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A Step-By-Step Guide to Chapter 7 Consumer Bankruptcy in Arkansas from the Debtor's Perspective

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Anyone who watches television or reads the newspaper is aware that the country is in a severe economic downturn.¹ Not surprisingly, bankruptcy filings are clearly on the rise.² The predictions of an increase in bankruptcy filings for this year are now coming true.³ The surge in filings

is not surprising. The three most common causes of consumer bankruptcy are job loss, illness and divorce.⁴ In modern day America unemployment is at record levels,⁵ over forty-five million are without health insurance⁶ and approximately half of all marriages end in divorce.⁷

1. See, e.g., Al Baker, *As Hard Times Loom, Will New York's Streets Get Meaner?*, N.Y. TIMES, Mar. 1, 2009, at A21, available at http://www.nytimes.com/2009/03/01/nyregion/01crime.html?_r=1&scp=1&sq=&st=nyt (discussing impact of economic crisis on crime).

2. Press Release, American Bankruptcy Institute, *Bankruptcies to Increase More Than 35 Percent in 2009, According to Latest ABI Quick Poll*, (January 26, 2009) (on file with author) (predicting an increase in filings by at least 35% over the nearly 1.1 million cases filed in 2008 based on an informal poll.), available at <http://www.abiworld.org/AM/Template.cfm?Section=Home&CONTENTID=56325&TEMPLATE=/CM/ContentDisplay.cfm>

3. Press Release, American Bankruptcy Institute, *Consumer Bankruptcy Filings Up Nearly 37 Percent Through First Half of 2009* (July 2, 2009) (on file with author) (confirming a 36.5 percent increase over the 494,610 total consumer filings during the same period a year ago, relying on data from the National Bankruptcy Research Center (NBKRC)), available at <http://www.abiworld.org/AM/Template.cfm?Section=Home&CONTENTID=58060&TEMPLATE=/CM/ContentDisplay.cfm>

4. ELIZABETH WARREN AND AMELIA WARREN TYAGI, *THE TWO INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE*, at 81 (2003) (quoting from the 2001 Consumer Bankruptcy Project).

5. Bureau of Labor Statistics, U.S. Dep't of Labor, *Calculators & Tables by Subject, Household Data Seasonally Adjusted Table A-3*, (last viewed July 10, 2009) (on file with author), available at <ftp://ftp.bls.gov/pub/suppl/empstat/cpseea3.txt>, (national unemployment was at 9.5% for June 2009, the highest rate it has been since August 1983).

6. U.S. Census Bureau, *Historical Health Insurance Tables, Table HIA-1. Health Insurance Coverage Status and Type of Coverage by Sex, Race and Hispanic Origin: 1999-2007* (Last Revised March 31, 2009) (on file with author), available at <http://www.census.gov/hhes/www/hlthins/historic/index.html>. (the number uninsured for 2007 was 45,657,000 or 15.3% of the U.S. population).

7. Centers for Disease Control and Prevention, *FASTSTATS- Marriage and Divorce*, Content Source: CDC/National Center for Health Statistics, (Page last reviewed March 6, 2009), (on file with author), available at <http://www.cdc.gov/nchs/fastats/divorce.htm>

While Americans fervently hope the tide is turning, most economists agree on two things: the end is not yet in sight, and employment is likely to be the last sector of the economy to rebound.⁸ March 2009 was the fourth straight month with job losses greater than 600,000, and the 741,000 job losses of January 2009 constitute the biggest one-month decline in absolute terms since 1949.⁹

The total number of bankruptcies has been rising in Arkansas as well.¹⁰ While the increase in total bankruptcy filings is striking, this article focuses on the largest individual category of filing, consumer (non-business)

chapter 7.¹¹ In Arkansas chapter 7 consumer filings represent a majority of all consumer filings,¹² and 94% of all chapter 7 filings.¹³ Perhaps more significantly, as a group, chapter 7 consumer bankruptcy filings comprise nearly one half of all filings.¹⁴

The chapter 7 consumer debtor¹⁵ is often the poorest of debtors.¹⁶ She is more likely to have few assets beyond those that are exempt¹⁷ or no assets at all.¹⁸ It is this dire financial situation that gives rise to the chapter 7 debtor's need for legal advice and bankruptcy assistance.¹⁹

8. See Justin Fox, *Unemployment Rise Shows Recession Far From Over*, TIME MAGAZINE, April 3, 2009, (on file with author) at <http://www.time.com/time/business/article/0,8599,1889402,00.html>

9. *Id.* Compare Bureau of Labor Statistics, U.S. Dep't of Labor, Household Data Annual Averages—Employment Status of the Civilian Non-institutional Population, 1940-date (2008), <ftp://ftp.bls.gov/pub/special.requests/lf/aat1.txt> (last visited July 10, 2009).

10. Administrative Office of U.S. Courts, Bankruptcy Statistics, Table F- U.S. Bankruptcy Courts, Cases Commenced, Terminated and Pending during the 12-month Periods Ended December 31, 2007 and 2008 (Last viewed July 10, 2009), (on file with author), available at <http://www.uscourts.gov/bnkrpctstats/statistics.htm#calendar> (shows a 13.3% increase in filings in the Eastern District of Arkansas and a 26.2 increase in the Western District of Arkansas).

11. Administrative Office of U.S. Courts, Table F-2. U.S. Bankruptcy Courts-Business and Nonbusiness Cases commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2008, (on file with author) available at <http://www.uscourts.gov/bnkrpctstats/bankruptcystats.htm> (last visited July 10, 2009).

12. *Id.*

13. Statistical information provided by the U.S. Bankruptcy Clerk for the Eastern and Western District of Arkansas for the period June 1, 2008 to May 31, 2009 (on file with author).

14. Administrative Office of U.S. Courts, Table F-2. U.S. Bankruptcy Courts-Business and Nonbusiness Cases commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2008, *supra* note 11.

15. For purposes of this article the term "debtor" means an individual with primarily consumer debt filing under Chapter 7 of Title 11 unless otherwise provided.

16. Ninety percent of cases filed indicated the debtor's household income was below the median for the state for the period from June 1, 2008 to May 31, 2009.

17. See Ed Flynn & Gordon Bermant, *Bankruptcy by the Numbers: Chapter 7 Asset Cases: Part II*, AM. BANKR. INST. J., May 2003, at 24. (Nationwide small estates, those less than \$10,000, grew from 65.7% in 1994 to 73.8% in 2002. About 4% of all chapter 7 cases included non-exempt assets nationwide while less than 2% of chapter 7 cases closed as asset cases in Arkansas).

18. Of the 7,822 consumer Chapter 7 cases closed during the period from June 1, 2008 to May 31, 2009, 95% of all cases were no-asset cases. Statistical information provided by the U.S. Bankruptcy Court Clerk from the CM/ECF database (on file with author).

19. 11 U.S.C. § 101(4)(A) (2006 & Supp. 2008). The term "bankruptcy assistance" means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.

As the demand for bankruptcy representation increases, practitioners throughout the state will be asked to assist new and existing clients. The number of lawyers available to meet the increased demand has dwindled significantly since imposition of the mandatory requirements for electronic filing,²⁰ and the passage of the latest amendment to the bankruptcy code, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [BAPCPA].²¹ These two developments taken together have had the effect of discouraging general practitioners from continuing to devote the necessary time and resources to this important area of the law. The practice was challenging before the adoption of new technology and the implementation of new law, and it remains a specialty practice in a complex subject matter.

In the wake of the increased demand for bankruptcy representation and the diminished supply of available legal services, attorneys should reconsider developing a fundamental working knowledge of this area of the law. As Arkansas attorneys develop and improve their competency in consumer bankruptcy, the bar's capability to provide access to justice for the poor will be enhanced. When counsel is not available the pro se debtor often turns to the courts, the clerks, or the trustees, none of whom may advise the debtor. In the alternative, pro se debtors may turn either to

self-help guides, or to bankruptcy preparers who by law cannot give legal advice.²²

Because attorneys are not immune from economic hardship in times of recession, development of this area of practice may prevent or soften the loss of other practice revenues for some. The author hopes to encourage Arkansas attorneys in helping the insolvent debtor on a paid or pro bono basis by providing a brief overview of the law and practice in consumer chapter 7 cases in Arkansas.

This article is intended to provide a resource guide for the assessment, preparation and filing of consumer chapter 7 (liquidation) individual and joint bankruptcies.²³ The scope of the material includes (1) an overview of bankruptcy, (2) background on debtor-creditor law generally, (3) relevant sources of bankruptcy and non-bankruptcy law and procedure, (4) distinctions among the various types of consumer bankruptcy, (5) the steps in a typical Chapter 7 case, (6) information on the official bankruptcy forms, and (7) references to helpful resources. Bankruptcy forms available online will permit an examination of the various documents to be prepared and reviewed with the client.²⁴

The goal is not to provide the uninitiated attorney with an independent capability based solely on this article, but rather to provide sufficient background about bankruptcy law generally and chapter 7 practice

20. See U.S. BANKR. CT. E. & W.D. ARK., ADMIN. PROC. ELEC. FILED CASES & RELATED DOC. (version 4 Dec. 15, 2006), available at <http://www.arb.uscourts.gov/orders-rules-opinions/orders/apgo19.pdf>

21. Pub. L. No. 109-8, 119 Stat. 23 (codified as amended at 11 U.S.C. §§ 101 et seq. (2006 & 2008 Supp.)).

22. 11 U.S.C. § 110(b)(2)(B), 110(e), 110(f) (2006 & Supp. 2008). Section 110(e)(2)(A) provides that "[a] bankruptcy petition preparer may not offer a potential a bankruptcy debtor any legal advice, including any legal advice, including any legal advice described in subparagraph (B)." The definition of "bankruptcy petition preparer" is not found in section 101, the definitional section of the Code, but rather at 11 U.S.C. § 110(a)(1) where it is defined to mean "a person, other than an attorney for the debtor or an employee of such attorney, who prepares for compensation a document for filing" by a debtor ...in connection with a case under this title.

23. Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532 (2006 & Supp. 2008), and all rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

24. <http://www.arb.uscourts.gov/> (last visited July 10, 2009) and <http://www.uscourts.gov/bkforms/>

specifically to engender an interest in the subject matter and a desire to explore other helpful resources.²⁵

The scope of this article does *not* include guidance for attorneys or their debtor clients who wish to file business bankruptcies²⁶ or consumer bankruptcies under other chapters of the Code.²⁷ Nor does this article address involuntary bankruptcies,²⁸ cross-border bankruptcies²⁹ or bankruptcies filed by governmental units.³⁰ The hypothetical consumer debtor who fits within the scope of this article is an individual or married couple eligible to file³¹ for consumer chapter 7 *and* unwilling or unable to file under any other chapter.³² While seemingly narrow these parameters nevertheless offer a formidable challenge in introducing this topic to a newcomer or in revisiting this subject with a former practitioner, who is tempted to reenter the fray.

I. Background Related to Bankruptcy Law

A. History: The Evolution of the Code

The origin of the word "bankruptcy" has been traced to Roman law in 118 B.C.³³ "Banca rupta" referred to a medieval custom of breaking the bench of a tradesman who absconded with his creditors' property. It is rumored that a version of the custom survives in Italy and parts of New York City today.

The legal concept of bankruptcy traveled to England in 1542, when Parliament enacted an "Act Against Such Persons as Do Make Bankrupt."³⁴ English bankruptcy law focused merely on creditors' rights. The idea of a "discharge" and "fresh start" for the hapless debtor did not emerge until 150 years later, and even then, not to assist the unfortunate, but more to reward debtors who cooperated in helping creditors get paid.

25. HENRY J. SOMMER, JOHN RAO, AND SUSAN A. SCHNEIDER, CONSUMER BANKRUPTCY LAW AND PRACTICE, VOL. 1 & 2, (John Rao, ed., National Consumer Law Center 8th ed. 2006 & Supp. 2008).

26. Chapter 7 filings for corporations(including LLCs and other limited liability entities), partnerships, and proprietorships are beyond the scope of this material.

27. Consumers may also be eligible to file under chapter 11 (Reorganization), chapter 12 (Family Farmers and Family Fishermen with Regular Income), and chapter 13 (Individuals with Regular Income).

28. See 11 U.S.C. § 303 (2006 & Supp. 2008). An involuntary petition may be filed by three or more entities holding claims against the debtor under certain circumstances. Because an involuntary petition is beyond the scope of this article, the use of the word "filing" means the filing of a voluntary petition by the debtor. Likewise the phrase "commencement of a case" means a voluntary filing. In the context of this article, use of the word "filing" and the phrase "commencement of a case" mean a voluntary filing under § 301(b) that constitutes an "order for relief."

29. 11 U.S.C. § 1501 et seq. (2006 & Supp. 2008)(replacing former section 304 of the Code).

30. 11 U.S.C. § 901 et seq. (2006 & Supp. 2008).

31. When our hypothetical debtor is filing with a spouse in a joint case, relevant distinctions are noted.

32. The scope of this article is limited solely to providing an overview of some of the prevalent consumer Chapter 7 bankruptcy issues related to individual and joint filers, and specifically excludes all business entities, including proprietorships, family farmers and family fishermen. Commodity brokers and stock brokers, while eligible for chapter 7 are also excluded from the scope of the article.

33. See Vern Countryman, *A History of American Bankruptcy Law*, 81 Com. L.J. 226 (1976).

34. 34 & 35 Henry 8, c. 4 (1542) (Eng.).

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Parliament first provided for a discharge from debt in 1705.³⁵ That was for the cooperative debtor. The uncooperative debtor could receive capital punishment.³⁶ The historical origins of bankruptcy help to explain the evolution of cultural attitudes and modern stereotypes associated with bankruptcy. Bankruptcy laws did not become a permanent part of the American legal system³⁷ until 1898.³⁸ Before then relief was mostly under state law.³⁹ The 1898 Bankruptcy Act⁴⁰ borrowed from state laws that exempted some forms of property from creditor levy. It permitted honest debtors to discharge their debts by giving up their non-exempt assets for distribution to creditors.

This simple idea is what we now call chapter 7 or “liquidation” bankruptcy. The 1898 Bankruptcy Act used bankruptcy judges who sat as “referees” for the district court. The referees in bankruptcy,⁴¹ as in other courts, made “findings of fact” and “conclusions of law” submitted for approval to the district court.⁴²

The 1898 *Act* was revised,⁴³ and ultimately it was replaced by the Bankruptcy Reform Act of 1978, commonly referred to as the “Code.”⁴⁴ The Code has been amended a number of times.⁴⁵ The most recent and most substantial amendment was the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [BAPCPA].⁴⁶

35. 4 Anne, ch. 17 (1705) (Eng.).

36. DOUGLAS G. BAIRD ET AL., *BANKRUPTCY CASES, PROBLEMS AND MATERIALS* 24 (rev. 3d ed. 2001).

37. The framers provided for bankruptcy laws. *See* U.S. CONST. art. I, § 8, cl. 4 (2006 & Supp. 2008).

38. Earlier Acts lasted only briefly 1800 (repealed 1803), 1841 (repealed 1843) and 1867 (repealed 1878).

39. With the advent of federal bankruptcy law, state law was preempted under the Supremacy Clause. *See* U.S. CONST. art. VI, § 2.

40. The Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, as amended, sometimes called the Nelson Act, repealed by Pub.L. No. 95-598.

41. In 1973 the Bankruptcy Rules changed the title of the office from “referee” to “judge.” The 1898 Act used the term “courts of bankruptcy.”

42. For current law, see 28 U.S.C. § 1334(a) (2006 & Supp. 2008).

43. The Chandler Act of July 22, 1938, c. 575, 52 Stat. 883, which revised the Act generally and materially amended the provisions covering corporate reorganizations, was repealed by Pub. L. No. 95-598.

44. Pub. L. No. 95-598, Title I, § 101, 92 Stat. 2549 (1978) (codified as 11 U.S.C. § 101 et seq.).

45. Prior to 2005, the most comprehensive amendments were the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA) effective July 10, 1984 and Amendment by Pub. L. No. 103-394 effective October 22, 1994. *See* *BANKRUPTCY, CODE, RULES AND FORMS*, 11.

46. Public L. No. 109-8 (S 256) April 20, 2005. On April 20, 2005, legislation was enacted when President Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act. The general effective date of the Act was October 17, 2005.

BAPCPA made it more difficult for debtors to file chapter 7 bankruptcy by, among other things, imposing a longer interval between chapter 7 filings for previous debtors,⁴⁷ requiring pre-petition credit counseling,⁴⁸ increasing filing fees,⁴⁹ and implementing “means testing.”⁵⁰ The amendment also created the term “debt relief agency” and defined it to include attorneys,⁵¹ imposed restrictions and required disclosures on debt relief agencies,⁵² changed the law regarding exemptions,⁵³ and mandated debtor education.⁵⁴

B. Sources of Law Relating to Bankruptcy

The greater body of bankruptcy law has evolved to encompass state collection laws including Revised Article 9 of the Uniform Commercial Code (UCC). This is known as the *Butner* principle.⁵⁵ The adoption of state

law in this manner leaves the determination of property rights in a debtor’s “estate”⁵⁶ to state law as much as possible insofar as those rights are normally created and defined by state law. The principle lends a greater degree of predictability to the law for parties to consumer and commercial transactions whose relationship arises primarily out of state law. Nevertheless, there are instances in which federal law disregards state law or the contractual agreements of the parties in effecting the objectives of the Code.⁵⁷

State law often governs the creation of contractual liability, the attachment and perfection of security interests, the status of general creditors, and liability under tort law. State law may also govern the property that a debtor may keep or exempt for the debtor’s fresh start after a discharge.⁵⁸ When state law contravenes the purposes of the Code,⁵⁹ generally state law must yield, under the

47. 11 U.S.C. § 727(a) (2006 & Supp. 2008).

48. 11 U.S.C. § 109(h) (2006 & 2008 Supp.).

49. 28 U.S.C. § 1930 (2006 & 2008 Supp.).

50. 11 U.S.C. § 707(b)(2) (2006 & 2008 Supp.).

51. 11 U.S.C. § 101(12A) (2006 & 2008 Supp.).

52. 11 U.S.C. § 526-27 (2006 & 2008 Supp.).

53. 11 U.S.C. § 522 (2006 & 2008 Supp.).

54. 11 U.S.C. § 111 (2006 & 2008 Supp.); 11 U.S.C. § 727(a)(11) (2006 & 2008 Supp.).

55. *Butner v. United States*, 440 U.S. 48, 55 (1979) (holding question of whether a security interest in property extends to rents and profits derived from the property was one resolvable by reference to state law, not some federal rule of equity, and the Court would not consider that state-law issue).

56. See 11 U.S.C. § 541 (2006 & 2008 Supp.). With certain exceptions, the commencement of a case creates an estate comprised of all legal or equitable interests of the debtor.

57. See, e.g. 11 U.S.C. § 524(c) (2006 & 2008 Supp.).

58. 11 U.S.C. § 522(b) (2006 & 2008 Supp.).

59. Congress may have the power to cut back on state sovereign immunity under section 5 of the 14th Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). At 11 U.S.C. § 106(a) (2006 & 2008 Supp.), the Code makes abrogation of the state’s sovereign immunity explicit, but this power is available only to prevent violations of due process rights, not merely for the implementation of federal policies.

Supremacy Clause⁶⁰ except in rare cases.⁶¹ Though the Supremacy Clause dictates that federal law is the supreme law of the land and preempts state law, the Code often incorporates or cites to state law.⁶² Thus the bankruptcy courts look to state law for guidance on many issues related to debt creation and lien validity and priority.

As a practical matter, state law and federal law outside the Bankruptcy Code are each part of the general law of bankruptcy under the *Butner* principle. However, while the Code and the bankruptcy courts look to state law and some non-Code federal law for guidance, the term “non-bankruptcy law” is used to describe state laws and non-Code federal laws that pertain to bankruptcy matters. Examples of federal laws that have an impact on debtor-creditor relations include limitations on the garnishment of wages,⁶³ debtors’ rights to verification of accounts from third-party collection agents,⁶⁴ debtors’ right to see and respond to erroneous credit report information,⁶⁵ and debtors’ right to have credit information reinvestigated and accurately maintained.⁶⁶

Mankind has devised “debt collection systems” since ancient times. Bankruptcy law is a “debt collection system,” but it is not the *only* system. Much of the creation and collection of debts by creditors goes on without the need for the court system, and in those cases in which court action is needed, the parties usually seek relief in the state and local courts. That means there are separate systems for each of the 50 states, the District of Columbia,⁶⁷ and the American Territories.⁶⁸ Even where one might expect to find uniformity among the different jurisdictions, it can be lacking. For example, every state has adopted the Uniform Commercial Code [UCC], but often only after the state legislature has altered its provisions, thereby creating non-uniformity among the laws of the states in a nominally “uniform” act.⁶⁹ Moreover, the appellate courts of each state are free to interpret the provisions of the UCC differently. State court jurisdiction may allow a debtor to be sued somewhere, but no single state court can enjoin creditors nationwide or compel creditors to litigate in one place.

60. U.S. CONST. art. VI, cl. 2. “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

61. Many cases have held that Congress lacks the power to cut back on sovereign immunity under Article I where the bankruptcy power lies based on *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). However, *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004), held that the bankruptcy courts in rem jurisdiction does not infringe on state sovereignty.

62. See, e.g., Revised Article 9, ARK. CODE ANN. § 4-9-101-709 (2001 & 2007 Supp.).

63. 15 U.S.C. § 1673 (2006 & 2008 Supp.).

64. 15 U.S.C. § 1692, et seq. (2006 & 2008 Supp.), Fair Debt Collection Practices Act (“FDCPA”).

65. 15 U.S.C. § 1681, et seq. (2006 & 2008 Supp.), Fair Credit Reporting Act (“FCRA”).

66. 15 U.S.C. § 1681(i) (2006 & 2008 Supp.).

67. 11 U.S.C. § 101(52) (2006 & 2008 Supp.) defines “state” to include the District of Columbia and Puerto Rico, except for the purposes of defining who may be a debtor under chapter 9.

68. Titles 11, 18 and 28 are made applicable to Guam, the Northern Mariana Islands and Virgin Islands, respectively, through 48 U.S.C. §§ 1424-4, 1821, and 1614 (2006 & 2008 Supp.).

69. For example, Arkansas’ General Assembly changed Revised Article 9 from the draft proposed for adoption.

This competition among creditors under *non-bankruptcy* law creates a “race” to collect assets and related problems that bankruptcy seeks to solve. Under non-bankruptcy law competing creditors who get to the debtor’s assets first may get everything while others get nothing. This is true even as to creditors who had equally valid claims because after the debtor’s assets and income are exhausted, there is nothing left. The “winner takes all” system also punishes the debtor who might otherwise recover given some latitude. Bankruptcy attempts to solve these problems by providing a central forum for all claims, an automatic stay to stop creditor collection action, and uniform law for the resolution of competing interests. Bankruptcy law forces creditors to cooperate and stops or minimizes the destructive race to seize and sell assets.

The constitutional authority for federal bankruptcy law is found in Article I,⁷⁰ and the substantive law of bankruptcy is set forth in title 11 of the United States Code, commonly referred to as the Bankruptcy Code or simply as “the Code.”⁷¹ In addition, the three other provisions of the United States Code that are commonly implicated in bankruptcy are title 28, 18 and 26. The aspects of bankruptcy law related to judges,⁷² jurisdiction,⁷³ venue,⁷⁴ fees⁷⁵ and the waiver of filing fees⁷⁶ are implemented through Title 28.⁷⁷ Current law authorizes the bankruptcy court to hear all cases by reference⁷⁸ from the district court.⁷⁹ A bankruptcy judge may hear and determine all cases under title 11 including all “core”⁸⁰ proceedings arising under title 11 or arising in a case under title 11, as well as “non-core” matters with the consent of the parties.⁸¹

70. U.S. CONST. art. I, § 8, cl. 4 (2006 & 2008 Supp.). See *United States v. Kras*, 409 U.S. 434 (1973) (constitutional grant of power to the Congress to legislate in this area does not create a constitutional right to obtain a discharge).

71. 11 U.S.C. §§ 101 et seq. (2006 & 2008 Supp.).

72. 28 U.S.C. § 151 et seq. (2006 & 2008 Supp.).

73. 28 U.S.C. § 1334(a) (2006 & 2008 Supp.). Except as provided in section (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

74. 28 U.S.C. § 1408 et seq. (2006 & 2008 Supp.).

75. 28 U.S.C. § 1930(a)-(f) (2006 & 2008 Supp.).

76. 28 U.S.C. § 1930(f)(1).

77. 28 U.S.C. § 1334 (2006 & 2008 Supp.).

78. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (finding that 28 U.S.C. § 1471, as added by § 241(a) of the Bankruptcy Act of 1978, impermissibly removed most, if not all, of “the essential attributes of the judicial power” from the Art. III district court, and vested those attributes in a non-Art. III adjunct and holding that such a grant of jurisdiction cannot be sustained as an exercise of Congress’ power to create adjuncts to Art. III courts). This constitutional infirmity was cured by the passage of BAFRA in 1984.

79. 28 U.S.C. § 157(a) (2006 & 2008 Supp.) (authorizing the district court to refer any or all proceedings arising under title 11, or arising in or related to cases under title 11 to the bankruptcy judges for the district).

80. 28 U.S.C. § 157(b) (2006 & 2008 Supp.). Core proceedings include, but are not limited to, matters concerning the administration of the estate. See 28 U.S.C. § 157(b)(2)(A)-(B) for a more complete list. Non-core proceedings under § 157(b)(2)(B) include the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purpose of distribution.

81. The bankruptcy court by reference has the option to hear, refer or abstain from hearing cases within its non-exclusive subject matter jurisdiction. See 28 U.S.C. § 1334(a) (2006 & 2008 Supp.). See also 28 U.S.C. 157(a) (2006 & 2008 Supp.).

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The court enters final orders and judgments, subject to review.⁸² While the bankruptcy court by reference has the power to abstain from hearing cases that may be heard in state court,⁸³ there are certain matters over which it retains exclusive jurisdiction.⁸⁴

When allegations of criminal behavior arise in the bankruptcy context, reference must be made to title 18. Specific provisions deal with criminal conduct by any person in connection with the estate of a debtor in Title 11 cases including concealment of property, false swearing, false claims and fraud.⁸⁵ The criminal conduct of trustees, custodians, marshals, attorneys or other officers of the court, their agents and employees is covered by prohibitions against and penalties for embezzlement,⁸⁶ as well as for other conduct.⁸⁷

There are also numerous references to the Internal Revenue Code of 1986⁸⁸ [IRC] in the Code. Title 26 of the United States Code

governs federal tax matters, and to the extent its provisions are incorporated by reference, controls the effect of many of the Code's provisions.⁸⁹

C. Types of Consumer Bankruptcy— The Chapters of the Code

The Code is broken down into "chapters" that do not flow in strict numerical sequence: 1, 3, 5, 7, 9, 11, 12, 13 and 15. Chapters 1, 3, and 5 apply to cases under chapter 7, 11, 12, or 13.⁹⁰ Chapter 1 provides definitions⁹¹ for bankruptcy terms, relates which parts of the Code go with which types of cases,⁹² and sets out eligibility requirements for each chapter.⁹³ Chapter 3 deals with case administration and explains how a bankruptcy case begins⁹⁴ and who administers the estate.⁹⁵ Chapter 5 explains how claims against the estate are identified, prioritized and paid.⁹⁶ Chapters 7, 11, 12, and 13 relate to specific

82. 28 U.S.C. § 158 (2006 & 2008 Supp.) provides three potential avenues of appeal. The district court, the bankruptcy appellate panel ("BAP"), and the court of appeals have appellate jurisdiction depending on the circumstances. See FED. R. BANKR. P. 8000 et seq.

83. See 28 U.S.C. § 1334(c) (2006 & 2008 Supp.).

84. 28 U.S.C. § 1334(e).

85. 18 U.S.C. §§ 151-52 (2006 & 2008 Supp.).

86. 18 U.S.C. § 153 (2006 & 2008 Supp.).

87. 18 U.S.C. § 154 (2006 & 2008 Supp.).

88. 26 U.S.C. § 101 et seq. (2006 & 2008 Supp.).

89. *E.g.*, 26 U.S.C. § 522(b)(3)(C) and § 522(d)(12) predicate the exemption of retirement funds on their exemption from taxation under sections 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.

90. 11 U.S.C. § 103(a) (2006 & 2008 Supp.).

91. 11 U.S.C. § 101 (2006 & 2008 Supp.).

92. 11 U.S.C. § 103 (2006 & Supp. 2008).

93. 11 U.S.C. § 109 (2006 & 2008 Supp.).

94. 11 U.S.C. §§ 301-07 (2006 & 2008 Supp.).

95. 11 U.S.C. §§ 321-31 (2006 & 2008 Supp.) (read in conjunction with §§ 701-05 in a Chapter 7 case).

96. 11 U.S.C. § 501 et seq. (2006 & 2008 Supp.).

types of bankruptcy relief that are available to eligible debtors⁹⁷ and will be dealt with separately and in more detail below.

Before exploring chapter 7 in greater detail a brief definition is necessary as a basis for comparison to the other chapters that follow. The description of chapter 7 as "Liquidation" is literal. It means to ascertain the liabilities and distribute the "non-exempt"⁹⁸ assets of an entity toward discharging indebtedness.⁹⁹ The trustee is the person designated by the United States Trustee's Office¹⁰⁰ to perform the tasks of identifying "non-exempt" assets and converting those assets to cash for distribution to creditors whenever a debtor files for bankruptcy.¹⁰¹ The United States Trustee [UST] supervises the administration of cases by the panel of private trustees who serve in chapter 7 cases. Among the other duties of the United States Trustee are ensuring that

required documents and fees are properly and timely filed,¹⁰² monitoring the progress of cases to prevent undue delay,¹⁰³ and reporting any suspected criminal activity.¹⁰⁴

While the scope of this article is limited to chapter 7 consumer debtors, it is essential that a practitioner know about the other types of relief that are available to individual consumer debtors in order to communicate those options to clients,¹⁰⁵ help each debtor make the best choice, associate more experienced counsel when needed, or refer clients whose cases are beyond counsel's expertise. Before we explore the aspects of consumer chapter 7 more fully, this section briefly examines the other "forms of relief" available to individuals.

