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BANKRUPTCY 101

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BANKRUPTCY OUTLINE

Why do most people declare bankruptcy?

A recent Harvard University study reveals that medical bills, plus related problems such as lost wages for the ill and their caregivers, contributed to 62% of all bankruptcies filed in 2007. (Los Angeles Times, June 4, 2009)

“Most medical debtors were well-educated, owned homes and had middle-class occupations.”

“Unless you’re Warren Buffet, your family is just one serious illness away from bankruptcy,” Harvard’s Dr. David Himmelstein said in a statement. “For middle-class Americans, health insurance offers little protection,” he added.

I. Introduction / General Concepts

A. What is Bankruptcy?

1. Bankruptcy is a concept under the Bankruptcy Code of 1978, 11 U.S.C. Sec.101 et seq. It is a creature of federal law, based in the Constitutional mandate of a system of uniform bankruptcy laws. (U.S. Const. Art. I & 8, cl. 4)
2. There are two types of bankruptcy, voluntary and involuntary bankruptcy.
Voluntary petitions are filed by the debtor. Involuntary bankruptcy proceedings are filed by the creditors. (See 11 U.S.C. Sec. 303)

B. Who is Involved in Bankruptcy Proceedings?

1. Debtor
2. Creditors
 - a. secured
 - b. unsecured
 1. Priority
 2. Committee
3. Judge: A bankruptcy judge is an Article I judge, appointed for a 14-year term, that has authority via the district court

4. United States Trustee: The United States Trustee system is run through the Department of Justice and is responsible for oversight of the overall bankruptcy system
5. Panel Trustee: Panel trustees are appointed in most bankruptcy cases, and are responsible for oversight of individual cases.
6. Accountant: Often an accountant is retained by the Trustee to assist in administering the debtor's estate.

Further, the Trustee might subpoena you, an outside accountant, for records you prepared for the debtor pre-bankruptcy. In the past, the accountant could assert an accountant-client privilege. However, Section 542(e) of the code provides:

“(e) Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.”

Relief under § 542(e) is discretionary and the court can fashion appropriate safeguards to protect the rights of the other party in interest. A party asserting a privilege under § 542(e) has the burden of establishing entitlement to the asserted privilege.

The legislative history of § 542(e) states:

Subsection (e) requires an attorney, accountant or other professional that holds recorded information relating to the debtor's property or financial affairs, to surrender it to the trustee. This duty is subject to any applicable claim of privilege, such as attorney-client privilege. It is a new provision that deprives accountants and attorneys of the leverage they have today when the information they hold is necessary to the administration of the estate.

II. Purpose of Bankruptcy

A. Goals for the Individuals in the Bankruptcy System (See *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 569 (1994))

1. Fair and orderly distribution of assets to creditors;
2. Fresh start for the debtor and the ability to start their financial life over again

- a. *In Local Owned Company v. Hunt*, 292 U.S. 234, 244, 54 S. Ct. 695, 78 L.E 1230 (1934) the Supreme Court held that a fresh start is a “new opportunity in life unhampered by the pressure and discouragement of pre-existing debt.”

B. Reasons for Entering the Bankruptcy System

1. Insolvency or inability to pay debts
2. Time for debtor to reorganize financial affairs
3. Protect debtor from dealing with creditors, and provide “breathing space” for the debtor through the automatic stay.

C. Primary Disadvantage for a bankruptcy debtor:

1. Length of bankruptcy
2. Lack of flexibility
3. Intrusion by trustee and other bankruptcy officials
4. Credit issues
5. Serial filing issues: what happens to a debtor who needs to file multiple bankruptcies in a row?
 - a. Chapter 7 followed by another chapter 7: need 8 years apart for discharge (727(a)(8))
 - b. Chapter 7 followed by a chapter 13: need 4 years apart for discharge (1328(f)(1))
 - c. Chapter 13 followed by a chapter 7: generally need 6 years apart for discharge (727(a)(9))
 - d. Chapter 13 followed by another chapter 13: need 2 years apart discharge (1328(f)(2)).
6. Debtors are not barred from filing a Chapter 13 in these situations, but debtor cannot get a discharge until requested time has passed.
7. Debtor can file a Chapter 13 bankruptcy the instant they receive a Chapter 7 discharge for the debts that were not discharged in Chapter

for

7 or liens that survived Chapter 7. However, debtor has not gotten discharge until four years after the earlier Chapter 7 case was filed. The strategy is commonly called a “Chapter 20 bankruptcy”.

D. Factors to Consider when deciding if Bankruptcy is the Right Choice

1. Is the debtor generally able to pay his/her debts?
2. Is the inability to pay the debts causing the debtor to incur additional debt?
3. Is the debtor being harassed by creditors or debt collection agencies?
4. What debts will the debtor incur in the future?
5. To whom does the debtor owe money? Is it an individual or institution?
6. What non-exempt assets does the debtor own?
7. Who has liens on the assets, particularly the exempt assets, of the debtor?
8. What are the debtor’s goals?
9. How comfortable is the debtor with having others making financial decisions for them?
10. Does the debtor have particular creditors that he or she wants to pay in full? Why?
11. Where has the debtor lived in the past forty months?
12. What debts will be passed onto the debtor’s estate upon death?
13. Who has the debtor recently given money to?
14. What assets does the debtor wish to retain?
15. Does the debtor owe for taxes?
16. Does the debtor owe for court imposed fines?
17. Does the debtor owe back child support or alimony?

