

The United States Bankruptcy Court
for the District of Utah



Consumer Bankruptcy PPP

Practice Pointer Potpourri

September 9, 2016

Presenters

William Thurman, *U.S. Bankruptcy Judge*

David Sime, *Clerk of Court*

Gary Gfeller, *Chief Deputy Clerk*

Andy Diaz, *Attorney at Law, Diaz and Larson*

Lon Jenkins, *Chapter 13 Trustee*

Kenneth A. Rushton, *Chapter 7 Trustee*

Geoffrey Chesnut, *Debtor's Attorney, Red Rock Legal Services*

Steven Beckstrom, *Creditor's Attorney, Snow Christensen & Martineau*

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Status of the Court and ProBono Project

Gary Gfeller

Status of the Court and ProBono Project

St George CLE – September 9, 2016

1. Pro Bono Project
 - a. Utah State Bar Pro Bono Bankruptcy Project Committee: The Honorable William T. Thurman, Mark Andrus, James (Jamie) Sorenson, Tyler Needham, Darwin Bingham, Jory Trease, P. Matthew Cox, David Sime, and Gary Gfeller
 - b. To Assist Pro Se Debtor Defendants defend against §§ 523 and 727 Actions
 - c. The Court will provide the pro se litigant a “Notice Regarding The Filing Of A Complaint To Your Bankruptcy Discharge”
 - d. A representative of Utah Legal Services will screen the litigant for eligibility (125% of Poverty level)
 - e. Once qualified, the litigant’s information is transferred to the President of the Utah State Bar Bankruptcy Section for placement
 - f. Once a volunteer attorney is confirmed, a letter to the attorney taking the case will be sent by the Access to Justice Director for the Utah State Bar
 - g. An engagement agreement detailing the nature of the pro bono representation will be provided to the litigant by the Access to Justice Director for the Utah State Bar
 - h. Volunteer Attorney may apply for up to \$2,000.00 per case for reimbursement of qualifying court costs
 - i. If interested in volunteering for this program, please contact Jamie Sorenson.

2. Operational Changes
 - a. Modifying Deficiency/Missing Documents Process
 - b. Implementing EditNotify – Documenting changes to the docket
 - c. Showing Attachments on the Docket
 - d. Flattening Signatures and Removing Meta-Data from PDFs
 - e. Pro Se Debtors Paying Installment Fees via Pay.Gov

3. Notice of Hearing vs Notice of Opportunity for Hearing
 - a. Local Form 9013-1 – Notice of Hearing
 - b. Local Form 9013-2 – Notice of Opportunity for Hearing
 - c. Local Form 9013-3 – Form for Certificate of Service
 - d. Local Form 9021-1 – Designation of Parties to Receive Notice

4. Dec 1 Changes
 - a. Bankruptcy Rules 1010, 1011, 2002, 3002.1, 7008, 7012, 7016, 9006, 9027, and 9033, and new Rule 1012.
 - b. https://www.supremecourt.gov/orders/courtorders/frbk16_4h25.pdf

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH**

IN THE MATTER OF THE
IMPLEMENTATION OF THE PRO BONO
DISCHARGE ASSISTANCE PROGRAM

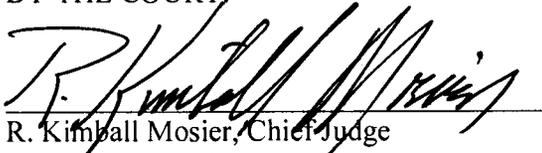
General Order No.: 16-001

The United States District Court for the District of Utah has entered its order approving the Bankruptcy Court's Pro Bono Discharge Assistance Program (the "Program") to assist qualified debtors in defending an adversary proceeding affecting their discharge. In furtherance of this Program, the Court hereby ORDERS as follows:

Upon the filing of an adversary proceeding in this District that includes a prayer for relief under Section 523 or Section 727 of the Bankruptcy Code, the Clerk of the Court shall, at the same time as the issuance of the summons, mail to the debtor/defendant(s) a notice of the availability of the Program in a form that substantially complies with the "Notice of Complaint Objecting to Discharge" attached hereto as Exhibit A.

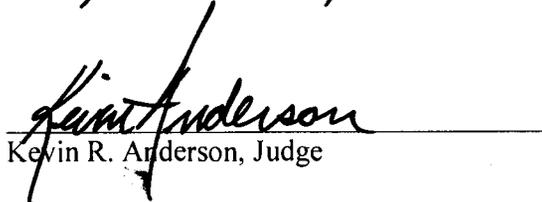
Dated this 11th day of August, 2016

BY THE COURT:


R. Kimball Mosier, Chief Judge

BY THE COURT:


Joel T. Marker, Judge


Kevin R. Anderson, Judge


William T. Thurman, Judge

[END OF ORDER]

Upon the filing of a complaint seeking relief under 11 U.S.C. §§ 523 or 727, the Clerk of the Court will mail a copy of this notice to the debtor/defendant (*see* General Order No.: 16-001)

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH**

*NOTICE REGARDING THE FILING OF A COMPLAINT
OBJECTING TO YOUR BANKRUPTCY DISCHARGE*

You have been named as a defendant in a complaint, filed in your bankruptcy case, that seeks to either deny your discharge of all debts under 11 U.S.C. § 727 or to determine that a specific debt should be excepted from discharge under 11 U.S.C. § 523. If you have not yet been served with a copy of the summons and complaint, you likely will be within the next few days. Even if you have already received your bankruptcy discharge, this is a serious matter that you should not ignore.

While individual debtors are entitled to appear without an attorney and represent themselves in the bankruptcy court, this nonetheless requires full compliance with the law and procedural rules that can be complex and confusing that can result in severe consequences for you personally. Before deciding to represent yourself in this complaint, which may result in a full or partial denial of your financial fresh start under bankruptcy law, you should consider consulting an attorney.

If you cannot afford an attorney, you may qualify for free legal assistance in defending against this complaint. To determine if you qualify, you must contact:

Utah Legal Services
205 North 400 West
Salt Lake City, UT 84103
Phone: 800.662.4245
Fax: 801.869.2715

NOTE: When you contact Utah Legal Services, you must have a copy of your Summons and Complaint readily available. Utah Legal Services will review your situation and determine if you are eligible for this program. If you qualify, a volunteer attorney may be appointed to represent you without payment of attorneys' fees. However, while some costs are covered by the program, you may still be responsible for the payment of other costs.

EditNotify – modifying docket events and documents will provide a log of the changes made to events through the creation of an edit NEF.

NEF Selection Menu

Multiple Notice of Electronic Filings

Select the NEF you wish to view

Part	Description	Date/Time
0	HTML formatted receipt	
1	Edit receipt: Docket Entry #3 updated	2016-04-21 08:55:21

U.S. Bankruptcy Court
District of Utah
Notice of Electronic Filing

The following transaction was edited by gg on 4/21/2016 at 8:55 AM MDT

Case Name: Joan VanDyke
Case Number: [2:16-bk-20001-WTT](#)
Document Number: [3](#)

Description of changes:

Modified Dkt text from:

Order Granting Application To Pay Filing Fees In Installments (Related Doc # [2](#)). Payment of 50.00 due by 3/10/2016. Payment of 75.00 due by 3/30/2016. Payment of 110.00 due by 4/13/2016. (jtcr)

to:

Order Granting Application To Pay Filing Fees In Installments (Related Doc [[2](#)]). Payment of 100.00 due by 3/10/2016. Payment of 75.00 due by 3/30/2016. Payment of 60.00 due by 4/13/2016. (jtcr) Modified on 4/21/2016 (gg).

Showing attachments on the docket

Filing Date	#	Docket Text
04/21/2016	11	Motion for Relief From Stay. Fee Amount: \$176, Filed by JIM SMITH (Attachments: # 1 Exhibit A # 2 Exhibit B # 3 Exhibit C) (gg) (EOD: 04/21/2016)

Notice of Hearing vs Notice of Opportunity for Hearing

Many attorneys are filing hearing notices that are not substantively compliant with the Local Rules. This problem may be solved by using the hearing notice forms provided in the Local Rules. Please note the differences in these forms and try to avoid using hybrid forms as they may cause confusion as to whether or not the hearing will be held.

Local Rule Form 9013-1

Notice of Hearing

This form is to be used for all hearings in adversary proceedings and for any hearings in bankruptcy proceedings which will need to go forward. The Notice of Hearing form tells people there will be a hearing on a certain date and time, but the hearing may be stricken if no objections are filed by a certain date. If an objection/response to the motion being set for hearing has already been filed, please use this form as the hearing will have to be held.

The correct event code to use when filing this form is either Notice of Hearing or Notice of Hearing (Amended/Rescheduled).

Local Rule Form 9013-2

Notice of Opportunity for Hearing

This form is only to be used for hearings in bankruptcy proceedings to which you believe an objection/response will not be filed. The Notice of Opportunity for Hearing form tells people that there will only be a hearing held if an objection is filed by a certain date. These hearings go on the Court's calendar as "reserved/inactive" and will not be held. If an objection/response is filed, the hearing will be activated. If no objection/response is filed, the hearing will not go forward.

The correct event code to use when filing this form is either Notice and Opportunity for Hearing or Notice and Opportunity for Hearing (Amended/Rescheduled).

PLEASE NOTE: If you initially notice out a matter using a Notice of Opportunity for Hearing and need to reschedule it, you should make note of whether or not an objection/response has been filed. If an objection/response has been filed, the hearing needs to be an active hearing so you should use a Notice of Hearing to reschedule the matter. If an objection/response has NOT been filed, then you may use a Notice of Opportunity for Hearing to reschedule the matter.

Local Form - 9013-1

Form for Notice - Local Rule 9013-1

Attorney Submitting (Utah State Bar No.)
Address
Telephone No.
Facsimile No. (Optional)
E-Mail Address (Recommended)
Attorney for

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH**

In re: Debtor(s).	Bankruptcy No. Chapter Hon. (<u>Judge's Name</u>)
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**NOTICE OF [MOTION TO] [APPLICATION FOR] [OBJECTION TO CLAIM]
AND **NOTICE OF HEARING****

(Objection Deadline: _____)
(Hearing Date: _____)

PLEASE TAKE NOTICE that [movant's name] has filed with the United States Bankruptcy Court for the District of Utah, [title of pleading] (the Motion/Application/Objection).

YOUR RIGHTS MAY BE AFFECTED. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. If you do not have an attorney, you may wish to consult one.

[Insert a specific statement of the relief requested, action intended or claim, including the amount of fees to be paid pursuant to Fed. R. Bankr. P. 2002(c)(2), if applicable; amount of debt to be incurred;

amount of payment to be made; the basic terms and provisions of a settlement or compromise; or, with respect to a proposed sale of property, a description of the property, the time and place of any public sale, and the terms and conditions of any private sale, all sufficient to meaningfully inform the parties of the intended action or claim.]

If you do not want the Court to grant the relief requested in the [Motion/Application/ Objection] then:

(1) on or before [objection deadline] you or your lawyer must file with the Bankruptcy Court a written objection to the [Motion/Application/ Objection] explaining your position, at:

United States Bankruptcy Court
350 South Main Street, Room 301
Salt Lake City, UT 84101

If you mail your objection to the Bankruptcy Court for filing you must mail it early enough so that the Court will **receive** it on or before [objection deadline]. You must also mail a copy to the undersigned counsel at [name and address of movants attorney].

