
A Fresh Start: Using Bankruptcy to Help Clients Deal with Debt, Student Loans, Evictions, Foreclosures and More

Friday, September 16, 2016

**Albany Marriott
Albany, NY**

CLE Course Materials and NotePad[®]

***Complete course materials distributed in electronic format online in
advance of the program.***

Sponsored by the

New York State Bar Association and The Committee on Legal Aid

This program is offered for education purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials. Further, the statements made by the faculty during this program do not constitute legal advice.

Lawyer Assistance Program 800.255.0569



Q. What is LAP?

- A.** The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

- A.** Services are **free** and include:
- Early identification of impairment
 - Intervention and motivation to seek help
 - Assessment, evaluation and development of an appropriate treatment plan
 - Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
 - Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
 - Information and consultation for those (family, firm, and judges) concerned about an attorney
 - Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

- A.** Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

- A.** LAP services are accessed voluntarily by calling 800.255.0569 or connecting to our website www.nysba.org/lap

Q. What can I expect when I contact LAP?

- A.** You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

- A.** The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?
2. Is it difficult for me to maintain a routine and stay on top of responsibilities?
3. Have I experienced memory problems or an inability to concentrate?
4. Am I having difficulty managing emotions such as anger and sadness?
5. Have I missed appointments or appearances or failed to return phone calls?
Am I keeping up with correspondence?
6. Have my sleeping and eating habits changed?
7. Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?
8. Does my family have a history of alcoholism, substance abuse or depression?
9. Do I drink or take drugs to deal with my problems?
10. In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?
11. Is gambling making me careless of my financial responsibilities?
12. Do I feel so stressed, burned out and depressed that I have thoughts of suicide?

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

Patricia Spataro, LAP Director

1.800.255.0569

New York State Bar Association

FORM FOR VERIFICATION OF PRESENCE AT THIS PROGRAM

Pursuant to the Rules pertaining to the Mandatory Continuing Legal Education Program for Attorneys in the State of New York, as an Accredited Provider of CLE programs, we are required to carefully monitor attendance at our programs to ensure that certificates of attendance are issued for the correct number of credit hours in relation to each attendee's actual presence during the program. Each person may only turn in his or her form-you may not turn in a form for someone else. Also, if you leave the program at some point prior to its conclusion, you should check out at the registration desk. Unless you do so, we may have to assume that you were absent for a longer period than you may have been, and you will not receive the proper number of credits.

Speakers, moderators, panelists and attendees are required to complete attendance verification forms in order to receive MCLE credit for programs. Faculty members and attendees: please complete, sign and return this form along with your evaluation, to the registration staff **before you leave** the program.

**You MUST turn in this form at the end of the
program for your MCLE credit.**

**A Fresh Start: Using Bankruptcy to Help Clients Deal with Debt, Student Loans,
Evictions, Foreclosures, and More, Friday, September 16, 2016 | New York State Bar
Association's Committee on Legal Aid, Albany Marriott, Albany, NY**

Name:

(Please print)

I certify that I was present for the entire presentation of this program

Signature:

Date:

Speaking Credit: In order to obtain MCLE credit for speaking at today's program, please complete and return this form to the registration staff before you leave. **Speakers** and **Panelists** receive three (3) MCLE credits for each 50 minutes of presenting or participating on a panel. **Moderators** earn one (1) MCLE credit for each 50 minutes moderating a panel segment. Faculty members receive regular MCLE credit for attending other portions of the program.

NEW YORK STATE BAR ASSOCIATION

Live Program Evaluation (Attending In Person)

Please complete the following program evaluation. We rely on your assessment to strengthen teaching methods and improve the programs we provide. The New York State Bar Association is committed to providing high quality continuing legal education courses and your feedback is important to us.

Program Name:

Program Code:

Program Location:

Program Date:

1. What is your overall evaluation of this program? Please include any additional comments.

☐ Excellent ☐ Good ☐ Fair ☐ Poor

Additional Comments _____

2. Please rate each Speaker's Presentation based on **CONTENT** and **ABILITY** and include any additional comments.

	CONTENT				ABILITY			
	Excellent	Good	Fair	Poor	Excellent	Good	Fair	Poor
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Additional comments (CONTENT)

Additional comments (ABILITY)

3. Please rate the program materials and include any additional comments.

☐ Excellent ☐ Good ☐ Fair ☐ Poor

Additional comments

4. Do you think any portions of the program should be **EXPANDED** or **SHORTENED**? Please include any additional comments.

☐ Yes – Expanded ☐ Yes – Shortened ☐ No – Fine as is

Additional comments

5. Please rate the following aspects of the program: **REGISTRATION; ORGANIZATION; ADMINISTRATION; MEETING SITE** (if applicable), and include any additional comments.

	Please rate the following:				
	Excellent	Good	Fair	Poor	N/A
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Organization	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Administration	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Meeting Site (if applicable)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Additional comments

6. How did you learn about this program?

☐ Ad in legal publication ☐ NYSBA web site ☐ Brochure or Postcard
☐ Social Media (Facebook / Google) ☐ Email ☐ Word of mouth

7. Please give us your suggestions for new programs or topics you would like to see offered



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**A Fresh Start: Using Bankruptcy to Help Clients
Deal with Debt, Student Loans,
Evictions, Foreclosures, and More**

**Chapter 7 Bankruptcy:
An Overview**

NYSBA Partnership Conference 2016

A Fresh Start: Using Bankruptcy to Help Deal With Debt

Chapter 7 bankruptcy: an overview

by Peter Barker-Huelster, Senior Staff Attorney, MFY Legal Services, Inc.

I. Bankruptcy: who needs it and what it can do

- Bankruptcy gives individuals the opportunity to eliminate or restructure debts and protect assets and income from creditors. It can benefit people facing wage garnishment, bank account levy, creditor lawsuits, foreclosures, evictions, and more. Most people who file for bankruptcy do not lose money or property as part of the process.

II. Basic bankruptcy concepts

a. Bankruptcy code and bankruptcy court

- Bankruptcy is governed by the federal Bankruptcy Code, Title 11 of the United States Code. The bankruptcy courts are, technically, subsets of the federal district courts, which generally refer all bankruptcy cases to the bankruptcy courts. *See, e.g.*, Amended Standing Order of Reference M-431, S.D.N.Y., Jan. 31, 2012.
- There are also Federal Rules of Bankruptcy Procedure, which generally follow the F.R.C.P. where applicable.
- State exemption laws also apply in some bankruptcy proceedings. 11 U.S.C. § 522(b)(3).

b. The automatic stay

- Upon filing of a bankruptcy petition, an automatic stay takes effect. 11 U.S.C. § 362. The stay prevents creditors from taking any action to collect from the debtor, including filing or continuing a lawsuit, garnishing wages, freezing a bank account, repossessing property, phone calls and letters, etc. Actions taken in violation of the stay are void. *See In re 48th Street Steakhouse, Inc.*, 835 F.2d 427 (2d Cir. 1987).
- The stay gives the debtor a great deal of protection and relief right away upon filing the case, but may not take effect or may be of limited duration

if the debtor has filed a recent bankruptcy case. 11 U.S.C. §§ 109(g), 362(c)(3). Check PACER before filing to ensure that a debtor has not filed previously.

- Creditors may also seek to have the stay lifted; this must be done on notice and hearing. Fed. R. Bankr. P. 4001.

c. Discharge of debts

- The discharge order is a permanent injunction against efforts to collect from the debtor for debts owed at the time of the bankruptcy filing. The discharge order does not list particular debts discharged; it simply states that the debtor is granted a discharge under § 727 of the Code.

d. The bankruptcy estate

- Upon filing of a bankruptcy case, an “estate” is formed, comprised of all the debtor’s interest in property. Section 541 of the Code describes the property comprising the estate. In routine Chapter 7 cases, the debtor does not have to turn over property or surrender control of it during the case. The debtor can exempt property from the estate, keeping it out of reach of creditors and the bankruptcy process.

e. The bankruptcy trustee

- In every Chapter 7 case, a trustee is appointed to administer the estate for the benefit of creditors. 11 U.S.C. §§ 701, 702. The trustee’s responsibility is to examine the debtor and investigate the debtor’s case to ensure that any non-exempt property can be liquidated for the benefit of creditors.
- Trustees are private attorneys, not judges. They receive a small fee for administering each case, but also keep a percentage of any payments made to creditors in the case, giving trustees an incentive to find non-exempt property to liquidate.