18. Does the debtor have debts under a marital settlement?
19. Does the debtor have any student loans?
20. Are debtor's parents dying or deceased?

III. Bankruptcy Chapters for Individuals

- A. Chapter 7 is designed to expeditiously "liquidate" the assets of the debtor and fairly distribute those assets (or proceeds thereof) to creditors.
 1. Eligibility: Any person not excluded by the means test or other abuse provisions may file under Chapter 7. §109(b), 707.
 2. Property of the estate: assets owned by the debtor as of the petition date
 - a. Does not include exempt property
 - b. Does include property recovered for the estate
 3. Length of bankruptcy: typically less than one year
 4. Distribution: typically from proceeds of sale of property of the estate
 5. What Debts are Discharged?
 - a. In Chapter 7, a debtor gets to cancel or discharge many types of debt.
 1. Credit card, medical and other consumer debt are discharged as are most court judgments and loans.
 - b. Some debt is not discharged in Chapter 7.
 1. Debts incurred to pay non-dischargeable taxes, court imposed fines, child support and alimony, debts owed under marital settlement agreements, loans owed to a pension plan. Student loans, recent back taxes, and debts for personal injury or debts resulting from drunk driving.
 - c. A creditor can prevent the discharge of a debt if he can obtain a court order that the debt will survive bankruptcy

6. Discharge of unpaid debt, with exceptions provided in Code
7. Chapter Seven: Discharge of Income Tax

In the case of an individual debtor, some claims are non-dischargeable in Chapter 7, such as support and some taxes. However, some taxes and penalties are dischargeable, and those that can't be discharged can be paid without interest in Chapter 13.

The automatic stay in bankruptcy stops collection actions by taxing authorities, including garnishment and seizure. These provisions of the law apply equally to state and federal tax agencies.

The amount of relief available in bankruptcy depends on a number of factors including:

- 1) The kind of tax involved
- 2) The age of the tax
- 3) Whether a return was filed
- 4) The type of bankruptcy chapter

In general, unsecured income taxes that were first due more than three years before the bankruptcy is filed, for which a timely and non fraudulent return was filed, can be discharged in full in any chapter of bankruptcy.

- a. The basic five requirements for discharge of income taxes.
 - I. If the income tax meets the five requirements, the tax is dischargeable in Chapter 7. The requirements are:
 - aa. The most recent due date for filing the return is over three years old. 11 U.S.C. Section 507 (a)(8) (A) (i). The three-year period commences at the most recent date a tax return is due including extensions. Therefore, for federal income taxes, the three-year period will begin on April 15th, August 15th, or October 15th following the tax year.
 - bb. The debtor filed the tax return for the year in question more than two years ago. 11 U.S.C.

Section 523 (a) (1) (B). The two-year period commences on the date the tax return is actually filed. However, if the return is filed early, the due date is deemed the filing date. For the purposes of obtaining the discharge, a substitute for a return filed on behalf of the taxpayer by the IRS does not count. However, an agreed substitute for a return that is signed by the taxpayer or a signed IRS Form 4549 agreeing to a proposed assessment counts as a return.

- cc. The assessment for the tax in question is over 240 days old. 11 U.S.C. section 507 (a) (8) (A) (ii).

The 240-day period commences when the tax is officially assessed by the IRS. The date of assessment is not the date the return is filed, but a separate discreet act performed by the IRS and given a date. The IRS uses the word assessed and this date is easily available. For state income taxes where the word assessed is often not used, cases have held that this tax is assessed for bankruptcy purposes when the proposed assessment can no longer be appealed administratively. In other words, it becomes final.

- dd. The tax return must not be fraudulent (11 U.S.C. § 523(a)(1)(C)).

The no fraudulent return rule simply means that to be counted as a filed return for bankruptcy purposes the return must not be fraudulent or frivolous.

- ee. The taxpayer must not have been guilty of an intentional or willful attempt to evade the tax (11 U.S.C. § 523(a)(1)(C)).

The willful attempt to evade the tax rule is subjective. Numerous cases have interpreted differently. The accountant must use caution to

explore any kind of conduct that might be deemed a willful attempt to evade or defeat the tax.

