TAKE BACK YOUR LIFE
BANKRUPTCY MYTHS AND OPPORTUNITIES

by DAVID CARL HILL

DISCLAIMER PAGE

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INTRODUCTION

I became a practicing attorney in 1979. I'm admitted to practice before courts in the state of Washington, the United States District Court for the Western District of Washington, the United States Ninth Circuit Court of Appeals, and the United States Supreme Court. This all sounds impressive, but trust me, it's not that impressive. We call ourselves practicing attorneys because that's what we do, we practice and it is an ongoing adventure in learning.

My first experience with bankruptcy occurred within a couple of weeks of my first job as an attorney. One of the senior attorneys handed me a bankruptcy file and told me to go handle the 341 hearing. My first question was: "what's a 341 hearing?" He assured me that it was no big deal and advise me to watch what all the other attorneys did at the hearing. The purpose of the 341 hearing is to allow a bankruptcy trustee to take the debtor's testimony that he fully disclosed all his assets and liabilities. Creditors can appear and ask questions, but they generally don't bother to show up. When I arrived at the hearing I located my client (whom I had never met) and then proceeded to jot down the questions every other attorney asked their clients when it was their turn for the hearing. In each case, the debtor would be sworn in by the trustee. The debtor's attorney would then ask the debtor a series of pretty mundane questions. When he was finished, the trustee might ask a question or two and then would ask if any creditors were present who had questions. Typically no creditors showed up and the debtor was excused.

When it was my turn my client and I went to the front table. He was sworn in and I asked the standard questions every other attorney used and he answered them correctly, or so I assumed. The trustee gave half of a yawn and said: "I don't have a questions. Are there any creditors who have questions?" Half the audience stood up! My client was then barraged with questions from tax agencies, suppliers, subcontractors, and customers. This was my introduction to bankruptcy law.

I have since attended 341 hearings for well over 4500 clients and have only experienced a similar situation in a handful of cases.

I title this book **Take Back Your Life** because that is the goal of bankruptcy. You are reading this because you want to bring financial peace to your life. When you are burdened by debt it becomes very difficult to focus on a positive future. When you are burdened by excessive debt it becomes all-consuming. The stress of this burden affects your mental, emotional, and physical health. Your marriage and family life can deteriorate because you're so focused on trying to dig out of the pit that appears to have no bottom. The good news is that there are options that will allow you to pull out of the pit and get your life back on track. There is a light at the end of the tunnel and it is not a train.

I. BANKRUPTCY BASICS

A. BACKGROUND

The concept of debt relief is very old. Basic concepts can be found in the Year of Jubilee that was part of the Mosaic Law. When the Constitution was established, Congress was specifically given the task to create uniform Bankruptcy laws. The bankruptcy laws have evolved over the last 200 years. In 1978 Congress enacted the current Bankruptcy Code. Since that time, the code has been amended periodically. However the underlying framework has remained essentially the same.

B. BANKRUPTCY TYPES

Although there are a number of bankruptcy chapters, the four that are most relevant to individuals and small business debtors are Chapter 7, Chapter 11, Chapter 12, and Chapter 13.

Chapter 7 is the most common type of bankruptcy. I will explain that in greater detail later on. Essentially a Chapter 7 bankruptcy eliminates, or discharges a person's unsecured debt. It may also eliminate secured debt as well. There are exceptions to the rule which will be discussed. A Chapter 7 is referred to as a liquidation for good reason. In a few cases debtors will be required to surrender property to a trustee who will then liquidate them to pay something towards the creditors. Chapter 7 is available to all qualified individuals and businesses.

Chapter 13 is the second most common form of bankruptcy. It is often referred to as a wage earner plan. In a Chapter 13 a debtor will pay a portion of his wages on a monthly basis to trustee for up to five years. The trustee will then allocate that money to creditors in accordance with a plan approved by the bankruptcy court. I will discuss this option in greater detail in a separate chapter. Chapter 13 is available for individuals and sole proprietorships. It is not available for partnerships, limited liability companies, or corporations. Ther is also a debt limit. Unsecured debts, including taxes, cannot exceed $419,275 and the secured debt limit is $1,257,850.

Chapter 11 is a debt reorganization. Although it is available for individuals as well as businesses, it really was written with the traditional Corporation in mind. Traditionally, it is very paper intensive and expensive. Recently, however, Congress created a small business version of Chapter 11 that is intended to be much more efficient for individuals and small businesses. It is kind of a hybrid between a traditional Chapter 11 and Chapter 13.

Chapter 12 is the least common form of bankruptcy. It is reserved exclusively for farmers and fishermen. It tends to be a cross between a Chapter 11 and chapter 13.

C. PROPERTY IN BANKRUPTCY

When you file bankruptcy all of your assets, from your real estate to your silverware, becomes part of what is referred to as the bankruptcy estate. However, you are allowed to exempt, or protect certain types of property from your creditors and these are essentially carved out of your bankruptcy estate. The types and values of property that are exempted varies from state to state. Some states require you to use exclusively their exemption rules, other states rely strictly on the federal rules and some states, such as Washington, allow you to choose either the state or the federal exemption rules. These rules will change from time to time either by legislative action or inflation. Since I practice in Washington I will focus on the exemptions related to this state. The following is a table that shows the individual exemptions as of this writing (May, 2021)

Type of property	Washington exemption	federal exemption
Homestead	the greater of $125,000 or the median home price in the county where the property is located (this applies to an individual or a couple)*	$25,150
Household goods	$6500	13,400
motor vehicle	$3250	$4000
jewelry	$3500	$1700
tools of the trade	$10,000	$2525
miscellaneous other property	$3000 for a single debtor or couple	up to $13,900, depending upon whether all of the Homestead exemption is used
retirement benefits	100%	100%, with certain qualifiers
life insurance	100%	100% for term policy or $13,400 for cash value policy
personal-injury settlement	$20,000	$25,150

*The state homestead is currently capped at $170,350 if the homestead was purchased within 1215 days prior to filing the bankruptcy.

The value of the property is the amount you would expect to pay for that property if you were to purchase it in its current condition. For instance, most attorneys value the vehicle based upon Kelly Blue Book, private party value. The value of used furniture and clothing can be determined by comparing it to similar items at a thrift store or other secondhand store. If the property, such as a vehicle, is encumbered by a loan, the amount of the loan is deducted from the value to determine the exemption value.

For most people, the most valuable asset is the Homestead. It is also the trickiest to put a value on. For Homestead purposes, you want to deduct the current mortgage or mortgages from the fair market value of the property. There are several commercial websites that can be used to value real estate, such as www.zillow.com or www.realtor.com. These websites are statistically based. They may be adequate if the net equity in the home is well below the Homestead limit. However, if you find that those websites suggest a net equity near or above the Homestead limit, you should consider obtaining either an appraisal or at least a comparative market analysis or brokers price opinion from a real estate broker. The good news is that the new Washington Homestead limit will shield the vast majority of residences.