III. Chapter 7 procedure

a. Who can file?

- Individuals and corporations can file for Chapter 7, but only individuals can receive a discharge of debts. 11 U.S.C. § 727(a)(1).
- Individuals can only receive a discharge of debts under Chapter 7 once every eight years. 11 U.S.C. § 727(a)(8). Time limit runs from filing date to filing date.

- Married couples can file a joint Chapter 7 petition under a single case number and for a single filing fee.

b. Credit counseling requirement

- With very limited exceptions, a debtor must complete an approved credit counseling course before filing the Chapter 7 petition. 11 U.S.C. § 521(b)(1). The counseling can typically be done online or over the phone for a small fee, and it usually takes about 90 minutes to complete.
- The requirement may be waived for certain debtors who are incapacitated, disabled, or on active military duty. 11 U.S.C. § 109(h)(2) *et seq.*

c. Petition, schedules, SOFA, means test

- The debtor must also file a petition; schedules listing her assets, debts, income, and expenses; a Statement of Financial Affairs (SOFA); and a Statement of Current Monthly Income, better known as the “means test.” 11 U.S.C. § 521. The petition must be filed in order to commence the case, but the remaining documents can generally be filed within 14 days. Fed. R. Bankr. P. 1007(c).
- Filing can be done online through ECF. Some local rules may apply.
- Forms are available at <http://www.uscourts.gov/forms/bankruptcy-forms>. Many attorneys also use special software to assist with the preparation and filing of the forms.

d. First meeting of creditors

- Section 341 of the Code requires the debtor to attend a “meeting of creditors,” administered by the trustee. Generally, creditors do not appear at the meeting, despite the name. The meeting usually takes place about a month after the initial filing.
- The debtor or her attorney must supply the trustee with documents prior to the meeting. Trustees generally want copies of the petition and schedules, the debtor’s most recent tax return, pay stubs for 60 days prior to the filing, recent bank statements, copies of vehicle titles, mortgage payoff letters, etc.
- The debtor must also bring her Social Security card and photo ID to the meeting. The debtor will be sworn under oath by the trustee.

- Trustees will ask the debtor about her debts, income, assets, and financial history. A debtor's attorney cannot answer these questions for her. Typically, the meetings take just a few minutes if the papers are in order and there are clearly no assets to administer.

e. Financial management requirement

- After the case is filed, the debtor must complete a second course, called financial management or debtor education. This can also be done online or over the phone for a small fee. The course must be completed within 60 days of the first date set for the 341 meeting.
- If the course is not completed, the debtor's case will be closed without discharge. 11 U.S.C. § 727(a)(11).

IV. Assets, exemptions, and the Chapter 7 estate

a. Debtor must list all assets

- A debtor must list all assets on Schedules A and B of the bankruptcy forms. Failure to disclose an asset could result in denial of discharge or even criminal penalties. 11 U.S.C. §§ 727(a)(2) (intentional transfer, concealment, or destruction of property grounds for denial of discharge), 727(a)(4) (making false statements or withholding information grounds for denial of discharge).

b. Unusual assets

- Tax refunds: a debtor must exempt an expected tax refund. Trustees love to take these, especially early in the year and around tax time.
- Personal injury, malpractice, and other claims: the debtor must disclose any potential legal or insurance claims, even if no claim or lawsuit has actually been filed. The debtor's possible right to payment is an asset as far as bankruptcy is concerned.
- Inheritance and divorce decrees: money or property expected as a distribution of a decedent's estate or as the result of a property settlement is an asset in bankruptcy. If the debtor becomes entitled to receive such property within 180 days of the filing of the petition, it becomes part of the bankruptcy estate and must be disclosed. 11 U.S.C. § 541(a)(6). This means that even after a case is discharged and closed it is possible that the debtor will have to amend the filing and the trustee could administer the property.

c. Exemptions

- The debtor can claim exemptions to remove property from the bankruptcy estate. Exemptions are available under state and federal law, but the debtor must choose one or the other set of exemptions. Exemptions are claimed on Schedule C.
- NY state exemptions: these are generally preferable if the debtor has substantial home equity. *See* CPLR §§ 5205, 5206, DCL §§ 282, 283.
- Federal exemptions: these are more flexible for most debtors, especially debtors with no home equity, due to the wildcard exemption at 11 U.S.C. § 522(d)(5).

d. Preferences

- Trustees can seek to undo certain payments and transfers made by the debtor before the filing of the bankruptcy case. Preferential payments are defined at 11 U.S.C. § 547; generally, the debtor must have made a payment of more than \$600 within 90 days prior to the bankruptcy filing. Payments to “insiders” that took place up to 1 year before filing can also be avoided, so clients should be asked about any repayments of loans from friends, family members, or business partners.
- Certain exceptions apply where the debtor receives new value and where the payment was made in the ordinary course of business. The trustee can recover this money from the recipient and preserve it for the estate.
- If the transfer was involuntary, such as a wage garnishment, the debtor can also exercise this power if the trustee declines to do so.

e. Fraudulent transfers

- The trustee also has the power to avoid fraudulent transfers made by the debtor before bankruptcy. 11 U.S.C. §§ 544, 548. Section 544 gives the trustee power under a state’s fraudulent transfer laws, DCL § 270 *et seq.*, and § 548 creates a bankruptcy-specific power.
- Transfers made with actual fraudulent intent can be avoided, but more often trustees will allege constructive fraud. *See* 11 U.S.C. § 548(a)(1)(B). The trustee must show that the debtor received less than reasonably equivalent value, and (a) was insolvent or made insolvent as a result, (b) engaged in business with unreasonably small capital, (c) intended to incur

debts beyond the debtor's ability to pay, or (d) made the transfer to or for the benefit of an insider under an employment contract.

- Trustees can recover the value of the transfer from the transferee in order to distribute money to creditors.

f. Liquidation of non-exempt assets by trustee

- If there appears to be money available for creditors, the trustee will issue a notice to file proofs of claim. Debtors (or the trustee) can object to claims; all allowed claims will be paid according to the schedule of priorities at 11 U.S.C. § 507.
- The debtor may have to turn over non-exempt property to the trustee for sale. The trustee may also be willing to settle with the debtor if the debtor can come up with cash to pay in to the estate.

V. Discharge of debts

a. Protects future income of debtor

- The primary goal of most Chapter 7 bankruptcies is to protect the debtor's future income from her creditors. This is the heart of the "fresh start" promised by bankruptcy. Income earned and (with very limited exceptions) property obtained after the filing date does not form part of the estate, and cannot be seized or levied by creditors whose claims are discharged.

b. Voids judgments for personal liability of debtor

- A Chapter 7 discharge voids any judgment for personal liability obtained before the bankruptcy filing. 11 U.S.C. § 524(a)(1).

c. Injunction against debt collection activity

- The discharge also operates as a permanent injunction against debt collection for a discharged claim, including "the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2).
- No specific right of action for violation of the discharge order exists in the Code, but discharge violations are contempt and may be punishable by sanctions. *See In re Nassoko*, 405 B.R. 515 (Bankr. S.D.N.Y. 2009). Such

violations may also run afoul of the Fair Debt Collection Practices Act or state debt collection laws.

d. Liens survive bankruptcy discharge

- While some liens can be avoided (a topic beyond the scope of this presentation), liens generally survive a bankruptcy discharge and continue to attach to pre-petition property of the debtor.

