# ROLE OF TRUSTEE IN CHAPTER 7 AND CHAPTER 13 BANKRUPTCIES

## U. S. Trustee Program

The United States Trustee Program is a component of the Department of Justice which acts as the "watchdog over the bankruptcy process." The U. S. Trustee Office in Kansas City, Missouri consists of a U. S. Trustee and an Assistant U. S. Trustee. The U. S. Trustee covers several states and is usually not present in the Kansas City office. There are also attorneys, paralegals, and other staff people who work in the office.

The main duties of the U. S. Trustee are:

1. Appointing and supervising the panel trustees.
2. Taking legal action to enforce the requirements of the Bankruptcy Code and to prevent fraud and abuse (e.g., filing motion to dismiss a bankruptcy for abuse or filing an adversary proceeding to prevent a debtor's discharge).
3. Referring matters to the U. S. Attorney for investigation and criminal prosecution when appropriate.
4. Ensuring that bankruptcy estates are administered promptly and efficiently, and that professional fees are reasonable.
5. Appointing and convening creditors' committees in Chapter 11 business reorganization cases.
6. Reviewing disclosure states and applications for the retention of professionals (e.g., lawyers or accountants for the bankruptcy trustee).

In practice, the U. S. Trustee plays a larger role in Chapter 7 bankruptcies than in Chapter 13. In a Chapter 7, the U. S. Trustee office examines all cases filed where the debtors are above median income. The office often requests additional documentation from the debtors to

determine if the debtors should really be in a Chapter 7 bankruptcy, or if the debtors should convert to a Chapter 13 and pay at least a portion of their unsecured debt.
The office also looks through the means test that is filed to see if there are any errors or if any additional information is needed.

If the U. S. Trustee office determines that it is an abuse for the debtors to remain in a Chapter 7, the Assistant U. S. Trustee or one of the attorneys will file a motion under § 707 of the Bankruptcy Code to have the case dismissed. Then the debtors must determine whether to convert to a Chapter 13, or have a hearing in front of the Bankruptcy Judge regarding the issues raised by the U. S. Trustee. If the debtors have a hearing and the Judge rules in favor of the U. S. Trustee, the debtors still have a right to convert to a Chapter 13 rather than have the case dismissed.

In some cases the U. S. Trustee will file an adversary proceeding under § 727 to prevent the debtors from receiving a discharge, usually due to some type of fraudulent activity on the part of the debtors. If the U. S. Trustee is successful, none of the debtors' debts are discharged in the bankruptcy, and the debtors cannot discharge those debts in a future bankruptcy.

The U. S. Trustee also supervises and evaluates the Chapter 7 and Chapter 13 trustees.

**Chapter 7 Trustees**

The U. S. Trustee appoints trustees who are a member of the "Chapter 7 Panel of Trustees." Each panel trustee normally has a meeting of creditors (section 341 meeting) once a month. In the Central Division, there are three panel trustees. They are John Reed (practices law in Jefferson City), Janice Harder (practices law in Columbia), and Jill Olsen (practices law in Kansas City).

The meeting of creditors for each Trustee is held at the City Council Chambers in Jefferson City. There are approximately 72 new cases (and some additional continued cases) on each docket. The meetings are conducted each hour, beginning at 8:00 a.m.

Prior to the meeting the Trustee will have looked over the petition and schedules filed by the debtors, as well as the pay advices the debtors filed with the petition and schedules, and also the prior year's federal tax returns, which are required by the Bankruptcy Code to be sent to the Trustee seven days or more before the date of the meeting.

In addition, the Trustee can request other information and documentation to assist the Trustee with analyzing the case. In the Central Division, the three trustees ask that the following documents be provided prior to the meeting:

1 Federal and state tax returns for the two prior years.

2. Bank statements for the two months prior to the bankruptcy filing, and including the date of the bankruptcy filing.

3. Recorded deeds of trust for any real estate owned by the debtors.

4. Titles for vehicles owned by the debtors, or other proof of ownership and perfected lien.

The Trustee may request other documents when appropriate. In reviewing the bankruptcy filing and the additional documents, the Trustee is determining (1)whether there are any nonexempt assets for the Trustee to administer and have funds to pay unsecured creditors; and (2) whether the debtors have been truthful in their filing and that there is no abuse of the bankruptcy system.

If the Trustee believes that there may be abuse or fraud involved, the Trustee will refer the case to the U. S. Trustee.

