

**MAJOR CHANGES IN THE BANKRUPTCY LAW  
DUE TO THE 2005 BANKRUPTCY REFORM ACT**  
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(Presenters' Outline)

(Citations are to Title 11 of the United States Code)

**A. Changes Affecting Consumer Cases - in general**

1. Time gaps required between discharge and re-filing: [ §§ 728(a)(8); 1328]

**Old Law:** 6 year wait between chapter 7's. No wait between anything and a 13.

**New Law:**

**A. If you have a prior chapter 7 discharge -**

- you cannot file a chapter 7 for 8 years, and
- you cannot file a chapter 13 for 4 years [No more chapter 20's]

**B. If you have done a chapter. 13 - (and obtained a discharge)**

- you cannot do another for 2 years
- but you can file a 7 right away

[There are also limits resulting from prior chapter 11's and 12's.]

2. Production of tax returns and other documents [ § 521]

a. Debtors must file with schedules

1. Certification of attorney that debtor was given notice required by 342(b)
  - Brief description of the different chapters
  - Types of services available from credit counseling agencies
  - Statement that person who knowingly and fraudulently conceals assets or makes a false oath in connection with this title will be subject to fine, imprisonment, or both
  - All information supplied by debtor subject to examination by Attorney General
2. Pay stubs received within 60 days before filing

3. Itemized statement of monthly net income (appears to mean "current monthly income" less deductions for support expenses and secured debts)
4. Statement of anticipated budget changes for ensuing year

b. Debtors must provide at least 7 days before meeting of creditors: tax return or transcript for most recent tax year.

3. Pre-bankruptcy briefing/budget and pre-discharge instructional course[§ 109]

a. Within 180 days of filing, debtors must receive an individual or group briefing from budget and credit counseling agency (may be in group or individually, and may be by internet or telephone)

1. Not required in certain circumstances (incapacitated, disabled or on active military duty)
2. Can delay until after filing in emergency

b. Debtors must complete an instructional course concerning personal financial management to receive discharge

4. Automatic stay

**Old Law:** Effective upon filing and remained in place, unless lifted by court order, until the end of the case.

A.. Serial filings – Dismissal and Re-filing. (i.e. filings within 1 year of dismissal of an earlier case) [§ 302]

1. If a 7, 11 or 13 filed w/in 1 yr of dismissal of an earlier case (Other than an 11 or 13 filed after 707(b) dismissal) stay expires 30 days after filing, unless debtor gets an order extending it. To do so, he must demonstrate good faith.
2. If another case is filed w/in the 1-yr period, no stay goes into effect. But, stay may be obtained by showing of good faith.

B. Two-Year Relief Orders [§ 362(d)(4)]

1. For unauthorized collateral transfers, or
2. For multiple filings regarding the same real property

- Court can grant 2-yr relief order (binding if recorded)
- Debtor can request stay. Good faith showing required

C. Ineligible Filers: Stay does not prevent lien enforcement, if debtor was ineligible to file

D. Eviction Proceedings: [§ 311] For leased residential real estate, eviction proceedings not stayed where:

1. Landlord obtained a pre-bankruptcy judgment for possession, but
  - a. Debtor may contest by certifying right to cure, and
  - b. Keep stay in effect by certifying cure w/in 30 days.
2. Eviction proceedings are based on,
  - a. endangerment of the leased property or
  - b. illegal use of controlled substances on the property
  - c. within 30 days before the bankruptcy filing.
  - d. Landlord's certificate of facts must be filed.
  - e. Debtor may contest by certificate denying assertions, and Court must then conduct a hearing w/in 10 days.

E. Notice of filing, and stay, Required to Bind Creditors: [§ 342]

No penalty for violating stay, unless notice is:

1. served at an address which is,
  - a. filed by the creditor with the court, or
  - b. stated by creditor in 2 communications in 90 days, including acct. # used by the creditor, or
2. received by a person designated by the creditor to receive bankruptcy notices.

6. Limiting definition of household goods for lien avoidance [§ 522]
  - a. Limits household goods to which NPMSA can be avoided to one radio, one television, one VCR and one personal computer.
  - b. Excludes certain items such as works of art not created by debtor (or relative), jewelry worth over \$500, and motor vehicles
  
7. Dischargeability of credit card debts and student loans [§ 523]
  - a. Presumption of fraud for credit card discharge is expanded.
    1. Luxury goods reduced from \$1,225 to \$500
    2. Cash advance is reduced from \$1,225 to \$750
    3. Period of time increased from 60 to 90 days for luxury goods, and from 60 to 70 days for cash advances.
  - b. Student loans nondischargeable (unless undue hardship) regardless of nature of lender, which covers loans from non-governmental and profit-making organizations. (“qualified education loan” as defined in Internal Revenue Code)
  
8. Two-year residency requirement for use of state exemptions[§522]
  - a. Debtor must use the state exemptions for state where has lived for last 730 days (2 years) before filing, and if not in single state for that long, must use domicile where lived for the majority of the last 180 years preceding the 730 days (2 to 2 1/2 years before filing). If for some reason no state exemptions would apply, can use federal exemptions.
  
