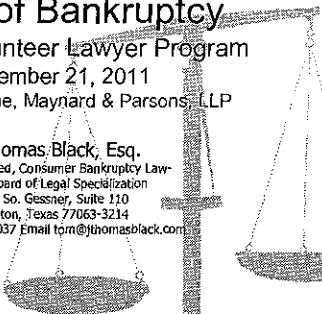


2nd Monday 2:30
staff only party

ABC's of Bankruptcy
Houston Volunteer Lawyer Program
September 21, 2011
Thanks to Beirne, Maynard & Parsons, LLP

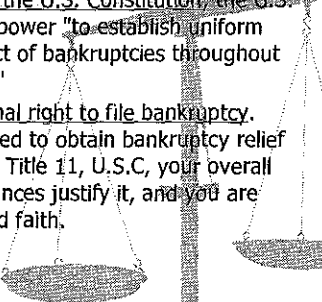
J. Thomas Black, Esq.
Board Certified, Consumer Bankruptcy Law
Texas Board of Legal Specialization
2600 So. Gessner, Suite 110
Houston, Texas 77063-3214
Tel. 713-772-8037 Email tom@jthomasblack.com





Basis for Law

- Article I, Sec. 8 of the U.S. Constitution, the U.S. Congress has the power "to establish uniform laws on the subject of bankruptcies throughout the United States."
- But no constitutional right to file bankruptcy. You are only entitled to obtain bankruptcy relief if you comply with Title 11, U.S.C, your overall financial circumstances justify it, and you are honest and in good faith.



Sources of Law

- Jurisdiction: 28 USC. 1334- Bankruptcy Court is adjunct of US District Court; District Court has original & exclusive jurisdiction; cases referred to bankruptcy courts.
- Venue: 28 USC 1408- district in which principal place of business, or principal assets in the US for last 180 days, or greater part of 180 days
- Statute: Title 11 United States Code (substantially amended by B.A.P.C.P.A. 2005)
- Rules: Fed Rules of Bankruptcy Procedure; Fed Rules of Evidence; Bankruptcy Local Rules.

can stop referral

not just residence

Are You A "Debt Relief Agency"?

§101(12A)

- Any person who provides any bankruptcy assistance to an assisted person in return for payment of money or anything else of value.
- Does not include officer, director, employee or agent of a Debt Relief Agent.
- Does not include 501(c)(3)'s, creditors, banks, credit unions or authors.

BAPCPA

Volunteer cases are exempt.

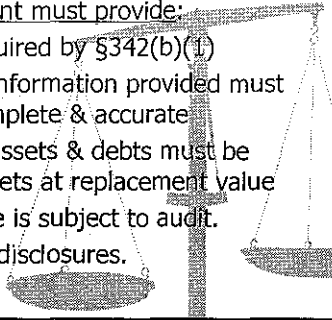
Debt Relief Agent Restrictions

§526

- Creates federal private right of action against..gulp...you and me for
- Failing to perform any promised service
- Making untrue or misleading statements
- Misrepresenting services to be provided, or benefits or risks of the services.
- Advising assisted person to incur debt in contemplation of a case
- Damages: Any fees & charges, actual damages, reasonable attorney fees and costs

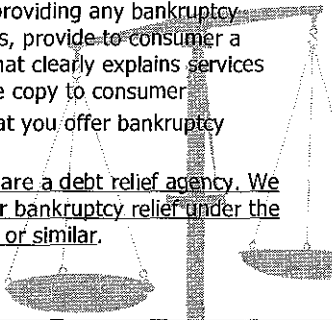
Debt Relief Agent Required Disclosures §527

- Debt Relief Agent must provide:
- Disclosures required by §342(b)(1)
- Notice that all information provided must be truthful, complete & accurate
- Notice that all assets & debts must be listed, §506 assets at replacement value
- Notice that case is subject to audit.
- Other required disclosures.



