

Information for Clients

Bankruptcy Basics

Part A

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Introduction

The *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* was the most extensive change in our country's bankruptcy laws in the prior 30 years. Despite its title, this law does little either to prevent bankruptcy abuse or to protect consumers. In addition, this law is so poorly written and so often internally inconsistent that it is nearly impossible to administer. Therefore, while we will explain the law to you to the best of our ability, we cannot guarantee that the Trustees or the Judges will agree with every detail of these explanations.

Chapter 1

General Information

This booklet an attempt to explain what you will need to know and do in order to file bankruptcy under the revised 2005 law. Unless otherwise noted, all references to “§xxx” are to sections of the current 2005 law.

The first thing you need to understand about the current bankruptcy law is that there is a great burden on you to supply your attorney with accurate information and the required documentation. In fact, attorneys have been specifically instructed that if you do not or cannot supply the required documents and information, they cannot file bankruptcy for you.

1.0 What Is Bankruptcy?

Bankruptcy is the system of laws (federal and state) which governs the relationship between debtors (those who owe debts) and creditors (those to whom debts are owed). The purpose of the bankruptcy laws is to provide relief to those who are overburdened by debt.

2.0 Types of Bankruptcy

There are several types of bankruptcy. Each type attempts to address a different financial need and is named for the chapter within Title 11 of the United States Code in which it is located. Each chapter is described for you by the Clerk of the Court in the §342(b) notice included with the Bankruptcy Questionnaire. Typically you would file either a Chapter 7 or a Chapter 13.

Chapter 7 is often called a liquidation bankruptcy. Its purpose is to make debts unenforceable (“discharged”), thus allowing individuals to start over financially. It is the most common type of bankruptcy, accounting for 70-75% of all filings. To qualify to file Chapter 7, you must live in the United States (§109(a)) and must also met one of the three “Means Tests” (*See*, Chapter 2).

Chapter 9 is reserved for cities and other municipalities (§109 (c)).

Chapter 11 is designed to give corporations and persons with huge debts time to reorganize their financial affairs, or to allow an orderly liquidation of assets at a higher value than could be obtained at a liquidation sale (§109(d)).

Chapter 12 is for individuals whose debts are at least 80% farm or fishing related (§109(f)).

Chapter 13 is often called a wager earner repayment plan. It is similar to a debt consolidation loan, except that the payments are made to the Chapter 13 Trustee, who then distributes those funds according to a plan filed by the debtor (§109(e)). If you file chapter 13, your attorney will write the plan for you.

3.0 The Automatic Stay - (§362)

The moment you file bankruptcy, an automatic “stay” arises by action of law and immediately prevents certain creditor actions against you. Unfortunately, the automatic stay does not prevent all actions against you.

3.1 Prohibited Actions - §362(a)

Subject to the exceptions in §362(b), discussed in the next paragraph, the automatic stay prevents your creditors from taking any action to collect a debt from you. Creditors cannot file a new legal action against you for an existing debt, continue any existing legal actions (including a foreclosure), garnish your wages, perfect a lien or other security interest, or even contact you by letter or telephone concerning your debts. Unfortunately, usually 10-14 days will pass after you file before the Court’s written notice will arrive to inform your creditors that you filed, so you may be contacted accidentally even after you file.

3.2 Allowed Actions - §362(b) exceptions

The automatic stay does not stop criminal matters, domestic cases (divorce and paternity matters), license hearings (driver’s and professional), tax refund interceptions, Social Security claims, refunds, set-offs, government audits, and 401(k) loan payments. The new automatic stay also does not stop garnishments for domestic support payments, foreclosure of real property if a prior stay was

lifted in another case during the last 2 years, or an eviction order obtained before you filed or because you used controlled substances.

3.3 Shortened Stay - §362(c)(3) and (d)(4)

If you had another bankruptcy dismissed in the last year, the automatic stay for a new case ends 30 days after you file, unless the prior case was a Chapter 7 dismissed under §707(b) and your new case is a Chapter 13 (§362(c)(3)). The stay also ends as to real property if the creditor shows that the current filing was part of a scheme to “delay, hinder and defraud” (§362(d)(4)). Finally, the stay can also be lifted if the Court grants a motion by the creditor to lift the stay.

3.4 No Stay - §362(c)(4)

The automatic stay does not arise at all in a new case if you had 2 or more prior cases dismissed during the last 12 months.

4.0 Filing Alone or Filing Jointly with Your Spouse

If you are married, in most cases it will be advisable to file jointly with your spouse. Under Utah law (UCA §30-2-9) the “expenses of the family and the education of the children are chargeable upon the property of both husband and wife or of either of them, and . . . they may be sued jointly or separately.” This means that both you and your spouse are equally liable for all family debts. A family debt is any debt incurred for the benefit of your family generally or your children rather than for one spouse. Liability does not require that both spouses sign for the debt, or that both spouses even know about the debt. Therefore, if you file bankruptcy without your spouse and any of your debts are later determined to be family debts, your spouse will remain liable on those debts. Your separate filing will not discharge your spouse’s liability on any debt.

If you and your spouse are contemplating divorce, it may be advisable to file bankruptcy jointly before the divorce becomes final. If you both discharge your debts before the divorce is final, when you file for divorce there will not be any debts to divide and the divorce will proceed more smoothly. If you are living separately, you will also more likely qualify under the “means tests.”

On the other hand, if you file bankruptcy after you divorce, the debts discharged by the one who files bankruptcy will become the responsibility of the one who does not file. The non-filer may later be forced to file a separate bankruptcy. Two filings doubles the cost of filing bankruptcy.

If you are ordered in a divorce to pay certain debts and then you file bankruptcy without paying those debts, you may not be allowed to discharge those marital debts in the bankruptcy (§523(a)(5)(& (15)) if your ex-spouse objects.

5.0 Your Credit after Bankruptcy

The fact that you have filed bankruptcy will remain on your credit report for up to 10 years. In addition, no one will remove any debt appearing on your credit report just because you filed bankruptcy. After discharge, the debts listed in your bankruptcy still technically exist, but have become unenforceable (“discharged”). That is what bankruptcy does. It discharges debt by making them unenforceable. Bankruptcy does not remove debts from your credit report.