(2) attend the hearing on the [Motion/Application/ Objection] which is set for [(date) at (time) in Courtroom ____, United States Bankruptcy Court, (address).] Failure to attend the hearing will be deemed a waiver of your objection.

If you or your attorney do not take these steps, the Bankruptcy Court may decide that you do not oppose the relief sought in the [Motion/Application/ Objection] and may enter an order granting that relief. In the absence of a timely filed objection, the undersigned counsel may and will ask the Court to strike the hearing enter an order approving the [Motion/Application/ Objection] without hearing.

Dated this ____ Day of _____, 20 .

Signature

CERTIFICATE OF SERVICE
(SEE LOCAL FORM 9013-3)

Local Form 9013-2

Form for Notice of Opportunity for Hearing - Local Rule 9013-2

Attorney Submitting (Utah State Bar No.)
Address
Telephone No.
Facsimile No. (Optional)
E-Mail Address (Recommended)
Attorney for

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH**

In re: Debtor(s).	Bankruptcy No. Chapter Hon. (<u>Judge's Name</u>)
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**NOTICE OF [MOTION TO] [APPLICATION FOR] [OBJECTION TO CLAIM]
AND NOTICE OF OPPORTUNITY FOR HEARING**

(Objection Deadline: _____)

PLEASE TAKE NOTICE that [movant's name] has filed with the United States Bankruptcy Court for the District of Utah, [title of pleading] (the Motion/Application/Objection).

YOUR RIGHTS MAY BE AFFECTED. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. If you do not have an attorney, you may wish to consult one.

[Insert a specific statement of the relief requested, action intended or claim, including the amount of fees to be paid pursuant to Fed.R.B.P. 2002(c)(2), if applicable; amount of debt to be incurred; amount of payment to be made; the basic terms and provisions of a settlement or compromise; or, with respect to a proposed sale of property, a description of the property, the time and place of any public sale, and the terms and conditions of any private sale, all sufficient to meaningfully inform the parties of the intended

action or claim.]

NO HEARING WILL BE CONDUCTED ON THIS [MOTION/APPLICATION/OBJECTION]

UNLESS A WRITTEN OBJECTION IS FILED WITH THE CLERK OF THE COURT ON OR

BEFORE THE OBJECTION DEADLINE SET FORTH BELOW.

If you do not want the Court to grant the relief requested in the [Motion/Application/ Objection] then you or your attorney must:

(1) on or before [objection deadline] file with the Bankruptcy Court a written Objection, explaining your position, at:

United States Bankruptcy Court
350 South Main Street, Room 301
Salt Lake City, UT 84101

If you mail your objection to the Bankruptcy Court for filing you must mail it early enough so that the Court will **receive** it on or before [objection deadline]. You must also mail a copy to the undersigned counsel at [name and address of movants attorney].

(2) attend a hearing on [(date) at (time) in Courtroom _____, United States Bankruptcy Court, (address).] **There will be no further notice of the hearing** and failure to attend the hearing will be deemed a waiver of your objection.

If you or your attorney do not take these steps, the Bankruptcy Court may decide that you do not oppose the relief sought in the [Motion/Application/ Objection] and may enter an order granting that relief. In the absence of a timely filed objection, the undersigned counsel may and will ask the Court to enter an order approving the [Motion/Application/ Objection] without hearing.

Dated this ___ Day of _____, 20__.

Signature of Individual

CERTIFICATE OF SERVICE
(SEE LOCAL FORM 9013-3)

Local Form 9013-3

Form for Certificate of Service - Local Rule 9013-1(l)

CERTIFICATE OF SERVICE – BY NOTICE OF ELECTRONIC FILING (CM/ECF)

I hereby certify that on (date) I electronically filed the foregoing (name of document) with the United States Bankruptcy Court for the District of Utah by using the CM/ECF system. I further certify that the parties of record in this case, as identified below, are registered CM/ECF users.

[List the name and email address for each party receiving electronic notice. The names and email addresses may be obtained and copied into the certificate of service by accessing the Court’s mailing report through CM/ECF Utilities/Miscellaneous/Mailings/Mailing Info for a Case]

CERTIFICATE OF SERVICE – MAIL, OTHER

I hereby certify that on (date) I caused to be served a true and correct copy of the foregoing (name of document) as follows:

[Select only the methods of service that apply]

Mail Service - By regular first class United States mail, postage fully pre-paid, addressed to:

[If service is on fewer than all parties in interest, list names and complete addresses of all parties receiving notice by mail].

Mail Service to Entire Matrix – By regular first class United States mail, postage fully pre-paid, addressed to all parties who did not receive electronic service as set forth herein listed on the Official Court Mailing Matrix dated _____ attached hereto.

[If notice must be served on all parties in interest (i.e. Rule 2002 notices) attach the court’s official case matrix that has the same date as the certificate of service. Parties receiving electronic notice do not need to receive additional notice by mail. A copy of the official case matrix in .pdf format may be obtained through CM/ECF/Utilities/Miscellaneous/Mailings/Mailing Matrix by Case and may be attached to the certificate of service through the Adobe program or other methods]

Certified Mail Service – By certified United States mail, postage fully pre-paid, addressed to:

Hand Delivery – By delivery to the following parties at:

Other - [identify parties served and manner of service]:

(Signature)

COMMITTEE NOTE (2013)

The purpose and intent of this form “Certificate of Service” is to establish that the serving party has complied with all applicable notice requirements. The Certificate of Service should only state the applicable method(s) of service used. All adaptations of the form should carry out the intent of the form.

Local Form 9021-1

Form for Designation of Parties to Receive Notice - Local Rule - 9021-1

DESIGNATION OF PARTIES TO RECEIVE NOTICE

Service of the foregoing **Order (Enter Exact Title of Order)** shall be served to the parties and in the manner designated below:

By Electronic Service: I certify that the parties of record in this case as identified below, are registered CM/ECF users.

[List the name and email address for each party receiving electronic notice. The names and email addresses for each party may be obtained and copied into the certificate of service by accessing the Court's mailing report through CM/ECF Utilities/Miscellaneous/Mailings/Mailing Info for a Case]

By U.S. Mail - In addition to the parties of record receiving notice through the CM/ECF system, the following parties should be served notice pursuant to Fed R. Civ. P. 5(b).

- *[State “None” if there are no additional parties.*
- *If there are additional parties list the names and addresses of the additional parties.*
- *If all parties on the official case matrix should receive notice, state “All parties on the Court’s official case matrix”.]*

(Signature by Filer)

COMMITTEE NOTE (2013)

The purpose and intent of this form “Designation of Parties to Receive Notice” is to identify the contesting parties and other entities who should receive notice of entry of an order pursuant to Fed. R. Bankr. P. 9022(a). Because of the significant mailing costs incurred by the Court notice by mail should be limited to contesting parties and entities required to receive notice pursuant to the Bankruptcy Code or Federal Rules of Bankruptcy Procedure. All adaptations of the form should carry out the intent of the form.



11 USC §727 and §523 Actions
Judge Thurman and Uchechi Egeonuigwe

DISCHARGE OF DEBTS:

- Except for the nine kinds of debts saved from discharge by § 523(a), a discharge in bankruptcy discharges the debtor from all debts that arose before bankruptcy. A preconfirmation debt is dischargeable unless it falls within an express exception to discharge. *F.C.C. v. Nextwave Personal Communications Inc.*, 123 S. Ct. 832 (2002).
- Who is eligible for discharge? Individuals (11 U.S.C. §§ 727(a), 1141(d), 1328(a)). “Court shall grant the debtor a discharge, unless – (1) the debtor is not an individual...”11 U.S.C. §§ 727(a)(1)
- The confirmation of a plan in a Chapter 11 bankruptcy discharges a non-individual debtor from pre-petition debt unless a creditor does not receive formal notice of the bankruptcy. *Jaurdon v. Cricket Commc'ns, Inc.*, 412 F.3d 1156 (10th Cir. 2005)
- Juvenile delinquency is an adjudication of status - not a criminal conviction. Section 1328(a)(3) precludes dischargeability of restitution that was included in a sentence on the debtor’s conviction of a crime. An adjudication of juvenile delinquency is not equivalent to a conviction of a crime under § 1328(a)(3). *In re Sweeney*, 492 F.3d. 1189 (10th Cir. 2007).
- Does not apply to corporations, LLCs, or similar entities. Congress intended that corporate debt would survive Chapter 11 proceedings and be charged against the corporation when it resumed operations. The primary concern underlying this section was to prevent businesses from evading liability by liquidating debtor corporations and resuming business free of debt. This applies to corporations “alter egos” as well. *N.L.R.B. v. Better Bldg. Supply Corp.*, 837 F.2d 377 (9th Cir. 1988).

523- NONDISCHARGEABILITY:

- What types of debts are nondischargeable?
 - “money, property, services . . .” to the extent obtained by “false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition” (§ 523(a)(2)(A))
 - To except a debt from discharge under § 523(a)(2)(A), the creditor must prove the following elements by a preponderance of the evidence: 1) the debtor made a false representation; 2) the debtor made the representation with the intent to deceive the creditor; 3) the creditor relied on the representation; 4) the creditor’s reliance was [justifiable]; 5) and the debtor’s representation cause the creditor to sustain a loss. *Fowler Brothers v. Young*, 91 F.3d 1367 (10th Cir. 1996). *See also Cohen v. De La Cruz*, 523 U.S. 213 (1998); *Field v. Mans*, 516 U.S. 59 (1995).
 - Although a settlement agreement and release may have worded a kind of novation, it does not bar a creditor from showing that the settlement debt arose out of false pretenses, a false representation, or actual fraud

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and consequently is nondischargeable under 523(a)(2)(A). *Archer v. Warner*, 123 S. Ct 1462 (2003).