9. Limits on homestead exemption [§ 522]
  - a. Amount of homestead exemption reduced by any addition to value of homestead by nonexempt property, made with intent to hinder, delay, or defraud creditors, during 10 years prior to bankruptcy filing
  - b. Absolute homestead cap of \$125,000 in certain situations
  
10. Avoidance of transfers to self-settled trusts [§ 548]
  - a. Trustee may avoid transfer to self-settled trust made within 10 years of filing

bankruptcy

b. Trustee must prove that transfer was made to hinder, delay or defraud a particular creditor (seems to be meaning of 548(e))

11. Exclusions from estate property [§541]

a. Funds placed in an educational retirement account at least 365 days prior to bankruptcy filing, for benefit of child or grandchild, excluded from debtor's estate

b. \$5000 limit on funds contributed between on and two years before filing

c. Similar contributions to qualified State tuition programs also excluded.

d. Employee contributions to ERISA qualified retirement plans, deferred comp plans, tax deferred annuities and health insurance plans excluded from estate property.

12. Bankruptcy appeals

a. Bankruptcy court case can be appealed directly to Circuit Court if accepted by Circuit Court.

b. Must be certification that direct appeal necessary to resolve matter of first impression, conflicting decisions, or public importance.

13. Effective date (October 17, 2005)

a. Limitations on homestead exemption went into effect immediately.

**B. Changes to Chapter 7**

1. Means Testing [§707]

A. If income is less than median income, means test does not apply.

1. Abuse can still be found based on general grounds, including bad faith.

2. If income less than median income, only judge or U. S. Trustee may bring motion to dismiss for abuse. If income greater, any party in interest can

bring a motion.

B. If income is greater than median income, debtor must pass means test in order to file a chapter 7.

1. Debtor's income is defined as debtor's "current monthly income" multiplied by 12. "Current monthly income" is debtor's average monthly income over a six month period prior to filing the bankruptcy.

2. Current monthly income includes contributions made to expenses (e.g., from non-filing spouse), but does not include social security benefits or "victim payments" (war crimes, international or domestic terrorism).

3. Means test overview:

- a. Calculate "current monthly income"
- b. Subtract allowed deductions
- c. Compare result to trigger points

4. Allowed deductions are determined by reference to IRS standards [www.irs.gov/businesses/small/article/0,,id=104627,00.html](http://www.irs.gov/businesses/small/article/0,,id=104627,00.html))

a. National standards for food, housekeeping supplies, apparel and services, personal care products and services, and miscellaneous

b. Local standards for housing and utilities (regional basis) (<http://www.irs.gov/businesses/small/article/0,,id=104920,00.html>) and transportation (county by county basis) <http://www.irs.gov/businesses/small/article/0,id=104623,00.html>)

5. Secured debt: 1/60 of all secured debt that will become due in the five years after filing. Past due debt may only be included in this amount if it is secured by property necessary for the support of the debtor and the debtor's dependents.

6. Priority debt: 1/60 of all priority debt.

7. Continued contributions to tax-exempt charities, up to 15% of gross income.

8. Chapter 13 fees (up to 10% of payments)

9. Miscellaneous deductions
  - a. Health insurance, disability insurance and health savings account
  - b. Expenses for care of elderly, chronically ill, or disabled immediate family member
  - c. Expenses for protection from domestic violence
  - d. Private school (\$1,500 per child under 18) with documentation as to why reasonable and necessary
10. Other expenses either necessary for income production (taxes, FICA, etc.) (child support) or for health and safety.
11. Compare to trigger points:
  - a. \$99.99 or less: not presumed abusive
  - b. \$100.00 to \$166.66: may be presumed abusive – if enough to pay 25% of general unsecured claims over 5 years (claims of \$24,000 to \$40,000)
  - c. \$166.67 or more: presumed abusive
  - d. To rebut presumption, debtor must swear to and document "special circumstances" that would decrease income or increase expenses so as to bring the debtor's income after expenses below the trigger points.
12. Procedure: Debtor must file statement of calculation under means test as part of the schedule of current income and expenses. If the presumption arises, then court is required to notify creditors within 10 days of the filing of the petition. Also, U. S. Trustee required to review debtor's materials and file with the court within 10 days after the first meeting of creditors as statement as to whether the presumption of abuse arises and provide notice to creditors and, if presumption arises, U. S. Trustee must file either a motion to dismiss or statement explaining why the motion is not being filed.