If you would otherwise qualify for a loan, most creditors will ignore your Chapter 7 bankruptcy filing after 18-24 months, and sometimes even after as little as 1 year. This means you may be able to purchase a new home or a car at regular interest rates within 1-2 years after filing. Before applying for a loan, remember that if you filed Chapter 13, you may not incur any new debt during the life of the Plan without permission of the Court.

Be careful in looking for credit. Many creditors will offer you a new credit card or extend credit to buy a car just as soon as the Court grants your discharge, or even on the day you file a Chapter 7, but you will usually pay much higher interest rates.

6.0 The Effect of Bankruptcy on Your Creditors

As stated above, the moment your case is filed, an automatic stay comes into effect and prevents your creditors from taking any action to collect any debt you might owe them, or to improve their financial position in relation to other creditors. In Chapter 13, creditors can file a proof of claim and will be paid under the provisions of your Plan.

7.0 Effect of Bankruptcy on Job Opportunities

Under federal law, you cannot be discriminated against for exercising your federal rights. This should mean that no employer can use your bankruptcy against you. However, filing bankruptcy can affect your employment if there is a “rational basis” for doing so. For example, if your employment requires financial responsibility (*e.g.*, mortgage broker, bank teller, etc), filing bankruptcy could have a severe impact on your job (§525).

Chapter 2 Qualifying to File

Any person who has a residence, business or real property in the United States may file bankruptcy, if they otherwise qualify (§109(a)). Guardians can file bankruptcy on behalf of their wards (*e.g.*, minors, the insane, and persons with mental handicaps).

1.0 Credit Briefing - §109(h)

Section 109(h) provides that no one can file bankruptcy unless they have completed a “briefing” provided by an approved nonprofit budget and credit counseling agency within the 180 days before filing bankruptcy. Information on how to complete this class can be found in the Instruction packet, Step 4. When you have completed the class, your attorney will be able to download a certificate of completion to be filed with your case.

Those who are physically or mentally unable to do the briefing may have it waived (§109(h)(4)). Unfortunately, the motion to do this costs extra fees.

2.0 Chapter 7 Qualifications to File

This section discusses the qualifications for filing a Chapter 7. Qualifications to file Chapter 13 are discussed on page 7.

2.1 Prior Filings

You can receive a discharge in a Chapter 7 only once every 8 years (§727(a)(8)). You can file a Chapter 7 after you previously filed a Chapter 13 if 6 years have passed and your Chapter 13 Plan paid at least 70% to unsecured creditors (§727(a)(9)).

You cannot file a Chapter 7 for 180 days (6 months) if you had a prior bankruptcy “dismissed by the court for wilful failure . . . to abide by orders of the court,” failed to appear before the Court, or you requested a voluntary dismissal of a prior case (§109(g)).

2.2 Presumption of Abuse - The “Means Tests”

You can file a consumer (non-business) Chapter 7 only if you can prove that your filing would not be an “abuse” of the bankruptcy system. (A Chapter 7 for business related debt is not subject to the means tests.) The 2005 law sets out a complex process for determining whether your bankruptcy would be presumed to be an abuse.

2.21 The First Means Test

The first “means test” is whether your current monthly income is above or below your State’s median income. Unfortunately, the phrase “current monthly income” does not mean only income that is current, monthly or even income. Instead, your “current monthly income” is determined by adding up certain specified sources of “income” (*e.g.*, Social Security is excluded, but regular gifts and Unemployment payments are both included) received over the last 6 months and dividing the total by 6. Then, you must determine whether your current monthly income is above or below your State’s “median income.” If it is below, you qualify to file Chapter 7. But, if your income is above your State’s median income, you do not qualify to file Chapter 7, unless you met one of the other two means tests. Unfortunately, filing under either of these two other tests will require higher attorney fees because they require much more documentation. If you do not qualify to file under Chapter 7, you may still be able to file under Chapter 13 (see section 3.0 on page 7).

2.22 The Second “Means Test”

Under the second “means test,” if your five year “disposable income” is less than \$6,000 (under \$100/month), abuse is not presumed and you qualify to file Chapter 7. “Disposable income” is your “current monthly income” less what the IRS and Congress consider to be “reasonable monthly living expenses” (§707(b)(2)(A)(ii)). On the other hand, if your five year “disposable income” is greater than \$10,000 (*ie*, averages more than \$166.66/month), abuse is presumed and you cannot file Chapter 7, but you can still file Chapter 13 (§707(b)(2)).

2.23 The Third “Means Test”

The third “means test” provides that if your five year disposable income is between \$6,000 and \$10,000, but is not sufficient to return at least 25% to your non-priority, unsecured creditors, you still qualify to file a Chapter 7. However, if your 5-year “disposable income” is sufficient to pay unsecured creditors at least 25%, you cannot file a Chapter 7, but you can still file Chapter 13.

2.24 Lack of Presumption NOT Absolute

Unfortunately, a finding of no “presumption of abuse” under any of the three means tests, does not prevent the Court or the Trustee from objecting to your bankruptcy under §707(c) if they still think your case is an abuse (§707(b)(6)). An attorney who files a case that is later determined to have been an abuse can be severely sanctioned (§707(b)(4)(B)), so do not ask to file a Chapter 7 if the presumption of abuse arises in your case.

3.0 Chapter 13 Qualifications to File

Chapter 13 is only available to individuals (other than stock brokers and commodity brokers) with regular income (from any source) and whose non-contingent, liquidated, unsecured debt is less than \$307,675 and whose non-contingent, liquidated, secured debt is less than \$922,975 (§109(e)). Regular income means income that is sufficiently stable to allow you to make the monthly payments required by your Chapter 13 Plan. Finally, you can get a discharge in a Chapter 13 only if 4 years have passed after a discharge in a prior Chapter 7, or 2 years have passed after a discharge in a prior Chapter 13 (§1328(f)).

Chapter 3 Debts in Bankruptcy

How your debts are treated in bankruptcy depends on a number of factors, including the types of debt you have and the type of bankruptcy you choose to file. Remember that bankruptcy applies only to existing debts and will not affect any debts you incur after the date of your filing.

1.0 Types of Debt

The Court generally divides your debts into four different classes:

(1) Priority, (2) Secured, (3) Executory Contracts and (4) Unsecured. Each class receives different treatment under bankruptcy law.