If you have property that either exceeds the exemption limit or is not exempt, that property creates what we refer to as a liquidation value. If you file for Chapter 7, a bankruptcy trustee will attempt to sell the property. If you do not want to lose the property, you may need to consider a Chapter 13 that will pay out enough money over a three to five-year period to protect the at risk property.

It is critical that you disclose all of your assets. So what is an asset? An asset is anything you have that has either a present value or a potential future value. Present value assets include, but are not limited to: real estate, motor vehicles, household goods, clothing, jewelry, financial accounts, retirements, tools. A bankruptcy worksheet will help break down those items. Future value assets include, but are not limited to: pending personal injury claims, Workmen's Compensation claims, other claims against third parties, pending inheritances, trust interests and intellectual property. My rule of thumb is always, when in doubt, list it. In the case of inheritances or trusts, you must disclose those interests that arise within 180 days after your bankruptcy is filed. Your interest in these types of assets arises when you become entitled to the inheritance. If you are listed in uncle Fred's will, but he is alive and well, you don't have an interest. However, if he dies before or within 180 days after you file your case, you have an interest even though you may not know exactly what the value that interest might be.

Three things can happen if you fail to list assets and all three are bad. First, you may lose an asset that might otherwise have been protected under various bankruptcy rules. Second, you can lose your right to discharge your debts, which is the reason you're filing this in the first place. Third, you could be subject to prosecution for bankruptcy fraud. I have never had a client incur the third consequence, but I have had several clients who suffer the first and or the second consequence. DO NOT ASSUME that the property is obscure enough that it will never be discovered. I am amazed at the resources trustees have to discover assets, sometimes years after the fact. I had one client who refused to disclose an inheritance she was about to receive from her grandmother. I advised her of the consequences but she assumed that the trustee would never find out. Three years later the trustee called me to inform me that he discovered the inheritance and was prepared to not only revoke my clients discharge but seek potential criminal action against her. Fortunately, she was able to borrow enough money against the house that she had purchased with the proceeds to pay all the creditors who filed claims in her case.

D. DEBT

You are filing bankruptcy to eliminate debt. However not all debt is created equal. There are essentially three types of debt and there is different treatment for each.

1.**Priority Debt**: priority debt is debt that, by its name is superior to other types of debt. In a chapter 7 it generally will not be discharged. In a chapter 13, priority debt will be paid ahead of general unsecured creditors. Priority debt includes alimony, child support, unpaid wages, and taxes (with certain exceptions that will be explained later).

2. **Secured debt**: secured debt is tied to specific types of property. The most common is a mortgage or deed of trust. It is tied to the home. The debt itself can be discharged in bankruptcy, but it remains an encumbrance on the property. Therefore, if you want to keep the property, you must keep this debt current or find a way of curing any deficiencies. This will be discussed in more detail as we examine the different bankruptcy chapters.

It is very important to review documents to determine whether a debt is, in fact, secured. The security documents for household furnishings are often questionable. In very rare situations major lenders will fail to record or otherwise secure the subject property. I have one case where the mortgage lender failed to record the deed of trust. That mortgage loan became a very large credit card debt. This can be a good new/bad news situation. Its great for you if your exemptions cover the full value of the asset. However, if you now have too much equity, a trustee could sell the asset to pay your creditors. In that case you might need to file a Chapter 13 to protect it.

3. **Unsecured Debt**: unsecured debt is a debt that is not tied to any specific piece of property. However not all unsecured debt is created equal. For instance, even though priority debt is unsecured, it is not going away when you file your bankruptcy. There other unsecured debts that, while not considered priority, will survive the bankruptcy. These include student loans, criminal court fines and restitution. Other debts may also survive, depending upon what chapters filed and actions taken by the creditor. Below is a table that addresses the most common debts that might survive a bankruptcy.

Type of debt	Chapter 7 or 11	Chapter 13
taxes	generally not dischargeable, but see chapter on taxes	same and must be paid in full over the life of the plan
fraud or credit card abuse	creditor must timely object to discharge	same
fraud by a fiduciary	creditor must timely object to discharge	same

domestic support obligation	not dischargeable	same and often must be paid in full over the life of the plan
willful and malicious injury to person or property	creditor must timely object to discharge	same, but limited to injury to person
government fine or restitution	not dischargeable	dischargeable unless it is criminal fine or restitution
student loans	generally not dischargeable	same
death or personal injury caused by intoxication	creditor must timely object to discharge	same
debt incurred to pay a tax	creditor must timely object to discharge	dischargeable
divorce decree debt other than domestic support	not dischargeable	dischargeable

E. **INCOME AND THE DREADED MEANS TEST**

Income is a major factor in determining first whether bankruptcy is appropriate and second, which Bankruptcy Chapter should be considered. Bankruptcy is an equitable remedy for resolving debt. Someone with a very substantial income is therefore treated differently than someone living at or below the poverty level.

1. **Income Tests**: Traditionally, the debtor is required to disclose current income and living expenses. If the current income significantly exceeds the monthly living expenses the debtor could be required to consider Chapter 13.

Congress decided that the above calculation was too simple. In 2005 Congress introduced the Means Test. In theory, the test was designed to be a more comprehensive analysis of the debtor's income. In reality, it mainly added an unnecessary burden on the debtors and their attorneys.

The Means Test has three parts to it. The first part looks at gross income from all sources from the previous six months and multiplies that number by 2 to create an annual income. That number is then compared to the median income of a similar sized household. The median income is based on census figures for the region and changes semi-annually. If you're calculated income is below the median for your size household, you pass the test and qualify for Chapter 7 or 13. If you are above the median the next part of the test becomes applicable.

The second part of the test is the most complicated. This section allows us to deduct various expenses from your income. Some deductions are standardized and others are unique to your

situation. For instance, you have a vehicle use deduction. The value of that deduction depends on whether it is a financed vehicle or not. The standard deduction is based upon the median operational cost of a vehicle in your geographical area. Deductions that are unique to you include income taxes, a portion of your out-of-pocket medical expenses, medical and life insurance and domestic support obligations. The laundry list for these deductions is quite long. An attorney can easily take an hour or more working through this part of the test. If these deductions bring you below the median, you are free to file a chapter 7, if that is your best option or a chapter 13. However the chapter 13 must be a five-year plan. I will explain that in more detail later. If you are still above the median, the third part of the test applies.

The third part of the test is the easiest. Essentially, if, after all the deductions are accounted for, your income exceeds the median my only $200 per month, you pass the test. Otherwise you may be required to go into a chapter 13. However there are exceptions to that rule as well.