Chapter 11 REORGANIZATION (ALSO CALLED REHABILITATION) is available to any person who may be a debtor under Chapter 7.¹⁰⁶ That

97. Chapter 9 does not afford relief to consumer debtors, and is beyond the scope of this article. Likewise, chapter 15 incorporates the Model Law on Cross-Border Insolvency to facilitate cooperation between the United States and foreign countries in cross-border insolvency cases and does not pertain to consumer cases and is excluded from the scope of this article. See 11 U.S.C. §§ 901-946 (2006 & 2008 Supp.). Chapter 9 allows "municipalities" as defined in section 101(40) to reorganize or restructure debt in order to recover from insolvency. Section 901 et seq. governs Chapter 9 filings. 11 U.S.C. §§ 1501-1532 (2006 & 2008 Supp.). Chapter 15 is governed by section 1501 et seq., which replaces former section 304 of the Code.

98. Exempt assets are those the debtor is permitted to keep for her "fresh start" in recovering financially. The concept will be discussed more fully in the examination of the chapter 7 step by step process. The origin of the phrase is traceable to *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918).

99. BLACK'S LAW DICTIONARY 264 (9th ed. 2009).

100. 11 U.S.C. § 701(a) (2006 & 2008 Supp.). The Interim Trustee is normally appointed by the United States Trustee from the panel of trustees to serve until the first meeting of creditors is held pursuant to 11 U.S.C. § 341(a) (2006 & 2008 Supp.). Thereafter, unless the creditors elect a different trustee, the Interim trustee continues to serve as the panel trustee in the case. The United States Trustee may serve as trustee in any case as needed or desired.

101. 11 U.S.C. § 704 (2006 & 2008 Supp.). In a chapter 7 case §§ 321-333 should be read with §§ 701-05.

102. 28 U.S.C. § 586(a)(3)(D).

103. 28 U.S.C. § 586(a)(3)(G).

104. 28 U.S.C. § 586(a)(3)(F).

105. 11 U.S.C. § 342(b)(1) (2006 & 2008 Supp.) and 11 U.S.C. § 527(a)(1) (2006 & 2008 Supp.) require that before the commencement of a consumer case the debtor be provided a written notice containing a brief description of Chapters 7, 11, 12, and 13 and the general purpose, benefits, and costs of proceeding under each. Official Form B1, Voluntary Petition (January 2008), available at http://www.uscourts.gov/rules/BK_Forms_08_Official/B_001_0108f.pdf, at page 3 requires the debtor's signature under oath certifying that debtor is aware of the right to proceed under Chapter 7, 11, 12 or 13 and the relief available under each and chooses chapter 7. Cf. ARK. RULES OF PROF'L CONDUCT R. 1.4(b) (2009).

106. 11 U.S.C. § 109(d) (2006 & 2008 Supp.).

means an individual (but not a stockbroker or commodity broker),¹⁰⁷ a partnership, or a corporation. Railroads are permitted to use chapter 11 as well.¹⁰⁸ While a debtor who is eligible for chapter 7 may file under chapter 11, it is infrequently used because relief under chapter 7 and chapter 13 can be obtained with much less cost. An exception is when the amount of debt exceeds the debt cap permitted for chapter 13 eligibility.¹⁰⁹ Eligibility for chapter 11 is not restricted by the amount and type of debt.¹¹⁰

Chapter 12 ADJUSTMENTS OF THE DEBTS OF A FAMILY FARMER OR FISHERMAN WITH REGULAR ANNUAL INCOME¹¹¹ was added to the Code in 1986 to provide a special type of bankruptcy for “family farm” operations. It is a form of reorganization bankruptcy for individuals and businesses similar to chapter 11 and chapter 13, but it is limited to debtors who meet the criteria for “family farmer”¹¹² or “family fisherman.”¹¹³

Chapter 13 ADJUSTMENT OF THE DEBTS OF AN INDIVIDUAL WITH REGULAR INCOME (formerly called the Wage Earner’s Plan) is available to “an individual with regular income”¹¹⁴ and includes spouses but excludes stockbrokers and commodity brokers. As mentioned above, there are debt limitations.¹¹⁵ For debtors who have sufficient disposable monthly income to fund a plan for repayment of some of their debt, chapter 13 may offer some debtors advantages over chapter 7. For example, chapter 13 offers the debtor a chance to keep non-exempt property by proposing a plan to pay creditors at least as much as they would receive in a chapter 7 Liquidation,¹¹⁶ and permits the debtor to “cure” a default on an obligation by having the court restructure the payment of the obligation during the term of the plan with compensation to the creditor for the delayed payment.¹¹⁷

107. 11 U.S.C. § 109(d) (2006 & 2008 Supp.).

108. 11 U.S.C. § 109(d) (2006 & 2008 Supp.).

109. 11 U.S.C. § 109(e) (2006 & 2008 Supp.). Eligibility for chapter 13 filing is currently limited to an individual or spouses with regular income who have less than \$336,900 in non-contingent, liquidated, unsecured debt *and* less than \$1,010,650 in non-contingent, liquidated, secured debt. 11 U.S.C. § 104 (2006 & 2008 Supp.) adjusts dollar amounts in the Code to reflect the change in the Consumer Price Index for All Urban Consumers (CPI) at 3-year intervals. The next adjustment is scheduled for April 1, 2010.

110. 11 U.S.C. § 109(d) (2006 & 2008 Supp.).

111. 11 U.S.C. §§ 1201-31 (2006 & 2008 Supp.). Chapter 12 did not originally include “family fishermen.”

112. Section 101(18) defines family farmer and section, and (19) defines “family farmer with regular income.”

113. 11 U.S.C. § 101(19A) (2006 & 2008 Supp.) defines family fisherman, and section (19B) defines “family fisherman with regular income.”

114. 11 U.S.C. § 101(30) (2006 & 2008 Supp.). This definition excludes partnerships and corporations.

115. 11 U.S.C. § 109(e) (2006 & 2008 Supp.).

116. The computation of what creditors receive is on a case by case basis. Secured creditors at a minimum receive the amount of the “allowed claim” to the extent of the “replacement value” of their collateral. To the extent that creditors are “unsecured” each would be entitled to a *pro rata* portion of the liquidated non-exempt assets according to the priorities for the payment of claims set forth in 11 U.S.C. § 507 (2006 & 2008 Supp.).

117. For installment payments interest is added. In *In re Till*, 541 U.S. 465, 124 S. Ct. 1951 (2004) *rev’g and rem’g*, 301 F.3d 583 (7th Cir. 2002), the U.S. Supreme Court held that the interest rate should be used to insure that the secured creditor receive the present value of the claim. The court held that an interest rate of the national prime interest rate plus 1 to 3 percent for risk would give the secured creditor the present value of the secured claim.

The filing of a chapter 13 petition triggers an automatic stay as in chapter 7.¹¹⁸ The stay generally stops all creditor action with few exceptions. While the chapter 7 stay protects the debtor, the chapter 13 stay may protect co-debtors as well.¹¹⁹ The chapter 13 plan provides for monthly payments to creditors over a three to five year period;¹²⁰ thus the stay may remain in effect much longer than in chapter 7 cases. However, a debtor under chapter 13 must make the plan payments or the case may be dismissed or converted.¹²¹ Debtors may convert a Chapter 13 to Chapter 7 on request.¹²² A debtor may also convert a chapter 7 to a chapter 13 if certain conditions are met.¹²³

Comparison of the specific relief available under chapters 7 and 13 is critical for debtors eligible for either chapter. There are two types of discharge under chapter 13: a

normal discharge and a "hardship" discharge, which is rarely granted.¹²⁴ While the hardship discharge is similar to a chapter 7 discharge,¹²⁵ the normal chapter 13 discharge includes debt categories that are excepted from discharge in chapter 7.¹²⁶

BAPCPA limits the availability of a discharge under chapter 13 in certain situations. For example, if the debtor has obtained a discharge in a chapter 13 filed within the two years prior to filing, the debtor cannot obtain a chapter 13 discharge. Similarly if the debtor has obtained a discharge in a chapter 7, 11, or 12 filed within four years prior to filing, the debtor cannot obtain a chapter 13 discharge.¹²⁷ When a debtor is eligible to file chapter 13, a careful examination of § 1328 based on the specific facts of the debtor's case is critical to an understanding of the debts that may and may not be discharged.¹²⁸

118. Compare 11 U.S.C. § 1301 (2006 & 2008 Supp.) and 11 U.S.C. § 362(a) (2006 & 2008 Supp.).

119. 11 U.S.C. § 1301 (2006 & 2008 Supp.); FED. R. BANKR. P. 4001. There are a number of exceptions to the co-debtor stay, e.g., debtor's plan does not propose to pay the claim of the creditor.

120. 11 U.S.C. § 1322(d) (2006 & 2008 Supp.).

121. 11 U.S.C. § 1307(c), (e) (2006 & 2008 Supp.).

122. 11 U.S.C. § 1307(a), (b).

123. 11 U.S.C. § 706 (2006 & 2008 Supp.).

124. 11 U.S.C. § 1328(a) and (b) (2006 & 2008 Supp.).

125. 11 U.S.C. § 1328(b), often referred to as the "hardship discharge," has similar exceptions to discharge in that the exceptions in section 523(a) are those found in section 727(b) governing discharge in chapter 7. The discharge under 11 U.S.C. § 1328(b) differs from the section 727 discharge in that it includes debts provided for under section 1322(b)(5) or under an allowed claim filed under 11 U.S.C. § 1305(a)(2), if prior approval by the trustee of the debtor's incurring the debt was practicable and not obtained, e.g., a post-petition consumer debt under the plan.

126. 11 U.S.C. § 1328(a) limits the exceptions to discharge found at section 523(a) and does not include 523(a)(6), (7), (10)-(19). Section 1328(a)(1), (3) and (4) do provide other exceptions to discharge that may be relevant to a choice of relief.

127. 11 U.S.C. § 1328 (f).

128. See 11 U.S.C. § 1328(a)(2).

D. Federal Rules of Bankruptcy Procedure

The Federal Rules of Bankruptcy Procedure [FRBP]¹²⁹ govern procedure in the U.S. Bankruptcy Courts.¹³⁰ The Rules consist of ten parts. Specific provisions of each Rule cross reference their counterparts in the Code. For example, Part I sets forth the procedures for commencement of the case, proceedings relating to the petition and the order for relief.¹³¹

Part II relates to Officers and Administration of the estate and includes provisions on notices, meetings, examination, elections, attorneys and accountants.¹³² Part III deals with claims, distributions and plans,¹³³ while Part IV specifies the debtor's duties and benefits.¹³⁴ Part V is devoted to the bankruptcy

courts and clerks,¹³⁵ and Part VI controls the collection and liquidation of the estate.¹³⁶

Part VII defines and governs adversary proceedings.¹³⁷ Appellate procedure for appeals to the district court, Bankruptcy Appellate Panel (BAP) and the United States Court of Appeals for the Eighth Circuit is in Part VIII,¹³⁸ and general provisions are in Part IX.¹³⁹ Parts VII and IX of the Rules incorporate by reference certain parts of the Federal Rules of Civil Procedure.¹⁴⁰ In some instances the bankruptcy procedural rule adopts the federal civil rule completely,¹⁴¹ and in other instances the bankruptcy rule is adopted with a modification and explanation.¹⁴² For that reason, cross referencing between the Rules of Bankruptcy and the Rules of Civil Procedure is critical.

129. U.S. Supreme Court promulgated the Federal Rules of Bankruptcy Procedure pursuant to 28 U.S.C. § 2075 (2006 & 2008 Supp.).

130. FED. R. BANKR. P. 1001.

131. FED. R. BANKR. P. 1001 et seq.

132. FED. R. BANKR. P. 2001 et seq.

133. FED. R. BANKR. P. 3001 et seq.

134. FED. R. BANKR. P. 4001 et seq.

135. FED. R. BANKR. P. 5001 et seq.

136. FED. R. BANKR. P. 6001 et seq.

137. FED. R. BANKR. P. 7001 et seq.

138. FED. R. BANKR. P. 8001 et seq.

139. FED. R. BANKR. P. 9001 et seq.

140. *See, e.g.*, Part VII, FED. R. BANKR. P. 7001 et seq.

141. *See, e.g.*, FED. R. BANKR. P. 9016. FED. R. CIV. P. 45 applies in cases under the Code (as amended Mar. 30, 1987, eff. Aug. 1, 1987.).

142. *E.g.*, FED. R. BANKR. P. 7041. The modified rules in some texts provide the Advisory Committee Notes for further clarification.

FRBP 9009 mandates that the Official Forms be observed and used with alterations as appropriate.¹⁴³ The Official and Procedural Bankruptcy Forms are generally published with the Bankruptcy Rules and list all of the forms required.¹⁴⁴ The U.S. Bankruptcy Courts for the Eastern and Western Districts of Arkansas have local rules and general orders that supplement the bankruptcy rules. These forms, rules and orders are on the court's website.¹⁴⁵

II. Consumer Chapter 7—Step-By-Step

A. Introduction

1. Who May Be a Debtor?

In a "voluntary"¹⁴⁶ case the debtor chooses to file a petition asking for relief from creditors and listing all assets, liabilities, income, expenses and other important information. Ironically, there is no requirement of insolvency in the Code.¹⁴⁷ All information is provided under oath under penalty of perjury.¹⁴⁸

143. The Official Forms were amended effective December 1, 2008. Fewer than all of the forms are relevant to our examination of this topic. The scope of this article is limited to the preparation of Official Forms B1, B3A, B3B, B6, B6A-BJ, B7, B8, B21, B22 and B23 *available at* http://www.uscourts.gov/bkforms/bankruptcy_forms.html#official. Two other forms are generated by the court and discussed briefly: Official Form B9A, Notice of Commencement of Case Under the Bankruptcy Code, Meeting of Creditors, and Deadlines (December 2008) *available at* http://www.uscourts.gov/rules/BK_Forms_1207/Form_9A_1207.pdf, and B18, EXPLANATION OF BANKRUPTCY DISCHARGE IN A CHAPTER 7 CASE (December 2007), *available at* http://www.uscourts.gov/rules/BK_Forms_1207/B_018_1207.pdf

144. FED. R. BANKR. P. 9009.

145. The court's site is <http://www.arb.courts.gov/forms/forms/htm>, and the U.S. Courts site is http://www.uscourts.gov/bkforms/bankruptcy_forms.html#official

146. 11 U.S.C. § 301 (2006 & 2008 Supp.). A voluntary case is commenced by the debtor's filing of a petition with the court, as opposed to an involuntary petition which is filed by the debtor's creditors. *See* 11 U.S.C. § 303 (2006 & 2008 Supp.).

147. 11 U.S.C. § 109 (2006 & 2008 Supp.) does not require "insolvency" as a prerequisite to filing except for municipalities. 11 U.S.C. § 101(32) (2006 & 2008 Supp.) defines insolvency generally to mean that total debts exceed total assets, not as the inability to pay undisputed debts as they come due.

148. *See* 18 U.S.C. § 1621 (2006 & 2008 Supp.) for perjury generally. For fines, *see* 18 U.S.C. § 3571 (2006 & 2008 Supp.). For form of oath, *see* 28 U.S.C. § 1746 (2006 & 2008 Supp.).

Chapter 7 is generally available to any “person” that resides or has a domicile, business or property in the United States. “Person” is broadly defined to include business entities as well as individuals, but certain entities are excluded from eligibility.¹⁴⁹ Stockbrokers and commodity brokers may use chapter 7 but must follow special rules.¹⁵⁰ Spouses may file separately or may file a “joint petition.”¹⁵¹ Debtors who have received a bankruptcy discharge in the past are not specifically barred from *filing* another petition, but may not receive a *discharge* except under certain circumstances.¹⁵²

2. Financial Counseling Requirements

Counseling requirements were imposed under BAPCPA. As a prerequisite for filing bankruptcy under chapter 7, 11, 12 or 13, an individual debtor must complete credit counseling with an agency approved by the United States Trustee’s office.¹⁵³ This requirement does not apply to debtors with exigent circumstances,¹⁵⁴ or debtors who are unable to complete the requirement because of the inadequacy of agency services,¹⁵⁵ incapacity, disability, or active military duty in a combat zone.¹⁵⁶

149. 11 U.S.C. § 101(41) (2006 & 2008 Supp.) The definition of person includes individuals, partnerships and corporations. 11 U.S.C. § 109(b)(1)-(2) (2006 & 2008 Supp.). Railroads are excluded from chapter 7, but not chapter 11, whereas domestic insurance companies, banks, savings and loans and others are excluded from eligibility entirely. Other federal and/or state law would govern the insolvency of these excluded entities.

150. 11 U.S.C. §§ 741-752 and §§ 761-66 (2006 & 2008 Supp.). These rules deal with customer accounts. Broker cases are beyond the scope of this article.

151. 11 U.S.C. § 302 (2006 & 2008 Supp.) and FED. R. BANKR. P. 1015(b). The filing fee for a joint petition is the same as for an individual petition and thus has the advantage of saving \$299. There may be disadvantages in that the spouses must choose the same set of exemptions (state or federal). In some instances spouses may gain an advantage by filing separately to permit each to choose a separate set of exemptions when that works best. See 11 U.S.C. § 522(b) (2006 & 2008 Supp.).

152. Compare 11 U.S.C. § 727 (a)(8) and (9) (2006 & 2008 Supp.).

153. 11 U.S.C. § 109(h)(1) (2006 & 2008 Supp.). Approved agencies are listed at the Trustee’s website, www.usdoj.gov/ust, and go to Credit Counseling and Debtor Education. The U.S. Trustee approves agencies under 11 U.S.C. § 111 (2006 & 2008 Supp.).

154. 11 U.S.C. § 109(h)(3) (2006 & 2008 Supp.).

155. 11 U.S.C. § 109(h)(2)(A) (2006 & 2008 Supp.). The pre-filing credit counseling requirement in section 109(h)(1) does not apply to a debtor who resides in a judicial district for which the U.S. trustee determines that the approved agencies are not reasonably able to provide adequate services. Because services (briefings) are available by phone and on the Internet this is rare.

156. 11 U.S.C. § 109(h)(4). “Incapacity” means the debtor is so impaired by reason of mental illness or deficiency that she is incapable of realizing and making rational decisions. “Disability” means the debtor is too physically impaired to participate in an in person, telephone, or Internet briefing.

The purpose of the pre-filing credit counseling¹⁵⁷ is to apprise the debtor of credit counseling opportunities¹⁵⁸ and assist the debtor in preparing a related budget analysis. The process determines whether an informal repayment plan would suffice to provide financial relief, so that bankruptcy is avoided. Counseling is required whether or not a repayment plan is feasible. While participation in counseling is required, individuals are not required to participate in any repayment plan the agency proposes. However, if the agency prepares a repayment plan, it is submitted to the court along with the certificate of credit counseling at filing or within fifteen days of filing.¹⁵⁹

Each debtor must also attend a *post*-filing counseling session with an approved agency. In a chapter 7 case completion of a course

on personal financial management, must be certified within 45 days of the date of the first meeting of creditors.¹⁶⁰ A debtor who fails to file proof of completion with the court cannot receive a discharge and risks dismissal.¹⁶¹

3. The Filing Fee

The filing fee for chapter 7 is currently \$299.¹⁶² Filing fees are subject to change and vary according to chapter, pleading and motion type. The court website and the U.S. Bankruptcy Clerk's offices in Little Rock and Fayetteville have current information.¹⁶³ While the best practice is to receive and pay all filing fees at filing, the bankruptcy rules permit payment of the filing fee in installments.¹⁶⁴ Filing fees paid in installments must be paid in full on or before the date first set

157. The credit counseling must be completed prior to filing, though the certificate certifying completion may be filed within 15 days after filing. Courts are split on whether the counseling must occur the day prior to filing or merely prior to filing on the day of filing. The best practice is to have the debtor complete the counseling at least one day before the filing.

158. This may be done through individual or group briefings including either by telephone or on the internet.

159. 11 U.S.C. § 521(b)(1), (2) (2006 & 2008 Supp.). It is the debtor's duty to file with the court a certificate from the approved agency that provided the debtor services under section 109(h) describing the services; and a copy of the debt repayment plan, if any.

160. FED. R. BANKR. P. 1007(b)(7) and (c). The filing must be prepared as prescribed by the appropriate Official Form B23, Debtor's Certification of Completion of Postpetition Instructional Course Concerning Personal Financial Management (December 2008), available at http://www.uscourts.gov/rules/BK_Forms_Pending_2008/B_023_1208.pdf

161. 11 U.S.C. § 727(a)(11) (2006 & 2008 Supp.) provides the court shall grant the debtor a discharge *unless* debtor failed to complete an instructional course concerning personal financial management described in section 111, except for a debtor described in section 109(h)(4).

162. FED. R. BANKR. P. 1006(a) defines filing fee to mean the filing fee prescribed by 28 U.S.C. § 1930(a)(1)-(5) (2006 & 2008 Supp.) and any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. § 1930(b) that is payable to the clerk at the commencement of a case. See <http://www.arb.uscourts.gov/filinginfo/chapter7.html>

163. <http://www.arb.uscourts.gov> The site is for informational purposes only and indicates that it is not to be relied on or cited as legal authority.

164. FED. R. BANKR. P. 1006(b)(1).

for the first meeting of creditors, unless otherwise ordered by the Court. Unless a waiver of the deadline for payment is obtained, the case will be dismissed if the filing fee is not paid.¹⁶⁵

For some cases, including pro bono cases, the filing fee may be waived in a manner similar to other *in forma pauperis* cases.¹⁶⁶ An application for waiver must be submitted.¹⁶⁷ The requirements are twofold. (1) The debtor's income must be within 150% of the income official poverty line,¹⁶⁸ and (2) the debtor must not be able to pay the fee in installments.¹⁶⁹

4. The Automatic Stay

The commencement of a case creates an "estate."¹⁷⁰ Generally speaking the estate is comprised of all the legal or equitable property interests of the debtor at the time of

filing, including but not limited to, (1) any proceeds of property of the estate, (2) any property acquired by or transferred to the estate, and (3) any property that the debtor acquires within 180 days of filing by inheritance, property settlement agreement, or life insurance.¹⁷¹

Filing a bankruptcy petition automatically and immediately "stays" creditors from taking any further action against (1) the debtor, (2) the property of the debtor, or (3) the property of the estate.¹⁷² The "automatic stay" gives the debtor immediate protection from the collection efforts of creditors during the bankruptcy.¹⁷³ There are exceptions to the stay, but these are limited in number and scope.¹⁷⁴ Non-filing co-debtors in Chapter 7 are not protected during or after the proceedings.¹⁷⁵

BAPCPA significantly altered the automatic stay for debtors filing more than one

165. FED. R. BANKR. P. 1006(b)(1) must be read in conjunction with the court's General Order No. 32 which requires payment of installments in full on or before the date first set for the first meeting of creditors. *In re Repeal of the Interim Rules*, General Order No. 32 Bankr. E.D. and W.D. Ark., (November 24, 2008), at paragraph 3 available at <http://www.arb.uscourts.gov/orders-rules-opinions/orders/go32.pdf> No. 32.

166. 28 U.S.C. § 1930(f)(1) (2006 & 2008 Supp.); FED. R. BANKR. P. 1006(c).

167. Official Form B3B, Application for Waiver of the Chapter 7 Filing Fee for Individuals Who Cannot Pay the Filing Fee in Full or in Installments (December 2007), available at http://www.uscourts.gov/rules/BK_Forms_1207/B_003B_1207f.pdf

168. The income poverty line is defined by the Office of Management and Budget, and revised annually in accordance with section 673(2) of the Omnibus Budget Reconciliation Act of 1981(codified at 42 U.S.C. § 9902(2) applicable to a family of the size involved. See http://www.uscourts.gov/bankruptcycourts/jcusguidelines.html#N_2

169. See FED. R. BANKR. P. 1006(b)(1) and *In re Repeal of the Interim Rules*, General Order No. 32 Bankr. E.D. and W.D. Ark., (November 24, 2008), at paragraph 3 available at <http://www.arb.uscourts.gov/orders-rules-opinions/orders/go32.pdf>

170. 11 U.S.C. § 541(a) (2006 & 2008 Supp.).

171. 11 U.S.C. § 541(a)(1)-(7) provides a list of property of the estate. Section 541(b) lists property not included as part of the estate.

172. 11 U.S.C. § 362(a) (2006 & 2008 Supp.).

173. 11 U.S.C. § 362(a), (c).

174. 11 U.S.C. § 362(b) There are 27 listed exceptions. 28 are numbered, but number 5 was repealed by Publ. L. No. 105-277, Div. I, Titl VI, § 603(1), 112 Stat. 2681-886.

175. This is in contrast to Chapter 13 proceedings in which a co-debtor may be protected under the stay under certain circumstances. See 11 U.S.C. § 1301 (2006 & 2008 Supp.); See also FED. R. BANKR. P. 4001. There are a number of exceptions to the co-debtor stay, e.g., debtor's plan does not propose to payment of the claim.

petition within one year. If the debtor has filed a petition in the prior year that was dismissed other than under section 707(b), the automatic stay terminates 30 days after filing.¹⁷⁶ The debtor or a party in interest may request the stay be extended by motion on notice after hearing within the 30-day period.¹⁷⁷ The order extending the stay must be entered within the 30-day period.¹⁷⁸ Local rules allow notice of the hearing to be shortened to 15 days on request.¹⁷⁹ In this situation it is imperative that counsel move for an extension of the stay and notify interested parties at filing to allow sufficient time for continuation of the stay. If the debtor has filed twice in the prior year, the automatic stay does not go into effect at filing.¹⁸⁰ The debtor must move for an imposition of the automatic stay after filing while the debtor is unprotected from creditor action.

The stay gives the trustee time to identify and collect the non-exempt property of the estate and arrange the pro rata distribution to creditors. Creditors' claims are also protected from the actions of their fellow creditors.¹⁸¹ The chapter 7 stay does not protect third parties, such as guarantors, sureties, and co-signers from creditor action. The stay may be lifted by the court on request of a party in interest¹⁸² or by operation of law.¹⁸³ Unless otherwise lifted the stay of an act against *property* continues until such property is no longer property of the estate, and¹⁸⁴ the stay of *any other act* continues until the earliest of the time the case is closed; the time case is dismissed; or in a case under chapter 7, the time a discharge is granted or denied.¹⁸⁵

Parties in interest may move to lift the stay¹⁸⁶ or confirm that the stay has been lifted by operation of law¹⁸⁷ in order to pursue

176. 11 U.S.C. § 362(c)(3), (4) (2006 & 2008 Supp.). Dismissal for abuse under 11 U.S.C. § 707(b) (2006 & 2008 Supp.) is discussed later in this article under the section III., 20 entitled Statement of Income-The Means Test (Official Form 22A).

177. 11 U.S.C. § 362(c)(3)(B). On motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period *only if* the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed.

178. See *In re Jana Faye Withers*, 4:06-bk-11691 E (2006) (available at http://www.arb.uscourts.gov/orders-rules-opinions/opinions/evans/amended_withers.pdf); *In re Carolyn Talley*, 4:06-bk-11899 E (2006) (available at http://www.arb.uscourts.gov/orders-rules-opinions/opinions/evans/amended_talley.pdf).

179. *Withers* at <http://www.arb.uscourts.gov> "Judges' Opinions."

180. 11 U.S.C. § 362(c)(4) (2006 & 2008 Supp.).

181. The stay continues against property of the estate until the property is no longer property of the estate pursuant to 11 U.S.C. § 362(c)(1) (2006 & 2008 Supp.). Unlisted property remains property of the estate after discharge and closing. Pursuant to § 362(d) on request of a party in interest after notice and hearing, the court may lift the stay.

182. 11 U.S.C. § 362(d), (e), (f) (2006 & 2008 Supp.).

183. 11 U.S.C. § 362(h)(1)(A)-(B) (2006 & 2008 Supp.). See also 11 U.S.C. § 521(a)(6) (2006 & 2008 Supp.).

184. 11 U.S.C. § 362(c)(1).

185. 11 U.S.C. § 362(c)(2)(A), (B), (C).

186. 11 U.S.C. § 362(d), (e), (f).

187. 11 U.S.C. § 362(j).

collection efforts against the property.¹⁸⁸ If the motion to lift the stay is granted, the creditor may then proceed as before the bankruptcy was filed. If a creditor violates the stay *without* knowledge of the filing, the action of the creditor may still be set aside. For a *willful* violation of the stay the debtor may recover actual damages including costs, attorney fees, and, in appropriate cases, punitive damages.¹⁸⁹

5. Property of the Estate

The trustee has the power to abandon any property of the estate that is burdensome or of inconsequential value and benefit to the estate.¹⁹⁰ Property that is listed on the debtor's schedules¹⁹¹ and not administered is abandoned to the debtor.¹⁹² Conversely, any unlisted property that is not administered or abandoned remains property of the estate.¹⁹³

The debtor files a Statement of Intention within 30 days of filing or by the date first set for the meeting of creditors, whichever is earlier, indicating whether each item of property is to be surrendered or retained, and whether an item is to be exempted.¹⁹⁴ Exempting property means the debtor wishes to keep the property, *e.g.*, residence, in the debtor's attempt to make a fresh start in the event a discharge is granted. Property not claimed exempt is termed non-exempt and is subject to sale for pro rata distribution to unsecured and under-secured creditors.¹⁹⁵

While the debtor's personal liability for debts is subject to discharge, creditors' liens against property "pass through" the bankruptcy so that secured creditors and other lien holders remain protected to the extent of the value of the property subject to the lien. If the debtor fails to file a statement of intention or to act on those intentions in a timely

188. If the stay is lifted, the creditor may proceed under state law to seize and sell the collateral, but may not attempt to obtain a deficiency judgment against the debtor personally unless the bankruptcy is dismissed or the debt is determined to be nondischargeable. For example, the creditor may attempt self-help repossession of personal property under Article 9 of the UCC or file an *in rem* legal action for replevin or foreclosure to recover and sell the property. A mortgagee may proceed with either a statutory foreclosure or judicial foreclosure, but may not seek a deficiency (in personam) judgment.

189. 11 U.S.C. § 362(k) (2006 & 2008 Supp.).

190. 11 U.S.C. § 544(a) (2006 & 2008 Supp.).

191. 11 U.S.C. § 521(a)(1) (2006 & 2008 Supp.). The debtor has the duty to file a list of all creditors, assets, liabilities, expenditures, and a statement of financial affairs.

192. 11 U.S.C. § 554(c) (2006 & 2008 Supp.).

193. 11 U.S.C. § 554(d) (2006 & 2008 Supp.).

194. 11 U.S.C. § 521(a)(2)(A) (2006 & 2008 Supp.) and Official Form B8, Individual Debtor's Statement of Intention (December 2008) available at http://www.uscourts.gov/rules/BK_Forms_Pending_2008/B_008_1208.pdf (hereinafter Official Statement of Intention).