e. Exceptions to discharge, 11 U.S.C. § 523

- Certain tax debts: income tax debts are dischargeable if (a) the returns were last due more than three years before the bankruptcy case is filed, (b) the returns were actually filed more than two years before the bankruptcy, and (c) no tolling events have occurred. 11 U.S.C. § 523(a)(1). Most other tax debts are not discharged.
- Fraudulent debts, willful and malicious injury, etc. 11 U.S.C. § 523(a)(2), (4), (6).
- Domestic support obligations. This is a broad exception for obligations such as child support, alimony, and other maintenance payments, and includes support debts owed to governmental units. 11 U.S.C. § 523(a)(5).
- Criminal fines and penalties. 11 U.S.C. § 523(a)(7). This generally includes parking tickets and other traffic fines. *See In re Bace*, 2012 WL 2567153 (S.D.N.Y. 2012).
- Student loans. 11 U.S.C. § 523(a)(8). Student loans may be dischargeable, but the debtor must bring a successful adversary proceeding to prove that the loans would cause an “undue hardship.” *See Brunner v. New York State Higher Educ. Svcs*, 831 F.2d 395 (2d Cir. 1987).
- Debts not listed. 11 U.S.C. § 523(a)(3). In a no-asset case, where no dividend is paid to creditors, innocent oversight in listing a debt does not result in the debt’s nondischargeability. *See, e.g., In re Johnson*, 2011 WL 2357826 (Bank. N.D. Ala. 2011). If a creditor is not notified of the bankruptcy in time to file a claim, however, the debt is not discharged. *See Duerkop v. Jongquist*, 125 B.R. 558 (D. Minn. 1991).

f. Overlooked dischargeable debts

- Tuition and fees. Student loans are not generally dischargeable, but tuition and fees owed directly to a school are dischargeable. *Cazenovia College v. Renshaw*, 222 F.3d 82 (2d Cir. 2000).
- Public benefit overpayments. Absent fraud, for which the objecting creditor bears the burden of proof, overpayments of SNAP, unemployment, Social Security, cash assistance, and other public benefits are dischargeable. *Lee v. Schweiker*, 739 F.2d 870 (3d Cir. 1984).
- Public housing rent arrears. Unlike rent owed to a private landlord, a debtor can discharge rent owed to a public housing authority without facing eviction for the discharged debt. *Stoltz v. Brattleboro Housing Auth.*, 315 F.3d 80 (2d Cir. 2002).
- Certain taxes. As described above, certain income tax debts are dischargeable in bankruptcy. To ensure that a particular tax debt meets the dischargeability requirements, a debtor should obtain tax account transcripts from the IRS or a consolidated statement of tax liability from New York state.

**A Fresh Start: Using Bankruptcy to Help Clients
Deal with Debt, Student Loans,
Evictions, Foreclosures, and More**

**Chapter 13 for Mortgage and Vehicle
Loan Debt**

A FRESH START: USING BANKRUPTCY TO HELP DEAL WITH DEBT

CHAPTER 13 FOR MORTGAGE AND VEHICLE LOAN DEBT

NYSBA 2016 Partnership Conference

Submitted by Mark H. Wattenberg

I. Two categories of consumer bankruptcy – Chapter 7 and Chapter 13

- A. Chapter 7 is a basic bankruptcy which cancels debts but will not cure mortgage arrears. The duration is typically just 3 or 4 months from filing the bankruptcy papers to the final order discharging debts.

Chapter 7 does not cancel the mortgage lien – it only cancels personal liability. As a result there are 2 main options:

- Cancel consumer debts but reaffirm the mortgage (if the homeowner is otherwise able to catch up on the mortgage or qualifies for a modification)
- Cancel consumer debts and the mortgage loan debt – give up the house - but get off to a new financial start

- B. Chapter 13 is a bankruptcy which can both cancels unsecured debts (hospital bills, credit cards, etc.) and allows a consumer to catch up on secured debts (mortgage and car loans.) The duration is typically 5 years, and is based on a financial plan (“Chapter 13 Plan”-Appendix “A”).

- Debtor resumes direct regular monthly mortgage payments
- Debtor makes regular payments to a Chapter 13 Trustee – typically by a wage order
- Chapter 13 Trustee uses these funds to: 1) pay off over a 5 year period mortgage arrears and car loans; 2) pay unsecured creditors a percentage of their claims (often 10% for lower income homeowners)
- At the end of 5 years – if the Chapter 13 Plan is successful – the mortgage arrears will be cured and the unsecured debts will be cancelled with a discharge order

- C. Distinctive features of Chapter 13

- Cure defaults in mortgages after acceleration - 11 USC § 1322(b)(3) and § 1322(c)(1)
- filing before the gavel falls at the foreclosure auction suspends the foreclosure proceedings, 11 USC § 362
- However, Bankruptcy Court lacks authority to modify mortgage terms (with some exceptions) – 11 USC § 1322(b)(2) *Note: where the lender’s security interest is just in a mobile home – terms can be modified. In re Thompson, 217 B.R. 375, 378 (B.A.P. 2d Cir. 1998)*
- “Cram-down” or “strip down” or modify car loans

“Strip-off” certain 2nd mortgages

In re Pond, 252 F.3d 122, (2d Cir.2001)

This means if on filing, the 1st mortgage is more than the equity in the home, (i.e. the home is “under water”) the 2nd mortgage is considered unsecured. For instance:

*1st mortgage - \$75,000 due; fair market value of house is \$70,000;
2nd mortgage of \$25,000 with payments of \$200 per month – 2nd mortgage is considered unsecured as the 1st mortgage leaves no equity;
Assuming 10% Chapter Plan – Chapter 13 Trustee will pay off \$2,500 over 10 year period - \$41/month*

- Cancel judgment liens on property – 11 USC § 522(f)
- At end of Chapter 13 Plan, lender must submit statement confirming arrears are cured – FRBP 3002(1)(f)

II. Who Should be Considered for Chapter 13?

- Primarily, a homeowner who got behind in the mortgage due to loss of income or unexpected expenses, but is now financially stable
- Chapter 13 allows a homeowner to immediately resume mortgage payments so as to avoid getting further behind
- Chapter 13 can be used in combination with applications to modify a mortgage – but the Bankruptcy Court cannot order a bank to modify the mortgage – it is ideal for homeowners who have a relatively decent mortgage but got behind and are now financially stable
- Chapter 13 involves financial balancing – a homeowner can have either too much or too little income to make it feasible – thus it is ideal for low to moderate income homeowners
- Chapter 13 is an important remedy when settlement conferences under CPLR § 3408 have failed to resolve the foreclosure and the homeowner has financially stabilized

III. Basic financial requirements for Chapter 13

- **Feasibility test - 11 USC § 1325(a)(6)**

The debtor must have a regular source of income.

There must be a showing that “the debtor will be able to make all payments under the plan and to comply with the plan” 11 USC § 1325(a)(6)

This means the homeowner must have sufficient income to:

- A) resume mortgage payments;
- B) pay off mortgage arrears over a 5-year period; and
- C) pay unsecured creditors a percentage of their claims;
- D) pay “priority claims” in full (e.g. domestic support obligations and certain IRS claims) 11 USC § 507

○ *Example – Assume net income of \$2,000 per month; mortgage payments of \$800 per month; mortgage arrears of \$15,000 – the homeowner:*

- *Resumes mortgage payments of \$800/mo;*
- *Pays the Chapter 13 Trustee \$250/mo. towards the mortgage arrears (\$15,000 divided by 60 months)*
- *Pays the Chapter 13 Trustee a percentage for the unsecured creditors*
- *Pays the Chapter 13 a 10% commission*

- **Disposable income test – 11 USC § 3125(b)**

The homeowner must pay surplus income (“projected disposable income”) to the unsecured creditors.

Lower income homeowners will typically qualify for a 10% Chapter 13 Plan in which unsecured creditors get paid 10% of their claims. But income and expenses must be documented on respectively, Schedule “I” and Schedule “J.” If there is a surplus of income after necessary expenses, the percentage for unsecured creditors will increase

- **Chapter 7 test – 11 USC § 1325(a)(4)**

The homeowner must pay the unsecured creditors the value of any non-exempt assets

Most basic assets of a homeowner are exempt. This means that they will not have to be sold as a condition of the bankruptcy. (Appendix “B” -Chart on exempt assets) However, if a homeowner has non-exempt assets, such as a high amount of equity in the primary house or owns a second house, this will create

complications in Chapter 13. The unsecured creditors will need to receive at least the value of the non-exempt assets.