2. **What's the big deal about the Means Test?** The Means Test creates a presumption. If your income is below the median, the presumption is that you have filed your bankruptcy in good faith and presumably do not have the ability to repay your debt. If your income is above the median, the presumption is that you can pay at least part of your debt and, in the context of Chapter 7, your acting in "bad faith".

A presumption is a starting point. If you are presumed to have filed your case in good faith, the burden is on the creditors or the trustee to prove the contrary. If you are presumed to have filed the case in bad faith, the burden is on you to overcome the presumption.

a). In Chapter 7 cases, the United States Trustee is tasked with the responsibility of reviewing a debtor's income to determine whether not the Chapter 7 was filed in bad faith. The United States Trustee (UST) can bring a bad faith action based upon either the Means Test or what I would call the "smell test".

If the trustee objects to a chapter 7 based upon the means test, it is up to the debtor to overcome the presumption. We try to take a proactive approach in those cases by filing a rebuttal of the presumption once we file the case. We can overcome the presumption by showing that the current circumstances are significantly different than the income reflected on the means test. For instance, if my client was recently laid off from a very high-paying position, he may fail the means test. However it is clear that his circumstances do not now permit him to pay his bills. I would file a document on his behalf that explains his change in circumstances establish that the Means Test presumption is no longer applicable. If the UST pursues the matter further, the Bankruptcy Judge will decide whether abuse exists. If the judge concludes that the chapter 7 petition is an abuse of the bankruptcy code the case will be dismissed unless the debtor voluntarily converts the case to Chapter 13 or Chapter 11.

The "smell test" is actually the traditional method by which the UST moves to dismiss the case for bad faith. The UST will look to significant positive changes to the debtor's income that are

not reflected in the Means Test. For instance, the UST may bring an action if the debtor gets a significantly higher paying job shortly before or shortly after the case is filed.

One loophole may with regard to the UST's ability to move to dismiss the case for bad faith. The Bankruptcy Code allows the UST to bring such an action if the debtor's obligations are primarily consumer, not business debts. I had a client who ran a car dealership that failed and he was obligated to several million dollars in business related debt. Shortly after the case was filed he was hired as a general manager of another dealership and, in the three months following earned a very significant amount of income. The UST investigated and threatened to move to dismiss the case unless the debtor voluntarily converted to a Chapter I put together a spreadsheet that showed that over 50% of the debt was business related, rather than consumer. The UST reviewed my spreadsheet, grumbled about it, and dropped the threat.

Unfortunately, the UST later found a way around this loophole by using an obscure provision of the Bankruptcy Code that allows a "party in interest" to petition the court to convert a case from Chapter 7 to Chapter 11. They invoked this provision against a physician client whose debts were primarily business related, but had recently taken a job earning well over $500,000 per year.

b). In Chapter 13 cases, the assigned Chapter 13 Trustee reviews the means test. If the debtor passes the first part of the means test, the debtor may file a repayment plan based upon the debtors available income that can run anywhere between three and five years. If the debtor fails the first part of the test, but passes the second part of the test, the repayment plan must run five years. However the debtor still has significant control over what the monthly payment will be. If the debtor fails all three parts the test, the test will establish the presumed monthly payment that should be made to pay unsecured creditors. That number is not cast in stone as will be explained in the discussion regarding Chapter 13.

F. DISCLOSURES

A debtor must file a document called a "Statement of Financial Affairs." In this document the Debtor discloses various financial activities over the previous several years. Some of the questions are rather innocuous or not relevant to a particular case. However, there are some critical transactions that must be disclosed.

1. **Transactions with relatives**. Transfers of property or money to relatives may qualify as a preferential transfer even if this was for a legitimate debt owing to those relatives. You must disclose any debt payments to a relative made within one year of filing the case. You must also disclose any gift totaling more than $200 to anyone made within two years of filing bankruptcy. The bankruptcy trustee has the right to avoid or undo these transactions with relatives. In addition, the trustee can also avoid a transaction with a relative beyond two years of filing bankruptcy if the transaction was done to either avoid creditors or to make you insolvent.

This requirement is consistent with state rules regarding fraudulent transfers. A fraudulent transfer occurs when someone gives away property in order to remove that property from the grasp of potential creditors. The classic example is the gentleman that sells his house to his brother for $10 so that is creditors cannot go after the house. That kind of transaction can be undone in either state court or as part of the bankruptcy.

2. **Payments to ordinary creditors** : you must disclose payments to any creditors that total more than $1,500 within the 90 days before the case was filed. The reasoning behind this dovetails the discussion regarding preferential transfers. Essentially the Code is trying to prevent you from picking and choosing which creditors you like.

. 3**. Business interests**: you must disclose any interest you have or may have had in a business within the last five years. That will include sole proprietorships, partnerships and small corporations in which you were a significant member.

4. **Legal proceedings**: you must disclose any lawsuits, foreclosures, garnishments, or other property attachments. In some cases, you or the trustee can undo some of these transactions. In the case of lawsuits in particular it is important for your attorney to know about any judgments entered against you. Those judgments can create a lien on your property which would survive against the property even though the debt was discharged. If your attorney is aware of the lien he can, while the bankruptcy is pending, file a motion to have that judgment lien removed as an encumbrance on your Homestead property.

5. **Prior residences**: you must disclose your prior addresses or their previous two years. This requirement may appear rather innocuous, but it can directly affect the types of exemptions you may use to protect your property. Congress, in its attempt to prevent debtors from moving to states with the best exemptions, created another complicated calculation to determine which state exemptions can be used. If you recently moved from another state, you might be required to either use that state's exemptions or may be limited to the federal exemptions for property.

6.**Property held for another person**: if you are on the title to your child's vehicle you need to disclose that information. The same would apply if you are a signor on your parents bank account. You do not want a bankruptcy trustee to sell your child's car or get access to your parents bank account. That will not happen if you have disclosed the relationship and, if necessary, provided evidence that you have no ownership interest in that particular asset.

7. **Property transfers**: You must disclose the transfer of any property within the last 12 months. Obviously the trustee is not going to challenge a garage sale of your clothing. However, he may be concerned if you sold something significant, such as real estate or a vehicle, for an unreasonably low price. He will also want to know what you did with the sale proceeds.

8.**Gifts**: you must disclose the gifts made to a third party within the last 12 months. This includes gifts to charities and churches. The trustee will not challenge tithing or other charitable

contributions unless they appear to be unreasonably large or inconsistent with your normal practices.

G. THE TRUSTEE

By now you're probably wondering who this mysterious Trustee is. There are basically two types of trustees, the United States Trustee and the Interim Trustee.

The United States Trustee and his staff belong to the United States Justice Department. One of their tasks is to oversee all bankruptcies in the District. They supervise the interim trustees. They also will review those cases where it appears the Debtors income is above the median. They will make a determination whether a Chapter 7 debtor qualifies for a discharge, based upon income. In more rare cases, the US trustee may get involved if it appears the debtor has intentionally failed to disclose assets or otherwise fail to fulfill his obligations in the bankruptcy. The US trustee is also directly involved in all Chapter 11 cases.