195. 11 U.S.C. § 726(a), (b) (2006 & 2008 Supp.).

manner,¹⁹⁶ the stay may be lifted or terminated.¹⁹⁷ Essentially the debtor has three options: (1) surrender the property subject to an allowed unsecured claim,¹⁹⁸ (2) exempt and redeem¹⁹⁹ the property by paying an amount deemed the replacement value in satisfaction of the allowed secured claim,²⁰⁰ or (3) reaffirm the debt under existing or renegotiated terms and remain liable for any future deficiency in the event of default.²⁰¹

6. The First Meeting of Creditors or 341 Hearing

Once the case is filed, a first meeting of creditors, or 341 hearing,²⁰² is set for a date not less than 20 days or more than 40 days after filing.²⁰³ A trustee is appointed,²⁰⁴ and notice is sent to interested parties.²⁰⁵ The trustee conducts the meeting without the presence

of the bankruptcy judge²⁰⁶ and audiotapes the examination of the debtor under oath²⁰⁷ under penalty of perjury as in a deposition.²⁰⁸ Creditors are also given an opportunity to ask questions of the debtor.²⁰⁹ Each debtor must present a form of photo identification and a Social Security Card.²¹⁰

The debtor's Fifth Amendment right against self-incrimination is preserved in bankruptcy.²¹¹ The debtor is entitled to a grant of "use immunity" before facing the choice of being compelled to testify or having the discharged denied. Unless the immunity is granted the debtor is not required to testify and may claim the privilege against self-incrimination. If use immunity is granted, the debtor loses the privilege and may be denied a discharge if she refuses to testify.²¹²

After the 341 meeting creditors may object to the debtor's claim of exemptions,²¹³ to the

196. 11 U.S.C. § 521 (a)(2)(B) (2006 & 2008 Supp.). *See also* 11 U.S.C. § 521(a)(2)(6) (2006 & 2008 Supp.).

197. 11 U.S.C. § 362 (h)(1),(2) (2006 & 2008 Supp.)

198. Surrender is the debtor's relinquishment of possession of the property. Because the debtor's rights under non-bankruptcy law remain intact, the debtor may still challenge any claim or lien.

199. 11 U.S.C. § 522(b)(1) or (2) (2006 & 2008 Supp.).

200. 11 U.S.C. § 506(a)(2) (2006 & 2008 Supp.).

201. 11 U.S.C. § 524(c) (2006 & 2008 Supp.).

202. 11 U.S.C. § 341(a) (2006 & 2008 Supp.).

203. FED. R. BANKR. P. 2003(a). Section 341 meeting dates for each trustee in each division are on the court's website.

204. 11 U.S.C. § 701(a)(1) (2006 & 2008 Supp.).

205. FED. R. BANKR. P. 2003(a).

206. 11 U.S.C. § 341(c) forbids the presence of the Bankruptcy Judge at meetings of creditors.

207. 11 U.S.C. § 343 (2006 & 2008 Supp.).

208. *See* 18 U.S.C. 1621 (2006 & 2008 Supp.) for perjury generally. For fines, *see* 18 U.S.C. 3571 (2006 & 2008 Supp.). For form of oath, *see* 28 U.S.C. 1746 (2006 & 2008 Supp.).

209. Creditors' questions are normally asked when the debtor appears for questioning under oath by the trustee at the First Meeting of Creditors held pursuant to 11 U.S.C. § 341 (2006 & 2008 Supp.). Depositions are also allowed under FED R. BANKR. P. 7027 and 9014.

210. 11 U.S.C. § 521(a) (2006 & 2008 Supp.). *See* FED. R. BANKR. P. 4002(b)(1)(A),(B).

211. U.S. CONST. amend. V.

212. 11 U.S.C. § 344 (2006 & 2008 Supp.). and 18 U.S.C. § 6001 et seq. (2006 & 2008 Supp.).

213. 11 U.S.C. § 522 (2006 & 2008 Supp.); FED. R. BANKR. P. 4003(b)-(d), 9014.

discharge of a particular debt,²¹⁴ and to the discharge of all debts.²¹⁵ If neither the trustee nor any creditor objects within the time allowed,²¹⁶ usually no further hearings are required prior to discharge.²¹⁷

7. Asset and No-Asset Cases

If there are assets in the case, the creditors receive their proportionate share of available assets. The debtor's personal liability is extinguished for debts that are dischargeable. The relief granted through the cancellation of the debtor's personal liability on the discharged debt and the debtor's retention of exempt property provides a "fresh start" financially. If creditors disagree as to the validity or priority of their respective claims, those matters may be litigated in the bankruptcy court or referred to state courts or foreign courts.²¹⁸

Chapter 7 cases are divided into two types: no-asset cases and asset cases, according to whether there is property to be distributed to pay creditors' claims. In no-asset cases, the trustee declares that the debtor has no prop-

erty other than exempt property or property abandoned as burdensome to the estate.²¹⁹ The exempt property may include assets owned by the debtor free and clear, as well as the debtor's equity in property subject to a lien.²²⁰

The trustee's declaration and designation of a case as "no-asset" means there are no assets to sell and distribute to creditors.²²¹ This does not mean that the debtor literally has "no assets" because "exempt assets" are not available for liquidation and distribution. The trustee does not make a finding or declaration concerning whether a case is an "asset" or "no-asset case" until after the trustee has examined the debtor's petition and schedules and questioned the debtor under oath at the First Meeting of Creditors.²²² If a case is determined to be a no-asset case, the trustee makes a "Report of No Distribution"²²³ and creditors are not asked to file a Proof of Claim unless assets are subsequently discovered.²²⁴

Asset cases are those in which the debtor has assets that are not exempt or abandoned. These assets may be encumbered by a lien, or

214. 11 U.S.C. § 523 (2006 & 2008 Supp.); FED. R. BANKR. P. 4007.

215. 11 U.S.C. § 727 (2006 & 2008 Supp.); FED. R. BANKR. P. 4004-4006.

216. See 11 U.S.C. § 522(l) (2006 & 2008 Supp.) and FED. R. BANKR. P. 4003(b)(1) for objections to exemptions; See 11 U.S.C. § 727(a) (2006 & 2008 Supp.) and FED. R. BANKR. P. 4004(a)(1) for objections to discharge; and see 11 U.S.C. § 523 (2006 & 2008 Supp.) and FED. R. BANKR. P. 4007 for determinations of dischargeability.

217. 11 U.S.C. § 524(d) (2006 & 2008 Supp.). Some debtors must appear at a hearing to reaffirm a debt.

218. 11 U.S.C. § 305 (2006 & 2008 Supp.).

219. 11 U.S.C. § 554 (2006 & 2008 Supp.).

220. The debtor's interest in property is the value of the property, if owned free and clear. If the property is subject to a lien, the debtor's interest is the value that would remain after the payment of all unavoidable liens.

221. The trustee determines whether there are assets available for distribution after reviewing the petition and examining the debtor at the first meeting of creditors.

222. 11 U.S.C. § 341(a) (2006 & 2008 Supp.).

223. 11 U.S.C. § 704(a) (2006 & 2008 Supp.). See FED. R. BANKR. P. 2015(a)(1)-(2).

224. FED. R. BANKR. P. 2002(e).

the assets may be unencumbered. The trustee identifies the specific properties and decides on the net value of each.²²⁵ The trustee is charged with the tasks of then marshalling, liquidating, distributing, and accounting for these assets.²²⁶ If assets are determined to be available for creditors' claims, the clerk notifies creditors to file a "Proof of Claim."²²⁷

From the perspective of the debtor, there may be little or no difference between the asset and no-asset case. In each situation the debtor is only permitted to keep property that is exempted or retained through redemption, reaffirmation, or repurchase from the estate. While the debtor in an asset case may face a loss of property, she is not normally concerned with how that property is divided among creditors. Other parties in interest, including creditors and the trustee, may contend over the validity and priority of claims and liens that do not affect the debtor. The debtor is entitled to receive a distribution of the remaining funds only when a debtor's total assets exceed all allowable claims,²²⁸ or when liens are avoided in such a way as to make property available for exemption.²²⁹

The trustee's goal is to abandon²³⁰ properties that have little or no value and retain and sell properties that have significant value to the estate.²³¹ For this reason the trustee may abandon as burdensome or of inconsequential value a valuable property because there is a lien that equals or exceeds the value of the property.²³² Because no proceeds for the estate would be generated by sale of the property, liquidation would not increase the amount available for distribution to the unsecured creditors.²³³ The trustee may release unencumbered property of little value for the same reason.

8. Discharge

The basic discharge provision for an individual enjoins any action to collect, recover or offset a discharged debt as a personal liability of the debtor²³⁴ for all debts that arose before the bankruptcy case was filed.²³⁵ The discharge eliminates the debtor's personal liability for dischargeable debts listed in the filing.²³⁶ The effect of the discharge is to void any judgment on a discharged debt and enjoin

225. "Net Value" is the amount calculated to remain after the property is sold and all lien holders are paid. Net value is the focus of the inquiry because, unless there is net value, no distribution to unsecured creditors can be made.

226. 11 U.S.C. § 704 (2006 & 2008 Supp.).

227. FED. R. BANKR. P. 2002(a)(7), 3003(c).

228. 11 U.S.C. § 726(a)(6) (2006 & 2008 Supp.).

229. 11 U.S.C. § 522(g) (2006 & 2008 Supp.).

230. 11 U.S.C. § 554(a) (2006 & 2008 Supp.).

231. 11 U.S.C. § 363(b)(1) (2006 & 2008 Supp.).

232. The lien may be of any type, provided it is not a lien that can be avoided by the trustee under her powers. *See e.g.*, 11 U.S.C. § 544 (2006 & 2008 Supp.). *See also* 11 U.S.C. § 522(f) (2006 & 2008 Supp.).

233. 11 U.S.C. § 726(a), (b) (2006 & 2008 Supp.).

234. 11 U.S.C. § 524(a)(2) (2006 & 2008 Supp.).

235. 11 U.S.C. § 727(b) (2006 & 2008 Supp.). Liability is also discharged on any claim determined under section 502 as if such claim had arisen before commencement of the case (emphasis added).

236. 11 U.S.C. § 523(a)(3) (2006 & 2008 Supp.). Unlisted and unscheduled debts are excepted from the discharge when the creditor is denied an opportunity to timely file a claim or litigate dischargeability of a debt. This provision has been held inapplicable to no-asset cases in certain instances. A best practice is to list or schedule all claims to protect a debtor against the potential discovery of assets during or after the case.

any legal action to collect.²³⁷ A discharge does not cancel or extinguish a debt or claim, but rather protects the debtor from continued personal liability.²³⁸ In *rem* actions to recover secured property may be filed after the stay is lifted or terminated.²³⁹

Common exceptions to the dischargeability of debts include taxes,²⁴⁰ domestic support obligations,²⁴¹ and student loans.²⁴² There are exceptions to these exceptions in certain instances. For example, student loans²⁴³ may be discharged based on “undue hardship.”²⁴⁴ Under some circumstances certain types of state and federal income tax liability may be dischargeable.²⁴⁵

Global objections to the discharge of all debts may also be made by creditors. In certain situations the discharge may be

denied.²⁴⁶ Common objections to discharge are fraudulent conduct and inadequate financial records.²⁴⁷ The grounds for objections are important because often they are discernible prior to filing and should determine counsel’s advice and the debtor’s decision as to whether to file.²⁴⁸

Governmental units may not discriminate against a discharged debtor by denying or terminating employment based solely on the bankruptcy filing. Protection is also afforded against discriminatory treatment by the government in denying, revoking, suspending or refusing to renew a license, permit, charter, franchise or similar grant solely because of a debtor’s insolvency.²⁴⁹ A governmental unit that operates a student grant or loan program,²⁵⁰ and an entity making student

237. 11 U.S.C. § 524(a)(1) (2006 & 2008 Supp.).

238. A secured debt remains and may be collected after the stay is lifted through an *in rem* action. An unsecured debt remains payable to the extent of any assets available for distribution through the estate according to the priority of the claim at distribution. See 11 U.S.C. § 726(a), (b) (2006 & 2008 Supp.).

239. 11 U.S.C. § 362(c) (2006 & 2008 Supp.). “Except as provided in subsections (d), (e), (f), and (h) of this section- (1) The stay of an act against property of the estate continues until such property is no longer property of the estate; (2) the stay of any other act under subsection (a) of this section continues until the earliest of- (A) the time the case is closed; (B) the time the case is dismissed; or (C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.”

240. 11 U.S.C. § 523 (a)(1) (2006 & 2008 Supp.).

241. 11 U.S.C. § 523(a)(5) (2006 & 2008 Supp.).

242. 11 U.S.C. § 523(a)(8) (2006 & 2008 Supp.).

243. For debtors with student loans but without an undue hardship, see <http://www.ibrinfo.org/what.vp.html>
See also <http://www.ed.gov/programs/wdffd/index.html>

244. 11 U.S.C. § 523(a)(8) (2006 & 2008 Supp.). An adversarial proceeding must be filed by the debtor against the student loan lender and all other interested parties under FED. R. BANKR. P. 7001 et seq. Courts examine each case using “totality of the circumstances” standard. See *In re Andrews*, 661 F.2d 702, C.A.S.D. (1981).

245. 11 U.S.C. § 523 (a)(1) (2006 & 2008 Supp.). An adversarial proceeding must be filed by the debtor against the taxing authority and all other interested parties under FED. R. BANKR. P. 7001, et seq.

246. 11 U.S.C. § 727(a) (2006 & 2008 Supp.).

247. 11 U.S.C. § 727(a)(3) (2006 & 2008 Supp.).

248. ARK. RULES OF PROF’L CONDUCT R. 1.4(b) (2009).

249. 11 U.S.C. § 525(a) (2006 & 2008 Supp.).

250. 11 U.S.C. § 525(c)(2) (2006 & 2008 Supp.).

loans guaranteed or insured under a student loan program, may not deny a student grant, loan, loan guarantee, or loan insurance to a person who is or has been a debtor under the Code.²⁵¹ A private employer may not terminate or discriminate in employment against an individual who is or has been a debtor under the Code solely for that reason or because a debtor has been insolvent or failed to pay a debt that is dischargeable or discharged.²⁵²

B. Ethical Considerations and Attorney's Duties

Bankruptcy courts have ruled that state rules of professional conduct apply and influence attorney disqualification.²⁵³ In Arkansas the Arkansas Rules of Professional Conduct and the Federal Rules of Bankruptcy Procedure are made applicable by local rule.²⁵⁴ These rules govern attorney conduct and communications in anticipation of represen-

tation, as well as when the representation is offered and begun.²⁵⁵ While the Code speaks of providing "bankruptcy assistance" to "assisted persons" and "prospective assisted persons," the Arkansas Rules of Professional Conduct use the words "client" and "prospective client."²⁵⁶ The Code imposes obligations with regard to prospective assisted persons or prospective clients in addition to those imposed by the Arkansas Rules.²⁵⁷

The definition of "debt relief agencies"²⁵⁸ includes bankruptcy attorneys in most situations.²⁵⁹ As a practical matter attorneys who provide bankruptcy assistance will need to comply with the provisions related to debt relief agencies because of the requirements placed on communications and advertising, and because at the point of first contact, an attorney will rarely know the ratio of consumer and non-consumer debt or the value of nonexempt assets of the prospective client.

251. 11 U.S.C. § 525(c)(1) (2006 & 2008 Supp.).

252. 11 U.S.C. § 525(b) (2006 & 2008 Supp.).

253. HON. WILLIAM L. NORTON, JR. & WILLIAM L. NORTON III, NORTON BANKRUPTCY LAW AND PRACTICE 172.1 (Thomson West 3d ed. 2008).

254. LOCAL RULES: BANKR .E.D. AND W.D. ARK. R. 2090-2.

255. 11 U.S.C. § 527(a)-(c) (2006 & 2008 Supp.) and ARK. RULES OF PROF'L CONDUCT R. 1.18 (2009).

256. "[B]ankruptcy assistance' means any goods or services ... provided to an assisted person with the ... purpose of providing information, advice, counsel, document preparation, or filing, ...or appearing in a ... proceeding on behalf of another ...under this title." 11 U.S.C. § 101(4A) (2006 & 2008 Supp.). "[A]ssisted person' means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$164,250." 11 U.S.C. § 101(3) (2006 & 2008 Supp.). The limit on the dollar value of nonexempt property will change on April 1, 2010 when the adjustment of dollar amounts becomes effective. Adjustments do not apply to cases commenced before the date of the adjustment. See 11 U.S.C. § 104(c) (2006 & 2008 Supp.). BLACK'S LAW DICTIONARY, 289 (9th ed. 2009), defines client as follows: "client, *n.* A person or entity that employs a professional for advice or help in that professional's line of work." The term "client" is not defined in the ARK. RULES OF PROF'L CONDUCT; however, "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client." ARK. RULES OF PROF'L CONDUCT R. 1.18(a). See Rule 1.18(b)-(d) and Rule 7.3 regarding obligations to prospective clients.

257. 11 U.S.C. §§ 526-528 (2006 & 2008 Supp.).

258. See 11 U.S.C. § 101(12A) (2006 & 2008 Supp.) for the definition of "debt relief agency."

259. 11 U.S.C. §§ 526-528 (2006 & 2008 Supp.). 11 U.S.C. § 101(4) (2006 & 2008 Supp.) While the definition of attorney is all encompassing, note that the definition of debt relief agency under § 101(12A) is limited to any person who provides bankruptcy assistance to an *assisted person* as defined at 11 U.S.C. § 101(4) (2006 & 2008 Supp.).

A STEP-BY-STEP GUIDE TO CHAPTER 7 CONSUMER BANKRUPTCY

The Code's treatment of debt relief agencies places restrictions on some actions and requires certain other actions. Among other things the provisions: (1) place tight restrictions on an attorney's speech;²⁶⁰ (2) mandate written disclosure of precise statutory information relating to bankruptcy within 3 business days of an offer of assistance by an attorney;²⁶¹ (3) require an executed attorney-client contract within 5 business days of initial contact and prior to filing;²⁶² (4) impose strict requirements on the content of the attorney-client contract;²⁶³ (5) and specify certain disclosures and wording to be contained in all attorney communications and advertisements.²⁶⁴

The Eighth Circuit Court of Appeals has held § 526(a)(4) to be unconstitutionally overbroad as applied to attorneys who provide bankruptcy assistance to assisted persons, as those terms are defined by the Code.²⁶⁵

Petitions for certiorari have been granted by the Supreme Court to both parties.²⁶⁶ The questions presented are:

[1] Whether [the section] precludes only advice to incur more debt with a purpose to abuse the bankruptcy system; [2] whether [the section], construed with due regard for the principle of constitutional avoidance, violates the First Amendment; [3] whether the appellate court's interpretation of attorneys as "debt relief agencies" is contrary to the plain meaning of 11 U.S.C. § 101(12A); [4] whether 11 U.S.C. § 528, which as applied to attorneys, restrains commercial speech by requiring mandatory deceptive disclosures in their advertisements, violates the First Amendment free speech guarantee of the United States Constitution; [5] whether 11 U.S.C. § 528 requiring deceptive disclosures in advertisements for consumers and attorneys, violates Fifth Amendment Due Process.²⁶⁷

260. 11 U.S.C. § 526(a)(4) (2006 & 2008 Supp.). "A debt relief agency shall not *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 charge for services performed as part of preparing for or representing a debtor ... under this title."

261. 11 U.S.C. § 342(b) (2006 & 2008 Supp.); § 527(a), (b), (c) (2006 & 2008 Supp.). See Procedural Form B201, Notice to Individual Consumer Debtor (December 2008), *available at* http://www.uscourts.gov/rules/BK_Forms_08_Official/Form_201_110708.pdf (hereinafter Procedural Form B201).

262. 11 U.S.C. § 528(a)(1) (2006 & 2008 Supp.).

263. 11 U.S.C. § 528(a)(1)(A), (B) (2006 & 2008 Supp.).

264. 11 U.S.C. § 528(a)(3), (4) (2006 & 2008 Supp.); 11 U.S.C. § 528(b)(1)(A), (B) (2006 & 2008 Supp.); 11 U.S.C. § 528(b)(2)(A), (B) (2006 & 2008 Supp.). All communications and ads must clearly and conspicuously disclose that the services, benefits or assistance are with respect to bankruptcy relief (in general media) or that the assistance may involve bankruptcy relief (for targeted ads for specific services). The statement to be included in all communications and ads is "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." A substantially similar statement may also be used.

265. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 541 F.3d 785 (8th Cir. 2008). The client-plaintiffs sought prebankruptcy advice regarding the incurrence of additional debt prior to filing bankruptcy. 11 U.S.C. § 526(a)(4) (2006 & 2008 Supp.) precludes a debt relief agency from advising an assisted person from incurring additional debt in contemplation of bankruptcy. The client-plaintiffs appeared on behalf of themselves and all others similarly situated who desire to exercise their First Amendment rights with attorneys regarding bankruptcy information. See footnote 1 of the opinion at 788.

266. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 541 F.3d 785 (8th Cir. 2008), *cert. granted*, United States Supreme Court Docket No. 08-1119 & 08-1225, Consolidated (June 8, 2009), *available at* 2009 WL 602029.

267. *Id.* *Available at* <http://origin.www.supremecourtus.gov/qp/08-01119qp.pdf> and <http://origin.www.supremecourtus.gov/qp/08-01225qp.pdf>. (on file with author).

The Eighth Circuit reversed the U.S. District Court's decision on two other points. The three judge panel²⁶⁸ held that attorneys that provide "bankruptcy assistance" to "assisted persons" are "debt relief agencies" as that term is defined at § 101(12A).²⁶⁹ The ruling also upheld the constitutionality of § 528(a)(4) and (b)(2) holding that the challenged sections only require debt relief agencies to include a disclosure on certain advertisements.²⁷⁰ Until these issues are decided by the Court, the better practice is to comply with § 526(a) to the greatest extent possible. Some of the provisions relating to debt relief agencies merely incorporate into the Code practices already followed by many attorneys, such as explaining about bankruptcy at first contact and providing a copy of a contract in clear language prior to filing. The difficulty in practice is that the breadth of the prohibition in § 526(a)(4) includes advice constituting prudent prebankruptcy planning that is not an attempt to undermine the bankruptcy laws.²⁷¹

The Three-Day Rule. An attorney offering bankruptcy assistance to assisted persons or prospective assisted persons must provide

three written notices and disclosures not later than three business days after the first date an attorney first offers to provide services to an assisted person.²⁷² The notice required of the clerk to pro se filers must be provided by the attorney to the client debtor.²⁷³ The written notice is published as a procedural form and contains: (1) a brief description of chapters 7, 11, 12, and 13 with the general purpose, benefits, and costs of proceeding under each; the types of credit counseling services available; (2) a statement specifying that anyone who knowingly and fraudulently conceals assets or makes a false oath or statement under penalty of perjury in a case shall be subject to fine, imprisonment, or both; and (3) a statement that all information supplied by a debtor is subject to examination by the Attorney General.²⁷⁴

The other two notices are not published as forms. One is to be a separate written notice that is set out in broad language in the Code. It requires that counsel advise the client that: (1) all information provided is to be complete, accurate and truthful; (2) all assets and liabilities are to be disclosed; (3) valuations of assets and income are to be stated after reasonable

268. Bye, Smith, and Colloton, Circuit Judges. Judge Smith, writing the majority opinion with Judge Colloton, concurring in part and dissenting in part.

269. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 541 F.3d 785, 791 (8th Cir. 2008). The court reasoned that "Congress specifically listed five exclusions from the definition of 'debt relief agency,' and if it meant to exclude attorneys from that definition it could have explicitly done so."

270. *Id.* at 797. The court held that "although less intrusive means may be conceivable to prevent deceptive advertising, § 528's disclosure requirements are reasonably related to the government's interest in protecting consumer debtors from deceptive advertising, and thus the section passes constitutional muster."

271. 11 U.S.C. § 526(a)(4) (2006 & 2008 Supp.). "Section 526(a)(4) as written, prevents attorneys from fulfilling their duty to clients to give them appropriate and beneficial advice not otherwise prohibited by the Bankruptcy Code or other applicable law." See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 541 F.3d at 794 n.9.

272. 11 U.S.C. § 527(a)(1) (2006 & 2008 Supp.). See Procedural Form B201, Notice to Individual Consumer Debtor(s) (December 1, 2008) under §342(b) of the Code, available at http://www.uscourts.gov/rules/BK_Forms_08_Official/Form_201_110708.pdf and 11 U.S.C. § 527(b) (2006 & 2008 Supp.).

273. 11 U.S.C. § 527(a)(1) (2006 & 2008 Supp.).

274. 11 U.S.C. § 342(b).

inquiry; (4) the information provided may be audited; and (5) failure to provide such information may result in dismissal or other sanction, including a criminal sanction.²⁷⁵

The third notice is published in the Code, and may be used verbatim or adapted by counsel, provided the disclosure is substantially similar. The caption for the notice indicates it is designed to provide important information about bankruptcy assistance services. Among other things the notice advises the debtor about: (1) the options for bankruptcy assistance; (2) the requirement that counsel provide a contract and disclose the cost of services; (3) the need to analyze eligibility for the different forms of relief; (4) the filing fee and attendance at the first meeting of creditors; (5) rights concerning the reaffirmation of secured debt; (6) the need to seek assistance from someone knowledgeable; and (7) the possibility of litigation.²⁷⁶

The Five-Day Rule. An attorney providing bankruptcy assistance to a client must execute a written contract with the client no later than five days after the first date that any bankruptcy assistance is provided.²⁷⁷ The contract must explain clearly and conspicuously the services to be provided,²⁷⁸ the fees or charges for the services, and the terms of payment.²⁷⁹ A copy of the contract must be

provided to the client.²⁸⁰ Any contract that does not comply with these requirements is void.²⁸¹

An attorney has exposure to liability to a client if found to have intentionally or negligently failed to comply with any provision related to the restrictions on debt relief agencies.²⁸² Liability to the client may also be predicated on an attorney's intentional or negligent failure to file any required document,²⁸³ or an attorney's intentional or negligent disregard of the material requirements of the Code or Rules.²⁸⁴

The signature of debtor's counsel on the Voluntary Petition constitutes a certification that the attorney has (1) performed a reasonable investigation into the circumstances, (2) determined that the petition is well grounded in fact, warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (3) concluded that the petition does not constitute an abuse of chapter 7.²⁸⁵ Counsel's signature on the petition further constitutes a certification that the attorney has no knowledge after an inquiry that the information in the schedules is incorrect.²⁸⁶ The steps needed to insure the accuracy of the information contained in the filing and protect client and counsel are discussed below.

275. 11 U.S.C. § 527(a)(2)(A)-(D) (2006 & 2008 Supp.).

276. 11 U.S.C. § 527(b) (2006 & 2008 Supp.).

277. 11 U.S.C. § 528(a)(1) (2006 & 2008 Supp.).

278. 11 U.S.C. § 528(a)(1)(A) (2006 & 2008 Supp.).

279. 11 U.S.C. § 528(a)(1)(B) (2006 & 2008 Supp.) Cf. ARK. RULES OF PROF'L CONDUCT R. 1.5.

280. 11 U.S.C. § 528(a)(2) (2006 & 2008 Supp.)

281. 11 U.S.C. § 526(c)(1) (2006 & 2008 Supp.)

282. 11 U.S.C. § 526(c)(2)(A) (2006 & 2008 Supp.).

283. 11 U.S.C. § 526(c)(2)(B) (2006 & 2008 Supp.).

284. 11 U.S.C. § 526(c)(2)(C) (2006 & 2008 Supp.).

285. 11 U.S.C. § 707(b)(4)(C) (2006 & 2008 Supp.).

286. 11 U.S.C. § 707(b)(4)(D). Cf. ARK. RULES OF PROF'L CONDUCT R. 1.1, 1.3, and 3.3.

A conflict check in a consumer bankruptcy may involve a large number of creditors, all of whom are adversarial parties to the debtor.²⁸⁷ Any party with a potential claim must be considered a "claim holder" or creditor. Thus co-signers, guarantors and sureties with a claim for indemnification are creditors.

Attorneys not licensed in the United States District Court for the Eastern and Western Districts of Arkansas are required to obtain admission to practice. An attorney who is a member in good standing of the bar of another state may be admitted to the court pro hac vice upon a proper showing of qualifications to participate in a particular case or proceeding before the court. The application is on written motion accompanied by a declaration under penalty of perjury asserting good standing in the state bar where movant maintains a law office. A member of the bar of the court who maintains an office in Arkansas must be designated as local counsel unless this requirement is waived by the court.²⁸⁸

C. The Interview Process

An initial interview of the prospective bankruptcy client has special considerations. Friends and family, including spouses, are "third parties" and possibly creditors. A relative or close friend is the most likely candidate to be a co-signer, surety or guarantor for the debtor. A best practice is to exclude everyone except the debtor from the intake interview initially to avoid risking the loss of the attorney-client privilege.²⁸⁹ All information from whatever source, including client communications and work product, should be treated as confidential.²⁹⁰

When spouses are prospective clients jointly, conflicts *between* the parties may arise at any time. The best practice is to explain to both spouses from the beginning that you may be forced to withdraw from representation of either²⁹¹ if they disagree on an appropriate course of action.²⁹² If either of the parties asserts a claim against the other the conflict will not be subject to waiver by informed written consent.²⁹³

287. ARK. RULES OF PROF'L CONDUCT R. 1.7, 1.8, 1.9 and 1.10.

288. Local Rule 2090-1.

289. Pursuant to FED. R. BANKR. P. 9017, the FEDERAL RULES OF EVIDENCE and FED. R. CIV. P. 43, 44 apply in cases under the Code. FED. R. EVID. 501 defers to state law regarding privileges. ARK. R. EVID. 502 prevents the disclosure of confidential (not intended for third persons) communications made to facilitate legal services.

290. ARK. RULES OF PROF'L CONDUCT R. 1.6 requires confidentiality not merely as to matters communicated in confidence but to information relating to the representation from whatever source.

291. ARK. RULES OF PROF'L CONDUCT R. 1.16(a)(1).

292. ARK. RULES OF PROF'L CONDUCT R. 1.7. One test for determining whether representation would be materially limited is to ask whether your advice would be different to one client if you weren't representing the other.

293. ARK. RULES OF PROF'L CONDUCT R. 1.7(b)(3).

At the intake interview the ultimate questions to resolve are: (1) whether the client²⁹⁴ is eligible for bankruptcy relief under chapter 7 or any other chapter,²⁹⁵ (2) whether and to what extent the debts are dischargeable,²⁹⁶ and (3) whether and to what extent the prospective client can retain exempt and nonexempt property for a fresh start.²⁹⁷ These questions cannot be answered until all the relevant facts have been gathered.

