Concurrent Session

Who Is Still Eligible for Bankruptcy Relief? Current Issues on the Means Test, Debt Limits and Serial Filers

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Educational Materials

Who is Still Eligible for Bankruptcy Relief? Current Issues on the Means Test, Debt Limits and Serial Filers

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I. Eligibility for Chapter 7

A. Who may be a chapter 7 Debtor?

- To qualify for relief under chapter 7 of the Bankruptcy Code, the debtor may be: an individual, a partnership, a corporation or other business entity. 11 U.S.C. §§ 101(41), 109(b).

- Assetless/dissolved corporations are eligible to file under chapter 7 as part of the process of winding up and liquidating its affairs. *See In re Quad City Minority Broadcasters, Inc.,* 252 B.R. 773 (Bankr. S.D. Iowa 2000). A dissolved corporation's ability to file for bankruptcy relief may depend on how the state in which it was incorporated defines its existence after dissolution. *In re Wine Farms, Inc.,* 94 B.R. 410 (Bankr. W.D. Va. 1988).

- Relief is available under chapter 7 regardless of the amount of the debtor's debts or whether the debtor is solvent or insolvent.

- No individual may be a debtor under chapter 7 unless she has, within 180 days before filing, received credit counseling from an approved credit counseling agency either in an individual or group briefing. 11 U.S.C. §§ 109, 111. There are exceptions in emergency situations or where the U.S. trustee (or bankruptcy administrator) has determined that there are insufficient approved agencies to provide the required counseling. If a debt management plan is developed during required credit counseling, it must be filed with the court.

B. Passing the Means Test

- If the debtor's "current monthly income," based on the debtor's household size is more than the state median, the Bankruptcy Code requires application of a "means test" to determine whether the chapter 7 filing is presumptively abusive.

- Abuse is presumed if the debtor's aggregate current monthly income over 5 years, net of certain statutorily allowed expenses, is more than (i) $10,000, or (ii) 25% of the debtor's non-priority unsecured debt, as long as that amount is at least $6,000.

- The debtor may rebut a presumption of abuse only by a showing of special circumstances that justify additional expenses or adjustments of current monthly income.

- Unless the debtor overcomes the presumption of abuse, the case will generally be converted to chapter 13 (with the debtor's consent) or will be dismissed. 11 U.S.C. § 707(b)(1).

1. Calculating Household Size

- The "heads on the bed" approach. – To calculate the size of Chapter 7 debtor's household, for purpose of determining his "allowable means test" expenses and deciding whether his Chapter 7 petition was presumptively subject to being dismissed, the court found it appropriate to use a "heads on the bed" approach and to fix household size at two, based on the fact that the debtor and his roommate were living in the same home, without considering whether the debtor provided any support to his partner, or whether the partner was dependent upon the debtor. *In re Epperson*, 2009, WL 2501995 (Bankr. D. Ariz, 2009), adopting approach in *In re Ellringer*, 370 B.R. 908 (Bankr. D. Minn. 2007).

- In *Epperson*, the court found that is inappropriate to consider a household member's dependency on the debtor when determining household size; and found that "household" should be understood in the ordinary sense of the word. The court in Epperson also found that the debtor was only required to include his roommate's monthly contributions to pay for household expenses in calculating the debtor's current monthly income, not all of the roommate's monthly income. But see *In re Jewell*, 365 B.R. 796 (Bankr. S.D. Ohio 2007) and *In re Law*, No. 07-40863, 2008 WL 1867971 (Bankr. D. Kan. 2004), in which the courts focused on the debtor's support of household members and dependency to determine household size.

2. Current Monthly Income

- A debtor's current monthly income ("CMI") is defined under 11 U.S.C. § 101(10A) 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 monthly immediately preceding the date of the commencement of the case if the debtor files the

schedule of current income required by [Bankruptcy Code] Section 521(a)(1)(B0(ii)…or…the date on which current income is determined for purposes of [chapter 7] if the debtor does not file the schedule of current income required by Section 521(a)(1)(B)(ii).

3. Deductible Expenses

- Pursuant to 11 U.S.C. § 707(b)(2)(A)(ii), a debtor is entitled to deduct applicable monthly expense amounts specified under the National and Local Standards, and a debtor's actual monthly expenses for the categories specified as "Other Necessary Expenses."

- The IRS National Standards include: food, clothing, household supplies, and personal care. A debtor's allowable expenses are uniform, regardless of where the debtor lives.

- Local Standards include: housing and transportation expenses. Amounts for these expenses vary from region to region.

- Transportation expenses regarding vehicles are divided into "ownership" costs and "operating" costs.

- Other Necessary Expenses include: taxes, mandatory payroll deductions, health care, and telecommunication services. The amounts for these expenses a debtor is allowed to deduct the actual amount that the debtor spends on a monthly basis, without any specified limitation on such expenses.

4. Special Circumstances

- To qualify as a "special circumstance," of a kind sufficient to rebut the statutory presumption arising under the means test that a debtor's Chapter 7 case was filed in bad faith, the circumstances need not be of an involuntary nature and have developed due to factors outside the debtor's control. *In re Haman*, 366 B.R. 307 (Bankr. D. Del. 2007). Special circumstances are also scenarios that leave a debtor with no reasonable alternative to the expense or adjustment of income. *In re Mravik,* 399 B.R. 202 (Bankr. E.D. Wis. 2008). Special circumstances are ones that are out of the ordinary for an average family. *In re Patterson*, 392 B.R. 497 (S.D. Fla. 2008).

- Above-median income Chapter 13 debtors may be able to claim additional expenses, beyond those allowed by the means test, based on special circumstances, circumstances, which may, in some instances, include the debtor's need for a new car. *In re Wilson*, 383 B.R. 729 (B.A.P. 8th Cir. 2008).