The interim trustee in Chapter 7 is typically a local attorney who has been appointed by the US trustee to oversee individual Chapter 7 cases or manage Chapter 13 plans. In Chapter 7 cases, the trustee will conduct the meeting of creditors and will also review the case to determine if there are any assets that need to be sold to pay creditors. In those relatively rare cases where he takes possession of assets he will pay the creditors from the proceeds on a pro rata basis, depending on their priority.

The Chapter 13 Trustee manages the Chapter 13 payment plan and distributes funds to the creditors in accordance with the terms of the confirmed plan. That will be discussed in greater detail later on.

II. CHAPTER 7–THE FRESH START

Chapter 7 is often referred to as a fresh start. With certain exceptions, when you receive a discharge in a Chapter 7 you have a financial clean slate.

On the flipside, however, Chapter 7 is also referred to as a liquidation. Those properties that are not protected by one of the exemptions will be liquidated by the Chapter 7 trustee to pay your creditors. The good news for most people is that the exemptions are generous enough to protect all of the assets.

A. PROPERTY CONSIDERATIONS

As I stated previously, everything you own and every property right that belongs to you becomes property of the bankruptcy estate. However, many of the rules are quite generous and you will normally be able to protect all or most of your property.

The first consideration is the appropriate exemption scheme. Generally the state exemptions are the best option if you have significant equity in your home. The downside is that it is not very generous with regard to vehicles. If you either do not have a homestead or the value of the homestead property is relatively low the federal exemptions might be the better option.

Valuation of your assets is the key to determining the best exemption option. Putting value on assets is more of an art than science the ultimate value is the price a willing seller and a willing buyer would agree upon. Obviously you are generally not planning to sell those assets, so there are other methods for valuing property. As mentioned previously, there are several ways of valuing real estate. Online services such as Zillow.com and realtor.com are useful to a point. However they do not take into account some of the unique and un-seen aspects of your home. If the net value is approaching the homestead limit I recommend that you obtain either a comparative market analysis, broker price opinion, or an appraisal.

There are several tools for valuing vehicles. KBB.com, private party value is generally pretty accurate. NADA.com is another good alternative. That site also has some good valuations for other types of vehicles, such as RVs, boats, trailers.

Household furnishings are much more subjective when it comes to valuations. We use a form we adapted from Salvation Army that puts an estimated price on various items based upon condition. This is an area that people really hung up on. You should be thorough, but not obsessive. The good news is that a Trustee does not get overly excited about household furnishings unless they are museum pieces. The same is true of clothing. Jewelry is a little trickier. The purchase price is not good means of valuation. If was recently purchased, jewelry markup is probably 3 to 4 times the actual value. On the other hand, a diamond ring that you purchased 30 years ago for $300 is

obviously going to be worth significantly more than that in today's market. You are under an obligation to provide a good faith value of these assets.

What if my assets exceed the exemption limits? In some cases, such as cash assets, you can convert the nonexempt property into exempt assets. For instance, if you have a significant amount of cash, you may want to make some needed car repairs with those funds. You could update furniture. You could invest a reasonable portion in an IRA. Assuming, however, that you cannot convert those assets you still have several options. First, if you chose the Chapter 13, you could protect the assets by proposing to pay the equivalent value as part of your plan. We will discuss this more in the context of Chapter 13. Second, you may need to resign yourself turning over that asset to the bankruptcy trustee when the case is filed. Third, after filing, you could negotiate to buy the asset from the trustee. Trustees are usually pretty amenable and will consider a reasonable discounted offer for the value.

Can I give away the asset before I file? Not unless you want to create a lot of headaches for yourself and the recipient of the property. You are under an abolsute obligation to disclose any gift. The trustee has a right to pursue any such gifts and could file suit against the recipient for a turnover. Unless the recipient is someone you really don't like, I would strongly recommend against it.

What happens if I don't disclose assets? See my previous discussion on the the trhee bad things that happen. Please disclose, Disclose, DISCLOSE!

B. DEBT IN CHAPTER 7

There are three types of creditors in the Chapter 7, priority, secured, and unsecured.

1. Priority Creditors: priority creditors hold claims against you that are not dischargeable and, in the case a Trustee as assets, will be paid ahead of unsecured creditors depending upon their priority status. The most common consumer types of priority debts include domestic support obligations and taxes.

2.**Secured creditors**: a secured creditor is a creditor who holds a documented interest in certain property. For instance, a mortgage lender secured your personal obligation by recording a deed of trust against your home. When you financed your car the lender was listed on title as either the legal owner or the lien holder. You have three options with regard to your secured property.

a. **Surrender** : if that car has been nothing but a lemon since the day you drove it off the lot this is your opportunity to give it back and end your liability on the vehicle. The same is true of any other secure property. If you don't need it or wanted this is your get out of debt free card.

b. **Redemption**: you can redeem or keep, the secured asset by proposing to pay the secured lender the fair market value of the asset. Obviously that's not going to take place with regard to your home. Typically this would be used in the case of a substantially over secured vehicle. For instance if the secured debt on the vehicle is $30,000 and the vehicles fair market value is $15,000, you could seek an order authorizing you to redeem the vehicle by paying $15,000 to the creditor. The obvious catch this is that you have to have $15,000. On the rare occasions when this remedy is applied it is usually for an old clunker that was pledged as collateral for a very expensive loan.

c. **Reaffirmation**: the most common way to retain a secured asset, such as a car, is to reaffirm the debt. Your lender will prepare a reaffirmation agreement that will recite the existing terms of the loan. Your attorney must review the agreement and certified to the court that the reaffirmation does not create an undue hardship and is in your best interest. Once the reaffirmation agreement becomes effective you have 60 days to change your mind. After that the debt is cast in stone and it is as if the bankruptcy never occurred spurs that lender is concerned.

Do I have to reaffirm the debt in order to keep my vehicle? You do not have to sign a reaffirmation agreement. However the lender can make that as a prerequisite to your retention of the vehicle. Some lenders will allow you to informally reaffirm the debt. They will let you keep the vehicle's long as you remain current on payments. There are two possible catches to this arrangement. First they will not be very forgiving if you are more than a few days late on your payments. Second, since you did not reaffirm the debt it will be reported to the credit bureaus as discharged in bankruptcy even though you are current on your payments.

