

## Overview of New Bankruptcy Laws

**For a free consultation regarding the bankruptcy law changes, and how such changes may impact your bankruptcy case, please call or email Attorney Bankruptcy Services today. Below you will find an overview of the law changes and how such changes shall affect consumers filing bankruptcy after October 17, 2005.**

### **Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.**

President Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 into Law on April 20, 2005. Most of the provisions of this new act will come into effect in 180 days after the day of enactment. Thus, October 17, 2005 was the effective date for the new law.

We have prepared this short synopsis of the law changes to assist you identifying the far-reaching effects of such changes. Please be advised that this letter is a general guide only, is not legal advice, and is not a complete or comprehensive account of any or all bankruptcy law changes and should not be relied upon for any reason.

### **Chapter 7 and Chapter 13 Bankruptcy changes:**

1. Credit Counseling. As a condition to filing for bankruptcy relief, the Debtor must undergo credit counseling within 180 days of the filing. The Debtor must also complete a course in personal financial management as a condition of receiving a discharge. Credit counseling applies to both Chapter 7 and Chapter 13 cases.

2. Means Testing. In order to qualify for Chapter 7 under the new bankruptcy laws you must pass a "means test". This means test is meant to force those who earn more than the median income to repay all or a portion of their debt in a Chapter 13 bankruptcy. In the event your "current monthly income" exceeds the state median income for your family size and you file a Chapter 7 bankruptcy (instead of a Chapter 13 case), you are presumed to have committed what federal law characterizes as "substantial abuse" of the bankruptcy laws under 11 U.S.C. 707(b). Your current monthly income is defined as all income earned in the last six months' divided by 6 and multiplied by 12. In order to qualify for Chapter 7 your current monthly income must be less than the median income based on the number of individuals in the debtor's family. Means testing applies to debtors in Chapter 7 and Chapter 13 cases (for Chapter 13 implication, please see #8 below).

Although the median income changes regularly, the median income in the state of Washington for 2005 is as follows:

<u>Family Size:</u>	<u>Income:</u>
Single:	\$42,452;
2 People:	\$52,272;
3 People:	\$57,773;
4 People:	\$70,857

For more information on current median income figures, please see [http://www.usdoj.gov/ust/bapcpa/bci\\_data/median\\_income\\_table.htm](http://www.usdoj.gov/ust/bapcpa/bci_data/median_income_table.htm).

3. Changes to monthly expenses. Under old bankruptcy laws, your actual monthly expenses could be utilized in calculating your eligibility to file Chapter 7. Now, those monthly expenses are capped at the amounts put forth by the IRS. Specifically, allowed living expenses are now governed by the Collection Financial Standards issued by the Internal Revenue Service according to §707(b)(2)(A)(ii) - (iv). There may be additional expenses which may be allowed:

- a. reasonable and necessary health insurance
- b. continuation of certain expenses paid for the care of an elderly
- c. up to \$1500/year for expenses of dependent minor child to attend private or public secondary school
- d. actual expenses for utilities in excess of allowance specified in Collection Financial Standards.

e. additional 5% of the National Standards for food and clothing if reasonable and necessary.

4. Extended Period for Re-filing. The time between Chapter 7 filings has been extended from 6 years to 8 years. In addition, a debtor cannot file a second Chapter 7 for eight years following discharge, as compared to the old bankruptcy law that allowed for filings every six years from the date of filing. That means that a Debtor after filing for Chapter 7, cannot file it again within the next 8 years of receiving a discharge or from the completion of the Debtor's bankruptcy case. Re-filing periods have also been modified for time between Chapter 7 and Chapter 13 case filings.

5. Presumed non-dischargeable debts. Debts incurred from a single creditor for more than \$550 for "Luxury goods" within 90 days of filing, and cash advances for more than \$750 within 70 days, are presumed nondischargeable and may not be capable of elimination in a Chapter 7. These changes to non-dischargeability pertains to Chapter 7 cases only.

6. Property subject to seizure. Goods Received by the Debtor within 45 days preceding the filing can be reclaimed by the creditors § 546c. The creditor will do a written reclamation demand:  
 -Not later then 45 days after receipt of goods by the debtor;  
 - Not later then 20 days after the petition is filed if the 45-day period expires post-petition;  
 If the creditor does not give timely notice, it still retains an administrative expense claim. The changes to property subject to seizure is applicable to Chapter 7 cases only.

7. Chapter 13 Payment Periods. In the event your current monthly income exceeds the state median income figure for your family size, your chapter 13 plan must be a 5-year plan.

As the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 contains the most comprehensive changes to the bankruptcy laws in decades, the above-cited information is a small sampling of bankruptcy law changes. Several other provisions have undergone changes, so the above-referenced information is for illustrative purposes only

Every bankruptcy case is different, so be sure to disclose all information in a truthful and correct manner to us so we may properly advise you in connection with the bankruptcy law changes. If you have any questions regarding any changes to the bankruptcy laws, or to inquire with us on how these changes may affect your ability to file bankruptcy, contact us today:

Here are some common questions and answers on the new bankruptcy laws:

1. What is the name of the new bankruptcy law:

a. "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005". We'll refer to it in this program as "the New Law".

2. "Consumer Protection" is in the title to the New Law, does the New Law protect consumers?

a. Overall, the New Law would more accurately be named "The Consumer Abuse and Creditor Protection Act of 2005". Overall, the New Law severely limits our client's options and damages consumers, by reducing the availability and efficacy of bankruptcy for consumer debtors, and increasing the cost. The New Law does amend reaffirmation procedures, 11 USC §524( c ) to require more information to be given to debtors in reaffirmation agreements, and does require "debt relief agencies" to give more detailed disclosures, both of which could be considered to be consumer protection; but doesn't reign in abusive practices by creditors, like failure to inform there will be interest rates above 20% on credit cards; so overall its NOT "consumer protection" legislation.