- A Chapter 7 debtor's nondischargeable obligation as a co-signer on her son's student loans qualified as a special circumstance of a kind sufficient to rebut the presumption that her Chapter 7 case was subject to being dismissed as abuse, where the debtor's son was afflicted with a medical condition that prevented him from repaying his student loans, and the debtor had no reasonable alternative but to pay the monthly student loan expense. *In re Haman*, 366 B.R. 307 (Bankr. D. Del. 2007). *But see In re Pageau*, in which the court found that the monthly payments that a Chapter 7 debtor was obligated to make on her nondischargeable student loan did not constitute a special circumstance where the debtor incurred the student loan debt in the ordinary course of acquiring her education, and not as part of retraining necessitated by any permanent injury, disability, or plant closing, and the debtor's contention that she had no reasonable alternative but to pay the loan was unpersuasive as the loan could be paid as long-term debt through a Chapter 13 plan. *In re Pageau*, 383 B.R. 221 (Bankr. D. N.H. 2008).

- Fact that Chapter 7 debtor-husband worked as a truck driver and had to eat outside of the home when on the road was not a special circumstance warranting an additional food expense of $400 per month for purpose of rebutting the presumption of abuse; the court found that allowing the debtors the full $400 per month in food without reducing the standard amount allowed to the debtors as a food expense for a family of three would be "double dipping." *In re Patterson*, 392 B.R. 497 (Bankr. S.D. Fla. 2008).

- Mere fact that Chapter 7 debtors had an obligation reimburse a 401(k) Plan for a prepetition loan was not enough to establish special circumstances rebutting presumption of abuse that arose in their case, but the circumstances that led to the debtors taking an advance from the plan could demonstrate special circumstance. *In re Cribbs*, 387 B.R. 324 (Bankr. S.D. Ga. 2008). Fact that debtors' retirement loan repayments would be deductible from their disposable income in a Chapter 13 case, and thus would not be required to be included in their plan payments, did not establish special circumstances rebutting the presumption of abuse arising under the means test in their Chapter 7 case. *In re Mowris*, 384 B.R. 235 (Bankr. W.D. Mo. 2008). Chapter 7 debtor's obligation to repay loan from a 401(k) employee retirement plan is not a special circumstance *per se*, on which debtor can always rely on to rebut statutory presumption that Chapter 7 petition is abusive; rather to determine whether such an obligation qualifies as a special circumstance, the bankruptcy court must engage in a fact-specific inquiry. Chapter 7 debtor's obligation to repay 401(k) loan presented a special circumstance that arose from the fact that among other things, the debtor had incurred the loan more than one year prior to the petition date, and debtor had used loan proceeds to pay credit card debt and to reduce unsecured debt that would otherwise be paid in a Chapter 13 case, and the debtor could not stop making payments unless he

quit his job or paid off the loans in full. *In re Lenton*, 358 B.R. 651 (Bankr. E.D. Pa. 2006).

- Above-median-income Chapter 13 debtor failed to demonstrate any special circumstances to additional deductions for food, clothing and personal care expenses above and that specified in the IRS guidelines, based on the fact that his job required him to be away from home for extended periods of time and allegedly resulted in an increase in such expenses, as debtor failed to explain why his extended absences from home required that he eat out, rather than in the rental property he stayed in, and failed to show that he had no reasonable alternative, or that such additional expenses were necessary for him to produce income or for his health and welfare. *In re Tuss*, 360 B.R. 684 (Bankr. D. Mont. 2007).

- Child support payments for which Chapter 7 debtor was not liable for on the date of filing due to the fact that the final divorce decree and even temporary support order were not entered until after the date of filing, could not be deducted by the debtor from his CMI on his means test; however, the court found that the same monthly child support payments qualified as a special circumstance. *In re Littman*, 370 B.R. 820 (Bankr. D. Idaho 2007).

- Above-median-income Chapter 13 debtors' need to maintain two separate households based on their inability to live together, as demonstrated by their separation and postpetition divorce, qualified as a special circumstance that would permit them to claim separate housing and related allowances for both households in performing the means test calculation to determine the projected disposable income that would have to be devoted to payment of unsecured creditors; there was no suggestion that the debtors' separate living situation was a scheme to avoid the application of the means test. *In re Crego*, 387 B.R. 225 (Bankr. E.D. Wis. 2008).

II. Eligibility for Chapter 13

A. Who is Eligible?

1. Generally

- Any individual, even if self-employed or operating an unincorporated business, is eligible for relief under Chapter 13.

- No individual may be a debtor under Chapter 13 or any chapter of the Bankruptcy Code unless the debtor has, within 180 days before filing, received credit counseling from an approved credit counseling agency either in an individual or group briefing. 11 U.S.C. §§ 109, 111.

- An individual cannot file under Chapter 13 or any other chapter if, during the preceding 180 days, a prior bankruptcy petition was dismissed due to a debtor's willful failure to appear before the court or comply with orders of the court, or was voluntarily dismissed after creditors sought relief from the Bankruptcy Court to recover property upon which they hold liens. 11 U.S.C. §§ 109(g), 362(d) and (e).

2. "Business Debtors"

- A corporation or partnership **may not** be a Chapter 13 Debtor. *See Forestry Products, Inc. v. Hope, M.D.*, 34 B.R. 753 (Bankr. M.D. Ga. 1983).

- Debtors did not have "regular income," and therefore did not qualify to be Chapter 13 debtors where the debtors and their son were in a partnership, and the son handled income receipts and disbursements, and "allocated" the expenses between him and his debtor parents, and son alone determined the amount of income that debtors received. In order for the debtors to be eligible for Chapter 13 relief, the debtors' partnership assets had to be excluded. *In re Ross*, 173 B.R. 943 (Bankr. E.D. Okla. 1994).

- Husband and wife who operated a "mom and pop" grocery store, who admitted being jointly liable to their trade creditors, who both signed certificate for partners, who both signed lease for grocery store, could not file jointly as individuals under Chapter 13 when they held themselves out to public as partners. *In re Krokos*, 12 B.R. 520 (Bankr. S.D.N.Y. 1981).

- But see *In re Ward*, 6 B.R. 93 (Bankr. M.D. Fla. 1980), where debtor wife worked in business without compensation, the debtors' schedules listed the debts of the business as joint debts and debtor wife had power to sign checks on business account, but debtors husband and wife did not have express or implied agreement between them to create a partnership, and did not hold out to public at large or to individual third parties that they were operating their business as a partnership, the court found that the evidence did not establish that the business was operated by a partnership and not by debtor husband alone as a sole proprietor, thus the business was not a partnership ineligible for Chapter 13 relief.