- The standard for excepting a debt from discharge due to fraud is not reasonable reliance, but the less demanding standard of justifiable reliance on the representation. Congress wanted to moderate the burden on individuals who submitted false statements because relative equities by be affected by practices of consumer finance companies. *Field v. Mans*, 516 U.S. 59 (1995).
- “money, property, services . . .” to the extent obtained by “use of a statement in writing” that is materially false, respecting the debtor/insider financial condition (§ 523(a)(2)(B)).
 - To come within the exception of § 523(a)(2)(B), the statement, to be "in writing," must either have been written by the debtor, signed by the debtor, or written by someone else but adopted and used by the debtor. The requirement of a writing is a basic precondition to nondischargeability under section 523(a)(2)(B). A creditor who forsakes that protection, abandoning caution and sound business practices in the name of convenience, may find itself without protection. A written statement of financial condition does not mean an oral statement converted into an electronic format. If the law lags behind technology and custom, that gap is a subject which must be addressed to the Congress and not the courts. *In re Kaspar*, 125 F.3d 1358 (10th Cir. 1997).
- A finding of reckless disregard should be very narrowly interpreted under § 523(a)(2)(B).
 - Intent is a subjective inquiry. Reckless disregard should be based upon an inference from the facts, not an objective legal standard of recklessness. Reliance may be proven by circumstantial evidence. The court must assess reliance on the based upon the facts and circumstances present in the particular case and not based upon industry standards. *In re Cribbs*, 327 B.R. 668 (10th Cir. BAP 2005) (Aff'd, 2006 WL 1875366 2007)(unpublished)
- Debts that the debtor fails to schedule in time to permit a creditor file a proof of claim (§ 523(a)(3))
 - For purposes of reopening a bankruptcy case in which there are no assets and no bar date, a mechanical approach which does not address a debtor's intent in failing to schedule a claim is adopted as the better reasoned and more faithful to the language of the Bankruptcy Code. The debtor's intent in failing to schedule a debt is irrelevant to the

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- bankruptcy court's decision to reopen. *Parker v. Parker*, 313 F.3d 1267 (10th Cir. 2002).
- Section 523(a)(3)(B) explicitly places a burden on creditors with knowledge of bankruptcy proceedings to act to protect their rights. *In re Walker*, 927 F.2d 1139 (10th Cir. 1991).
 - Unless the creditor had notice or actual knowledge of the bankruptcy filing, section 523(a)(3)(A) denies the discharge of a debt that was not scheduled in time to permit the timely filing of a proof of claim or otherwise participate in the bankruptcy. *In re Dawson*, 209 B.R. 246 (10th Cir. BAP 1997).
 - “fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny” (§ 523(a)(4))
 - Absent an express agreement or state law, a partnership relationship is not a sufficient basis to find a fiduciary duty pursuant to § 523(a)(4). *In re Hatley*, 227 B.R. 757 (10th Cir. BAP 1998).
 - “The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm’s length bargain. If it does not, equity will set it aside.” We believe that this formulation expresses the meaning of the phrase “fiduciary duty” in 15 U.S.C. § 35(b). *Jones v. Harris*, 130 S.Ct. 1418 (2010).
 - Under § 523(a)(4), embezzlement will have occurred when there is a fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come, and it requires fraud in fact, involving moral turpitude or intentional wrong, rather than implied or constructive fraud. *Cousatte v. Lucas*, 300 B.R. 526 (10th Cir. BAP 2003).
 - § 523(a)(4) includes only those frauds involving moral turpitude or intentional wrong, and does not extend to fraud implied in law which may arise in the absence of bad faith or immorality. Under Utah law a corporate officer owes a fiduciary duty to the corporation and to its shareholders collectively, and no fiduciary duty to shareholders individually. *In re Black*, 787 F.2d 503 (10th Cir. 1986).
 - domestic support obligations & obligations in separation agreement/divorce decree (§ 523(a)(15))
 - For debts to be excepted under § 523(a)(15), all that is required is that the obligations be: 1) to a former spouse; 2) that are not (a)(5) support; and 3) are incurred in connection with a divorce decree or

an order of a court of record. In the absence of an agreement, no bankruptcy statute or rule awards fees to a creditor who successfully excepts a debt from discharge. *In re Taylor*, 478 B.R. 419 (10th Cir. BAP 2012).

- A Chapter 7 debtor's agreement to pay a pre-existing marital debt owed to a third party as part of a separation agreement which omitted a hold harmless agreement, was a debt "to a former spouse" and was excepted from discharge even if the debtor's direct obligation to the third party has been discharge. *In re Wodark*, 425 B.R. 834 (10th Cir BAP 2010).
- "willful and malicious injury by the debtor to another entity or to the property of another entity" (§ 523(a)(6))
 - Nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. Negligent or reckless acts do not suffice to establish that a resulting injury is "willful and malicious". Intentional torts generally require that the actor intend "the consequence of an act" not simply the act itself. *Kawaauhau v. Geiger*, 523 U.S. 57 (1998).
 - A debt falling under § 523(a)(6) and therefore non-dischargeable under Chapter 7 may nevertheless be dischargeable under Chapter 13 pursuant to § 1328(a). *In re Young*, 237 F.3d 1168 (10th Cir. 2001).
 - The maliciousness required by § 523(a)(6) can be established by showing the debtor had knowledge of the creditor's rights, and without justification or excuse, proceeded to act in violation of those rights. It must also be shown that it was at least reasonably foreseeable the debtor's act would injure the creditor. *In re Cantrell*, 208 B.R. 498 (10th Cir. BAP 1997).
- securities fraud (§ 523(a)(19))
 - Securities fraud requires 1) fraudulent conduct; 2) in connection with the offer or sale of any security; 3) by the use of any means or instructions of transportation or communication in interstate commerce. *United States v. Lewis*, 594 F.3d 1270 (10th Cir. 2010).
 - The non-exclusive four-part test to determine whether a note should be viewed as a security includes: 1) the buyer's and seller's motivations, 2) the plan of distribution, 3) the investing public's expectations, and 4) whether risk-reducing factors are present. *Reves v. Ernst & Young*, 494 U.S. 56 (1990).
 - Essentially, a debtor cannot discharge his or her debt if two conditions are satisfied: first, the debt must stem from a violation

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of securities laws or a fraud in connection with the purchase or sale of a security, and second, the debt must be memorialized in a judicial or administrative order or settlement agreement. *Tripodi v. Welch*, 810 F.3d 761 (10th Cir. 2016).

727 – ALL DEBTS

- “with intent to hinder, delay or defraud a creditor or officer of the estate” the debtor transfers property of the debtor within 1 year of the bankruptcy or any time after the bankruptcy has been filed (§ 727(a)(2))
 - To obtain a denial of discharge under §727(a)(2)(A), plaintiff must prove: 1) that a transfer of property occurred; 2) that the debtor owned the property transferred; 3) that the transfer occurred within one year of filing the petition; and 4) that the debtor had, at the time of the transfer, the intent to defraud a creditor. *In re: Seay*, 215 B.R. 780 (10th Cir. BAP 1997).
 - Debtor may be denied discharge if he converts property "with intent to hinder, delay, or defraud a creditor ... within one year before the date of the petition." Extrinsic evidence of fraudulent intent is required to establish fraud. *In re Carey*, 938 F.2d 1073 (10th Cir. 1991).
 - Under the continuous concealment doctrine, a concealment will be found to exist during the year before bankruptcy even if the initial act of concealment took place before this one year period as long as the debtor allowed the property to remain concealed into the critical year. *In re Gordon*, 526 B.R. 376 (10th Cir. BAP 2015).
 - The Bankruptcy Code must be construed liberally in favor of the debtor and strictly against the creditor. The mere fact that a transaction occurred soon before the filing of bankruptcy does not necessarily support the inference of fraud. The circumstances of the transaction must be examined. No inference of fraudulent intent can be drawn from an omission when the debtor promptly brings it to the court's or trustee's attention absent other evidence of fraud. A debtor must not be penalized for an inadvertent mistake. *In re Brown*, 108 F.3d 1290 (10th Cir. 1997).
- destruction/falsification of debtor's books and records (§ 727(a)(3))
 - This provision is intended to enable [a debtor's] creditors reasonably to ascertain his present financial condition and to follow his business transactions for a reasonable period in the past. The Code places the burden on the debtor both to maintain adequate, orderly records and to produce them. If it is determined that a debtor's records are inadequate, the burden shifts to the debtor to provide justification. *In re Hanson*, No. ADV 03-02204, 2005 WL 6960215, at *4 (B.A.P. 9th Cir. Aug. 10, 2005)
 - A debtor's records need not be so complete that they state in detail all or substantially all of the transactions taking place in the course of debtor's business. It is sufficient

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that the records identify the transactions so that intelligent inquiry can be made respecting them. *In re Stewart*, 263 B.R. 608 (10th Cir. BAP 2001).

- false oaths, statements or claims (§ 727(a)(4))
 - In order to deny a debtor's discharge pursuant to 727(a)(4)(A) a creditor must demonstrate by a preponderance of the evidence that the debtor knowingly and fraudulently made an oath and that the oath relates to a material fact. A debtor will not be denied discharge if a false statement is due to mere mistake or inadvertence. Moreover, an honest error or mere inaccuracy is not a proper basis for denial of discharge. The fact that a debtor comes forward with omitted material of his own accord is strong evidence that there was no fraudulent intent in the omission. *In re Brown*, 108 F.3d 1290 (10th Cir. 1997).
 - To infer fraudulent intent, courts look for specific indicia of fraud. Actions from which fraudulent intent may be inferred include situations in which a debtor conceals prebankruptcy conversions, converts assets immediately before the filing of the bankruptcy petition, gratuitously transfers property, continues to use transferred property, and transfers property to family members. Courts also consider the monetary value of the assets converted in determining whether the debtor acted with fraudulent intent. Other indicia of fraud include: 1) that the debtor obtained credit in order to purchase exempt property; 2) that the conversion occurred after entry of a large judgment against the debtor; 3) that the debtor had engaged in a pattern of sharp dealing prior to bankruptcy; and 4) that the conversion rendered the debtor insolvent. *In re Carey*, 938 F.2d 1073 (10th Cir. 1991).
- debtor received a discharge within 6 or 8 years, as applicable (§ 727(a)(8) & (9))
 - Under the section of the Bankruptcy Code providing that a Chapter 7 debtor is not entitled to a general discharge if debtor has been granted a discharge in a Chapter 7 case commenced within six years before the date of the filing of the instant petition, where debtor's prior case was converted from Chapter 13 to Chapter 7, the six-year period runs from the petition date of the prior case, not from the date of conversion. *In re Asay*, 364 B.R. 423 (Bankr. D.N.M. 2007)

HOW TO SEEK NONDISCHARGEABILITY:

Initiate adversary proceeding:

- Time for Objecting to Discharge – Rule 4004(a)
 - 60 days after first date set for meeting of creditors under Section 341
 - Although the time limits under Rules 4004(a) and 4007(c) are strictly construed, the bankruptcy court is not precluded from accepting a late filed complaint objecting to discharge where the creditor relied on the court's notice setting a incorrect deadline. *In re Themy*, 6 F.3d 688 (10th Cir. 1993).
 - Bankruptcy rules governing time limit for creditor to file objections to discharge serve three primary purposes: (1) they inform objecting creditor of

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time he has to file complaint; (2) they instruct court on limits of its discretion to grant motions for complaint-filing-time enlargements; and (3) they afford debtor affirmative defense to complaint filed outside time limits. *Kontrick v. Ryan*, 540 U.S. 443 (2004)

- Complaint/Adversary Proceeding
 - A debtor or any creditor may file a complaint to obtain determination of dischargability (Rule 4007)
 - Although the time limits under Rules 4004(a) and 4007(c) are strictly construed, the bankruptcy court is not precluded from accepting a late filed complaint objecting to discharge where the creditor relied on the court's notice setting a incorrect deadline. *In re Themy*, 6 F.3d 688 (10th Cir. 1993).
 - The fraud-based debt of a creditor will be discharged if the creditor has actual knowledge of the bankruptcy case in time for timely filing of a proof of claim and request for a determination of the dischargability of a debt. A chapter 7 creditor holding an unsecured claim does not have the right to assume receipt of further notice. Section 523(a)(3)(B) explicitly places a burden on creditors with knowledge of bankruptcy proceedings to act to protect their rights. *In re Walker*, 927 F.2d 1139 (10th Cir. 1991).
 - Objection is governed by Part VII of the Rules (similar, but not identical, to certain Federal Rules of Civil Procedure)
 - Objections under § 727 by motion and considered contested matters per Rule 9014 (which pulls in many Part VII Rules)
- Common errors made by litigants seeking a nondischargability order
 - Know the difference between fraud claims (garden variety v. based on writing); see 11 U.S.C. § 523(2)(A) & (B)
 - High standard for “willful and malicious injury” under 11 U.S.C. § 523(a)(6)

NEW DEVELOPMENTS:

- Reversing the Fifth Circuit, the Supreme Court held in *Husky International Electronics v. Ritz* (US Sup Ct; May 16, 2016) that a debt can be nondischargeable for “actual fraud” under Section 523(a)(2)(A) of the Code in the absence of a fraudulent misrepresentation to the creditor. The Court held that “actual fraud” subsumes “forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation.” A “fraudulent conveyance of property made to evade payments to creditors” is among the types of actual fraud that can result in a nondischargeable debt.
- The Supreme Court granted certiorari in *Czyzewski v. Jevic Holding Corp.* to decide whether bankruptcy courts are allowed to dismiss chapter 11 cases when property is

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distributed in a 9019 settlement that violates the priorities contained in Section 507 of the Bankruptcy Code. Although *Jevic* deals with structured dismissals, the decision of SCOTUS might also have the effect of allowing or barring “gift plans” or sub-rosa plans where a secured creditor or buyer makes a payment, supposedly from its own property, which enables a distribution in a chapter 11 plan not in accord with priorities.

