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# 2021 Caribbean Virtual Insolvency Symposium

*Consumer Track*

## **Counseling the Client During the Post-COVID Period**

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## Counseling the Client During the Post COVID Period

Important dates and events for consumer cases:

### I. Pre-Steps:

#### A. Filing under the Same Bankruptcy Chapter

1. Successive Chapter 7 cases - You will have to wait **eight (8) years after the filing date of the first Chapter 7 case** before filing the second case.
2. Successive Chapter 13 cases - Two years must elapse between filing dates before you will be entitled to receive a second Chapter 13 discharge.

#### B. Filing Under Different Chapters

1. Chapter 13 before Chapter 7 - If the court granted your first discharge under Chapter 13 bankruptcy, you need to wait **six years** (from the Chapter 13 bankruptcy filing date) **before filing for a Chapter 7 discharge**. You would not have to wait that long, however, if you paid unsecured creditors in-full in the Chapter 13 case, or, if you paid at least 70% of the claims, the plan was proposed in good faith, and represented your best effort.
2. Chapter 7 before Chapter 13 - If the court granted your first discharge under Chapter 7, you would have to wait **four years from the Chapter 7 filing date before filing a Chapter 13 case**.

#### C. Re-Filings (11 U.S.C. Sec. 362 (c))

1. **1st Re-Filing withing one year of dismissal (30 days stay)**  
11 U.S.C. Sec. 362(c)(3)--

“(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the

stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and ...”

2. 2nd Re-Filing withing one year of dismissal (No automatic stay)

11 U.S.C. Sec. 362(c)(4)(A)--

“(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect; ...”

3. Automatic Bar to Refile (11 U.S.C. Sec. 109 (g))

“(g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if—

[Willful failure to abide the orders of the Court]

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or

[Voluntary dismissal after motion to lift stay]

(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

II. Prior to Filing:

A. Homestead Exemption

1. Sec. 522 (p)(1) - In real property claimed by the Debtor requesting that the amount of the exemption be limited either to \$125,000, the so-called automatic homestead exemption under state law, or \$160,375, based on the maximum exemption allowable under the Bankruptcy Code for property

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interests acquired by a debtor during the 1,215-day period (that's about three years and four months) preceding the filing of his bankruptcy petition.

"A debtor may not exempt any amount of interest that was acquired by the debtor during the 1215-day period preceding the date of the filing of the petition that exceeds in the aggregate \$160,375 in value [dollar amount as adjusted by the Judicial Conference of the U.S.] in—

- a. real or personal property that the debtor or a dependent of the debtor uses as a residence;
  - b. a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;
  - c. a burial plot for the debtor or a dependent of the debtor; or
  - d. real or personal property that the debtor or dependent of the debtor claims as a homestead."
2. Sec. 522 (b)(3)(a) - Residence Requirement to claim state exemption.

The place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition or if the debtor's domicile has not been located in a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place;

### B. Preferences to Insiders

1. Sec. 547 (b)(4)(B) - Avoidable Preferential Payments or Transfer to Insiders. The trustee may avoid any transfer of an interest of the debtor in property one (1) year before the date of the filing of the petition; except to the extent that such transfer was made to be a (a) contemporaneous exchange for new value given to the debtor, (b) in the ordinary course of business or financial affairs, or (c) creates a security interest over new value received.

### C. Current Monthly Income (CMI) (Form 122/means test) -

1. For purposes of the means test, your current monthly income (CMI) is the average monthly income you receive from all sources during the full six (6)-month period preceding your filing date.

2. To get your CMI, add up the total income you received from all sources during the six-month look-back period, and then divide by six to come up with your average monthly income. If the income is from wages, use the gross amount. If you don't pass the first portion of the means test, you'll be able to deduct your income tax—and other expenses—when completing the second form.
3. You must include all of your income, whether it is taxed or not, except the following: (a) payments you received under the Social Security Act (including Social Security Retirement, SSI, SSDI, and TANF), (b) payments to victims of war crimes or crimes against humanity, and (c) payments to victims of international or domestic terrorism.
4. Section 1113 of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") indicates that the following are not reportable as part of current monthly income or disposable income when filing for bankruptcy:  
"...payments made under the Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID-19)."  
The changes will remain in effect for one year from March 27, 2020 (one year after the enactment of the Act).