3. Trust as a Debtor

- A trust cannot qualify as an individual with regular income of a kind eligible to be a Chapter 13 debtor. *In re W.F.C. Real Estate Trust No. 1*, 236 B.R. 90 (Bankr. S.D. Fla. 1999).

4. Decedent's Estate

- The estate of a deceased person was not eligible to be a debtor under Chapter 13, in part because a deceased person was not an individual with

regular income. *In re Jarrett*, 19 B.R. 413 (Bankr. M.D.N.C. 1982). In *Jarrett*, the Chapter 13 debtor passed away before completing his plan and the administrator of his probate estate sought to convert the case to a case under Chapter 7 rather than dismissing it. The court found that a deceased debtor did not meet the definition of an individual with regular income, specifically noting that the term as defined under 11 U.S.C. § 101 as an individual whose income is sufficiently stable and regular to enable such an individual to make plan payments. The court also found that conversion to Chapter 7 by the debtor's probate estate was prohibited by the requirement of 11 U.S.C. § 109 that only a "person" may file under Chapter 7, and that a probate estate is not an individual person within the meaning of bankruptcy law and may not file for Chapter 7 relief.

- But see *In re Perkins*, in which the court found that FRBP 1016 providing that a Chapter 13 case may proceed even after the debtor's death, if further administration is possible and in the best interests of parties, did not conflict either with the definition of "debtor" as a person or municipality concerning which a bankruptcy case has been commenced, or with the Chapter 13 eligibility requirement, which requires a debtor to be an individual with regular income. *In re Perkins*, 381 B.R. 530 (Bankr. S.D. Ill. 2007).

B. Regular Income Requirement

1. Generally

- The requirement that a debtor under Chapter 13 be an individual with "regular income," an individual with regular income means an individual whose income is sufficiently stable and regular to enable that individual to make payments under a Chapter 13 plan. In re Mullins, 360 B.R. 493 (Bankr. W.D. Va. 2007); In re Terry, 3 B.R. 63 (Bankr. W.D. Ark. 1980). The test for determining whether a Chapter 13 debtor is an individual with regular income is not the type or source or debtor's income but its regularity and stability. In re Bottelberge, 253 B.R. 253 (Bankr. D. Minn. 2000).

2. What constitutes "regular income?"

- In deciding whether debtor has sufficient "regular income" to be eligible for Chapter 13 relief, the phrase "regular income" should be construed to include investments, pensions, social security, welfare, and unemployment benefits, not just wages. *In re Rigales*, 290 B.R. 401 (Bankr. D. N.M. 2003); *In re Hagel*, 184 B.R. 793 (9th Cir. BAP (Mont.) 1995); *In re Robertson*, 84 B.R. 109 (Bankr. S.D. Ohio 1988); *In re Sassower*, 76 B.R. 957 (Bankr.S.D.N.Y. 1987).

3. Lack of income

- Debtors, who stated that they lacked regular income sufficient to enable them to make Chapter 13 plan payments, were ineligible for relief under Chapter 13. *In re Gavia*, 24 B.R. 573 (9th Cir. BAP (Cal.) 1982). *See also In re LeSane*, in which the court found that the pro se debtor's Chapter 13 case was not filed in good faith and would be dismissed where the debtor indicated she had no regular income, and indicated that her lack of income was the reason for filing the case. *In re LeSane*, 301 B.R. 625 (Bankr. M.D. Ga. 2003).

4. Income from operation of business

- Debtor was eligible for Chapter 13 relief in that he was an individual who received regular income from operation of businesses and rents from real property; a liquidation of his assets could also furnish alternative source of income to fund a plan. *In re Rebeor*, 89 B.R. 314 (Bankr. N.D.N.Y. 1988). Similarly, debtors who would have monthly income of $500 each from the operation of their corporate business, met the jurisdictional "regular income" requirement so as to be eligible for Chapter 13 relief. *In re Bradley*, 18 B.R. 105 (Bankr. D. Vt. 1982).

5. Do contributions from friends or relatives constitute regular income?

- Debtor did not have sufficiently stable and regular income to be able to fund a plan, and was not eligible to be a Chapter 13 debtor, given that the debtor could not make plan payments without her boyfriend's contribution of housing, food, and utilities and possibly half of proposed plan payments themselves, and that debtor's boyfriend had no legal obligation to pay of debtor's expenses. *In re Heck*, 355 B.R. 813 (Bankr. D. Kan. 2006).

- University student who received $300 per month from his father that was property characterized as a gift and who had worked part time at a hospital while being enrolled at another university, did not quality to be a Chapter 13 debtor as he had no source of regular income. *In re Cregut*, 69 B.R. 21 (Bankr. D. Ariz. 1986).

- Unmarried, unemployed student whose only income consisted of $650 a month in assistance from friends and family members was not "individual with regular income" eligible for Chapter 13 relief. *In re Hanlin*, 211 B.R. 147 (Bankr. W.D.N.Y. 1997). But see *In re Rowe*, 110 B.R. 712 (Bankr. E.D. Pa. 1990), in which the court found that the debtor's consistent, longstanding receipt of monthly contribution from her son qualified her as a debtor under Chapter 13 as individual with regular income; and In re Varian, in which the non-debtor husband's commitment to pay monthly payments to Chapter 13 trustee to fund Chapter 13 plan was source of regular income to debtor wife that qualified her to be a debtor under Chapter 13, as under Connecticut law, a spouse is responsible for

liabilities incurred by the other spouse during period of separation if reasonable support had not been provided during the separation, and the debtor wife had incurred debts which were included in the Chapter 13 plan during the time she and her husband had been separated and husband had only provided token support to the debtor, the parties were now reconciled, and the husband had provided the court with a letter confirming his commitment. *In re Varian*, 91 B.R. 653 (Bankr. D. Conn. 1988).

6. Income from part-time, seasonal, and self-employment

- Debtor who received monthly take home pay of $761.00 from a part-time position as a clerk at a liquor store was not so unstable or irregular as to render the debtor ineligible for Chapter 13 relief, even though the debtor's disposable income, apart from student loans he obtained to fund his continuing education, was only $18.00 per month. *In re Kelly*, 217 B.R. 273 (Bankr. D. Neb. 1997).