One additional purpose of the meeting is for creditors to be able to appear and if they

wish, ask questions of the debtors. Creditors do not often appear. However, secured creditors may appear to question the debtors regarding the collateral and to find out if the debtor intends to reaffirm the debt. Creditors may also ask questions regarding charges made on credit cards prior to the bankruptcy filing, or other questions to determine if a particular debt may be nondischargeable in the bankruptcy. Sometimes creditors resulting from a dissolution decree appear and ask questions concerning the provisions of the decree. The creditor or the creditor's attorney must sign an appearance sheet and state his or her name on the record and then is allowed to ask questions of the debtors. If the questioning is too lengthy, the creditor may need to later conduct an examination of the debtors under Rule 2004 of the Bankruptcy Rules since time at the 341 meeting is limited.

**Chapter 13 Trustee**

The U. S. Trustee appoints one Chapter 13 Standing Trustee in the Western District of Missouri. The current Trustee is Richard Fink. His job is to administer cases and repayment plans under Chapter 13 of the Bankruptcy Code.

The Chapter 13 Trustee has an office in Kansas City and employs attorneys and other staff members. Either Richard Fink or one of the other attorneys in the office conducts the Chapter 13 meetings of creditors. The meetings are similar to those in a Chapter 7 except that the meetings are somewhat less formal. The meetings are held once a month in Jefferson City at the City Council Chambers. Creditors may appear and question the debtors.

As in a Chapter 7, the debtors are required to send the Chapter 13 Trustee the prior year's federal tax return seven or more days before the meeting of creditors. Other documents may be requested by the Trustee.

Someone in the Trustee's office will have analyzed the case prior to the meeting of creditors, and the attorney will receive a paper at the meeting that has a list of issues or problems in the case. If the issues are not resolved, at some point the Chapter 13 Trustee will file a motion to dismiss the case. The attorney for the debtors can work with the Chapter 13 Trustee office to work out most problems in the case.

Once all issues have been resolved, the Trustee will file a recommendation that the Plan be confirmed.

Once the Plan is confirmed, payments are made by the debtors to the Chapter 13 Trustee, and the Trustee's office makes monthly disbursement to creditors. The U. S. Trustee monitors the Trustee's financial management of trust funds and internal operating budget.

**AFFECT OF A PARTY TAKING BANKRUPTCY IN A DISSOLUTION AND/OR PERSONAL INJURY SUIT**

**PERSONAL INJURY SUITS**

The case of ***Benn v. Cole***, 491 F.3d 811 (July, 2007) changed how debtors have to deal with accrued or pending personal injury actions in their bankruptcy filings. Prior to that time the common law precedent was that contingent claims cannot be garnished, or assigned, and therefore are exempt from attachment and execution and exempt in bankruptcy. We would file a bankruptcy before a claim was finalized, so that the debtors could keep their payment or settlement at a later date. However, in ***Benn,*** the 8th Circuit court looked at the issue of whether debtor's anticipated tax refunds were exempt in bankruptcy or whether they were part of the bankruptcy estate. Section 513.427 RSMo. opts out of the federal exemptions and provides that where another Missouri statute specifies that certain property is exempt from attachment and execution, a debtor may exempt that property from his bankruptcy estate. The Court determined that there is no statute that specifically indicates that tax refunds are exempt and it was determined that the part of the tax refund earned prior to the filing of the petition would belong to the trustee and the bankruptcy estate.

In the case of ***In re Mahony*** and ***In re Anderson***, 374 B.R. 717 (September 4, 2007) the Court addressed the issue of whether a contingent and unliquidated phen-phen and an automobile accident claim, respectively were exempt. Enlarging upon ***Benn*** and using the logic of ***Benn,*** the court determined that debtors could not exempt their unliquidated personal injury claims

So, how does it really work.

**Debtors**

I would tell my debtors to try to hold out until they can get their settlement and spend it. However, they can't accumulate assets that would not be exempt. If the settlement is substantial maybe they can use the money to do a workout, i.e. fifty cents on the dollar settlement, etc. and avoid bankruptcy. If that is not possible, they can just use up the money, wait ninety days to get past the preference period and not to pay anything to family members.

**Trustees**

I believe that trustees who see a possible pot of money to pay something to creditors are not very interested in maximizing the settlement of a personal injury claim. If there is already a personal injury attorney in place, they would usually work with them to finish the case. If there is no lawsuit pending or attorney in place, I think that in some cases they are offering it back to the defendant, potential defendant or the insurance company for pennies on the dollar.