D. Credit Counseling

1. Sec. 109 (h)(1) - In general, an individual may not be a debtor under this title unless such individual has, during the 180-day period ending on the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a).
2. A debtor may be entitled to a temporary waiver of the credit counseling requirement, which would permit completion of credit counseling after filing the petition, but only in very limited circumstances provided under Sec. 109 (h)(3), which references a 7-day period in which the debtor requested the service but was unable to obtain it due to exigent circumstances.
3. On September 28, 2017, the United States Trustee temporarily waived the credit counseling and personal financial management education requirements for individual bankruptcy filers in the District of Puerto Rico. The revocation of such waiver will occur effective March 24, 2021.

E. Venue Requirements for the District Court of filing -

A bankruptcy case may be commenced in the district court for the district--

1. in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the 180 days immediately preceding such commencement, or for a longer portion of such 180 days period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district; or
2. in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership.

F. Preferences to Creditors

1. Sec. 547 (b)(4)(A) - Avoidable Preferential Payments or Transfer to Insiders. The trustee may avoid any transfer of an interest of the debtor in property ninety (90) days before the date of the filing of the petition; except to the extent that such transfer was made to be a (a) contemporaneous exchange for new value given to the debtor, (b) in the ordinary course of business or financial affairs, or (c) creates a security interest over new value received.

G. Debts Presumed Excepted from Discharge

1. Sec. 523 (a)(2)(C)(i)(I) - an individual debtor will not be discharged from any debt which are—
  - a. consumer debts owed to a single creditor and aggregating more than \$675 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and
  - b. cash advances aggregating more than \$900 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

H. Pre-petition Payment Advices

1. Sec. 521 (a)(1)(b)(iv) - requires a debtor to file with the court copies of all payment advices received within 60 days of filing, and Interim Rule

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4002(b)(2)(A) requires the debtor to bring “evidence of current income such as the most recent payment advice” to the § 341 meeting.

### I. Cramdown / Strip Down

11 U.S.C. Sec. 1325 (a) hanging paragraph

1. For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, and
  - a. the debt was incurred within the 910-day period preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or
  - b. if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

### III. Post Filing

#### A. Filing Date

1. The bare minimum to be filed includes:
  - a. *Voluntary Case*. In a voluntary case, the debtor shall file with the petition a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H as prescribed by the Official Forms, and a verified statement of social security number.
  - b. *Involuntary Case*. In an involuntary case, the debtor shall file, within seven days after entry of the order for relief, a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H as prescribed by the Official Forms, and a verified statement of social security number.

#### B. Complete Filing

1. FRBP 1007 (c) - Time limits to file the schedules, statements and other documents required to be filed with the petition generally lapses within 14 days after the entry of order for relief [the date of filing].
2. Payment advices for 60 days pre-petition [Trustee] 14 days after the entry of order for relief [the date of filing].

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3. Documents in general to be filed include:
  - a. schedules of assets and liabilities,
  - b. a schedule of current income and expenditures,
  - c. a schedule of executory contracts and unexpired leases,
  - d. a statement of financial affairs,
  - e. copies of all payment advices or other evidence of payment, if any, received by the debtor from an employer within 60 days before the filing of the petition, with redaction of all but the last four digits of the debtor's social-security number or individual taxpayer-identification number,
  - f. a record of any interest that the debtor has in an account or program of the type specified in Sec. 521(c) of the Code, and
  - g. a statement of Current Monthly Income (CMI).

### C. Statement of Completion of the Personal Financial Management Course

1. In a chapter 7 case, the debtor shall file it within **60 days after the first date set for the 341 meeting** of creditors under sec. 341 of the Code, including:
2. In a chapter 13 case, **no later than the date the last payment was made under the plan.**

### D. Statement of Intention

1. Sec. 521 (a)(2)(A) - f an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate within **thirty days after the date of the filing of a petition** under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property.

### E. Extensions of Time to File Required Documents

1. Any extension of time may be granted by the Court only **on motion for cause shown** and on notice to the United States trustee, any committee elected

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under Sec. 705 or appointed under section 1102 of the Code, trustee, examiner, or other party as the

2. court may direct.

### F. Automatic Dismissal for failure to submit documents

1. Sec. 521 (i)(1) - if an individual debtor in a voluntary case under chapter 7 or 13 fails to file all the information required under subsection (a)(1) **within 45 days after the date of the filing of the petition**, the case shall be **automatically dismissed** effective on the 46th day after the date of the filing of the petition.