3. How significant are the changes that the New Law makes:

a. Stated simply, substantial. The New Law is the biggest changes in bankruptcy since the Bankruptcy Code, which is the present law, was enacted in 1978. We'll refer to the pre-amendment Bankruptcy Code as "existing law" in this program. There are over 150 changes that are significant, about 90% in consumer cases, and 10% in non-consumer cases

4. Does the new law replace or amend the existing Bankruptcy Code.

a. In form the New Law amends the existing Bankruptcy Code. But there is so much of the Bankruptcy Code that is changed or added by the New Law that in reality the New Law revokes large parts of the Bankruptcy Code, and replaces them with provisions that are much worse for debtors. The convenience of the "amendment" format is that you can use the same Bankruptcy Code layout you are used to, to find the New Law bad-for-debtors provisions, where the old good-for-debtors provisions used to be.

5. What is the overall effect of the New Law:

a. The overall effect of the New Law--and I might add goal--of the New Law is:

i. (1) to substantially reduce the number of consumers who file bankruptcy by making bankruptcy procedurally more difficult, more expensive, and much less beneficial/efficacious for consumers;

ii. 2) for those consumers that do still file bankruptcies under the New Law, to push many more of them into Chapter 13, and to make most Chapter 13 plans 5 years, instead of present 3 years; and

6. How did this New Law get enacted?

a. New Law bought by over 2 billion dollars of credit card company lobbying money spent lobbying Representatives and Congress people, over 8 years.

7. What **date** did the New Law become law?

a. Answer: On April 20, 2005, the date Pres Bush signed the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005" into law

8. Why will it be **more expensive** for consumers to do a bankruptcy under the New Law?

a. Consumer Bankruptcy will be more expensive for at least six reasons:

i. **First**, debtors will have to pay a **fee to a "credit counseling agency"** for mandatory credit counseling before they file bankruptcy, or they will be ineligible to file bankruptcy per 11 USC §109(h) added mandatory credit counseling pre-bankruptcy requirement.

ii. **Second**, consumer debtor attorneys will have to do **so many additional tasks** to comply with the New Law that consumer debtor attorneys will have to raise the prices they charge debtors; I've heard: whatever you are charging now, raise it by \$1,000.

iii. **Third**, Chapter 7 **Court filing fees will apparently go up** as of October 17, 2005 from \$209 for filing a Chapter 7 case to \$274. [28 USC §1930(a) will charge \$220, plus 28 USC §1930(b) will charge \$54 additional (to be paid to US Trustee) = \$274 total Chapter 7 filing fee]. There will be a possibility of fee waivers for the poorest debtors. Court filing fees for Chapter 13 will change also on 10/17/05, how is unclear. The filing fee changes are so ambiguous they will probably be clarified by a technical correction bill, before October 17, 2005.

iv. **Fourth**, as already discussed, consumer debtor attorneys will have **more personal exposure**, and will have to raise rates to compensate themselves for the additional risk.

v. **Fifth**, consumer debtors will have to have **during bankruptcy mandatory debtor financial education** before they can receive a discharge, and will likely have to pay a fee for that also.

vi. **Sixth**, the New Law will **force** more debtors into Chapter 13 that could be in Chapter 7 under existing law. And most Chapter 13 plans will have to be **5 years**, not the present 3 years. That's a **lot of payments** under New Law, that debtors wouldn't be making, under existing law.

9. Explain the changes the New Law makes in homestead exemptions, starting with whether, under the New Law, consumer debtors residing in Washington use the *Washington State exemptions*, or the *Federal exemptions*

a. 11 USC §522(a)(3)(A) retains the language that provides that a debtor in bankruptcy can exempt:

"any property that is exempt under *Federal law*, other than subsection (d), **or State or local law** that is applicable on the date of the filing of the petition at the place in which the debtors domicile has been located".

b. The State of Washington previously elected to use WA state exemptions—which is set forth in RCW 6.13.010 instead of using the federal exemptions listed in 522(d).

i. This election **to** use WA exemptions instead of the 522(d) list of exemptions does NOT appear to be changed by the New Law, because the 522(a)(3)(A) language I just quoted has not

changed.

ii. However, there are other subsections of 11 USC §522, other than the 522(d) federal exemptions, and these additional “federal exemptions” subsections apply to ALL individual debtors, nationwide, regardless of whether that state, like WA, has opted to use the state exemptions instead of the 522 (d) exemptions, because “opt out” only applies to 522(d).

iii. So though 522(d) can be opted out of, the rest of 522 cannot be opted out of, and applies to all individual debtors nationwide.

c. What does the New Law change about exemptions?

i. Existing Law: For states that have opted to use state exemptions instead of the 522 (d) federal exemptions, the state exemptions under existing law are the state exemptions of the state where the debtor’s domicile was located for the **180 days immediately preceding** the date of filing of the petition. This lets people who are about to get big judgments against them move to states that have almost unlimited homestead exemptions, like Florida and Texas, and then file bankruptcy 181 days later, and claim the unlimited homestead exemptions of the state they moved to so they could take advantage of the unlimited exemption.

ii. New Law 11 USC §522(a)(3)(A) provides that the state exemptions to be used are either the state where the debtor has been domiciled for the **730 days –that’s 2 years--immediately preceding** the date of filing of the petition; or, if debtor resided in multiple states within the 730 day period, the place in which debtor’s domicile was located for the 180 days immediately **preceding** the 730 day period, which would be days 910 to 731 before the bankruptcy was filed.