Example - assume a debtor, who after deducting the amount owed on the mortgage and applying the homestead exemption, still has \$5,000 of equity in the home – the unsecured creditors are entitled to payments, over the 5 year life of the Chapter 13 Plan, totaling at least \$5,000

IV. Types of foreclosure for which Chapter 13 may be a remedy

- conventional mortgages – right to cure default until foreclosure sale – 11 USC § 1322(c)(1)
- reverse mortgages – arrears are typically unpaid property taxes and insurance;
- mortgages with balloon payments – the balloon payment can be paid off during the 5 years of the Chapter 13 Plan (curing a default is not a prohibited “modification” of a mortgage) In re Taddeo, 685 F.2d 24, 27 (2d Cir. 1982)
- land contracts – “Such contracts are, in substance, mortgages and are treated accordingly.” In re Mastowski, 135 B.R. 1 (Bankr. W.D.N.Y.1992)
- property tax foreclosures – tax arrears can be paid off over 5 years if the Chapter 13 is filed before a judgment of tax foreclosure is entered (with some exceptions).

V. Chapter 13 Mortgage Litigation

- The bank or lender must submit a detailed claim to be paid under the Chapter 13 Plan (FRBP 3001, Official Forms 410 and 410a) - Appendix “C”
- Debtor may object to the claim (FRBP 3007)
- Debtor may file Motions and Adversary Proceedings to resolve claim issues (FRBP 7001)
- The bank or lender may counter with a Motion to Lift the Stay - 11 USC § 362(d)

VI. Special handling of car loans

- “Cram-down” of car loans over 910 days old before filing – 11 USC § 1325(a)(9) [hanging clause] and § 506 – (See Appendix “A”)
- Modification of high-interest car loans under 910 days old, to reduce monthly payments during Plan – 11 USC § 1322(b)(2) (“modify” but not “bifurcate”)

XI. Voluntary Dismissal of a Chapter 13

Dismissal as of right – 11 USC § 1307(b)

- Refund to debtor of undistributed funds – In re Bailey, 330 BR 183 (Bankr.SD Ohio 2007) NCLC n. 272
- Conversion as of right to Ch. 7 – 11 USC § 1307(a)

Special Considerations for Bankruptcy Practitioners

1. Admission to Bankruptcy Court (Appendix “C”)
2. Bankruptcy Basics
<http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics>
3. Federal Rules of Bankruptcy Procedure
<http://www.uscourts.gov/rules-policies/current-rules-practice-procedure/federal-rules-bankruptcy-procedure>
4. Bankruptcy District Websites
NDNY - <http://www.nynb.uscourts.gov>
SDNY - <http://www.nysb.uscourts.gov>
EDNY - <http://www.nyeb.uscourts.gov>
WDNY - <http://www.nywb.uscourts.gov>
5. Local Rules and Administrative Orders
6. Electronic docket Management
A. CM/ECF – Electronic Case and Document Filing
B. PACER – Public Access to Court Electronic Records (www.pacer.gov)
7. NCLC Manual - <https://library.nclc.org/Bankr>

Filing Fees

1. \$335 - Chapter 7
2. \$310 -Chapter 13

Note:

- If the Debtor is under 150% of FPIG, the Debtor maybe eligible for a waiver of the fees by application or *informa pauperis* motion.
- A waiver of fees in only available for a Chapter 7
- An application to the Court to pay filing fees in installments is available for both Chapter 7 and Chapter 13 Debtors

The Role of Paralegals in Bankruptcy Practice

1. Document gathering
2. Judgment searches
3. Property Valuation reports and assessments
4. Assist in drafting Petitions and Plans
5. Electronic Filing
6. Docket Case Management
7. Keep track of Deadlines
8. Prepare Trustee information packets

APPENDIX “A” – Sample Chapter 13 Plan

APPENDIX “B” - Federal and State Exemptions Chart

APPENDIX “C”- Proof of Claim – Mortgage, Official Forms 410 and 410a

APPENDIX “D” – Sample Application for Admission in Bankruptcy Court (WDNY)

**A FRESH START:
USING BANKRUPTCY TO HELP DEAL WITH DEBT
CHAPTER 13 FOR MORTGAGE AND VEHICLE LOAN DEBT**

NYSBA 2016 Partnership Conference

Appendix “A”

Submitted by Mark H. Wattenberg

Sample
CHAPTER 13 PLAN
JOHN M. DEBTOR AND JANE A. DEBTOR

1. Debtors have filed this Chapter 13 Proceeding in order to save their home from foreclosure. Debtors propose a 5 year plan with 10% payment of unsecured debts and to include payment of arrears in their mortgage and property taxes and to “cram down” their car payment. The proposed payments to the Trustee are \$206.47 per month. Debtors will make their on-going mortgage and property tax payments outside of the Chapter 13 Plan.

2. Debtors’ mortgage is held by XYZ Finance Co. and is dated 1/1/00.

3. XYZ finance co. has started a foreclosure proceeding

4. The mortgage terms are a mortgage loan of \$35,000 at 11.5% interest with monthly payments of \$350 over a 30 year period.

5. Property taxes and insurance are not included.

6. Debtors are 10 payments behind

7. Debtors estimate their mortgage arrears at \$3,500 (10 payments of \$350 per month) + late fees of \$300

+ attorney’s fees from the foreclosure of \$2,200

TOTAL = \$6,000

8. Debtors owe property taxes of \$1,000

TOTAL = \$1,000

9. Debtors’ car loan was from ABC Car Loan, Inc. and is dated 1/1/2014.

10. The loan was for \$4,200 at 15% interest and monthly payments of \$100 over a 5 year period.

11. Debtors are current on their loan.

12. Debtors owe \$2,486.78 on the loan.
13. Debtors propose to modify the car pursuant to §1322(b)(2) (“cram-down”)
14. The value of the car is \$1,000.
15. Debtors propose to classify the balance of \$1,486 as unsecured debt.
16. Debtors have \$11,500 in additional unsecured debt
17. Debtors unsecured debt totals \$12,986

Proposed payment to the trustee - \$206.47/month – 60 months

- SECURED DEBT

18. \$ 6,000 Mortgage arrear
 19. \$ 1,000 property tax arrear
 20. \$ 1,000 value of car
- | | |
|----------------------------|-----------|
| TOTAL | \$ 8,000 |
| Amortized at 9% interest = | \$ 166.07 |

- UNSECURED DEBT

21. Unsecured debts (Schedule F) \$11,500
 22. Unsecured car loan balance \$ 1,486
- | | |
|---------------------------|----------|
| TOTAL | \$12,986 |
| 10% | \$1,298 |
| Amortized – no interest - | \$21.63 |
23. Secured \$166.07
 - Unsecured \$21.63
 - TOTAL \$ 87.70
 24. Trustee’s Commission – 10% - \$18.77/month
 25. Monthly payment \$187.70 + \$18.77 = \$206.47

26. Debtors consent to entry of a wage order with L & M Factory, 5 Maple Street, Corning, NY 14810, the employer of debtor Jane A. Debtor, for payment to the trustee. Debtors request that payment be taken on a pro-rated basis out of each weekly check.

27. Debtors' Duties - In addition to the duties and obligations imposed upon Debtors by the Bankruptcy Code and Rules, Local Rules, and the Order of Confirmation, this plan imposes the following requirements on Debtors:

- a. Transfers of Property and New Debt. Debtor are prohibited from transferring, encumbering, selling, or otherwise disposing of any personal or real property with a value of \$1,000 or more other than in the regular course of Debtor's business affairs, without first obtaining court authorization. Except as provided in 11 U.S.C. §364 and §1304, Debtor shall not incur aggregate new debt of \$500 or more without prior approval of the Trustee or the Court, except such debt as may be necessary for emergency medical care, unless such prior approval can not reasonably be obtained.
- b. Insurance. Debtor shall maintain insurance as required by any law, contract, or security agreement.
- c. Support Payments. Debtor shall maintain child or spousal payments directly to the recipient pursuant to a separation agreement, divorce decree, the applicable child support collection unit, or other court order.
- d. Compliance with Non-Bankruptcy Law. Debtor shall comply with applicable non-bankruptcy law in the conduct of his/her financial and business affairs. This includes the timely filing of tax returns and payment of taxes.
- e. Periodic Reports. Upon the Trustee's request, Debtor shall provide the Trustee with a copy of any tax return, W-2 or 1099 form, filed or received while the case is pending.