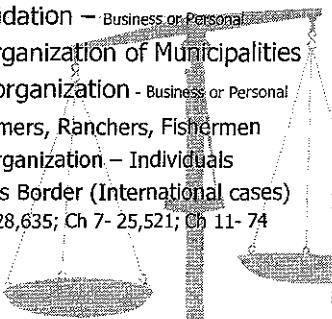
Debt Relief Agent - Other Requirements §528

- Within 5 days of providing any bankruptcy assistance services, provide to consumer a written contract that clearly explains services and fees, and give copy to consumer
- Disclose in ads that you offer bankruptcy services
- State in ads: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code" or similar.



Operative Chapters

- Chapter 7- Liquidation – Business or Personal
- Chapter 9- Reorganization of Municipalities
- Chapter 11- Reorganization - Business or Personal
- Chapter 12- Farmers, Ranchers, Fishermen
- Chapter 13 – Reorganization – Individuals
- Chapter 15 – Cross Border (International cases)
- Texas 2010- Ch 13- 28,635; Ch 7- 25,521; Ch 11- 74



Chapter 7 Liquidation §701 et seq.

- For consumers, Ch 7 is a trade of "non-exempt assets" for discharge of debts.
- Corp's & LLC's: have no exemptions; if file Ch 7, they go out of business & assets sold; proceeds distributed to creditors (after admin claims).
- Corp's & LLC's receive no discharge in 7.
- Trustee is liquidating agent of property of estate, under supervision of bankruptcy court; paid commission on property collected.

Chapter 7 Commencement of Case- Debtor's Duties §521

- Case commenced by filing petition, other required documents. Can file jointly with spouse.
- Includes list of creditors, schedules, Statement of Financial Affairs, income & expenses, copies of 60 days' payment advices, etc.
- "Automatic dismissal" if required documents not filed within 45 days
- Attorney fee and source must be disclosed; court can regulate fee & fee splitting or forwarding fees prohibited. §329
- Suggestion: get detailed credit reports to be sure to list ALL CREDITORS. www.creditfonet.com

can file individually, all
CP comes in as bankruptcy estate
LSP, SMCP & J MCP

public record too, tax liens & such

Property of Estate §541

- Filing of bankruptcy creates an estate similar to probate estate.
- Generally includes all the Debtor's property and rights to property, wherever located.
- Includes property Debtor becomes entitled to inherit within 180 days after filing, or receive by way of divorce settlement or life insurance proceeds within 180 days.

TX can exempt

Chapter 7 Trustee §§701-704

- No "hide the ball" in bankruptcy; Debtor must make full disclosure of assets, debts, and financial condition or risk denial of discharge, and federal prison for bankruptcy fraud or perjury. 18 USC 152, 157.
- Trustee has "strong arm" powers to reverse fraudulent & preferential transfers to relatives, insiders of business, creditors. 11 USC 544.
- 4 yr Statute of Limitations on transfers; 1 yr for payments to relatives. 11 USC 547, 548.

even repaying a loan

Exemptions

- Exempt property is property that cannot be taken by Trustee.
- Choice of law in Texas; federal or state exemptions- choice depends on facts
- Must live in Texas ≥ 2 yrs to be eligible to choose TX exemptions; must live here 1215 days to exempt $> \$146.5K$ in homestead equity (possible doubling for joint filers).

3yrs
4 mo

- must choose same set of exemptions if filed jointly
- if new TX resident, issues:
www.exemptions@express.com

Texas Exemptions

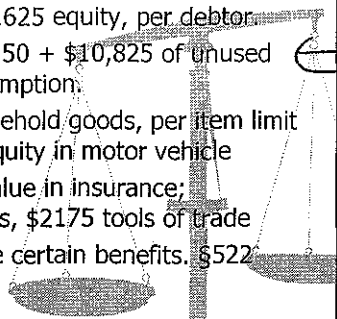
- Amazingly generous vis a vis most states
- Homestead: 10 acres urban, 100/200 a, rural, and all improvements.
- Equity in personal property \$30K single/ \$60K family, listed items in TPC §42.001.
- Also retirement plans, annuities, whole life insurance, life insurance proceeds, etc
- IRA's may not be exempt if inherited, unsettled
- But no cash, cash equivalents like stocks or bonds. Didn't need in prairie days; GIT.