1.1 Priority Debts

Priority debts are entitled to special treatment under the bankruptcy law. For example, they have special collection and enforcement rights, and such debts may be non-dischargeable (*i.e.*, these debts may never become unenforceable). Examples of priority debts include: taxes, debts incurred by fraud, debts related to driving under the influence, government fines, alimony, child support, and certain recent consumer debts.

Recent consumer debt often presents special problems under §523(a)(2). This type of debt most often arises in connection with credit cards. If you have charged more than \$500 of luxury goods or services (*i.e.*, things not needed for the support of your family) within the last 90 days, or have taken a cash advance (or made a balance transfer) in excess of \$750 within the 70 days prior to filing, those debts will not be dischargeable in your bankruptcy. In addition, even if you are beyond these time limits, if you have made very small payments (or worse, no payments at all), the credit card company may still ask the Court to declare these debts non-dischargeable because of your demonstrated lack of intent to pay. Therefore, to avoid problems with credit cards in your bankruptcy, you should

make no charges on any credit cards for at least the 90 days prior to filing. In addition, during those 90 days you should continue to make your regular monthly payments on all credit cards with balance transfers or large charges during the last 6 months.

1.2 Secured Debts

A secured debt means that there is some form of collateral which secures payment of the obligation. This means that, if the required payments are not made, the creditor is entitled to take possession of the property given as collateral to help satisfy the underlying debt. Secured obligations generally fall into one of four categories: (1) title liens, (2) purchase money security interests, (3) consensual liens, and (4) possessory liens.

1.21 Title Liens

A title lien is a debt that is evidenced by a written document such as a trust deed for a home or a certificate of title on a motor vehicle. These documents are recorded with the State and can be examined by any interested person. This public filing puts the public on notice that they cannot purchase the item free and clear of the underlying debt. Typical title lien debts include debts on cars, boats, trailers, houses, mobile homes and office buildings.

1.22 Purchase Money Security Interests (PMSI)

A purchase money security interest exists when a creditor provides either the financing or the cash for the purchase of a specific item. Purchase money security interests can exist on cars, furniture, and even electronic appliances purchased with credit cards.

1.23 Consensual Liens

A consensual lien exists when a lender provides a cash loan in return for an interest in property already owned by the person obtaining the loan. In order for a consensual lien to be valid, there must be a written promise to pay and a written security agreement. In addition, a UCC-1 form must be filed with the appropriate State office.

1.24 Possessory Liens

A possessory lien exists when a lender retains possession of an item of property until the underlying debt is repaid. For example, a loan with a pawn shop or the debt for repairs on your car fits into this category.

1.25 Perfected Debt

Some secured debts, such as consensual liens or title liens, are not valid until certain documents are signed and filed with the appropriate State office. When this filing occurs, the debt is said to be “perfected” and the debt is entitled to secured status. Prior to this filing, the debt is not perfected and will usually not be entitled to secured status.

1.26 Cross-collateralized debt

Many credit unions have you sign an agreement pledging any collateral for any debt you have with them as collateral for all debts you have with them. This is called cross-collateralized debt. This can make reaffirmations difficult, if not impossible. (See p.13 in this booklet)

1.27 The Priority of Debts

It is possible for more than one creditor to claim an interest in the same collateral. If the value of the collateral is not sufficient to cover all of the debt pledged against it, it is necessary to determine which creditor is entitled to what share of the proceeds. In other words, we have to decide the priority of each secured debt. This, in turn, tells us which debt will be satisfied first. Priority of debts is based upon the date of perfection. Whoever perfects first is in first place. Whoever perfects second has second priority, and so on.

1.28 Secured Debts that Survive Bankruptcy

A number of debts can attach to real estate. Each of these debts survives bankruptcy. These debts include tax liens, mechanics liens, and judgment liens. If the real estate is not surrendered, your creditors can still collect these debts, even after you file bankruptcy. These debts also continue to accrue interest and costs after filing.

There is one exception to the general rules. If a judgment lien against your primary residence interferes with your homestead exemption (p.20), under §522 the Court can set aside the lien. This requires extra time and fees. If you think you need to set aside a judgment lien, speak with the Attorney.

1.3 Executory Contracts

The third class of debts is executory contracts. An executory contract is simply an agreement under which both sides have continuing obligations to each other. In other words, the agreement has not yet ended. Typical examples of executory contracts include apartment rental agreements, storage unit rentals, mobile home leases, real estate contracts, real estate listing agreements, utilities, book and music clubs, spa memberships, cell phones, leased cars, rent to own furniture, time-shares and leased business equipment.

1.4 Unsecured Debts

The fourth class of debts is unsecured debts. Unsecured debts include all your financial obligations that do not fit into one of the other three classes. Typical unsecured debts include medical and dental bills, unsecured credit card debt, open accounts with vendors and promissory notes. Unsecured debt also includes the unsecured portion of any secured debts. For example, if you owe \$7000 on a vehicle that is worth only \$5000, then \$5000 of the debt is secured and \$2000 is unsecured.

1.5 Unliquidated, Contingent and Disputed Debts

There are three other terms that describe debts that you need to know:

Contingent. A debt is contingent only if liability depends upon the occurrence of a certain event.

Unliquidated. A debt is unliquidated only if the approximate amount of the debt is not readily determinable by reference to account statements or invoices.

Disputed. A debt is disputed only if you and the Creditor do not agree on either your liability, or the amount of the debt.

2.0 How Debts are Treated in Chapter 7

How each of the four classes of debt is treated in Chapter 7 is discussed below.

2.1 How Priority Debt Is Treated in Chapter 7

Most priority debt is non-dischargeable in Chapter 7. This means the debt can be enforced after the filing of a Chapter 7 and the creditor can still collect the debt. Priority debts include taxes, student loans, unpaid wages, claims for death or personal injury resulting from driving under the influence, fraudulently incurred debts, debts not listed in a prior bankruptcy, intentional torts, post-petition association fees, violations of securities laws, recently incurred consumer debt and domestic support obligations.

2.10 Tax Liability

All business taxes, unfiled personal tax liabilities and timely filed tax debts less than 3 years old are non-dischargeable. If you owe personal income taxes that were filed on time more than 3 years ago and you have not signed a voluntary extension of the collection period, and the IRS has not filed a lien, those taxes *may* be discharged in bankruptcy.