### G. Proof of Claim

1. FRBP 3002 (c) - Time for Filing. In a **voluntary** chapter 7 case, chapter 12 case, or chapter 13 case, a **[non-governmental]** proof of claim is timely filed if it is filed **not later than 70 days after the order for relief** under that chapter or the date of the order of conversion to a case under chapter 12 or chapter 13. In an **involuntary** chapter 7 case, a proof of claim is timely filed if it is filed **not later than 90 days after the order for relief** under that chapter is entered. But in all these cases, the following exceptions apply:
  - a. a proof of claim filed by a **governmental unit or entity** - **180 days after the date of order of relief**,
  - b. extensions by the Court in the interest of justice - **as granted**,
  - c. unsecured debts arising from post-petition judgments - **30 days after judgment becomes final**,
  - d. a claim arising from the rejection of an executory contract or unexpired lease of the debtor - **as the Court may direct**,
  - e. on motion of creditor before expiration - the court may extend the time by **not more than 60 days from the date of the order granting the motion**,
  - f. a proof of claim filed by the holder of a claim that is secured by the debtor's principal residence is timely filed if:
    - i. the proof of claim, together with the attachments required by Rule 3001(c)(2)(C), is filed **not later than 70 days after the order for relief** is entered, and
    - ii. any attachments required by Rule 3001(c)(1) and (d) are filed as a supplement to the holder's claim **not later than 120 days after the order for relief is entered**.
- I. Inheritance, divorce, life insurance, interest acquired /arising post-petition

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1. Sec. 541 (a)(5) - Any interest in property that the debtor acquires or becomes entitled to acquire **within 180 days after the date of the filing of the petition.**
  2. FRBP 1007 (h) - If, as provided by §541(a)(5) of the Code, the debtor acquires or becomes entitled to acquire any interest in property, the debtor shall **within 14 days after the information comes to the debtor's knowledge or within such further time the court may allow, file a supplemental schedule** in the chapter 7 liquidation case, chapter 11 reorganization case, chapter 12 family farmer's debt adjustment case, or chapter 13 individual debt adjustment case. If any of the property required to be reported under this subdivision is claimed by the debtor as exempt, **the debtor shall claim the exemptions in the supplemental schedule.** The duty to file a supplemental schedule in accordance with this subdivision continues notwithstanding the closing of the case, except that the schedule need not be filed in a chapter 11, chapter 12, or chapter 13 case with respect to property acquired after entry of the order confirming a chapter 11 plan or discharging the debtor in a chapter 12 or chapter 13 case.
- J. Provide tax returns to the Trustee
1. Sec. 521 (e)(2)(A)(i) - the debtor shall provide **not later than 7 days before the date first set for the first meeting of creditors,** to the trustee a copy of the Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such return) for the most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return was filed.

### IV. 341 Meeting of Creditors

- A. Debtor's reaffirmation/redemption as to claims secured by property of the estate
1. Sec. 521 (a)(2)(B) - **within 30 days after the first date set for the meeting of creditors** under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, perform his intention with respect to such property, as specified in the Statement of Intention filed with the Clerk of the Court.
- B. Objections to Exemptions
1. FRBP 4003(b) - generally, a party in interest may file an objection to the list of property claimed as exempt **within 30 days after the meeting of creditors held under section 341(a) is concluded or within 30 days after any**

amendment to the list or supplemental schedules is filed, whichever is later. The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension.

C. Debtor's reaffirmation/redemption as to personal property of the estate

1. Sec. 521 (a)(6) - If the debtor has not retained personal property of the property, not later than 45 days after the first meeting of creditors under section 341(a), unless the Debtor either—
  - a. enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or
  - b. redeems such property from the security interest pursuant to section 722.

Otherwise, the stay under section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected.

D. Trustee's last day to reclaim collateral

1. If the debtor fails to so act within the 45-day period of Sec. 521 (a)(6), on motion filed before the expiration of such 45-day period the Trustee may reclaim the possession of any collateral from the Debtor.