spend down bank accounts
Tax refunds

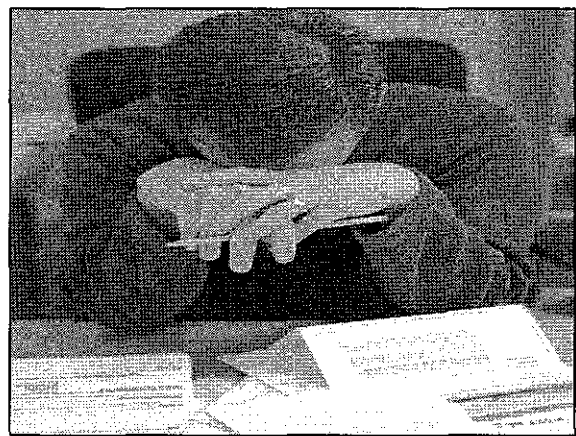
compare the two

Federal Exemptions §522

- Homestead \$21625 equity, per debtor
- "Wild card" \$1150 + \$10,825 of unused homestead exemption
- \$11525 in household goods, per item limit \$525; \$3450 equity in motor vehicle
- \$11525 cash value in insurance; retirement plans, \$2175 tools of trade
- Right to receive certain benefits. §522

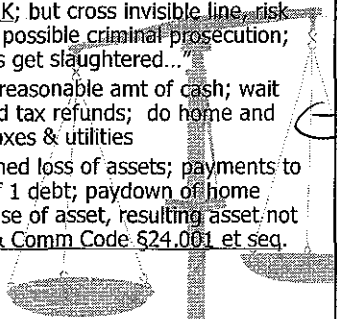


extra equity in anything



Pre-Bankruptcy Planning

- Limited amount OK; but cross invisible line, risk loss of discharge, possible criminal prosecution; "pigs get fat, hogs get slaughtered..."
- OK- Spend down reasonable amt of cash; wait to receive & spend tax refunds; do home and car repairs, pay taxes & utilities
- Not OK- Unexplained loss of assets; payments to relatives or payoff 1 debt; paydown of home mortgage; purchase of asset, resulting asset not exempt Tex Bus & Comm Code §24.001 et seq.



roofs, not large improvements
home repairs

lips bank statements repp.
can catch up, can't prepay

Not all Debts Discharged §523

- Recent income taxes, all "trust fund" taxes
- Debts incurred through fraud or false financial statement, embezzlement, larceny, willful & malicious injury
- Omitted debts (poss exp. "no asset" cases), student loans unless undue hardship, child support (DSO), debts in divorce decree
- Debt for death or personal injury while DUI
- Restitution; debts to pay nondisch taxes, etc.
- Non-exclusive list; see §523.

business employee taxes

credit cards charged up.

non-filing spouse can force bankruptcy client to pay amount right to pursue spouse for anything non-filing has to pay. Paper judgment

if paid taxes via credit card then not only chap 7

Are Income Taxes Discharged?

- Must be >3 yrs old measured from due date of tax return, including exemptions
- Returns must've been filed 2 yrs before bankruptcy
- Must be assessed >240 days prior to filing
- Cannot be false or fraudulent tax return
- Cannot have willfully attempted to evade or defeat tax
- Tax liens are I.R.S. property right; not cancelled must await 10 yr Statute of Limitations or settle

substitute for returns don't count

Are Student Loans Discharged? Not usually...sorry!

- Must show "undue hardship": (1) Debtor cannot maintain minimum standard of living if forced to repay student loan(s)
- (2) Debtor's situation likely to last most or all of repayment period;
- (3) Debtor has made good faith effort to repay the student loan.
- New argument: Debtor didn't first try IBR or ICR, other mitigation options

Grant loans

problematic

Not All Debtors Discharged §727

- Entities (non-individuals; entities can get discharge in Chapter 11 cases)
- Debtor transfers or conceals property, within year prior or during case
- Debtor makes false oath, bribes, or withholds documents or records, fails to explain loss of assets, fail to obey court orders
- Prior discharge in Ch 7 or 11 case filed within last 8 yrs, or Ch 12 or 13 filed within last 6 yrs.
- Non-exclusive list; see §727.