10. Washington state law allows a homestead exemption of \$40,000.00. What happens to the state law homestead exemption under the New Law?

a. NOTHING, if you’ve owned your residence for 1215 days before you file your bankruptcy, and haven’t committed any frauds or crimes. But if not, the New Law 522 changes may “cap” your homestead exemption at \$125,000, regardless of what state law provides

11. Explain how the NEW Law “\$125,000 homestead caps work:

a. Time Cap: First, New Law 11 USC §522(p) places a cap of \$125,000 on higher homestead exemptions provided by state law, such as the Washington \$40,000 homestead exemption, if the debtor acquired the interest in the residence during the 1215 day before filing the petition, except that \$125,000 cap does **not** apply if the debtor is a family farmer, and does not apply to rollovers of equity from one residence to another.

b. Cap if you did fraudulent conveyance within 10 years: Second, New Law 11 USC §522(o) requires that the homestead exemption shall be reduced to the extent the value in the homestead is attributable to any portion of any property that the debtor disposed of in the 10 years before filing bankruptcy that was disposed of with an intent to hinder, delay or defraud creditors.

c. Selected Felonies Cap: Third, New Law 11 USC §522(q) puts a \$125,000 cap on any higher state law homestead exemption if the debtor has been convicted certain felonies, including securities law violations, deceit in a fiduciary capacity, and certain other torts, unless the debtor or debtor’s dependants need the higher exemption provided by applicable state law as “reasonably necessary for the support of the debtor and any dependant of the debtor”

12. Are ANY of the New Law 522 exemption changes actually beneficial to debtors

a. Answer: Surprise, the ONE MILLION dollar IRA exemption added by the New Law: New Law

adds exemption provisions 11 USC §522(n) allows individual debtors to exempt up to ONE MILLION dollars of “assets in an individual retirement account [IRA] described in section §408 or §408A of the Internal Revenue Code of 1986”, with certain exceptions.

b. Moreover the ONE MILLION dollar figure “may be increased if the interests of justice so require”.

c. Allowing exempting IRAs is similar to the result in the recent US Supreme Court decision, Rousey v. Jacoway, US Supreme Court, 2005 DJDAR 3851 (4/4/05), which held that existing exemption 11 USC §522(d)(10)(E) allowed debtors to exempt IRAs, as being within the §522(d)(10)(E) “...payment under a stock bonus, pension, profit-sharing, annuity or similar plan or contract on account of ...age”.

d. Second, New Law adds 11 USC §522(b)(2)( C ), which states that a debtor can exempt “retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457 or 501(a) of the Internal Revenue Code of 1986.”

i. That provision does NOT appear to have a one million dollar limit, so if the debtor had MORE than \$1 million in a 401kplan, the debtor could exempt it.

13. How does the New Law pension and IRA amendments to §522 square with the US Supreme Court Paterson v. Shumate case, which held that “ERISA qualified” pension plans are not property of estate at all.

a. Reasoning is different, but Result is same: debtor gets to keep the money in IRS tax-exempt pension plan, creditors don’t get that money.

What if a debtor has borrowed from his or her pension plan and is making monthly payments to pay that loan back to the pension plan. Do those payments get subtracted from “surplus”; or is a debtor paying back a loan to a pension plan not a reasonable and necessary monthly expense in Chapter 13? Contrast existing law and New Law:

a. Most chapter 13 trustees take the position that paying loans back to your pension plan is NOT a reasonable and necessary expense, and so add those payments to the surplus that must be paid into the plan. The New Law changes that result in a way favorable to debtors. New Law 11 USC 1322(f) is added and states: “A plan may not materially alter the terms of a loan described in section 362(b)(19) [loan from pension plan] and any amounts required to repay such loan shall not constitute “disposable income” under section 1325.”

14. What is a “**debt relief agency**”

a. You are a **debt relief agency**, if you are a consumer debtor attorney. The New Law adds sections 526, 527 and 528 regarding “Debt relief agencies”. “Debt relief agency” is defined at 11 USC §101(12A) as:

“(12A) The term “debt relief agency” means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110, but does not include...( c ) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor...[there are (A)-(E) exceptions].

b. “Assisted person” is defined by New Law §101(3) as:

“any person whose debts consist primarily of consumer debts and the value of whose nonexempt

property is less than \$150,000”.

So if your client has more than 50% business debts, and less than 50% consumer debts, then you are not a “debt relief agency” vis- a-vis that client. Or if your client has less than \$150,000 of nonexempt property, you are not a “debt relief agency”.

15. What is the “**MEANS TESTING**” imposed by the New Law?

a. “**Means testing**” is a mechanism in the New Law whose purpose is to try to force a lot more consumer debtors to file Chapter 13, instead of being able to be in Chapter 7, and to force a lot of those Chapter 13s to be 5 year plans, instead of the present 3 year plans, by creating a presumption that the debtor is abusing bankruptcy, and additionally increases exposure of consumer debtor attorneys.

b. Means testing is mandated by New Law 11 USC §707(b)(2) et seq. For each Chapter 7 case, §707(b)(2) et seq. requires doing a calculation to determine if the debtor has a surplus of income over expenses per month.

c. Some expenses are actual expenses, but many expenses are NOT actual expenses, but instead are figures from IRS tables, which are what the IRS thinks are the “average” for what a debtor or family should be paying for things like housing and a car and food.