2.11 Domestic Support Obligations

Ongoing alimony and child support must be paid as part of your monthly budget and must be listed on Schedule E. Past due support obligations are NOT discharged by a Chapter 7 bankruptcy.

2.12 Student Loans

The general rule is that student loans cannot be discharged in bankruptcy. The exceptions to this are very limited. It may be possible to have the debt forgiven outside of bankruptcy. *See, www.ed.gov* for further information.

2.13 Post-Dated Check Loans

Many post-dated check loan agreements have language stating that you cannot file bankruptcy on them. This is not correct. You are required by law to list all of your debts, including post-dated check loans. These loans are usually unsecured and will be discharged, unless they were made or renewed during the 90 days before you filed and the original balance was over \$750.

2.2 How Secured Debt Is Treated in Chapter 7

Debtors generally have three options in connection with secured debt in Chapter 7. You can surrender, reaffirm, or redeem.

2.20 Surrender

Surrender occurs when you return to a secured creditor the property that secures the claim. If you surrender property in a Chapter 7, the entire debt is discharged. There is no deficiency for you to pay later.

After you surrender the collateral, the creditor will sell it. Some creditors will send you a letter telling you they intend to sell the collateral, or that they have already sold the collateral. These letters will often incorrectly indicate that you are responsible for the balance of the debt. If the collateral was timely returned to the creditor without damage, you can ignore these letters. You are not responsible for any deficiency. The one partial exception is a federally insured mortgage. In that case you will receive a 1099 showing the amount forgiven. You must include this amount on your next year's taxes as income and pay taxes on it.

It is generally better to surrender collateral to a creditor after the filing of the bankruptcy. If you surrender before the filing, an adverse notation such as a repossession may be added to your credit report. Such notations are usually not added if the surrender takes place after the filing.

A creditor is not allowed to take the collateral from you without your permission, unless they have a court order, or they can take the collateral without "breaching the peace" (meaning quietly and without injury to person or property). If you think your property may be repossessed, do not leave it where it can be taken without your permission. If you are delinquent in your payments on a vehicle, you should immediately remove all of your personal items from the vehicle. Although creditors are required to let you have your personal property back after a repossession, many do not, or it takes a long time to get your things, if you ever get them.

2.21 Reaffirmation - §524(c) & (k)

Reaffirmation is an agreement with a creditor in which you agree to continue to make payments and the creditor agrees to let you retain the property. Reaffirmations most often occur in connection with vehicles and furniture. Creditors are not required to reaffirm with you, even if you are willing and able to make your payments. Nevertheless, if you are current in your payments most creditors will agree to reaffirm the debt.

Some creditors, such as mortgage companies, will not send you formal reaffirmation documents, even when they are willing to reaffirm. Many creditors will also not even send you a monthly statement after you have filed bankruptcy. Therefore, if you want to reaffirm, you should request in writing that they send you monthly statements and that they send a written reaffirmation agreement to your Attorney.

You cannot reaffirm any debt unless your budget (see Schedules I and J) shows that you have sufficient income to make the required payments. If you do not have sufficient income to justify a reaffirmation, the Attorney is prohibited by law from agreeing to the reaffirmation agreement. In such cases, do not ask the Attorney to make an exception for you.

If you want to reaffirm any debts that are cross-collateralized (see p.9) and keep the collateral, you may be required to reaffirm all debts you have with that Creditor, including unsecured debts. If you decide not to reaffirm, you will have to surrender all the collateral. It will often not be wise to reaffirm a large debt for collateral of little value.

It is very important that you understand that if you reaffirm a debt and then default on your payments, the bankruptcy will offer you no protection and the creditor will be entitled to sue you to collect the balance of the debt after repossessing and selling the collateral.

2.22 Redemption - §722

The bankruptcy code provides that if you make a lump sum payment to a creditor in the amount of the fair market value of the collateral, the creditor must give you clear title to the property. This is called redemption. Some creditors, such as those selling household furnishings and electronics, will often also allow you to redeem by making monthly payments on a reduced balance. In most cases, they will also close your account to further purchases.

2.23 Co-Debtors

Co-debtors are called co-signers outside of bankruptcy law. If you have a co-debtor on any debt, when you file Chapter 7 they will be legally liable for the debt. Your bankruptcy will not discharge the liability of any co-debtor.

2.3 How Executory Contracts Are Treated in Chapter 7

Executory contracts must be either accepted or rejected. If you accept the contract, you must continue to make your regular payments and the creditor must allow you to retain the property or continue to receive the service. However, you cannot accept a contract unless you are current. If you reject the contract, you do not have to make any more payments and the service is cancelled or you must return the property, if any. Executory contracts are automatically rejected if you do not accept them within 30 days after filing.

2.4 How Unsecured Debt Is Treated in Chapter 7

Unsecured debt is discharged in Chapter 7. Discharge means the debt still exists, but has been made entirely unenforceable. You do not have to pay it. Some people who file Chapter 7 want to pay some of their unsecured creditors despite the bankruptcy. This is perfectly legal. The creditor can accept whatever you are willing to pay, but may not force you to continue to make payments if you decide to stop paying.

3.0 How Debts Are Treated in Chapter 13

How your debts are treated in Chapter 13 will depend on the type of debts you have.

3.1 How Priority Debt is Treated in Chapter 13

Most priority debt must be paid 100%, plus interest, in the Chapter 13 Plan.

3.10 Tax Liabilities

All business taxes, all timely filed tax obligations less than 3 years old, and all unpaid taxes must be paid 100%, plus interest, over a 3 year period. If you owe personal income taxes for returns filed more than 3 years ago and you have not signed a voluntary extension of the collection and the IRS has not filed a lien, those taxes are considered unsecured. Unsecured taxes, interest and penalties on taxes are not dischargeable. If they are not paid 100% in your Plan, you will have to pay them at the end of the Plan.

3.11 Student Loans

Student loans are treated as unsecured debts. Sometimes the Trustee will require you to pay 100% of the student loan. If you are not required to pay 100% of the student loan through your Plan, after your Plan is complete, you will still owe the balance of the student loan, plus accumulated interest. Unfortunately, you may not pay a student loan 100% unless you also pay 100% to all your unsecured debts.