DATED:

JOHN M. DEBTOR

JANE A. DEBTOR

**A FRESH START:
USING BANKRUPTCY TO HELP DEAL WITH DEBT
CHAPTER 13 FOR MORTGAGE AND VEHICLE LOAN DEBT**

NYSBA 2016 Partnership Conference

Appendix “B”

Submitted by Mark H. Wattenberg

Exemption Description	New York	Federal
Real Property	\$82,775 CPLR 5206(a)	\$23,675 11 U.S.C. § 522(d)(1)
*Stoves and home heating equipment	\$11,025 -CPLR §5205(a)	\$600 per item and \$12,625 in total in furnishings, household goods, apparel, appliances, books, animals, crops, or musical instruments for personal, family, or household use. 11 U.S.C § 522(d)(3)
*apparel, furniture, refrigerator, radio, television, computer , cellphone , and cookware, prescribed health aids		
* Religious texts , family pictures, and portraits \$550	\$550 CPLR§5205(a)2	Professionally prescribed health aids 11 U.S.C § 522(d)(9)
*pew	CPLR §5205(a)3	
*domestic animals	\$1,100 CPLR§5205(a)	
*wedding ring, jewelry and art \$1,100 in value	\$1,100 CPLR §5205(a)6	\$1,600 in jewelry for personal, family, or household use 11 U.S.C § 522(d)(4)
* tools needed for profession , up to \$3,300 in value	\$3,300 CPLR§5205(a)	\$2,375 in any implements, professional books, or tools of the trade 11 U.S.C § 522(d)(6)
* one vehicle not exceeding \$4,425 in value	\$4,425 CPLR §5205(a)	\$3,775 11 U.S.C. § 522(d)(2)
earnings - %90 earned within 60 days of or after execution delivered to Sheriff	CPLR §5205(d)(2)	
trust fund income – 90%	CPLR §5205(d)(1)	
trusts	CPLR §5205(c)	
payments from matrimonial awards	CPLR §5205(d)(3)	
security deposit	CPLR §5205(g)	
guide dog	CPLR §5205(h)(2)	
NYS college choice tuition savings program trust fund payment monies	CPLR §5205(j)	

cause of action and damages for talking or injuring exempt personal property	CPLR §5205(b)	
cash	\$5,525 D&C 283(2)	*Wildcard* \$1,250 plus up to \$12,625 of any unused amount of homestead exemption. 11 U.S.C § 522(d)(5)
*if no homestead exemption, \$1,100 in personal property, bank account, or cash	\$1,100 CPLR §5205(a)(9)	
Life insurance	Insurance Law §3212(c) D&C §282	Life insurance 11 U.S.C. §522(d)(11)(c) 11 U.S.C. §522(d)(7)
Payments under stock bonus, pension, profit sharing, 401k and IRA	D&C Law §282(2)	11 U.S.C §522(d)(10)(E)
Right to receive benefits	D&C Law §282(2)	11 U.S.C §522(d)(10)
Crime victim's reparation law, wrongful death, loss of future earnings	D&C Law §282(3)	11 U.S.C §522(d)(11)
Personal injury	\$8,275 D&C Law §282(3)	Personal injury to \$23,675 11 U.S.C §522(d)(11)(D)

**A FRESH START:
USING BANKRUPTCY TO HELP DEAL WITH DEBT
CHAPTER 13 FOR MORTGAGE AND VEHICLE LOAN DEBT**

NYSBA 2016 Partnership Conference

Appendix “C”

Submitted by Mark H. Wattenberg

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2
(Spouse, if filing) _____

United States Bankruptcy Court for the: _____ District of _____

Case number _____

Official Form 410

Proof of Claim

04/16

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. Do not send original documents; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?

Name of the current creditor (the person or entity to be paid for this claim) _____

Other names the creditor used with the debtor _____

2. Has this claim been acquired from someone else?

☐ No

☐ Yes. From whom? _____

3. Where should notices and payments to the creditor be sent?

Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?

Name _____

Number _____ Street _____

City _____ State _____ ZIP Code _____

Contact phone _____

Contact email _____

Where should payments to the creditor be sent? (if different)

Name _____

Number _____ Street _____

City _____ State _____ ZIP Code _____

Contact phone _____

Contact email _____

Uniform claim identifier for electronic payments in chapter 13 (if you use one):

4. Does this claim amend one already filed?

☐ No

☐ Yes. Claim number on court claims registry (if known) _____

Filed on _____
MM / DD / YYYY

5. Do you know if anyone else has filed a proof of claim for this claim?

☐ No

☐ Yes. Who made the earlier filing? _____

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor? ☐ No
☐ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: _____

7. How much is the claim? \$_____. Does this amount include interest or other charges?
☐ No
☐ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. What is the basis of the claim? Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.
Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).
Limit disclosing information that is entitled to privacy, such as health care information.
- _____

9. Is all or part of the claim secured? ☐ No
☐ Yes. The claim is secured by a lien on property.
- Nature of property:**
- ☐ Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.
- ☐ Motor vehicle
- ☐ Other. Describe: _____
- Basis for perfection:** _____
- Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)
- Value of property:** \$_____
- Amount of the claim that is secured:** \$_____
- Amount of the claim that is unsecured:** \$_____ (The sum of the secured and unsecured amounts should match the amount in line 7.)
- Amount necessary to cure any default as of the date of the petition:** \$_____
- Annual Interest Rate** (when case was filed) _____%
- ☐ Fixed
- ☐ Variable

10. Is this claim based on a lease? ☐ No
☐ Yes. Amount necessary to cure any default as of the date of the petition. \$_____

11. Is this claim subject to a right of setoff? ☐ No
☐ Yes. Identify the property: _____

12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☐ No

☐ Yes. Check one:

☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).

Amount entitled to priority

\$ _____

☐ Up to \$2,850* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).

\$ _____

☐ Wages, salaries, or commissions (up to \$12,850*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).

\$ _____

☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).

\$ _____

☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).

\$ _____

☐ Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.

\$ _____

* Amounts are subject to adjustment on 4/01/19 and every 3 years after that for cases begun on or after the date of adjustment.

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☐ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date _____
MM / DD / YYYY

Signature

Print the name of the person who is completing and signing this claim:

Name

First name

Middle name

Last name

Title

Company

Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Number

Street

City

State

ZIP Code

Contact phone

Email

(12/15)

If you file a claim secured by a security interest in the debtor's principal residence, you must use this form as an attachment to your proof of claim. See separate instructions.

Part 1: Mortgage and Case Information	Part 2: Total Debt Calculation	Part 3: Arrearage as of Date of the Petition	Part 4: Monthly Mortgage Payment
Case number: _____	Principal balance: _____	Principal & interest due: _____	Principal & interest: _____
Debtor 1: _____	Interest due: _____	Prepetition fees due: _____	Monthly escrow: _____
Debtor 2: _____	Fees, costs due: _____	Escrow deficiency for funds advanced: _____	Private mortgage insurance: _____
Last 4 digits to identify: _____	Escrow deficiency for funds advanced: _____	Projected escrow shortage: _____	Total monthly payment: _____
Creditor: _____	Less total funds on hand: - _____	Less funds on hand: - _____	
Servicer: _____	Total debt: _____	Total prepetition arrearage: _____	
Fixed accrual/daily simple interest/other: _____			

Part 5 : Loan Payment History from First Date of Default

[illegible]

(12/15)

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**A FRESH START:
USING BANKRUPTCY TO HELP DEAL WITH DEBT
CHAPTER 13 FOR MORTGAGE AND VEHICLE LOAN DEBT**

NYSBA 2016 Partnership Conference

Appendix “D”

Submitted by Mark H. Wattenberg

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

PETITION FOR ADMISSION TO PRACTICE INSTRUCTION SHEET

Admission to Practice in Bankruptcy Court for the Western District of New York, is governed by Local Rule 2090-1. **Attorneys seeking to practice in U.S. Bankruptcy Court must FIRST be admitted in U.S. District Court for the Western District of New York.** The U.S. Bankruptcy Court requires:

1. the attached Petition for Admission to Practice Form be properly filled out and **typewritten**. The form should include full address with zip code, the admission date in District Court, and should be notarized; and
2. the Petition for Admission to Practice Form be returned to:
U.S. Bankruptcy Court
Attn: Lisa Czaja
Olympic Towers
300 Pearl Street, Suite 250
Buffalo, New York 14202-2510

A Certificate of Admission will be provided to you upon completion of the above requirements. Attorneys are directed to this Court's website: www.nywb.uscourts.gov for important information relating to practice before this Court, such as local rules, standing orders, calendars, Judges' Decisions, motion practice and forms. This site is updated regularly and you are strongly encouraged to visit it often for the most current information.