- ff. Discharge of interest. The requirement for discharging interest that has accrued on a dischargeable tax in a Chapter 7 case is that the interest dischargeability is the same as the tax dischargeability. If the underlying tax is dischargeable, then the interest is dischargeable.
- gg. Discharging Penalties. The requirement for discharging tax penalties in Chapter 7 is similar to the rule for discharging interest. The penalties are dischargeable if the event for which the penalty was imposed took place more than three years before the bankruptcy is filed. Chapter 13 super discharge for taxes is eliminated. The super discharge for income taxes in Chapter 13 is eliminated by imposing the same rules for discharge in Chapter 13, as applies in Chapter 7. For taxes to be dischargeable in Chapter 13 the tax return must have been filed for the applicable years at least more than two years before the bankruptcy petition is filed.
- hh. Section 523 tax is treated the same as educational loans in Chapter 13. Although non-dischargeable, the tax liabilities falling under § 523(a)(1) are still not made priority claims. Therefore such liabilities are similar in nature to certain other non-priority, non-dischargeable claims such as federally guaranteed educational loans. Section 1322 of the Bankruptcy Code does not require that the taxes be paid in full through the plan. However though most case law does not permit them to be treated in the plan differently from dischargeable unsecured debts. Where the last payment of the debt would fall beyond five years from confirmation of the plan, most jurisdictions say the debtor can pay the claim outside the plan. Therefore, in most jurisdictions, where it can be shown that it would take more than five years to pay off a tax claim, it

seems the plan could provide for the payment to continue outside the plan.

- B. Chapter 13 creates a repayment plan which the debtor follows over a longer period of time.
 - 1. Eligibility, § 109(e):
 - a. Debtor must have regular income.
 - b. Debtor must have limited indebtedness.
 - i. Secured debts can not exceed \$1,010,650.
 - ii. Unsecured debts can not exceed \$336,900.
 - c. Business can not file for Chapter 13.
 - d. Debtor must be current on income tax filings.
 - i. Debtor has to prove that federal and state income tax returns for four tax years prior to bankruptcy filing have been filed.
 - 2. Property of the estate: assets owned by the debtor as of the petition date, plus property received by debtor during the bankruptcy proceeding.
 - 3. Lengthy of bankruptcy: 3 to 5 years.
 - 4. Distribution
 - a. Typically from wages earned during bankruptcy and, to some extent, sale of property of the estate.
 - b. Distributions are governed by a repayment plan created by the debtor, and approved by the court.
 - 5. Discharge
 - a. "Super-Discharge" provides discharge from some debts not granted discharge in a Chapter 7.

“Super-Discharge” package debts are:

- i. Marital debts created in a divorce on settlement agreement.
 - ii. Debts incurred to pay a non-dischargeable tax debt.
 - iii. Court fees.
 - iv. Condominium, cooperative, and homeowner’s association fees.
 - v. Debts for loans from a retirement plan.
 - vi. Debts that could not be discharged in a previous bankruptcy.
- b. But super-discharge is less “super” than pre-BAPCPA (Bankruptcy Abuse Prevention and Consumer Protection Act of 2005).
- c. Non-discharge for certain unfiled tax claims in Chapter 13. Bankruptcy Code § 1328(a) accepts to discharge those certain trust fund taxes described at § 507(a)(8)(C), and taxes falling within the criteria of § 523(a)(1)(B) and (C). Therefore, the aforementioned taxes will remain undischarged even where the IRS never filed a proof of claim.
- d. Nevertheless, this restriction of the discharge of taxes in Chapter 13 does not cover every category of tax. While amended § 1328(a) adds taxes under § 523(a)(1)(B) and (C) and § 507(a)(8)(C) to the exceptions to discharge, it does not include in the non-dischargeable category taxes under § 523(a)(1)(A) which includes priority taxes for personal income taxes. Therefore a Chapter 13 discharge under the new law still continues to technically discharge priority taxes under § 507(a)(8)(A) priority personal income taxes, priority taxes under § 507(a)(8)(B), employment taxes under § 507(a)(8)(D) excise of sales taxes under § 507(a)(8)(E) custom duties under § 507(a)(8)(F) and penalties under § 507(a)(8)(g). Bankruptcy Code § 1322(a)(2) provides that the plan must provide for full payment of all priority claims. Nevertheless when a taxing entity fails to file a timely proof of claim for the taxes, the taxes are still disallowed claims and will be discharged upon final discharge in the Chapter 13 except for trust fund taxes.

IV. Required Steps for Voluntary Bankruptcy

Documentation:

Practice note: Last minute urgent bankruptcy filings are now strongly discouraged. Due to the recent changes in the Bankruptcy Code, debtors are required to complete a pre-bankruptcy briefing certificate. The debtors are also required to provide their most recent tax returns, payment invoices for the last 6 months, as well as copies of driver's licences and Social Security cards. If the debtor is unable to obtain or provide these documents to the trustee, the debtor's case may be dismissed and the debtor would be unable to file again until the applicable delays have run.

A. Credit Counseling

1. Before a Debtor may file Chapter 7 or 13, the debtor must consult a non-profit credit counseling agency. This determines whether there is a feasible way to handle the debtor's debt outside of bankruptcy.
2. Counseling is required even if it is obvious that a repayment plan isn't possible.
3. The Debtor is not required to participate with the agency's proposal. However, if the counseling agency comes up with a repayment plan the debtor must file it along with all other bankruptcy documents.