16. Is there a “magic number” under the means testing formula to qualify for bankruptcy?

a. There are at least 4 magic numbers:

i. First, if the consumer debtor’s income is **below the state median**, means testing is NOT required.

ii. Second, if the debtor’s monthly surplus, calculated as specified in subsection 707(b)(2) is less than \$100 per month, there is no presumption and the debtor is not presumed to be abusing the bankruptcy laws by virtue of his or here Chapter 7 filing.

iii. Third, if the monthly surplus is OVER \$166.67 per month, calculated as specified in the means testing formula of 707(b)(2) et seq., there is a presumption the debtor is abusing Chapter 7, unless the debtor can show “special circumstances”.

iv. Fourth If the debtor has a monthly surplus between \$100 and \$166.67 per month, calculated using the formula specified in 707(b)(2), then you have to determine whether that surplus, multiplied by 60 (**a 5 year plan is 60 months**) would pay 25% of debtors unsecured debt, or \$10,000, and if either, there is a presumption of abuse of Ch 7.

17. What is substantial abuse and how can it affect my bankruptcy case filing?

Substantial abuse is an objection to your bankruptcy arising after you file a Chapter 7 bankruptcy that seeks to dismiss or convert your bankruptcy case. Substantial abuse can be a legal presumption under the new bankruptcy laws that would seek to dismiss a Chapter 7 bankruptcy case or convert a Chapter 7 case to a Chapter 13 case. Under the new law, a bankruptcy trustee, the Office of the United States Trustee, or a creditor can bring a motion for substantial abuse.

The substantial abuse presumption most often arises when a debtor(s) current monthly income exceeds the median income in the state of Washington. Substantial abuse cases can also arise in other cases such as fraud, inequity and in cases where income does not exceed the median income, but the debtor can afford to repay debt in a Chapter 13 case. Note, if current monthly

income does not exceed the Washington median income, only the Office of the United States Trustee can make a motion for substantial abuse.

a. **New Law:** Any creditor, the Chapter 7 Trustee, the US Trustee, or any other party in interest can file a 707(b) "abusing chapter 7" motion, whenever the debtor's monthly income is greater than the Washington median income as reported by the US Census bureau, as adjusted by the consumer price index. 11 USC 707(b)(10 and (b)(6). If the debtor's monthly income is below the state median, only the judge or US Trustee can bring a 707(b) motion, or maybe no one can move. §707(b)(6) and (7) [(6) and (7) when read together seem contradictory].

i. **Reaffirmation Agreements:** Expect creditors will threaten and bring 707(b) abuse motions where debtors don't reaffirm debt owed to that creditor, in order to pressure debtor to reaffirm.

18. The standard for a Court granting a 707(b) Motion was "**substantial abuse**" of chapter 7 under existing law. What is it under the New Law?

a. The word "**substantial**" is deleted from 707(b)(1), so the standard is whether debtor being in Chapter 7 is "**an abuse**" of Chapter 7, **not** whether it is a "substantial abuse of chapter 7".

19. Do you have to do the §707(b) "**means testing**" calculation if you file a **Chapter 13 or 11** case?

a. Directly—no. The "means testing" provisions are in 11 USC §707, and 700 series Code sections only apply in Chapter 7 cases,

b. But indirectly **yes**, in both Chapter 13 and 11.

i. Chapter 13 cases have always had the requirement that the debtor pay the debtor's full "surplus" each month to fund the Chapter 13 plan;

ii. Per New Law 11 USC §1325(b)(3), surplus ("disposable income") in Chapter 13 has to be calculated using the same "**means testing**" formula in **11 USC §707(b)**. Thus in Ch 13, when you do the monthly income minus reasonably necessary expenses = surplus/disposable income that must be paid into plan to fund plan, income and expenses are calculated using the §707(b) means testing formula, which means that instead of the actual expenses of the debtor, many items are calculated by State median income minus a bunch of "average" expenses set forth in IRS tables. This may help debtors who pay less than the IRS averages, but there aren't many of those in the state of Washington. It will hurt debtors whose mortgage payments or car payments are higher than the IRS averages, because the part of the mortgage or car payments that the debtor in fact pays, but which are higher than the IRS averages, will NOT be counted as being reasonable expenditures, and so will end up as surplus income to be paid in the Chapter 13 bankruptcy plan.

20. Can the Chapter 13 plan be **shorter than 5 years** under New Law?

a. Under existing law, the average Chapter 13 plan is 3 years. Per New Law 11 USC §1325(b)(1)-(4), where the trustee or **any** unsecured creditor objects, the **Chapter 13 plan must be 5 years long**, if the debtor's income is **greater than or equal to the median income of the State** [§1325(b)(4)(A)(ii)], unless the plan pays the objecting creditor 100%.

b. Section 11 USC 1325(b)(4) says the chapter 13 plan is required to be **3 years**, except where it is required to be "**not less than 5 years**", and that the chapter 13 plan is required to be **not less than 5 years**:

" if the current monthly income of the debtor and the debtor's spouse combined, when multiplied

by 12, **is not less than...the median family income of the applicable State**” for the debtor, if only one person in household, or is not less than the median family income of the applicable State for a family of the same number of people as the debtor’s family has, up to 4 people.

c. For families with over 4 people, add \$525 per month for each individual in excess of 4 to determine if debtor family is over or less than the median family income of the applicable state [11 USC 1325(b)(4)(A)(i),(ii) and (iii)].