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In the Matter of the Application of

ADMISSION TO PRACTICE
PETITION FORM

Name: _____

To be Admitted to Practice as an Attorney in this Court.

TO THE CLERK OF THE U.S. BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NEW YORK:

_____, petitioner herein, respectfully states:

1. That petitioner resides at _____ and
has an office for the practice of law at _____ at
the law firm of _____.
2. That petitioner was admitted to practice before the United States District Court for the Western District of New
York on the _____ day of _____, 20____.
3. That petitioner has read and is familiar with:
 - (a) the provisions of the Judicial Code 28 U.S.C. § 1334, §§ 151 - 158, §§ 1408 - 1412, and § 1452, which
pertain to jurisdiction over and venue of bankruptcy cases, proceedings and matters;
 - (b) the Bankruptcy Code, Title 11 U.S.C.;
 - (c) the Federal Rules of Bankruptcy Procedure;
 - (d) the Local Rules of Bankruptcy Practice for the Western District of New York; and
 - (e) the Administrative Procedures.

WHEREFORE, your petitioner respectfully requests that he/she be admitted as an attorney in the United States
Bankruptcy Court for the Western District of New York.

_____, being duly sworn, deposes and says: that he/she is the petitioner herein; that
he/she has read the foregoing petition; that the same is true to petitioner's own knowledge except as to the matters stated
to be alleged on information and belief, and that as to those matters he/she believes it to be true.

OATH: I _____, do solemnly swear(or affirm) that as an attorney and as a counselor of
this Court, I will conduct myself uprightly and according to law, and that I will support the Constitution of the United
States.

Sworn to before me this _____ day
of _____, 20____

Notary Public

Signature of Petitioner

(_____) _____
Telephone Number

Email Address

Admittance and Electronic Filing for Attorneys

U.S. Bankruptcy Court - Western District of New York

(Rev. 05/2015)

300 Pearl Street, Olympic Towers, Suite 250, Buffalo, NY 14202 (716) 362-3200

Admission to Practice

1. Must be admitted to the **District Court** for the Western District of NY. Contact the District Court for admittance procedures at 716-551-4211 or visit the website: www.nywd.uscourts.gov
2. **After you have been admitted to District Court**, you may be admitted to Bankruptcy Court. **There is NO Fee.** To download the form, go to: www.nywb.uscourts.gov > For Attorneys > Admittance to Practice. Mail the completed form to the Buffalo office of the Court.

****Attorneys admitted to U.S. District Court for the Western District of NY before September 1, 1979 are grand-fathered into Bankruptcy Court. Attorney needs only to supply date of admission.**

Register for Electronic Filing - Attorneys that have been admitted

To register for full e-filing privileges, go to: www.nywb.uscourts.gov > For Attorneys > How to become an E-filer, #4 Click here to register. Once the Court verifies the requirements and prerequisites, an email will be sent to the attorney which contains the e-filing credentials.

Training Requirements for Attorneys. Are you currently e-filing in another Bankruptcy Court?

- If Yes, fill out the Training Waiver form. Go to: www.nywb.uscourts.gov > For Attorneys > How to become an E-filer, click on the: Request for Waiver of Training Requirement form. The form must be mailed to the Buffalo office of the Court with an original, wet signature.
- If No, the attorney **MUST** complete 5 training modules which can be found on the Court's website under: For Attorneys > How to become an E-filer, #3 Training Requirement. After each training module, print the Certificate of Completion and mail it to the Buffalo office of the Court.

Pro Hac Vice (follow the steps below in order)

1. Register for an e-filing account. Go to: www.nywb.uscourts.gov > **For Attorneys > Pro Hac Vice.**
- when asked for your Bar ID, enter: PHV
2. Send an email to: lisa_czaja@nywb.uscourts.gov
 - a) the email should state that you intend to be admitted to practice pro hac vice; and
 - b) the email should contain the case number, if there is one.
3. The Court will then send an email to the attorney which contains their e-filing credentials.
4. **After receiving your e-filing credentials**, e-file an Ex Parte Motion and Proposed Order to Appear Pro Hac Vice.
5. After e-filing the motion & order, mail a Chambers Copy to the appropriate office of the Court.

***WDNY does not have a local form template for the motion and order.**

Register for Electronic Filing - Creditor/Limited Filer

An attorney may apply for a Creditor/Limited Filer e-filing account. However, the e-filing privileges are limited to documents such as: Filing Proof of Claims, Transfer of Claims, Reaffirmation Agreements, Notice of Appearances. Training is not mandatory. The attorney does not need to be admitted to District or Bankruptcy Court. To register for a Creditor/Limited Filer e-filing account, go to: www.nywb.uscourts.gov > **For Attorneys > How to become an E-filer, Click here to register.**

Public Access to Court Electronic Records (PACER)

To view pleadings and dockets, you must register for PACER. You will receive a **separate** User Name and Password for PACER(which is in addition to your e-filing user name & password). To register for PACER, go to: www.pacer.gov

Voice Case Information System (VCIS): Case filing information and deadline dates can be obtained **free of charge** by calling our Voice Case Information System (VCIS): (716) 362-3201 or 866-222-8029

****The Court requires an original wet signature on all forms. All forms should be mailed to the Buffalo office. There is No Fee.** This information is provided as a general overview. Please review applicable Local Rules and Administrative Procedures for additional information.

A FRESH START: USING BANKRUPTCY TO HELP DEAL WITH DEBT

CHAPTER 13 FOR MORTGAGE AND
VEHICLE LOAN DEBT

2016 NYSBA Partnership Conference

Two categories of consumer bankruptcy

Chapter 7

A basic bankruptcy which cancels debts but will not cure mortgage arrears. The duration is typically just 3 or 4 months from filing the bankruptcy papers to the final order discharging debts.

Chapter 13

A bankruptcy which can both

cancel unsecured debts (hospital bills, credit cards, etc.) and

allows a consumer to catch up on secured debts (mortgage and car loans.) The duration is typically 5 years, and is based on a financial plan ("Chapter 13 Plan").

Chapter 7

Chapter 7 does not cancel the mortgage lien – it only cancels personal liability. As a result there are 2 main options:

- ▶ Cancel consumer debts but reaffirm the mortgage (if the homeowner is otherwise able to catch up on the mortgage or qualifies for a modification)
- ▶ Cancel consumer debts and the mortgage loan debt – give up the house – but get off to a new financial start

Chapter 13

- ▶ Debtor resumes direct regular monthly mortgage payments
- ▶ Debtor makes regular payments to a Chapter 13 Trustee
- ▶ Chapter 13 Trustee uses these funds to: 1) pay off over a 5 year period mortgage arrears and car loans; 2) pay unsecured creditors a percentage of their claims (often 10% for lower income homeowners)
- ▶ At the end of 5 years – if the Chapter 13 Plan is successful – the mortgage arrears will be cured and the unsecured debts will be cancelled with a discharge order

Distinctive features of Chapter 13

- ▶ Cure defaults in mortgages after acceleration – 11 USC § 1322(b)(3) and § 1322(c)(1)
- ▶ Filing before the gavel falls at the foreclosure auction suspends the foreclosure proceedings – 11 USC § 362
- ▶ However, Bankruptcy Court lacks authority to modify mortgage terms (with some exceptions) – 11 USC § 1322(b)(2) *Note: where the lender's security interest is just in a mobile home – terms can be modified. In re Thompson, 217 B.R. 375, 378 (B.A.P. 2d Cir. 1998)*
- ▶ “Cram-down” or “strip down” or modify car loans
- ▶ “Strip-off” certain 2d mortgages – In re Pond, 252 F.3d 122, (2d Cir.2001)
- ▶ Cancel judgment liens on property – 11 USC § 522(f)
- ▶ At end of Chapter 13 Plan, lender must submit statement confirming arrears are cured – FRBP 3002 1(f)

Who Should be Considered for Chapter 13?