**Opposing counsel**

If opposing counsel in a personal injury case knows that a claimant is in bankruptcy, it would be wise to deal directly with the trustee in regard to any pending settlement. At the very least, you are probably going to need to get the trustee to sign off on any settlement agreement. Any professional who is representing a debtor while they are in bankruptcy, however, has to file a motion to be approved by the bankruptcy court as a professional if they want to ultimately be paid.

On July 26, 2010, Rick Fink promulgated a memorandum asking for additional information or language with regard to Chapter 13 filers. One of the points related to potential lawsuits.

"If your client has a pending or potential lawsuit or administrative claim my office will require the following language in the plan:

Debtor has a pending or potential lawsuit or administrative claim against _____. Any net non-exempt proceeds which become liquidated during the applicable commitment period will be turned over to the trustee for the benefit of unsecured creditors absent other court order and absent other agreement with the trustee.

A chapter 13 case no longer will allow the discharge of restitution or damages awarded in a civil action as a result of willful or malicious injury that caused personal injury or death, even in Chapter 13 since BAPCPA.

Under 11 USC Section 523(a)(9) a discharge in Chapter 7 or 13 will not discharge a debtor for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance.

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The two most important concepts with regard to a dissolution and personal injury suit and how they are affected by bankruptcy are **Automatic Stay** and **Discharge**, or what is not discharged.

**Automatic Stay**

Section 362

A petition filed under the bankruptcy code **operates as a stay**, applicable to all entities, of

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the

commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from he estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title.;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement f the case under this title; . . . .

A petition filed under the bankruptcy code **does not operate as a stay**

(A) of the commencement or continuation of a civil action or proceeding -

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations

(iii) conceming child custody or visitation;

(iv) For the dissolution of a marriage, except to the extent aht such proceeding seeks to determine the division of property of the estate;

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specicifed in section 466(a)(16) of the Social Security Act;

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under Title IV of the Social Security Act; . . . .

**DIFFERENCE BETWEEN DISCHARGE AND DISCHARGEABILITY**

The issues of discharge and dischargeabilty mainly arise under 11 U.S.C. §523(a) and 11 U.S.C. §727(a). Not all debts are dischargeable in bankruptcy. The terms discharge and dischargeability are distinguishable. **In re Walker**, 53 B.R. 174, 176 (W.D. Mo. 1985). Discharge refers to the discharge of all debts of a debtor in bankruptcy. Dischargeabilty refers to one particular debt of debtor. Debts that are not dischargeable are excepted from debtor's general discharge.

**EFFECT OF DISCHARGE**

The effect of a discharge is governed by 11 U.S.C. §524. Section 524 states that a discharge (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged . . . whether or not discharge of such debt is waived; (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and (3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from or offset against, property of the debtor . . . on account of any allowable community claim, except a community

claim that is excepted from discharge . . ., or that would be so excepted, determined in accordance with the provisions of §§ 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether to not discharge of the debt based on such community claim is waived."

The law since 2005 under the **BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 (BAPCPA)** has added specific requirements to receive a discharge in Chapter 13 even though debtor may have complied with all the terms of the Chapter 13 plan. These include:

(1) A debtor must certify that any domestic support obligations payable pursuant to a judicial or administrative order or by statute and due on or before the date of the certification have been paid. As to amounts due before the date of the filing of the petition, such amounts must have been paid as required by the plan. **11 U.S.C. §1328(a)**.

The Code makes nondischargeable all debts for "domestic support obligation" which is a newly defined phrase in §101(14A). **11 U.S.C. §523(a)(5)**. It includes debts incurred before, on or after the date of the order for relief and interest that accrues on any such debt. It also includes debts (a) owed to or recoverable by a spouse, former spouse, child of the debtor or such child's parent, legal guardian, or responsible relative; (b) in the nature of alimony, maintenance or support; (c) established or subject to establishment before, on or after the date of the order for relief, by a separation agreement, divorce decree, property settlement agreement, court order or determination made by a governmental unit; and (d) not assigned to a non-governmental entity, unless assigned voluntarily for the purpose of collection. There is no longer a need to file a Motion for Relief from Stay under §362(b)(2) to pursue most issues in domestic relations.

Obligations owed to a spouse, former spouse, or child of the debtor, not included in the definition of domestic support obligations, and incurred in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other court order are nondischargeable. **11 U.S.C. §523(a)(15)**.