BEST PRACTICES FOR BANKRUPTCY ATTORNEYS

- Understand and become familiar with Utah Bankruptcy Court Local Rules and Chamber Policies and Procedures listed on the Court’s website.
- The Court understands emergencies but try to avoid filing documents via CM/ECF or calling to strike or reschedule a hearing at the “last minute.” Plan ahead and save the Court’s time and your goodwill with the Court.
- Reputation: An Attorney’s Most Valuable Asset.
 - Ethical conduct and reputation most always precedes the attorney’s appearance in Court. Respect for the Court as an institution is critical as is respect for attorneys on the other side of your client.
- Motions and Petition Practice
 - Preparation is essential
 - Know the facts of your case
 - Know the law and how it applies to your case
 - When possible, cite 10th circuit case law versus non-binding case law. Suggestion: use the “Straley Compendium.”
 - Procedural rules: Fed. R. Bank. P., Fed. R. Evid., and Local Rules
 - Local Rule 7056-1 Rules for Summary Judgement Motions
 - Make arguments clear and concise
 - Timeliness and proper courtroom decorum is critical. Be respectful towards adversary and others in the courtroom.
 - Avoid the temptation to include slighting comments about counsel in your briefs.
- Find a mentor. There are people around you who know more than you do. Let them help you.



Chapter 7 Trustee Practice Pointers

Kenneth A. Rushton

DEBTOR ATTORNEY BEST PRACTICE SUGGESTIONS FROM TRUSTEES

Do's:

1. File all statements and schedules timely (due within 14 days after the Petition filing date), or if unable to do so, obtain a court order to extend the time.
2. Furnish tax returns and 60-day payment advices to the trustee as soon as you have them, but not later than 7 days prior to the 341 meeting. It is also helpful to furnish bank statements to the trustee in advance so that the trustee does not need to take time during the meeting to review them.
3. Always remind your clients a day or two before to bring their picture I.D., proof of social security number, most recent payment advice and bank statements (not transaction history or account activity report) to the 341 meeting.
4. Read all statements, schedules, means test and documents actually printed and signed by the clients. Do not rely on your software input information. Many obvious errors in the schedules and statements could be avoided if the attorney would review the actual documents they file. You should also verify that all assets are listed in the correct categories.
5. After filing any document, always review on PACER the documents you just filed and verify that they are correct images. Many filing errors result from the wrong image being filed with the court.
6. Report all income for 3 years (including Social Security, V.A. disability, child support, food stamps, self-employment and retirement income) on Questions 4 and 5 of S.O.F.A.
7. File Rule 2016 Attorney Fee Disclosure statement in every case.
8. Report charitable gifts on Question #14 of S.O.F.A. if the budget shows monthly charitable contributions.
9. Claim the full statutory amount allowed for exemptions in real property and vehicles (not just the scheduled value). Then if the appraiser or auctioneer has a higher value your client is protected and you will not need to amend Schedule C.
10. Always return your clients telephone calls. Trustees receive many calls from disgruntled debtors who say their attorneys will not return their calls, so they call the trustee in frustration. Trustees may have an obligation to recommend to the debtors that they contact the United States Trustee or the Utah State Bar if they have complaints against their attorneys.
11. Consider combining multiple debts owed to the same creditor at the same address into one listing on Schedule E/F. For example, if the debtor has 10 bills from Intermountain Healthcare, they could be added together and listed once on Schedule E/F.

12. Review pay stubs to be certain you have disclosed all assets and garnishments on the statements and schedules. It is not uncommon for trustees to find undisclosed stock, insurance policies, bank accounts, retirement accounts, or garnishments simply by reviewing the pay stubs.

13. Make certain the debtors have disclosed any and all claims or causes of action belonging to the debtor, even if the debtor has not pursued them or thinks they are of no value. Doing so could save both debtors and attorneys a lot of time and money later.

Don't's:

1. Do not file amendments the day before the 341 meeting and expect the trustee to have reviewed them. If recent amendments have been filed, they should be disclosed to the trustee and copies provided at the 341 meeting.

2. Do not ignore trustee directives and requests or tell your client that the deadline to respond is not important (be familiar with Local Rule 4002-1 requiring debtors to produce documents and information within 14 days after a written request by the trustee).

3. Do not furnish to the trustee more documents than are required unless requested by the trustee or U.S.T.. For example, usually only the most recent tax return is required, unless otherwise requested. Always review for yourself all documents furnished to the trustee.

4. Do not claim exemptions that your client is not entitled to or in amounts above the statutory limits. You may lose credibility and the trustee may then scrutinize all of your documents in greater detail and other issues may be discovered that could negatively impact your client.

5. Do not claim 100% exemption for assets that have a statutory maximum exemption limit. Instead, claim the applicable statutory limit, even if the scheduled value is less.

6. Do not list student loan, property taxes or court fine debts as priority. They are usually non priority unsecured debts, even though they may be nondischargeable. Property taxes may be secured debts.

7. Do not list wage garnishments that will cease after filing as a deduction on Schedule I. They should be reported on S.O.F.A. Question #10.



Chapter 13 Trustee Practice Pointers

Lon Jenkins

**OFFICE OF CHAPTER 13 TRUSTEE
LON A. JENKINS**

CHAPTER 13 BEST PRACTICES

Communication with the Trustee

I. Organization

- a. Staff Attorneys & Judge Assignments
 - i. Tami Gadd-Willardson (Marker)
 - 1. Jaci Coyle (paralegal)
 - ii. Ryan Cadwallader (Mosier)
 - 1. Michelle Moses (paralegal)
 - iii. Brian Porter (Thurman/Anderson)
 - 1. Kristen Ott (paralegal)
- b. Duties
 - i. Conduct § 341 Hearings—Meeting of Creditors
 - ii. Confirmation Hearings
 - iii. Law and Motion Hearings

II. § 341 Hearings—Meeting of Creditors

- a. Helpful Contact
 - i. Debtor(s) intend to reschedule the hearing
 - ii. Debtor(s) will be unable to appear
 - iii. Appearing Telephonically (needs court order)
 - iv. Rescheduling Hearing (needs court order)
 - v. Need an Interpreter
 - vi. Covering for another attorney

III. Confirmation Practice

- a. Organization
 - i. Assigned Case Managers
 - 1. Check the Chapter 13 Network—<http://www.13network.com/>
 - 2. Contact the Trustee's office directly—(Phone: 801-596-2884)
 - 3. Ask who the case manager is at the 341 Meeting
- b. Prior to the Hearing
 - i. Contact the assigned case manager (email preferable)
 - ii. If complicated matter, contact assigned staff attorney in advance
 - 1. Appreciate a head's up (e.g., email: Brian can we talk about X case. Have to go get case, get familiar, if multiple objections time consuming. Can set up time to talk)
- c. Day before the Hearing (Triage operation-30 to 70 hearings)
 - i. Staff Attorney given the case
 - 1. Some communication tips:
 - a. Send brief email summary (e.g., dismissal, requesting continuance, etc.). ****If filed continuance that day, I won't see until the next**
 - b. Last minute phone calls not always helpful

- c. File documents early
- d. Day of the Hearing
 - i. Provide Staff Attorney with brief action plan (e.g., dismissal, requesting continuance, etc)
 - 1. **Ryan once had a neck slitting gesture, that he interpreted as “let’s go to war,” but was really, and maybe this is a universal sign nationally that case will dismiss
 - ii. Understand that it is difficult to review last minute documents (e.g., multiple changes to form 22, fully amended plan)

IV. Post-Confirmation Practice: Motions

- a. Motions
 - i. Provide detailed explanation of your request
 - 1. Use Guideposts—captions, headings, and subheadings
 - 2. Include terms for potential order in your prayer for relief
 - ii. Notice
 - 1. Notice and Opportunity for Hearing
 - a. Caveat—If evidentiary hearing is necessary please contact the Trustee earlier to discuss timeframe and possible discovery
 - 2. Timely file Certificate of Service
 - iii. ****Supporting Documents/Evidence****
 - 1. Attach exhibits or provide Trustee with copies through TNG
 - 2. Examples
 - a. Amended budget and updated pay advices
 - b. Increased Expenses (e.g., insurance, medical expenses, transportation),
 - c. Changed Income
 - d. Good Faith Estimate
 - e. Settlement Statement
 - 3. Much easier to provide prior to hearing
- b. Communication Prior to the Hearing
 - i. Review Trustee’s Response
 - ii. Contact assigned Staff Attorney to resolve issues (email preferable)
 - iii. Draft Orders
 - 1. Email terms of agreed order
 - iv. Strike Hearing
 - 1. Contact Court scheduling clerk or Judge’s Chambers
 - 2. Please do not pre-emptively strike hearings prior to an agreed order.
 - v. Word on Continuances

1. Obtain agreement before rescheduling hearing
 2. Trustee may seek entry of an interim order in connection with rescheduled hearing
- c. Additional Comments on Orders
- i. File order quickly after the hearing
 1. Delays often cause problems for everyone (e.g., Debtor, Court, Trustee)
 - ii. Pay attention to signed orders
 1. Court may modify order terms

TAXES

Death and taxes are inevitable

AS IS PAYING THE TRUSTEE THE TAX CONTRIBUTION REQUIREMENT

PRE CONFIRMATION TAX YEARS FOR PLAN

	RETURN FILED <u>BEFORE</u> PETITION	RETURN FILED <u>AFTER</u> PETITION
LIABILITY	Tax year in Plan starts with 2016	Tax year in Plan starts with 2015
REFUND EXPECTED	Tax year in Plan starts with 2015 + Turnover refund in amount in paragraph 1(c) – to resolve 1325(b)(1)(B) requirement + Pot required to satisfy 1325(a)(4)	Tax year in Plan starts with 2015 + Turnover refund in amount in paragraph 1(c) – to resolve 1325(b)(1)(B) requirement + Pot required to satisfy 1325(a)(4)
REFUND RECEIVED	Tax year in Plan starts with 2016 + Tax Refund disposition (including date when actually received and date all was spent – cause may need Motion to Abate) (if cash / balance remains in possession, gets 1325(a)(4) analysis based on CASH)	Tax year in Plan starts with 2015 + Turnover refund in amount in paragraph 1(c) – to resolve 1325(b)(1)(B) requirement + Pot required to satisfy 1325(a)(4) + Motion to Abate (if needed)

****DO NOT** subtract the amount of USTC liability from the turnover requirement for pre-confirmation cases

- USTC files claims with this amount on it – so absent substantiation of debtor's payment of the claim, it will **NOT** be netted from turnover amount
- It will be addressed in 1325(a)(4) analysis as a priority claim.