- ▶ Primarily, a homeowner who got behind in the mortgage due to loss of income or unexpected expenses, but is now financially stable
- ▶ Chapter 13 allows a homeowner to immediately resume mortgage payments so as to avoid getting further behind
- ▶ Chapter 13 can be used in combination with applications to modify a mortgage – but the Bankruptcy Court cannot order a bank to modify the mortgage – it is ideal for homeowners who have a relatively decent mortgage but got behind and are now financially stable

Who Should be Considered for Chapter 13?

- ▶ Chapter 13 involves financial balancing – a homeowner can have either too much or too little income to make it feasible – thus it is ideal for low to moderate income homeowners
- ▶ Chapter 13 is an important remedy when settlement conferences under CPLR § 3408 have failed to resolve the foreclosure and the homeowner has financially stabilized

Basic financial requirements for Chapter 13

Feasibility test – 11 USC § 1325(a)(6)

- ▶ The debtor must have a regular source of income.
- ▶ There must be a showing that “the debtor will be able to make all payments under the plan and to comply with the plan” 11 USC § 1325(a)(6)
- ▶ This means the homeowner must have sufficient income to:
 - ✓Resume mortgage payments;
 - ✓Pay off mortgage arrears over a 5-year period;
 - ✓Pay unsecured creditors a percentage of their claims; and
 - ✓Pay “priority claims” in full (e.g. domestic support obligations and certain IRS claims) 11 USC § 507

▶

Disposable income test

11 USC § 3125(b)

The homeowner must pay surplus income (“projected disposable income”) to the unsecured creditors.

Lower income homeowners will typically qualify for a 10% Chapter 13 Plan in which unsecured creditors get paid 10% of their claims. If there is a surplus of income after necessary expenses, the percentage for unsecured creditors will increase

Chapter 7 test

11 USC § 1325(a)(4)

- ▶ The homeowner must pay the unsecured creditors the value of any non-exempt assets
- ▶ Most basic assets of a homeowner are exempt.

Types of foreclosure for which Chapter 13 may be a remedy

- Conventional mortgages
- Reverse mortgages
- Mortgages with balloon payments
In re Taddeo, 685 F.2d 24, 27 (2d Cir. 1982)
- Land contracts
In re Mastowski, 135 B.R. 1 (Bankr. W.D.N.Y.1992)
- Property tax foreclosures

Chapter 13 Mortgage Litigation

- ▶ The bank or lender must submit a detailed claim to be paid under the Chapter 13 Plan (FRBP 3001)
- ▶ Debtor may object to the claim (FRBP 3007)
- ▶ Debtor may file Motions and Adversary Proceedings to resolve claim issues (FRBP 7001)
- ▶ The bank or lender may counter with a Motion to Lift the Stay (11 USC 362(d))

Special handling of car loans

- ▶ “Cram-down”

Car loans over 910 days old before filing
(11 USC § 1325(a)(9) and § 506)

- ▶ Modification of high-interest car loans, under 910 days old to reduce monthly payments during Plan

(11 USC § 1322(b)(2) – “modify” but not “bifurcate”)

Voluntary Dismissal of a Chapter 13

Dismissal as of right
11 USC § 1307(b)

Refund to debtor of undistributed funds –
In re Bailey, 330 BR 183 (Bankr.SD Ohio 2007)
NCLC n. 272

Conversion as of right to Ch. 7
11 USC §1307(a)

Bankruptcy District Websites

- ▶ NDNY – <http://www.nynb.uscourts.gov>
- ▶ SDNY– <http://www.nysb.uscourts.gov>
- ▶ EDNY – <http://www.nyeb.uscourts.gov>
- ▶ WDNY– <http://www.nywb.uscourts.gov>



Filing Fees

- ▶ \$335 – Chapter 7
- ▶ \$310 –Chapter 13

Note:

- ▶ If the Debtor is under 150% of FPIG, the Debtor maybe eligible for a waiver of the fees by application or *informa pauperis* motion
- ▶ A waiver of fees in only available for a Chapter 7
- ▶ An application to the Court to pay filing fees in installments is available for both Chapter 7 and Chapter 13 Debtors

**A Fresh Start: Using Bankruptcy to Help Clients
Deal with Debt, Student Loans,
Evictions, Foreclosures, and More**

**Discharging Student Loan Debt in
Bankruptcy**

**A FRESH START:
USING BANKRUPTCY TO HELP DEAL
WITH DEBT**

DISCHARGING STUDENT LOAN DEBT IN BANKRUPTCY

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NYSBA 2016 PARTNERSHIP CONFERENCE

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DISCHARGING STUDENT LOAN DEBT IN BANKRUPTCY

INTRODUCTION

Discharging student loans in bankruptcy is an important tool for low-income debtors suffering an undue hardship. While discharging student loan debt in bankruptcy is a difficult process, it is not impossible. This brief guide will address the key factors needed to seek a bankruptcy discharge of student loans.

TYPES OF STUDENT LOANS

When considering discharging student loans, there are usually, two types: federal or private loans. All outstanding federal student loans with the US Department of Education were issued under three Higher Education Act programs: the Direct Loan, Federal Family Education Loan (“FFEL”), and Perkins Loan programs and can include Stafford, PLUS(typically issued to graduates or parents of undergraduate students) and Perkins Loans. The US Department of Education offers various income driven repayment plans for all loans except Parent PLUS. In addition, if the borrower qualifies, they can obtain an administrative discharge of their student loans. *See US Department of Education’s website.* Private student loans, on the other hand, are those issued by a private lender or bank. These lenders usually do not have an income driven repayment plan or have forgiveness programs available to borrowers.

EDUCATIONAL LOAN UNDER THE BANKRUPTCY CODE

Generally, under the bankruptcy law, debtors can discharge their obligations to unsecured creditors, with some statutory exceptions. When filing for bankruptcy the debtor must list all

their consumer debts, including their student loan obligations. While student loans are considered an unsecured debt, their dischargeability is limited under the bankruptcy code. The bankruptcy law lists debts that are excepted from discharge, including educational loans, unless excepting these obligations from discharge “would impose an undue hardship on the debtor and the debtor’s dependents.” 11 U.S.C. §523(a)(8). However, prior to the 2005 bankruptcy amendments, undue hardship restriction applied to education loans insured or guaranteed by a governmental unit. Thus, private lenders of student loans had to show that the debt was guaranteed by a governmental agency and therefore not dischargeable. Congress decided to expand the meaning of a non-dischargeable education loan by adding two additional provisions to the §523(a)(8). Thus, a student loan that falls under the following categories is deemed generally non-dischargeable:

- “an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution” 11 U.S.C. §523(a)(8)(A)(i); or
- “an obligation to repay funds received as an educational benefit, scholarship, or stipend” 11 U.S.C. §523(a)(8)(A)(ii); or
- “any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who was an individual.” 11 U.S.C. §523(a)(8)(B).

In helping debtors decide whether their student loans are dischargeable or not, the first step is to determine if in fact the debt is an educational loan “excepted from discharge” under the

§523(a)(8). The student loan holder has the burden of proving that the debt is a non-dischargeable educational loan.

UNDUE HARDSHIP DISCHARGE

Assuming a debt falls within the scope of section 523(a)(8)(A)-(B), debtors may still be entitled to discharge. As a matter of law, educational loans are not discharged in the initial bankruptcy filing. An additional action, called an adversary proceeding must be initiated to seek a discharge of student loan debt. *Fed.R.Bankr.P.7001(6)*. When seeking to discharge student loans debtors must prove that excepting the debt from discharge poses an undue hardship on them and their dependents. The bankruptcy code does not define an “undue hardship”. Instead, Congress has left it up to the Courts to construe its meaning. The Courts have interpreted “undue hardship” by adopting a three-prong test established in *Brunner v. New York State Higher Education Serv. Corp.* 831 F. 2d 395 (2d Cir. 1987). This is the standard used by nine US Circuits, including the Second Circuit which incorporates New York State.