21. What **proportion** of Chapter 13 debtors will have **greater** than state median income, and so be **forced to do 5-year Chapter 13 plans**, instead of 3 year Chapter 13 plans?

a. A large proportion: (1) First, everyone forced in to Chapter 13 by the 707(b) means testing “presumption of abuse” of the New Law will have income above the state median income (see TOP line of the 707(b) FLOW CHART, you only have to perform the 707(b) “means testing” calculation where the debtor has greater than state median income). (2) Second, most people in major metropolitan areas who are able to afford to buy homes have above median state income, filing chapter 13 to cure default in home mortgages is a common use of Chapter 13, so people who file Chapter 13 to cure a default in a home mortgage will have to do 5 year Chapter 13 plans.

22. Does **anyone** get to do a **3-year Chapter 13 plan** under the New Law?

a. Yes, per 11 USC §1325(b)(4)(A)(i) and (ii) the “applicable commitment period” (aka Chapter 13 plan length) is 3 years, where the debtor/debtor family group has income less than the state median income. But those people will be filing 7s , not 13s, even under the New Law, because if your income is less than the state median, there is no presumption of abuse of Chapter 7. So basically, people who won’t be filing 13s could do 3-year plans, but the people who will be filing 13s will be required to do 5-year plans.

23. Are there **new notices** that the Consumer debtor attorneys has to give, under the New Law, that were not previously required?

a. Yes, first, the consumer debtor attorney must give all the written notices required by the “Debt relief agency” provisions we just went over, 11 USC §526, 527 and 528.

b. Second, though the New Law says Clerk of Court which has to give consumer debtor the 11 USC 342(b) notice of available Chapters, services available from credit counseling agencies, statements specifying that debtor can be imprisoned if debtor knowingly and fraudulent conceals or makes false oath. But though New Law says “Clerk”, it’s the debtor’s attorney that has to give the consumer debtor this notice, see 11 USC §522(a)(1)(B)(iii), and debtor must file a certificate that debtor has received and read this notice, or the case gets dismissed.

24. Are there **new documents** which must be filed under New Law, in consumer bankruptcy cases?

a. Yes, per New Law amendments to 11 USC §521, in addition to filing all the schedules and other petition pleadings the debtor is required to file under existing law, under New Law 521 the debtor has to file the following **additional documents** with the Court, as follows:

i. Per 521(a)(1)(iv): copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition;

ii. Per 521(a)(1)(v) statement of amount of monthly net income, itemized to show how the amount is calculated [individual debtors have been doing this under existing law, in Schedule I (Income ), but corporate and partnership debtors under existing law do not file Schedule I (income) or J (personal expenditures). Because the 500 series code sections apply to all Chapters, all debtor in

all chapters, including corporate and partnership debtors, will have to file the itemized monthly net income statement.

iii. Per 521(b)(1) individual debtors shall file with the Court the certificate from the approved credit counseling agency proving the debtor has completed his/her pre-bankruptcy credit counseling, and

iv. Per 521(b)(2) individual debtors shall file with the Court a copy of the debt repayment plan, if any, developed by the credit counseling agency for that debtor;

v. Per 521(c), debtors shall file with the court a record of any interest the debtor has in an education IRA; and

vi. Per 521(e)(2)(A), the individual chapter 7 or 13 debtor, not later than 7 days before the date first set for the 341a meeting, shall provide the Chapter 7 or 13 trustee a copy of the debtor's federal income tax return for the most recent tax year ending before the case, for which the debtor filed a return, and at the same time shall send a copy to any creditor which requests same; and

vii. Per 521(f), shall at the request of the Court, US Trustee or any party in interest, an individual 7, 11 or 13 debtor shall file with the court each return filed during the bankruptcy case at the same time the debtor files it with the tax authority; and each return not filed as of the date of the petition, but filed for any tax year ending in the 3 years before the bankruptcy was filed;

viii. Per 521(f)(4) in Chapter 13, annually after the case is filed, file "a statement under penalty of perjury, of the income and expenditures of the debtor during the tax year most recently concluded, and of the monthly income of the debtor, that shows how income, expenditures, and monthly income are calculated.", plus additional information.

ix. Per §521(h)(1) and (2), if requested by US Trustee or Trustee, the debtor must prove his/her identity by showing a driver's license, passport or other document containing a photograph of the debtor, or other personal identifying information to establish the identity of the debtor. [Not a change in CD CA, because Trustees have been requiring this at 341a for several years].

25. Can a bankruptcy be dismissed if the Debtor fails to follow the laws?

a. YES. Per 11 USC §521(i)(1), if the debtor fails to file the documents required by 521(a)(1) (includes the pay stubs) within 45 days after filing the petition, "the case shall be **automatically dismissed effective on the 46th day** after the date of the filing of the petition" per 11 USC 521(i)(1), with certain exceptions as follows:

i. On motion of the debtor brought before the 45 days expires, the Court may allow the debtor an additional 45 days to file the information required by 521(a)(1), "if the court finds justification for extending the period".

ii. On motion of the trustee, the court may decline, per 521(i)(4) to dismiss the case, if the court finds the debtor attempted in good faith to file all the information required by subsection 521(a)(1)(iv)--ie, pay stubs--and that the best interests of creditors would be served by administration of the case".

iii. Per 521(j), taxing agencies can request conversion or dismissal if the debtor does not timely file tax returns that come due during the case, and the court **shall** dismiss or convert the case if the debtor does not file the required return or get an extension to do so within 90 days after a taxing authority requests dismissal for failure to file the return

iv. Also, per 11 USC 707(a)(3) the Office of the US Trustee may file a motion to dismiss the debtor's case if the debtor fails to file all items required by 521(1).