The Automatic Stay §362

- Primary protection of Debtors in bankruptcy; prohibits most collection actions, calls, letters, suits, foreclosures, repossessions; limited exceptions
- Effective immediately upon filing of case.
- Duration: unless court grants relief from stay, lasts until end of case, either by discharge, dismissal or closing. Stay of act against property lasts until prop no longer "property of estate."
- Creditor violates stay: Private right of action, actual damages, costs, attorney fees, possible punitive damages §362(k)

→ strict liability

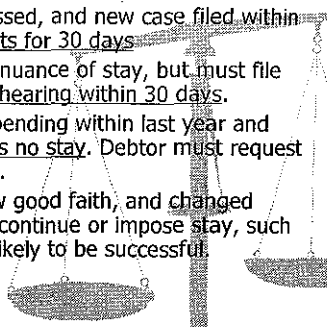
Motion for Relief from Stay §362(d)

- Creditors can seek relief from the stay to foreclose or repossess their collateral, if they lack "adequate protection" or if the Debtor has no equity in the property, and the property is not necessary for the Debtor's reorganization.
- Creditors can seek relief from stay for other acts, such as to continue with a divorce or other suit, but must show cause.
- Monitor cases with PACER; file documents with CM/ECF.
- Programs to prepare cases and capture & save case documents; IGN & BkPro, www.legal-pro.com

I got notices

Duration of Stay For "Serial" Filers

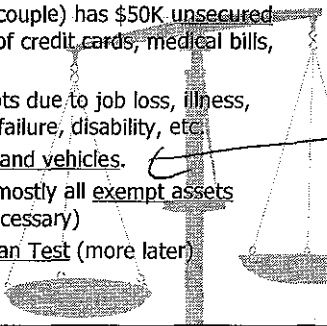
- If one case dismissed, and new case filed within 1 yr, stay only lasts for 30 days.
- Can request continuance of stay, but must file motion and have hearing within 30 days.
- 2 or more cases pending within last year and dismissed, there is no stay. Debtor must request imposition of stay.
- Debtor must show good faith, and changed circumstances to continue or impose stay, such that new case is likely to be successful.





Typical Chapter 7 Fact Scenario

- Debtor (single or couple) has \$50K unsecured debts, consisting of credit cards, medical bills, payday loans, etc.
- Unable to pay debts due to job loss, illness, divorce, business failure, disability, etc.
- Current on house and vehicles.
- Debtor has all or mostly all exempt assets (spend down if necessary)
- Debtor passes Mean Test (more later)



if they are going to keep them otherwise repo likely

Always Review Options with Potential Debtors

- Do nothing; just don't pay ("jump in lake" or "pound sand" option). Possible suit defense, run Statute of Limitations 4 yrs.
- Debt Management Plan (pay 100% plus interest plus fees) Money Management
- Debt Settlement (requires charge offs, lump sums, fees, 1099's)
- Chapter 7 - Discharge Unsecured debts
- Chapter 13 - Reorganize

short SOL not a lot will sue. debt buyers don't always have all documents so can defeat

Debt Settlement Services Regulated- Many Operate Illegally

- In Texas, debt management or debt pooling services are regulated by the Texas Debtor Assistance Law, Chapter 394 of Texas Finance Code.
<http://www.statutes.legis.state.tx.us/Docs/FI/htm/FI.394.htm> .
- These services must be registered with the TX Consumer Credit Commissioner to operate legally. Registered services are listed <http://www.occc.state.tx.us/pages/searches.html> .
- Also recent FTC Telemarketing Rule.

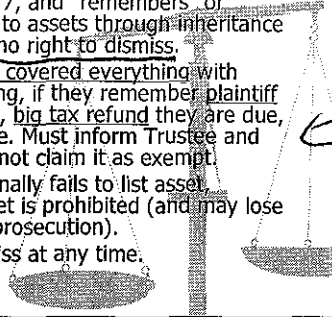
typically not debt settlement

Chapter 7 - Can Seek Waiver of Filing Fee – HVLP or Special Case

- If very low income Debtor (less than 150% of poverty guidelines), and cannot afford to pay \$299 filing fee, even in installments, can file Application for Waiver of Filing Fee in Chapter 7 only. Use Official Form- B3B.
- If assisting Debtor, you both may have to attend hearing to prove up Debtor's inability to pay.
- It's not likely to be granted, if you have been paid any significant attorney fees.
- If denied, court may set up installments for Debtor to pay filing fee.