- Chapter 13 debtor who testified that he received income from his stone sealing work, which while somewhat seasonal, averaged $1800 per month, was an individual with regular income who was eligible to file Chapter 13 bankruptcy. *In re Beck*, 309 B.R. 340 (Bankr. N.D. Cal. 2004); but see *in re Hickman*, in which income of debtor who was seasonably employed as a sprinkler-system installer was not sufficiently stable and regular, even when supplemented by unemployment compensation and odd-jobs he worked during the off-season, to permit him to file for Chapter 13. *In re Hickman*, 104 B.R. 374 (Bankr. D. Colo. 1989). Real estate salesperson whose income varied from month to month depending upon her sales was a person with "regular income" who was eligible for Chapter 13 relief. *In re Widdicombe*, 269 B.R. 803 (Bankr. W.D. Ark. 2001),

C. Debt Limits

1. Debt Limitations

- An individual is eligible for Chapter 13 relief as long as on the date of the filing of the petition, the individual's non-contingent, liquidated, unsecured debts are less than $336,900 and non-contingent, liquidated, secured debts are less than $1,010,650. 11 U.S.C. § 109(e). These amounts are adjusted periodically to reflect changes in the consumer price index, pursuant to Section 104(a) of the Bankruptcy Code. The debt limitation applies to individual or joint debtors. If a husband and wife have separate debts, the combination of which would cause them to exceed the jurisdictional limits for filing Chapter 13, then each would have to file a separate Chapter 13 case.

- Courts have adopted two approaches for determining the time for determining the amount of a debtor's debts under Chapter 13: 1) the petition date, by the schedules, if they were filed in good faith; *In re Smith*, 325 B.R. 498 (Bankr. D. N.H. 2005); *In re Scovis*, 249 F.3d 975 (9th Cir. 2001); and 2) after the filing of proofs of claim in the case; *Hounsom v. United States*, 325 B.R. 319 (M.D. Fla. 2005).

2. "Non-contingent" and "liquidated"

- A debt is liquidated for the purpose of determining Chapter 13 eligibility, regardless of whether it is disputed, so long as it is capable of ascertainment by reference to agreement or by simple computation. *In re Wenberg*, 94 B.R. 631 (9th Cir. BAP (Cal.) 1988), affirmed 902 F.2d 768.

- Claim that could easily be calculated only if court accepted the findings of non-binding arbitrator, and that would otherwise require a full trial to determine the contractor-debtor's liability and each element of homeowner's damages, as well as debtor's counter-claim, was not a liquidated claim, and would not be included with debtor's other non-contingent, liquidated, unsecured debt in determining whether the debtor was eligible for Chapter 13 relief. *In re Osborn*, 346 B.R. 204 (Bankr. N.D. Cal. 2006).

- Debt allegedly owed to client of debtor's companies for accounts receivable that were collected but not remitted to client was liquidated for purposes of the debtor's eligibility for Chapter 13 relief, as the amount of the alleged debt was certain and had been the subject of judicial determination in other litigation, and debtor's dispute with client the litigation concerned his liability and not the amount of any liability. *In re Leggett,* 335 B.R. 227 (Bankr. N.D. Ga. 2005).

- Chapter 13 debtor's obligation on secured loan to bank was liquidated debt and had to be included with debtor's other noncontingent, liquidated, secured debts in determining her eligibility for Chapter 13, despite the fact that the debt was only partially secured by collateral with a value that had not been precisely determined, but collateral consisted of a few items of equipment that could be easily appraised and therefore value was readily determinable. *In re Enriquez*, 315 B.R. 112 (Bankr. N.D. Cal. 2004).

- In determining Chapter 13 debtor's eligibility for relief, bankruptcy court should not have included among debtor's non-contingent, liquidated, unsecured debts a breach of contract claim asserted against the corporation in which the debtor was a minority shareholder, where the debtor was not party to, nor guarantor of, contract, and was not named as a defendant in state court lawsuit brought by corporate creditor, and had only listed the creditor in her bankruptcy schedules because of the remote possibility that the state court might enter a sanctions award against her for her actions in the state court lawsuit. *In re Ho*, 274 B.R. 867 (9th Cir. BAP (Cal.) 2002).

III. Repeat Filings

A. Discharge

- If a debtor received a Chapter 12 or 13 discharge in a case filed within 6 years, a debtor cannot receive a Chapter 7 discharge for a newly filed case under Section 727(a)(9) unless the debtor paid 100% of the allowed unsecured claims, or 70% of those claims, and the plan was proposed in good faith by the debtor and represented the debtor's best effort.

- The length of time between which a debtor can receive a chapter 13 discharge after receiving a discharge in a case filed under Chapters 7, 11, or 12 is 4 years. 11 U.S.C. § 13289f)(1).

- A debtor cannot receive a discharge under Section 1328(a) or (b) if the debtor received a discharge in a case filed under Chapter 13 during the 2 year period preceding the date of such order. 11 U.S.C. 1328(f)(2). The meaning of the words "such order" is the subject of much debate. One interpretation of the words "such order" refers to the words "the order for relief under this chapter" as provided in Section 1328(f)(1). *See In re West*, 352 B.R. 482 (Bankr. E.D. Ark. 2006). Others argue that this reading of the statute is absurd, since almost every Chapter 13 case, which results in a discharge, continues for at least 3 years.

B. The semi-automatic stay for repeat filers

- Under BAPCPA amended §362(c)(3)(A), if a case is dismissed within one year before another case filing, the stay is automatically terminated "with respect to the debtor…" on the 30th day after the later case is filed. To continue the stay, a party in interest must file a motion for continuation of the stay, and after notice and hearing, the Court must conclude that the case is filed in good faith with respect to the creditors to be stayed. A second case filed in one year is presumed to not be filed in good faith.