The question of the client's eligibility for filing is covered generally by § 109 and may be affected by other provisions of the Code.²⁹⁸ The Code permits any "person" to file a "petition"²⁹⁹ provided the person is not precluded from filing for a number of reasons including prior dismissal.³⁰⁰ As a practical matter,

the debtor may also be effectively precluded from filing by a prior discharge because an insufficient amount of time has elapsed since the prior discharge making discharge impossible, despite the fact that filing is permitted.³⁰¹ This poses a dangerous trap for the unwary counselor. Because venue is based on the location of a debtor's domicile, residence, principal place of business or principal assets in the United States, these criteria may affect a debtor's ability to file as well.³⁰²

For joint filings each spouse must meet the eligibility requirements for an individual filing and be prepared to make proof of marriage, if challenged.³⁰³ Spouses married to a partner of the opposite sex with a valid state license are eligible to file. "Common law"

294. For our purposes the word "client" will be used to encompass assisted persons, prospective assisted persons, and prospective clients. The "client" will be referred to in the bankruptcy context as the "debtor."

295. 11 U.S.C. § 109(b) (2006 & 2008 Supp.). Section 109(b) limits who may be a debtor under chapter 7. "[O]nly a person [defined as an individual, partnership or corporation in § 101(41)] that resides or has a domicile, a place of business, or property in the United States...may be a debtor." Other business entities not mentioned in § 109, such as a limited liability company, may also be eligible. Certain business entities are excluded from chapter 7 eligibility by § 109(b)(1),(2) and (3)(A) and (B). The scope of this article is limited solely to eligibility for individual and joint filers, and specifically excludes all business entities, including proprietorships, family farmers, family fishermen, commodity brokers and stock brokers, whether eligible for chapter 7 or not.

296. 11 U.S.C. § 727 (2006 & 2008 Supp.), on discharge, sets forth the circumstances under which a debtor may be denied a discharge. 11 U.S.C. § 523 (2006 & 2008 Supp.), on exceptions, to discharge provides guidance regarding the types of debts that are not included in the discharge. Read together, these two sections reveal circumstances that affect the discharge of the debtor generally, and the dischargeability of particular debts.

297. 11 U.S.C. § 522 (2006 & 2008 Supp.).

298. 11 U.S.C. § 109(g); 11 U.S.C. 727(a)(8)-(9); 28 U.S.C. § 1408 (2006 & 2008 Supp.).

299. 11 U.S.C. § 101(42) (2006 & 2008 Supp.). [P]etition means petition filed under §§ 301, 302, 303, or 304. *See* FED. R. BANKR. P. 1002(a).

300. 11 U.S.C. § 109(g) (2006 & 2008 Supp.). "[N]o individual ...may be a debtor ...who has been a debtor in a case ...in the preceding 180 days if -(1) the case was dismissed ... for willful failure ... to abide by orders of the court or to appear before the court in proper prosecution of the case; or (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by § 362."

301. 11 U.S.C. § 727(a) (2006 & 2008 Supp.). "The court shall grant the debtor a discharge unless-... the debtor has been granted a discharge under ... [chapter 7], ...[chapter 11] ... in a case commenced within 8 years before the date of the filing of the petition, the debtor has been granted a discharge under ... [chapter 12] or ... [chapter 13] ... in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least- (A) 100 percent of the allowed unsecured claims in such case; or (B)(i) 70 percent of such claims; and (ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort."

302. 28 U.S.C. 1408 (2006 & 2008 Supp.).

303. 11 U.S.C. § 302(a) (2006 & 2008 Supp.). *See* FED. R. BANKR. P. 1002(a).

marriages are recognized by some states,³⁰⁴ and relationships between same-sex couples are problematic.³⁰⁵

Oddly, eligibility for filing is not tied to the insolvency of a debtor. As a practical matter a debtor's inability to pay debts as they come due is normally the precipitating event for filing; however, for consumer bankruptcy the inability to pay debts as they come due is not the definition of insolvency. The Code defines insolvency for individuals as "balance sheet" insolvency, wherein the amount of all debts exceeds the value of all assets, i.e., negative net worth.³⁰⁶ This makes sense when you consider that chapter 7 is not merely about giving the debtor a fresh start, but also about providing for the orderly and equitable distribution of property towards satisfaction of creditors' claims.

The desirability of filing for a particular debtor is an entirely separate matter from the issue of eligibility to file. Issues affecting the decision to file include (1) whether the debtor's current monthly income and expenses will make the case a target for an "abuse"

action;³⁰⁷ (2) the likelihood of obtaining a discharge;³⁰⁸ (3) whether and to what extent the debts are dischargeable;³⁰⁹ (4) the ability of the debtor to retain properties³¹⁰ and (5) whether there are other viable remedies to the debtor's financial distress.³¹¹ These issues will be discussed in greater detail below as they arise in the course of the preparation of the petitions and schedules necessary for filing.

Prospective clients typically request bankruptcy assistance³¹² because of a "triggering event" such as creditor action. Once a prospective client becomes a client³¹³ the anxiety and financial pressure subside, and a client may not be motivated to cooperate. Simply put, it means leaving counsel to deal with creditors without the ability to file for relief under the stay. Prior to filing this may be handled by severing the professional relationship. If this occurs after filing, withdrawal may be difficult.³¹⁴ For this reason a best practice is to have the client bring necessary fees and information to the initial interview when the contract is executed.³¹⁵

304. A number of states permit heterosexual couples to establish a common law marriage without a valid state marriage license or certificate. The law defining common law marriage varies from state to state, and some only recognize common law marriages that were created before a certain date.

305. See *In re Kandu*, 315 B.R. 123, 138 (Bankr. W.D. Wash. 2004) (declining to apply the doctrine of comity to recognize the marriage of a lesbian couple who had legally married according to the laws of British Columbia because those laws directly conflicted with the Defense of Marriage Act (DOMA) [1 U.S.C.A. § 7 (2006 & 2008 Supp.)], which provides, for federal purposes, that marriage is solely the union between one man and one woman).

306. 11 U.S.C. § 101(32) (2006 & 2008 Supp.). "The term 'insolvent' means ... [a] financial condition such that the sum of [an] entity's debts is greater than ... [its] property, at a fair valuation, exclusive of —(i) property transferred, concealed, or removed with intent to hinder ... creditors; and (ii) property that may be exempted ... under § 522."

307. 11 U.S.C. § 707(b)(2) (2006 & 2008 Supp.).

308. 11 U.S.C. § 727 (2006 & 2008 Supp.).

309. 11 U.S.C. § 523(a) (2006 & 2008 Supp.).

310. 11 U.S.C. § 522(b) (2006 & 2008 Supp.).

311. ARK. CONST. art. IX, §§ 2-3; non-bankruptcy federal exemptions, e.g., Social Security payments etc.

312. 11 U.S.C. § 101(4A) (2006 & 2008 Supp.).

313. The Code uses "assisted person" as defined at 11 U.S.C. § 101(3) (2006 & 2008 Supp.) rather than client. Likewise, the Code speaks of "prospective assisted persons." See 11 U.S.C. § 526(a)(1) (2006 & 2008 Supp.).

314. ARK. RULES OF PROF'L CONDUCT R. 1.16(b) (2009).

315. 11 U.S.C. § 528(a) (2006 & 2008 Supp.).

A client may be unable to assist in the representation in some particular area before or after filing. Counsel is to work within any disability of the client as far as possible in order to maintain a normal attorney-client relationship.³¹⁶ The client may need a family member or trusted friend to serve as attorney-in-fact, or have a guardian ad litem appointed in order to file or conclude the case.³¹⁷ While a decedent's estate is not an entity permitted to file for relief, the Code permits the continued administration of a case despite the death of the debtor.³¹⁸

Cultural attitudes related to the filing of bankruptcy, such as stigmatism, create guilt, anxiety, desperation and depression in clients. Some clients may need referral to a doctor or mental health care provider. Others may need referral to state or federal welfare agencies or non-profit organizations that provide assistance to the poor.³¹⁹

When reviewing the client or prospective client's eligibility for relief under the Code, gather information as promptly as possible. A debtor may not be aware of imminent adverse creditor action that can be prevented by the filing, if discovered promptly. Authorizations in writing are needed to obtain financial records³²⁰ and current credit reports for the verification of debts, creditor addresses, account numbers and other information.³²¹ A number of companies offer credit report retrieval and import services that provide the credit report data in a format ready for download to document assembly programs.³²²

Information regarding income, expenses, assets and liabilities provides data needed to complete the petition and schedules and perform the necessary calculations.³²³ Assets are designated as exempt or non-exempt.³²⁴ Liabilities are classified as secured, unsecured priority and unsecured nonpriority

316. ARK. RULES OF PROF'L CONDUCT R. 1.14.

317. FED. R. BANKR. P. 1004.1 and FED. R. BANKR. P. 1016.

318. FED. R. BANKR. P. 1016.

319. The following website has listings for various nonprofit agencies in Arkansas, http://www.manta.com/mb_43_F0_04/associations_non_profits/arkansas

320. Bank records are protected from government authorities by federal law under the Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401 et seq. Broader protection may be found in the contractual agreement between the debtor and the financial institution. In addition the Arkansas case law follows the restatement (Second) of Torts in recognizing privacy torts that cover behavior harmful to the plaintiff even though there is no injury to reputation. See *Wal-Mart Stores, Inc. v. Lee*, 74 S.W. 2d 534 (Ark. 2002).

321. Equifax, Experian and Transunion are the major credit reporting agencies. Under federal law all are required to provide a consumer with one free annual credit report per year. The report can be obtained at www.freeannualcreditreport.com. Credit reports are also available online for a fee through the agencies and through credit report retrieval companies that deliver the data ready for download to the schedules through document assembly software.

322. Credit report retrieval and import services are offered by Suite Solutions from OCR, CIN Legal Data Services, and First American Credco.

323. 11 U.S.C. § 521(a)(1)(B)(iv) (2006 & 2008 Supp.).

324. 11 U.S.C. § 522(b) (2006 & 2008 Supp.). See Official Form B6C, Schedule C-Property Claimed As Exempt (December 2007), available at http://www.uscourts.gov/rules/BK_Forms_1207/B_006C_1207f.pdf.

for preparation of the schedules.³²⁵ Debtor's counsel must distinguish between debts that are dischargeable, and those that are or may be nondischargeable.³²⁶ If bankruptcy is not available because of the client's ineligibility or because filing would offer no relief, representation can be declined or terminated promptly.

D. Preparation of the Voluntary Petition and Schedules

Bankruptcy practice is electronic and paperless³²⁷ with a few exceptions.³²⁸ While print copies are often retained by counsel, all documents filed by counsel must be submitted electronically.³²⁹ The court provides server-side software called the Electronic Court

325. See Official Form B6D, Schedule D-Creditors Holding Secured Claims (December 2007), *available at* http://www.uscourts.gov/rules/BK_Forms_1207/B_006D_1207f.pdf; see Official Form B6E, Schedule E-Creditors Holding Unsecured Priority Claims (December 2007), *available at* http://www.uscourts.gov/rules/BK_Forms_1207/B_006E_1207f.pdf; and see Official Form B6F, Creditors Holding Unsecured Nonpriority Claims (December 2007), *available at* http://www.uscourts.gov/rules/BK_Forms_1207/B_006F_1207f.pdf

326. 11 U.S.C. § 523(a) (2006 & 2008 Supp.). *E.g.*, domestic support obligations.

327. LOCAL RULES: BANKR. E.D. AND W.D. ARK. R. 5005-4. Electronic Filing. All pleadings and documents required to be filed with the Court shall be electronically filed. Electronic filing shall mean filed over the internet using the Court's Electronic Case ("ECF") System. Orders submitted in open court shall be announced and then e-mailed in Portable Document Format ("PDF format") (adopted 1/12/2006).

328. LOCAL RULES: BANKR. E.D. AND W.D. ARK. R. 5005-4. Exceptions to this required procedure for electronically filing documents and pleadings include: (1) Documents under seal. (2) Pleadings and/or documents submitted by parties without legal representation. (3) Proofs of Claim filed by a creditor who is not a registered user of ECF. (4) Filer's Internet failure. Filers experiencing Internet failure shall submit a pleading and/or document on diskette or CD in PDF format with an "Affidavit and Request to File" attached. A sample Affidavit can be found on the Court's website. The Clerk's Office will electronically file the pleading and/or document on behalf of the filer. (5) Court's Internet failure.

329. LOCAL RULES: BANKR. E.D. AND W.D. ARK. R. 5005-4. Filers filing pleadings and/or documents via paper, who do not fall under one of the exemptions listed above, will be issued an Order to Show Cause why they cannot file electronically, and will be requested to appear before this Court.

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Filing system or ECF³³⁰ for this purpose. Consequently, providing bankruptcy assistance requires the acquisition of computer hardware and software that meet certain specifications.³³¹ Guidelines³³² are provided at the court's website for the submission of filed documents.³³³

By local rule the court has adopted administrative procedures to govern electronic filing.³³⁴ To file documents on ECF an attorney must have a PACER³³⁵ account and an ECF system login password assigned by the Court.³³⁶ Any attorney may become a "filing

user,"³³⁷ provided the requirements for registration are met.³³⁸ To do so, an attorney must complete and sign an ECF Attorney/Participant Registration Form³³⁹ and complete the required training.³⁴⁰ An ECF certified attorney in another bankruptcy or federal district court may obtain an ECF login ID and password without additional training in this District by providing the clerk with the name of the court where she is certified.³⁴¹

Cases and documents are maintained on the ECF in electronic format and are accessible through PACER. Logging on to the

330. The U.S. Bankruptcy Clerks use this electronic system for case management, and the system is therefore often referred to as the "Case Management/Electronic Court Filing" system or CM/ECF. The current version is ECF 3.3.

331. Requirements include a computer with Internet access and browser, Adobe Acrobat or other Portable Document Format [PDF] creation software, scanner for conversion and transmission of documents not in a word processing system. MS Internet Explorer version 7.0 or later, Adobe Acrobat 6.0 or greater are recommended.

332. The scanner is required for the submission of documents not in PDF format. The scanning guidelines require (1) a maximum resolution of 300 dpi, (2) an image type in black and white drawing (not gray scale or color), (3) a TIF format (ideally compressed CCITT4) and (4) a file size no larger than 3MB.

333. See http://www.arb.uscourts.gov/ecf/scanning_guidelines.pdf

334. LOCAL RULES: BANKR. E.D. AND W.D. ARK. R. 5005-4. See U.S. BANKR. CT. E. & W.D. ARK., ADMIN. PROC. ELEC. FILED CASES & RELATED DOC., REGISTRATION FOR THE ELECTRONIC FILING SYSTEM I.B (version 4 Dec. 15, 2006), available at <http://www.arb.uscourts.gov/orders-rules-opinions/orders/apgo19.pdf>

335. PACER is an acronym for Public Access to Court Electronic Records. The PACER service provides on-line access to U.S. Appellate, District, and Bankruptcy court records and documents nationwide. The PACER Service Center is the Federal Judiciary's centralized registration, billing, and technical support center for PACER. The fees charged for access through PACER are authorized by 28 U.S.C. § 1913 and set by the Judicial Conference of the United States. The current version is PACER 3.3. For more information see <http://pacer.psc.uscourts.gov/>

336. U.S. BANKR. CT. E. & W.D. ARK., ADMIN. PROC. ELEC. FILED CASES & RELATED DOC., REGISTRATION FOR THE ELECTRONIC FILING SYSTEM I.B (version 4 Dec. 15, 2006), available at <http://www.arb.uscourts.gov/orders-rules-opinions/orders/apgo19.pdf>

337. *Id.* at I.C. A filing user is any individual with a court-issued login and password to the System.

338. *Id.* at I.D., subparagraphs 2-4.

339. *Id.* at I.C. All signed Registration Forms are to be mailed to the ECF Help Desk, U.S. Bankruptcy Court, 300 West 2nd Street, Little Rock, AR 72201 or delivered to the Bankruptcy Clerk's Office in Little Rock or Fayetteville in an envelope marked "Attn: ECF Help Desk." Registration Forms may also be faxed to 501-918-5558.

340. ECF training dates are on the court's website. Attorneys receive a System login and password after training.

341. U.S. BANKR. CT. E. & W.D. ARK., ADMIN. PROC. ELEC. FILED CASES & RELATED DOC., REGISTRATION FOR THE ELECTRONIC FILING SYSTEM I.D.4 (version 4 Dec. 15, 2006), available at <http://www.arb.uscourts.gov/orders-rules-opinions/orders/apgo19.pdf>

system using the assigned login and password constitutes the attorney's original signature on all documents.³⁴² Local rule specifies the information to be provided in all filings³⁴³ and provides instructions for when the system is down.³⁴⁴

All of the forms discussed below must be completed and included in a chapter 7 filing. Leaving a form blank makes it unclear whether there was no entry, or the form was overlooked and information is missing. The official forms and document assembly software have directions and explanations; however, both require counsel to gather and analyze the necessary information.

Preparation of the petition, schedules, statements and other forms requires investigation and fact gathering.³⁴⁵ All property including all legal or equitable interests of the debtor become a part of the bankruptcy "estate" when the case is filed.³⁴⁶ A list of

creditors, schedules of all assets and liabilities, schedules of income and expenditures, and statement of financial affairs must be filed.³⁴⁷ A petition filed by an attorney must include a certificate that the attorney delivered to the debtor the notice explaining the various forms of relief available.³⁴⁸

There are types of information that must be protected to maintain confidentiality and guard the client against identity theft and credit fraud, as well as protect others. Social Security numbers and account numbers are masked except for the last four numbers to prevent their capture from the public database. Likewise, information regarding the identity of a minor child is protected by listing only the minor's initials with the name and address of the minor's parent or guardian.³⁴⁹ Trade secrets and information that is confidential or privileged when required for the filing may be protected by the court.³⁵⁰

342. *Id.* at I.B.

343. LOCAL RULES: BANKR. E.D. AND W.D. ARK. R. 5005-4. "1. Attorneys are to include their complete address, phone number, and state bar number on all filings. 2. All information on the adversary proceeding cover sheet must be filled in completely."

344. LOCAL RULES: BANKR. E.D. AND W.D. ARK. R. 5005-4. "If a filer attempts to electronically file a pleading and/or document but cannot do so because ECF is not accessible, ... [u]pon a written request by a party demonstrating adequate grounds, the Chief Judge may waive the requirement for electronic filing."

345. There are a number of document assembly programs designed to assist specifically with the preparation and filing of bankruptcy cases. Best Case, Top Form, E-Z filing, Bankruptcy 2009, New Hope and Legal Pro are among those available. While preparation and filing does not require the use of these programs, bankruptcy practitioners find them helpful, and most would say indispensable to their practice.

346. 11 U.S.C. § 541(a) (2006 & 2008 Supp.).

347. 11 U.S.C. § 521(a)(1) (2006 & 2008 Supp.).

348. 11 U.S.C. § 521(a)(1)(B)(iii)(I). See Procedural Form 201, available at http://www.uscourts.gov/rules/BK_Forms_08_Official/Form_201_110708.pdf

349. 11 U.S.C. § 112 (2006 & 2008 Supp.); FED. R. BANKR. P. 1007(m).

350. 11 U.S.C. § 107 (2006 & 2008 Supp.); FED. R. BANKR. P. 9018.

1. Voluntary Petition

The Voluntary Petition³⁵¹ is the basic document for filing bankruptcy.³⁵² The petition constitutes an “order for relief” by the bankruptcy court and operates as a stay, referred to as the “automatic stay.” The first page of the page form requires basic information about each debtor including names, aliases, street address and mailing address,³⁵³ and the last four digits of the debtor’s social security number.³⁵⁴ This information is critical because it will be used to check other public and private repositories of information to test the accuracy of the contents of the petition, schedules and statements to be filed with the court.

The petition requires identification of the type of debtor³⁵⁵ and the chapter of the Code.³⁵⁶ The other information is required for statistical purposes, but requires an assessment by counsel of several aspects of the debtor’s case. For instance, the basis for venue for an individual consumer debtor may be domicile, residence, principal place of business or principal place of assets.³⁵⁷ The designation of the nature of debts requires identification of the debts as “primarily consumer”³⁵⁸ or primarily business. Identification of the nature of all debts is critical because the Code treats consumer and business cases differently.³⁵⁹

An indication must be made whether the debtor is requesting waiver of the filing fee,³⁶⁰ paying in installments,³⁶¹ or attach-

351. 11 U.S.C. § 101(42) (2006 & 2008 Supp.), “petition” means petition filed under section 301, 302, 303, or 304 of this title, as the case may be, commencing a case under this title. Section 303 deals with involuntary cases and is beyond the scope of this article, and section 304 was repealed by BAPCPA and replaced by chapter 15.

352. Official Form B1, Voluntary Petition (January 2008), *available at* http://www.uscourts.gov/rules/BK_Forms_08_Official/B_001_0108f.pdf

Sections 301 and 302 provide that a case is commenced by the filing of a petition, however a “skeletal” petition requires a creditors’ matrix be filed to enable the clerk to provide notice to interested parties. *See* FED. R. BANKR. P. 1007(a) (1).

353. A physical address is required. A mailing address may be listed, if different from the street address.

354. The full social security number is not listed in any part of the petition, statements or schedules except on Form B21, Statement of Social-Security Number or Individual Taxpayer-Identification Number (ITIN) (December 2007) *available at* http://www.uscourts.gov/rules/BK_Forms_08_Official/B_001_0108f.pdf

355. For our purposes this will be an individual. The individual box is checked for spouses filing as joint debtors as well. Designation of the “Nature of Business” and “Tax-Exempt Entity” are unnecessary in our context.

356. As noted earlier for our purposes this will be Chapter 7.

357. 28 U.S.C. § 1408 (2006 & 2008 Supp.). Venue of cases under Title 11. “[A] case ... may be commenced in the district court for the district (1) which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person...have been located for the 180 days immediately preceding such commencement, or for a longer portion of such 180-day period than ...in any other district; or (2) in which there is pending a case under title 11 concerning such person’s affiliate, general partner, or partnership.

358. 11 U.S.C. § 101(8) (2006 & 2008 Supp.).

359. *E.g.*, under sections 11 U.S.C. § 547(b)(8)-(9) (2006 & 2008 Supp.), preferences are treated differently, and only individual consumer Chapter 7 filers are subject to the means test at 11 U.S.C. § 707(b)(1) (2006 & 2008 Supp.).

360. 28 U.S.C. § 1930(f)(1) (2006 & 2008 Supp.); FED. R. BANKR. P. 1006(c); Official Form B3B, Application for Waiver of the Chapter 7 Filing Fee for Individuals Who Cannot Pay the Filing Fee in Full or in Installments (December 2007), *available at* http://www.uscourts.gov/rules/BK_Forms_1207/B_003B_1207f.pdf

361. FED. R. BANKR. P. 1006(b)(1); *In re Repeal of the Interim Rules*, General Order No. 32 Bankr. E.D. and W.D. Ark., (November 24, 2008), ¶ 3, *available at* <http://www.arb.uscourts.gov/orders-rules-opinions/orders/go32.pdf>

ing the filing fee.³⁶² The designation of the case as an “asset” or “no asset” case is made under the heading Statistical/Administrative Information by estimating whether funds will be available to distribute to creditors after the exempt property is excluded³⁶³ and administrative expenses are paid.³⁶⁴ As noted earlier, the overwhelming majority of consumer chapter 7 cases have no assets to distribute to creditors after this computation is made.³⁶⁵ An approximation of the number of creditors, the amount of assets, and the amount of liabilities is required.

On page two of the petition any prior bankruptcy of the debtor within the past eight years³⁶⁶ and any pending case of debt-

or’s spouse, partner or affiliate³⁶⁷ is listed. PACER should be used to check for bankruptcies within the past eight years under each name of the debtor in the district of the filing and in any jurisdiction in which the debtor has lived during that period.³⁶⁸

Completion of Exhibit B requires a declaration that counsel has informed the debtor of the availability and types of relief under chapters 7, 11, 12 or 13 and must be signed.³⁶⁹ The portion of page two of the petition labeled as Exhibit C requires disclosure of the debtor’s possession or alleged possession of any property that poses a threat of imminent and identifiable harm to public health or safety. An affirmative answer requires completion and

362. “Filing fee attached” means the submission of payment information online by debit card or credit card. If payment cannot be made online, payment may be made by fax using a form provided at the court’s website.

363. 11 U.S.C. § 522(b)(1) (2006 & 2008 Supp.).

364. 11 U.S.C. § 503(a) (2006 & 2008 Supp.).

365. Of 7,822 consumer chapter 7 cases closed between June 1, 2008 and May 31, 2009, 95% of the cases were no-asset cases. Statistical information furnished by the U.S. Bankruptcy Court Clerk from the CM/ECF database.

366. U.S.C. § 727 (a) The court shall grant the debtor a discharge *unless*- (8) the debtor has been granted a discharge under this section [chapter 7] or section 1141 [1141] of this title, or under section 14, 371, or 476 of the Act [precursor to the Code], in a case commenced within 8 years before the date of the filing of the petition; (9) the debtor has been granted a discharge under section 1228 [chapter 12] or 1328 [chapter 13] of this title or under section 660 or 661 of the Bankruptcy Act [precursor to the Code], in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least- (A) 100 percent of the allowed unsecured claims in such case; or (B)(i) 70 percent of such claims; and (ii) the plan was proposed by the debtor in good faith, and was the debtor’s best effort.

367. 11 U.S.C. § 101(2).

368. PACER is an acronym for Public Access to Court Electronic Records. The PACER service provides on-line access to U.S. Appellate, District, and Bankruptcy court records and documents nationwide. The PACER Service Center is the Federal Judiciary’s centralized registration, billing, and technical support center for PACER. The fees charged for access through PACER are authorized by section 1913 of title 28 and set by the Judicial Conference of the United States. The current version is PACER 3.3. For more information, see <http://pacer.psc.uscourts.gov/>

369. 11 U.S.C. § 527(a) requires that a debt relief agency [attorney] providing bankruptcy assistance to an assisted person [client] shall provide (1) the written notice required by section 342(b)(1). Section 342(b)(1) provides: Before the commencement of a consumer case the clerk shall provide the debtor written notice containing a brief description of Chapters 7, 11, 12, and 13 and the general purpose, benefits, and costs of proceeding under each. Official Bankruptcy Form B1, Voluntary Petition (January 2008), *available at* http://www.uscourts.gov/rules/BK_Forms_08_Official/B_001_0108f.pdf at page 3, requires the debtor’s signature under oath certifying that debtor is aware of the right to proceed under chapter 7, 11, 12 or 13 and the relief available under each and chooses chapter 7. *See* Procedural Form 201. *Cf.* ARK. RULES OF PROF’L CONDUCT R. 1.4(b). The signature may be made by a scanned copy of a cursive signature or by the representation “/s/ followed by the name of the signee.

submission of the Official Form B1, Exhibit C.³⁷⁰ Official Form B1, Exhibit D certifies the debtor's completion of the required pre-filing credit counseling.³⁷¹ A box is provided for joint filers as well. Compliance may be demonstrated in any one of the five ways listed on the form to insure eligibility to file.³⁷² Failure to comply will result in loss of the filing fee, and a debtor's creditors will be able to resume collection action.³⁷³

Toward the bottom of page two of the petition there are three options with regard to venue.³⁷⁴ Venue will normally be determined by a debtor's connection to the forum state for the greater portion of the 180-day period prior to filing.³⁷⁵ In rare instances venue may be based on a debtor's association with a pending case of an affiliate, general partner or partnership or pending foreign proceedings.³⁷⁶

At the bottom of page two is the Certification by a Debtor Who Resides as a Tenant of Residential Property.³⁷⁷ If a debtor is a tenant whose landlord has a judgment for possession or writ of possession under a residential lease, check all applicable boxes.³⁷⁸ The Code gives a debtor facing dispossession protection under the stay for 30 days from the date of filing and an opportunity to gain continued protection from the stay during the pendency of the action.³⁷⁹ The procedure governing deposit of rental monies with the clerk are found in General Order 32.³⁸⁰

On page three at the top left the signature of the debtor verifies under penalty of perjury³⁸¹ that the information in the petition is true and correct and that the debtor understands the relief available under chapters 7, 11, 12 and 13. The print copy to be retained by counsel as ex-officio clerk must be an origi-

370. If self-disclosure requires filing an Official Form B1, Exhibit C (September 2001), *available at* http://www.uscourts.gov/rules/BK_Forms_1207/B_001C_0901f.pdf, all property that poses or is "alleged to pose a threat of imminent and identifiable harm to the public health or safety" must be identified and described, as well as the nature and location of the dangerous condition whether environmental or otherwise. The client's potential exposure to civil and criminal liability must be considered prior to filing.

371. 11 U.S.C. § 109(h)(1) (2006 & 2008 Supp.) Official Form B1, Exhibit D-Individual Debtor's Statement of Compliance with Credit Counseling Requirement (December 2008), *available at* http://www.uscourts.gov/rules/BK_Forms_Pending_2008/B_001D_1208.pdf

372. 11 U.S.C. § 109(h)(1) (2006 & 2008 Supp.).

373. If the case is dismissed and a case is filed later, a debtor may be required to pay another filing fee and take extra steps to stop creditor action under the stay. *See* 11 U.S.C. § 362(c)(3)(A), (B).

374. 28 U.S.C. § 1408 (2006 & 2008 Supp.).

375. 28 U.S.C. 1408(1).

376. 28 U.S.C. § 1410 (2006 & 2008 Supp.).

377. The certification is not needed if the tenant is not subject to a judgment for possession of debtor's residence.

378. 11 U.S.C. § 362(l)(1) (2006 & 2008 Supp.) provides a 30 day window of opportunity for a debtor to avoid dispossession after a judgment of possession or writ of possession has been entered under certain conditions. Note that this section relates solely to a judgment for possession, not for damages.

379. ARK. CODE ANN. § 18-60-301, et seq. (2003 & 2007 Supp.), does not provide a tenant with an opportunity to cure a default prior to the issuance of a writ of possession. An argument under "applicable nonbankruptcy law" could be made under a provision for cure in the terms of a residential lease.