3.12 Fraud and Personal Injury

Debts from fraud and personal injury are generally treated as unsecured debt. On occasion, the Trustee may require a higher percentage of repayment to these creditors. Any amounts not paid in your Plan will still be owed after completion of the Plan.

3.13 Government Fines and Penalties

Government fines and penalties are not dischargeable. Further, criminal fines cannot be paid through a Chapter 13 Plan. Therefore, you must pay these debts *directly* to the creditor as part of your budget and outside the Plan.

3.14 Domestic Support Obligations

Ongoing alimony and child support must be paid as part of your monthly budget. Past due support obligations must be paid in the Plan 100%. At this time, the treatment of debts ordered to be paid as part of a decree of divorce is not known.

3.15 Recent Consumer Debt Over \$500

Recent consumer debt over \$500 is not dischargeable in Chapter 7, but in Chapter 13 it is treated as a general unsecured claim. Any amount not paid as part of the Plan is discharged upon completion of the Plan.

3.16 Retirement Loans

Payments on 401(k) and other retirement loans cannot be altered. Thus, they must be paid each month as a regular deduction from your paycheck.

3.2 How Secured Debt is Treated in Chapter 13

You generally have 2 options for the payment of secured debts in a Chapter 13: (1) you can surrender the property and thus extinguish the debt, or (2) you can keep the property and pay the full allowed value through the Plan.

3.21 Surrender

If you elect to surrender property, it should be returned to the creditor as soon after filing bankruptcy as possible. If you intend to surrender a vehicle, you should not expect to continue to drive it for very long after you file. Some creditors will let you keep it until the 341 hearing, but seldom longer.

If you are surrendering a home, the creditor may want you to remain in the home until they can take actual possession. This will ensure that the property is not damaged or vandalized while it sits vacant. Nevertheless, you should be prepared to move as soon as a formal request is made.

Surrendered property is usually “surrendered in full satisfaction of the secured creditors claim.” This means that the value of the property is equal to or greater than the debt so no deficiency needs to be paid in your Plan. Occasionally, however, the creditor will sell the property for less than the debt and you will have to pay a deficiency as part of your Plan. A deficiency is treated like an unsecured debt.

If you have luxury items, such as boats, campers, snow mobiles, wave runners or vehicles valued over \$20,000, the Court may require you to surrender those items. The Court will not allow you to retain expensive property and pay only a small amount to your unsecured creditors through your Plan. Sometimes the Judge and Trustee will allow you to retain these items if you pay 100% of your unsecured debts in your Plan (this will depend on your Judge and Trustee).

3.22 Retaining the Collateral

If you decide to retain certain collateral, the creditor is entitled to payment of the “secured value” of the collateral, plus interest, through the Plan, in equal monthly installments (§1325(a)(5)(B)(iii)). Unfortunately, the “secured value” is not easily determined. For most property purchased more than a year ago, the “secured value” will be the “replacement value” (§506(a)(2)). [Replacement value is the price a merchant would charge for an item the same age and condition as your item.] Unfortunately, for any item purchased less than a year ago and for vehicles purchased within the last 910 days (2 ½ years), the “secured value” is the actual loan balance (§1325(a)(5)(i)(I)(aa)), even if the property is actually worth much less.

Because collateral tends to depreciate more rapidly than its debt can be paid down in a Chapter 13, the creditor is also entitled to “adequate protection.” This means that a certain portion of your monthly payment to the Trustee is ear-marked for the benefit of that creditor. Prior to confirmation, these funds are sent directly to the creditor by the 13 Trustee. Adequate protection does not increase your payment to the Trustee.

If you have a mortgage and decide to retain your house, you must continue to make all the regular monthly payments outside of the Plan. This includes all mortgages (1st, 2nd, 3rd, etc.). Chapter 13 will not reduce the amount paid on your mortgages. If you are behind on any mortgage when you file, you can pay the arrearage through your Plan at 100% over 3 years. Interest is not paid on mortgage arrearages because the arrearage itself is mostly interest.

3.23 Co-signed Debt in Chapter 13

Cosigned debt may be treated in a number of ways in a Chapter 13. First, you may surrender the property, if any, and treat the

Creditor as unsecured. In this case, the creditor can pursue your co-signer for the difference between the debt balance and the amount you are paying through the Chapter 13 Plan. Second, you may keep the property and treat the creditor as secured. Any amount not paid as part of the Plan becomes the liability of the co-signer. Third, you may be allowed to protect the co-signer by paying the debt in full through the Plan.

3.3 How Executory Contracts are Treated in Chapter 13

There are 2 options in connection with executory contracts: (1) you can accept the contract and continue to make the payments, or (2) you can reject the contract, stop making payments and cancel the service or surrender the property. You cannot accept an executory contract unless you are current on the account. Executory contracts are automatically rejected if they are not formally accepted within 30 days of filing bankruptcy.

3.4 How Unsecured Debt is Treated in Chapter 13

Unsecured debt is repaid in an amount at least equal to what would have been paid if a Chapter 7 had been filed. This is called the liquidation amount. But, if your “disposable income” would allow you to pay more than the liquidation amount, you must pay that instead.

If your current monthly income is greater than the State median income, your “disposable income” in a Chapter 13 is your “current monthly income” (§707(b)(2); see p.6) less certain enumerated expenses (§1325(b)(2)). If your current monthly income is less than the State median income, the 2005 law gives no clear direction as to how to calculate your “disposable income.” My best guess is that your “disposable income” will be your “current monthly income” less your actual expenses (rather than the expenses in §1325(b)(2)).

3.5 Plan Length

If your income is greater than the Utah median income, your Plan must be for 5 years. If your income is less than the State median, your Plan can be for only 3 years. You can pay off your Plan early only if all unsecured creditors are paid 100% of their claims (§1325(b)(4)(A)(ii) & (B))

Chapter 4 Assets in Bankruptcy

Whether you retain or lose assets in bankruptcy depends on the type of property, the nature and amount of the debt against that property, the Trustee appointed in your bankruptcy, and the type of bankruptcy you file.