- The presumption can be overcome by the debtor showing, by clear and convincing evidence, that the previous dismissal was not the result of failure to amend or file documents without substantial excuse, nor failure to provide adequate protection as ordered by the Court, nor failure to perform under the terms of a confirmed plan, and that there has been a substantial change in the personal or financial affairs of the debtor which will enable him to obtain a chapter 7 discharge or perform under a new confirmed chapter 13 plan. *See In re Galanis,* 334 B.R. 685 (Bankr. D. Utah 2005).

- Provision of BAPCPA authorizing court, on motion filed within 30 days of petition date, to impose stay on creditor collection activity, while immediately following another provision indicating that no stay, not even a temporary 30-day stay, will arise in bankruptcy case filed by debtor who has had multiple prior

cases dismissed within one year of petition date, is not limited in application only to multiple repeat filers, but may be invoked by debtors who had one prior case pending within one year of petition date. *See In re Beasley*, 339 B.R. 472 (Bankr. E.D. Ark. 2006); and *In re Wright*, 339 B.R. 474 (Bankr. E.D. Ark. 2006).

- The primary issue regarding the semi-automatic stay for repeat filers is which stay terminates. Under Section 362(a), there is an automatic stay as to the debtor, property of the debtor, and property of the estate. Early decisions have read this Section 362(a) to apply to all three. *See In re Jumpp*, 334 B.R. 21 (Bankr. D. Mass. 2006); and *In re Jupiter*, 344 B.R. 754 (Bankr. D. S.C. 2006).

- Other courts have concluded that the stay terminates as to the debtor and property of the debtor. *In re Jones*, 339 B.R. 360 (Bankr. E.D. N.C. 2006); and *In re Moon*, 339 B.R. 668 (Bankr. N.D. Ohio 2006).

- Still other courts concluded that the stay terminates as to just the debtor. *In re Bell*, WL 1132907 (Bankr. D. Colo. 2006) (unpublished).

- The majority of courts conclude that property of the estate remains protected by the automatic stay under Section 362(c)(3). However, in *In re Holcomb*, the Bankruptcy Court followed the small minority of cases which have construed Section 362(c)(3)(A) to vacate the stay as to property of the estate, rather than property of the Debtor. Appeal was made to the BAP. *In re Holcomb*, 380 B.R. 813 (10th Cir. BAP 2008). The BAP first found the language of the statutory subsection to be unambiguous in its application to the Debtor's property, and not to estate property. The Court further found that such an interpretation was consistent with the bankruptcy law policy of "obtaining a maximum and equitable distribution for creditors" citing *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 563 (1994). The BAP noted that the minority view would allow a single creditor full access to property that could otherwise be available for other creditors, and stated: "In a Chapter 7 case, equity in the property above the creditors' security interest could be realized by the Trustee to pay a dividend to creditors… Maintaining the stay with respect to such property is an important creditor protection." The Tenth Circuit BAP thus joined the First Circuit BAP in affirming the majority opinion on this issue. *See In re Jumpp*, 356 B.R. 789 (1st Cir. BAP 2006).

IV. Chapter 11 Eligibility

- Chapter 11 is typically used to reorganize a business, which may be a corporation, sole proprietorship, or partnership.

- Any person who may be a debtor under Chapter 7 may also be a debtor under Chapter 11, with two exceptions: a stockbroker and a commodity broker may be debtors under Chapter 7 but not under Chapter 11. 11 U.S.C. § 109(d), *See also In re Co. Petro Marketing Group, Inc.*, 680 F.2d 566 (9th Cir. 1982) (Debtor who made his own

market for futures contract sold to customers was not a commodity broker and therefore was entitled to file a Chapter 11 petition.)

- Persons who are not eligible for relief under Chapter 11 include a range of financial intermediaries – certain federally regulated businesses such as domestic insurance companies, banks, savings banks, cooperative banks, savings and loan associations, building and loan associations, homestead associations, a small business investment company licensed by the SBA, credit unions, and their foreign counterparts. 11 U.S.C. § 109(b)(2),(3).

- Bankruptcy law determines who may file but state law governs the question or who can speak for an institutional debtor in making the decision to file for Chapter 11. *See In re Hawaii Times Ltd.,* 53 B.R. 560 (Bankr. D. Haw. 1985); *In re Farner, Boring & Tunneling, Inc.,* 26 B.R. 29 (Bankr. E.D. Tenn. 1982); *In re Acoustic Fiber Sound Systems, Inc.*, 20 B.R. 769 (Bankr. S.D. Ind. 1982); and *In re Autumn Press, Inc.*, 20 B.R. 60 (Bankr. D. Mass. 1982).

- A personal or spendthrift trust is no eligible for relief under Chapter 11. *See In re Mosby*, 791 F.2d 628 (8th Cir. 1986). A testamentary trust is also ineligible for relief under Chapter 11. *See Matter of Walker*, 79 B.R. 59 (Bankr. M.D. Fla. 1987); *In re Goerg*, 844 F.2d 1562 (11th Cir. 1988); *In re Estate of Whiteside by Whiteside*, 64 B.R. 99 (Bankr. E.D. Cal. 1986). *See also Matter of Jarrett*, 19 B.R. 413 (Bankr. M.D. N.C. 1982) (deceased Chapter 11 debtor's estate could not convert debtor's Chapter 11 case to case under Chapter 7.

- Liquidating trusts are typically permitted to stay in bankruptcy court, though courts do not always agree that liquidating trusts are true business trusts or that they should be permitted to file for Chapter 11 relief. The result has depended on whether the court applied federal law or state law in its determination of eligibility. *See In re Cooper Properties Liquidating Trust, Inc.*, 61 B.R. 531 (Bankr. W.D. Tenn. 1986) (liquidating trust established as successor to grantor corporation was a corporation under the Bankruptcy Code, and, therefore, eligible for Chapter 11 relief); *Matter of Captran Creditors Trust*, 53 B.R. 741 (Bankr. M.D. Fla. 1985) (trust created for purpose of liquidating assets of debtor for benefit of creditors was eligible for Chapter 11 relief); *In re Tru Block Concrete Products, Inc.*, 27 B.R. 486 (Bankr. S.D. Cal. 1983) (liquidating trust was business trust). *See however, In re Gurney's Inn Corp. Liquidating Trust*, 215 B.R. 659 (Bankr. E.D. N.Y. 1997) (adopting view that eligibility is determined by federal rather than state law and holding that the liquidating trust was not a business trust and not eligible to file Chapter 11).