Chapter 7 – No Right to Dismiss

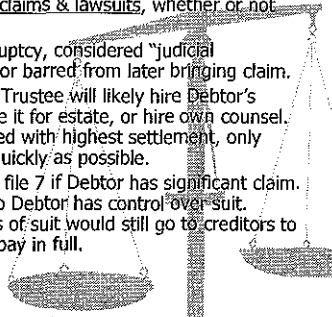
- If Debtor files Ch 7, and “remembers” or becomes entitled to assets through inheritance within 180 days, no right to dismiss.
- Be sure you have covered everything with Debtor before filing, if they remember plaintiff lawsuit they have, big tax refund they are due, etc., likely too late. Must inform Trustee and turn it over if cannot claim it as exempt.
- If Debtor intentionally fails to list asset, exemption of asset is prohibited (and may lose discharge & risk prosecution).
- Chapter 13- dismiss at any time.



any potential claims

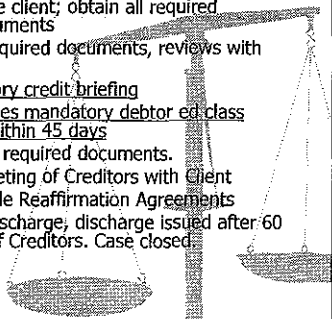
Chapter 7- “Contingent & Unliquidated Claims” Must Be Listed or Lose Them

- Debtor MUST list all claims & lawsuits, whether or not filed.
- If not listed in bankruptcy, considered “judicial admission” and Debtor barred from later bringing claim.
- If Debtor lists claim, Trustee will likely hire Debtor’s attorney to prosecute it for estate, or hire own counsel. Trustee not concerned with highest settlement, only paying creditors as quickly as possible.
- May be better not to file 7 if Debtor has significant claim. If anything file 13, so Debtor has control over suit. Nonexempt proceeds of suit would still go to creditors to extent necessary to pay in full.



Typical “No Asset” Chapter 7 Timeline

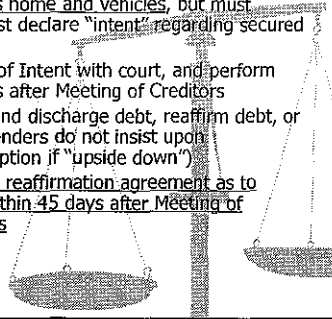
- Interview prospective client; obtain all required information and documents
- Attorney prepares required documents, reviews with Client
- Client takes mandatory credit briefing
- Case Filed. Client takes mandatory debtor ed class anytime thereafter within 45 days
- Provide Trustee with required documents.
- Attorney attends Meeting of Creditors with Client
- Negotiate sign and file Reaffirmation Agreements
- If no objections to discharge, discharge issued after 60 days after Meeting of Creditors. Case closed



3-4 months

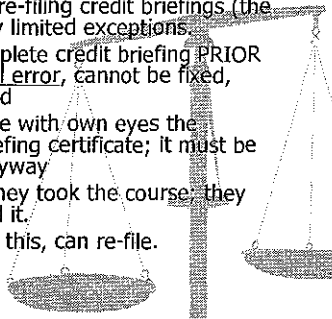
Typical Chapter 7 Case §521- Statement of Intent re Secured Debts

- Client typically keeps home and vehicles, but must continue to pay; must declare "intent" regarding secured debts
- Must file Statement of Intent with court, and perform intent within 45 days after Meeting of Creditors
- Options: surrender and discharge debt, reaffirm debt, or redeem. Mortgage lenders do not insist upon reaffirmation (best option if "upside down")
- Must redeem or sign reaffirmation agreement as to personal property within 45 days after Meeting of Creditors, or stay lifts



Warning- This Cannot Be Fixed §§109(h) & 521(b)(1)