2. Sanctions imposed on debtor's counsel [§707]

- a. Court may award costs and fees to a trustee and against debtor's counsel if finds that the Chapter 7 filing violated Rule 9001.
- b. Statute provides that signature of a debtor's attorney constitutes a certification that the attorney has "performed a reasonable investigation" and determined that the signed document is well grounded in fact, that the petition is not an abuse under 707(b), and that the attorney has no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect. This statute portion has no provision for sanctions in the event that its signature certification is incorrect.

c. There are new disclosure and record keeping requirements imposed on bankruptcy attorneys in §§ 526, 527 and 528 (for debt relief agencies).

3. Support priority; dischargeability of property settlements [§507; 523]

a. Domestic support obligations of the debtor will have first priority in distribution (subject to expense of trustee in administering assets used to pay obligation). Support owed directly to former spouse or child given priority over support obligations owed to a governmental unit.

b. §523(a)(15) amended to exclude affirmative defenses. All property settlements arising from dissolution decree (not in the nature of support which is covered under §523(a)(5)) are now nondischargeable.



4. Reaffirmations [§524]

- a. Debtor must receive disclosures as condition to effectiveness of reaffirmation agreement [§524(k)]
- b. Debtor must disclose income, expenses, and resulting balance available to pay debt to be reaffirmed.
- c. If insufficient income to pay, presumption of undue hardship which lasts for 60 days. Court can disapprove the reaffirmation agreement but only with notice and hearing. If no one requests a hearing, apparently the reaffirmation agreement will be valid. Also, reaffirmation agreement can be filed after the 60 day presumption period passes. While §542(c)(1) requires that reaffirmation agreements be "made before the granting of a discharge," there is no deadline for filing the agreement. (Per Eugene R. Wedoff, Bankruptcy Judge for Northern District of Illinois)

5. Redemptions [§722; §506]

- a. The secured claim must be paid in full at the time of the redemption. [§722]
- b. Redemption amount is "replacement value" of secured property [§506]

6. Ride-through [§521; §362]

- a. Debtor must reaffirm or redeem to retain collateral if secured debt.
- b. Debtor must either reaffirm or redeem within 45 days of the first meeting of creditors. [§521(a)(6)]
  1. If debtor does neither, automatic stay terminates and property is removed from estate unless trustee files motion within the 45 day period, that property is "of consequential value or benefit to the estate.
  2. If court grants trustee's motion, court must order appropriate adequate protection, and order the debtor to deliver the collateral to the trustee.
- c. Debtor must file statement of intention regarding secured debt required by §521(a)(2) within 30 days of the case filing or stay is terminated and secured property is removed from estate. [§362(h)]
- d. Debtor must perform intention regarding secured debt as required by §521(a)(2) within 30 days of the meeting of creditors or stay is terminated and secured property is removed from estate. [§362(h)] (conflicts with §521(a)(6))

e. Trustee may file motion to keep property in the estate as stated above.

7. Trustee compensation [§330]

a. Chapter 7 trustee is excluded from professionals whose compensation must be based on time spent in providing services.

b. Compensation is on a percentage basis as set out in §326 (asset cases).

8. Non-subordination of property tax liens to family support claims [§ 724]

a. Chapter 7 trustee to pay property tax lien before other priority claims except for wage and benefit claims.

**C. Changes to Chapter 13.**

1. Secured claims

**Old Law:**

A. Strip-Down. Under § 506, the claim of an undersecured lienholder is bifurcated into its two components: a secured claim equal to the value of the collateral, and an undersecured claim for the balance.

B. In chapter 13, the debtor must either pay secured claims (i.e. pay the value of the collateral), or surrender it. The only exception was the home mortgage, secured only by residential real estate, i.e. could not modify (bifurcate).

**Amendments:**

A. New Limits on Strip-Down of Purchase-Money Mortgages: [New § 1325(a)] No strip-downs under § 506 of -

1. Pmsi's in motor vehicles purchased for personal use w/in 2 ½ yrs (910 days) of filing, or

2. All other purchase-money collateral, within 1 yr of filing.

3. Protected collateral must be paid for in full, with interest, through the plan, or surrendered.

4. Non-purchase money collateral and older collateral and business vehicles can still be paid-to-value, but liens are not satisfied, until plan is completed. (See Lien Retention, below).

B. Valuation (Same as Redemptions)

1. Replacement value (w/o deduction for costs of sale or marketing) [basically the same as the old law], and

2. If acquired for personal, family or household purposes – retail

C. Adequate Protection Payments on Secured Claims

**Old Law:** To obtain pre-confirmation adequate protection payments, the secured creditor had to obtain an order requiring them.

