

ABCs of Representing Consumers in Bankruptcy Cases

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EXAMINATION OF BANKRUPTCY LAWS AND PROCEDURES
RELATING TO CHAPTER 7 CONSUMER BANKRUPTCIES

1) Bankruptcy Code

- a) Title 11 of the United States Code is referred to as the Bankruptcy Code. The Code consists of odd numbered chapters, except for Chapter 12. Chapters 1, 3 and 5 contain provisions which may apply to all types of bankruptcy and the remaining chapters are outlined below:

Chapter 7	Liquidation
Chapter 9	Adjustment of Debts of a Municipality
Chapter 11	Reorganization
Chapter 12	Adjustment of Debts of a Family Farmer or Fisherman with Regular Income
Chapter 13	Adjustment of Debts of an Individual with Regular Income Wage Earners
Chapter 15	Ancillary and Other Cross-Border Cases

b) Chapter 7 Eligibility:

- i) Who may be a debtor?: 1) A Debtor must reside in the U.S., or 2) be a person with a domicile, place of business or property in the U.S., or 3) be a municipality. 11 U.S.C. § 109(a).
- ii) A “person,” including individuals, partnerships and corporations may file Chapter 7. 11 U.S.C. § 109.
- iii) A person is not eligible for a discharge under Chapter 7 if the Debtor has received a discharge in a previous Chapter 7 case filed less than eight years prior to the subsequent case being filed.
- iv) A person is eligible for discharge under Chapter 7, even if it is filed less than six years after a prior Chapter 13 and if the prior Chapter 13 paid 70-100% of the allowed unsecured claims or upon court approval. 11 U.S.C. § 727(a)(9).

Procedural Law

- b) The Federal Rules of Bankruptcy Procedure (“FRBP”) and forms govern procedure in cases under Title 11 of the U.S. Code.

Section Nos.	
1001	Scope of Rules
1002-1021	Commencement of Case; Proceedings Relating to Petition and Order for Relief
2001-2020	Officers and Administration; Notices; Meetings; Examinations; Elections; Attorneys and Accountants
3001-3022	Claims and Distribution to Creditors and Equity Interest Holders; Plans
4001-4008	The Debtor; Duties and Benefits
5001-5012	Courts and Clerks
6001-6011	Collection and Liquidation of the Estate

7001-7087	Adversary Proceedings
8001-8020	Appeals to District Court or Bankruptcy Appellate Panel
9001-9037	General Provisions

c) Local Rules – check the district website

d) Official Forms

i) Petition and Schedules

- Voluntary Petition (revised 1/08)
- Exhibit A to Voluntary Petition
- Exhibit C to Voluntary Petition
- Exhibit D to Voluntary Petition (revised 12/08)
- Summary of Schedules (revised 12/07)
- Schedule A (revised 12/07)
- Schedule B (revised 12/07)
- Schedule C (revised 12/07)
- Schedule D (revised 12/07)
- Schedule E (revised 12/07)
- Schedule F (revised 12/07)
- Schedule G (revised 12/07)
- Schedule H (revised 12/07)
- Schedule I (revised 12/07)
- Schedule J (revised 12/07)
- Declaration Concerning Debtor's Schedules (revised 12/07)

ii) Forms

- Statement of Financial Affairs (revised 12/07)
- Debtor's Statement of Intention (revised 12/08)
- Statement of Social Security Number(s) (revised 12/07)
- Statement of current monthly income and means-test calculation (Chapter 7) (revised 12/08)
- Debtor's Certification of Completion of Financial Management Course (revised 12/08)
- Notice to Individual Consumer Debtor (revised 12/08)
- Disclosure of Compensation of Attorney for Debtor (revised 1/04)
- Payment Advices Cover Sheet

THE BANKRUPTCY PROCEEDINGS

1) Pre-filing considerations

The initial conference is an opportunity to gather the facts necessary for determining the appropriateness of the filing and the information needed for filing. This information is then entered into the bankruptcy petition, schedules and forms for review by the attorney.