Prior year filing (2014 and earlier)

- CANNOT START TAX YEAR CONTRIBUTION IN PLAN WITH PRIOR YEAR
- Entire amount calculated at 1325(a)(4) analysis
- Turnover to the Trustee amounts over the \$1,000/\$2,000
- Ask Court for different treatment if do not want to submit
 - If case was chapter 7, the refunds would be turned over the chapter 7 trustee for immediate distribution to unsecured class – here it gets paid in order of distribution (attorney's fees, mortgage arrears etc.)
 - Clients get to retain a portion they would not be able to retain in chapter 7

ANNUAL TAX REQUIREMENT

4/30/2016: Date the tax returns MUST be submitted pursuant to Court Order

6/30/2016: Date the tax refund contribution MUST be paid pursuant to Court Order

- Email Laurie (lneebling@ch13ut.org) for report of cases with tax requirement
- FTP Code 691: 2015 state and federal tax returns
- FTP Code 693: Affidavit of Reason Debtor not Required to File Tax Returns
- HELP YOUR CLIENTS DETERMINE THE AMOUNT
 - Our office may send letter stating what amount we believe, but may not in all cases – and our calculations may not be the correct amount
 - If accountant hired and fees approved under 11 U.S.C. § 330, we expect that service to be a net benefit to the estate by assisting the Debtor in the turnover amount
 - Review Skougard: retain UP TO \$1,000 of Additional Child Tax Credit or Earned Income Credit
 - If ACTC or EIC amounts less than \$1,000 – you get the amount of those credits, not the full \$1,000
 - DO NOT TELL YOUR CLIENTS TO CALL THE TRUSTEE'S OFFICE/WAIT FOR THE TRUSTEE'S OFFICE COMMUNICATIONS/ETC.

Offsets: FTP Code 692: Verification of Offset

- REFUND STATUS SCREEN SHOTS NOT OFFSET EVIDENCE
- BANK STATEMENT DEPOSIT NOT OFFSET EVIDENCE
- Transcripts can be evidence of offset
- Letters from government agency best form of offset evidence

WHAT IF YOUR CLIENT DOES NOT PAY THE CONTRIBUTION?

Violation of a lawful order of the court – all Orders Confirming Chapter 13 Plan includes provision regarding the tax refund contribution.

- In re Standiferd, 641 F.3d 1209 (10th Cir. 2011): case initially chapter 13, converted to chapter 7 – debtors spent tax refund despite confirmation order requiring turnover – debtors preconversion misconduct may support denial of discharge under 727(a)(6)(A)
- Rupp v. Pearson, 2015 WL 9305674 (D. Utah 12/21/2015)(appeal filed): debtor's conduct in prior chapter 13 by spending tax refund that was to be contributed was not sufficient to establish ground for denial of discharge under 727(a)(2)(A) without further scienter regarding intent to defraud

Four Judges – four trains of thought on tax refund contribution

- This is our best interpretation of how the Judges are ruling
- Our office interpretation only – if you believe it is wrong, please get clarification from the Judges via Court ruling, **NOT** by arguing with us
- As always, rulings are subject to change by each individual Judge
 - If a Judge changes the procedure, we try to alert through our responses – and again, if you believe our interpretation of a judicial ruling is wrong, please come to hearing for a clarification

RKM:

- As of July 2015: no distinction between retain/abate (requests before or after the refund has been spent)
 - No longer requires increase to the pot to unsecured
 - **UNLESS** there is a Hughes pot
- My interpretation of his view is non-contribution is a breach of the contract – debtors are requesting a modification of the contract by not paying the year committed
 - Trade tax year for tax year – **4th year contribution**
 - But base is calculated by the current tax year
 - These 2 requirements resolves differing code sections:
 - 1322(d)(2): additional tax year means the plan term may be reduced closer to the 36 month time allotment for below median cases – additional tax year used to accelerate the plan term and is NOT added to base
 - 1325(b)(1)(B): current tax year refund is disposable income

ABOVE / BELOW MEDIAN DISTINCTION

- Because the base formula includes non-contributed “contracted” year

ABOVE MEDIAN cases require IMMEDIATE payment increase to resolve the 60 month minimum/60 month maximum dilemma (1325(b)(4)(A)(ii) vs. 1322(d)(1)).

- ABOVE MEDIAN CASES DO NOT HAVE 4TH YEAR CONTRIBUTION
- If fourth year contribution used to accelerate the plan term, base would be paid off prior to the end of the applicable commitment period (60 months) – resulting in cases remaining open despite the base being met prior to 60 months.
- Base calculated NOW with non-contributing “contracted” year and increase in payment to resolve disposable income issues
- REMEMBER: above median cases only required to pay tax refunds for 3 of 5 years despite tax refunds being disposable income for the entire applicable commitment period.

BELOW MEDIAN cases may or may not require payment increase (1322(d)(2) and 1325(a)(6)(feasibility))

- **BELOW MEDIAN CASES DO HAVE 4TH YEAR CONTRIBUTION**
- Base calculated NOW with non-contributing “contracted” year
 - If there is sufficient time (meaning plan payments) available to resolve base in 60 months, may not require payment increase
 - Generally, cases with low payments and high refunds will require an immediate payment increase
 - Example: \$100 plan payments with \$9,000 turnover – 60 month maximum to pay base of \$12,600 – not feasible and immediate payment increase required
- 4th year NOT added to the plan base – treated as lump sum acceleration to bring the case to the 36 month applicable commitment period

JTM:

- Distinguishes between spent / not spent (abate / retain) prior to Order
 - **Retain** and **Abate** terms of art in our office
 - My interpretation of his view is because 1325(b)(1)(B) disposable income issue – all income less amounts reasonably necessary for maintenance and support of the debtor
 - If come to Court prior to spending, Court can determine if the expenses are reasonable and necessary and thus can EXCLUDE the tax refunds from disposable income
 - If tax refund is spent, Court cannot retroactively exclude from disposable income and thus becomes regular abatement issue

RETAIN: (not spent):

- Proof of possession through date of tax refund deposit until hearing date
 - Balance cannot drop below contribution amount
- Follow up on receipts since Court determined those specific expenses were reasonable and necessary
- Hughes still applicable if first year
- Not added to base or pot

ABATE: (spent):

- Contribution amount added to base
- Contribution amount added to pot
- Above-median will always have payment increase to resolve the 60 month minimum / 60 month maximum dilemma regarding base
- 180 day lockout if case is dismissed within 180 days from the hearing date

WTT:

- Distinguishes between spent / not spent (abate / retain) prior to Order
- My interpretation of his view is because he wants Debtors to comply with his order and the same 1325(b)(1)(B) disposable income issue as JTM.

ABATE: (spent)

- Not allowed generally
- Will always require Court hearing if want a different ruling – Trustee’s office will not endorse any order absent affirmative Court ruling
 - Because it is ad hoc, we do not have consistent way to administer
 - Base: most likely added to base
 - Pot: unsure
 - 180 day lockout: unsure
 - 4th year contribution: unsure
 - If abatement is allowed and pot or base increase changed, may have result in feasibility issue that we cannot address at Court and will be subject to second Motion to Dismiss.

RETAIN: (not spent):

- Proof of possession through date of tax refund deposit until hearing date
 - Balance cannot drop below contribution amount
- Follow up on receipts since Court determined those specific expenses were reasonable and necessary
- Hughes still applicable if first year
- Not added to base or pot

KRA:

- THE GREAT UNKNOWN
- No rulings yet – no interpretation of his views at this time

Pre-341 Requirement for Pay Advices

11 U.S.C. § 521(a)(1)(B)(iv) and F.R.B.P. 1007(b)(1)(E) and 1007(c)

- 14 days for filing 60 day pay advices at Court
- Subject to automatic dismissal at 45 days if not provided

Standing Order 12-002

- Lessened the harshness of the automatic dismissal by requiring the Trustee to file a Motion to Dismiss
 - Likely still subject to the 90 day automatic dismissal 521(i)(3)
- 14 DAYS FROM PETITION STILL THE REQUIRED TURNOVER DATE

Motion to Dismiss for Pay Advices

- Trustee's office does not have adequate time to review the documents before the 341 meeting to allow a complete and meaningful examination
- Mailed to Debtor and ECF notification to attorney

After Motion to Dismiss is filed – RESCHEDULE THE 341 AHEAD OF TIME

- Object to the Motion to Dismiss
 - Include in the caption: request to reschedule 341 meeting and continue meeting of creditors
- File Order Sustaining the Objection to Motion to Dismiss
 - Deny the Motion to Dismiss
 - Reschedule the 341 meeting to date as scheduled by clerk of the court – extend deadlines for filing objections to exemptions and dischargeability (30 and 60 days from new 341 date)
 - Continue the confirmation hearing to date as scheduled by clerk of the court
 - Date for initial plan payment remains date of the originally scheduled 341 meeting
- This fast tracks the process, will not have to wait until confirmation hearing to get the 341 meeting rescheduled.
- **DO NOT** extend deadline for filing claims **UNLESS** case was dismissed

**Form Order on Order Sustaining Motion to Dismiss, Rescheduling 341 Meeting,
and Continuing Confirmation Hearing**

The Court, having reviewed the Debtors Objection to the Motion to Dismiss and Motion to Reschedule 341 Meeting and Continue Confirmation Hearing, and having considered such other and further matters as the Court deemed appropriate, and good cause appearing, hereby ORDERS:

- 1) The objection to the motion to dismissed is sustained;
- 2) The motion to dismiss (docket #) is denied;
- 3) The deadline for providing pay advices to the Trustee is extended until xx/xx/2016
- 4) The 341 meeting shall be rescheduled to date determined by the Clerk of the Court;
- 5) The deadlines to object to exemptions and dischargeability shall be extended 30 and 60 days (respectively) from the new 341 meeting date;
- 6) The Confirmation Hearing shall be continued to date determined by the Clerk of the Court;
- 7) The initial payment remains due on the date of the original 341 meeting date.