Prior to 2005, there were two types of issues with regard to dissolution. Debt in the nature of alimony, maintenance or support (DSO's) were nondischargreable. However, with regard to other debts such as property settlements and debt set aside to a bankrupt spouse, under Section 523(a)(15) there was a two prong test which would permit a debtor to obtain a discharge of these kinds of debts incurred in a dissolution by demonstrating inability to pay or that the discharge would result in a benefit to the debtor that outweighed the detriment to the creditor. That would always require a hearing to weight the benefit v. the burden. That has been eliminated. Reference to these debts has also been deleted from §523(c). The nondischargeability of a non-support domestic obligation under §523 (a)(15) would no longer be dependent upon the initiation of a timely adversary complaint under Section 523(c). Under Chapter 7, the non-support domestic obligation would survive the discharge. The "greater hardship" exception to the exception has been eliminated.

However, debtors that are seeking to discharge a non-support domestic obligation could do so only under Chapter 13.

At the time a discharge is entered, the Chapter 7 and the Chapter 13 trustee must notify the holder of a domestic support obligation and the applicable state child support agency of the last known address of the debtor, the address of the debtor's employer, the name of each creditor holding a debt not dischargeable under 523(a)(2), (4) or (14A) and all debts reaffirmed. **11**

**U.S.C. §704(c).** ***See also*** **11 U.S.C. §1302(d).** This information will necessitate an additional notice from trustees which, along with the additional information required on a final report, will involve additional record keeping.

A domestic support obligation holder "may request" of a creditor with nondischargeable debt listed above, or a debt that was reaffirmed, the last known address of the debtor. **11 U.S.C. §1302(d)(2).** A creditor that provides such information to a support creditor is immune from liability by virtue of providing that information.

**BOTTOM LINE**

A. DSO'S CONTINUE TO RECEIVE GREATER PROTECTION IN BANKRUPTCY THAN OTHER DOMESTIC DEBTS

1. Highest payment priority.
2. Garnishment may be continued post-filing.
3. Chapter 13 must provide for full payemnt of pre-filing DSO claims, unless the creditor agrees otherwise.
4. Chapter 13 plan cannot be confirmed unless post-petition DSO payemnts are current.
5. Chapter 13 case may be dismissed for failure to pay post-filing DSO's.

B. Because of the automatic stay, most often there will still be a Motion to Lift Stay in a dissolution because in most cases property rights will be affected. Many courts will allow the division to be determined but not actually made until approved by the trustee.

C. Debtors who owe debts incurred in a domestic relations case are probably going to have to pay them.

**DISCHARGEABILITY**

1. Balance of harm test has been eliminated

   A. No ability to pay and the benefit to the debtor outweighed the detriment to a spouse, former spouse or child

2. Chapter 7

No discharge for essentially all debts incurred in a dissolution or separation. 11 U.S.C. Section 523(a)(5) and 523(a)(15)

In re Kline, 8th Cir. - Ad litems are the same as spouses, former spouses or children and obligations to them are under the umbrella of a DSO

3. Chapter 13

DSO's not discharged but debts not in the nature of support or that are owed to or recoverable by unrelated parties are discharged. 11 U.S.C. Section 1328(a)(2)

Attorney's fees owed directly to a former spouse's attorney would be discharged in Chapter 13 unless the court finds it to be in the nature of support.
In re Sullivan, 423 B.R. 881 (Bankr.E.D.Mo. 2010)

It is still important to include in settlement agreements and dissolution decrees information that certain debt is nondischargeable and in the nature of support.

Factors to determine "in the nature of support"

A. Intent of the parties or court

B Each party's financial resources and earning power

C. Custody of the children

D. Whether obligation is to be paid in a lump sum or periodically

E. Whether the obligation is subject to modification if earning power changes, termination upon remarriage

F. Tax treatment

G. Whether obligation is enforceable by contempt.

**CHAPTER 13 PLAN**

Must provide for payment in full of all priority debts, which includes DSO claims

Since the statute permits debtor to pay less than the full amount if the creditor consents, a debtor may propose less than full payment, and if the DSO recipient doesn't object, it is

res judicata, assuming the creditor had adequate notice

*In re Burnett*, 408 B.R. 233 (B.A.P. 8th Cir. 2009. A Chapter 13 debtor's ex-wife obtained a post discharge state court judgment that debtor owed her arrearages and interest for past due child and spousal support. Debtor reopened his case and asked the bankruptcy court to hold her in contempt for violation of his confirmed plan by collecting excess support not provided in the plan. BAP reversed the Court and held that the confirmed plan only dealt with the principal amount of the support arrearage and the plan did not limit the former wife's right to collect accrued interest and did not limit the wife's right with regard to any support that accrued post-filing.