26. Are there New Law changes re **scheduling creditors**?

a. Yes, per New Law 11 USC §342( c ) (1) and (2) has new rules regarding notices to creditors and scheduling creditors.

i. New Law Section 342( c )(2) provides that "if within 90 days before the commencement of a voluntary case, a creditor supplies the debtor in at least 2 communications sent to the debtor with a current account number of the debtor and the address at which such creditor **requests to receive correspondence**, then any notice required by this title to be sent by the debtor to such creditor shall be sent to such address and shall include such account number.

ii. Per New Law Section 342( c )(1) "if notice is required to be given to creditors,... such notice shall contain the name, address and last 4 digits of the taxpayer identification number of the debtor."

iii. New Law section 342(e) a creditor at any time during the case can file and serve a notice of address, which must thereafter be used for that creditor by debtor and court. Per 342(f) an entity may file an address to be used for that entity by the bankruptcy court in ALL bankruptcy courts in that District.

27. How does the New Law make it harder for people to file bankruptcy?

a. First, New Law aims to make representing consumer debtors so risky for lawyers that the number of attorneys representing debtors in consumer bankruptcy cases will go down, and the smart debtors attorneys decide the personal liability exposure is not worth it and quit representing debtors

b. Second, by putting so many additional requirements that debtor attorneys must do more work which will result in attorneys having to raise their rates for consumer cases from whatever they were charging before.

c. By requiring that the consumer debtor attend and complete "credit counseling" before filing, as a pre-requisite for being eligible to file bankruptcy, and file with the Bankruptcy Court a . 11 USC §109(h) and 11 USC §521(b)(1).

d. By increasing Chapter 7 court filing fees for filing a Chapter 7 bankruptcy case.

e. By providing that after they file, consumer debtors can't be granted a discharge until they have taken and completed a "financial literacy" course, **during** their bankruptcy, given by an approved provider

f. By reducing the types of debts that can be discharged, even in Chapter 13

g. By forcing more debtors to file Chapter 13, instead of Chapter 7

h. By making most Chapter 13 plans 5 years, instead of 3

28. Please describe the requirement of **mandatory credit counseling** for consumer debtors **before** they are allowed to file bankruptcy?

a. New Law adds section 11 USC §109(h), which states that "an individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of

the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing are

b. What does “approved” credit counseling agency refer to? Refers to fact that the pre-bankruptcy filing credit counseling only counts if it is from a credit counseling agency that is on the US Trustee “approved” credit counseling provider list. Under the New Law, the Office of the US Trustee decides which credit counseling providers get on the US Trustee approved list.

c. What does “nonprofit” mean. Does NOT mean free to your clients. To the contrary, the client will have to pay a fee to the credit-counseling agency for the credit counseling. “Nonprofit” just means the credit counseling company can’t have money left over (profit) after it pays its expenses, including salaries of executive insiders. US Trustee nationally working on standards right now. KPM is on the CD Consumer Bankruptcy Attorney Association “auditioning” credit counseling agencies, and writing US Trustee nationally and for our region to say what consumer bankruptcy debtor attorneys think the standards for approval should be.

d. Must be within 180 days before the bankruptcy is filed. In reality, will probably be after they come to you, and you tell them they have to do it.

e. Can be on line or on phone credit counseling, “if effective” and if US Trustee approves the credit counselor who offers on line or on phone credit counseling. We expect that there will be credit counseling agencies approved that offer phone in, maybe on line.

f. Prices being quoted at NACBA [National Association of Consumer Bankruptcy Attorneys] 3 day conference on New Law were between \$35 and \$50 per debtor, if all the credit counselor does is talk to debtor and decide that credit counseling won’t work, and then issues a certificate of compliance.

g. If the financial problems of the client can be solved by an out of bankruptcy payment plan, and the client signs up with the credit counseling agency for one, the agency charges them (in Washington a fee of cap of 8.5% of total payments that debtor will pay to the credit counseling agency, for the credit counseling agency to pay to the various creditors). So if \$50,000 were to be paid to creditors through credit agency, fee would be \$4250 to credit agency, over time. WE may be cheaper. But may be “cap” of \$35 per month to credit counseling agency; if it were a 60 month payment plan x \$35 per month, that would be \$2100.

h. Attorneys for consumer debtors hope that an on-line credit counselor gets on approved list, or phone in, and use them, as faster.

i. When the client completes the pre-petition credit counseling, if credit counseling without bankruptcy does not solve the client’s debt problems, then the client gets a certificate from the approved credit counselor, which certificate is required to be filed with the Bankruptcy Court as part of the bankruptcy filing [11 USC §521(b)(1)].

j. Use an approved provider who will email a copy of the certificate to your law firm, as well as emailing a copy to the client, because you can’t trust the client to get the certificate filed with the court, so it’s the attorneys who will end up having to file the certificates with the Bankruptcy Court

k. If the credit-counseling agency has produced a debt repayment plan for the client, the debt repayment plan must be filed with the bankruptcy court, in addition to the certificate being filed with the bankruptcy court. [11 USC §521(b)(2)]. Again attorney should use a credit-counseling agency which will email a copy of any plan to the law firm as well as the client. You don’t want a plan, because its has danger of being inconsistent with the schedules

I. Debtor also has to file with the court a record of any interest debtor has in an education individual retirement account. 11 USC §521(c)

29. Under the New Law Are there any exceptions to consumer debtors having to complete an approved credit-counseling course **before** the debtor files bankruptcy.

i. Yes, but not very useful or long lasting ones. 11 USC §109(h)(3)(A) provides that the requirements of pre- bankruptcy credit counseling “shall not apply with respect to a debtor who submits to the court a certification that—(1) describes exigent circumstances that merit a waiver of the requirements of paragraph (1); (ii) states that the debtor requested credit counseling services from an approved provider but was unable to obtain the services during the 5 day period beginning on date of request, and (iii) is satisfactory to the court.