380. *In re Repeal of the Interim Rules*, General Order No. 32 Bankr. E.D. and W.D. Ark., (November 24, 2008), ¶ 2 *available at* <http://www.arb.uscourts.gov/orders-rules-opinions/orders/go32.pdf>

381. *See* 18 U.S.C. § 1621 (2006 & 2008 Supp.), for perjury generally. For fines, *see* 18 U.S.C. § 3571 (2006 & 2008 Supp.). For form of oath, *see* 28 U.S.C. § 1746 (2006 & 2008 Supp.).

nal. The filed copy may bear a scanned PDF of the cursive signature or an electronic representation of the signature symbolized by “/s/” followed by the name of the debtor. The Clerk will not accept the filing without an electronic signature.

The attorney’s signature constitutes a certification that (1) the attorney has no knowledge after an inquiry that the information in the schedules is incorrect,³⁸² and (2) that the debtor understands the relief available under the other chapters of the Code.³⁸³ The duty to investigate the facts and the law is imposed on counsel³⁸⁴ and on debtor³⁸⁵ alike. An attorney’s failure to investigate the facts and research the law may carry sanctions.³⁸⁶

2. Application to Pay Filing Fee in Installments (Official Form 3A)

The payment of a filing fee by an individual in a voluntary case or spouses in a

joint case is authorized at title 28.³⁸⁷ Official Form 3A, Application To Pay Filing Fees In Installments, must be filed for a debtor who cannot pay at filing and is ineligible for a fee waiver.³⁸⁸ The form provides for disclosure of the proposed installments. Debtor must state that no further payments will be made to an attorney or any other person for services in connection with the case until the filing fee is paid.³⁸⁹ A warning is provided that debtor’s failure to pay the filing fee or any installment may result in dismissal of the case and denial of a discharge.³⁹⁰ Debtor and debtor’s attorney must sign and date the application. The form for the application includes the form for the order to be signed by the court granting the application and setting out the terms and conditions of payment.³⁹¹

The wording of Official Form B3A regarding the time allowed may be easily misconstrued.³⁹² At paragraph 4 the form references Rule 1006(b)(2) and provides that the final

382. 11 U.S.C. § 707(b)(4)(D) (2006 & 2008 Supp.).

383. 11 U.S.C. § 527(a)(1) (2006 & 2008 Supp.); 11 U.S.C. § 342(b) (2006 & 2008 Supp.); and Procedural Form B201.

384. FED. R. BANKR. P. 9011 (a),(b) and (c).

385. 11 U.S.C. § 527(a)(2)(A)-(D), (c).

386. This certification of counsel is in addition to the FED. R. BANKR. P. 9011(a)-(b) requirement that every pleading shall be signed by an attorney certifying the attorney’s reasonable belief that the representations are warranted by law and supported by evidence. Rule 9011(c) provides for sanctions for violation of the Rule. ARK. RULES OF PROF’L CONDUCT R. 1.4(b) requires attorneys to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions.”

387. 28 U.S.C. § 1930(a)(7) [hanging paragraph prior to subsection (b)] (2006 & 2008 Supp.). An individual commencing a voluntary case or a joint case under title 11 may pay such fee in installments.

388. FED. R. BANKR. P. 1006(a) Every petition shall be accompanied by the filing fee except as provided by court order permitting payments in installments or waiving the filing fee.

389. FED. R. BANKR. P. 1006(b)(3). See 2009 Bankruptcy Code, Rules and Forms 489: The requirement that filing fees be paid in full before the debtor may pay an attorney for services in connection with the case codifies that rule declared in *In re Lathan*, 271 Fed. 538 (N.D.N.Y. 1921), and *In re Darr*, 232 Fed. 415 (N.D.Cal. 1916).

390. 11 U.S.C. § 707(a)(2) (2006 & 2008 Supp.); FED. R. BANKR. P. 1006(b)(2).

391. FED. R. BANKR. P. 1006(b)(2), (3).

392. FED. R. BANKR. P. 1006(b)(1) And see FED. R. BANKR. P. 1006(b)(2). These rules must be read in conjunction with *In re Repeal of the Interim Rules*, General Order No. 32 Bankr. E.D. and W.D. Ark. (November 24, 2008), ¶ 3, available at <http://www.arb.uscourts.gov/orders-rules-opinions/orders/go32.pdf>

installment “shall be payable not later than 120 days after filing.”³⁹³ The court by General Order 32 has shortened the time for payment by installment to the date first set for the first meeting of creditors unless the court otherwise orders.³⁹⁴ When an Official Form conflicts with the Code, the Rules or order of the court, the Official Form is construed to conform. If the installment payments are not made the case may be dismissed.³⁹⁵

3. Application for Waiver of the Chapter 7 Filing Fee for Individuals Who Cannot Pay the Filing Fee in Full or in Installments (Official Form 3B)

In some cases, especially pro bono cases, a debtor may not have the ability to pay the filing fee in full or in installments.³⁹⁶ Official Form B3B must be submitted to obtain a waiver of the filing fee.³⁹⁷ Part A of the form requires information as to debtor’s family size and income. Debtor’s income³⁹⁸ from line 16 of Official Form B6I, Schedule I—Current Income of Individual Debtor(s) is restated at line 2 of the form and added to the income of any dependents shown at line 3. Schedule

I is attached, if available.³⁹⁹ Official Form, B6J, Schedule J—Current Expenditures of Individual Debtor(s), or an estimate of debtor’s total monthly expenses may be used to complete Part B. A debtor must state whether an increase or decrease in income (Part A) or expenses (Part B) is expected during the next six months.⁴⁰⁰

For Part C a debtor may attach completed copies of Schedules A (Real Property) and Schedule B (Personal Property) or answer the questions on the form regarding available assets excluding household furnishings and clothing. Any payments made or promised to an attorney or anyone other than an attorney, in connection with the case, must be disclosed and the amount stated, including amounts paid by others on debtor’s behalf on Part D.⁴⁰¹ Unlike an application to pay in installments, Official Form B3B must be signed under penalty of perjury.⁴⁰²

4. Schedule A—Real Property (Official Form 6A)

The disclosure required by Schedule A covers any legal, equitable, or future interest in all real property owned by a debtor

393. FED. R. BANKR. P. 1006(b)(2).

394. *In re Repeal of the Interim Rules*, General Order No. 32 Bankr. E.D. and W.D. Ark., (November 24, 2008), ¶ 3, available at <http://www.arb.uscourts.gov/orders-rules-opinions/orders/go32.pdf>

395. 11 U.S.C. § 707(a)(2) (2006 & 2008 Supp.).

396. FED. R. BANKR. P. 1006(b)(3).

397. 28 U.S.C. § 1930(f)(1), (2) (2006 & 2008 Supp.); FED. R. BANKR. P. 1006(c). See Official Form B3B, Application for Waiver of the Chapter 7 Filing Fee for Individuals Who Cannot Pay the Filing Fee in Full or in Installments (December 2007), available at http://www.uscourts.gov/rules/BK_Forms_1207/B_003B_1207f.pdf

398. A spouse is not included, if a debtor is separated and not filing a joint petition.

399. 11 U.S.C. § 521(a)(1)(B)(ii) (2006 & 2008 Supp.).

400. Cf. Schedule I at line 17 and Schedule J at line 19 (describing any increase or decrease in income and expenditures reasonably anticipated to occur within the year following the filing).

401. This obligation falls on counsel as well. See 11 U.S.C. § 329(a) (2006 & 2008 Supp.).

402. See 18 U.S.C. § 1621 (2006 & 2008 Supp.) for perjury generally. For fines, see 18 U.S.C. § 3571 (2006 & 2008 Supp.). For form of oath, see 28 U.S.C. § 1746 (2006 & 2008 Supp.).

and includes interests held as a cotenancy, community property or future interest. Rights and powers exercisable for a debtor's benefit are also included. If a debtor is married, each ownership interest is labeled to reflect whether title is held in the name of the husband, wife, jointly or as community property.⁴⁰³ A description and location must be sufficient to identify each property, and a full legal description is not required.

Three other schedules are referenced. Unexpired leases are listed on Schedule G. Creditors' liens against real property are reported as secured debt on Schedule D. Real property claimed as exempt is on Schedule C. Regardless of the information provided by a debtor, all other available sources of information should be checked to document counsel's

due diligence.⁴⁰⁴ An attorney's signature on the petition certifies that (1) she has made a reasonable investigation into the circumstances, (2) the petition is well-grounded in fact,⁴⁰⁵ and (3) she has no knowledge after an inquiry that the information in the schedules is incorrect.⁴⁰⁶

The real estate index records in the Circuit Clerk's office of each county can be used to verify ownership and liens.⁴⁰⁷ The Circuit Clerk's Office land records or real estate "index" records⁴⁰⁸ contain information on deeds,⁴⁰⁹ mortgages, judgments, and lawsuits⁴¹⁰ affecting real estate.⁴¹¹ Many county and state records are available online.⁴¹² For information about remote access to court records visit the website for the National Center for State Courts.⁴¹³

403. Community property jurisdictions include Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.

404. See ARK. RULES OF PROF'L CONDUCT R. 1.3.

405. 11 U.S.C. § 707 (b)(4)(C) (2006 & 2008 Supp.). Cf. FED. R. BANKR. P. 9011(b)(1)-(4) and ARK. RULES OF PROF'L CONDUCT R. 11(a); see ARK. RULES OF PROF'L CONDUCT R. 1.1, 1.3.

406. 11 U.S.C. § 707 (b)(4)(D); FED. R. BANKR. P. 9011 (a)-(b).

407. Some counties, such as Pulaski and Washington, offer remote online access to public records for subscribers.

408. These include a Grantor index, a Grantee index, Lis Pendens, and copies of all filed instruments affecting title.

409. In Arkansas deeds are filed with "Real Estate Transfer Tax" stamps affixed to the face of the deed. Each stamp bears a face value related to the actual purchase price of the land, e.g. \$3.30 per \$1,000. Once you verify the ratio the value of the stamps to purchase price for the tax year of the transaction, you can estimate purchase price. This is helpful because the deeds often simply state "\$1.00 and other valuable consideration" rather than the true price.

410. 11 U.S.C. § 541(a)(5)(A)-(C) (2006 & 2008 Supp.).

411. Lawsuits affecting real estate generally require the contemporaneous filing of a "Lis Pendens" notice showing that there is a suit related to a particular parcel so that prospective buyers and others are made aware of the litigation.

412. Pulaski County and Washington County provide remote electronic access to public records by subscription. The Secretary of State provides remote access by subscription, as well as some free services.

413. <http://www.ncsconline.org/WC/CourTopics/StateLinks.asp?id=118>

Records in the Assessor's office contain a debtor's sworn assessment regarding property ownership and should match the schedules.⁴¹⁴ The assessment records can be valuable in providing a legal description for realty;⁴¹⁵ an actual (appraised) value;⁴¹⁶ an "assessment value" for each type of property; a diagram and description of any structures; and cross references to deed records.⁴¹⁷

Probate records may reveal interests in realty or other property. The County Clerk's Office maintains the probate records of decedents' estates⁴¹⁸ and may show whether a debtor stands to inherit property. If a debtor has a deceased relative or other person through whom she may inherit an interest in property, verify whether a probate case is pending. A debtor's interest in an estate must be disclosed whether the interest is vested or contingent. Property inherited within 180 days of filing is considered part of the estate.⁴¹⁹

Accurate valuation of real property is essential for determination of a debtor's interest for purposes of exemption. Real estate appraisers may be too expensive for an insol-

vent debtor. Real estate agents may be willing to furnish a letter appraisal that satisfies the trustee as to value at little or no charge. Cross check the agent's letter appraisal with the assessor's records and the purchase price on the deed.⁴²⁰ If the property is financed, the mortgage will indicate the amount of the loan, and the loan file may contain an appraisal. Another option is to search for sales of comparable real estate. Websites can be useful in finding comparable homes offered for sale.⁴²¹

5. Schedule B – Personal Property (Official Form 6B)

There are thirty-five categories for the classification of all personal property. The property description and location of each property is itemized. As with realty, a married debtor must indicate whether an item is owned by the husband, the wife, jointly or as community property. Current value of debtor's interest without deduction of secured claims or exemptions is shown for each category and for more valuable items individually.⁴²²

414. Trustees routinely check assessment records prior to the first meeting of creditors. If the assessment records do not match the schedules, debtor should be prepared to provide an explanation for any discrepancy.

415. Check to see whether the Assessor's legal description is partial or incomplete. Check the deed records in the index records of the Circuit Clerk's Office and real estate tax records in the Tax Collector's Office for a more complete legal description and as a cross reference to verify information as to value.

416. Assessor's appraisals are not performed yearly. Ask about the currency of an appraisal to better determine its reliability. Assessors are good free sources of information about real property values generally within the area.

417. The accuracy of the assessor's records can be checked through websites such as Google Earth and zillow.com

418. The office designated by law to maintain probate records may vary from state to state.

419. 11 U.S.C. § 541(a)(5)(A) (2006 & 2008 Supp.).

420. Tax stamps represent \$3.30 per \$1,000 of the purchase price. The tax rates have changed over time so for older properties you'll have to verify the tax rate at the time of the transaction, e.g., \$2.20 per \$1,000 or \$1.10 per \$1,000.

421. See <http://www.zillow.com>; <http://www.realtor.com>; <http://www.craigslist.com>

422. E.g., stereo system, vehicle or big screen television.

If property is held for a debtor by someone else, that person's name and address must be listed.⁴²³ Minors for whom a debtor holds property should not be listed by name. Instead, the child's initials and the name and address of the parent or guardian should be disclosed.⁴²⁴

Items within a category should be lumped together and given one total value. An itemized list with value calculations for the listing should be preserved. A notation may be entered parenthetically that an itemized list is available on request. This prevents listing numerous items of smaller value while preserving a record for inspection by the trustee or auditor.⁴²⁵

The Assessor's records may be used to verify the accuracy of information regarding certain items of personality.⁴²⁶ In Arkansas the Circuit Clerk maintains court records⁴²⁷ and the UCC filing records on agricultural liens,⁴²⁸ cut timber and a few other types of collateral.⁴²⁹ The Secretary of State's Office⁴³⁰ maintains records of all other UCC filings.⁴³¹

The financing statement provides a description of the collateral and the name and address of the secured party.⁴³² Names of secured parties who have liens on the debtor's property are listed in Schedule D, discussed below. The existence of a lien in favor of a debtor is a receivable listed as personal property.⁴³³

Copies of monthly bank statements or an online account statement indicate debtor's balance at filing. For that reason the entries to the schedule and the paper or electronic records must match. Checking accounts, savings accounts, certificates of deposit, safety deposit boxes, and all other forms of account offered by each financial institution are to be included. Pay stubs and tax returns from the debtor contain information needed as well.⁴³⁴

For valuation of automobiles and other properties with established markets refer to those market resource guides.⁴³⁵ The Code provides for valuation at replacement value.⁴³⁶ Published vehicle values are available for wholesale, trade-in, private sale, M.R.S.P. and retail prices, but generally not

423. Cf. Official Form B7, Statement of Financial Affairs (December 2007), *available at* http://www.uscourts.gov/rules/BK_Forms_1207/B_007_1207f.pdf at Question 14.

424. 11 U.S.C. § 112 (2006 & 2008 Supp.); FED. R. BANKR. P. 1007(m).

425. 28 U.S.C. § 586(f) (2006 & 2008 Supp.).

426. Assessment information may be helpful with Items 25, 26, 27, 28, 29, 30, 31 and 33 of Schedule B.

427. 11 U.S.C. § 541(a)(5)(A)-(C) (2006 & 2008 Supp.).

428. ARK. CODE ANN. § 4-9-501(a)(2) (2001 & 2007 Supp.), Liens on farm equipment, farm products or accounts.

429. ARK. CODE ANN. § 4-9-501(a)(1)(A) (2001 & 2007 Supp.).

430. <http://www.sosweb.state.ar.us>. There is \$75 annual subscription fee plus usage fees.

431. ARK. CODE ANN. § 4-9-501(a)(3) (2001 & 2007 Supp.).

432. ARK. CODE ANN. § 4-9-502 (2001 & 2007 Supp.).

433. See Official Form B6B, Schedule B-Personal Property (December 2007), *available at* http://www.uscourts.gov/rules/BK_Forms_1207/B_006B_1207f.pdf at item 16.

434. Financial information is needed for Items 1, 2, 11 and 12 of Schedule B.

435. <http://www.kbb.com> (Kelley Blue Book); <http://www.edmunds.com>; <http://www.blackbook.com/>; <http://www.nada.com> (National Auto Dealers Assn.).

436. 11 U.S.C. § 506(a)(2) (2006 & 2008 Supp.).

for replacement value. Often a trustee is willing to accept private-party value. For other forms of personal property online trading sites may be helpful.⁴³⁷ Local thrift shops can provide pricing on many common types of personal property.

6. Schedule C: Property Claimed As Exempt (Official Form B6C)

Schedule C⁴³⁸ provides a debtor the opportunity to exempt the properties listed on Schedules A and B.⁴³⁹ The goal is to exempt as much of the debtor's property as possible. For that reason, Schedule C should be a mirror image of Schedules A and B unless the law does not permit the exemption of all listed property.⁴⁴⁰ Any properties that cannot be exempted are either surrendered or retained by the debtor in one of four ways.⁴⁴¹

In Arkansas, debtors whose domicile has

been located in Arkansas for the 730 days immediately preceding the date of the filing of the petition⁴⁴² may choose either the federal bankruptcy exemptions⁴⁴³ or the Arkansas state law exemptions.⁴⁴⁴ Spouses who file a joint petition must choose the same set of exemptions.⁴⁴⁵ If spouses in a joint case cannot agree on the alternative to be elected, the parties shall be deemed to elect the federal exemptions, where that election is permitted under the law of the jurisdiction where the case is filed.⁴⁴⁶ The Code allows states to "opt out" of the federal exemptions by legislative act.⁴⁴⁷ Arkansas has not opted out, thus both the federal and state exemptions are available to debtors who have resided in Arkansas continuously for at least 730 days.

The debtor must "choose" the property to be retained as exempt.⁴⁴⁸ The debtor depends on counsel in making this decision. There are two sets of exemptions available in Arkansas:

437. Popular websites such as www.ebay.com and www.craigslist.com are available for pricing many items.

438. Official Form B6C, Schedule C-Property Claimed as Exempt (December 2007), *available at* http://www.uscourts.gov/rules/BK_Forms_1207/B_006C_1207f.pdf (hereinafter Schedule C.).

439. 11 U.S.C. § 522(b)(1) (2006 & 2008 Supp.).

440. A debtor who has resided continuously in the state for 730 days may choose the federal exemptions authorized by 11 U.S.C. § 522(b)(2) [522(d)] or the "state" exemptions authorized by 11 U.S.C. § 522(b)(3). Some exemptions under 11 U.S.C. § 522(d) have limitations on the type of property and the dollar value of the debtor's interest. State law exemptions and federal non-bankruptcy exemptions may have similar limitations. Under ARK. CONST. art. IX, § 4, for a qualifying married person or head of household, there is no limit on the dollar value of a rural homestead consisting of no more than 80 contiguous acres, nor is there a limit on the value of an urban homestead of no more than one quarter acre. ARK. CONST. art. IX, § 5. Arkansas state exemptions for personal property are governed by ARK. CONST. art. IX, §§ 1-2.

441. Redemption under 11 U.S.C. § 722 (2006 & 2008 Supp.), reaffirmation under 11 U.S.C. § 524(c) (2006 & 2008 Supp.), lien avoidance and exemption of the property, as permitted by 11 U.S.C. § 522(f) (2006 & 2008 Supp.), or buy-back by mutual agreement with the trustee to purchase the property out of the estate under 11 U.S.C. § 363 (2006 & 2008 Supp.).

442. 11 U.S.C. § 522(b)(3)(A) (2006 & 2008 Supp.).

443. 11 U.S.C. § 522(d) (2006 & 2008 Supp.).

444. ARK. CODE ANN. § 16-66-217 (2001 & 2007 Supp.).

445. 11 U.S.C. 522(b)(1) (2006 & 2008 Supp.).

446. *Id.*

447. 11 U.S.C. 522(b)(2) (2006 & 2008 Supp.).

448. 11 U.S.C. § 522(b)(1) (2006 & 2008 Supp.).

(1) the Code exemptions referred to as the “federal exemptions,”⁴⁴⁹ and (2) the exemptions provided under state law⁴⁵⁰ combined with certain allowable bankruptcy exemptions⁴⁵¹ and certain federal non-bankruptcy law exemptions,⁴⁵² collectively referred to as the “state exemptions.”⁴⁵³ Each exemption specifies whether it limits the type of property or the amount that may be claimed and to what extent. A debtor’s ability to claim a particular exemption may be affected by any number of things including: whether the realty is urban or rural;⁴⁵⁴ whether the debtor is married⁴⁵⁵ or is a “head of household,”⁴⁵⁶

whether the property is of a certain size;⁴⁵⁷ whether a residence is affixed to the realty;⁴⁵⁸ and whether the debtor has resided in the state the requisite time.⁴⁵⁹

In Arkansas, the debtor will normally claim the federal exemptions under the Code because the state exemptions are less favorable.⁴⁶⁰ The federal exemptions generally allow a debtor to keep more types of property and maximize the value retained for the debtor’s fresh start.⁴⁶¹ If the debtor is eligible to file in more than one jurisdiction, it is important to check any other state exemptions available to see which set would be more favorable.⁴⁶²

449. 11 U.S.C. § 522(b)(1) (2006 & 2008 Supp.) authorizes the exemptions.

450. 11 U.S.C. § 522(b)(3)(A) (2006 & 2008 Supp.).

451. 11 USC 522(b)(1) (2006 & 2008 Supp.).

452. *E.g.*, 42 U.S.C. § 407 (2006 & 2008 Supp.) provides for the exemption of Social Security benefits.

453. 11 U.S.C. § 522(b)(3)(B),(C) (2006 & 2008 Supp.).

454. ARK. CONST. art. IX, §§ 4-5.

455. ARK. CONST. art. IX, § 3. *See Parker v. Johnson*, 368 Ark. 190, 244 S.W.3d 1 (2006), *Vesper v. Woolsey*, 231 Ark. 782 at 785-86, 332 S.W.2d 602 at 604-05 (1960), and *Melton v. Melton*, 126 Ark. 541, 191 S.W. 20 (1917).

456. *City Nat. Bank v. Johnson*, 192 Ark. 945, 96; S.W.2d 482, 484 (1936). As we have said, the exemption laws are to be construed liberally. The Constitution provides for the homestead, and, when once established, the presumption is that it continues until it is shown by the evidence that it has been abandoned. The question of homestead and residence, being a question of intention, must be determined by the facts in each case, and the chancellor’s finding of fact will not be disturbed unless it appears to be against the preponderance of the evidence.

457. ARK. CONST. art. IX, §§ 4-5.

458. *See* ARK. CONST. art. IX §§ 4-5 limits the homestead to “land, with the improvements thereon” and consequently does not include mobile homes unless affixed to the realty.

459. 11 U.S.C. § 522(b)(3)(A) (2006 & 2008 Supp.) and the “hanging paragraph” following § 522(b)(3)(C).

460. For example, Arkansas law allows a resident debtor who is the “head of household” to exempt the wearing apparel of the family and personal property not to exceed \$500. *See* ARK. CONST. art. IX, § 2. A resident debtor, who is unmarried and not a head of household, may exempt her wearing apparel and personal property not to exceed \$200 in value. *See* ARK. CONST. art. IX, § 1.

461. For example, the federal “wild card” exemption at 11 U.S.C. § 522(d)(5) allows the debtor to exempt any type of property within stated dollar limits. Currently the debtor may exempt up to one half of any “unused” portion of § 522(d)(1) not to exceed \$11,200 effective April 1, 2007. This amount is subject to change under 11 U.S.C. § 104 effective April 1, 2010. 11 U.S.C. § 522(d) also provides limited exemptions for one motor vehicle, jewelry, tools of the trade and prescription health aids.

462. Choice of forum issues could occur due to multiple bases for venue, while exemption eligibility may be affected by the duration of the debtor’s domiciliary periods, state exemption law and bankruptcy case law.

If the debtor's domicile has not been located in Arkansas for the 730 days immediately preceding the date of the filing of the petition, a combination of Code provisions and state law determine which jurisdiction's exemption scheme applies.⁴⁶³ After determining which state's exemptions a debtor may elect, recommendations can be made by counsel consistent with a debtor's goals. The choice may be federal bankruptcy exemptions when allowed by applicable state law, or the state exemptions of the prior domiciliary jurisdiction and exemptions permitted under federal non-bankruptcy law.⁴⁶⁴

7. Schedule D: Creditors Holding Secured Claims (Official Form 6D)

Secured creditors are distinguished from unsecured creditors and are listed here. Each creditor name is listed alphabetically with the mailing address and last four digits of

the account. All secured interests are included.⁴⁶⁵ Ideally, a debtor will provide a written record of each debt and lien. If documentation is lacking, copies of recorded liens may be obtained from the Secretary of State,⁴⁶⁶ Circuit Clerk,⁴⁶⁷ or creditor. An entry is required whether or not a debtor is the primary obligor, and regardless of ownership of the pledged property. The trustee or a creditor may ask a debtor to supply documentation at the First Meeting of Creditors.⁴⁶⁸

For a married debtor each debt is marked to show liability on the debt by a letter designation for each entry.⁴⁶⁹ If there is a co-debtor on a debt, a notation is made. Other than a filing spouse in a joint case, all co-debtors are listed on Schedule H, including non-filing spouses. Each secured claim is described according to the date incurred, the nature of the lien, and a description and value of the property pledged. Claims are marked as contingent,⁴⁷⁰ unliquidated,⁴⁷¹ or disputed.⁴⁷² The amount of the total claim is included without deduction

463. 11 U.S.C. § 523(b)(3)(A) (2006 & 2008 Supp.) and the hanging paragraph following 11 U.S.C. § 523(b)(3)(C) (2006 & 2008 Supp.) that refers to § 522(b)(3)(A). These provisions together require an investigation by counsel to determine the place of the debtor's domicile for the greater portion of the 180 days *preceding* the 730-day look back period. Once the look back state jurisdiction is identified, a determination is made as to whether the debtor was eligible for that state's exemptions *on the date of filing*. If so, that state's exemption law governs the debtor's choices. If the effect of the domiciliary requirement is to render the debtor ineligible for any exemption, the savings clause found in the "hanging paragraph" provides that the debtor may elect to exempt property under § 522(d).

464. Nonbankruptcy federal exemptions available other than those at § 522(d) of title 11.

465. Schedule D includes judgment liens, garnishments, statutory liens, mortgages and deeds of trust.

466. ARK. CODE ANN. § 4-9-501(a)(3) (2001 & 2007 Supp.).

467. ARK. CODE ANN. § 4-9-501(a)(1), (2) (2001 & 2007 Supp.).

468. A party in interest may have a financial interest in challenging the validity of a security interest. To the extent the property is freed of a particular lien, its net value may increase. If so, the equity created by the elimination of the lien may become available to a debtor as an exempt asset, or to a trustee as a nonexempt asset, or to a creditor as an inferior lien holder whose priority improves.

469. The form gives 4 options: husband (H), wife (W), joint (J), and community property (C), *e.g.* Texas).

470. A contingent claim requires the occurrence of an event before liability attaches to the debtor. The contingency may be defined by contractual agreement or arise by operation of law, *e.g.*, bonus owed to an employee based on a production quota. Neither the debt obligation nor the amount of the debt is in dispute. The only question is whether the contingency will occur.

471. An unliquidated debt is a legal obligation that is acknowledged by the debtor but the amount due the creditor is unknown, *e.g.*, a tort or contract claim for which liability is admitted, but damages have not been assessed.

472. A disputed debt is contested as to the existence of the debt. The debtor disputes that creditor is owed anything. The debtor's knowledge of the claim of the creditor requires that the debt be listed.

of the value of the collateral, and any unsecured portion is listed separately.

Each creditor must be scheduled and listed on the creditor matrix to insure the discharge of every debt.⁴⁷³ While some courts have held that the failure to schedule a creditor in a no-asset case is harmless,⁴⁷⁴ the best practice is to list all creditors, collection agents and interested parties. A case anticipated to be a no-asset case may become an asset case,⁴⁷⁵ and the designation of the case as asset or no-asset cannot be discerned with surety at filing. As a practical matter, the relief sought by the debtor through the protection of the stay is lost, if creditors are not notified of the proceeding. The Code also mandates the listing of the creditors.⁴⁷⁶

A debtor is required to file a Statement of Intentions⁴⁷⁷ with regard to each item of secured property stating whether the collateral

will be (1) surrendered, (2) exempted⁴⁷⁸ and redeemed,⁴⁷⁹ or (3) retained under a reaffirmation agreement with the secured creditor.⁴⁸⁰ Counsel plays a key role in assisting a debtor in making the best decision. Factors and issues relating to a debtor's decision are reviewed below in the discussion of the Statement of Intentions.

8. Schedule E: Creditors Holding Unsecured Priority Claims (Official Form B6E)

In bankruptcy there is a "pecking order" or hierarchy for the payment of claims. Schedule E⁴⁸¹ is a complete listing of all claims entitled to priority designated according to the type of priority. This schedule is primarily for domestic support obligations,⁴⁸² taxes,⁴⁸³ and other debts given special priority.⁴⁸⁴ Each

473. A discharge under section 727 ... does not discharge an individual debtor from any debt ... neither listed nor scheduled ... in time to permit ... timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing.

474. See *In re Madaj*, 149 F.3d 467, 469-70 (6th Cir. 1998).

475. Cf. *Waterson v. Hall*, 515 F.3d 852 (8th Cir. 2008) (declined to follow). These cases do not apply in a situation where there is an undisclosed asset in the form of an insurance policy (citing *Houston v. Edgeworth (In re Edgeworth)*, 993 F.2d 51, 53 (5th Cir.1993)) (holding a § 727 discharge does not apply to a lawsuit brought to collect a judgment solely to proceed against a malpractice liability policy "because 11 U.S.C. § 524(e) excludes the liability insurance carrier from the protection of bankruptcy discharge.").

476. 11 U.S.C. § 521(a)(1)(a) (2006 & 2008 Supp.).

477. Official Form B8. See also, 11 U.S.C. § 521(a)(2)(A) (2006 & 2008 Supp.).

478. 11 U.S.C. § 522 (2006 & 2008 Supp.).

479. 11 U.S.C. § 722 (2006 & 2008 Supp.).

480. 11 U.S.C. § 524(c) (2006 & 2008 Supp.).

481. As in schedules D and F, a married debtor indicates individual or joint liability by checking the appropriate box, and lists co-debtors on Schedule H. Each claim is designated as contingent, unliquidated or disputed.