- Railroad reorganizations have specific requirements under subsection IV of Chapter 11. 11 U.S.C. § 109(d).

V. Automatic Dismissal

A. Filing Statement of Intention, payment advices, and federal tax returns

- BAPCPA amended the debtor's duties under 11 U.S.C. § 521 to, *inter alia*, require debtors to file and/or produce documents, including a Statement of Intention, payment advices, and federal tax returns, in addition to a list of creditors, schedule of assets and liabilities, schedule of current income and current expenditures including statement of current monthly income, statement of financial affairs, statement of the amount of monthly net income, and statement disclosing any reasonably anticipated increase in income or expenditures over the 12 month period following the filing date. *See* 11 U.S.C. §§ 521(a)(1)(A)(B)(i)-(vi), 707(b)(2)(C).

- If the debtor fails to file payment advices, or the other documents required by Section 521(a)(1), the Bankruptcy Code provides that "the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition. 11 U.S.C. § 521(i)(1). The court may extend the time within which a debtor may file the required documents for up to an additional 45 days if the debtor files a request "within 45 days after the filing of the petition," and if the court finds "justification" for the request. 11 U.S.C. § 521(i)(3). A trustee may move during the first 45 days of the case for the case not to be dismissed if the debtor attempted in good faith to file the information required under Section 521(a)(1) and the interests of creditors would best be served by administering the estate.

- Courts have taken different approaches to the implementation of these provisions and the effect when a debtor fails to comply.

1. Payment Advices

- In *In re Warren*, after the chapter 7 trustee discovered potential nonexempt assets that might be administered for the benefit of creditors, the chapter 7 debtor moved to voluntarily dismiss his own bankruptcy case on the grounds that he had not obtained the required prepetition credit counseling and based on his failure to timely file the required payment advices and statements. *In re Warren*, 568 F.3d 1113 (9th Cir. 2009). The bankruptcy court denied debtor's dismissal motion and the debtor appealed. The district court reversed and remanded the case back to the bankruptcy court on the theory that dismissal was automatic once a debtor missed the 45-day statutory deadline for filing the required financial disclosures, and that the bankruptcy court was without authority to excuse the debtor's deficient filings. The court of appeals found that when a party moves for an order dismissing an incomplete bankruptcy petition, a court can do one of three things: 1) dismiss the case; 2) decline to dismiss the case if an exception

applies; 3) determine, in its discretion, that missing information is not required or that denial of dismissal is necessary to prevent the debtor from abusing and manipulating the bankruptcy system. *In re Warren*, 568 F.3d at 1118-1119. The court of appeals held that the bankruptcy court had discretion not to dismiss the case based on the debtor's failure to file the requisite financial disclosures before the expiration of the 45-day statutory deadline, where the bankruptcy court reasonably determines that there is no continuing need for the missing information, or that a wavier of the filing requirement is necessary to prevent automatic dismissal pursuant to the Bankruptcy Code from furthering debtor's abusive conduct. *Id*. *See also In re Parker*, 251 B.R. 790 (Bankr. N.D. Ga. 2006), which involved a similar fact situation to that in *Warren* in that after chapter 7 trustee took action to sell the debtor's houseboat, the debtor moved to dismiss his case claiming that the case was automatically dismissed after 45 days because he failed to file payment advices and to comply with the credit counseling certificate requirements of Section 109(h). The court in *Parker* found that dismissal under Section 521 was not a ministerial act and that the court must review the docket and enter an order of dismissal. The court further found that it could excuse the filing requirements in a case at any time under appropriate circumstances, before or after the 45 day period pursuant to Section 521(a)(1)(B).

- But *see In re Fawson*, an early case addressing Section 521(a)(1)(iv) and Section 521(i) where the court found that the statute is unambiguous and require strict application by the court, and held that a case is automatically dismissed on the 46th day if a debtor fails to file the appropriate payment advices or obtain an extension. *In re Fawson*, 338 B.R. 505, 510 (Bankr. D. Utah 2006). The court in *Fawson* rejected the debtors' argument that a motion to extend the time to file the payment advices could be filed after the expiration of the first 45 day period where the failure to act was the result of excusable neglect pursuant to Fed. R. Bank. P. 1007 and 9006(b). *See also In re Calhoun*, 2007 WL 117725 (Bankr. E.D. Mo. 2007) (dismissal is automatic and court lacks authority to extend time for filing documents required by Section 521(a)(1) past 45 days when the debtor failed to seek an extension); *In re Williams*, 339 B.R. 794 (Bankr. M.D. Fla. 2006)(same); *In re Ott,* 343 B.R. 264 (Bankr. D. Colo. 2006) (same); and *Rivera v. Miranda*, 379 B.R. 382 (Bankr. D. Puerto Rico 2007) (same).

- *See also In re Wilkinson*, in which after a chapter 13 debtor filed pay advices received from her employer for the period extending some seven months prepetition, and it was discovered that one pay advice was missing and that in its place was a pay advice for approximately the same pay period but from the previous year, and the debtor filed a copy of the missing pay advice prior to the plan confirmation hearing, the bankruptcy court found that it had no discretion to find either that the debtor complied

with the statutory duty to file payment advices through an "amendment" or that she had "substantially" complied with her due to do so in the first place. The bankruptcy court in *Wilkinson* found that either all pay advices received by the debtor were timely filed with the court or they were not, and the court could not do violence to the statutory scheme in the name of equity. *In re Wilkinson*, 346 B.R. 539 (Bankr. D. Utah 2006).

2. Statement of Intent

- Section 521(a)(2) requires debtors to file a Statement of Intent with respect to secured estate property. With respect to any debt secured by personal property which will not be surrendered, BAPCPA now requires that a chapter 7 debtor: (1) file a statement of intention declaring an intent within 30 days of the filing of the petition; and (2) perform the stated intention within 30 days of the first date set for the meeting of creditors under Section 341(a). 11 U.S.C. § 521(a)(2)(A). If the debtor fails to fulfill these requirements, the debtor will lose the benefit of the automatic stay and risks having the personal property removed the bankruptcy estate. 11 U.S.C. § 362(h).