ii. The last requirement “(iii) satisfactory to the court’ is probably fatally vague. Or maybe not if impliedly means satisfactory to the court in the court’s reasonably exercised discretion”.

b. Who issues the certificate? Doesn’t say. I don’t see how you are going to get a certificate from the provider that doesn’t have time to see you? It will take case law to explain that. Maybe try a declaration of the debtor stating facts that fall within this “**exigent circumstances**” exception to pre-filing credit counseling.

c. How do you figure out what all these new rules and tests and terms added by the New Law actually mean

i. Will take years of case law to find out just what is considered to be an “exigent circumstance” justifying consumer filing without going to credit counseling before file. Certainly if foreclosure sale about to be held, car about to be repossessed, judgment about to be entered. But what if just being harassed by phone calls, or lawsuit filed but not close to judgment. Doubtless will be variation among judges and probably regions of country as to what is an exigent circumstance

d. If the individual doesn’t do the pre-bankruptcy credit counseling because of “exigent circumstances”, does that mean the debtor is permanently excused from doing the “approved” credit counseling?

i. No, debtor in that case still has to complete the approved credit counseling within 30 days after the bankruptcy is filed, get the credit counseling completed certificate, and file it with the Court, or the case will be dismissed. [11 USC §109(h)(3)(B)] Moreover, the 30 days can only be extended once, by the court, for cause, for 15 more days, and that is all.

ii. Any permanent exceptions to having to complete credit counseling? Yes, if debtor is unable to complete the requirements because of “incapacity, disability, or active military duty in a military combat zone”. But impaired is defined as mental illness or defect so severe that debtor is incapable of realizing and making rationale decisions with respect to his financial responsibilities, and “disability” means that the debtor is so physically disabled that debtor can’t participate in telephone or internet credit counseling. Basically forget it. Even if in military in Iraq, they have Internet.

iii. If the certificate of completion of credit counseling has not been filed with the Court (from an approved provider) within the 30 or 45 day time period, then on the 46th day, the case must be **automatically** dismissed, per 11 USC §521 “exigent circumstances “ declaration

30. Does the requirement of **pre-bankruptcy filing credit counseling** apply to all debtors?

a. No, it does not apply to corporations or to partnerships. This requirement only applies to individuals who are consumer debtors.

b. What does **consumer** debtor mean?

i. Defined as more than ½ debts of person are consumer debts rather than business debts.

c. What if more than ½ debts of person are business debts?

i. If more than ½ debts are business debts, as opposed to debt from personal items (medical, dental, credit cards used for personal expenses as opposed to business expenses) then NOT a consumer debtor and Don't have to do credit counseling before filing.

31. What is the **post-filing “debtor education”** required by the New Law?

a. After consumer debtors have completed their pre-bankruptcy credit counseling, from a US Trustee approved credit counseling provider, and then they file, consumer debtors still can't get a discharge until--during bankruptcy case--they take and complete an approved “debtor education” course.

b. Who approves the debtor education requirement? The local Office of the United States Trustee.

c. Is it free? No, its nonprofit, but the nonprofit providers can and will charge a fee, just as the approved nonprofit pre-bankruptcy credit counseling agencies will charge debtors a fee.

d. What will be included in the “debtor education” course? Guidelines not finished, but certainly things like how expensive credit card interest is, minimize use of credit cards, etc.

32. Will it be harder to get credit cards and other debt once the New Law is in effect.

a. No, credit card companies will loan to even less credit worthy consumers than they do now, because the credit card companies, car lenders, etc. will know that it will be harder to file than before the New Law, and harder to discharge debt, and that few kinds of debts will be dischargeable, and that more people will have to do 5 year Chapter 13s, so the lenders will give even more people credit/loans, despite those consumers having a high danger of defaulting on paying

33. How do the New Law provisions affect **discharge**?

a. The New Law provisions adversely affect discharge in 3 ways:

i. First, the New Law **reduces** the types of debts that can be discharged--primarily “super-discharge” almost totally revoked, and tax debt harder to discharge.

ii. Second, all consumer debtors are required to jump through more hoops to get a discharge of those debts that are still eligible to be discharged under the New Law.

iii. Third, under existing law and caselaw, there is a presumption that a debtor is entitled to a discharge, e.g.727 “the court shall grant the debtor a discharge, unless....” certain exceptions apply. New Law 707(b) turns that presumption in favor of discharge into a presumption that debtor is abusing Chapter 7, and should not be allowed a Chapter 7 discharge, wherever the 707(b) presumption of abuse applies.

34. What is the “**super discharge**” under existing law, and what happened to it under the New Law?

a. So called “superdischarge” was that in Ch 13 , if a debtor confirmed and fully performed Ch 13

plan, the plan could discharge debts for fraud, conversion, embezzlement, breach of fiduciary duty, and willful and malicious acts, including, in some cases, tax evasion, plus could discharge property division debts arising from divorce. This “super-discharge” was due to the fact that in Chapter 7 and 11, the full list of “nondischargeable” debts specified in 11 USC §523(a)(1) through \_\_\_ applied; but in Chapter 13, only a few of those grounds for “nondischargeability applied”, because 11 USC §1328(a)(2) under the old law states that a Chapter 13 discharge discharges any debt,

“(a)...except any debt—(2) of the kind specified in paragraph (5)(8), or (9) of section 523(a)”...