A system for collecting the information assists in the accuracy of the filed documents.

a) Initial conference

i) Client folder includes:

- (1) Fee Agreement
 - (2) Initial Client Interview Checklist
 - (3) Client Information Checklist
 - (a) Client should be advised to contact the office upon completion of the client information checklist.
 - (4) List of Credit Counselors from UST website.
 - (5) Business Cards
 - ii) At the initial meeting, there is a fine line between getting too much information and overwhelming the client and not getting enough information in order to assess the appropriate time to file (activities which trigger preferences or fraudulent conveyances).
 - iii) A determination should be made during the discussion of the fee agreement regarding the amount of fees required prior to filing.
 - iv) If you use a bankruptcy software program, it is important to begin entering the information so you can track what information still needs to be received by the client and what requires further clarification.
 - v) Utilize early assessment, proper follow-up, and organization.
 - b) Follow-up meeting
 - i) Upon contact from the client, schedule an appointment to review the materials or have the materials forwarded to the paralegal for review, prior to a follow-up meeting.
 - ii) Confirm receipt of signed Fee Agreement.
 - iii) Confirm proper steps have been followed within your law firm's conflict check system. However, review the conflicts information to confirm all applicable parties are named within search. One extra minute or two to confirm conflicts analysis may save potential problems in the future.
 - iv) Organize materials received by the client following the schedules on your outline.
 - v) Do your homework.
 - (1) State court access systems for lawsuits and judgments.
 - (2) Real estate access websites for real estate ownership and mortgage recording information.
 - (3) Helpful Hint: Keep a separate folder of the various passwords established for Pacer, Tapestry, Landshark, Westlaw and Lexis.
- 2) Preparation of Petition

- a) Name of Debtor: Include full name of Debtor, including Jr., Sr., or III designations within the name filed.
- b) Other names: Include name of sole proprietorship within last eight years (i.e., trade name)
- c) Social Security Number: only include last 4 digits as the records filed are public documents. If your office is using a bankruptcy software program, insert the entire social security number and the program should mask all but the last four digits.
- d) Check appropriate box for “Nature of Debts.” This should be consistent with documents provided by the client and coordinate with information provided on Schedules D, E and F.
- e) Prior Bankruptcy: If the client has not provided a copy of its Discharge of Debtor and Final Decree, check Pacer for prior bankruptcy action information.
- f) Exhibit D – It is important that if this is a joint petition, each spouse must complete and sign a separate Exhibit D. In addition, the actual Certificate of Counseling must be filed separately.
- g) Signatures – The attorney should review the petition and schedules with the client prior to filing. The attorney must sign the section entitled Exhibit B. 11 U.S.C. § 342(b).
- h) The attorney must also sign on page 3 of the Petition which confirms that the “attorney has no knowledge after an inquiry that the information in the schedules is incorrect.” The attorney should spend time with the client, prior to obtaining signatures, to carefully review the schedules.

3) List of Creditors

The mailing matrix must be filed at the time of filing the petition. The Clerk’s office uses the matrix to send notice to creditors and other interested parties. If your firm does not use a bankruptcy software package, which would automatically generate this page, then consult the local court rules regarding format.

4) Preparation of Schedules, Forms and Statement of Financial Affairs

- a) Schedule A – Real Property
 - i) Note: Include legal description in Western District cases. Show the fair market value of the property and list the source of the value.
 - ii) Do not reduce the value by costs of sale.
 - iii) List amount of secured claim. This amount will be linked to Schedule D if using a bankruptcy software program.
- b) Schedule B – Personal Property
 - i) Review list of every type of property with the client.
 - ii) Documents that may be of assistance in preparing the list include retirement statements, tax returns, life insurance declaration sheets, bank account statements, loan applications, credit card statements, possible refunds noted on tax returns, home owner’s insurance policies with riders listing jewelry, furs, etc.