1. Now, the plan must provide for equal installments on secured claims, at least sufficient to provide adequate protection to that secured creditor. [§ 1325(a)(5)(B)(iii)].

2. Debtor must make pre-confirmation adequate protection payments on purchase-money claims, secured by personal property, directly to creditor, and deduct from plan payments. [Note: There is no indication of how much is required to constitute adequate protection.] [1326(a)(1).]

3. If secured creditors must be paid in equal installments, starting immediately and throughout the plan, this could make it difficult or impossible for some debtors to cure arrearages as a priority, or within a reasonable time, thus making plans not feasible.

D. Lien Retention:

1. Secured creditor retains lien, until plan is completed or the claim is paid in full, not till paid to value. [§ 1325(a)(5)(B)(I)]

2. Therefore, Debtor cannot obtain a release of the lien before completion of the plan, or payment of the debt in full.

E. Proof of Insurance:

1. Not later than 60 days after filing, Debtor must provide Lessor or Secured Creditor proof of insurance, and

2. "Continue to do so for so long as the debtor retains possession."

2. Disposable Income.

A. If Debtor does not pay 100% of debt, with interest, he must pay full D.I. for minimum term of plan.

B. If income is above median, Debtor must use means test to determine disposable income.

3. Plan length.

A. General rule - 3 to 5 years

B. Plan must run 5 years if Debtor's income is over the median, or

4. Discharge.

A. Diminution of Superdischarge. [1328(a)] No Longer Dischargeable are:

- a. 523(a)(2) Debts incurred through fraud
- b. 523 (a)(1)(B)&(C) Obligations under unfiled, late-filed or fraudulent tax returns
- c. 597(a)(8)(C) Withholding taxes the debtor was responsible to collect
- d. 523(a)(3) Debts to creditors who were not notified of the bankruptcy in time to file a claim
- e. 523(a)(4) Embezzlement, or breach of fiduciary duty
- f. 523(a)(6) Willful or malicious injury to a person
- g.. 523(a)(6) Personal injury or death caused by D.W. I.

[Note: Interest and penalties continue to accrue on non-dischargeable claims.]

B. Superdischarge Still Covers:

- a. 523(a)(6) Willful or malicious injury to property,
- b. 523(a)(14) Debts incurred to pay non-dischargeable taxes, and
- c. 523(a)(15) Property settlement obligations

C. Debtor Education.

- A. Personal Financial Management Course Required as a pre-requisite to a chapter 13 discharge..
- B. [Same as prerequisite for chapter 7 discharge.]

5. Filing requirements during a chapter 13 case

A. Annual Financial Statements.

- 1. [521(f)(4)]. On request of a party in interest or the judge, the debtor must file a financial statement annually, under penalty of perjury, showing income and expenditures of the debtor during the tax year most recently concluded.
- 2. The statement must disclose:
  - a. the amount and sources of the income, and
  - b. the identity of any person who contributed, and the amount contributed, to the household in which the debtor resides

B. Tax Returns to be Filed with the Court:

- 1. [521(f)(4)]. At the request of any party in interest or the judge, the debtor must file with the court all post-petition tax returns and amendments, or transcripts thereof.
- 2. The foregoing shall remain available to all parties in interest.

B. Pre-Petition Tax Returns to be Filed with Taxing Authorities.

- 1. All tax returns required to be filed for a taxable period ending within 4 years of the filing of the bankruptcy case, must be filed with the taxing authority not later than the day before the 341 meeting. Trustee may grant the debtor an extension up to 120 days to file. Court may extend for another 30 days. [§1308(a)]
- 2. Also, plan may not be confirmed, unless Debtor has filed all tax returns required to be filed. [§ 1325(a)(9)].
- 3. Debtor must provide the most recent pre-bankruptcy returns to the trustee at least 7 days prior to the 341 meeting. [§ 521(e)].

4. Debtor must file all returns that become due during the pendency of the case. [§ 521(f)].

6. Loans from pension and profit-sharing plans

A. Wage Deductions Continue. Payments on such loans unaffected by stay [362(b)(19)].

B. Plan May Not Alter. Terms of the loan, [1322(f)] and

C. Loan Payments. Are not included in disposable income.

7. Support obligations

A. Post-petition Currency Required.

1. For confirmation,
2. For discharge and
3. To avoid dismissal. 1307(c)(11)

B. Prepetition Support. Must be paid in full as a priority claim, but obligations owed to a governmental unit need not be so paid, if Debtor pays full disposable income for five years.

C. Exceptions to Automatic Stay.

1. Income withholding for support,
2. Suspension of drivers licenses for non-support, [potentially threatening feasibility]
3. Interceptions of tax refunds. [thereby excluding tax refunds from disposable income.]