- In *In re Ruona*, a chapter 7 debtor who filed a statement of intention with respect to a motor vehicle securing creditor's claim which did not elect between redemption and reaffirmation, but which indicated that debtor would retain vehicle while continuing to make his regular monthly payments on his car loan, failed to make the required election, with the result that the automatic stay terminated as to the vehicle, and the vehicle cased to be property of the estate. *In re Ruona*, 353 B.R. 688 (Bankr. D. N.M. 2006).

- Even assuming that the bankruptcy court had authority, under BAPCPA, to order turnover of motor vehicle securing debt on which the debtor was current as of the commencement of his Chapter 7 case, based on the debtor's failure to file a statement of intent either to surrender or redeem the motor vehicle, or to reaffirm the debt to the creditor, the court would not exercise that authority under the circumstances of the case, in which the debtor had indicated his intent to remain current on the payments to the creditor until the debt was paid in full, and there was no evidence of any impairment of the collateral. *In re Rowe*, 342 B.R. 341 (Bankr. D. Kan. 2006).

3. Income Tax Returns

- Section 521(e)(2) provides that a debtor shall provide a copy of her most recent federal income tax return, or a transcript of such return, to the chapter 7 trustee within 7 days before the date first set for the Section 341 meeting of creditors. 11 U.S.C. § 521(e)(2).

- There is no provision for automatic dismissal of a debtor's case upon the failure to provide tax returns. Instead, if a debtor fails to comply with Section 521(e)(2), the court shall dismiss the case unless the debtor demonstrates that failure to comply is "due to circumstances beyond the control of the debtor." 11 U.S.C. § 521(e)(2)(B).

- Chapter 7 debtors were not prevented from timely complying with the statute requiring them to provide the trustee with copies of their federal tax returns due to circumstances beyond their control, rather than due to culpable neglect, and therefore the bankruptcy court was required to dismiss the case as requested by the trustee. *In re Nordstrom*, 381 B.R. 766 (Bankr. C.D. Cal. 2008).

- In *In re Ring*, the court addressed the issue of debtors who were not required to file federal income tax returns for many years because their only income was Social Security benefits. The debtors in *Ring* sought an advisory ruling from the court that they did not violate 11 U.S.C. § 521(e)(2) by not filing tax returns. The court found that while Section 521(i) mandates automatic dismissal if certain filings are not made under Section 521(a), there is no automatic dismissal if tax returns are not filed, and that any dismissal for failure to provide tax returns would require a motion to dismiss with notice and opportunity for a hearing. *In re Ring*, 341 B.R. 387, 389-390 (Bankr. D. Me. 2006).

- In *In re Duffus*, 339 B.R. 746 (Bankr. D. Ore. 2006) and *In re Grasso*, 341 B.R. 821 (Bankr. D. N.H. 2006), the trustees moved for dismissal of the debtors' cases as the debtors provided their tax returns to the trustees less than seven days prior to the Section 341 motion of creditors. The courts denied the motions to dismiss, stating that trustees should exercise "prosecutorial discretion" in determining whether to seek dismissal in such cases. However, in *In re Norton*, the court disagreed with both the *Grasso and Duffus* case and found that there was nothing within Section 521(e)(2) to allow a trustee to request an extension to file tax returns on behalf of a debtor and that the trustee had not provided the court with any reasons behind her request to demonstrate that the debtor's failure to comply with the requirement to provide tax returns within seven days of the Section 341 meeting of creditors was due to circumstances beyond the debtor's control. *In re Norton*, 347 B.R. 291, 301-302 (Bankr. E.D. Tenn. 2006).

B. Credit counseling/Financial Management

1. Credit counseling generally

- In order to be eligible for relief under the Bankruptcy Code, an individual must obtain from an approved nonprofit budget and credit counseling

agency described in Section 111(a) of the Bankruptcy Code, an individual or group "briefing," within the 180 day period preceding the date of filing of the petition. 11 U.S.C. § 109(h)(1).

2. Timing for obtaining credit counseling

- The initial requirement for the briefing is that it occurs before the filing of the petition. Some courts have held that this requirement is completed if done not later than the day before filing, *In re Murphy,* 342 B.R. 671 (Bankr. D. D.C. 2006); *In re Mills*, 341 B.R. 106 (Bankr. D. D.C. 2006), while other courts have concluded that completing the briefing on the day of filing satisfies the requirement. *In re Warren*, 339 B.R. 475 (Bankr. E.D. Ark. 2006).

- Debtors who obtained credit counseling 182 days prior to the commencement of their Chapter 13 case did not satisfy their obligation, as a prerequisite to being eligible for bankruptcy relief, to receive such counseling within 180 days of filing for bankruptcy relief, and the court had no discretion to excuse debtors' noncompliance with the express terms of the credit counseling requirement upon the theory that the debtors had complied with its spirit. *In re Giles*, 361 B.R. 212 (Bankr. D. Utah 2007).

3. "Exigent circumstances," waivers, and dismissal for noncompliance

- An individual may be eligible for relief under the Bankruptcy Code without obtaining the pre-filing briefing if the individual can certify to the court that "exigent circumstances" exist meriting a waiver of the briefing. 11 U.S.C. § 109(h)(3). An individual must demonstrate to the court's satisfaction that she requested a briefing, but was unable to obtain it during the 5-day period beginning on the date of the initial request. See *In re Rodriguez*, 336 B.R. 426 (Bankr. D. Idaho 2005); *In re Dipinto*, 336 B.R. 693 (Bankr. E.D. Pa. 2006).

- Certification of exigent circumstances, such as debtors must submit in order to obtain a temporary waiver of the credit counseling requirement to be eligible to file for bankruptcy relief, must be document in which debtors personally verify, in a form consistent with federal statues governing declarations, verifications and certificates submitted under penalty of perjury, the facts that they wish the court to consider in ruling on their request. *In re Rodriguez*, 336 B.R. 426 (Bankr. D. Idaho 2005); *In re Mingueta*, 338 B.R. 833 (Bankr. C.D. Cal. 2006); *In re Cobb*, 343 B.R. 204 (Bankr. E.D. Ark. 2006).