B. Filing of Petition and schedules §301 and Rules 1002, 1007.

C. Appointment of a trustee §§ 321-326.

D. Notification to creditors Rule 2002.

E. Initial Meeting of Creditors § 341 and Rule 2003.

1. After chapter 7 is filed, the court sets a meeting of creditors.

- a. The debtor is required to attend and is run by the bankruptcy trustee who has been assigned to the debtor's case.

information

2. At the 341 hearing, the trustee asks the debtor questions about the information in the petition and schedules filed in the bankruptcy.

- a. Are there any anticipated refunds coming to the debtor?

- b. Any recent large payments made to the creditors or relatives?

- you
than 7?
- c. What method was used to arrive at the value of property items are claiming as exempt such as house and car?
 - d. Inquiry to whether you will proceed under Chapter 13 rather
 - e. Insure that all applicable paperwork has been filed and that all information is consistent.
3. Creditors can attend 341 hearing, however, the trustee is typically the person who asks most of the questions.
 4. At the end of the bankruptcy the debtor is discharged from all the debts that he is entitled to be discharged from. A creditor is forever barred from trying to collect a discharged debt.

F. Filing by creditors of proofs of claims, §501 and Rules 3001-3005.

Proof of Claim:

A Proof Of Claim is a document filed with the Bankruptcy Court, used to substantiate the claim of a creditor. It is generally filed by a creditor, and it may determine if an unsecured creditor will be paid, and the amount of such payment.

If you hold a secured claim in a Chapter 7 case, you do not need to file a proof of claim.

Unsecured creditors with claims against the debtor must file a Proof of Claim with the court within 90 days after the first date set for the meeting of creditors. A governmental unit may file until the expiration of 180 days from the date the case is filed. An unsecured creditor in a Chapter 13 bankruptcy must file a proof of claim to participate in a distribution.

Compliance within the deadline is generally strictly required. If an unsecured creditor fails to file a Proof Of Claim before the last date to file, it may lose its right to be paid. The Bankruptcy Code allows a creditor to seek permission of the Court to file a tardy claim, and may be successful only in certain limited situations.

Common mistakes in filing a Proof of Claim:

1. Failing to file timely
2. Failing to attach supporting documentation (invoice, promissory note,

etc.)

3. Not filling out Proof of Claim fully and correctly
4. Failing to sign the Proof of Claim

G. Determination of allowed claims, §502 and Rules 3007-3008.

Priority: The Bankruptcy Code's statutory ranking of unsecured claims that determines the order in which unsecured claims will be paid if there is not enough money to pay all unsecured claims in full. For example, under the Bankruptcy Code's priority scheme, money owed to the case trustee or for prepetition alimony and/or child support must be paid in full before any general unsecured debt (i.e. trade debt or credit card debt) is paid.

Claims in a higher priority must be paid in full before claims with a lower priority receive anything. All claims with the same priority share pro rata. Claims are paid in this order: 1) costs of administration 2) priority claims and 3) general unsecured claims. Secured claims are paid from the proceeds of liquidating the collateral which secured the claim.

The order of payment is as follows:

1. Claims for debts to spouse or children for court ordered support
2. Administrative expenses of the bankruptcy
3. Unsecured, post petition claims in an involuntary case
4. Wage claims of employees and independent sales persons up to \$10,000 per claim
5. Contributions to employee benefit plans up to \$10,000 per employee
6. Claims of farmers and fishermen against debtors operating storage or processing facilities
7. Return of deposit claims of individuals who didn't get the item they made the deposit on
8. Generally, income, sales, employment or gross receipts taxes assessed within 240 days before the date of the filing of the

petition.

H. Collection of property of the estate, §541.

1. Some property is excluded from the estate under section 541. This property was never part of estate. Example-the debtor holds property as trustee for another person.
2. Some property is property of the estate, but section 522 allows the debtor to exempt it out of the estate for policy reasons. The debtor's car or home would be an example.
3. Trustee may abandon property of estate because there is not enough equity in property. For example, the debtor owns a motorcycle worth \$15,000, but has a secured debt of \$20,000.

I. Mandatory Budget Counseling

1. Debtors are required to participate in a 2 hour course on budget management before the debt is discharged
2. If debtor files a Chapter 7 bankruptcy then changes his mind he must ask the courts permission to dismiss the case
3. If the case is dismissed, the debtor can always file again later.
 - a. In some circumstances, the debtor may be required to wait 180 days.
 - b. An alternative to dismissing the case is converting the case to a different type of bankruptcy for which the debtor qualifies.

J. Distribution of estate, §§ 721-726, 1321-1328.

K. Discharge §727-1328.

VI. Chapter 7 vs. Chapter 13

A. Debtors no longer have a choice between Chapter 7 and 13

1. If the debtor's average income over 6 months prior to filing is higher than the median monthly income for their state, the debtor cannot file a Chapter 7 if their projected disposable income would allow them to pay their unsecured creditors at least \$182.50 a month over a 5 year period.