A plan may provide for less than full payment of a DSO assigned or owed to a governmental agency if debtor devotes all disposable income to the plan for five years.

In either case the DSO is not discharged, just delayed.

To obtain discharge, debtor must in a Motion for Entry of Chapter 13 Discharge certify that he/she is current on DSO claims that became payable after the petition date, and must have met the obligations in the plan with regard to the pre-filing DSO's.

For debtors who owe DSO 's

1. Stay current
2. Provide for arrearage and current payment in the plan
3. Exclude DSO from calculation of disposable income

For creditors who are owed DSO's

1. If plan provides for less than full payment, you have to determine whether to object

    A. Are you going to get more in bankruptcy than out?

2. You can continue to collect DSO despite bankruptcy

Transfers in payment of DSO's are not avoidable, but payments of property settlement obligations are. 11 U.S.C. Section 547(c)(7)

A non-consensual, judicial lien securing a property settlement can be avoided under 11 U.S.C.

Section 522(f), but a judicial lien securing a DSO cannot

EXCEPTIONS TO DISCHARGE DO NOT NEED TO BE LITIGATED IN BANKRUPTCY COURT TO BE PRESERVED

ATTACHED IS LANGUAGE FROM THE FAMILY LAW CONFERENCE AT LAKE OF THE OZARKS LAST WEEK THAT IS TOO GOOD NOT TO USE IN A SETTLEMENT AGREEMENT

## SAMPLE "BANKRUPTCY-SAVVY" PROVISION

If either party files for bankruptcy, the parties agree that the responsibility and liability of the filing party to the other to pay the marital and separate debts as herein stated shall be "in the nature of alimony" for bankruptcy purposes (*i.e.*, for the support of the other), and therefore not dischargeable in bankruptcy. The parties agree that failure by either party to pay the debts as herein stated, as the same shall affect the other party, or failure to indemnify the other or hold the other harmless as stated herein, is a fraud upon the other under 11 U.S.C. § 523 of the Bankruptcy Code. If either party files a Chapter 13 bankruptcy, the parties agree that the non-filing party shall have a claim against the filing party for violation of any term of this Agreement, that such claim shall be an "allowed" claim within the meaning of the Bankruptcy Code and that such allowed claim shall be a priority claim to be paid 100% to the non-filing party under the Chapter 13 plan, and that failure of the filing party to propose such a plan shall be a fraud upon the non-filing party.

# Exceptions to the Bankruptcy Automatic Stay When Concerning Residential Tenant Evictions

## Overview

On April 20, 2005, President George W. Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the 2005 Act).[1] The 2005 Act, 512 pages in length, made significant changes to the Bankruptcy Code and other bankruptcy statutes, and affects nearly every aspect of bankruptcy cases. The 2005 Act, in general, took effect 180 days from signing, on October 17, 2005. There were, however, several provisions that became effective upon enactment.

The 2005 Act created two new limitations on, or exceptions to, the Automatic Stay[2] in landlord-tenant matters. These are likely to cause new hardship for some tenants seeking to avoid homelessness by curing rent arrearages through Chapter 13 bankruptcy. They are also likely to cause confusion among landlords and lead to violations of the automatic stay.

The first limitation applies when the lessor has obtained a pre-petition judgment in an eviction, unlawful detainer, or similar action for possession of the residential real property where the debtor resides.

The second limitation applies if the landlord files a certification regarding illegal use of controlled substances on the property or endangerment of the property.

## Pre-petition Judgment for Possession

Under section 362(b)(22), the eviction of a debtor from residential property in which the debtor resides as a tenant under a lease or rental agreement is not stayed by section 362(a)(3) if the lessor has obtained a judgment for possession prior to the filing of the bankruptcy petition, unless the debtor meets certain conditions.[3] If a pre-petition judgment for

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[1] Pub. L. No. 109-08, 119 Stat. 23 (2005).

[2] 11 U.S.C. §362(a).