- Individual who admittedly failed to fulfill the credit counseling requirement and did not argue that any of the exceptions to the

requirement applied to him was not eligible to be a chapter 7 debtor. *Wyttenbach v. C.I.R.*, 382 B.R. 76 (Bankr. S.D. Tex. 2008), affirmed, 291 Fed. Appx. 673, 2008 WL 4155277. But see *In re Hess,* in which the mere fact that chapter 7 debtors, as a result of their inability to provide required proof of prepetition credit counseling or to qualify for waiver or exemption from credit counseling requirement, were ineligible for bankruptcy relief did not necessarily mean that the court had to dismiss the debtors' bankruptcy cases, rather the court had discretion, in order to prevent manifest injustice, to excuse debtors' technical noncompliance with prepetition credit counseling requirement and to allow their bankruptcy cases to go forward. *In re Hess*, 347 B.R. 489 (Bankr. D. Vt. 2006).

- Section 109(h)(4) permits a wavier of a pre-filing briefing in circumstances where the court determines, after notice and a hearing, that an individual is unable to complete a briefing because of incapacity, disability of active military duty in a military combat zone. 11 U.S.C. § 109(4)(h). Section 109(4)(h) also defines incapacity as an individual impaired by reason of mental illness or mental deficiency so that he is incapable or realizing and making rational decisions with respect to his financial responsibilities. An individual is under a disability if the individual is so physically impaired as to be unable, after a reasonable effort, to participate in an in-person, telephone, or internet "briefing."

- To qualify for a waiver, a motion requesting a waiver with sufficient supporting facts must be filed with the court. See *In re Tulper*, 345 B.R. 322 (Bankr. D. Colo. 2006).

- Incarcerated debtor who sought chapter 7 relief, and whose incarceration prohibited him from physically attending a credit counseling course, who laced Internet access, and whose request for permission to call the credit counseling agency was denied by prison officials, did not fall within the exigent circumstances exception to the Bankruptcy Code's credit counseling requirement; the court found that even if the exception was applicable to the prisoner, if would have been of no practical assistance, as it would have entitled him only to a 45-day extension f time in which to comply with the credit counseling requirement, and the prisoner's earliest possible release date was nine months into the future. *In re Hubel*, 395 B.R. 823 (Bankr. N.D.N.Y. 2008).

VI. Other eligibility issues

A. Non-married cohabitants

- Non-married cohabitants may not file a joint bankruptcy petition pursuant to Section 302(a), which provides in part:

> A joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual's spouse. 11 U.S.C. § 302(a).

- Courts interpret Section 302(a)'s "individual and individual's spouse" as applicable only to those couples that are legally married. See *In re Jorge Lucero, et al.*, 408 B.R. 348 (Bankr. C.D. Cal. 2009); *Bone v. Allen* (*In re Allen*), 186 B.R. 769, 744 (Bankr. N.D. Ga. 1995).

- Courts addressing erroneous joint petitions by non-spouses have given debtors the option of dismissing one party in the joint petition or facing dismissal of the entire case. *In re Allen*, 186 B.R. at 774 (same-sex couple); *In re Lam*, 98 B.R. 965, 966 (Bankr. W.D. Mo. 1988) (mother and daughter); and *In re Malone*, 50 B.R. 2, 3 (Bankr. E.D. Mich. 1985).

- The courts that have considered this issue have also recognized their broad statutory authority under 11 U.S.C. § 105 to fashion suitable relief consistent with bankruptcy's principles of fairness and equity favoring debtors. In *Allen,* the court allowed the debtors 20 days to dismiss one of the co-debtors from the case or face dismissal of the entire case. *In re Allen*, 186 B.R. at 744. In *Lam*, the court allowed a mother and daughter filing a joint petition 30 days to remove one party from the case before it would order dismissal of the whole case. *In re Lam*, 98 B.R. at 966. In *Malone*, the court gave the debtors 10 days to amend their Chapter 13 petition to cure the defect. *In re Malone*, 50 B.R. at 3. In *Lucero*, the court dismissed one of the debtors from the case and allowed the remaining debtor's case to proceed; the court also held that dismissed debtor's dismissal from the case did not operate as a case dismissal for purposes of limitation on the automatic stay in the dismissed debtor's subsequent case. *In re Jorge Lucero, et al.*, 408 B.R. at 351.

B. In Forma Pauperis Waiver under 28 U.S.C. § 1930(f)(1)

- In addition to amending the eligibility requirements of Section 521, BAPCPA amended title 28 of the United States Code to include a new two-pronged test at Section 1930(f)(1) to determine whether a Chapter 7 debtor is eligible to waive the bankruptcy case filing fee. Section 1930(f)(1) provides:

> Under the procedures prescribed by the Judicial Conference of the United States, the district court of the bankruptcy court may waive the filing fee in a case under chapter 7 of title 11 for an individual if the court determines that such individual has income less than 150 percent of the income

> official poverty line [sic] … applicable to a family of the size involved and is unable to pay that fee in installments.

- The factors that courts have applied to determine, based on the totality of the circumstances, whether a debtor is able to pay the filing fee in installments include: (1) whether expenses exceed income; (2) whether there are any discrepancies between the debtor's application and schedules; (3) whether the debtor has any collateral sources of income from family or friends to pay the filing fee; (4) whether the debtor listed unreasonable expenses that could be directed to pay the filing fee; (5) whether the debtor has any exempt property that could be used to pay the filing fee. See *In re Spisak*, 361 B.R. 408 (Bankr. Vt. 2007); *In re Machia*, 361 B.R. 416 (Bankr. Vt. 2007).

- In *In re Kauffman*, the court held that it may vacate an order granting a waiver of the filing fee based on developments in the administration of the case that subsequently demonstrate that a waiver is not warranted. *In re Kauffman*, 354 B.R. 682 (Vt. 2006) (After Chapter 7 debtor converted her case to Chapter 13, Chapter 7 trustee moved for reconsideration on the ground that the debtor was able to pay the filing, noting, among other things, that the debtor owned her home free and clear of liens and could have obtained s home equity loan against the property, and that the debtor was entitled to a property tax rebate as of the petition date.)

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