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in
she

2. Debtor's Income Determines Status
 - a. Bankruptcy law divides potential debtors into 2 classes:
 1. Those Debtor whose currently monthly income is more than the family median income for their state.; and
 2. Those Debtor whose monthly income is less than the median family income for their state.
 - b. Disabled Veterans are excepted from the higher income rule. If the was incurred while the Debtor was serving on active duty or engaged homeland defense activities, the court must treat the Debtor as if he or were in the lower income group.

B. Means testing, § 707 (b)

1. First step: compare Current Monthly Income to state average
 - a. Section 101 (10A) defines CMI as “the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor’s spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on.... the last day of the calendar month immediately preceding the date of the commencement of the case [or court determined date as needed]; and includes any amount paid by any entity other than the debtor (or in a join case the debtor and the debtor’s spouse), on a regular basis for the household expenses of the debtor or the debtor’s dependents (and in a joint case the debtor’s spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism or domestic terrorism on account of their status of victims of such terrorism.”
 - b. Sample state average of incomes for 2-person household, according to:

http://www.usdoj.gov/ust/eo/bapcpa/20090315/bci_data/median_income_table.htm.
(as of March 15, 2009):

Alaska:	\$71,550
Arizona:	\$57,620

California:	\$65,097
DC:	\$72,724
Florida:	\$53,939
Indiana:	\$53,169
Maine:	\$52,065
North Dakota	\$53,389
Nevada	\$60,557
New Jersey	\$69,853
New York	\$57,006
Oklahoma	\$51,322
Puerto Rico:	\$20,715

(See attachment for list of all states.)

- c. No presumption of abuse if debtor's income is equal to or less than state average for a household of that size.

2. Second step: calculate reasonable expenses

- a. Section 707 (b)(2)(A)(ii)(I): "applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides," available at <http://www.usdoj.gov/ust/eo/bapcpa/20090315/meanstesting.htm> (as of January 31, 2009).

1. Includes expenses of spouse and dependents in most cases.
2. Includes "reasonably necessary" health and disability expenses.
3. Includes "reasonably necessary" safety expenses under the Family Violence Prevention and Services Act.
4. Includes "reasonable and necessary" expenses for food and clothes, up to an additional 5% over the IRS standards.

- b. Section 707 (b)(2)(A)(ii)(II)-(V) permits other actual expenses that are "reasonable and necessary," including (among others) "the continuation of actual expenses paid by the debtor that are

reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family who is unable to pay for such reasonable and necessary expense." All of those provisions will require that a court make determinations regarding what is reasonable and necessary for the maintenance and support of a debtor and the debtor's dependents.

3. Third step: calculate difference between CMI and the allowable expenses to determine whether filing of a Chapter 7 is presumed to be abusive.
 - a. A Chapter 7 filing is presumed to be abusive (thus forcing a debtor into a Chapter 13 or, in rare cases, a Chapter 11) if the difference between the CMI and allowable expenses is equal to or exceeds \$182.50 per month.
 - b. A Chapter 7 filing is also presumed to be abusive if the difference between the CMI and allowable expenses is equal to or exceeds \$100 per month if the difference would be sufficient to pay at least 25% of anticipated unsecured claims over the course of a 5-year plan.
 - c. A Chapter 7 filing is not presumed to be abusive if the difference between the CMI and allowable expenses is less than \$100 per month.

Example: Harry Hebert, earned \$2,000 in each of the last 6 months from his job as trapper, plus stock dividends of \$200 per month, and Social Security payments of \$500 per month. Debtor lives alone.

Debtor's Current Monthly Income under section 101 (10A) of the Bankruptcy Code is \$2,200 (\$2,000 from job + \$200 stock dividend per month). The Social Security payments are not included. If the Debtor lives in a state in which the average monthly household income equals or exceeds \$2,200, the Debtor does not need to go any further, and debtor is entitled to file under either Chapter 7 or Chapter 13 (absent some other abuse) under 707 (b)(7)(A). However, if the state median monthly income is less than \$2,200 (only true in Arkansas and Mississippi, and some US Territories), the debtor must go on to the next step of the means test.

Example: Pierre David makes \$4,500 a month as a plant worker. His current monthly

income is more than the median income for his state, so he has to pass the means test in order to be able to file for Chapter 7. After he deducts his allowable expenses from his income, he has \$200 a month extra. Because his excess income exceeds \$182.50, Pierre David fails the means test. If Pierre David had only a \$125 a month extra, he would be required to determine if the \$125 would pay 25% of his unsecured, nonpriority debt in five years. For example, if he owed \$32,000 in credit card debt, he would be barred from Chapter 7, if he could pay \$8,000 (25% of debt) over five years. However, he has only \$7,500 extra, he would pass the means test, and be eligible for Chapter 7, if he meets other eligibility factors.