Should I reaffirm the debt on my house? Your house is not only your biggest asset, but the mortgage against it is your largest debt. I am of the opinion that any attorney who recommends that his clients sign a reaffirmation agreement on a mortgage has probably committed malpractice. None of us can predict our personal future let alone the world economic condition I filed many bankruptcies after the 2008 housing collapse. At least one of those clients had, was that previous attorney, signed a reaffirmation agreement on a second mortgage. When the house went into foreclsoure, the second mortgage lender purused the client for the reaffirmed debt. I was forced to put them into a Chapter 13 to address debt since he did not qualify for Chapter 7.

3. **Unsecured creditors**: all creditors who do not fit into the previous categories are considered unsecured creditors. As you will note from my prior discussion, some debts are unsecured but are or may not be dischargeable. Some of those debts, such as student loans and government fines are presumed nondischargeable. That puts the burden on you to prove otherwise. Other debts are presumed dischargeable unless the creditor provides evidence to the contrary. For instance, even though the debtor may have caused injuries while driving under the influence of intoxicants that debt will be discharged unless the injured party files a formal lawsuit in bankruptcy that asks that the debt survive the bankruptcy.

A commercial lender may object the discharge in one of two basic circumstances. First the creditor may object to the discharge on grounds that the debtor falsified information that the lender relied on in granting the loan. Second, the creditor may object to the discharge if the debtor incurred the debt within 90 days for major purchases or cash advances (I call this the final fling debt). The first situation is very rare because most lenders know about you than you do yourself when it comes to your finances. The second situation arises on very rare situations for the simple fact that most people do not intentionally run up their debt in anticipation of a bankruptcy

C. THE PROCESS

The Chapter 7 process involves three phases.

1. **Prefiling**: the process starts when you meet with your attorney. Your attorney will review your financial situation and discuss the various bankruptcy options available to you. Generally, but not always, the attorney will be able to determine whether Chapter 7 the best option for you. Your attorney will then give you some homework assignments.

The first assignment is called "credit counseling". This is not what it says it is. Congress believed that many people file bankruptcy because they did not know there were other options. Congress decided that you needed to consult with an independent credit counselor and receive alternate recommendations. Keep in mind that these are all merely recommendations that are not binding on you. The good news is that this is normally done online and if you take more than one and a half hours to complete the requirement you are overthinking it. You and generally your attorney will receive a certificate. This certificate must be filed when the case is filed. Timing is somewhat important. The certificate is only good for six months. Do not complete this requirement unless you are just about ready to file your bankruptcy. You don't want to do this twice.

The second assignment is much more important in preparing your case. Your attorney will give you a thick packet of paperwork to fill out. That packet will also include a list of documents that the office will need to prepare your case. Some of the documents and questions may not be applicable to your case. However, when in doubt, provide the information. If you are uncertain about a question or documents please call your attorney's office for clarification. We would rather have too much than not enough information.

Once you have returned the packet and supporting documents to the office a legal assistant will organize the information and enter the appropriate information into the bankruptcy document assembly program. During this process we summarily will order a credit report. We are not interested in the score. The credit report helps us make sure that at least those creditors who report to the credit reporting system are included in your bankruptcy. The credit report data also downloads into our system, which improves our accuracy and make sure that bankruptcy notices are going to creditors reported address. We will also review the County real estate records we

will occasionally find critical information that the client may not be aware of regarding their property. Your attorney will also review your property list and apply appropriate exemption rules to your assets. He will also prepare the means test analysis.

2. **Filing process**: all of the information you provide to us will be assembled into a bankruptcy petition. That petition lists your assets, liabilities exemption claims, income, expenses, financial history declaration, the means test, and a declaration of your intent regarding secured assets. Once it is prepared you will be asked to review and sign the documents. You will also be required to provide us bank statements that list the current bank balances on the day you sign the documents.

It is critical that you review the documents before you sign. The petition includes your declaration, under penalties of perjury, that the information contained in the petition is true and accurate. While minor errors can be fixed later, it is embarrassing and dangerous to have those errors discovered by the trustee.

We file the bankruptcy petition the same day you sign the documents. The minute this case is mild you are officially in bankruptcy and entitled to the protections of the Bankruptcy Code. That means that all collection action grinds to a halt. Creditors cannot call you, send you threatening letters, file suit or seize property without court permission. Practically speaking, they will not get formal notices for a week or two after the case is filed. If you are contacted by a creditor you should politely advise the creditor that you have filed bankruptcy and refer them to your attorney's office.

3. **Post-filing**: once your case is filed, the Bankruptcy Court will assign a Trustee and schedule a hearing, referred to as the 341 hearing.

The 341 hearing is normally scheduled four to six weeks after the case is filed. As of this writing, due to the Covid pandemic, these hearings are conducted by telephone. In the future hearings might be held in an open court setting. The purpose of this hearing is to allow the Trustee to take your testimony under oath that you have fully disclosed all of your assets and financial dealings and to allow creditors to appear and ask questions. Although many of the trustee's questions will be the same for every debtor, he may have specific questions for you about the information contained in your petition. When he has completed his questions he will ask if there are any creditors who have questions. Creditors generally do not participate in the hearing unless the creditor has some specific questions regarding assets or activities that may not have been fully disclosed. Although a typical hearing scheduled for one hour, there are a number of other participants. Your testimony will probably last between three and five minutes.

The Trustee has two responsibilities. First he conducts the 341 hearing and takes your testimony. Second, he will analyze your assets to determine if everything is properly exempt. In the event you have assets that are not protected under one of the various rules he will take possession of them, sell them and use the proceeds to pay creditors.

Your discharge is normally granted between 60 and 70 days after the 341 hearing. There are several things that need to take place during the time between filing and the discharge. First, in order for you to get a discharge, you must complete a debtor education or financial management course and file the completion certificate. The purpose of this course is to provide you with basic information about budgeting, financing, and financial management. The course can usually be completed in less than two hours.

Second, if you intend to reaffirm a vehicle or other personal property debt, the reaffirmation agreement must be filed before the discharge. Your creditor will prepare the form and send it to my office for review. We will then send it on to you to complete.

Third, any actions to challenge your discharge or your exemptions must occur before the discharge. If a creditor waits even one day after the discharge to file a complaint against you, the complaint normally can be summarily dismissed. The only exceptions to this rule would be if you either failed to disclose assets or fail to list a creditor in your bankruptcy.

Your case closes normally within a few days of the discharge order. However there are certain exceptions. For instance, if you are in the middle of litigating whether a debt should be discharged, the case will remain open until that is resolved. If the trustee is administering assets for creditors, the case will remain open until he has distributed all of the assets to creditors and made a final report to the court. This can sometimes cause confusion when you are dealing with future lenders. Some potential lenders may be unwilling to consider granting you a new loan until the case is closed, even though you have received a discharge. You may need to find a lender who has more understanding of the process.

The discharge order relieves you of any further legal obligation to pay any creditors listed in your bankruptcy unless the debt is an exception to discharge (such as a student loan, tax debt, or unpaid domestic support). You will now be free to begin the process of rebuilding your credit.