482. 11 U.S.C. § 507(a)(1) (2006 & 2008 Supp.).

483. 11 U.S.C. § 507(a)(8).

484. See generally 11 U.S.C. § 507.

unsecured priority debt is listed whether the debt is dischargeable or not.⁴⁸⁵ Taxing entities and child support collection agencies generally have special addresses and personnel for bankruptcy cases.⁴⁸⁶

As in schedule D a married debtor indicates individual or joint liability by checking the appropriate box,⁴⁸⁷ and lists co-debtors on Schedule H.⁴⁸⁸ Each claim is designated as contingent,⁴⁸⁹ unliquidated,⁴⁹⁰ or disputed.⁴⁹¹ Information on domestic support obligations is available through a search of the court records. Income tax information can be gathered from a debtor's state and federal tax returns. The county tax collector's office maintains records on ad valorem taxes due on real and personal property. The tax records contain legal descriptions, tax payments, and tax deficiencies that may be cross checked against other records.

9. Schedule F: Creditors Holding Unsecured Non-Priority Claims (Official Form B6F)

Schedule F⁴⁹² often contains the most entries of any schedule because individual consumer/non-business Chapter 7 bankruptcies principally have unsecured debt. A credit report notation as to payment of a claim or closing of an account is not conclusive. The frequency of inaccurate credit reporting is the basis for federal consumer legislation.⁴⁹³ As noted above, a best practice is to include all creditors listed in a debtor's credit report. Omission of any potential creditor's claim leaves open the possibility of future liability for a debtor.⁴⁹⁴ Because the credit report shows a credit relationship, failure to schedule a claim that could easily be listed and discharged draws into question professional diligence⁴⁹⁵ and competence.⁴⁹⁶

485. Because there may be a limitation on the *amount* that is payable on a priority claim, the form calls for a debtor to report the amounts of unsecured priority claims that not entitled to priority listed on each sheet as "Subtotals."

486. Notices to the IRS for all Arkansas bankruptcy cases must be sent to IRS, 700 W. Capital Ave., Stop 5700 LIT, Little Rock, Arkansas 72201. Notices for tax debt to the State of Arkansas should be sent to the Dept. of Finance and Admin., State Capitol Building, Little Rock, AR 72201. Notice of domestic support obligations should be sent to the Office of Child Support Enforcement, Department of Finance and Administration, P.O. Box 8133, Little Rock, AR 72203-8133.

487. The form gives 4 options: husband, wife, joint, and community (for community property states, *e.g.* Texas).

488. A co-debtor spouse in a joint case is not listed on Schedule H.

489. A contingent claim requires the occurrence of an event before liability attaches to the debtor. The contingency may be defined by contractual agreement or arise by operation of law, *e.g.* bonus owed to an employee based on a production quota. Neither the debt obligation nor the amount of the debt is in dispute. The only question is whether the contingency will occur.

490. An unliquidated debt is a legal obligation that is acknowledged by the debtor but the amount due the creditor is unknown, *e.g.*, a tort or contract claim for which liability is admitted, but damages have not been assessed.

491. A disputed debt is contested as to the existence of the debt. The debtor disputes that creditor is owed anything. The debtor's knowledge of the claim of the creditor requires that the debt be listed.

492. As in schedules D and E, a married debtor indicates individual or joint liability by checking the appropriate box, and lists co-debtors on Schedule H. Each claim is designated as contingent, unliquidated or disputed.

493. 15 U.S.C. § 1681 et seq. (2006 & 2008 Supp.), Fair Credit Reporting Act (FCRA).

494. 11 U.S.C. § 523(a)(3) (2006 & 2008 Supp.).

495. ARK. RULES OF PROF'L CONDUCT R. 1.3.

496. ARK. RULES OF PROF'L CONDUCT R. 1.1.

Another advantage of listing every potential creditor is that the debtor avoids the potential cost of amending to add a creditor, if it turns out the credit report was in error in showing no debt was owed.⁴⁹⁷ No credit report is totally accurate and up to the minute because the data reported will always be dated.⁴⁹⁸ By including every entity with whom the client has had, or may have had, a debtor-creditor relationship, any potential liability as of the date of the filing becomes subject to discharge. Thus a debtor is provided the maximum protection and bankruptcy relief with regard to each debt whether the debtor incurred the charges or knew of the charges.

10. Schedule G: Executory Contracts and Unexpired Leases (Official Form 6G)

Common entries to Schedule G include real estate leases and agreements for the rental of personal property including time-share interests.⁴⁹⁹ The schedule calls for the names and mailing addresses of the other

parties to the contract, *e.g.*, landlords, auto lease companies and utilities.⁵⁰⁰

In some situations there may be a question whether certain "rental agreements" are, in fact, true rental agreements or sales contracts. The "lease agreement" may be construed as a "sales agreement" and vice versa depending on the terms and conditions. For instance, if the debtor must only pay a nominal fee at the end of the "lease" to acquire title, the court may declare the agreement to be a "sales agreement" rather than a "lease agreement." The nature of the relationship between the parties may affect their rights and responsibilities dramatically.⁵⁰¹

A debtor is called on to assume or reject each unexpired lease. Information regarding each lease and a debtor's decision to assume or reject is recorded on Official Form 8, the Statement of Intentions. Utility contracts receive special treatment under the Code.⁵⁰² A utility may alter, refuse, or discontinue service if neither the trustee nor debtor, within twenty days of the filing, furnishes a deposit or other security for service after the filing.⁵⁰³ The payment of a deposit can

497. A creditor listed on the credit report may be safely omitted if the debtor has a written proof that no debt is owed as of the date of filing. Otherwise, an unpaid creditor may allege (post-discharge) that a debt was, in fact, owed, and is not discharged because it was neither listed nor scheduled. The cost to amend is \$26 per amendment.

498. Assuming data is accurate as of the date last reported, there is always the chance of a subsequent, unreported transaction. Credit report error can occur at the point of input by the creditor or in transmission of the data. The interval between receipt of the data and filing of the petition permits the possibility of additional credit charges by the client, an authorized person, or an unauthorized person, such as an identity thief.

499. 11 U.S.C. § 101(53D) (2006 & 2008 Supp.).

500. BLACK'S LAW DICTIONARY 369 (9th ed. 2009). A contract that remains wholly unperformed or for which there remains something still to be done on both sides, often as a component of a larger transaction and sometimes memorialized by an informal letter agreement, by a memorandum, or by oral agreement. 2. *Bankruptcy*. A contract under which debtor and nondebtor each have unperformed obligations and the debtor, if it ceased further performance, would have no right to the other party's continued performance.

501. If the agreement is in reality a sales agreement, a debtor may have an equity interest in the property despite a default.

502. 11 U.S.C. § 366 (2006 & 2008 Supp.).

503. 11 U.S.C. § 366(b).

create a hardship on an insolvent debtor, who is dependent on basic utility services.⁵⁰⁴ Planning in advance to meet this contingency is critical.

11. Schedule H: Co-Debtors (Official Form B6H)

This schedule requests information concerning any person or entity, other than a spouse in a joint case, that is liable for a debt listed in schedules D, E or F.⁵⁰⁵ A spouse other than in a joint case,⁵⁰⁶ co-signers and guarantors are included. Parents and spouses may have legal liability for “necessaries” without benefit of contract.⁵⁰⁷ A debtor who resides or resided in a community property jurisdiction⁵⁰⁸ within the eight years immediately preceding filing must provide all names

used by a spouse or former spouse during the eight-year period.⁵⁰⁹ Spouses who are co-debtors in joint cases are listed on the separate schedules listing those debts.⁵¹⁰

12. Schedule I: Current Income of Individual Debtor(s) (Official Form B6I)

Schedule I⁵¹¹ lists the debtor’s “current income” as an estimate of the average or projected monthly income at the time the case is filed.⁵¹² This amount must be distinguished from “current monthly income” for purposes of the calculation of the “means test” on Official Form B22A,⁵¹³ which is derived from the average of the income for the six months prior to the month of filing.⁵¹⁴ The figures on Schedule I and Official Form

504. The Public Service Commission General Service Rules address deposits, the amount that may be charged, and the circumstances under which utility service can be terminated. For bankruptcy deposits see rules 3.04(A)(6), 4.01(B)(5), 4.02(A)(7), 4.02(B)(2), 4.06(A)(2), 6.03. For rules on the amount of deposits see 4.01(B) and 4.03 *available at* <http://www.apscservices.info/rules.asp?group=electric>

505. See Form B6H, Schedule H-Codebtors (December 2007), *available at* http://www.uscourts.gov/rules/BK_Forms_1207/B_006H_1207f.pdf

506. A “non-debtor spouse” is a spouse who chooses not to file jointly with the individual filing bankruptcy. The non-debtor spouse may not file bankruptcy at all or may file separately.

507. *Davis v. Baxter County Reg’l Hosp.*, 313 Ark. 388, 855 S.W.2d 303 (1993).

508. A community property jurisdiction may be a state, commonwealth or territory, including Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, or Wisconsin.

509. *Cf.* Official Form B7, Statement of Financial Affairs (December 2007), *available at* http://www.uscourts.gov/rules/BK_Forms_1207/B_007_1207f.pdf (hereinafter Official Form B7) at question 16.

510. A joint case is a case in which the husband and wife file a bankruptcy petition together. A single filing fee is charged, and the spouses’ cases are administered together, though exemptions must be separately claimed. A discharge is granted to each. See 11 U.S.C. § 302 (2006 & 2008 Supp.); FED. R. BANKR. P.1015(b).

511. Official Form B6I, Current Income of Individual Debtor(s) (December 2007), *available at* http://www.uscourts.gov/rules/BK_Forms_1207/B_006I_1207f.pdf (hereinafter Schedule I).

512. 11 U.S.C. § 521(a)(1)(B)(ii) (2006 & 2008 Supp.).

513. Official Form B22A, Chapter 7 Statement of Current Monthly Income and Means-Test Calculation (January 2008), *available at* http://www.uscourts.gov/rules/BK_Forms_08_Official/B_022A_1208.pdf (hereinafter Official Form B22A.).

514. 11 U.S.C. § 101(10A) (2006 & 2008 Supp.).

B22A may align, but could differ because of the specific calculations made in each form.⁵¹⁵ In a joint filing, the income for both spouses is shown. The income for a non-filing spouse is also shown unless a debtor files a statement under penalty of perjury that the parties are separated and living apart and discloses the amount received from the spouse attributed to debtor's income.⁵¹⁶ Any change in income anticipated to occur within the year following the filing is described.

Payroll earnings statements and tax returns are the best sources of information for completing the Schedule I.⁵¹⁷ A benefits statement will suffice for a debtor who is unemployed, disabled, or receiving welfare assistance. A debtor with unreported taxable income must file the necessary tax returns under oath before submitting a petition and schedules under oath. If unreported income is from illegal activities, the debtor must be advised of the potential objections to discharge,⁵¹⁸ potential exposure to criminal liability,⁵¹⁹ ethical implications,⁵²⁰ and the constitutional protections available in and out of bankruptcy.⁵²¹

13. Schedule J: Current Expenditures of Individual Debtor (Official Form 6J)

Schedule J calls for a calculation of the debtor's estimated average or projected

monthly expenses for the debtor and her family. In a joint case if a debtor's spouse maintains a separate household, each spouse must file a separate form. Any changes anticipated to occur within a year of the filing are reported. Reliable sources of information are (1) debtor's checking account statement, (2) creditor invoices and other billing statements, (3) itemizations of expenditures on credit card bills, and (4) receipts. If a debtor's average monthly expenses exceed average monthly income, some possibilities are: (1) third parties may be contributing to debtor's support, (2) the debtor may be using credit cards, open accounts, pawn shops, check cashing advances or other forms of credit, (3) the debtor may be liquidating property, or (4) the debtor may be hiding income.

If the debtor's income exceeds expenses, a different set of issues is presented depending on the circumstances. Usually an insolvent debtor will not have disposable income at the end of the month. Inability to pay creditors on time or "cash flow" is the reason bankruptcy assistance is needed. Monthly expenditures may be underestimated. The inability of a debtor to estimate monthly expenses accurately and budget properly may be the basis for the debtor's financial difficulties. Otherwise, a debtor should logically be saving money each month. If a debtor has verifiable disposable monthly income, a debtor's eligibility for chapter 13 must be considered.⁵²²

515. An example is that the definition of "current monthly income" in 11 U.S.C. § 101(10A)(B) (2006 & 2008 Supp.) excludes benefits received under the Social Security Act, while Schedule I at line 11 includes Social Security.

516. 11 U.S.C. § 707(b)(7)(B) (2006 & 2008 Supp.).

517. Detailed statements of regular income are required for a business or profession.

518. 11 U.S.C. § 727(a) (2006 & 2008 Supp.).

519. See 18 U.S.C. § 1621 (2006 & 2008 Supp.) for perjury generally. For fines, see 18 U.S.C. § 3571 (2006 & 2008 Supp.). For form of oath, see 28 U.S.C. § 1746 (2006 & 2008 Supp.).

520. ARK. RULES OF PROF'L CONDUCT R. 1.16(a)(1), 1.16(b)(2)-(4); ARK. RULES OF PROF'L CONDUCT R. 1.6(b)(1)-(3).

521. U.S. CONST. amend. V; 11 U.S.C. § 344 (2006 & 2008 Supp.).

522. The analysis required for evaluating eligibility and desirability for chapter 13 is beyond the scope of this article.

14. Summary of Schedules (Official Form 6)

The Summary of Schedules recaps the totals of schedules A, B, D, E, F, I and J.⁵²³ Totals for Schedules A and B are reported as total assets.⁵²⁴ Schedules D, E and F are added to report total liabilities.⁵²⁵ Document assembly software programs check the totals in the summary; however, it is the obligation of counsel to insure their accuracy. Changes to individual schedules in the preparation process or by way of amendment require an update of the summary.⁵²⁶

Individual debtors with primarily consumer debts who are filing under chapter 7 must also file a Statistical Summary as a part of Official Form 6.⁵²⁷ This information is for statistical purposes only.⁵²⁸ The form collects data related to the types of liability reported in the schedules, income and expenses.⁵²⁹ The data must be summarized by category and totaled. The liability category types are those that may be excepted from the discharge.⁵³⁰

15. Declaration Concerning Debtor's Schedules (Official Form 6 Declaration)

This form requires debtor's signature. The debtor must swear under penalty of perjury that she has read the summary and schedules and that they are "true and correct" to the best of the debtor's knowledge, information, and belief. Criminal penalties for false swearing and concealing property under federal law are set forth on the form. Flag the form when the debtor reviews the petition to be sure the debtor signs, and that the debtor, in fact, reads and understands the penalties for making a false statement and concealing property.

16. Statement of Financial Affairs (Official Form 7)

This form consists of a series of numbered questions and requires the debtor's signature under oath.⁵³¹ Spouses provide combined answers on a single form in joint cases.⁵³² The first 18 questions are answered by every

523. The individual schedules are discussed below.

524. 11 U.S.C. § 521(a)(1)(B)(i) (2006 & 2008 Supp.).

525. *Id.*

526. FED. R. BANKR. P. 1009(a).

527. 28 U.S.C. § 159(a) (2006 & 2008 Supp.).

528. 28 U.S.C. § 159(a).

529. Form B6, Summary of Schedules (December 2007), *available at* http://www.uscourts.gov/rules/BK_Forms_1207/B_006_Summary_1207f.pdf states specifically where the thirteen required amounts may be found in Form B22A and schedules D, E, F, I, and J.

530. 11 U.S.C. § 523(a) (2006 & 2008 Supp.).

531. 11 U.S.C. § 521(a) (2006 & 2008 Supp.). The debtor shall-(1) file ...(B) unless the court orders otherwise- (iii) a statement of the debtor's financial affairs. *Cf.* FED. R. BANKR. P. 1007(b)(1)(D).

532. Information for each spouse is broken out separately, such as for income; however, only one form is used.

debtor. A debtor who is or has been engaged in business⁵³³ during the six years immediately preceding filing must answer questions 19-25. A debtor who has not been in business during the six-year period may skip from question 18 to the signature page. Definitions for “in business” and “insider”⁵³⁴ are shown on the first page.

State and federal tax returns are the best sources of information for questions 1 and 2. Question 1 asks for earned income for the year of the filing to date plus the two years prior to the year the case is filed.⁵³⁵ A payroll earning statement should be compared to the periods in question. All income not listed in question 1 is listed in question 2 for the two year period prior to filing.⁵³⁶ If a debtor’s tax returns are unavailable, other sources of information include (1) debtor’s tax preparer, (2) W-2 Forms or 1099 Forms, and (3) IRS tax transcripts.⁵³⁷ The answers to questions 1 and 2 for gross annual income may not match the information contained in other schedules reporting information on monthly income.⁵³⁸

If these figures do not match, be prepared to furnish the trustee, creditors and the court an explanation for any discrepancy.

Question 3(a) requires itemization of any payment aggregating \$600 or more to any creditor within the 90 days immediately preceding filing.⁵³⁹ Payments made to a creditor based on a domestic support obligation or as a part of an alternative repayment schedule⁵⁴⁰ are marked with an asterisk. Auto loan payments, auto insurance premiums, mortgage payments, and rent are common examples of payments that are large enough to be listed. The monthly expense items in Schedule J of \$200 or more that are payable to any one particular creditor should correlate to these entries. Payments to or for the benefit of “insiders”⁵⁴¹ within one year of filing are reported at question 3(c).⁵⁴² Bank records, credit card receipts and other financial records will document the amount and timing of a debtor’s payments. These traceable print and electronic records leave a trail that should be examined prior to filing.

533. The term “in business” is not defined in the definitional section of the Code, but is provided on the first page of Official Form B7, Statement of Financial Affairs. *Cf.* definition of “equity security holder” at 11 U.S.C. § 101(17) (2006 & 2008 Supp.).

534. 11 U.S.C. § 101(31) (2006 & 2008 Supp.).

535. Income information is listed by source and amount for each time period.

536. No explanation is given in the form or Code for the discrepancy in the time periods for questions 1 and 2.

537. Caveat: Obtaining the transcripts from the IRS may take considerable time and delay progress in the case.

538. The information on Official Form B6I, Schedule I-Current Income of Individual Debtor(s)(December 2007), *available at* http://www.uscourts.gov/rules/BK_Forms_1207/B_006I_1207f.pdf (hereinafter Schedule I) for monthly income and the information on Official Form B22A, for current monthly income may vary from reported income on Official Form B7 because the type of income, method of calculation and reporting periods are different.

539. 11 U.S.C. § 547(b) permits the trustee to avoid certain transfers of property by the debtor within stated time frames. Section 547(c) lists those instances when the trustee may not avoid a transfer, including (c)(8) which allows a preferential transfer of less than \$600 by a debtor with primarily consumer debts to one creditor.

540. The term “alternative repayment schedule” is undefined in the Code but includes payments made by a debtor to a creditor under a plan by an approved nonprofit budgeting and creditor counseling agency. *See* 11 U.S.C. § 111(c) (2)(E), (F), (H) (2006 & 2008 Supp.).

541. 11 U.S.C. § 101(31) (2006 & 2008 Supp.).

542. 11 U.S.C. § 547(b) (2006 & 2008 Supp.).

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All lawsuits,⁵⁴³ administrative proceedings, executions, garnishments and attachments⁵⁴⁴ in which debtor is or was a party within one year before the bankruptcy filing are listed in response to question 4(a).⁵⁴⁵ A description of all property that has been attached, garnished or seized under any legal or equitable process is included at question 4(b).⁵⁴⁶ Repossessions, foreclosures and returns⁵⁴⁷ within the year prior to filing are reported at question 5.⁵⁴⁸ When a debtor has resided, done business or held title to land elsewhere it may be appropriate to include a search of other domestic and international jurisdictions.

Questions 6(a)-10(b) call for information regarding transfers, transactions and events within stated periods prior to filing or after filing. Assignments for the benefit of creditors within 120 days of filing are described at 6(a).⁵⁴⁹ Property placed in the hands of a custodian, receiver, or court-appointed official within one year of filing are reported at 6(b).⁵⁵⁰

Gifts and charitable contributions made within one year of filing are itemized at question 7.⁵⁵¹ Ordinary and usual gifts aggregating less than \$200 per individual family member and charitable contributions totaling less than \$100 recipient are excluded. Question 8 requires the listing of all losses from fire, theft, other casualty or gambling within one year of filing or since the commencement of the case.⁵⁵²

Payments for debt counseling or bankruptcy are shown at question 9, including transfers of property by or on behalf of the debtor to any persons. Attorney fees,⁵⁵³ credit reports, filing fees, credit counseling fees⁵⁵⁴ and other charges for services concerning debt consolidation, bankruptcy relief or document preparation are itemized here. Property transfers and pledges of property as security that are not in the ordinary course of business or financial affairs of a debtor are listed at question 10(a) for the two years immediately preceding the filing.⁵⁵⁵ All property trans-

543. 11 U.S.C. § 724(a) (2006 & 2008 Supp.); 11 U.S.C. § 726(a)(4) (2006 & 2008 Supp.).

544. In Arkansas, repositories of court records include the District Court Clerk and other inferior courts, the Circuit Clerk and County Clerk, the Clerk of the Arkansas Supreme Court, and the clerks for the United States Bankruptcy Court and the United States District Courts for the Eastern and Western Districts. Records of appellate cases may be checked through the database for the United States Courts of Appeals (includes records for BAP), and the United States Supreme Court. There is no single database for all court records, so each must be checked separately. PACER may be used for all federal jurisdictions.

545. Court records are public and may be obtained from the court's clerk or database in the jurisdictions in which a debtor has resided during the past year with a few exceptions. Examples of nonpublic court proceedings include Social Security administrative proceedings, adoptions, juvenile cases, and cases under seal.

546. 11 U.S.C. § 548(a)(1) (2006 & 2008 Supp.).

547. 11 U.S.C. § 547(a)(1) (2006 & 2008 Supp.).

548. Statutory and judicial foreclosures are included. Repossessions and returns of any type, whether voluntary or involuntary, are reported including property transferred though a deed in lieu of foreclosure or return to seller.

549. 11 U.S.C. § 543(d)(2) (2006 & 2008 Supp.); 11 U.S.C. § 547(a)(1).

550. 11 U.S.C. § 543(d)(2).

551. 11 U.S.C. § 548(a)(2) (2006 & 2008 Supp.); 11 U.S.C. § 548(d)(3)(4).

552. 11 U.S.C. § 524(e) (2006 & 2008 Supp.).

553. 11 U.S.C. § 329 (2006 & 2008 Supp.).

554. 11 U.S.C. § 111(c)(2)(B) (2006 & 2008 Supp.).

555. 11 U.S.C. § 546(c) (2006 & 2008 Supp.); 11 U.S.C. § 547(c)(2)(B) (2006 & 2008 Supp.).

ferred by a debtor to a self-settled trust or similar device within ten years of filing must be listed at 10(b), if the debtor is a beneficiary of the trust.⁵⁵⁶

If a debtor has given, assigned, or transferred property to others or had property taken by others in the ten years immediately preceding the bankruptcy, questions 3, 4, 5, 6, 7, 9 and 10 may require disclosure of the event depending on the nature of the transfer and the time frame. When property is disposed of within stated time periods prior to filing, the transfer may be avoided by the trustee under certain circumstances.⁵⁵⁷ These time frames vary, and sometimes the amount of the transaction is excluded as inconsequential. Every transaction must be examined through the prism of the trustee's avoiding powers to determine whether a presumption arises.⁵⁵⁸

The presumptions shift the burden of proof to the debtor to show a transfer was not a "preference" or preferential favoring of a creditor.⁵⁵⁹ A factual inquiry is required to confirm (1) the length of time any transfer precedes the filing,⁵⁶⁰ (2) whether the transfer was to an insider, and (3) whether the debtor

was insolvent. The analysis of each transaction will be fact driven. Transfers, gifts, donations, assignments, payments to creditors, and pledges of property may be a red flag for fraudulent conduct on the part of the debtor. Further investigation may be needed to advise the client properly as to the right against self-incrimination and the need for immunity.⁵⁶¹ The debtor may need to defend against an objection to dischargeability of a particular debt,⁵⁶² or to the discharge of all debts.⁵⁶³

Question 11 requires a listing of closed accounts for the past year before filing, and question 12 requires disclosure of safety deposit boxes or other depositories in which a debtor holds or has held securities, cash, or other valuables. Past financial records will reveal bank accounts that have been closed and financial products and services provided to a debtor. A best practice is to request information from all financial institutions with which a debtor has done business.

Setoffs made by any creditor against a debt or deposit of a debtor within 90 days of filing are reported at question 13.⁵⁶⁴ The Code creates a presumption that a debtor is

556. 11 U.S.C. § 548(e)(1) (2006 & 2008 Supp.).

557. 11 U.S.C. § 547(b) sets forth the circumstances under which the trustee may avoid a payment or transfer of an interest of the debtor to a creditor, called a "preference." 11 U.S.C. § 548 governs fraudulent transfers and obligations.

558. 11 U.S.C. §§ 522, 544, 545, 547, 548, 549, 550, 553(b) and 724(a) are examples of a trustee's avoiding powers.

559. 11 U.S.C. § 547(c).

560. 11 U.S.C. § 548 is titled "Fraudulent Transfers and Obligations" and allows the trustee to avoid certain transfers completed during the two years prior to the petition date, or longer if permitted under state law. *See* ARK. CODE ANN. § 4-59-204-205 (2001 & 2007 Supp.). While the title of section 548 alludes to only "Fraudulent" transfers, be careful. There is no intent requirement for the types of transfers listed under 11 U.S.C. § 548(a)(1)(B).

561. Debtor's counsel must advise the client of her Fifth Amendment right against self-incrimination under 11 U.S.C. § 344, and research the implications of criminal conduct on the filing or continuation of the bankruptcy, including provisions for immunity under 18 U.S.C. § 6001 et seq.

562. 11 U.S.C. § 523(a) (2006 & 2008 Supp.).

563. 11 U.S.C. § 727(a) (2006 & 2008 Supp.).

564. 11 U.S.C. § 553(a), (b) (2006 & 2008 Supp.).

insolvent within 90 days of the filing.⁵⁶⁵ The presumption serves the interest of the trustee in the recovery of the offset, and the recovery may, in turn, permit a debtor to claim the recovered property as exempt.⁵⁶⁶

Questions 14-16 require a debtor to list any property held or controlled for another person,⁵⁶⁷ all addresses at which the debtor has lived within the three years preceding filing,⁵⁶⁸ and spouses and former spouses who reside or resided with debtor in a community property state within eight years of filing.⁵⁶⁹ If the debtor has received notice in writing by a governmental unit of liability, potential liability, or violation on an environmental law, the name and address of each site must be provided at question 17. The governmen-

tal unit, the date of the notice, and the environmental law, if known, are also required.

For an individual debtor with no business interest, questions 18(a) and (b) are the last questions to be answered. A debtor who is or has been connected with any business enterprise⁵⁷⁰ within six years immediately preceding the filing is to list the business names, addresses, taxpayer identification numbers, and beginning and ending dates for each business.⁵⁷¹ Any business that involves "single asset real estate" is identified.⁵⁷² The final page is a signed declaration under penalty of perjury verifying that the debtor has read the answers and any attachments and that the information is true and correct.

565. 11 U.S.C. § 553(c).

566. 11 U.S.C. § 522(g) (2006 & 2008 Supp.). Notwithstanding sections [11 U.S.C. §§ 550 and 551] of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section [11 U.S.C. §§ 510(c)(2), 542, 543, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if-(1)(A) such transfer was not a voluntary transfer of such property by the debtor; and (B) the debtor did not conceal such property; or (2) the debtor could have avoided such transfer under subsection [11 U.S.C. § 522 (f)(1)(B)] of this section.

567. Official Form B7, question 14. Property held for by a debtor as guardian of a ward or as trustee of a trust should be included here.

568. Official Form B7, question 15.

569. 11 U.S.C. § 541(a)(2) (2006 & 2008 Supp.); Official Form B7, question 16.

570. A debtor must answer this question if a debtor is or was any of the following: an officer, director, managing executive, or owner of more than 5 percent of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership, a sole proprietor or self-employed in a trade, profession, or other activity, either full-time or part-time.

571. See Official Form B7, question 18(a).

572. 11 U.S.C. § 101(51B) (2006 & 2008 Supp.). "The term 'single asset real estate' means real property constituting a single property or project, other than residential property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental." See Official Form B7 at question 18(b).

17. Statement of Intentions Concerning Secured Property (Official Form 8)

A debtor's Statement of Intentions⁵⁷³ indicates whether each item of secured property listed on schedule D is to be surrendered,⁵⁷⁴ or retained, and whether or not each property will be claimed as exempt.⁵⁷⁵ If the debtor chooses to retain property, her intention regarding each separate property indicates whether the property is to be retained by redemption,⁵⁷⁶ by reaffirmation,⁵⁷⁷ or by lien avoidance and exemption.⁵⁷⁸ Each item of property is listed in Part A by checking the appropriate box and describing the property. Debtor's choices as to exemptions should conform to those on schedule C.

The debtor's intention with regard to an executory contract or unexpired lease of personal property is listed in Part B.⁵⁷⁹ The lessor's name and a description of the prop-

erty are set out in separate columns, and the intention to either assume or reject each lease is indicated in a third column.⁵⁸⁰ The form is signed under penalty of perjury. The Code allows an initial period of 60 days following the filing for the trustee to assume or reject a lease before the lease is deemed rejected.⁵⁸¹ No statement of intention is required as to the other unexpired leases and executory contracts listed on schedule G. These are deemed rejected unless assumed by the trustee. A debtor may assume or reject any lease or contract not assumed by the trustee.⁵⁸²

There are a number of factors to consider in completing the statement of intention. For property pledged as security, the type, value and use of the property, as well as the amount of the unavoidable liens against the property reveal whether reaffirmation or redemption may be feasible and in a debtor's best interest. An individual debtor may redeem⁵⁸³ tangible personal property intended for personal,

573. 11 U.S.C. § 521(a)(2)(A) (2006 & 2008 Supp.).

574. The term "surrender" is not defined in the Code. Surrender results in a debtor and creditor returning to their status under nonbankruptcy law prior to the filing. Assuming a discharge is granted, a surrender of the collateral to the secured party will extinguish the debt. Pending discharge preservation of any rights and defenses a debtor may have protects a debtor against the possibility of a denial of discharge or a successful objection to the dischargeability of a particular debt.

575. 11 U.S.C. § 522 (2006 & 2008 Supp.).

576. 11 U.S.C. § 722 (2006 & 2008 Supp.).