C. No Means Test

1. Disabled veteran.
2. If more than 50% of your debt load comes from business debt, taxes, or debts for personal injury on property damage you caused to someone else.

D. Advantages of Chapter 7

- over
filer
1. Relatively fast, effective and easy to file and doesn't require payment time.
 - a. Typical case is opened and closed within 6 – 9 months and the emerges debt free except for mortgage and car payments and certain types of debt that survive bankruptcy

E. Hurdles of Chapter 7

- tax
least 2
lived previously and
1. Attorney fees are much higher under the new law
 2. Documentation is more extensive in Chapter 7 including most recent return and wage stubs from the 60 days prior to filing.
 3. Credit counseling and realignment management education is required §727 (a)(11) and 111.
 4. Debtors who have not lived in the state where they are filing for at least 2 years must use exemption rules for the state where they lived previously and forty months for homestead exemption.

F. Homestead Exemption

1. The first step is a determination of which state's exemption laws apply to this particular debtor. If the debtor has been domiciled in one state for the 2 years preceding filing, use that state's exemption laws. If the debtor has not been domiciled in one state for that time, you need to go back to the 6 months before that 2 year period and determine the state of domicile (and, if there have been multiple domiciles in that 6-9 month period, you may use place of longest domicile in that 6-month period). § 522(b)(3)(A).
2. Next, you need to determine whether the state's internal laws have opted out of the federal Bankruptcy exemptions. If so, the Debtor may only use state-granted exemptions, local exemptions, and federal exemptions not granted by the Bankruptcy Code. If not, the Debtor may choose between the state-exemption scheme or the federal-bankruptcy-exemption scheme. More than 2/3 of states have opted out of the federal bankruptcy exemption scheme. § 522(b)(2).
3. If the state grants a homestead exemption of more than \$125,000, you also need to consider § 522(p)(1). Section (p)(1) prohibits a debtor from using more than \$125,000 (now \$136,875 with adjustment for inflation) worth of the homestead exemption obtained in the 1215 days (roughly 3 years, 4 months) before filing. However, value transferred between homes in the same state can be taken.
4. The bar cap changes the residency requirement for homestead exemptions. The homestead exemption determines how much of the debtor's equity in a house the debtor can keep under Chapter 7. The debtor must live in the state for 40 months prior to the filing in order to claim more than \$136,875.00 worth of homestead exemptions. Example: if Boudreaux moves from California to Nevada 30 months ago and files a Chapter 7 bankruptcy his homestead exemption would be capped at \$136,875.00 even though Nevada's homestead is higher. The California homestead varies from \$50,000.00 for single persons to \$150,000.00 for persons over 65 or over 55 with disabilities.
5. Planning Tip: Boudreaux may want to wait ten months before filing. When he has lived in Nevada for 40 months, he will be able to claim an added homestead exemption of \$350,000.00. Debtor can file a Chapter 13 bankruptcy the instant they receive a Chapter 7 discharge for the debts that were not discharged in the Chapter 7 or liens that survive Chapter 7. However debtor does not get discharged until four years after the earlier the Chapter 7 was filed. The strategy is commonly called a "Chapter 20 bankruptcy." Super discharge packet

debts are:

- agreement,
- (a) Marital debts created in a divorce or settlement
 - (b) Debts incurred to pay a non-dischargeable tax debt,
 - (c) Court fees,
 - (d) Condominium, cooperative and homeowner's association
- fees,
- (e) Debts for loans from retirement plans, and
 - (f) Debts that could not be discharged in a previous
- bankruptcy.

6. The Trustee may abandon property of an estate because there is not enough equity in the property. For example, the debtor owns a motorcycle worth \$15,000.00, but it is secured by a debt of \$20,000.00.

Pierre Thibodeaux makes \$4,500.00 a month as a plant worker. His current monthly income is more than the median income for his state so he has to pass the means test in order to be able to file for Chapter 7. After he deducts his allowable expenses from his income he has \$20.00 a month extra. Because his excess income does not exceed \$182.50 Pierre Thibodeaux qualifies for Chapter 7.

7. If Pierre Thibodeaux had only \$125.00 a month extra he would be required to determine if the \$125.00 would pay 25 percent of his unsecured non-priority debt in five years.
8. For example, if he owed \$32,000.00 in credit card debt, he would be barred from Chapter 7 if he could pay \$8,000.00, 25 percent of the debt over five years. However, he has only \$7,500.00 extra. He would pass the means test and be eligible for Chapter 7 if he meets the other eligibility factors.

G. Choosing between Chapter 7 or Chapter 13

1. A Debtor should consider Chapter 13 if they have adequate disposable income to fund a plan and meet any or all of the following situations:
- a. Debtor is behind on car or house payments and wants to make

up
agreement;

the missed payments over time and reinstate the original

credit; and

in

- b. Debtor has a tax obligation, student loan or other debt that cannot be discharged in chapter 7 that can be paid over time in chapter 13;
- c. Debtor has a strong desire to repay debts and restore good credit; and
- d. Debtor owes debt that may be discharged in Chapter 13, but not Chapter 7.