III CHAPTER 13.

Chapter 13 differs from Chapter 7 in that you will be involved in a repayment plan that can last anywhere from a few months to five years. It may pay all of your creditors in full or only a small portion. Complete your Chapter 13 you normally will receive a discharge that has the same effect as the Chapter 7 discharge.

A. WHY CHAPTER 13?

There are four common reasons for Chapter 13 and several others are not as common.
1. **Prior bankruptcy**: if you received a discharge in a prior Chapter 7 was filed within the last eight years, Chapter 13 is your only bankruptcy option.

2. **Nondischargeable debts**: if a significant portion of your debts nondischargeable, Chapter 13 may be your best option to deal with them. This is particularly true with regard to court fines and divorce related debts, other than domestic support. Under Chapter 7, government fines and court fines are not dischargeable. However, in Chapter 13, the rule only applies to criminal fines and restitution. Chapter 13 becomes a good tool for clearing out the traffic infractions that might otherwise be holding up a driver's license.

Debts and other obligations, other than domestic support, that are included in a divorce decree may not be dischargeable in Chapter 7. However, other than domestic support obligations, divorced related debts can be discharged in a Chapter 13.

3. **Nonexempt property**: Chapter 13 is a good solution if you want to retain property that cannot be exempt under the various rules. You will be able to keep that property as long as your payment plan pays out to the creditors the equivalent value of that property.

4. **Over secured property**: if you own a car that is worth substantially less than the debt against it, you may be able to reduce your obligation to the fair market value of the vehicle. This is a tricky area, however, because it applies only if you financed the purchase with the current lender more than 710 days before your case is filed. If it was purchased less than 710 days before filing you may still be able to get a discount interest rate. In addition if you rolled the debt from a previous vehicle into the current loan, you often can at least have that portion stripped off of your obligation.

This concept, referred to as a cram down can sometimes be used to strip off a junior mortgage. if your home has no equity after deducting the first mortgage, a junior mortgage can be stripped off when the case is completed. However, if you have even one dollars worth of equity above the current first mortgage, the second survives in its entirety.

5. **The Means Test**: The Means Test may determine not only whether a Chapter 13 is required, but also the length of the Chapter 13. For instance, if a person passes the income portion of the Test the Chapter 13 Plan can be completed in a minimum of 36 months. However, if a person's income exceeds the median for the household size, even if the deductions ultimately bring them below the income limit, a plan must run 60 months.

The means test does have one deduction in Chapter 13 that is not available in Chapter 7. An individual can deduct voluntary contributions to be retirement plan when determining the income available to creditors. That deduction is not allowed in Chapter 7. As a result, little or nothing will be paid to the general unsecured creditors and the focus will be on secured and priority claims

6. **Security Clearance**: government employers generally have no interest in the type of bankruptcy you select. Their main concern is that your personal financial problems do not interfere with your employment. However that may not be the case if you hold a high security clearance status. Oddly enough, you are considered a better security risk if you are bound to a Chapter 13 payment plan than if you were to discharge all of your debts in a Chapter 7. It's the old story that "military logic is to logic as military music is to music."

7. **The Morality Perspective**: occasionally I will have clients who want to pay their bills and believe they have the ability to at least partially pay their creditors. Even though they may otherwise qualify for a Chapter 7, they elect a Chapter 13 plan that will allow them to pay their creditors in a manner they can afford and on a timeline that meets their current financial situation. I have always appreciated their integrity.

B. THE PROCESS

1. **Prefiling**: the prefiling process is the same as the Chapter 7 prefiling process. You will still need to complete the Credit Counseling requirement, fill out the bankruptcy packet, and provide the required documents. Once those tasks are completed we will prepare the bankruptcy petition.

Where we diverge from the Chapter 7 process is preparation of your Chapter 13 Plan. Your plan will be formulated after reviewing your income and expenses, secured debt, priority debt, and nonexempt assets.

a. **Secured Debt**: Debt secured by property generally must be included in your Chapter 13 payment plan. The one significant exception may be your current mortgage. However it must also be included in your plan payment if your plan is designed to cure any mortgage arrears. We may spread your car payments over the entire length of the plan (36 or 60 months). We may also modify the interest rate and, in some cases propose to pay the total debt at the fair market value of the vehicle. Mortgage arrears are generally amortized over the length of the plan but do not bear interest.

b. **Priority debt and other specialized debt**: priority debt, such as taxes and domestic support arrears must be paid in full over the life of the plan. We will generally propose that any criminal fines be paid in full over the life of the plan. However, if the plan payment is not going to be sufficient to pay criminal fines in full, we may provide that the unpaid balance will survive the discharge.

c. **Non-exempt property** : if you are filing the Chapter 13, in part to protect assets that otherwise would be sold in a Chapter 7, we need to determine their value and make sure there is enough money going into the plan to protect it.

d. **Income**: In formulating a plan we must consider what you must pay and what you can afford to pay. The first part is governed by the above items. In addition, the Means Test may also dictate the amount that must be paid to unsecured creditors.

The second part can be trickier. The two schedules that are used to determine the plan payment are Schedule I (income) and Schedule J (expenses). Ideally, after deducting the expenses from the income there will be enough to fund, but not overfund the Plan. Sometimes will will have to increase the expenses to prevent too much from going into the plan.Other times we may need to reduce your expenses to make the Plan work.

An ideal plan has a set monthly payment that presumably will remain the same over the life of the Plan. Sometimes the ideal doesn't work. We may provide a step up plan that will start lower and gradually increase so that the payment average covers the Plan needs. Another option is to provide for a lump sum that will be payable during the life of the plan. That might reqire you to sell or refinance a significant asset.

Once we have prepared a Plan that works for you the case will be ready to file. You will sign the petition and plan and we will file it the same day.

C. TIMING

TIMING IS EVERYTHING when it comes to filing a Chapter 13. If you have a pending foreclosure, the case must be filed before the foreclosure sale date. You must assume that the date is cast in stone. I have had a number of clients who were assured that the sale would be postponed while they negotiated a sale or refinance, only to discover that the sale was still going forward. While we have filed too many Chapter 13 cases the night before the sale, it is not good for your ulcer or ours!! I am a pessimistic optimist. I may hope for the best, but I expect and prepare for the worst.

D. POST FILING

1**. Plan Payments** : your first plan payment is due 30 days after the case is filed. The payment is sent to the Chapter 13 Trustee's depository bank in Memphis Tennessee. There are several ways

to make your plan payments. The easiest, and preferred method, as far as the Trustee is concerned is a wage deduction. The trustee will send a deduction order to your employer that will include all the necessary instructions for your employer to make payments. After almost 40 years of Chapter 13 practice, I doubt that I have had more than 10 employers who had a problem with this system. Unlike garnishments, which involve's a lot of annoying paperwork, this is a very simple order and it is easy for your employer to put it into their payroll program.