1.0 How Assets Are Treated in Chapter 7

1.1 Under-secured Property

If the value of your property is less than the debt against that property, you may reaffirm or redeem the property, if the creditor is willing (see pp.13-14). The Court and the Trustee will have no interest in the property because it cannot be sold for more than the debt.

1.2 Over-secured Property

If the value of your property is greater than the debt against that property, the Court will expect the Trustee to take the property, sell it and apply the proceeds of the sale to the benefit of your creditors. To prevent this, you must hope there is an exemption (see §2.0 below) equal to or greater than the equity in the property. If there is, you can reaffirm or redeem the property. If there is not, the Trustee may seek to take the property and sell it for your creditors.

1.3 Other Property

If there is no debt against the property, to keep it there must be an applicable exemption for that property. If the amount allowed for an applicable exemption equals or exceeds the value of your property, then you may retain that property. If there is no applicable

exemption, or if the applicable exemption does not cover the entire value of the property, the Trustee may seek to sell that property and give the proceeds to your creditors.

In Chapter 7 the Trustee will often require you to turn over your next tax refund. **If you requested an extension of time to file your taxes, when you file bankruptcy that extension will no longer be valid.** Any tax refunds to which you may be entitled on the day of filing, but have not yet received, belong to the Court and can be taken by the Trustee and used to satisfy the claims of your creditors. This also includes returns that you are not required to file until next year.

2.0 Exemptions

Congress has determined that you should be able to retain certain items of property after filing bankruptcy because you will need some basic items to sustain your life and to start over economically. The items you are allowed to keep are called exemptions.

The specific exemptions allowed in Utah are found in Utah Code Annotated §78-23-1 *et seq.* For a married couple, these exemptions include, among others, \$40,000 equity in your principle residence (called “homestead” exemption), a washer, a dryer, a fridge, a freezer, a stove, a microwave, a sewing machine, all beds & bedding, all clothing (except furs), a 12-month supply of food, up to \$1000 of dining/kitchen tables & chairs, up to \$1000 of additional household furnishings and appliances, up to \$1000 of sentimental items (*e.g.*, wedding rings), up to \$1000 of books, animals and musical instruments, up to \$3500 of the tools of your trade, up to \$2500 each in a motor vehicle. The exemptions for a single person are generally ½ of these.

Unfortunately, if you have not lived in Utah continuously for the last 2 years, you cannot claim the Utah exemptions. Instead, you will be required to claim the exemptions for the state in which you resided for the greater part of the 180 days before the last 2 years (§522(b)(3)(A)). Further, if you disposed of real property in the last 10 years with the intent to “hinder, delay, or defraud” your creditors, the amount of your homestead exemption can be reduced (§522(o)).

3.0 How Property is Treated in Chapter 13

As a general rule, you will be allowed to keep all your property in a Chapter 13. This is why many people prefer to file Chapter 13. However, there are exceptions. You can voluntarily surrender any secured property you desire. You can also sell any property (with the permission of the Court - this also requires extra fees) within 6 months after filing and have the proceeds given to your creditors by the Trustee. **For the first three years of your Plan, you must give the Trustee all but the first \$1000 of any tax refunds you receive.**

4.0 Post-Petition Credit

After filing a Chapter 13 and during the term of your Plan, you may not obtain credit of any type without the express permission of the Court. This means your Attorney must file a motion, explain to the Court the credit you want, why it is necessary, prove you can make the payments, and prove you can also make your ongoing Plan payments. If the Court agrees, you can proceed. This type of request most often arises when you want to purchase a new vehicle, refinance your house or obtain a student loan. This motion will require additional Attorney fees. These motions for student loans are almost always granted. These motions for other matters are not always granted and can take up to 2 months before you get the Court’s decision.

Chapter 5 Alternatives and Choices

1.0 Alternatives to Bankruptcy

Some alternatives to bankruptcy are more helpful than others, depending on your circumstances.

1.1 Consolidation Loan

If you are having financial problems, the chances of obtaining a loan are usually not good without giving collateral. But converting unsecured debt into secured debt by giving collateral for a loan is nearly always a bad idea. Furthermore, if the secured loan does not

solve your financial problems, you will have many more problems when you do file bankruptcy than if you did not have the secured loan.

Unfortunately, even if you are able to get an unsecured loan, the new loan is more likely to compound your problems rather than to solve them. The interest you pay on the new loan is just more debt in addition to the debt you cannot pay now. The only time an unsecured consolidation loan is to your advantage is if you can lower the interest rate and also reduce the overall amount of your debt. If not, a consolidation loan will only delay the inevitable.

1.2 Second Mortgage

Many people think a second mortgage or home equity line is a good way to avoid bankruptcy. Unfortunately, most of these loans are high interest loans and not only do they have all the problems discussed above under “Consolidation Loan”, but they put the family home at risk. Furthermore, debts attached to real estate survive bankruptcy and must be paid in full if the real estate is not surrendered.

1.3 Selling Assets

If you have luxury items, such as expensive cars, boats, big-screen TVs or firearms, it may be wise to sell them and apply the proceeds to your debts. If you file a Chapter 7 you are likely to lose these items to the Trustee anyway, so you might as well apply them to your debts now. Of course, if you had such items, you would not be thinking about bankruptcy.

1.4 Voluntary Debt Repayment Plans

Voluntary repayment plans are what most credit counseling agencies claim to do. In theory, these companies negotiate with each creditor for a reduced amount of interest and principle and for lower monthly payments. If they are successful, they claim these plans can pay off all your debts in as little as 3-4 years. Unfortunately, many creditors simply will not reduce late fees or waive interest, although some will reduce monthly payments. Of course, lower monthly payments mean that your debt continues to increase rather than decrease. In addition, most agencies will not even make a payment to any creditor until you have given them 3-4 monthly payments. Add this to the 3-4 months you were behind when you contacted the agency, and you will be really behind and many creditors will have lost interest in working with you.

In some unfortunate cases, the credit counseling company will take your money, but will not contact your creditors or will not get any agreements in writing. Some agencies will simply disappear with your money. As a result, your debt continues to increase when you think you are paying it down.

1.5 Negotiated Settlements

Another alternative is the negotiated settlement. If you have a pool of cash available, it may be possible to negotiate a settlement with your creditors in which they will accept 30% to 70% of the actual amount you owe them as payment in full. If you attempt a negotiated settlement, get all such agreements in writing. Of course, if you had a lot of money available to pay such settlement claims, you would probably not be thinking about bankruptcy.