[3] The pre-petition judgment for possession must relate to rental property in which the debtor resides under a lease or rental agreement. It does not apply, for example, to an eviction judgment obtained by a purchaser of property at foreclosure who does not have a lease or rental

possession has been obtained for property in which the debtor resides, the debtor must so indicate on the bankruptcy petition, and state the name and address of the lessor.[4]

This stay exception is limited to the continuation of proceedings stayed under section 362(a)(3), which are actions seeking to obtain possession of property of the estate or of property from the estate, or to exercise control over property of the estate. If the lessor has obtained a judgment for possession that includes a money judgment against the debtor for back rent owed, the lessor must still seek relief from the stay under section 362(a)(6) in order to enforce the judgment against the debtor, or at least the portion of the judgment representing the claim for back rent. Section 362(b)(22) also does not apply to judicial actions stayed under section 362(a)(1) to recover a pre-petition claim against the debtor, including further proceedings that may be necessary to enforce the judgment for possession.

Notwithstanding the stay exception under new section 362(b)(22), the debtor may obtain an automatic stay for a period of thirty days by filing and serving on the lessor a certification under penalty of perjury that:

- The debtor has a right to cure the monetary default under applicable non-bankruptcy law; and
- The debtor, or an adult dependent of the debtor, has deposited with the clerk of the bankruptcy court all rent that would become due during the thirty days after the filing of the petition.[5]

If no certification is filed with the petition, the clerk must "immediately" serve on the debtor and the lessor a certified copy of the docket indicating the lack of a certification and the applicability of the

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agreement with a debtor occupying the property. *See In re* McCray, 342 B.R. 668 (Bankr. D. Col. 2006).

[4] 11 U.S.C. § 362(*l*)(5)

Official Form 1 provides a space for this information. Presumably, if a judgment has been resolved by a cure of any default and the lessor is no longer seeking to evict the debtor based on the judgment, it need not be listed. Otherwise, listing of judgment that are years old and no longer valid would be required.

[5] 11 U.S.C. § 362(*l*)(1).

The form petition, Official Form 1, has been modified to include a statement that contains the required certification.

exception to the stay.[6] If the debtor files a certification with the petition and makes the required deposit with the clerk, the clerk is to promptly transmit the deposit to the lessor.[7]

The debtor may obtain a stay under section 362(a)(3) beyond the initial thirty days if the debtor files, within thirty days after the petition, a further certification that the monetary default upon which the eviction is being sought has been completely cured.[8]

The lessor has the right to contest either the initial certification seeking a thirty-day stay or the certification that the monetary default has been cured.[9] If the lessor files an objection to either certification and serves it on the debtor, the court must hold a hearing within ten days to determine if the certification is true.[10]

If the stay under section 362(a)(3) is terminated by section 362(b)(22), and the lessor has not enforced the pre-petition judgment for possession prior to confirmation in a chapter 13 proceeding or objected to confirmation, the lessor may be bound by the terms of a confirmation order which provides for the curing of the default.[11]

**Illegal Use of Controlled Substances or Endangerment to the Property**

A second new exception to the automatic stay under section 362(a)(3) applies if the lessor files and serves on the debtor a certification under penalty of perjury that:

- An eviction action has been commenced based on endangerment of the property or illegal use of controlled substances on the property; or
- The debtor has within thirty days before the certification either endangered the property or illegally used or allowed to be used controlled substances at the property.[12]

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6 11 U.S.C. § 362(*l*)(4)(A).
7 11 U.S.C. § 362(*l*)(5)(D).
8 11 U.S.C. § 362(*l*)(2).
9 11 U.S.C. § 362(*l*)(3).
10 11 U.S.C. § 362(*l*)(3)(A).
11 *See, e.g., In re Sullivan*, 321 B.R. 306 (Bankr. M.D. Fla. 2005); *Green Tree Fin. Corp. v. Garrett (In re Garrett)*, 185 B.R. 620 (Bankr. N.D. Ala. 1995).
12 11 U.S.C. § 362(b)(23).

If the landlord files such a certification the debtor has fifteen days to file and serve on the lessor an objection to the truth or legal sufficiency of the lessor's certification before the stay exception goes into effect.[13] If the debtor files an objection challenging the truth or legal sufficiency of the lessor's certification, the exception to the stay does not go into effect, if at all, until after the court rules on it. The court must hold a hearing within ten days of the filing of the debtor's objection to determine whether the circumstances described in the lessor's certification existed or have been remedied.[14] It is not clear when the debtor may remedy the circumstances, but presumably it may occur at any time prior to the hearing. If the court rules in favor of the debtor, the stay under section 362(a)(3) remains in effect.