H. Automatic Stay

1. Prohibits Creditors and collection agencies to take any action to collect most debt that is owed unless allowed by the law of bankruptcy
2. The Creditor cannot do the following actions:
 - a. File a lawsuit or proceed with an existing lawsuit;
 - b. Record liens or judgments against the debtor's property;
 - c. Report the debt to a credit reporting agency; and
 - d. Seize the Debtor's property or income.
3. Public Benefits
 - a. Bankruptcy doesn't prevent the denial or termination of benefits including Medicaid
4. Domestic Relation Proceedings
 - a. All proceedings relating to divorce or paternity actions continue and are not affected by Automatic Stay.
5. Tax Proceedings
 - a. The Automatic Stay stops the IRS from issuing a lien or seizing levying against any of the debtor's property or income
 - b. The IRS can continue issuing a tax deficiency notice, tax return, issuing a tax assessment and

or

demanding a

demanding payment of an assessment.

6. Landlord / Tenant Proceedings

- a. Generally the Automatic Stay does not stop the eviction of a tenant if 1) the landlord obtains a judgment prior to the bankruptcy filing or 2) the tenant is endangering the property or 3) is engaging in illegal activities on the property.

7. Foreclosures

bankruptcy
previous
proceed with

- a. Foreclosures are generally stayed by the bankruptcy filing. The Automatic Stay won't apply if the Debtor filed another within the past 2 years and the Bankruptcy Court in the proceeding lifted the stay and allowed the lender to proceed with the foreclosure.

8. Utilities

- a. Utility companies may not discontinue service because you filed bankruptcy. However, the utilities may be shut off 20 days after filing if you don't provide them with a deposit or other means to insure future payment.

A glossary of bankruptcy terms can be found at the United States Courts website at:
<http://www.uscourts.gov/bankruptcycourts/bankruptcybasics/glossary.html#341>

G. Interesting Cases

1. Department of Justice Press Release

For Immediate Release

May 14, 2009 United States Attorney's Office

Middle District of Louisiana

Contact: (225) 389-0443

Indictment in Baton Rouge, Louisiana on Charges of Bankruptcy Fraud

United States Attorney David R. Dugas announced that a federal grand jury returned an indictment yesterday charging LEE M. ALLEN, age 66, and SANDRA SUE ALLEN age 62, both residents of Zachary, Louisiana, with bankruptcy fraud in connection with their bankruptcy case filed in June 2005.

The eight-count indictment alleges that the two women posed as a married husband and wife, both on their bankruptcy petition filings and schedules, and under oath in a proceeding conducted before a bankruptcy trustee in August 2005. The indictment further alleges the two women concealed from creditors and the bankruptcy estate over \$18,000 worth of jewelry and over \$138,000 which Sandra Sue Allen received from her mother who had died in March 2005. The alleged scheme involved converting the proceeds which Sandra Sue received from the sale of her mother's home in Chicago into a series of bank cashier checks during the existence of the bankruptcy estate. The checks were then used to purchase land in Zachary and two mobile homes that were placed on the land. None of the transactions were disclosed in the bankruptcy proceedings. Public records associated with both the purchase of the land and attaching the mobile homes to the land indicated the two defendants were unmarried women.

If convicted of all counts, Sandra Sue Allen could receive a maximum sentence of forty

years imprisonment and a \$2 million fine, while Lee M. Allen could receive a maximum sentence of thirty years imprisonment and a \$1.5 million fine.

The case was investigated by the Federal Bureau of Investigation; the Office of the United States Trustee in Bankruptcy, Fifth District, headquartered in New Orleans; and Assistant U.S. Attorney Ian F. Hipwell.

NOTE: An indictment is a determination by a grand jury that there is probable cause to believe that offenses have been committed by the defendants. The defendants, of course, are presumed innocent until and unless they are proven guilty at trial.

2. ACCOUNTANT FOR T. MILTON STREET CHARGED WITH BANKRUPTCY AND TAX FRAUD

For Immediate Release August 1, 2008

PHILADELPHIA - Acting United States Attorney Laurie Magid today announced the filing of an information charging Fred A. Johnson, Jr., a self-employed accountant, with concealing assets during a bankruptcy, and with filing false tax returns for the years 2001 through 2004. Johnson, a tax accountant, testified in the case of United States v. T. Milton Street, Sr. in February 2008. Johnson identified himself as the tax accountant for Street.

“The signature of a certified preparer on your tax form carries with it some measure of integrity because they are well versed in our tax laws,” said Magid. “When they violate the trust placed in them, the expense to the IRS is eventually borne by everyone else who is honest about reporting their income.”

INFORMATION REGARDING THE DEFENDANT

NAME	ADDRESS	AGE
Fred A. Johnson, Jr.	Mullica Hill, NJ	55

If convicted, the defendant faces a maximum possible sentence of 17 years imprisonment, a \$1,250,000 fine, 3 years of supervised release, and a special assessment of \$500.