577. 11 U.S.C. § 524(c) (2006 & 2008 Supp.).

578. 11 U.S.C. § 522(f) (2006 & 2008 Supp.). The Code does not prohibit interested parties from reaching a mutually acceptable agreement allowing a debtor to retain the collateral and continue payments without reaffirmation or redemption when redemption is not feasible and reaffirmation has been rejected by the court. When this occurs it is referred to as a "ride through." See 11 U.S.C. § 524(f) (2006 & 2008 Supp.).

579. 11 U.S.C. § 365(p)(1) (2006 & 2008 Supp.). If a lease of personal property is rejected or not timely assumed by the trustee under subsection (d), the leased property is no longer property of the estate and the stay under § 362(a) is automatically terminated.

580. 11 U.S.C. § 365(p)(2).

581. 11 U.S.C. § 365(d)(1).

582. 11 U.S.C. § 554(c) (2006 & 2008 Supp.). Common examples are residential leases, vehicle leases, and other rental agreements of inconsequential value and benefit to the estate.

583. 11 U.S.C. § 722 (2006 & 2008 Supp.).

family or household use⁵⁸⁴ from a lien securing a dischargeable debt⁵⁸⁵ if the property is exempted⁵⁸⁶ or abandoned.⁵⁸⁷

To the extent that the property is worth less than the claims against it, the debtor will be better served to redeem the property by paying its replacement value.⁵⁸⁸ This is because a secured claim is bifurcated into component parts consisting of the portion that is secured by the value of the security and the portion, if any, that remains unsecured.⁵⁸⁹ A debtor may elect to redeem property by paying the “allowed secured claim” or replacement value in full⁵⁹⁰ at the time of the redemption.⁵⁹¹ This amount may be substantially less than the amount of the creditor’s

claim. The Code allows an initial 30-day period following the date first set for the first meeting of creditors for redemption; however, the court may grant additional time for cause shown within the 30-day period.⁵⁹²

If a debtor cannot redeem the property, a reaffirmation agreement offers an alternative.⁵⁹³ The viability of this option hinges on a debtor’s ability to cure any existing default and pay the debt in full. The agreement may mirror the existing agreement or be tailored to the parties’ mutual interests in light of present circumstances.⁵⁹⁴ Ideally, the resulting agreement will not pose an undue financial hardship on the debtor, but may be certified if counsel feels the debtor is able

584. Vehicles, appliances and household furnishings are common examples of tangible personal property that depreciate quickly and thus have a relatively low replacement value while having significant utility to a debtor.

585. See 11 U.S.C. § 523(a) (2006 & 2008 Supp.).

586. 11 U.S.C. § 522 (2006 & 2008 Supp.).

587. 11 U.S.C. § 554 (2006 & 2008 Supp.).

588. 11 U.S.C. § 506(a)(2) (2006 & 2008 Supp.).

589. 11 U.S.C. § 506(a)(1).

590. The practical difficulty with the redemption option is that an insolvent debtor often finds it impossible to borrow the money necessary to pay the full balance due on the obligation to the secured party. Redemption works best when the balance due is small or the creditor is willing to accept terms. There are lenders who specialize in financing § 722 redemption loans and provide services in Arkansas. Caveat: If there is disagreement over the replacement value, a valuation hearing may be required. See FED. R. BANKR. P. 6008. Note: A proceeding under the FED. R. BANKR. P. is governed by FED. R. BANKR. P. 9014.

591. 11 U.S.C. § 722 (2006 & 2008 Supp.).

592. 11 U.S.C. § 521(a) (2006 & 2008 Supp.).

593. 11 U.S.C. § 524(c) (2006 & 2008 Supp.).

594. Caveat: If a debtor’s motion for reaffirmation is denied, and redemption is not feasible, the parties may continue under the existing agreement. While this may seem to be in their mutual financial self-interest, there is a danger. The debtor may pay to keep the secured property, and the creditor may forebear any legal action to receive payment. The risk to the debtor is that the obligation’s default language may permit an *in rem* action for seizure of the collateral based on insolvency even when payments are current. While the debt may be discharged, the payments will be lost along with the collateral, unless the payments satisfy the obligation or a waiver is obtained. This may also occur if the debtor fails to assume a lease. See 11 U.S.C. § 524(f) (2006 & 2008 Supp.), 11 U.S.C. § 521(a)(7) (hanging paragraph) (2006 & 2008 Supp.) and 11 U.S.C. § 524(d) (2006 & 2008 Supp.).

to make the required payment.⁵⁹⁵ Counsel's obligation to insure that a debtor's agreement is fully informed and voluntary is set out specifically in the Code.⁵⁹⁶ A debtor has the right to rescind the agreement by notifying the creditor in writing⁵⁹⁷ within the later of the discharge or 60 days from the filing of the agreement with the court.⁵⁹⁸

If counsel is unwilling to certify the agreement, the debtor must move for approval of the reaffirmation and⁵⁹⁹ appear before the court unless the obligation is consumer debt secured by real estate.⁶⁰⁰ When the debtor's income minus expenses is insufficient to pay the reaffirmed debt, a presumption of undue hardship exists that must be rebutted.⁶⁰¹ The court considers whether the agreement will impose an undue hardship on the debtor, and whether it is consistent with the debtor's best interest.⁶⁰² Even when counsel feels the

debtor's decision to reaffirm is ill-advised, counsel should assist the debtor at the reaffirmation hearing.⁶⁰³ The court will inform the debtor of her rights related to the agreement, and counsel will be given an opportunity to adduce proof in support of the motion and rebut any presumption of undue hardship.⁶⁰⁴ Any agreement must be made within 30 days of the date first set for the meeting of creditors unless additional time is granted by the court.⁶⁰⁵ After reaffirmation the debtor retains the property that secures the debt, but remains personally liable for any deficiency in the event of a default.

The debtor's failure to file a statement of intentions within the deadlines prescribed by the Code will result in the termination of the automatic stay⁶⁰⁶ absent an order of the court.⁶⁰⁷ Likewise a debtor's failure to take the action specified in the time allowed will result

595. 11 U.S.C. § 524(k)(4)(A) (2006 & 2008 Supp.). Procedural Form B240A, Reaffirmation Agreement (January 2007), *available at* http://www.uscourts.gov/rules/BK_Forms_06_Dir/Form_240A_0107.pdf (hereinafter Procedural Form B240A) at page 7-Certification By Debtor's Attorney. The certification is to be filed only if the attorney represented the debtor during the course of negotiating the reaffirmation agreement. Counsel must certify that (1) the agreement represents a fully informed and voluntary agreement by the debtor; (2) the agreement does not impose an undue hardship on the debtor any dependent of the debtor; and (3) that counsel has fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement. If the lender is other than a Credit Union [See 11 U.S.C. § 524(k)(3)(J)(i) and (m)(2)], and a presumption of hardship exists [11 U.S.C. § 524(m)(2)], counsel must opine that debtor is able to make the required payment.

596. 11 U.S.C. § 524(c)(1)(C); 11 U.S.C. § 524(k)(3)(J)(i); 11 U.S.C. § 524(k)(6)(B).

597. The Code does not require notice in writing. A best practice is to send a written notice by a form of mail or delivery system, print or electronic, that provides proof of receipt in the event notice is challenged.

598. 11 U.S.C. § 524(c)(4) (2006 & 2008 Supp.); 11 U.S.C. § 524(k)(3)(J)(i).

599. 11 U.S.C. § 524(k)(7) (2006 & 2008 Supp.).

600. 11 U.S.C. § 524(d); 11 U.S.C. § 524(k)(3)(J)(i) and 11 U.S.C. § 524(c)(6)(B) (2006 & 2008 Supp.).

601. 11 U.S.C. § 524(m) (2006 & 2008 Supp.).

602. 11 U.S.C. § 524(d)(6)(A)(ii), *Cf.* 11 U.S.C. § 524(k)(3)(J)(i) ; Procedural Form B240A at paragraph 7.

603. 11 U.S.C. § 524(d) (2006 & 2008 Supp.).

604. 11 U.S.C. § 524(m)(1); 11 U.S.C. § 524(k)(6)(A).

605. 11 U.S.C. § 521(a)(2)(B). The court for cause may allow additional time.

606. 11 U.S.C. § 362(h)(1)(A) (2006 & 2008 Supp.).

607. 11 U.S.C. § 362(h)(2) (2006 & 2008 Supp.).

in lifting of the stay.⁶⁰⁸ If additional time is needed for the submission of the statement⁶⁰⁹ or time to perform,⁶¹⁰ the court may extend the time in each instance for cause shown within such period.⁶¹¹ A copy must be served on the trustee and the creditors named in the statement.⁶¹²

There are seven possible ways a secured creditor can reach collateral or the cash value of the collateral. The four ways mentioned above allow the debtor a voice in whether, how and to what extent a creditor's claim is satisfied. The other three options available to a creditor are (1) obtaining relief from the stay;⁶¹³ (2) abandonment of a property by the trustee;⁶¹⁴ and (3) sale of the collateral by the trustee and distribution of the proceeds to the secured creditor.⁶¹⁵ For any property that a debtor wishes to keep, negotiation with a secured creditor as soon as possible serves to avoid the lifting of the stay and debtor's loss of possession.

18. Disclosure of Compensation of Attorney for Debtor (Procedural Form B203)

Disclosure of attorney compensation must be made whether or not an attorney charges the client.⁶¹⁶ The form⁶¹⁷ is to be signed, dated, and submitted within 15 days of the filing or at such other time as the court may direct.⁶¹⁸ A copy shall be transmitted to the United States Trustee.⁶¹⁹ Compensation paid within the year prior to filing and any compensation to be paid for legal services is reported.⁶²⁰ The source of compensation paid and to be paid is disclosed.⁶²¹ Counsel must disclose whether there is an agreement to share any compensation with persons other than members or associates of counsel's law firm.⁶²² The particulars of any sharing agreement are to be attached.⁶²³

608. 11 U.S.C. § 362(h)(1)(B) (2006 & 2008 Supp.).

609. 11 U.S.C. § 521(a)(2)(A) (2006 & 2008 Supp.).

610. 11 U.S.C. § 521(a)(2)(B) (2006 & 2008 Supp.).

611. 11 U.S.C. § 521(a)(2)(A). The debtor must submit the statement within 30 days of filing or on or before the date of the § 341 meeting of creditors, whichever is earlier. 11 U.S.C. § 521(a)(2)(B) requires the debtor to perform the intentions within 30 days after the first date set for the § 341 meeting. 11 U.S.C. § 341(a) (2006 & 2008 Supp.).

612. FED. R. BANKR. P. 1007(b)(2).

613. 11 U.S.C. § 362(d), (f), (g) (2006 & 2008 Supp.).

614. 11 U.S.C. § 554(a), (b) (2006 & 2008 Supp.).

615. 11 U.S.C. § 363 (2006 & 2008 Supp.).

616. 11 U.S.C. § 329(a) (2006 & 2008 Supp.); FED. R. BANKR. P. 2016(b).

617. Procedural Form B203, Disclosure of Compensation of Attorney for Debtor (December 1994), available at <http://www.uscourts.gov/bkforms/official/b203.pdf>

618. FED. R. BANKR. P. 2016(b).

619. FED. R. BANKR. P. 2016(b).

620. 11 U.S.C. § 329(a) (2006 & 2008 Supp.).

621. 11 U.S.C. § 329(a) (2006 & 2008 Supp.); FED. R. BANKR. P. 2016(a)-(b).

622. FED. R. BANKR. P. 2016(a)-(b).

623. *Id.*

The work to be done in handling the bankruptcy is described at Paragraph 5(e),⁶²⁴ and legal work that is excluded from the representation is shown at Paragraph 6.⁶²⁵ This form defines the extent of counsel's legal and ethical obligations. The attorney-client contract required by the Code⁶²⁶ should conform to the detailed services listed in the disclosure filed with the court.⁶²⁷ Essential bankruptcy services are to be included but other services may be limited. A best practice is not to leave the attorney-client contract open ended but rather negotiate and accept work in increments. This approach allows careful consideration of the services requested in light of any time or financial constraints and gives the practitioner greater flexibility.⁶²⁸

19. Verification of Creditor Matrix

This form accompanies the credit matrix⁶²⁹ and calls for the debtor to verify that the attached list of creditors is true and correct to the best of her knowledge. It requires that the debtor read the "creditor matrix" or list of creditors. Debtor and counsel should each

review the matrix to verify that no creditor has been omitted. If document assembly software is being used, a best practice is to confirm all changes have been saved to the file a final time before uploading. Omission of a creditor results in an additional filing fee.⁶³⁰

20. Statement of Social Security Number or Individual Taxpayer Identification Number (ITIN) (Official Form B21)

A debtor is required to submit a statement under penalty of perjury setting out her Social Security number,⁶³¹ or, if none, another government-issued taxpayer-identification number.⁶³² The full number is shown on the clerk's notice of the meeting of creditors.⁶³³ Subsequently, the Code requires redacted filings by a party or non-party⁶³⁴ unless the filing is exempt,⁶³⁵ under seal,⁶³⁶ under protective order,⁶³⁷ or subject to other court orders.⁶³⁸ A filing may include only (1) the last four digits of the social security number and taxpayer-identification number; (2) the year of an individual's birth; (3) a minor's initials;

624. FED. R. BANKR. P. 2016(a).

625. Compare 11 U.S.C. § 521(a)(1)(A)-(B) (2006 & 2008 Supp.).

626. 11 U.S.C. § 521(a)(1)(A)-(B).

627. Procedural Form B203, Disclosure of Compensation of Attorney for Debtor (December 1994), *available at* <http://www.uscourts.gov/bkforms/official/b203.pdf>

628. FED. R. BANKR. P. 2017(a)-(b).

629. 11 U.S.C. § 521(a)(1)(A). The list includes all creditors and all other interested parties. The matrix is provided in text format, not in PDF. This is the one exception to the electronic filing rules requiring all documents to be filed in PDF format. Text formats ending in .txt or .scn are acceptable to the clerk and permit changes in the addresses.

630. The filing fee for each amendment to add or remove creditors is \$26.

631. FED. R. BANKR. P. 1007(f).

632. FED. R. BANKR. P. 1005.

633. FED. R. BANKR. P. 2002(a)(1).

634. FED. R. BANKR. P. 9037(a)-(g).

635. FED. R. BANKR. P. 9037(b).

636. FED. R. BANKR. P. 9037(c).

637. FED. R. BANKR. P. 9037(d).

638. FED. R. BANKR. P. 9037(a).

and (4) the last four digits of a financial account number.⁶³⁹ A debtor or other entity waives the protection afforded regarding its own information by filing without redaction and not under seal.⁶⁴⁰

21. Statement of Current Monthly Income and Means – Test Calculation (Official Form B22)

The means test is designed to identify chapter 7 filings that are deemed an abuse of

the provisions of chapter 7.⁶⁴¹ Official Form B22A⁶⁴² is used to elicit financial disclosures to that end.⁶⁴³ The statement is broken into eight parts. A debtor will only complete Parts I, II, III and VIII⁶⁴⁴ unless a presumption of abuse arises. Every individual chapter 7 debtor with primarily consumer debts⁶⁴⁵ either claims exemption/exclusion⁶⁴⁶ or temporary exclusion⁶⁴⁷ from the means test,⁶⁴⁸ or performs the required financial calculations and indicates whether the presumption of abuse does or does not arise.⁶⁴⁹ Joint debtors may complete a single statement except in special

639. FED. R. BANKR. P. 9037(a)(1)-(4).

640. FED. R. BANKR. P. 9037(g).

641. 11 U.S.C. § 707(b)(1) (2006 & 2008 Supp.).

642. Official Form B22A, Statement of Current Monthly Income and Means-Test Calculation (January 2008), *available at* http://www.uscourts.gov/rules/BK_Forms_08_Official/B_022A_1208.pdf (hereinafter Official Form B22A).

643. 11 U.S.C. § 707(b)(2)(C).

644. Approximately 90% of debtors filing Chapter 7 in Arkansas fall within a safe harbor provision exclusion so that the presumption of abuse does not arise. The reportings at Part I and II reveal eligibility for safe harbor protection. Part VIII is the verification section requiring a debtor's signature under penalty of perjury.

645. If a debtor has primarily non-consumer debts, the means test is not required. Official Form B22A is completed by checking the box on Part I at 1B and signing the verification at Part VIII.

646. 11 U.S.C. § 707(b)(2)(D) (2006 & 2008 Supp.); 11 U.S.C. § 707(b)(2)(7)(A)-(B). While the term "exemption" is often used, "exclusion" is the term used in the caption of Part II of Official Form B22A.

647. The temporary exclusion is for reservists and National Guard Members who were called to active duty or performed homeland defense activity after September 11, 2001, for a period of at least 90 days, are excluded from all forms of means testing during the time of active duty or homeland defense activity and for 540 days thereafter ("the exclusion period"). Those who qualify for the temporary exclusion must check (1) the appropriate boxes on Part I at 1C in the Declaration of Reservists and National Guard Members, (2) the box for "presumption is temporarily inapplicable" at the top right, and (3) complete the verification in Part VIII. The remainder of the form must be completed no later than 14 days after the date the exclusion period ends, unless the time for filing a motion raising the means test presumption expires before the exclusion period ends. *See* Official Form B22A at Part I, 1C.

648. Pub. L. No. 110-438, § 2, 122 Stat. 5000 as codified at 11 U.S.C. § 707(b)(2)(D)(i)(I),(II) and (ii)(I),(II). The amended language reads as follows: (D) Subparagraphs (A) through (C) shall not apply, and the court may not dismiss or convert a case based on any form of means testing--(i) if the debtor is a disabled veteran (as defined in section 3741(1) of title 38), and the indebtedness occurred primarily during a period during which he or she was-- (I) on active duty (as defined in section 101(d)(1) of title 10); or (II) performing a homeland defense activity (as defined in section 901(1) of title 32); or (ii) with respect to the debtor, while the debtor is-- (I) on, and during the 540-day period beginning immediately after the debtor is released from, a period of active duty (as defined in section 101(d)(1) of title 10) of not less than 90 days; or (II) performing, and during the 540-day period beginning immediately after the debtor is no longer performing, a homeland defense activity (as defined in section 901(1) of title 32) performed for a period of not less than 90 days; if after September 11, 2001, the debtor while a member of a reserve component of the Armed Forces or a member of the National Guard, was called to such active duty or performed such homeland defense activity. 11 U.S.C.A. § 707. *See* Official Form 22BA at Part I, 1A and 1C.

649. 11 U.S.C. § 707(b)(2)(C) (2006 & 2008 Supp.).

circumstances in which case, each spouse must complete a separate statement.⁶⁵⁰ The income information required is drawn from the six-month period ending on the last day of the calendar month immediately preceding the filing,⁶⁵¹ and the expense information is derived from IRS national standards, local standards and actual expenses of the debtor at the time of filing.⁶⁵²

Provisions relating to means testing were added by BAPCPA.⁶⁵³ If a debtor is not protect-

ed by one of the two "safe harbor" provisions for disabled veterans⁶⁵⁴ and debtors with below median income,⁶⁵⁵ a means test formula⁶⁵⁶ is applied to determine whether a presumption of abuse of chapter 7 exists.⁶⁵⁷ A disabled veteran⁶⁵⁸ is excluded from any form of means testing⁶⁵⁹ if her indebtedness primarily occurred during a period during which she was on active duty⁶⁶⁰ or performing a homeland security defense activity.⁶⁶¹ The other more frequently used safe harbor provision is for a

650. If the exclusion for reservists and national guard members at Part I, 1C applies, each spouse must complete a separate statement and sign the verification at Part VIII.

651. See Official Form B6I, Schedule I-Current Income of Individual Debtor(s) (December 2007), available at http://www.uscourts.gov/rules/BK_Forms_1207/B_006I_1207f.pdf, and Official Form B6J, Schedule I-Current Expenditures of Individual Debtor(s) (December 2007), available at http://www.uscourts.gov/rules/BK_Forms_1207/B_006J_1207f.pdf; See also, 11 U.S.C. § 521(a)(1)(B)(ii) (2006 & 2008 Supp.).

652. 11 U.S.C. § 707(a)(2)(A)(ii)-(iv) and (B) (2006 & 2008 Supp.).

653. 11 U.S.C. § 707(b)(2)(D) (2006 & 2008 Supp.). The term "means testing" is used in this subparagraph to refer generally to calculations for the determination of bankruptcy abuse.

654. 11 U.S.C. § 707(b)(2)(D). "[T]he court may not dismiss or convert a case based on any form of means testing, if the debtor is a disabled veteran (as defined in [38 U.S.C. § 3741(1) (2006 & 2008 Supp.)]), and the indebtedness occurred primarily during ... active duty (as defined in [10 U.S.C. § 101(d)(1) (2006 & 2008 Supp.)]); or (ii) performing a homeland defense activity (as defined in section 901(1) of title 32).

655. 11 U.S.C. § 707(b)(7)(A). No judge, United States trustee, ...trustee, or other party in interest may file a motion under paragraph (2) if the current monthly income of the debtor, including a veteran (as that term is defined in section 101 of title 38), and the debtor's spouse combined, as of the date of the order for relief when multiplied by 12, is equal to or less than-(i) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner; (ii) in the case of a debtor in a household of 2,3, or 4 individuals, the *highest* median family income of the applicable State for a family of the same number or *fewer* individuals; or (iii) in the case of a debtor in a household exceeding 4 individuals, the *highest* median family income of the applicable, State for a family of 4 or *fewer* individuals, plus \$575 per month for each individual in excess of 4.

656. 11 U.S.C. § 701(b)(2)(a)(i). In considering ...whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's CMI reduced by the amounts determined under clauses (ii),(iii), and (iv), and multiplied by 60 is not less than the lesser of -(I) 25 percent of the debtor's nonpriority unsecured claims in the case, or \$6,575, whichever is greater; or (II) \$10,950.

657. 11 U.S.C. § 707(b)(2)(A)-(B).

658. 38 U.S.C. § 3741(1) (2006 & 2008 Supp.). (1) The term "disabled veteran" means (A) a veteran who is entitled to compensation under laws administered by the Secretary for a disability rated at 30 percent or more, or (B) a veteran whose discharge or release from active duty was for a disability incurred or aggravated in line of duty.

659. 11 U.S.C. § 707 (b)(2)(D))(i)(I),(II) and (ii)(I),(II) (2006 & 2008 Supp.).

660. 10 U.S.C. § 101(d)(1) (2006 & 2008 Supp.).

661. 32 U.S.C. § 901(1) (2006 & 2008 Supp.).

debtor with current monthly income [CMI]⁶⁶² after deduction of allowable expenses⁶⁶³ that falls below the median for Arkansas.⁶⁶⁴ A debtor who does not qualify for one of the safe harbor provisions may seek to demonstrate special circumstances⁶⁶⁵ to avoid dismissal or conversion for abuse.⁶⁶⁶ The Code delineates examples of special circumstances⁶⁶⁷ such as a serious medical condition or active duty in the Armed Forces.⁶⁶⁸ The U.S. Trustees' Office in the wake of Hurricane Katrina in 2005 issued a press release stating that a natural disaster will be considered a special circumstance.⁶⁶⁹

If a debtor's CMI minus allowable expenses exceeds the median for the state, the court "shall presume abuse exists."⁶⁷⁰ Conversely, if a debtor's CMI is less than the median, the Code's safe harbor provision precludes a motion for abuse⁶⁷¹ under the general abuse provision⁶⁷² based on the means test.⁶⁷³ In Arkansas approximately 90% of debtors filing chapter 7 pass the means test, while the remaining debtors are required to rebut the presumption or face conversion or dismissal.⁶⁷⁴

662. 11 U.S.C. § 101(10A) (2006 & 2008 Supp.). "The term 'current monthly income'- (A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on-(i)the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or (ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section [11 U.S.C. § 521(a)(1)(B)(ii)]; and (B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), or a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but *excludes* benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism."

663. 11 U.S.C. § 707(b)(2)(A)(ii)-(iv) (2006 & 2008 Supp.).

664. State median income figures by family size can be found at the U.S. Trustee's website www.usdoj.gov/ust.

665. 11 U.S.C. § 707(b)(2)(B). Special circumstances, such as a serious medical condition or call to active duty in the Armed Forces may justify additional expenses or adjustments to the CMI.

666. 11 U.S.C. § 707(b)(1) (2006 & 2008 Supp.).

667. Some bankruptcy courts have acknowledged other special circumstances. See *In re Templeton*, 365 B.R. 213 (W.D. Okla. 2007), (considering a post-petition increase in a chapter 7 debtor's student loan payments), but see *In re Ries*, 377 B.R. 777 (Bkrtcy. D. N.H. 2007).

668. 11 U.S.C. § 707(b)(2)(B).

669. See http://www.usdoj.gov/ust/eo/public_affairs/press/docs/pr20051005.htm

670. 11 U.S.C. § 707(b)(2)(A)(i).

671. 11 U.S.C. § 707(b)(7)(A)(i)-(iii) (2006 & 2008 Supp.).

672. 11 U.S.C. § 707(b)(1). [T]he court...may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 ..., if it finds that the granting of relief would be an abuse of the provisions of this chapter.

673. 11 U.S.C. § 707(b)(2)(A).

674. Statistical information for cases filed during the period from June 1, 2008, to May 31, 2009, provided the U.S. Bankruptcy Court Clerk for the Eastern and Western District of Arkansas.

In a joint case the CMI of each spouse is listed. A married debtor with a non-filing spouse includes the income of a non-filing spouse unless the debtor and the non-filing spouse are legally separated or are living apart for reasons other than to evade the provision.⁶⁷⁵ If a debtor's CMI and that of her non-filing spouse, if required, minus the allowed expenses,⁶⁷⁶ is less than the most recent figures for median income for Arkansas,⁶⁷⁷ completion of the means test will not be required because of the safe harbor provision. In short, a chapter 7 debtor under these circumstances will not be subject to a motion to dismiss or convert for abuse based on income,⁶⁷⁸ but will remain subject to the "bad faith" and "totality of the circumstances" tests.⁶⁷⁹

If a debtor's CMI minus the allowed expenses exceeds the median income for Arkansas, and the safe harbor is not otherwise available under the disabled veteran's provision, a debtor must pass the means test to avoid the presumption that abuse exists.⁶⁸⁰ Identification and calculation of the income and expense figures that go into determining application of the safe harbor provision and passing the means test can be somewhat challenging depending on the circumstanc-

es.⁶⁸¹ The basis for the means test is best understood when examined from its inception in 2005 with the original dollar amounts intact, prior to the CPI adjustments that occurred in April 2007.⁶⁸² The test was driven by the notion that a debtor, whose CMI after allowable expenses⁶⁸³ would permit a payment of \$100 per month for 60 months (\$6,000) or payment of 25% of her unsecured nonpriority claims in a chapter 13 plan, should be required to pay at least \$6,000 and up to \$10,000 towards the claims in a chapter 13 plan.⁶⁸⁴ The amounts have changed, but the concept remains the same. That is, that there should be a threshold CMI after expenses at which a debtor should be required to make some payments towards the satisfaction of creditors' claims. If a debtor is unable to pass the means test, the case may then be dismissed or, with a debtor's consent, converted to a chapter 11 or 13 case upon motion of the court, the trustee, or other party in interest.⁶⁸⁵ We will tackle the detailed calculation as we take up the Official Form below.

Lines 1A through 1C of Part I of the means test calculation deal with the issues related to exemption and exclusion under the safe harbor and temporary exclusion provi-

675. 11 U.S.C. § 707(b)(7)(B) (2006 & 2008 Supp.).

676. The allowed expenses are listed in detail in 11 U.S.C. § 707(b)(2).

677. The median family income for Arkansas may be found at <http://www.usdoj.gov/ust/>

678. 11 U.S.C. § 707(b)(7) (A)(i)-(iv).

679. 11 U.S.C. § 707(b)(3)(A)-(B).

680. 11 U.S.C. § 707(b)(2)(A)-(B).

681. An in depth examination of the means test is beyond the scope of this article.

682. 11 U.S.C. § 104 (2006 & 2008 Supp.).

683. The expenses allowed are the amounts determined under 11 U.S.C. § 707(b)(7) (A)(i)-(iv) (2006 & 2008 Supp.).

684. 11 U.S.C. § 701(b)(2)(a)(i) (2006 & 2008 Supp.). In considering ...whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's CMI reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of -(I) 25percent of the debtor's nonpriority unsecured claims in the case, or \$6,575, whichever is greater; or (II) \$10,950.

685. 11 U.S.C. § 707(b)(1). [T]he court...may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 ..., if it finds that the granting of relief would be an abuse of the provisions of this chapter.

sions. The front page of the statement at top right provides boxes to be checked indicating that whether the presumption arises or is temporarily inapplicable. In the event a presumption arises or a debtor fails to indicate whether a presumption arises or is temporarily excluded, the clerk is directed to notify all creditors within 10 days.⁶⁸⁶

Part II is the calculation of monthly income for exclusion based on income. The entries at lines 2-15 require information that tracks the safe harbor provision. A debtor marks one of the four options for marital status and reports average monthly income from all sources derived from the six months prior to filing, ending on the last day of the month prior to filing. For joint cases a debtor's entries are made to column A and a spouse's entries to column B. Entries are made for gross income from employment, business operations, unearned income, pension and retirement income. The income calculation also includes amounts paid by another person or entity, on a regular basis, for the household expenses of a debtor or dependent of the debtor including child support.⁶⁸⁷ Unemployment compensation other than from Social Security is listed in the columns, and⁶⁸⁸ line 10 of Part II specifies the source and amount of income from all other sources.⁶⁸⁹

After subtotals for each column are made and tallied at line 12, the monthly income figures are annualized at line 13 of Part III and compared to the appropriate median family income according to state and household size.⁶⁹⁰ If the amount shown as a debtor's annualized CMI is less than the applicable median family income, the box on page one is checked to show the presumption does not arise. Parts IV through VII are not completed, and the verification at Part VIII is signed under penalty of perjury.

If the amount of the annualized CMI is more than the applicable median family income, the box is checked to show the presumption arises, and creditors are notified by the clerk. Though the presumption of abuse arises, a debtor may rebut the presumption by passing the means test.

Part IV is the calculation of CMI for the means test and begins with reentry of line 12. A marital adjustment in CMI in joint cases is made reducing CMI by the amount of a spouse's income that was not paid on a regular basis for the household expenses. Part V, Subpart A, allows for the deduction of expenses according to IRS standards⁶⁹¹ for food, clothing, health care, housing, utilities, transportation and other items.⁶⁹² The entries in Subpart B are for additional ac-

686. FED. R. BANKR. P. 5008; FED. R. BANKR. P. 2002(f).

687. Alimony and separate maintenance payments paid by a debtor's spouse are not included, if included in Column B, however, all other payments of alimony or separate maintenance are included.