If no objection to the lessor's certification is filed, or if the court rules against the debtor, the clerk must "immediately" serve a certified copy of the docket on the lessor and the debtor, indicating the failure to object or the court's order.[15]

It appears that, if the certification is based on the commencement of an eviction action, the eviction must specifically have been based at least in part on the endangerment of the property or illegal use of controlled substances on the property. In addition, because this stay exception is limited to the stay provided under section 362(a)(3), the lessor may not proceed with any eviction that seeks to recover on a pre-petition claim against the debtor, such as a property damages claim or a rent claim, without obtaining relief from the stay provided under section 362(a)(6), or with any judicial action that could have been commenced prior to the petition, without obtaining relief from the stay under section 362(a)(1).

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13 11 U.S.C. § 362(m).

14 11 U.S.C. § 362(m)(2)(A), (B).

15 11 U.S.C. § 362(m)(2)(D), 362(m)(3).

## PRIOR TO THE BANKRUPTCY

# Look Backs

Statutory and Formal

- §11 USC 523(a)(2)(C)(i)(I) consumer debts owed to a single creditor and aggregating more than $550 for luxury goods or services incurred by an individual within 90 days before the filing of a bankruptcy cannot be discharged. The definition of luxury goods is a transitory one; it can go beyond diamond rings and fancy vacations but can apply to other things not necessarily considered luxury. The totality of the debtor's financial condition at the purchase is considered. For instance the purchase of a home theatre system which included a television and surround sound was considered a luxury as the court could find no practical use for it.

- §11 USC 523(a)(2)(C)(i)(II) cash advances aggregating more than $825 that are extensions of consumer credit under an open end credit plan within 70 days of the filing of bankruptcy
  (As defined in of the Truth in Lending Act.)
  { The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment
  The adjective "consumer", used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes.
  The term "open end credit plan" means a plan under which the creditor reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be

computed from time to time on the outstanding unpaid balance. A credit plan which is an open end credit plan within the meaning of the preceding sentence is an open end credit plan even if credit information is verified from time to time.}

Statutory and informal

§11 USC 523(a)(2)(B) is the false statement provision. Often an informal look back takes place. This is when a creditor compares the application for credit to the schedules filed by the debtor and discovers debts in the schedules that would have made the debtor credit unworthy. The raises the immediate specter of an adversary complaint to determine the dischargeability of the debt. This is sometimes referred to as non-dischargeability look back.

Fraudulent conveyance.

The trustee has all of the rights in the property of the debtor that a Judgment Lien holder would have. Thus the trustee has the right to set aside any conveyance made at any time that would be a fraudulent conveyance under §428.024 RSMO; the fraudulent conveyance statute. Please see that statute for a complete discussion.

## DISCLAIMER

The Boone County Bar Association Commercial Law Committee is made up of attorneys who practice in the area of Debtor's Rights, Creditor Rights and Collections. This brief CLE is not exhaustive of the subject matter. The committee recommends the MOBAR CLE manual on Bankruptcy (2 volumes) and the material from the Missouri Bar annual bankruptcy institute for more in depth treatment of the subject area.

The Commercial Law Committee of the Boone County Bar Association

The executive committee of the association at the beginning of the year challenged those members who engage in commercial law to form a committee and prepare a CLE for the association. This is that CLE. We thank the executive committee for this opportunity to serve the profession.

Material used in this CLE will be available on the BCBA website for download in PDF format.