The case was investigated by the Internal Revenue Service. The case has been assigned to Assistant United States Attorney Jennifer Arbittier Williams.

UNITED STATES ATTORNEY'S OFFICE Contact: PATTY HARTMAN
EASTERN DISTRICT, PENNSYLVANIA Media Contact
Suite 1250, 615 Chestnut Street 215-861-8525

Philadelphia, PA 19106

3. New Century Bankruptcy Examiner Says KPMG Aided Fraud

By: Tiffany Kary for Bloomberg.com

Last Updated: March 26, 2008

New Century Financial Corp.'s bankrupt estate might have cause to sue its former accountant KPMG LLP and some directors and officers for improper accounting leading up to its bankruptcy, a court examiner said in a report.

The company, once the second-biggest U.S. subprime-mortgage lender, engaged in accounting fraud in 2005 and 2006 before filing for bankruptcy in April 2007, according to the 581-page report by court examiner Michael J. Missal unsealed today.

New Century ``engaged in a number of significant improper and imprudent practices related to its loan originations, operations, accounting and financial reporting processes," Missal wrote in the report. He said ``KPMG contributed to certain of these accounting and financial reporting deficiencies by enabling them to persist" and in some cases ``precipitating" a departure from ``applicable accounting standards."

``This is really the embryo of the credit crisis," Missal said today in a phone interview. ``The theme of the report is how easily the loans were originated, how exceptions were made, how they used bad appraisals. There were no appropriate internal controls, and KPMG failed to look at these things skeptically."

Missal said the bankrupt estate may be able to sue KPMG for professional negligence. KPMG resigned as independent auditor of Irvine, California-based New Century on April 27.

``We strongly disagree with the report's conclusions concerning KPMG," firm spokesman Dan

Ginsburg said in a phone interview. "We believe that an objective review of the facts and circumstances will affirm our position."

SEC Investigation

The U.S. Securities and Exchange Commission is also reviewing KPMG's role as New Century's auditor and has subpoenaed the accounting firm, two people familiar with the matter said. They declined to be identified because the inquiry isn't public.

Ginsburg declined to comment on whether the SEC has subpoenaed KPMG.

Missal said the estate may also have reason to sue directors and officers to seek recovery of bonuses paid to them in 2005 and 2006 because those bonuses were tied to incorrect financial statements.

The estate "could seek millions of dollars in recoveries," according to the report. Missal said in an interview that some bonuses for executives were in the "tens of millions" of dollars.

Three founders of the company, former Chairman Robert Cole, former Vice Chairman of Finance Edward Gotschall and former Chief Executive Officer Brad Morrice received bonuses in 2005 "that were at least 300 percent more than they should have been," according to the report. The bonuses were based on profits resulting from bad accounting, Missal said in the report.

Loss, Not Profit

Because of the accounting failures, New Century reported a profit of \$63.5 million in the third quarter of 2006 when it should have reported a loss. The company reported that earnings grew 8 percent for that quarter, when they actually declined at least 40 percent, according to the report.

"While we have not yet had a chance to review the report, Mr. Gotschall and Mr. Cole have cooperated and will continue to cooperate with the examiner and any other inquiries," Charles Sipkins, a spokesman for the two, said in a phone interview. Sipkins declined to comment further.

New Century spokesman Dan Gagnier said in an e-mail that the company is "pleased that the Examiner's report is finally completed and that we can take the next steps of confirming the plan of liquidation." Gagnier declined to comment further.

KPMG's Recommendation

According to the report, New Century "engaged in seven kinds of improper accounting, including understating its repurchase reserve -- money set aside to repurchase bad loans. In the third quarter of 2006, New Century understated this reserve by at least \$104.8 million, at a time when "the company was being flooded with repurchase claims from investors," Missal said.

The examiner said several people he interviewed for the report claimed KPMG recommended the

improper changes to the reserve calculation, and KPMG denied doing so. Work papers show KPMG ``evaluated and approved the change," Missal said.

From 2004 to 2006, ``investors rejected around \$800 million in loans simply due to missing documentation, and billions of dollars of loans for other reasons," Missal said.

Missal described how increasingly risky loan-origination practices created the problems which led the company to cover up its situation through faulty accounting.

Underwriting Exceptions

New Century's loan originations, which rose from \$14 billion in 2002 to \$60 billion in 2006, increased as the company made exceptions to its underwriting guidelines and gave money to homeowners who couldn't afford rates past the low initial ``teaser rates," eventually creating ``a ticking time bomb that detonated in 2007," Missal said.

Former New Century employees asked a judge on March 19 to unseal the report, saying that without it, they didn't have enough information to know whether they should vote in favor of New Century's liquidation plan.

Investigators had announced they were looking into New Century's accounting in March 2007, prior to bankruptcy and the SEC said in July 2007 that it was stepping up a probe into the company's practices.

The case is *In re New Century TRS Holdings Inc.*, 07-10416, U.S. Bankruptcy Court, District of Delaware (Wilmington).