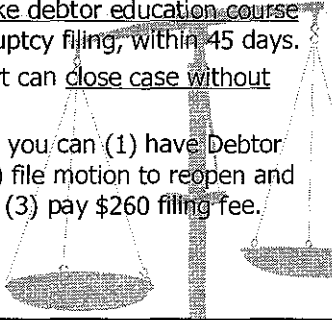
- BAPCPA mandates pre-filing credit briefings (the "ticket in." Extremely limited exceptions.
- If Client doesn't complete credit briefing PRIOR to filing of case- fatal error, cannot be fixed, case will be dismissed
- Always check and see with own eyes the completed credit briefing certificate; it must be filed with petition anyway
- Clients will tell you they took the course; they didn't, or just started it.
- If case dismissed for this, can re-file.



disabled + incompetent

Debtor Education Course – The "Ticket Out" §727(a)(11)

- Debtor must take debtor education course after the bankruptcy filing, within 45 days.
- Otherwise, court can close case without discharge.
- If this happens, you can (1) have Debtor take course; (2) file motion to reopen and enter discharge (3) pay \$260 filing fee.



Chapter 7 - Means Test §707(b)(2)

- Ch 7 cases are subject to dismissal for "abuse" if income exceeds certain thresholds: (presumption of abuse arises)
- "Means test" requires filing of B22A form
- >50% Consumer debt, debtor subject to means test; otherwise not.
- Mortgage is consumer debt; taxes, business debts, tort debts not.
- U.S. Trustee's Office is bankruptcy "watchdog" oversees bankruptcy system and is who you deal with in disputes over the means test in Chapter 7 cases.

if >50% is consumer debt

to IAO.

Chapter 7 - Means Test §707(b)(2)

- Means Test looks at last 6 full calendar months of income prior to filing of bankruptcy.
- All sources of income count, except Social Security income. Loans are not income. Sales of property are.
- If income less than median income for debtor's locale and family size, passes. Texas 2011- 1 person \$38294; couple \$55178; 3 people \$56445; 4- \$65477
- If income more than median, go on and complete balance of form; may yet pass. Most do; if not, consider if special circumstances. If not, consider planning opportunities with client and/or review Chapter 13 option with Client.

all other gov't benefits count

aberration of 6 mo. but since lost job, etc.

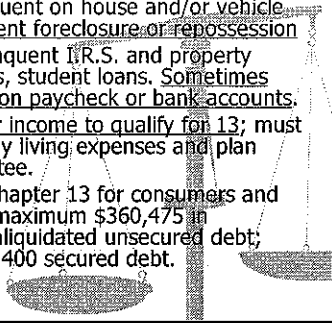
disability/life/health insurance

Chapter 7 - Means Test §707(b)(3)

- Even if pass actual Means Test, a motion to dismiss a Ch 7 can be brought under 707(b)(3), which allows court to consider if Debtor filed petition in bad faith, or if the totality of the circumstances indicates that case is abusive.
- If U.S. Trustee's Office brings motion to dismiss for abuse, you can litigate it, convert to Ch 13, or allow case to be dismissed. No absolute right to convert to Ch 13.

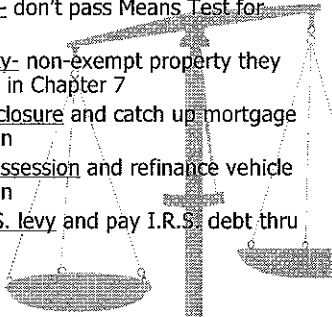
Chapter 13- Typical Fact Scenario

- Consumers delinquent on house and/or vehicle payments; imminent foreclosure or repossession
- Also possibly delinquent I.R.S. and property taxes, credit cards, student loans. Sometimes facing I.R.S. levy on paycheck or bank accounts.
- Must have regular income to qualify for 13; must be sufficient to pay living expenses and plan payments to Trustee.
- Eligibility limits: Chapter 13 for consumers and sole proprietors; maximum \$360,475 in noncontingent, unliquidated unsecured debt; maximum \$1,081,400 secured debt.