2.0 How to Tell If You Might Need to File Bankruptcy

If you answer YES to any of the following questions, it may be an indicator that you need to file bankruptcy:

1. Are you a one income family with more than \$8,000 in unsecured debt?
2. Are you a two income family with more than \$12,000 in unsecured debt?
3. Is more than 20% of your take home pay committed to installment debts?
4. Are you able to make only the minimum payments on your debts?
5. Do you skip payments on some bills in order to pay other bills?
6. Do you take out loans to pay for ordinary living expenses?
7. Are you receiving frequent calls from creditors about overdue bills?
8. Are you receiving utility shut-off and collection notices regularly?
9. Is your house mortgage two or more payments behind?
10. Do you have both a second mortgage and credit card debt?
11. Has your spouse been forced back to work to pay for the basics of life?
12. Do you move or change jobs frequently?

If you answered YES to any of these questions, you may have a serious financial situation.

3.0 Which Bankruptcy is Best for You

If you do decide to file bankruptcy, you will want to choose the best chapter for your circumstances. Of course, if you cannot qualify for Chapter 7, the law will require you to file Chapter 13, if you file at all. (*See* Chapter 2)

A Chapter 7 is generally best for those who are young, have a large amount of debt, have few assets, have little income, or are elderly.

A Chapter 13 is generally best for those who are middle-aged with solid employment or who have a small amount of debt, have substantial assets, are delinquent on houses or vehicles they want to keep, have suffered a short-term reduction in income but are generally able to handle their normal debts, or have previously filed a Chapter 7 within the last 8 years.

4.0 You Can Change Your Mind After Filing

It is not uncommon for circumstances to change after a bankruptcy is filed. Therefore, you may find it desirable to dismiss or convert your bankruptcy. Any bankruptcy will be dismissed if you fail to attend the Meeting of Creditors. Any bankruptcy can be dismissed if you file a motion requesting that it be dismissed and the Court agrees. A Chapter 13 will be dismissed if you fail to make your plan payments. A Chapter 7 can be converted to a Chapter 13. A Chapter 13 can be converted to a Chapter 7.

5.0 Minimizing the Consequences of Filing Bankruptcy

Advanced preparation can improve the impact of filing bankruptcy. A number of typical options and their impact are discussed below.

5.1 Giving Away Assets

You are required to disclose any transfers of property you made during the last 2 years. If any of these transfers is over \$600, it can be set aside by the Trustee. For example, if you gave a \$2500 car to your brother 18 months before filing, that transfer must be disclosed and the Trustee can take the vehicle from your brother, sell it, and use the funds to pay your creditors. If the transfer occurred more than 2 years ago, but you continue to use the property (you “borrow” your brother’s car), it can also be taken (§547).

5.2 Selling Assets

You can sell property before filing as long as you sell it for its actual value. If you sell it for less than its actual value, the Trustee can set aside the transaction, take the property, and sell it to pay your creditors. If you have not yet been fully paid for the sale, the Trustee can take the payments.

Even if you sold the property for its actual value and the Trustee does not take it or the funds, he can require you to account for what you did with the funds. If you still have some of the funds, the Trustee can take them. If you paid anyone more than \$600 out of those funds within 90 days prior to filing, that person can be required to refund the money to the Trustee. If you gave any of the funds to a relative, the Trustee can take it back from your relative.

5.3 Paying Creditors before Filing

You can make payments on regularly scheduled debts as they come due, such as your mortgage and utilities, without the Trustee taking it back. You may also pay less than \$600 on any debt (§547).

5.4 Loading Up

“Loading up” means converting non-exempt assets (such as cash) into exempt assets (such as a bed, *see* p.20) prior to filing. If you do this, make sure the asset is actually exempt. Loading up also means incurring new secured debt prior to filing. Attorneys are expressly forbidden by Congress from telling you the advantages of such purchases and may not encourage you to incur any new debt prior to filing (§526).

Chapter 6 Pre-Filing Concerns

1.0 The Hearing Date

The Attorney has no control whatsoever over when the Court will schedule your hearing. Hearings are usually held 30-45 days after the bankruptcy is filed. If you know you will be out of town or otherwise unavailable during certain times, please put that information in writing and give it to your Attorney so that he can properly plan the filing of your case.

2.0 Pending Foreclosure

If there is a foreclosure pending against your real property on the day you file and your bankruptcy is later dismissed for any reason (e.g., failing to appear at the hearing), you may not be allowed to re-file for 180 days. This will give your creditors time to complete a foreclosure and you will lose your property.

3.0 Taxes and Tax Refunds

If you receive a substantial tax refund prior to filing, it is important that at least 1 month pass for every 1 or 2 thousand dollars of the tax refund so that a reasonable amount of time will have passed for the spending of the refund before you file. If the Trustee thinks insufficient time has passed, he can request copies of your financial records to see whether any creditor received a preferential transfer.

4.0 Mortgage Payments

If you have a home you want to retain through a Chapter 7 bankruptcy, you must continue to make all the regular mortgage payments after filing, and you must be current at the time you execute the reaffirmation agreement. A Chapter 13 can pay any mortgage arrearages through the Plan.

5.0 Utilities

If you list a utility company you are still using on your bankruptcy, you must pay them a new deposit within 20 days after you file if you wish to continue that service. The required deposit can be 2 or 3 times the largest monthly bill you have had with that utility.

6.0 Non-Exempt Property

You can lose property if you file bankruptcy. Your Attorney will do all he can to minimize that possibility. If you are concerned about specific items of property, you should discuss them with the Attorney.

7.0 Hiding Assets

The Court has extraordinary powers to get back property you may have sold to someone for less than its actual market value prior to filing. Therefore, you should not attempt to dispose of or hide assets prior to filing.

8.0 Bank Accounts

Any money in any bank account with your name on it on the date of filing may be taken by the Trustee. Therefore, you will not want more than \$50 in the bank on the date of filing. This refers to the actual amount of money in the bank, not the amount on your check ledger. Checks that have not officially cleared by the day of filing will not count to lower the balance shown on your bank statement.