--END OF ORDER--

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

IN THE MATTER OF FILING
REQUIREMENTS UNDER 11 U.S.C.
§ 521(a)(1)(B)(iv)

Standing Order Number 12-002

This Standing Order Number 12-002 is issued by the United States Bankruptcy Court for the District of Utah pursuant to 28 U.S.C. § 2071, Federal Rule of Civil Procedure 83, Federal Rule of Bankruptcy Procedure 9029, District Court Local Civil Rule 83-7.4, and Bankruptcy Court Local Rule 1001-1(e). It is effective for all cases filed after December 1, 2012.

After due consideration, the judges of the United States Bankruptcy Court have determined that in the interest of judicial economy and to prevent undue prejudice to debtors it is appropriate to establish procedures for the filing requirements of 11 U.S.C. § 521(a)(1)(B)(iv). Accordingly it is hereby,

ORDERED that filing of payment advices or other evidence of payment as described in § 521(a)(1)(B)(iv) shall be as follows:

Filing Payment Advices Pursuant to 11 U.S.C. § 521(a)(1)(B)(iv)

(1) **Non-Filing of Payment Advices.** Unless the court orders otherwise, the copies of payment advices or other evidence of payment as described in § 521(a)(1)(B)(iv) shall not be filed with the court. If the court permits the payment advices or other evidence of payment to be filed with the court, the filing party is responsible for redacting any confidential information such as all but the last 4 digits of the debtor's social security number and all but the last 4 digits of any financial account numbers.

(2) **Submission to Case Trustee.** The copies of payment advices or other evidence of payment as described in § 521(a)(1)(B)(iv) must be provided to the case trustee in a case under chapter 7, 12, or 13, within 14 days of the petition date at the trustee's mailing address or an e-mail address designated by the trustee.

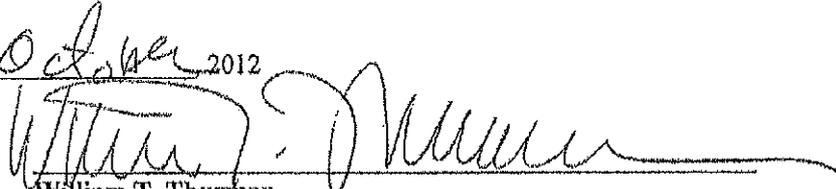
(3) **Submission to United States Trustee.** The copies of payment advices or other evidence of payment as described in § 521(a)(1)(B)(iv) must be provided to the Office of the United States Trustee in a case under chapter 11, within 14 days of the petition date. In a case under chapter 7, 12, or 13, copies of payment advices or other evidence of payment as described in § 521(a)(1)(B)(iv) must be provided by the debtor to the United States Trustee upon request. Copies of the payment advices or other evidence of payment must be provided within seven (7) days from the request.

(4) **Failure to Submit to Trustee or United States Trustee.** If the debtor fails to provide the copies of payment advices or other evidence of payment to the case trustee within the time specified in paragraph (2) of this subdivision, or the United States Trustee within the time specified in paragraph (3) of this subdivision, the case trustee or the United States Trustee may file a motion to dismiss or notice of failure to comply pursuant to Local Rule 2083-1(f) or 4002-1(d) stating such failure. The motion to dismiss or notice of failure to comply shall be served on the debtor and the debtor's attorney. If an objection is not filed within twenty-one (21) days after the motion or notice is mailed, the clerk of the court must enter an order dismissing the case.

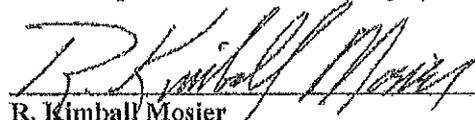
(5) **Submission to Creditors.** Copies of payment advices or other evidence of payment as described in § 521(a)(1)(B)(iv) shall be provided to any creditor who timely

requests copies of the payment advices or other evidence of payment. To be considered timely, a creditor's request shall be made not later than fourteen (14) days before the date first set for the first meeting of creditors under § 341. Copies of the payment advices or other evidence of payment shall be provided to the requesting creditor within seven (7) days from the request.

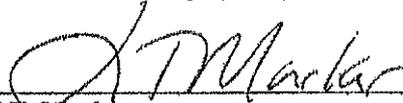
DATED this 18th day of October 2012



William T. Thurman
Chief Judge, United States Bankruptcy Court for the District of Utah

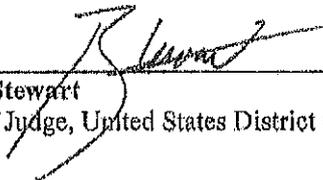


R. Kimball Mosier
United States Bankruptcy Judge



Joel T. Marker
United States Bankruptcy Judge

Approved



Ted Stewart
Chief Judge, United States District Court for the District of Utah

Motion to Vacate Dismissal – Reschedule 341 Meeting

- Technically, a Motion for Relief from Order under FRBP 9024(b)

Is the deficiency that caused the dismissal resolved?

- Generally a preconfirmation issue
- Most likely the filing fee installment – has it been paid now
- If other dismissal for documents, have those been provided
- Are the plan payments current

IF DEADLINES FOR CLAIMS NOT PASSED – NEW 341 MOST LIKELY REQUESTED

NOTICE is most important part of bankruptcy practice.

- If case is dismissed, creditors not likely filing claims
- If case is re-instated, how will creditors know to file claims again
- Should creditors be penalized for the time the case was dismissed when they could have been filing claims
 - REQUIRES RE-SETTING OF THE CLAIMS FILING DEADLINE
- Creditors are accustomed to seeing claims deadlines in 341 notices
- EVEN if 341 meeting already held, our office may request new 341 meeting for notice purposes
- If case is not confirmed, how will new confirmation date be obtained and notice without the Clerk of the Court re-sending the notice

Form of Order on Motion to Vacate Dismissal Order

The Court, having reviewed the Debtors' Motion to Vacate Order of Dismissal, and having considered such other and further matters as the Court deemed appropriate, and good cause appearing, hereby ORDERS:

- 1) The Debtor's Motion to Vacate Dismissal Order is granted;
- 2) The case shall be reinstated;
- 3) The 341 meeting shall be rescheduled to date determined by the Clerk of the Court;
- 4) The deadlines to object to exemptions and dischargeability shall be extended 30 and 60 days (respectively) from the new 341 meeting date;
- 5) The deadlines for filing claims shall be extended to 90 days from the new 341 meeting date for non-governmental entities and 180 days for governmental entities;
- 6) The Confirmation Hearing shall be continued to date determined by the Clerk of the Court;
- 7) The Debtor shall cure all delinquent plan payments through xx/xx/2016 within 14 days of entry of this order or the case may be dismissed without further notice or hearing upon the filing of a declaration of non-compliance and proposed order of dismissal.

--END OF ORDER--

*Designation of parties to be served should be the entire matrix!

POST-PETITION CLAIMS

a. Late Filed Claim

i. Timing:

2. **Rule 3002:** "not later than 90 days after the first date set for the meeting of creditors"

ii. Exceptions:

3. Governmental units: 180 days from the date of the petition
4. Infants/incompetent person (or legal representative): 30 days from a final judgment on an allowed unsecured claim
5. Claim from an executory contract/unexpired lease: whatever time period the court may direct

iii. Who files?

6. **Jones V. Arros:** Time cannot be enlarged by the creditor. **Claim needs to be filed by the Debtor**

iii. Generally no fees because should have been caught during claims review

iv. Procedure

1. **Rule 3004:** If not timely filed by creditor, the Debtor or Trustee may file a claim within 30 days after the expiration of the time for filing claims prescribed by rules
2. **Extending Time Beyond 30 days:**
 - a. Motion to Extend Time needed
 - b. **Rule 9006:** "...the court *for cause shown* may at any time and in its discretion
 - i. (1) with or without notice extend time if the request is made before the period expires
 - ii. (2) on motion made after the expiration of the specified period
 - c. We are generally ok upon a showing of "cause" or "excusable neglect"
3. Payment on Claims
 - a. Disbursement on claim, secured or unsecured, does not begin until entry of a final order
4. Secured Claim:
 - a. If included in plan but no claim, motion to allow late claim should be filed
 - b. If not included in plan and no claim, motion to modify under §1329 needed
 - c. Interest to begin accruing at entry of order

d.

b. 1305 Claim

i. What Types are allowed?

5. **§1305(a)(1):** Taxes that become payable to a governmental unit while the case is pending
6. **§1305(a)(2):** Consumer Debt, that arises after the petition date, and that “is for property or services necessary for the debtor’s performance under the plan”

ii. Who files?

7. Section 1305 is explicit that proof of a post-petition claim may only be filed “by an entity that holds a claim against the Debtor.” **(IE, the Creditor)**
8. If no proof of claim is filed, there is case law to suggest that it is exempt from discharge, so that is why we require the proof of claim to be properly filed before agreeing to the 1305 claim

iii. When it is not allowed?

9. Not allowed if the claim holder knew/should have known that prior approval by the Trustee of the debtor’s incurring the obligation was practicable and was not obtained

iv. Debtor must still move to modify plan under §1329

v. Generally, fees allowed

Checklist: Motion for Hardship Discharge

Step One: Is the Debtor eligible for chapter 13 discharge?

- Has the Debtor received a discharge in a prior case (chapter 7, 11, or 12) four years before their chapter 13 petition was filed?
 - If yes → Debtor is ineligible for hardship discharge.
- Has the Debtor received a discharge in a prior chapter 13 case two years before their chapter 13 was filed?
 - If yes → Debtor is ineligible for hardship discharge.

Step Two: Can the Debtor satisfy all three elements of Section 1328(b)?

- First, is the Debtor unable to complete their plan payments because of financial difficulties?
 - Examples:
 - Permanent loss of employment or regular income.
 - Medical impairment or disability.
 - Increased family household expenses.
 - Death or incompetency.
 - Should the Debtor be held accountable for their changed circumstances?
- Second, have unsecured creditors been paid, to date, what they would have received in a hypothetical chapter 7 liquidation?
 - Review “Pot” return in plan and confirmation order.
 - Check Trustee’s website for amounts disbursed to unsecured creditors.
<http://www.13network.com/trustees/sla/slahome.asp>
- Third, can the Debtor modify the plan under Section 1329?
 - Examples:
 - Extend plan payments within commitment period (3 or 5 years).
 - Reduce payments on claims of a particular class (e.g., reduce return to unsecured creditors).
 - Abate delinquent payments.

- Surrender property related to secured claims.

Step Three: Prepare and file the Motion and Notice of Hearing.

- Does the Motion clearly explain how the Debtor has satisfied all three elements of Section 1328(b)? See FED. R. BANKR. P. 9013.
- Does the Motion include supporting evidence?
 - Potential exhibits:
 - Medical records (beware of sensitive information).
 - Proof of changed expenses (receipts, bank statements, etc.).
 - Current pay-advice.
 - Amended budget.
 - Most recent tax returns.
 - Updated bankruptcy schedules (e.g., post-petition assets).
 - Signed affidavit(s).
- Notice of Hearing
 - If hearing will take more than five minutes, review Chamber Procedures at <https://www.utb.uscourts.gov/policy-and-procedures>.