- iii) Assets are to be valued at their current value as of the date of filing.
 - iv) If the debtor does not own a particular asset listed on Schedule B, place an “x” by none. Do not leave any asset classification blank. Also, an asset should not be listed as none, even if the asset has nominal value.
 - v) If the debtor wishes to be creative by placing lawn equipment or tools under “Machinery, fixtures, equipment and supplies used in business,” to allow those items to be exempted in Schedule C, it may open up the door for the Trustee to review income and tax returns.
 - vi) Full disclosure is required.
- c) Schedule C – Exemptions
- i) Debtors may elect state or federal exemptions. A legal analysis of the federal or state exemption is usually reviewed by the attorney after you have completed a draft of the schedules.
 - ii) Prior to filing, do your math. Even if you utilize a bankruptcy software program, some exemptions may double when filing jointly when it is not proper to do so.
 - iii) Corporations cannot claim exemptions and therefore do not file Schedule C.
- d) Schedule D – Creditors Holding Secured Claims
- i) Obtain the supporting documents from the client.
 - ii) Confirm that the lien has been properly perfected.
 - iii) The value of the property should match the property listed in the schedules.
 - iv) If the debtor no longer owns the asset that was the collateral, then list the creditor on Schedule F.
 - v) The recording information for all mortgages and liens on personal property should be listed. Western District Local Rule 1007-1-2.
- e) Schedule E – Creditors Holding Unsecured Priority Claims
- i) Types of Priority Claims include: domestic support obligations or certain taxes and other debts owed to governmental units.
 - ii) List name of ex-spouse or parent/entity that receives child support.
 - iii) If you utilize a bankruptcy software program, every creditor listed on Schedules D, E and F will be included in the mailing matrix to receive Notice of Bankruptcy. The bankruptcy management software used by the Clerk, usually includes the Internal Revenue Service and the State Department of Revenue, but you may want to consider listing both agencies as a safety precaution.
- f) Schedule F – Creditors Holding Unsecured Priority Claims

- i) List all creditors including a complete address and at least the last four digits of the account number. If there is a co-debtor, check the box next to the named creditor and include the person or company on Schedule H.
 - ii) If applicable, check the box for contingent, unliquidated or disputed. Do not overlook this area.
 - iii) List approximate date when the debt was incurred and if the debt is business or personal debt.
 - iv) All unsatisfied judgments in the lawsuit should be included on Schedule F unless there is real estate equity to which a docketed judgment can attach.
 - v) List ex-spouses and partners, both personal and business who may be co-debtors.
 - vi) If using a bankruptcy software package, the entry of unsecured creditors is made much easier, especially for those debts which have a co-debtor or where additional notice to another party is necessary.
- g) Schedule G – Executory Contracts
- i) Types of executory contracts may include an apartment lease, vehicle lease and time share interests. Review time share documents carefully, as the debtor’s interest in a time share may be included in Schedule A.
- h) Schedule H – Co-Debtors
- i) Types of co-debtors may include guarantors, co-signers, debtor’s former spouse or perhaps a minor child. Do not disclose the minor’s name and consult the instructions on this schedule on how to properly identify a minor.
- i) Schedule I – Current Income of Individual Debtors and Schedule J – Current Expenditures of Individual Debtor
- i) The schedules should include current income and expenses.
 - ii) The Trustee and the Office of the U.S. Trustee will cross-check this information with the data contained in the Debtor’s tax returns, schedules and statement of financial affairs.
 - iii) If regular income from operating a business is noted on the form, attach a detailed statement. If this is not provided, the Trustee may not conclude the Creditors’ Meeting.
 - iv) Provide explanation of increases or decreases anticipated by Debtor.
- j) Form 22A - Statement of current monthly income and means-test calculation
- i) File with the Petition. If not filed within 45 days of petition date, the case may be automatically dismissed. In addition, failure to file will cause Trustee to continue the § 341 meeting.
 - ii) Be consistent with the information provided on the petition.
 - iii) If debts are not primarily consumer debts, check the appropriate box on the form and verification section. However, be prepared to provide documentation of non-consumer debt.

- iv) Look back six months (ending with the last day of the month before month of filing). While it may be initially easier to rely on the Debtor's comments as to income, look at the documents yourself.
 - k) Statement of Financial Affairs
 - i) The Debtor needs to respond to each question carefully and completely. Review this document carefully to make sure it coincides with information on Schedules. A member of your office will obtain the information and complete Question 9 regarding statement of fees paid.
 - ii) Pending lawsuits should be listed and should also be reflected on correct schedule.
 - iii) If bank accounts were closed, indicate how was the money distributed.
 - iv) If assets were sold, note accordingly and make sure the client understands the terms "preference" and "fraudulent transfers." These discussions usually occur at the initial meeting by the attorney, so read initial meeting notes and communicate with your attorney if you find anything to red flag.
 - l) Miscellaneous documents to be filed include:
 - i) Debtor's Statement of Intention – must be filed within 30 days of filing of the petition and needs to address all debts secured by property. It is best to file the statement of intention with the Petition, if possible.
 - ii) Declaration Concerning Debtor's Schedules.
 - iii) Declaration re: Electronic Filing. Mail the original to the court for filing.
 - iv) Statement of Social-Security Number or Individual Taxpayer-Identification Number.
 - v) Certificate of Debtor Education – must be completed and filed prior to receipt of discharge.
 - vi) Notice to Consumer Debtors under § 342(b) of the Bankruptcy Code.
 - vii) Disclosure of Compensation of Attorney for Debtor. Again check for consistency that it coincides with information on fee agreement and Statement of Financial Affairs, number 9. This document must be filed within 15 days of the Order for relief.
 - m) Amendments
 - i) When amending Schedule D, E or F to add a creditor, file a complete amended schedule, a revised mailing matrix and a signed Declaration Sheet. The fee is \$26 with no cap on number of creditors added.
 - ii) When filing an amended Schedule B, you may need to also amend Schedule C, Amended Summary of Schedules, Statistical Summary of Certain Liabilities and a signed Declaration Sheet.
- 5) Motion for Relief and Abandonment