If you pay any debts by automatic withdrawal from your bank account, before you file you will want to terminate those withdrawals for any debts you will not pay after the bankruptcy.

If you owe money to any bank in which you also have funds deposited, you should remove all those funds prior to filing. Otherwise, the bank will seize the money and close your account when they learn of the bankruptcy. In many cases you may also be unable to open another account. Therefore, before you file you may want to open a new account with a new bank.

9.0 Payroll Deductions

Prior to filing, you should contact your payroll department to stop all payroll deductions for debts you will discharge in your bankruptcy.

10.0 Garnishments

If you file bankruptcy before a garnishment is served on your employer, that garnishment is void. On the other hand, if you file bankruptcy after a garnishment has already been served on your employer, the creditor can still garnish one of your checks for amounts you earned up to the date of the filing. If you are being garnished, bring a copy of the first page of the garnishment to the Attorney so he can appropriately terminate the garnishment.

11.0 Supplemental Orders

If you receive a Motion and Order in Supplemental Proceedings before the filing of your bankruptcy, you must attend that hearing, even if you file prior to the date of the hearing. Even if the attorney who filed the Motion excuses you from the hearing, it is advisable to attend the hearing as a precaution.

12.0 Preferential Transfers

If you make payments greater than \$600 to any creditor or any payment to a family member during the 3 months prior to filing bankruptcy, the Court can require those persons to refund those payments to the Trustee for distribution to your creditors. As a result, you should make no payments at all to relatives and no payments greater than \$600.00 to creditors during the 90 days prior to filing..

13.0 Judgement Liens

If a judgment is entered against you prior to filing bankruptcy, that judgment becomes a lien against any real estate you own in the county in which the judgment is entered, or transcribed. That judgment will also survive the bankruptcy and will remain an obligation against your house, unless it is removed under 11 U.S.C. §522(f). If it is not removed, if you ever refinance or sell your home, that debt will have to be paid at that time.

14.0 Personal I.D.

At your hearing you will be required to present an official government-issued photo ID and proof of your Social Security number. A driver's license with your Social Security number on it will qualify for both. If you do not now have such a government-issued photo ID, you will need to obtain one before the hearing. A Social Security card, W-2 form, or pay stub will also prove your Social Security number.

15.0 Preparing to File - Steps 1-6

The first 6 Steps in filing your bankruptcy are detailed in the Instructions for the Bankruptcy Questionnaire. Briefly, these steps are:

1. Initial Consultation with the Attorney
2. Read the Information Provided
3. Gather the Required Documents. Be sure to use the green sheets.
4. Mandatory Pre-Filing Briefing. This is the online class.
5. Complete the Questionnaire. Call us if you have questions.
6. Review the Questionnaire with the Attorney.

After you have reviewed the Questionnaire with the Attorney and made your payment, the Attorney's office will prepare your bankruptcy papers.

Chapter 7

Filing Bankruptcy

Steps 7-10

1.0 Preparation of the Official Papers (Step 7)

After you and the Attorney have reviewed the Questionnaire at the second consultation and you have made your payment, the paralegal will begin to prepare your case for filing. If the paralegal has any questions about the information on the Questionnaire, she will call you for clarification. Your official papers will usually be ready to review 2-5 days after you return the completed Questionnaire and required documents. The paralegal will call you to make an appointment to review and sign the official papers.

2.0 Third Consultation - Reviewing and Signing the Papers (Step 8)

During your third consultation you will review all your official bankruptcy papers with the Attorney, one page at a time. This review will allow you to verify the accuracy of the information before you sign the papers. It will also allow the Attorney to check for errors, request further clarifications and give you any additional information about the consequences of filing. It is not uncommon for additional corrections to be made on the official papers before your papers are actually filed with the Court. If your case is a joint filing, both you and your spouse must attend this consultation and sign the papers. Only original signatures can be accepted. Faxed signatures cannot be accepted. Your case cannot be filed until you have reviewed and signed the official papers.

3.0 Final Preparation of Papers for Filing

After your bankruptcy papers have been reviewed and signed, and the mandatory briefing completed, any final corrections to your papers will be typed and printed. When these corrections have been completed, your papers are ready to file. If you have paid your fees in full, your case will be filed.

4.0 Filing Your Bankruptcy (Step 9)

The Bankruptcy Clerks have requested that we file as many cases as possible at the same time. This allows them to schedule cases more conveniently. Therefore, a few days may pass after you have signed your papers before your case is actually filed. If you have any questions about when your case will actually be filed, you should ask the Attorney or his paralegal.

After you bring the balance in your bank accounts down to less than \$50, do not put any money back in the accounts until you have confirmed with the Attorney's office that your case has actually been filed. Upon occasion it is necessary to change the date of filing, so check with the Attorney before putting money in your accounts.

When your case is filed, the Court will assign it a unique bankruptcy number. You can obtain this number by calling the Attorney's office after your case has been filed. You can pick up a complete copy of your filed papers any time after your case has been filed, or the papers can be emailed to you.

5.0 Notices to Creditors (Step 10)

After your case has been filed, the Court will send each creditor listed on your mailing matrix an official notice telling them the date you filed and giving them your bankruptcy number and the date, time and place for your meeting with the Trustee. These are sometimes called 341 Notices because §341 requires you to attend the Meeting. You will know when those notices have been received by your creditors because the Court will also send you a copy of the notice. Your Attorney does not send out these notices.

After you have received the Court's official 341 Notice, the Attorney will send you his standard 341 letter explaining some important information about your hearing (also known as a Meeting of Creditors or 341 Meeting). If you have any questions about anything in the letter, or any questions about your bankruptcy, you should call the Attorney's office (224-2119).

**When you have finished all the steps in this booklet,
please go to Booklet B.**

Getting Answers to Your Questions

If you have any questions concerning your bankruptcy case, you should first look for the answers in this booklet. If you do not find the answer you need in this booklet, please feel free to contact our office at **801-226-2101**. There are two attorneys at this location, so be sure to ask for Mr. Jensen's paralegal. If your question regards a procedural matter (such as the date of your hearing or whether a reaffirmation has arrived) the paralegal can help. If your question involves legal matters the paralegal cannot handle, you should provide her with all the information regarding your question and the Attorney will call you back