**Checklist: Filing a bankruptcy petition for an incompetent debtor under FED.
R. BANKR. P. 1004.1**

- Does the incompetent debtor have a representative?
 - o Examples:
 - Guardian
 - Conservator
 - Power of Attorney
- Did the representative sign the petition and schedules?
- Be prepared to provide the court and the trustee with evidence that a third-party may represent the debtor in bankruptcy.
- If the incompetent debtor does not have a representative, then request that the court appoint a *guardian ad litem*.
- Will the representative appear at the scheduled § 341 Hearing?

**Checklist: Waiving Credit Counseling Certificate requirement for an
incompetent debtor under section 109(h)(4)**

- File a motion and notice of hearing with the court. ~~Is there a form instead?~~
- Establish that the debtor is incapacitated.
 - o The debtor is impaired by reason of mental illness or mental deficiency.
 - In other words, the Debtor is incapable of realizing and making rational decisions with respect to their financial responsibilities.
- Support motion with evidence.
 - o Examples
 - Signed affidavits.
 - Proof of guardianship, conservatorship, etc.

Issues Recently Addressed or To Be Addressed By the United States Bankruptcy Court for the District of Utah

1. Retirement Loan Debts Scheduled on Schedule F:

The Chapter 13 Office instructs that retirement loan (401(k) etc) debts be scheduled on Schedule F and the appropriate box checked (“debts to pension or profit-sharing plans, and other similar debts”)

When the issue recently was argued before the Court, the Court ruled that under the circumstances of the case, the failure to schedule a 401(k) loan repayment obligation on Schedule F was not in bad faith and therefore need not be listed. Confirmation was not precluded by the Schedule F omission.

Query whether such a debt is properly scheduled as unsecured debt, or should it be scheduled as a secured debt.

2. Can Chapter 7 Debtor’s Attorneys’ Fees be Allowed and Paid Through a Chapter 13 Plan?:

The Chapter 13 Office recently objected to the fee application filed by Chapter 7 counsel, who now is counsel for the debtor in the converted Chapter 13 case, seeking to have pre-conversion Chapter 7 attorneys fees paid through the Chapter 13 plan.

The Chapter 13 Office argued that Section 330(a)(4)(B) provides for allowance of fees to debtor’s counsel only for services rendered in the Chapter 13 case and that, based upon U.S. Supreme Court authority, debtor’s counsel can be allowed fees only if counsel was retained by the trustee under Section 327.

The matter is under advisement.

3. What is the effective date of lien avoidance under Section 522(f)?:

The Chapter 13 Office recently argued in a contested matter that the avoidance of a lien under Section 522(f) is effective only upon discharge of the debtor under Section 1328.

The matter is under advisement.

4. Exemption for Firearms:

The Chapter 13 Office has taken the position that the exemption for firearms under UCA §78B-5-505(1)(a)(xvii) allows an exemption for only one of each type of enumerated firearm: One handgun . . . one shotgun . . . and one shoulder arm. Counsel for a debtor has opposed that interpretation and the parties are in the process of briefing the issue for the Court. It is unclear

presently when the Court will hear the matter.

5. Non-Filing Spouse Income/Expenses:

The Chapter 13 Office has taken the position that if a non-filing spouse's income is listed on Schedule I, then the non-filing spouse's expenses must be verified upon request of the Chapter 13 Office. This issue may be brief in the near future, but is not presently pending.

6. Why Does the Chapter 13 Office Not Pay Mortgage Payments for Debtors?:

Historically, in the face of the national trend, the Utah Chapter 13 Office has not served as a "conduit" for debtor's mortgage payments. The office has taken the position that the debtor and debtor's counsel are best situated to keep abreast of mortgage payments and changes in monthly payment amount to prevent post-petition defaults. In addition, debtors will be required to maintain their mortgage payments current upon completion of the case and there exists no reason why debtors should not become accustomed to making those payments timely and in the correct amount.

The policy could change if the office is required by the EOUST to make mortgage payments, or by virtue of a change in circumstances which would compel the office to do so.

7. National Model Plan:

Although not a current issue before the Court, nationally a model plan will be adopted, likely on December 1, 2017. The current Utah plan is very similar to the model plan and it is anticipated that few revisions will be made. Districts may opt out of the national model plan if the local plan contains the provisions mandated by proposed FRBP 3015.1. The comment period for proposed FRBP 3015 and 3015.1 ends on October 3, 2016.

Stand by for further developments.

ATTORNEY FTP DOCUMENTS – DOCUMENT TYPE CODE LISTING (CONTINUED)
(Documents not otherwise filed with the court)

LAW & MOTION

- 685. Payment Advices (support motion to modify plan)
- 686. Verification to Support Motion to Modify/Motion to Retain Tax Refunds
- 687. Verification Tax Refund Is in Debtor's Possession (e.g., bank statements)
- 688. Sale or Refinance of Property (documents)
- 689. Settlement Statement from Sale or Refinance of Real Property
- 690. Mortgage Modification Documents

TAX REFUND REQUIREMENT

- 691. Federal and State Tax Return (required by confirmed plan)
- 692. Verification of Offset
- 693. Affidavit of Reason Debtor not Required to File Tax Returns

OTHER DOCUMENTS

- 765. PRE/POST 341 ATTORNEY MEMO AND/OR OTHER CORRESPONDENCE

ATTORNEY FTP DOCUMENTS – DOCUMENT TYPE CODE LISTING

(Documents not otherwise filed with the court)

PRE 341 MEETING/CONFIRMATION DOCUMENTS

- 675. Pre 341 Federal and State Tax Returns (most recent due)
- 676. Pre 341 Tax Refund Spent Affidavit (refund spent pre-confirmation)
- 677. Pre 341 Proof of charitable contributions (60 days prior to petition date)
- 678. Pre 341 County Property Tax Assessment (most recent)
- 679. Pre 341 Bank Account Statements (covering petition date)
- 680. Pre 341 Postpetition Payment Advice (most recent)
- 681. Pre 341 Business Questionnaire
- 682. Pre 341 Domestic Support Obligation Questionnaire
- 683. Pre 341 Real Property Appraisal or Broker's Price Opinion
- 684. Pre 341 Verification of Non-Filing Spouse's Income
- 694. Pre 341 Profit and Loss Statements
- 695. Pre 341 Verification of Other Income (e.g., pension, social security, etc.)
- 764. Pre 341 Payment Advice/Evidence of Payment and/or Payment Advice Certification
- 711. Pre/Post 341 Domestic Support Obligation "DSO Questionnaire

POST 341 MEETING/CONFIRMATION DOCUMENTS

- 696. Post 341 Federal and State Tax Returns (most recent due)
- 697. Post 341 Tax Refund Spent Affidavit (refund spent pre-confirmation)
- 698. Post 341 Proof of charitable contributions (60 days prior to petition date)
- 699. Post 341 County Property Tax Assessment (most recent)
- 700. Post 341 Bank Account Statements (covering petition date)
- 701. Post 341 Postpetition Payment Advice (most recent)
- 702. Post 341 Business Questionnaires
- 703. Post 341 Domestic Support Obligation Questionnaires
- 704. Post 341 Real Property Appraisal or Broker's Price Opinion
- 705. Post 341 Verification of Non-Filing Spouse's Income
- 706. Post 341 Profit and Loss Statements
- 707. Post 341 Verification of Other Income (e.g., pension, social security, etc.)
- 711. Pre/Post 341 Domestic Support Obligation "DSO Questionnaire
Post Confirmation Documents (Paralegal)



Bankruptcy Dirty Dozen

Geoffrey Chesnut

BANKRUPTCY DIRTY DOZEN FOR BANKRUPTCY PRACTITIONERS

Geoffrey Chesnut-Red Rock Legal Services, PLLC

1. Don't advise clients to wait too long to file.

-There is a misconception that filing bankruptcy closes the door to new credit, but studies have shown it can actually give a consumer access to more credit. People who file bankruptcy see their mailboxes full of new credit offers. Within a year they can see great rates for auto financing and within two to three years qualify for good mortgage rates. FHA will allow individuals to qualify for a mortgage two years after the discharge in Chapter 7. FHA has even implemented policies to allow individuals in Chapter 13 to obtain approval for a mortgage after twelve months of payments under their Chapter 13 plan.

-See *Insolvency after the 2005 Bankruptcy Reform* by Federal Reserve Bank of New York

-http://www.fha.com/fha_requirements_credit

2. What are the differences between Chapter 7 and Chapter 13?

-Chapter 7 Liquidation or "Straight Bankruptcy" generally the best option for someone with no substantial assets, no tax debt, no past due DSO, no equity in non-exempt property totaling more than approximately \$1000, no mortgage arrearage on home debtor seeks to retain. Trustee appointed to locate assets for unsecured creditors. Not much control of case after filing on the part of the debtor, estate is controlled by trustee and debtor holds all property including non-exempt as fiduciary for estate until abandonment, administration of asset or case is closed. Debtors should be advised accordingly.

-Chapter 13 Reorganization can be helpful to a debtor who has a car or title loan with high interest loans they wish to retain (restructure debt), possibly 'cram-down' principle on car or other personal property loan if older than 910 days or one year respectively, mortgage payment arrearages on home they seek to retain, past due taxes with obligations, past due DSO, non-exempt property subject to liquidation. Good for debtors who would like to get into a mortgage within the next 12-18 months. Basic principles of Chapter 13 are a plan to "reorganize" and in that plan most unsecured debt will be discharged. "Pot plans" are preferable to percentage plans. If there is no ability to repay in chapter 7 due to lack of income or lack of assets it is unlikely unsecured creditors will receive any payment even in Chapter 13.

3. General exemptions of property protected under bankruptcy.

-Utah State statutes regarding exemptions of property are NOT very generous. The general exemptions are found at U.C.A. § 78B-5-501 et. seq.

-Homestead \$30,000 individual, \$60,000 married couple

-Auto Exemption up to \$3000 in a single vehicle (married couple can stack in one vehicle up to \$6000)

- An individual is entitled to exemption of the following property up to an aggregate value of items in each subsection of \$1,000:

- (a) sofas, chairs, and related furnishings reasonably necessary for one household;
- (b) dining and kitchen tables and chairs reasonably necessary for one household;
- (c) animals, books, and musical instruments, if reasonably held for the personal use of the individual or the individual's dependents; and
- (d) heirlooms or other items of particular sentimental value to the individual.

- Tools of the Trade Exemption-An individual is entitled to an exemption, not exceeding \$5,000 in aggregate value, of implements, professional books, or tools of the individual's trade, including motor vehicles to which no other exemption has been applied, and *that are actually used by the individual in the individual's principal business, trade, or profession.* (Emphasis added)

4. Retirement is protected 100%.

-Under Utah State statute U.C.A. § 78B-5-505(1)(a)(xiv) states: “except as provided in Subsection (1)(b), any money or other assets held for or payable to the individual as a participant or beneficiary from or an interest of the individual as a participant or beneficiary in a retirement plan or arrangement that is described in Section 401(a), 401(h), 401(k), 403(a), 403(b), 408, 408A, 409, 414(d), 414(e), or 457, Internal Revenue Code.” Subsection 1(b) attempts to limit the amount of the contributions, by seeking to exclude the contributions within the past twelve months.

5. Taxes can be discharged.

-In the 2005 amendments to the bankruptcy code, Congress eliminated the “Super Discharge”. A debtor could obtain a discharge of taxes in Chapter 13, which they could not in Chapter 7, of unfiled, late or even fraudulently filed returns. This has been changed. In order to obtain a discharge of taxes the taxes must fit the following minimum requirements.