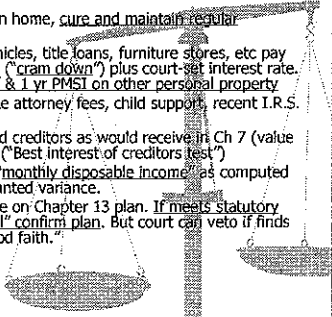
Chapter 13- Typical Reasons to File in lieu of Chapter 7

- Too much income- don't pass Means Test for Chapter 7
- Too much property- non-exempt property they don't want to lose in Chapter 7
- Need to stop foreclosure and catch up mortgage through Ch 13 plan
- Need to stop repossession and refinance vehicle through Ch 13 plan
- Need to stop I.R.S. levy and pay I.R.S. debt thru plan



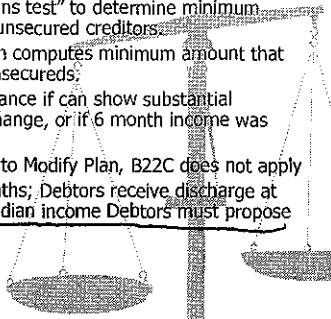
Contents of Chapter 13 Plan §§1322, 1325

- If delinquent mortgage on home, cure and maintain regular payments through plan.
- Secured creditors like vehicles, title loans, furniture stores, etc pay at least value of property ("cram down") plus court-set interest rate. Exception: "910 vehicles" & 1 yr PMSI on other personal property
- Pay any priority debts, like attorney fees, child support, recent I.R.S. taxes
- Pay as much to unsecured creditors as would receive in Ch 7 (value of non-exempt property- "Best interest of creditors test")
- Pay unsecured creditors "monthly disposable income" as computed by Form B22C, unless granted variance.
- Creditors don't get to vote on Chapter 13 plan. If meets statutory requirements, court "shall" confirm plan. But court can veto if finds plan not proposed in "good faith."



Chapter 13- Compute "Disposable Income" with Form B22C

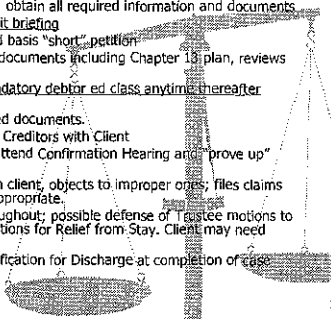
- Ch 13 has own "means test" to determine minimum amount to repay to unsecured creditors.
- Complete B22C; form computes minimum amount that must be repaid to unsecureds.
- Debtors allowed variance if can show substantial certainty of future change, or if 6 month income was atypical.
- Can later file Motion to Modify Plan, B22C does not apply
- Plan lasts 36-60 months; Debtors receive discharge at completion. Over median income Debtors must propose 60 month plan.



can convert to Chap 7 if already repaying & something changes

Typical Chapter 13 Timeline

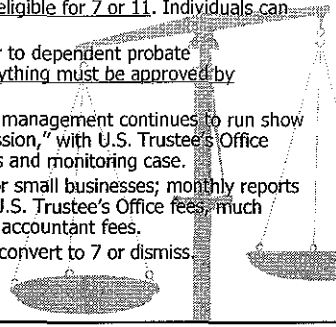
- Interview prospective client; obtain all required information and documents
- Client takes mandatory credit briefing
- Often must file on expedited basis "short" petition
- Attorney prepares required documents including Chapter 13 plan, reviews with Client and files
- Case Filed. Client takes mandatory debtor ed class anytime thereafter within 45 days
- Provide Trustee with required documents.
- Attorney attends Meeting of Creditors with Client
- If objections, may need to attend Confirmation Hearing and "prove up" confirmation
- Attorney reviews claims with client, objects to improper ones; files claims for certain creditors when appropriate.
- Attorney monitors case throughout; possible defense of Trustee motions to dismiss for nonpayment, Motions for Relief from Stay. Client may need Motions to Modify Plan.
- Attorney files Motion & Certification for Discharge at completion of case





