is typically through Schedules I & J, based on the budget you create with your client.

        2. Income – Expenses = DMI.

        3. The CMI on Schedule I will include a spouses income, regardless of whether the case is a single or joint filing, as well as any contribution made by a domestic partner (i.e.; live-in girl friend or boy friend), roommates, etc.;

        4. Expenses on Schedule J, apart from unsecured payments, reflect reasonable amounts the debtor can spend to maintain a reasonable standard of living for himself and his dependents.

            i. The DMI should include the portion of the payment meant to cover any secured debts paid under the plan. Therefore you should not list any secured debts on Schedule J that will otherwise be paid through the plan.

    b. Determining Payment Amount for Above Median Debtors

        1. §1325(b)(3) provides that above-median debtor's, who failed the Means Test, are required to submit no less than a 5-year plan, regardless of the total owed to unsecured creditors. The Form 22 Means Test surplus (line 50) will determine the minimum amount a debtor must pay for the benefit of unsecured creditors, per month. This is in addition to the amount needed to pay for secured creditors under the plan.

        2. Even an above-median debtor who otherwise "passes" the Means Test, and elects to file a Ch. 13, must submit a 5-year plan with a payment based on Form 22 (line 50).

            i. Where Line 50 is a negative number and the debtor elects to file a Ch.13, but Schedule J reflects a positive DMI, the debtor will be required to pay that amount instead.

4. Competition Among Creditors

    a. Secured Debts

        1. Secured claims will always be paid first. This may be payment of their claim in full or only on an allowed secured claim (i.e.; mortgage payments/"910" car claim vs. cram downs / lien avoidance).

    b. Unsecured Debts

        1. §1332(a)(2) incorporates §507 and creates priority status for the payment of unsecured creditors in the plan. The plan must provide for the 100% payment of any existing priority claims, or the plan will not be confirmed. Interest will not be paid to priority claims.

        2. Priority Debts

            i. Priority debts must be paid in full during the life of the plan. These include tax liabilities or other debts owed to governmental units, and support or maintenance arrears.

            ii. The debtor is responsible for making current support/maintenance payments. It is possible, in some cases, that the arrears on these kind of debts are so large as to make repayment in the plan impossible.

            iii. No tax obligations are dischargeable under Ch.13 (as opposed to the discharge available for taxes older than 3 years under Ch. 7). However, Ch.13 offers two benefits for paying these debt in the plan. First, the debts can be paid out over time, during the life of the plan. Second, the Bankruptcy Code locks in the claim at its current amount. No additional interest or penalties will accrue.

    c. Non-dischargeable Debts

        1. Some other debts are not affected by the filing of a bankruptcy case at all. Typically, these are in the nature of student loans. If student loan debts have come due, they can be paid pro rata along with other unsecured debts. This may be a benefit to the debtor in that he will be able to pay down at least a portion of those student loans during the plan even though they are not subject to discharge at the end.

5. Modifying The Plan; Dismissal of a Case

    a. In the case of a change of circumstance, the debtor may move to modify his plan under §1329. This allows for the adjustment of payments or disbursements based on the debtor's current situation. §1329 also allows for a creditor to move to amend a plan if the creditor learns of an upswing in the debtor's financial situation.

    b. Typically, the Trustee will move for dismissal where a debtor fails to make two consecutive payments. It it up to the debtor to either amend the plan or to catch up on the payments.

        1. The Trustee may also move to dismiss based on “bad faith”, fraud, or any of the reasons that would also lead to denial of discharge.

        2. The debtor himself may also move to dismiss when his circumstances have changed in such a way that even modification would not lead to the debtor feasibly maintaining the plan payments.

6. Completion of the Plan; Chapter 13 Discharge

    a. Once the required payments as determined under the plan have been completed, the debtor is entitled to a discharge of any remaining unpaid unsecured claims. Similar to Ch.7, a discharge injunction is entered preventing creditors from pursuing any claims remaining after the completion of the plan.

V. Appendix

A. Required Notices and Acknowledgment

B. Intake Sheet

C. Interview Forms

D. Initial Interview Recitals and Acknowledgment

E. Documentation Checklist

F. Important things to think about when you plan to file

G. Common 341 questions

H. Means Test Form

I. CMI Worksheet

J. Best Interest of Creditors Test