- The due date of the tax return must be more than three years prior to the petition date including extensions.
- The tax returns must have been filed more than two years prior to the petition date.
- The tax returns must have been assessed within 240 days prior to the petition date.
- The tax returns must not be related to “Trust Fund Taxes”, e.g. employee withholdings.
- Returns cannot be filed fraudulently or as a “willful attempt” to evade or defeat taxes.

-*The Basics of Discharging Taxes in Bankruptcy after BAPCPA*

6. Student Loans are nearly impossible to discharge.

-In the *BAPCPA* amendments to the bankruptcy code in 2005 Congress gave “private” student loans the same level of protection against dischargeability as student loans backed by the federal government. This exception from discharge is found at 11 U.S.C. § 523(a)(8).

-Most of the federal districts (including the Tenth Circuit) in the U.S. adhere to the *Brunner* analysis in determining the dischargeability of student loans. In order to seek discharge of student loans a separate “adversary proceeding” must be initiated in the bankruptcy court as part of the bankruptcy.

-The *Brunner* analysis is a three-pronged test:

1. That the debtor cannot maintain, based on current income and expenses, a ‘minimal’ standard of living for herself and her dependents if forced to repay the loans;
2. The additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans;
3. That the debtor has made good faith efforts to repay the loans.

7. Fraudulent Transfers.

A recent case from the Utah Supreme Court, *Rupp v. Moffo*, 2015 UT 71 has held that where a debtor allows a party to reside in fully encumbered, real property, rent-free has not transferred an “asset” under Utah law. In *Moffo* a debtor allowed his sister-in-law to reside in an investment property without paying rent for eight years. After the BIL filed for Chapter 7 bankruptcy the trustee sued the SIL for back rent under Utah’s Uniform Fraudulent Transfer Act, sections 25-6-1 to -14 of the Utah Code. The district court determined the SIL was the recipient of a fraudulent transfer and entered a judgment against her for \$34,200. The Utah Supreme Court in overturning the district court held that “[w]hile the Act broadly defines “transfer,” it specifically excludes from that definition the transfer of property “to the extent it is encumbered by a valid lien.” Thus, the plain language of the Act dictates that property that is fully encumbered is not an “asset” within the Act’s reach.”

- See *Rupp v. Moffo*, 2015 UT 71.

8. Estate Planning and Corporate Structures.

Clients should be dissuaded from placing anything in an heir's name for "probate reasons." It can become an asset of the bankruptcy estate. Further, property obtained by devise, inheritance, including life insurance proceeds can become property of the bankruptcy estate if the debtor has rights to the property within 180 days of a petition. Congress created the 180-day rule to discourage people from filing for bankruptcy in anticipation of receiving a significant inheritance. The idea is that people should not file for bankruptcy just to protect an upcoming inheritance.

Business clients should have discussion with counsel about the issues that might arise regarding bankruptcy and personal liability of corporate debts. Too many debtors believe LLCs protect them from a creditor's claims if they obtain a debt for a business or if they place assets in a trust as part of an estate plan. Clients should have explained to them a self-settled trust where they retain control of the corpus will not escape liquidation under Chapter 7 or review as an asset in a Chapter 13. This is due to the debtor's interests in the trust and/or LLC (or other corporate structure) become property of the bankruptcy estate. However, the bankruptcy estate only has rights to whatever rights belong to the debtor. Therefore, although a beneficial interest must be disclosed a proper "spend-thrift" clause in an irrevocable trust is likely to survive and preserve assets for the debtor. A self-settled trust with a spendthrift clause will likely fail.

-See 11 U.S.C. § 541(a)(5)

-See *Can a Bankruptcy Trustee Recover Assets Transferred to a Self-Settled Trust?*, 6 ST. JOHN'S BANKR. RESEARCH LIBR. NO. 9 (2014).

9. Domestic Support is non-dischargeable this can include attorney's fees.

Pursuant to 11 U.S.C. § 523(a)(5) a Domestic Support Obligation such as child support or alimony is non-dischargeable under bankruptcy. This includes attorney's fees awarded and ordered in relation to custody disputes absent "unusual circumstances". The creditor objecting to discharge has the burden of proof by a preponderance of evidence that the claim is non-dischargeable.

- See *In re Jones*, 9 F 3d. 878 (10th Cir. 1993); See also *In re Lowther*, 266 B.R. 753 (B.A.P. 10th Cir. 2001) and *In re Rider*, 233 B. R. 176 (B.A.P. 10th Cir. (Utah)) *unpublished*.

10. File a timely claim.

In cases under Chapter 12, and 13, a proof of claim must be filed within ninety days after the first date set for the meeting of creditors required by 11 U.S.C. § 341(a) of the Bankruptcy Code. FRBP 3002(c). In a Chapter 7 the claim must be filed within the time indicated after the request by the Trustee's request for claims. There are certain specifically defined exceptions to FRBP 3002(c), including exceptions for claims of governmental units and for claims resulting from the rejection of executory contracts and unexpired leases. FRBP 9006(b)(3) limits the enlargement of time for the creditor to file a proof of claim pursuant to Rule 3002(c) but does not limit such enlargement of the time for the debtor to file a proof of claim on behalf of the creditor pursuant to Rule 3004.

In the District of Utah the bar date is absolute as to creditors. If a creditor receives notice of the bankruptcy and fails to file a timely claim, the claim is disallowed and forever barred. A debtor can file a claim on behalf of a creditor within 30 days of the claims deadline. A debtor is not subject to the absolute deadline and can file a claim even after the 30 day deadline but a finding of 'excusable neglect' on the part of the debtor must be found to enlarge the deadline by notice and hearing.

- See *In re Scarborough*

- See *How to Complete a Proof of Claim: A Primer for Non-Bankruptcy Practitioners*

- See Official Proof of Claim Form

11. Do not violate the Automatic Stay or Discharge Order.

When a debtor files a petition of bankruptcy pursuant to 11 U.S.C. § 362 a stay against:

“(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court

may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.”

This code section is broad enough to include property repossessed by a creditor prior to a petition in bankruptcy. If the creditor continues to possess the property at the time of the petition they must return the property to the debtor as part of the estate.

-See *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983).

- See *Weber v. SEFCU*, 477 B.R. 308 (N.D.N.Y. 2012)

12. Stripping of Second Mortgages.

In a Chapter 13 a debtor can seek to remove the lien of a junior mortgage, which is “wholly unsecured”. Pursuant to Section 506(a) of the Bankruptcy Code and Fed. R. Bankr. P. 3012 a debtor in a Chapter 13 (ONLY in a chapter 13) can move for the court to value the lien as unsecured if there is not a single dollar of value, in the real property in question, more than the lien senior to the encumbrance the debtor is seeking to remove. However, under local rulings upheld by the Tenth Circuit a creditor maintains its lien until the debtor obtains a Chapter 13 discharge. If there is no equity to secure the junior lien, the lien is avoided for purposes of the Chapter 13 case and Lender’s claim is treated as a non-priority unsecured claim. However, the lien will be unaffected until Lender’s claim is paid in full under ii U.S.C. § 1325(a)(5)(B) or the debtor receives a discharge under § 1328 of the bankruptcy code. If the debtor fails to complete the plan, the case is dismissed or converted to another case under the bankruptcy code the lien shall be retained by Lender to the extent recognized by applicable nonbankruptcy law.

- See *In re Woolsey*, 696 F.3d 1266 (10th Cir. 2012).



Filing a Proof of Claim

Steven Beckstrom

FILING A PROOF OF CLAIM

- I. When must a proof of claim be filed?
 - a. For Chapter 7 or 13, Rule 3002 provides that a proof of claim is timely if filed not later than 90 days after the first date set for the meeting of creditors
 - i. What happens if meeting of creditors is continued?
 1. No continuance of proof of claim deadline
 - b. In Chapter 11, under Rule 3003 Court will fix deadline for filing proof of claim
 - i. A proof of claim may not be required because debtor's statement of liabilities filed under §521 is prima facie evidence of the validity and amount of a creditor's claim unless they are listed as disputed, contingent, or unliquidated
 - ii. If claim is not scheduled or scheduled as disputed, contingent, or unliquidated then filing a proof of claim is mandatory
 - iii. The filing of a proof of claim supersedes the scheduling of the claim or interest
 1. To ensure that creditor's proof and amount of claim controls, it's wise to file a proof of claim!
 - iv. In Chapter 11, Court can extend deadline for filing proof of claim for cause shown
 - c. Consequences for failure to file by claims bar date?
 - i. In Chapter 7 and 13, generally will not be entitled to a claim or distribution
 1. Will debtor or trustee file claim on your behalf?
 - a. Rule 3004 permits debtor or trustee to file a claim within 30 days after claims bar date
 2. If excusable neglect can be shown, then untimely proof of claim may be allowed
 - a. Pioneer Inv. Servs. Co. v. Brunswick, 507 U.S. 380 (1993)- 4 factors to determining if neglectful late filings are "excusable":
 - i. Will allowing the late claim prejudice the debtor;
 - ii. The length of the delay in filing the claim in the resulting potential impact on judicial proceedings;
 - iii. The reason for the delay, including whether the delay was within the reasonable control of the creditor filing the claim; and
 - iv. Whether the creditor that filed the claim in good faith
 3. Bottom line- don't be late!

- ii. In Chapter 11, if creditor is required to file proof of claim, and fails to do so, then it will not be treated as a creditor for the purpose of voting and distribution- See Rule 3003(c)(2)
- II. How to File Proof of Claim
 - a. Follow Form 410
 - i. Note that there is a new form effective April, 2016
 - b. Mortgage Proof of Claim
 - i. Remember mortgage proof of claim attachment form changed April, 2016
 - 1. Now requires home mortgage claimant to provide loan history on when payments were received, how they were applied, when fees and charges were incurred, and when escrow charges were satisfied
 - 2. Committee notes indicate that history should be started from the first date in which the debtor first failed to make a payment under the mortgage and related note, unless debtor brought the loan completely current after first event of default
 - c. Remember Mortgage Payment Change form
- III. Who Should file the Proof of Claim?
 - a. Official form purports to suggest that creditor, creditor's attorney or authorized agent, debtor/trustee, or guarantor/surety/endorser/codebtor may file claim
 - b. In re Rodriguez, 2013 WL 2450925 (Bank. S.D. Texas)- Case No. 10-70606
 - i. Court held that, based upon Texas attorney-client privilege and work-product privilege law, creditor's attorney waived the privileges by signing and filing a proof of claim on behalf of creditor
 - 1. Ruled that attorney-client privilege waived by offensive use since filing a proof of claim is prima facie evidence as to the claim's validity
 - a. Distinguished the filing of a Complaint by creditor's attorney which would not waive the privilege because Complaint is not a determinative action
 - ii. Court did limit the waiver to matters related to the proofs of claim and found that privilege still applied to other matters where attorney represented creditor
 - iii. Is this case good precedent?
 - 1. No other cases where another court has followed the holding of case
 - c. Best practice is to have creditor sign his/her/its own proof of claim