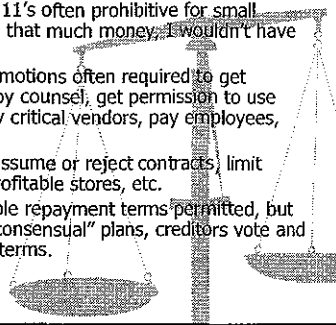
Chapter 11 Reorganization

- Corp's & LLC's only eligible for 7 or 11. Individuals can file 11, but unusual.
- Chapter 11 is similar to dependent probate administration; everything must be approved by Bankruptcy Judge.
- No trustee, debtor's management continues to run show as "Debtor in Possession," with U.S. Trustee's Office conducting meetings and monitoring case.
- Costly & unwieldy for small businesses; monthly reports required, quarterly U.S. Trustee's Office fees, much higher attorney and accountant fees.
- Many don't survive, convert to 7 or dismiss.



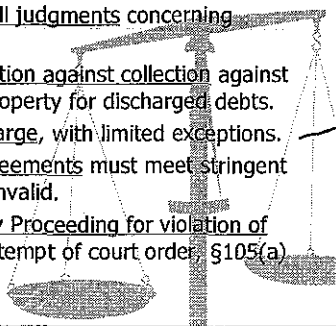
Chapter 11 Continued

- Retainer fees for Ch 11's often prohibitive for small businesses. "If I had that much money, I wouldn't have to file bankruptcy."
- Batch of "First Day" motions often required to get permission to: employ counsel, get permission to use "cash collateral," pay critical vendors, pay employees, etc.
- But, have ability to assume or reject contracts; limit damages, close unprofitable stores, etc.
- Longer & more flexible repayment terms permitted, but most Chapter 11's "consensual" plans, creditors vote and agree to negotiated terms.



Discharge §§524, 727, 1141, 1328

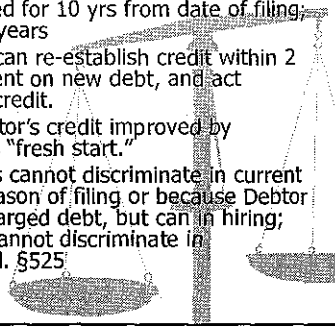
- Discharge voids all judgments concerning discharged debts.
- Permanent injunction against collection against Debtor or their property for discharged debts.
- Community discharge, with limited exceptions.
- Reaffirmation Agreements must meet stringent requirements or invalid.
- Can file Adversary Proceeding for violation of discharge, as contempt of court order. §105(a)



→ discharges SMP even if only 1 spouse files

Effects on Credit

- Chapter 7 reported for 10 yrs from date of filing; Chapter 13 for 7 years
- Most consumers can re-establish credit within 2 years if stay current on new debt, and act responsibly with credit.
- Not unusual, Debtor's credit improved by bankruptcy, gives "fresh start."
- Private employers cannot discriminate in current job "solely" by reason of filing or because Debtor did not pay discharged debt, but can in hiring; Govt employers cannot discriminate in employment at all. §525



Resources

- U.S. Courts information about bankruptcy <http://www.uscourts.gov/FederalCourts/Bankruptcy.aspx>
- U.S. Courts Official Bankruptcy Forms <http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx>
- U.S. Courts Official Form to seek Waiver of Chapter 7 Filing Fee http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_1207/P_003a_1_297a.pdf
- U.S. Trustee's Office Median Income Table http://www.justice.gov/ust/eo/bapcpa/20110315/bci_data/median_income_table.htm
- U.S. Trustee's Office position on B22A: http://www.justice.gov/ust/eo/bapcpa/docs/ch7_line_by_line.pdf
- U.S. Trustee's Office position on B22C: http://www.justice.gov/ust/eo/bapcpa/docs/chapter13_analysis.pdf
- U.S. District Court Website, SD Texas; All local rules and forms <http://www.tds.uscourts.gov>
- Texas Constitution and Statutes <http://www.statutes.legis.state.tx.us/>
- National Assn. of Consumer Bankruptcy Attorneys <http://www.nacba.org/>
- Houston Assn. of Consumer Bankruptcy Attorneys <http://www.hacba.org/>
- *Consumer Bankruptcy Law and Practice*, 9th Edition, by Henry J. Sommer. Published by National Consumer Law Center, www.consumerlaw.org.