To qualify for an undue hardship discharge under the *Brunner* test, debtors must demonstrate satisfaction of three prongs by a preponderance of the evidence the following:

- Debtors must establish they “cannot maintain, based on current income and expenses, a minimal standard of living and repay the loans.”
- Debtors must also show that “additional circumstances exist” such that the debtors “will not be able to repay the loans for a substantial part of the repayment period.”
- Debtors must demonstrate they “attempted to repay the loans in good faith.” *In re Brunner*.

These are typically known as the present, future and past prongs of the *Brunner* test. All three prongs must be satisfied in order to establish an undue hardship.

Present prong - minimal standard of living

The first prong of the Brunner test, also known as the **present** prong, debtors must show that they “cannot maintain, based on current income and expenses, a minimal standard of living” and repay their student loans. There is no uniform definition of what qualifies as a minimal standard of living. Most courts agree that the “minimal standard of living” should allow debtors to have or purchase basic needs such adequate housing, utilities, food, transportation, health insurance and modest recreation. *In re Ivory* 269 B.R. 890, 899 (Bankr. N.D. Ala. 2001). In determining the minimal standard of living, that Court decided that “minimal standard of living is a measure of comfort, supported by a level of income, sufficient to pay the costs of specific items recognized by both subjective and objective criteria as basic necessities. To determine whether the debtors can maintain that standard of living, this Court has: (a) identified the *specific items necessary for a minimal standard of living*; (b) conducted a *subjective evaluation of the debtor's income and expenses*; and (c) conducted an *objective evaluation of the debtor's income and expenses*.” Other Courts have held that a minimal standard of living is the equivalent of 200% of the federal poverty level. *Bene v. Educ. Credit Mgmt. Corp. (In re Bene)*, 474 B.R. 56, 73 (Bankr. W.D.N.Y. 2012) (citing *HHS v. Smitley*, 347 F.3d 109 (4th Cir. 2003) (Michael, J., dissenting)).

Some creditors have argued in favor of denying a student loan discharge on the grounds certain of the borrower’s current expenses are unnecessary for them to maintain a minimal

standard of living. Creditors have challenged expenses such as debtors' choice of living arrangements, neighborhoods in which they live in (if it is in a high rent district), and food and eating out expenses. *Shaffer v. U.S. Department of Education*, 481 B.R. 15 (8th Cir. BAP 2012). In determining reasonable expenses, the Court in *Ivory* stated, “Common sense, knowledge gained from ordinary observations in daily life, and general experience, establish skills from which most people can determine whether someone's expenses are unnecessary or unreasonable, whether someone is paying for something that is not needed, or whether someone is paying too much for something that is needed.” Some courts, like New York, have stated that debtors need not live below the poverty level to satisfy this prong. Hon. Judge Arthur Gonzalez argued that debtors must show that “the financial strain of repaying” their student loans would be more than “tight finances” but not necessarily as such that “would drive [debtors] below the poverty line.” It is important to review the debtors’ income and expenses when helping debtors set forth that they cannot maintain a minimal standard of living. Expenses should be reviewed by looking at bank statements, collecting bills and receipts, determining if they are living beyond their means and have made reasonable efforts to reduce expenses.

Future Prong - “additional circumstances”

The second prong of *Brunner* requires debtors to establish that “additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loan.” To satisfy the “additional circumstances” requirement of this prong, debtors must establish the existence of “unique” circumstances “that would clearly limit their ability to earn a living, support themselves, and repay their loans.” *Jackson v. Educ. Res. Inst. (In re Jackson)*, No. 05-15085, 2007 WL 2295585, at *6 (*Bankr. S.D.N.Y. 2007*).

Additional circumstances may include age as well as “illness, a lack of useable job skills, the existence of a large number of dependents, or a combination of these” *Brunner*, 46 B.R. at 755.

Debtors have argued that their ongoing medical condition is an “additional” and “unique” circumstance that satisfies this future prong. Courts have been reluctant to grant discharges to debtors who have failed to submit evidence in support of their medical condition such as medical records or doctors' letters confirming the existence and effects of such condition.

Past Prong – Good faith repayment efforts

The final prong of *Brunner* is easier to satisfy. Under this prong, debtors must show that in the past they have made good faith efforts to repay their student loans. Courts have considered loan repayment history to be significant in determining whether debtors attempted to repay their loans in good faith. *Educ. Credit Mgmt. Corp. v. Mosko (In re Mosko)* and that those efforts must be “interpreted in light of his ability to pay.” *Benjumen v. AES/Charter Bank (In re Benjumen)*, 408 B.R. 9, 21 (Bankr. E.D.N.Y. 2009). Thus, making minimal payments, even where such payments fall below any monthly minimum payment requirement, would satisfy this prong

Other Considerations

Student loan creditors are very creative and will find ways to argue that debtors do not meet the undue hardship for dischargeability of the student loans. They are likely to look at other matters significant to each part of the *Brunner* test. Factors such as failure to minimize expenses, efforts by the debtors to obtain employment, their work and salary history are some examples of what student loan holders will look at. Additionally, if debtors show any surplus

after the calculation of their income and household expenses, lenders will contest the undue hardship. If debtors have claimed that a medical condition is an “additional circumstance” such as physical or mental condition, lenders may inquire into the nature of the condition and the extent to which it impedes them from working or earning more than the “minimal standard of living” that prevents them from repaying their student loans.

ADMINISTRATIVE DISCHARGE AS AN ALTERNATIVE

Debtors of federal student loans may be forgiven if they are totally and permanently disabled (“TPD”). Pursuant to *34 C.F.R. § 682.200*, the US Department of Education will consider borrowers to be “totally and permanently disabled” if they are “unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment” that either can be expected to result in death, or has lasted or is expected to last for five years.

Borrowers seeking a TPD discharge must submit an application that includes either a physician’s certification or a letter from the Social Security Administration indicating that their next “scheduled disability review will be in five to seven years”. Once an application for TPD has been submitted, any collection activity on the federal student loan is suspended. If the application is granted, the borrower is awarded a “conditional discharge” with a “three-year monitoring period.” Upon successful completion of the monitoring period, a final discharge will be granted.

The TPD administrative discharge is available to veterans who have been determined to be unemployable due to “a service-connected condition,” individuals who are recipients of Social Security Disability or Social Security Supplemental Income, and individuals who are otherwise totally and permanently disabled.

Private lenders of student loans generally do not have options for administrative discharges or forgiveness of the student loan.

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Biographies

Speaker Biographies

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Peter Barker-Huelster is a Senior Staff Attorney in the Low-Income Bankruptcy Project (LIBP) at MFY Legal Services, Inc., an independent non-profit civil legal services provider in New York City. In 2012 he received a Skadden Fellowship to establish LIBP, adding bankruptcy services to MFY's existing consumer and foreclosure prevention practices. He has represented clients in Chapter 7 and Chapter 13 bankruptcies, litigated in bankruptcy court, and contributed to amicus briefs and other advocacy on bankruptcy-related issues. He holds a B.A. in English literature from Kenyon College and a J.D. from New York University School of Law.

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Ramona Morel is the Director of the Consumer Bankruptcy Project at the City Bar Justice Center. Ramona has worked with the Consumer Bankruptcy Project when it first launched in 2004. She provides legal assistance with filing for bankruptcy relief to low income New Yorkers faced with mounting debts. In addition, Ramona trains, mentors, and supervises staff and volunteers to provide direct legal services to these clients. She works in this capacity for the City Bar Justice Center as well as other outside legal service organizations to help foster pro bono assistance to other New Yorkers in various boroughs. Previously, she served as Legal Counselor on the Legal Hotline of the New York City Bar Association. Ramona received a B.A. from New York University, and J.D. from Brooklyn Law School.

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