**Bankruptcy Procedure and why you should stay out of it if you don't know it.**

1. What you don't know can and will hurt you; have you read and do you understand these parts of the law:
    a. TITLE 11 US CODE The Bankruptcy Act;
    b. TITLE 18 US CODE Chapter 9 Bankruptcy (Bankruptcy crimes)
    c. TITLE 28 US COCE Chapter 6 Bankruptcy Judges
    d. TITLE 28 US COCE Chapter 41 Administrative Office of the United States Courts
        i. §604 duties of Director
        ii. §651 through §658 Alternative Dispute Resolution ( see adversary complaints later)
        iii. §959 Trustees and receivers suable
        iv. §1334 Jurisdiction and Venue – Bankruptcy cases and proceedings
        v. §1408 through §1412 District Courts, Venue
    e. BANKRUPTCY RULES (With Official Forms)
    f. FEDERAL RULES OF CIVIL PROCEDURE
    g. FEDERAL RULES OF EVIDENCE
    h. FEDERAL RULES OF APPELATTE PROCEDURE
        i. §6 appeal in a Bankruptcy case
    i. CFR 28 Part 58 Bankruptcy Reform Act Regulations
    j. LOCAL RULES OF THE BANKRUPTCY COURT (Eastern and Western)
    k. MISSOURI SUPREME COURT RULE 90 (post Judgment Remedies)
    l. RSMO §513.427 through §5I3.440 exemptions
    m. RSMO 400.9 (all sections) Security Interests
    n. Relevant cases; there are cases that are applicable that may only be published from Bankruptcy Appeals Panels (commonly called BAP)?
2. The GEEK squad
    a. The Bankruptcy Courts are totally paperless (for attorneys). All filings are through the CM/ECF system. Local rules require that filers must have had training (3.9 CLE hours) in the use of the CM/ECF system.
    b. A log in must be established for filing and a method of payment of fees must be made available to the court (usually a credit card).
    c. The system depends on the proper selection of an "event" for what is being filed. While the Eastern and Western CM/ECF systems differ in some important ways they both have over 300 possible events that must be selected. If the proper event is not selected the Court Clerk can refuse the filing or request corrections.
    d. Court notices are sent to required parties through electronic mail (email) so every attorney must maintain a working email system.
    e. Filings must be in PDF form (the court is using Ver. 8 but they accept Ver. 9 documents; they cannot accept anything earlier than 8).
    f. REDACT; REDACT; REDACT. Filing requires an active statement of redaction. Redaction is required not only of the SSN but any number or other information that would single out

a debtor for identification. The mention of the name and / or age of any minor child is forbidden. This is similar to state redaction.

g. PACER is a system to retrieve documents and reports from the court's databases. This requires a log in and method of payment. Fees are $0.08 per page; statements are sent quarterly (unless the amount is large then it is sent monthly); a method of payment; credit card; must be on file with the Court Administration Office in Washington.
h. Become familiar with how to search the Missouri Secretary of State's web site for corporate information and UCC filings (later requires a log in registration)

3. Know your enemy
    a. Creditors are of two kinds; those that will close their file upon receipt of the bankruptcy notice and those that will fight tooth and nail for anything they can get.
    b. The later will not care if the amount of attorney's fees they must pay to fight exceeds the amount of the loan; they want to make a point with debtor's counsel as they believe that in the long run debtor's counsel will recognize that it is easier to settle the matter than to fight with a sophisticated creditor counsel. Almost all of these creditors by agreement require that their counsel file no debtor bankruptcies even if that particular creditor is not named.
    c. Trustees are highly sophisticated bankruptcy attorneys; do not ignore their requests or filings.
    d. These numbers when spoken by creditors mean that you must start talking to your debtor client about the fact that things are starting to unravel: 2004 (as in rule 2004 examination by a creditor) 523 / 727 (an adversary action to deny your client discharge).
    e. Debtor's counsels routinely file Motions to Avoid Liens; creditors of the later type will file responses to these and go to hearing. Debtors must prove these by the preponderance of the evidence. What you plead here and what you say here can cause that 523 / 727 issue to arise.
    f. The fact that the creditor did not appear at the 341 meeting means nothing; they simply don't want to delay the trustee in attending to the trustee's docket.
4. Your worst nightmare.
    a. The trustee is filing motions about the property of the estate and / or objections to the 13 plan.
    b. The creditor sent you a notice under rule 9011 (Sanctions); you have a 21 day "safe harbor" to fix things.
    c. The CM/ECF clerk is telling you that you filed things in error (whether or not you must correct them).
    d. Show cause orders from the court.
5. The "sabbatical" rule. Deadlines are now on a 7 day system. Read the rule! First the courts never close (24/365) thus 7 days, 14 days and 21 days mean just that. Negative certification is a certification by the proponent of a pleading that the respondent failed to respond in accordance with the time limit set by law. Upon receipt of that certification the court will enter an order.
6. In the Western District hearings are set automatically by the clerk; in the Eastern District hearings must be noticed after obtaining a docket setting from the Judge's clerk.

7. Bankruptcy proceedings not only move quickly but tend to be more informal than in other courts. Judges will often ask at the start of hearing if any attempts have been made to resolve the matter; your answer should be yes.

So you thought that you might want to practice in the bankruptcy courts; after hearing this are you still so inclined?