Immediately upon the filing of a bankruptcy petition, an automatic stay is put into place against efforts to collect prepetition debts, or to obtain or control debtor's property. 11 U.S.C. § 362(a). This means that the creditor cannot commence or continue a lawsuit, enforce a judgment, or perfect or enforce a lien. There are a certain number of actions barred by the automatic stay, the most common of which are criminal enforcement actions, certain family law matters and actions by governmental units. 11 U.S.C. § 362(b).

A creditor may file a Motion for Relief from Automatic Stay and Abandonment with the Court. This is most commonly filed by a secured mortgage lender or vehicle lien holder on the grounds that the debtor has no equity in the property, that it is decreasing in value or is not properly insured. The Trustee may object to the bankruptcy estate's abandonment of the asset but will allow the motion for relief from automatic stay. The Trustee may need additional time to ascertain the asset's value or determine that the asset has equity.

6) Debtors' duties

- a) The debtor must comply by filing the required documents to initiate their bankruptcy filing. 11 U.S.C. § 521.
- b) Seven days prior to the § 341, the Debtor must provide to the Trustee a signed copy of the most recently filed tax return. Tax returns are not to be filed with the court.
- c) The debtor must appear at the first meeting of creditors (commonly referred to as the § 341 meeting) and answer the Trustee's questions, under oath, about the contents of the documents filed. 11 U.S.C. §§ 341, 343.
- d) The Debtor must bring with him/her to the meeting of creditors, his/her social security card and picture identification card.
- e) The debtor shall cooperate with the Trustee by providing additional information and documents if so requested. 11 U.S.C. § 521 (3) and (4).

Please instruct the client, in writing, to appear at the U.S. Trustee's office for the §341 meeting. While the address is clearly stated on the Notice of Chapter 7 Bankruptcy Case, it is not unusual for the Debtor to appear at the office of the Chapter 7 Panel Trustee, running late, much winded and totally confused regarding how to get from point A to point B.

7) The role of the Chapter 7 Trustee

- a) When the Order for Relief is entered, an interim Trustee is appointed. 11 U.S.C. 701(a)(1). Appointment of the Trustee becomes permanent at the Meeting of Creditors, unless creditors elect a different Trustee at the Meeting of Creditors. 11 U.S.C. 702.
- b) Duties:
 - i) Conducts the Section 341(a) meeting.
 - ii) Investigates the Debtor's financial affairs to determine if schedules and statement of financial affairs are completed in good faith.
 - iii) Statutory duties include:
 - (1) Collection and liquidation of assets, § 741(1)

- (2) Accountability of the Trustee for all property received § 741(2)
 - (3) Examining the Debtor's exemptions and statement of intention, § 741(3)
 - (4) Investigate the financial affairs of the debtor, § 741(4)
 - (5) Examine proofs of claim, § 741(5)
- c) Review of Debtor's attorney fees
 - d) Determination of no-asset cases
 - e) Liquidates non-exempt assets
 - f) Valuation of assets and review of Schedules C and D
 - g) Creditors and the Trustee have standing to object to claimed exemptions and bear the burden of proving that the exemptions are not properly claimed. Deadline to object to exemptions is 30 days after the meeting of creditors has been concluded, or 30 days after the filing of an amended or supplement to Schedule C. Rule 4003.
 - h) Acquires additional assets through avoiding powers
 - i) If successful, stands in the shoes of the creditor
 - ii) Review of Statement of Financial Affairs
 - iii) Preference payments (payments made within 90 days prior to date of filing)
 - iv) Transfers/Sale of Assets – insiders.