688. Unemployment compensation claimed to be a benefit under the Social Security Act is listed at Part II, Item 9.

689. The following are excluded from income: Social Security benefits, payments received as a victim of a war crime, crime against humanity, or as a victim or international or domestic terrorism.

690. The website for the U.S. Trustee is provided on the form at Item 14. See <http://www.usdoj.gov/ust/>

691. 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006 & 2008 Supp.).

692. Some of the other expense deductions included are: taxes, court-ordered payments, childcare, life insurance, employment related education, education for physically or mentally challenged child and telecommunications services other than a basic home phone or cell phone service.

tual living expense deductions not included in Part V and include health insurance, disability insurance, and health savings account expenses.⁶⁹³ Deductions may be taken for expenses related to caring for an immediate family member or household member who is elderly, chronically ill, or disabled,⁶⁹⁴ and for educational expenses for dependent children less than eighteen.⁶⁹⁵ Other expense deductions are also allowed.⁶⁹⁶ Documentation may be required to claim the expense deduction⁶⁹⁷ and should be available to support the claim of the expense deduction in each instance.

Subpart C provides for the remaining allowable deductions from CMI. For a chapter 7 debtor these expenses fall into three basic categories: (1) deductions for debt payments including future payments on secured claims,⁶⁹⁸ (2) payments made to "cure" a default to retain possession of property necessary for the support of a debtor or debtor's dependents,⁶⁹⁹ and (3) payments on prepetition priority claims including taxes, child support and alimony claims.⁷⁰⁰ The total

of all deductions allowed under the means test are recorded at Subpart D, and Part VI is used to determine whether the presumption of abuse is rebutted.⁷⁰¹

The total of all monthly expense deductions allowed are subtracted from the CMI figure as adjusted to determine the debtor's monthly disposable income. That amount is multiplied by 60 and entered on line 51 for comparison to the various amounts listed on line 52.⁷⁰² There are three possibilities: (1) if the amount is less than \$6,575 the presumption of abuse does not arise,⁷⁰³ (2) if the amount is more than \$10,950, the presumption of abuse arises, or (3) if the amount is at least \$6,575, but not more than \$10,950, the remainder of Part VI, lines 53-55 must be completed.⁷⁰⁴ These amounts are for 2009 and will be readjusted on April 1, 2010.

To ascertain whether the presumption arises in this circumstance the debtor's total non-priority unsecured debt is multiplied by 25% and compared to debtor's 60-month disposable income from line 51.⁷⁰⁵ If the

693. 11 U.S.C. § 707(b)(2)(A)(ii)(I).

694. 11 U.S.C. § 707(b)(2)(A)(ii)(II).

695. 11 U.S.C. § 707(b)(2)(A)(ii)(IV).

696. 11 U.S.C. § 707(b)(2)(A)(ii)(V) (2006 & 2008 Supp.). Home energy costs in excess of the IRS allowance, and 11 U.S.C. § 707(b)(2)(A)(ii)(I). Expenses incurred to maintain the safety of the debtor and family of the debtor from family violence as identified under section 309 of the Family Violence Prevention and Services Act or other applicable federal law.

697. 11 U.S.C. § 707(b)(2)(A)(ii)(IV), (V).

698. 11 U.S.C. § 707(b)(2)(A)(iii)(I).

699. 11 U.S.C. § 707(b)(2)(A)(iii)(II).

700. 11 U.S.C. § 707(b)(2)(A)(iv) (2006 & 2008 Supp.).

701. 11 U.S.C. § 707(b)(2).

702. 11 U.S.C. § 707(b)(2)(A)(i).

703. 11 U.S.C. § 707(b)(2)(A)(i)(I).

704. 11 U.S.C. § 707(b)(2)(A)(i)(II).

705. 11 U.S.C. § 707(b)(2)(A)(i)(I) (2006 & 2008 Supp.).

amount on line 51 is less than 25% of debtor's unsecured priority debt, the presumption does not arise.⁷⁰⁶ If the amount on line 51 is equal to or greater than the 25% of debtor's unsecured priority debt, the presumption arises.⁷⁰⁷ Once a final calculation is made, the appropriate box on page one is checked, and the verification at Part VIII is signed under penalty of perjury.

Part VII grants one final opportunity for the debtor to rebut the presumption by itemizing expenses not otherwise listed that are required for her health and welfare or that of her family. These expenses may inform the court and trustee on the abuse issue but do not change the presumption shown on the face of the statement. If the presumption does not arise or is rebutted, the court will only consider whether a debtor filed in bad faith,⁷⁰⁸ or whether the totality of the circumstances of the debtor's financial situation demonstrates abuse.⁷⁰⁹ The court may order counsel for a debtor to reimburse the trustee for all reasonable costs in prosecuting a motion for abuse, including attorneys' fees, costs and a civil penalty,⁷¹⁰ if the court grants the motion and finds counsel's chapter 7 filing violated rule 9011.⁷¹¹ Likewise, the court may award counsel for a party in interest, other than a trustee or United States Trustee, reasonable attorneys' fees and costs in contesting a motion for abuse, if the court denies the motion and finds the position of the movant violated rule 9011.⁷¹²

E. Filing the Petition and Schedules

Once the petition, schedules, and all other documents are prepared for filing, a review of all information is in order. After all changes are made and final, a best practice is to have the debtor read and sign a pre-filing checklist regarding the consequences of omitting particular types of information, *e.g.*, concealed assets or favored creditors. The checklist serves as counsel's documentation that the client has been fully informed prior to filing. The checklist may prompt questions or further changes in filing documents.

Procedural Form 200 provides a checklist for lists, schedules, statements and fees. A full packet for filing should include: a filing fee in the amount of \$299; an original of the VOLUNTARY PETITION with appropriate exhibits including EXHIBIT D; an APPLICATION TO PAY IN INSTALLMENTS or an APPLICATION TO WAIVE FEES, if appropriate; SCHEDULES A THROUGH J; DECLARATION CONCERNING DEBTOR'S SCHEDULES; OFFICIAL FORM 7: STATEMENT OF FINANCIAL AFFAIRS; OFFICIAL FORM 8: CHAPTER 7 INDIVIDUAL DEBTOR'S STATEMENT OF INTENTIONS CONCERNING SECURED PROPERTY; DISCLOSURE OF COMPENSATION OF ATTORNEY FOR DEBTOR; NOTICE TO CONSUMER DEBTOR UNDER § 342(B) OF THE BANKRUPTCY CODE; VERIFICATION OF CREDITOR MATRIX; CREDITOR MATRIX; STATEMENT OF SOCIAL SECURITY NUMBER OR INDIVIDUAL TAXPAYER IDENTIFICATION NUMBER (ITIN), AND CHAPTER 7 STATEMENT OF CURRENT MONTHLY INCOME AND MEANS-TEST CALCULATION.

706. 11 U.S.C. § 707(b)(2)(A)(i).

707. 11 U.S.C. § 707(b)(2)(A)(i)(I).

708. 11 U.S.C. § 707(b)(3)(A).

709. 11 U.S.C. § 707(b)(3)(B).

710. 11 U.S.C. § 707(b)(4)(A) (2006 & 2008 Supp.).

711. 11 U.S.C. § 707(b)(4)(B).

712. 11 U.S.C. § 707(b)(5)(A).

At a minimum a debtor signs eight times including the third page of the Voluntary Petition stating under oath that the information in the petition is true and that debtor understands the other bankruptcy options; the Declaration Concerning Debtor's Schedules, the oath at the end of the Form 7: Statement of Financial Affairs; Official Form 8: Chapter 7 Individual Debtor's Statement of Intentions; the Notice to consumer debtor under § 342(b) of the bankruptcy code the Verification of Creditor Matrix; Official Form 21: Statement of Social Security number; and Official Form 22A: Chapter 7 Statement of Current Monthly Income and Means Test Calculation. An application for payment of filing fees in installments or an application for filing fee waiver also requires a signature.

Counsel must sign at least four times including the petition at exhibit B on page 2, on page 3 beneath debtor's signature, on the certification of the Disclosure of Compensation of Attorney for Debtor(s), and on the Certificate of Attorney on page 2 of the Notice to Consumer Debtor(s) Under § 342(b) of the Bankruptcy Code.

After all pages are initialed⁷¹³ and signed, print copies should be furnished for each

debtor before filing electronically. Signatures in the filing may be marked with "/s/" followed by the name of signing party or scanned to show the original signature. Once the case has been filed online using ECF, the electronic court filing system or ECF will generate an electronic receipt for payment of the filing fee.

The date and time of the first meeting of creditors⁷¹⁴ can be checked online through PACER or by calling the U.S. Bankruptcy Court Clerk. A print notice will also be mailed by the Bankruptcy Notification Center. The clerk's office sends electronic notices of the date and time of the first meeting of Creditors and notice of all subsequent document filings. These notices are e-mailed to the attorney of record and any other persons authorized by counsel to receive them as well as to all other interested parties.

F. After the Case is Filed

A debtor's duties are set out in the Code,⁷¹⁵ Rules⁷¹⁶ and in other federal law.⁷¹⁷ In addition to the petition, schedules and statements required for the filing,⁷¹⁸ a debtor is required upon request in writing by interested party

713. A best practice is to have a debtor initial each page so that there is no question that no pages were omitted or altered during the filing process.

714. 11 U.S.C. § 341 (2006 & 2008 Supp.). This meeting is often called the 341 meeting after the section of the Code which requires it.

715. 11 U.S.C. § 521 (2006 & 2008 Supp.).

716. FED. R. BANKR. P. 4002.

717. 28 U.S.C. § 528(f) (2006 & 2008 Supp.).

718. 11 U.S.C. § 521(i)(1). "If a debtor fails to file all the information required under § 521(a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day."

to provide copies⁷¹⁹ of payment advices⁷²⁰ received within 60 days of filing the petition.⁷²¹ A debtor's most recent tax return is to be made available⁷²² to the trustee no later than 7 days prior to the first meeting of creditors.⁷²³

The debtor's other obligations include (1) cooperation with the trustee⁷²⁴ and surrender of any recorded information, if required, (2) appearing at the first meeting of creditors and producing payment advices⁷²⁵ and financial records,⁷²⁶ and, if required, appearing at the discharge hearing, (3) performing the intentions stated regarding secured property, (4) filing a certificate of completion of instruction in personal financial management and a copy of the debt repayment plan, if any, (5) continuing to perform the obligations of an ERISA administrator unless the trustee is serving as administrator, (6) filing a record of any interest in an "education individual retirement account,"⁷²⁷ (7) furnishing on

request to any party in interest copies of tax returns or transcripts for each tax year the case is pending and for amended returns filed for the three years prior to commencement of the case, (8) submitting copies of amended returns while the case is pending, and (9) informing the trustee in writings to the location or real property in which debtor has an interest and the name and address of every person holding money or property subject to debtor's withdrawal.⁷²⁸

Post filing representation includes (1) assisting the client in the completion of her duties and keeping the client informed of the status of the case, (2) contacting and negotiating with creditors, (3) preparing the client for the first meeting of creditors, (4) monitoring all deadlines in the case, (5) assisting the client in obtaining instruction in personal financial management from an approved agency, (6) obtaining a debtor's Certificate of Debtor

719. In the event a debtor is unemployed or has not received evidence of earnings from her employer, a statement may be submitted attesting to the facts precluding submission of the requested information.

720. 11 U.S.C. § 521 (a)(1)(B)(iv) (2006 & 2008 Supp.). The term "payment advices" is not defined in the Code or BLACK'S LAW DICTIONARY. The accepted meaning includes communications that evidence income, *e.g.*, pay stub.

721. Filing Additional Documents. Debtors who file a voluntary petition under chapter 7 or 13 are not required to file with the Court the additional documents required by 11 U.S.C. § 521(a)(1)(B)(iv) (regarding payment advices or evidence of payment, (v) (regarding a statement of the amount of monthly net income), and (vi) (regarding a statement disclosing reasonably anticipated increases in income or expenditures). Upon request in writing made by the United States Trustee, the case Trustee, the Chapter 13 Trustee, or any other party in interest, a bankruptcy Debtor shall provide copies of the excluded documents to the requesting party without further order of this Court or formal discovery request, unless the production of these documents is excused by protective order. Failure to provide the documents required by this paragraph may be grounds for dismissal after a notice and a hearing.

722. Some trustees require that copies of the tax return be furnished in print and will not accept electronic formats.

723. 11 U.S.C. § 521 (e)(2)(A).

724. 28 U.S.C. § 528(f) (2006 & 2008 Supp.). The obligation to cooperate applies to a trustee, United States trustee or an auditor alike.

725. FED. R. BANKR. P. 4002(b)(2)(A).

726. FED. R. BANKR. P. 4002(b)(2)(B).

727. 26 U.S.C. § 530(b)(1) (2006 & 2008 Supp.).

728. FED. R. BANKR. P. 4002(a)(3).

Education and filing it with the Debtor's Certification of Completion of Postpetition Instructional Course Concerning Personal Financial Management within 45 days of the first meeting, (7) assisting the debtor with reaffirmation, redemption and repurchase, (8) filing amendments, (9) filing motions to avoid liens that impair exemptions, (10) adversary proceedings, and (11) opposing objections to exemptions and (12) opposing objections to dischargeability and discharge.

1. Certification of Completion of Postpetition Instructional Course Concerning Personal Financial Management Course (Official Form 23)

In addition to the certificate from a credit counseling agency submitted at or within 15 days of filing,⁷²⁹ an individual debtor or each spouse in a joint case must file with the court a form⁷³⁰ certifying completion of a financial management counseling course from an approved⁷³¹ financial management instruction provider.⁷³² The certification must be filed with the Certificate of Debtor Education issued by the approved agency⁷³³ within 45

days after the date first set for the meeting of creditors.⁷³⁴

This requirement is inapplicable to a debtor whom the court determines, after notice and hearing, is unable to complete the requirement because of incapacity, disability, or active military duty in a military combat zone.⁷³⁵ A debtor's failure to meet the requirement or establish that the requirement does not apply is a basis for denial of the discharge.⁷³⁶

2. Contacting and Negotiating with Creditors

Generally speaking, the most immediate problem the debtor faces prior to filing is relief from the collection efforts of creditors. Collection efforts may take the form of phone calls, threatening invoices, dunning letters or lawsuits. Halting creditor action can be difficult because a debtor is without the protection of the automatic stay.⁷³⁷ The Fair Debt Collection Practices Act (FDCPA) affords relief against certain actions of third party collection agents, including attorneys, but does not regulate first party creditors.⁷³⁸ The rules of ethics mandate that creditors'

729. FED. R. BANKR. P. 1007(c).

730. Official Form B23, Debtor's Certification of Completion of Postpetition Instructional Course Concerning Personal Financial Management (December 2008), *available at* http://www.uscourts.gov/rules/BK_Forms_Pending_2008/B_023_1208.pdf

731. 11 U.S.C. § 111 (2006 & 2008 Supp.).

732. FED. R. BANKR. P. 1007 (b)(7).

733. See http://www.usdoj.gov/ust/eo/bapcpa/ccde/cc_approved.htm#AR for approved agency providers for Arkansas.

734. FED. R. BANKR. P. 1007(c).

735. 11 U.S.C. § 727(a)(11) (2006 & 2008 Supp.); 11 U.S.C. § 109(h)(4) (2006 & 2008 Supp.).

736. 11 U.S.C. § 727(a)(11) (2006 & Supp. 2008).

737. 11 U.S.C. § 362(a) (2006 & Supp. 2008).

738. 15 U.S.C. § 1692, et seq. (2006 & Supp. 2008).

counsel deal exclusively with debtor's counsel once on notice that a debtor is represented.⁷³⁹ A best practice is to demand that creditors cease contact with a debtor and direct any future communications to counsel.

After the petition is filed, notice to courts and creditors should stop all collection activity barred by the stay.⁷⁴⁰ Creditors who willfully violate the stay may be held liable for actual damages, including costs and attorneys fees, and in appropriate cases, punitive damages.⁷⁴¹

3. Communications with the Client

One of the most frequently violated canons of ethics is the requirement that an attorney communicate with the client and keep the client reasonably informed about the status of a legal matter.⁷⁴² At a minimum, the case file should reflect letters and memoranda regarding (1) the client's consent to representation, (2) the limitations on the representation, (3) counsel's explanation of the client's options on all critical issues, (4) the client's decisions on critical issues, and (5) the client's grant of authority to act upon her decision. A best practice is to copy a client with all correspon-

dence, pleadings and other documents on a real time basis so that a client can review the documents and refer to them during communications about them.

4. Preparing the Client for the First Meeting of Creditors

The client's first face to face meeting with the trustee and the creditors as a group occurs no fewer than 20 days and no more than 40 days after the petition is filed.⁷⁴³ The first meeting of creditors is very similar to a deposition. It is an examination under oath under penalty of perjury.⁷⁴⁴ The client may be anxious about being examined. A review of how the meeting is conducted and the questions that will be asked will help allay the client's fears.⁷⁴⁵ Preparation should be done as for a deposition. The client should be instructed to pause before responding to any question that is not routine so that counsel has the opportunity to instruct whether to answer, if a question calls for a response that could be incriminating. Counsel's obligation to advise a client of her Fifth Amendment rights is a continuing obligation whether or not counsel has agreed to undertake representation in a criminal proceeding.⁷⁴⁶

739. ARK. RULES OF PROF'L CONDUCT R. 4.2. In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

740. 11 U.S.C. § 362(a) (2006 & Supp. 2008).

741. 11 U.S.C. § 362(k) (2006 & Supp. 2008).

742. ARK. RULES OF PROF'L CONDUCT R. 1.4(a).

743. FED. R. BANKR. P. 2003(a).

744. FED. R. BANKR. P. 2003(b)(1).

745. See Handbook for Chapter 7 Trustees (includes updated 341 questions effective March 1, 2006).http://www.usdoj.gov/ust/eo/private_trustee/library/chapter07/docs/7handbook1008/Ch7_Handbook.pdf

746. ARK. RULES OF PROF'L CONDUCT R. 3.1 and Comment [1]-[3].

5. Filing Amendments FRBP 1009

It is not unusual for the client to omit information from the original petition and schedules. When this happens the newly discovered information must be added as quickly as possible by amendment.⁷⁴⁷ For the most part, amendments to the original petition and schedules are prepared and filed in much the same manner as the originals. There is no filing fee for an amendment except to add or delete creditors or when the case is reopened.⁷⁴⁸ Reopening fees may be waived on motion for good cause shown.⁷⁴⁹

6. Motion Practice

Motions in bankruptcy practice are governed by the Rules.⁷⁵⁰ Except when an application is authorized by the rules,⁷⁵¹ all requests for an order shall be made by a written motion, except that oral motions may be made during a hearing. Each motion shall state the grounds and the relief or order

sought. Every motion, except those that may be considered ex parte, shall be served on the trustee and on the entities specified by the rules or as the court directs. Reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought.⁷⁵² The original motion shall be served on all interested parties,⁷⁵³ as are pleadings and documents served after the motion.⁷⁵⁴ Unless the court otherwise directs, certain Part VII rules apply to contested motions.⁷⁵⁵ Testimony may be taken as in an adversary proceeding or perpetuated by deposition.⁷⁵⁶ Local rules and orders of the court control whether a motion hearing will be an evidentiary hearing at which witnesses may testify.⁷⁵⁷ The issuance of subpoenas to compel the attendance of witnesses is authorized.⁷⁵⁸

Litigation of certain matters is governed by different rules. Dismissal or conversion of a case;⁷⁵⁹ requests for relief from the automatic stay and the use of cash collateral;⁷⁶⁰ avoidance of a lien;⁷⁶¹ transfer of exempt property;⁷⁶² and assumption or rejection of

747. See FED. R. BANKR. P. 1009.

748. For reopening see 11 U.S.C. § 350 (2006 & Supp. 2008) and FED. R. BANKR. P. 5010. The filing fees may change. An updated fee schedule can be found at <http://www.arb.uscourts.gov/CourtInfo/newfees.htm>.

749. 28 U.S.C. § 1930(f)(2) (2006 & Supp. 2008).

750. FED. R. BANKR. P. 9013 is derived from Rule FED. R. CIV. P. 5(a) and 7(b)(1).

751. For example an application under FED. R. BANKR. P. 2014 for approval of the employment of a professional.

752. FED. R. BANKR. P. 9014(a).

753. FED. R. BANKR. P. P. 7004.

754. FED. R. BANKR. P. 9014(b) and FED. R. CIV. P. 5(b).

755. FED. R. BANKR. P. 9014(c) provides for the application of 7009, 7017, 7012, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-56, 7064, 7069, and 7071.

756. FED. R. BANKR. P. 7027.

757. FED. R. BANKR. P. 9014(e) authorizes the specific procedure to be handled by local rules.

758. FED. R. BANKR. P. 9016. See also FED. R. BANKR. P. 7030 for deposition on oral exam; FED. R. BANKR. P. 7031 for deposition on written questions; and FED. R. BANKR. P. 2004 for compelling attendance for examination and production of documentary evidence.

759. FED. R. BANKR. P. 1017(d).

760. FED. R. BANKR. P. 4001(a).

761. 11 U.S.C. § 522(f) (2006 & Supp. 2008).

762. FED. R. BANKR. P. 4003(d).

executory contracts or unexpired leases⁷⁶³ are governed by Part IX.⁷⁶⁴ When the rules of Part VII⁷⁶⁵ are applicable to a “contested matter,” reference in those rules to “adversary proceedings” should be read as a reference to a “contested matter.”⁷⁶⁶

7. Adversary Proceedings (AP)

An adversary proceeding (or AP) in bankruptcy practice is governed by Part VII of the Rules.⁷⁶⁷ Ten types of actions are classified as “adversary proceedings.”⁷⁶⁸ An adversary proceeding is a term of art used to describe a legal action by two or more parties in the context of the bankruptcy and is similar to a civil lawsuit.

Whenever the Federal Rules of Bankruptcy Procedure [Rules] make reference to the Federal Rules of Civil Procedure [FRCP] and incorporate those Rules by reference certain words take on new meanings. The words “action” and “civil action” when lifted from the FRCP into the Rules mean “an adversary proceeding or, when appropriate, a contested petition, or proceedings to vacate an order for relief or to determine any other contested matter.”⁷⁶⁹ References by the Rules to the FRCP that incorporate rules and make them applicable in bankruptcy proceedings shall be read as a reference to the FRCP *as modified* by Part VII of the Rules.⁷⁷⁰

Notice of appearance must be filed by an attorney appearing for a party in a case under the Code. The notice of appearance and/or substitution of counsel must list the attorney’s name, address and telephone number. The notice may also list an e-mail address for electronic notices. All pleadings and papers shall be signed by at least one attorney of record in the attorney’s individual name.⁷⁷¹

The attorney’s signature certifies she has made a reasonable inquiry and that (1) the pleading or paper is not for any improper purpose; (2) the contentions are warranted; (3) the allegations are likely to have evidentiary support; and (4) the denials of factual contentions are warranted on the evidence, or reasonably based on a lack of information or belief.⁷⁷² Sanctions may be imposed for the violation of the rule.⁷⁷³

Preparation and filing of an adversary proceeding differ from the preparation and filing of a bankruptcy petition and schedules. AP pleadings are usually drafted as any other pleading, and may not be a pleading that can be generated by document assembly software. Once the pleading is converted to PDF, an AP Cover sheet from the court’s website is attached to the Complaint as an attachment and submitted with the filing. Adobe Acrobat is needed to complete the AP cover sheet that is presently in use. Any exhibits must be converted to PDF format.

763. FED. R. BANKR. P. 6006(a).

764. FED. R. BANKR. P. 9014.

765. FED. R. BANKR. P. 7001 et seq.

766. FED. R. BANKR. P. 9002(1).

767. FED. R. BANKR. P. 7001-7087.

768. FED. R. BANKR. P. 7001.

769. See FED. R. BANKR. P. 9002(1).

770. See FED. R. BANKR. P. 7002.

771. See FED. R. BANKR. P. 9011(a).

772. FED. R. BANKR. P. 9011(b).

773. FED. R. BANKR. P. 9011(c).

After the complaint is filed the clerk will issue a Summons.⁷⁷⁴ The Summons has a "File Memo" that is completed using Adobe Acrobat. Completion and return of the File Memo certifies the manner in which service of process is being made.⁷⁷⁵ The completed File Memo is filed with the Court and print copies of the Summons, Complaint and AP Cover sheet are mailed to all parties entitled to notice.⁷⁷⁶

Delivery of the summons and complaint is to be made within 10 days after the summons is issued.⁷⁷⁷ If service is authorized by any form of mail, the summons and complaint shall be deposited in the mail within 10 days after the summons is issued. If a summons is not timely delivered or mailed, another summons shall be issued and served.⁷⁷⁸

An AP complaint has a shelf life of 120 days.⁷⁷⁹ Failure to obtain service or an extension within the 120 day period may result in dismissal of the unserved party without prejudice.⁷⁸⁰ An extension of the time for service beyond 120 days may be obtained for good cause shown.⁷⁸¹ Service in a foreign country is not covered by this provision.⁷⁸²

8. Opposing Objections to Exemptions, Discharge and Dischargeability

Objections to exemptions, discharge or dischargeability of a debt must be made by the trustee or a creditor within the deadlines stated in the Notice of the First Meeting of Creditors unless extended by the court for cause prior to the expiration of the deadline.⁷⁸³ Some objections can be met by an amendment to the pleadings. In other cases an objection will need to be met with a responsive pleading, even though a responsive pleading may not be required by the court.⁷⁸⁴ Generally an objection will allege either that the value of the claimed property exceeds the amount of the exemption allowed,⁷⁸⁵ or that the property claimed is of a type that does not fall within the exemption category claimed.⁷⁸⁶

Responses to objections are pled as a contested matter. Pleadings are filed electronically and normally served by regular mail with a certificate of service.⁷⁸⁷ Service by mail should always include the trustee, whether the trustee is the objecting party or

774. FED. R. BANKR. P. 7004(a).

775. FED. R. BANKR. P. 7004 (a)(1).

776. FED. R. BANKR. P. 7004(b).

777. FED. R. BANKR. P. 7004(e) authorizes service of process under FED. R. CIV. P. 4(e); (g); (h)(1); (i); or (j)2.

778. FED. R. BANKR. P. 7004(e).

779. FED. R. BANKR. P. 7004(a) by incorporation of FED. R. CIV. P. 4(m).

780. FED. R. BANKR. P. 7004(a) by incorporation of FED. R. CIV. P. 4(m).

781. FED. R. BANKR. P. 7004(a) by incorporation of FED. R. CIV. P. 4(m).

782. Neither FED. R. BANKR. P. 7004(e) nor FED. R. CIV. P. 4(m) apply to service in a foreign country.

783. FED. R. BANKR. P. 4003(b), 4004(a) and 4007(c).

784. FED. R. BANKR. P. 9014(a).

785. For example, the trustee may object to exemption of a motor vehicle because the auto pricing guides place the value of the vehicle at an amount that causes debtor's interest to exceed \$3,225, which is the dollar amount of the exemption allowed by 11 U.S.C. § 522(d)(2) (2006 & Supp. 2008).

786. For instance, the trustee may object to the debtor's exemption of a motor vehicle as a "tool of the trade" under 11 U.S.C. § 522(d)(6) (2006 & Supp. 2008) on the ground it does not fit within the definition of "tools of the trade."

787. FED. R. BANKR. P. 9014(b) Service. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004. Any paper served after the motion shall be served in the manner provided by FED. R. CIV. P. 5(b).

not. The court will provide notice of shortened response deadlines and hearing dates.

Valuation issues in the context of a hearing cannot be handled in the same manner as in preparation of the petition because references to online resources will not necessarily be admissible or suffice to carry the burden of proof required to rebut the evidence presented in support of the objection. A lay witness or expert witness who is qualified to testify as to the value of the item in question is best. In some situations it may be possible to exempt the particular item under another category of exemption by amending Schedule C.⁷⁸⁸

Normally exemptions must be claimed within 15 days of filing.⁷⁸⁹ If the debtor fails to file within that time, a dependent of the debtor may file the list of exemptions within 30 days.⁷⁹⁰ Late amendments to claimed exemptions will stand unless an objection to timeliness is raised.⁷⁹¹

Common examples of objections to discharge are the failure to keep adequate financial records and fraudulent conduct.⁷⁹² These objections can be used to block the discharge of the debtor as to all debts or to block the dischargeability of a particular debt. These objections generally do not relate to the nature or type of debt. These objections are made because of the conduct of the debtor. Responding to these objections and defending against them requires a careful review of the allegations and any related financial documents. If the facts and the law reveal that the debtor may not be able to defend successfully against a particular objection, an attempt to negotiate a resolution of the matter should be considered by the debtor.

Objections to discharge are not normally made under 11 U.S.C. 523. Most of the types of debt listed in 523(a) are defined as “nondischargeable.” Therefore, a creditor with a debt of the type listed in 523(a) usually need not take any action to avoid the discharge of these debts, even though these debts are listed in the schedules. It is taken for granted that debts listed as “Exceptions to Discharge” will not be included in or covered by the Court’s discharge order. This can result in some confusion when there is no clear agreement as to the nature of a specific debt and may require a motion or AP to clarify the nature of the debt.

Conclusion

Bankruptcy in its simplest form is a complex subject matter. The various fact patterns that may emerge create an endless number of possibilities, as individual as the debtors themselves. While the representation of debtors in providing bankruptcy assistance is challenging, it offers an opportunity to help the poorest in our society, to provide access to justice, and to give those who are in financial distress a chance for a fresh start.

Matters beyond those covered by this article will no doubt arise in the course of bankruptcy representation. The possibilities are too numerous to deal with here, but hopefully this examination of the subject will give a sufficient overview to enable the uninitiated to join the fray and stay out of harm’s way in the representation of chapter 7 consumer debtors.

788. The “wildcard exemption” at 11 U.S.C. § 522(d)(5) (2006 & Supp. 2008) permits “any” property to be exempted subject to the dollar value caps.

789. FED. R. BANKR. P. 1007(c).

790. FED. R. BANKR. P. 4003(a).

791. 11 U.S.C. § 522(l); FED. R. BANKR. P. 4003(b); *Taylor v. Freeland and Kronz*, 503 U.S. 638 (1992).

792. 11 U.S.C. § 727 (2006 & Supp. 2008).