A second option is to use a service such as TFS. This company will arrange with you to withdraw your plan payment from your bank on a specified date each month. There is a small fee for this service, but it is comparable to the cost of a cashiers check and much more convenient. This is an especially good choice if you are self-employed or do not draw a regular paycheck.

The final option is direct payment to the Trustee. You will be required to send a cashiers check or a money order to the Trustees bank. Cash and personal checks are not accepted. This puts the burden on you to remember to go to the bank each month, pick up the cashiers check (and pay the fee) and mail it to the proper address. You also need to make sure that your case number is included on the cashiers check.

2. **The 341 Hearing**: as with Chapter 7, you are required to attend a Meeting of Creditors or a 341 hearing. It will be scheduled for six weeks after the case is filed. An attorney representing the Chapter 13 Trustee will normally conduct the hearing. Like the Chapter 7 Trustee, he will take your testimony under oath that you fully disclosed your assets and liabilities. In addition, he will have questions about your income and expenses, the status of your tax returns, sources of income, and other questions that are pertinent to administering the Plan. He may also point out any concerns he has about the plan. He will also identify any additional information he needs to complete his evaluation. If necessary, he may continue the hearing to a future date in order to get the additional information.

3. **Confirmation**. The court will schedule a confirmation hearing that will take place roughly 4 to 6 weeks after the 341 hearing. The purpose of the hearing is to allow the Judge to approve the plan. He will take argument from your attorney, the Trustee's attorney, and any third party. You normally are not required to attend that hearing. Typically the hearing does not actually take place.

The Trustee and any creditor must object to the plan confirmation at least seven days before the scheduled hearing. Typically, the confirmation hearing will be continued while your attorney and the objecting parties work out any differences. A new plan may need to be filed in order to resolve disputes. In this regard it's important to understand the nature of the Plan itself.

Think of your plan as a business proposal. You proposed to resolve your debts under the particular payment arrangement. That plan is based upon the information available to you and your attorney. Sometimes there is information available to the creditors and the trustee that you may not have had access to when the plan was formulated. They will object to your proposal if it

does not adequately resolve your obligations in accordance with law. A creditor cannot object merely because he thinks he ought to get more money from the plan.

Typical objections arise when the proposed plan payment is insufficient to cure mortgage arrears or pay priority creditors in full. The Trustee may also object if the plan payment is not proposing to pay the unsecured creditors at least as much as the Means Test assumes you can afford. However, you can overcome that objection if you can show that the Means Test does not accurately reflect your available income. We refer to this as the Lanning Test.

The court will not confirm a plan until the objections are resolved or unless the court overrules the objections. Typically the confirmation hearing may be continued for one or two months to allow the parties to work out the differences. If those differences cannot be worked out the Judge will rule on the objections and either confirm the plan or require the debtor to make changes in order to confirm the plan.

The confirmation order is a critical document. By virtue of the confirmation order the Plan becomes binding upon the debtor and all creditors.

4. **Creditor Claims**: a creditor must file a document called "proof of claim" in order to participate in the Chapter 13 Plan. Nongovernmental entities or creditors must file a proof of claim within 70 days after the case is filed. Government entities have 190 days to file a claim. A creditor who fails to file a proof of claim may be excluded from any plan payment distributions really pushing but is okay where is the house located on in the house is just dancing okay so

You can object to any proof of claim if you believe it to be either invalid or otherwise improperly filed. However, if your plan will pay little or nothing to an unsecured creditor it is probably not worth the attorneys fees to object to that particular proof of claim. On the other hand, if your plan is dependent upon the payment of a critical creditor, such as a tax agency, you may need to object to the proof of claim if you believe the agency overstates the liability. Most objections to claims can be resolved between the parties. If the dispute cannot be resolved the court may required evidentiary hearing to determine the extent and validity of the claim.

On rare occasions you may wish to file a claim on behalf of a creditor. For instance, if one of your creditors is a family member you may want to file on his or her behalf in order to make sure that the family member receives at least some disbursement. You are not allowed to pay a family member creditor separate from the Plan. You may also want to file a proof of claim for a necessary creditor, such as a lender for student loan since they oftentimes will not bother to file a claim.

5. **Post Confirmation Matters**: Chapter 13 is a dynamic process that recognizes that time does not stand still while you're in the plan. Some of the most common issues are as follows:

a. **Delinquent plan payments**. Ideally, you will make consistent plan payments until the case is completed. However, you may run into an occasional bump in the road. If your employer is making the plan payments and you get laid off, obviously your plan payments will fall behind. If you are self-employed and your business is not generating enough income to cover your living expenses and the plan the plan sometimes get shortchanged. While the trustee wants the plan to be successful if you fall too far behind he will eventually file a motion to dismiss your case. He will be more aggressive if your plan requires him to make your current mortgage payments. Typically the trustee will allow you to reinstate the plan and put you on a six-month probation if you resume payments and begin resolving the missed payments. The obvious key is communication with your attorney and the trustee. An ounce of prevention is worth a pound of cure.

b. **The dead car**. If your car dies you cannot just go out and finance a new car. While you are on a chapter 13 you cannot incur new debt without court permission. Traditionally, you would have to file a motion with the court seeking permission to incur a new debt to purchase a vehicle and set that matter on for hearing with notice to all creditors. In the Western District of Washington, however, the Chapter 13 Trustee has authority to approve a car purchase without a formal hearing on the matter. The Trustee has certain guidelines and restrictions on the price and terms of the new vehicle, so it's always best to check with the trust the or your attorney before you begin car shopping.

c. **Changes in income**. A significant loss of income obviously will impact your plan. You can file a motion to modify your plan to address the reduced income. Keep in mind that if your plan payment includes certain fixed expenses, such as a current mortgage, mortgage arrears, or vehicle payments, the revised payment must cover these obligations unless you're willing to surrender the home or the vehicle.

If you have a significant increase in income you are required to report that positive change to the Trustee. He may request an increase in your plan payment, based upon the excess income. You should always discuss this situation with your attorney. Your attorney will want to also review your current living expenses to see if they may need to be adjusted as well. We don't want a pay increase to put you in a worse position than you were in when you filed your original Plan.

6. **Plan Completion**. Your plan normally is complete when you have made all of your required plan payments. If your income is below the median, that will occur sometime between 36 and 60 months after the cases filed. If your income is above the median when the case is filed, the plan must run 60 months or until all creditors are paid in full, whichever first shall occur.

When you complete your plan you will normally receive a discharge order. That order discharges your obligation to pay any remaining unpaid debts, with certain exceptions. For instance, student loans normally are not paid off in a chapter 13 plan. Thus, student loans will still be valid after the discharge has been granted. The same is true with unpaid domestic support obligations and

criminal court fines. Occasionally, tax debts might also survive the completion of your plan if not paid in full.