E. Financial Management Courser (Form 423)

1. FRBP 1007 (b)(7) - individual debtors in bankruptcy must file a statement of completion of an instructional course concerning personal financial management from an approved provider.
2. FRBP 1007 (c) - in a chapter 7 case, the debtor shall file the statement required by subdivision FRBP 1007(b)(7) within 60 days after the first date set for the meeting of creditors under section 341 of the Code, and in a chapter 11 or 13 case no later than the date when the last payment was made by the debtor as required by the plan or the filing of a motion for a discharge under section 1141(d)(5)(B) or section 1328(b) of the Code.
3. On September 28, 2017, the United States Trustee temporarily waived the credit counseling and personal financial management education

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requirements for individual bankruptcy filers in the District of Puerto Rico. The revocation of such waiver will occur effective **March 24, 2021**.

### F. Reaffirmation Agreement filing deadline

1. FRBP 4008(a) - A reaffirmation agreement shall be filed **no later than 60 days after the first date set for the meeting of creditors under section 341(a) of the Code**. The reaffirmation agreement shall be accompanied by a cover sheet, prepared as prescribed by the appropriate Official Form. The court may, at any time and in its discretion, enlarge the time to file a reaffirmation agreement.

### G. Deadline for Creditors to Object to Discharge of a Debt or all Debts

1. FRBP 4007 (c) - Object to Discharge of a Debt. A complaint to determine the dischargeability of a debt under section 523(c) shall be filed **no later than 60 days after the first date set for the meeting of creditors under section 341(a)**.
2. FRBP 4004(a) - Object to Discharge of all Debts
  - a. In a **chapter 7** case, **a complaint, or a motion** under section 727(a)(8) or (a)(9) of the Code, objecting to the debtor's discharge shall be filed **no later than 60 days after the first date set for the meeting of creditors under section 341(a)**.
  - b. In a **chapter 11** case, the **complaint** shall be filed **no later than the first date set for the hearing on confirmation**.
  - c. In a **chapter 13** case, a **motion** objecting to the debtor's discharge under section 1328(f) shall be filed **no later than 60 days after the first date set for the meeting of creditors under section 341(a)**.

### H. Deadline for US Trustee or Court to Dismiss for Abuse

1. FRBP 1017 (e) - Dismissal of an Individual Debtor's Chapter 7 Case, or Conversion to a Case Under Chapter 11 or 13, for Abuse.

The court may dismiss or, with the debtor's consent, convert an individual debtor's case for abuse under section 707(b) only on its own **motion**, on a motion filed by the Trustee or any other party in interest, only **within 60 days after the first date set for the meeting of creditors under section 341(a)**, unless, on request filed before the time has expired, the court for cause extends the time for filing the motion to dismiss.

# Faculty

**Hon. Enrique S. Lamoutte** is a U.S. Bankruptcy Judge for the District of Puerto Rico in San Juan, initially appointed in November 1986 and having served as Chief Judge. He is also a judge for the U.S. Bankruptcy Appellate Panel for the First Circuit, for which he served as Chief Judge. Judge Lamoutte previously clerked for U.S. District Judge Hernan G. Pesquera of the U.S. Bankruptcy Court for the District of Puerto Rico and was chief of the Civil Division of the U.S. Attorney's Office. He is also a retired colonel of the Puerto Rico Air National Guard. Judge Lamoutte graduated from Boston College and the University of Puerto Rico Law School.

**Edgardo Mangual Gonzalez** is a practitioner with his own firm, EMG Despacho Legal, CRL, in San Juan, P.R., where he specializes in consumer bankruptcy law. Previously, he clerked for Hon. Jaime Fuster Berlingery of the Puerto Rico Supreme Court and for Hon. Brian K. Tester of the U.S. Bankruptcy Court for the District of Puerto Rico. He also worked as litigation attorney in the Puerto Rico Department of Justice's Federal and Bankruptcy divisions, and as an attorney in two law firms. Mr. Mangual-Gonzalez is admitted to practice law in the Puerto Rico Supreme Court, the U.S. District Court for the District of Puerto Rico and the First Circuit Court of Appeals. He has also prepared seminars for the Notary Association of Puerto Rico. Mr. Mangual-Gonzalez received his J.D. with honors from the University of Puerto Rico Law School.

**Juan M. Suarez Cobo** is an attorney with Legal Partners, PSC in San Juan, P.R., and is Board Certified in consumer bankruptcy law. He received his B.A. and graduate degree from InteerAmerican University in 1998 and 1993, respectively, and his his J.D. in 1995 from the University of Puerto Rico.