You will also not receive a discharge of any of your debt if you previously received a discharge in a chapter 7 case that was filed within four years of when you file the current Chapter 13. You might ask, why would I file a Chapter 13 if I am not entitled to a discharge? We occasionally will file a Chapter 13 after a Chapter 7 discharge to address unique situations. For instance, we may want to get rid of all of the unsecured debt in a chapter 7 and then use chapter 13 to address tax debts. We may use a chapter 13 to focus exclusively mortgage arrears and a fully unsecured Junior mortgage.

IV. SPECIAL BANKRUPTCY ISSUES

A. DISCHARGING TAX DEBTS

You have probably been told that you cannot bankrupttax debt. That is not entirely true. Depending upon the type of tax there may be options to discharge all or portion of back taxes.

There are certain taxes that cannot be discharged or will at least continue to affect you after the case is completed. Certain taxes are referred to as trust fund taxes. These usually arise in the small business context. As an employer, you are required to withhold your employees tax and Social Security benefits and send those to the IRS. You are, in a sense, a “trustee” of those funds for the IRS. Those debts cannot be discharged. The same rule applies if you are collecting sales tax on your products or services.

Some taxes are secured by property. Even though you may be personally discharged of a property tax obligation, it still attaches to your home. The same is also true of a federal tax lien. You may be able to discharge your personal liability for the tax, but the lien still attaches to your property.

Personal income taxes may be dischargeable if you meet three criteria. First, the tax had to become due more than three years before your case is filed, taking into account any extensions. Second, you personally filed the tax return more than two years before you file the bankruptcy petition. Third any audits or other adjustments by the IRS must have occurred more than eight months before the case is commenced. Technically there is fourth requirement which is that your failure to pay taxes cannot be part of an attempt to defraud the government. I personally have not encountered this in my practice.

Although the rules appear on the surface to be straightforward, there some hidden traps. In some instances, if the IRS suspended enforcement because of a pending agreement, those time periodsmay be put on r more of the three rules on hold. Occasionally the IRS will file a tax return on your behalf. If that happens you can never meet the two-year requirement. The key to avoiding

these traps is to obtain a tax transcript that includes the chronology of events related to the tax year in question.

Although the IRS may internally discharge taxes that meet the criteria, I prefer to take a proactive approach. I recommend that a lawsuit be filed against the IRS in connection with your bankruptcy that alleges that you have met all of the requirements fordischarge. Typically, the IRS will review the lawsuit and, if you meet the requirements, will consent to the entry of an order officially discharging the particular tax liability. Keep in mind, however, that this discharge will not eliminate any previously filed tax liens, since they attached to your property. You may need to negotiate with the IRS separately regarding those liens.

B. STUDENT LOANS

Student loans are probably the biggest obligation for most younger debtors. Unfortunately, bankruptcy generally provides little or no relief for this massive obligation. I will refrain from political commentary other than to observe that Congress has been talking about this issue for many years and has done nothing meaningful to address the burden.

Student loans are presumed not dischargeable in bankruptcy. That does not mean that they cannot be discharged, but it puts a substantial burden on the debtor to overcome this presumption. This presumption, however applies to student loans issued or guaranteed by a governmental entity or a nonprofit organization. On very rare occasions I have encountered purely private student loans. These can be discharged.

A student loan can be discharged if it creates an undue hardship on the debtor. The question is, what is an undue hardship. Courts have strictly construed that definition. The courts have universally adopted the three-part test set forth in *Brunner v. New York State Higher Education Services, 831 F. 2d 395 (1987)*. First, the debtor must show that she cannot currently maintain a minimum standard of living if compelled to repay the student loan. Second she must show that her current financial circumstances will likely to continue for the duration of the loan term. Third she must show that she has made a good faith attempt to repay the student loan.

Originally this decision was an all or nothing choice. If you cannot meet all three criteria the student loan survives. Courts have subsequently taken a more balanced approach and will consider a partial discharge in some situations.

Discharging a student loan will be a hard fought and expensive battle. The student loan lenders do not rollover easily and are willing to spend a lot of money on attorneys fees, even on cases that seem rather obvious. They also know that if you are in bankruptcy, you cannot afford to spend a lot of money on legal fees. They will therefore do what they can to wear you down.

Sometimes it is advisable to file the student loan lawsuit to encourage the lender to offer alternatives. The most common alternative is the income-based repayment plan (IBR). This may

be a good alternative because the student loan payment is based upon an annual review of the individual's income. In addition, these plans usually provide that the student loan will be forgiven at some future date, usually 20 years. If your income is at or near the poverty line, you may pay little or nothing toward your student loan until your income improves significantly. Other times the lender may offer to reduce the debt in exchange for a set ongoing payment.

C. DEFENDING THE DISCHARGE

In rare occasions a debtor may be forced to defend the right to a discharge. This may apply to the entire case or to a specific claim.

Typically a general objection to discharge will come from the United States Trustee. If the objection is based upon excess income, it typically will come in the form of a Motion to dismiss or Convert. This is typically a numbers game. The court will consider testimony as to the income and expenses. The debtor may also need to put on evidence to show that there has been a significant change in circumstances that makes alternatives to a Chapter 7 discharge unfeasible.

In more rare situations the US trustee may move to dismiss for debtor malfeasance. Typically that would arise if the debtor fails to disclose significant assets or significant transactions that occurred shortly before filing bankruptcy. If the objection involves undisclosed assets, the motion or complaint may also include a court order compelling the debtor to surrender the undisclosed asset. In addition to the civil remedy in bankruptcy, the US Trustee can refer this over to the US Attorney for criminal prosecution.
Individual creditors may object to the discharge of their particular obligation. However, their objection must be based upon one of the exceptions to discharge set forth in the bankruptcy code. For instance, a commercial lender would need to allege that the debtor either falsified significant information in order to obtain the loan or substantially abused their credit privileges shortly before filing bankruptcy. In the case of an injury claim, the creditor would need to allege that either the injury was caused by the willful and malicious act of the debtor or at a time when the debtor was under the influence of intoxicants.

A complaint to disallow a discharge must be filed within 60 days after the originally scheduled first meeting of creditors (341 hearing). The exception to this rule might occur if the US Trustee became aware of the fraudulent activity after the bankruptcy was discharged.

If the debtor is served with a complaint to determine dischargeability, the debtor has 20 days to respond. If the debtor disputes the allegations the matter will be set for trial and will be subject to the usual pretrial preparation including such things as depositions, interrogatories, request for production, retaining expert witnesses, etc. These can be both very costly and very time-consuming. It is imperative that the debtor worked closely with his or her attorney throughout this process. As with any civil trial, the parties may and are encouraged to seek alternate means of resolving the dispute through informal discussions or mediation.