But the New Law adds back into §1328(a)(2), as being exceptions from discharge, several kinds of §523(a) debts, as follows:

“(a)...except any debt—(2) of the kind specified in section 507(a)(8)( C ) or in paragraph (1)(B), (1)( C ), (2), (3), (4), (5), (8), or (9) of section 523(a);”

These are added exceptions to discharge in Chapter 13 are tax debts where there was fraud or intent to evade or defeat tax, or where the tax return was not filed or was filed less than 2 years before the Chapter 13 case was filed; debts for fraud; debt for conversion, embezzlement or breach of fiduciary duty; and debts that are 11 USC §523(a)(3) debts of certain types. The 523(a)(3) debts that are excepted from discharge even in Chapter 13 are 523(a)(2)—fraud debts-- or 523(a)(4)—conversion, embezzlement, breach of fiduciary duty debts, where the debt in question was not scheduled in the petition, and where the creditor did not find out about the bankruptcy in time to file a timely “nondischargeability adversary proceeding to seek to hold that debt nondischargeable.

In addition, the New Law adds new subsection 11 USC §1328(a)(4), which excepts from discharge debts:

“(4) for restitution or damages, awarded in a civil action against the debtor as a result of a willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual”.

b. Are there ANY kinds of debts you can discharge in Chapter 13 under the New Law that you cannot discharge in Chapter 7 or 11? Yes, the rest of the kinds of debts specified in 11 USC §523(a), other than the ones listed in §1328 as exceptions to discharge, can still be discharged in Chapter 13 if the debtor confirms and fully performs a Chapter 13 plan.

c. Which is the most important kind of debts that can still be discharged in Chapter 13, even where it can't be discharged in Chapter 7 or 11?

i. Debts that are debts owed to a spouse or child pursuant to a property division in a divorce are the most significant category of debt, 11 USC §523(a)(15), that can be discharged in Chapter 13, but not in Chapter 7.

d. What's the bottom line here?: You can still abuse your ex-spouse by discharging the property division (so long as it wasn't a secured debt) in Chapter 13, if you can confirm and perform a Ch 13 plan; but you can no longer use Chapter 13 to discharge debts for fraud, conversion, embezzlement, breach of fiduciary duty, or willful and malicious acts that injured or killed someone, or tax fraud/evasion.

e. How does the New Law amend old law §523(a)(15)?

i. The New Law amends §523(a)(15) debts owed to an ex-spouse or child pursuant to a divorce property division to make those debts absolutely NOT dischargeable in Chapter 7 and 11;

whereas under the existing law, (a)(15) property division debts are dischargeable if the burden on the debtor if those property division debts are NOT discharged, is greater than the burden onto the ex-spouse if those property division debts are discharged.

35. Does the New Law make any changes regarding **alimony and child support**, and divorce property divisions?

a. Under existing law, alimony and child support at **not dischargeable**, per 11 USC §523(a)(5), and this continues to be the case under New Law.

b. However, under existing law, if the alimony or child support debt had been **assigned** to a governmental agency, then the debt became **dischargeable**. Assignment to a governmental agency of a debt for alimony or child support occurs where the ex-spouse the Court has ordered to pay the alimony or child support does not pay it, and the other spouse (who is supposed to be receiving the support) and kids therefore have to live on welfare; and as a condition of getting welfare, the wife has to assign the alimony and child support arrearages to the welfare agency. New Law 11 USC 507(a)(1)(A) **removes the “assigned to governmental agency” exception**, so under the New Law, a debt for alimony or child support will be nondischargeable, even where that debt has been assigned to a governmental agency.

c. Under existing law, alimony and child support are **not a priority debt**, just a general unsecured nondischargeable debt. The New Law makes alimony and child support an 11 USC §507(a)(1) **priority, ie highest priority**, regardless of whether claim filed by ex-spouse/child, or whether the claim has been assigned to a governmental agency, and is filed by the governmental agency. So if there is any money left after paying secured creditors from their collateral, that money will go to pay the domestic support obligation,

i. All other administrative priorities move down one notch, so administrative expenses (except for trustee) are no 507(a)(2) priority, when they used to be 507(a)(1) priority.

ii. DIP counsel is an administrative priority, so DIP counsel in an individual Chapter 7 or 13 case gets paid after the alimony and child support.

iii. Does any other priority claim get paid ahead of child support/alimony?

(1) Trustee fees will be paid before the support obligations, per 11 USC 507(a)( C ), “to the extent that the trustee administers assets that are otherwise available for payment of such [the domestic support claims]” Unclear what that means.

d. Priority claims are not dischargeable in any chapter, and **must be paid in full** during the life of any Chapter 11 or 13 plan, unless the priority claimant agrees otherwise, which in the case of an ex-spouse is not very likely. Where the pre-petition alimony or child support arrearage is large, it will be infeasible to confirm a Chapter 11 or 13 plan, because the debtor will not be able to pay that arrearage in full over the life of the plan (max. 60 months in Ch 13).

e. New Law expands definition of alimony and child support from pre-petition, to amounts owed DURING case. New Law definition 11 USC §101(14A) “domestic support obligation”. Under New Law, debtor can't get a Chapter 13 discharge unless the debtor files a **certification** with the bankruptcy court that the debtor has paid all “domestic support obligations” **that came due during the Chapter 13 case**, per 11 USC §1328(a). This means you, the attorney, will have to get and file that certification.

f. What about **nondischargeability** of divorce **property divisions** under existing versus New Law?

i. Under existing law, 11 USC §523(a)(15) has a balancing test, ie would it be greater hardship on debtor if property division debt is not discharged, or greater hardship on ex-spouse if property division debt is discharged.

ii. New Law strikes the balancing test language out of §523(a)(15), so that divorce property divisions are nondischargeable, period, in Chapter 7 and 11. However, in Chapter 13, property division debts are discharged if the debtor gets a Chapter 13 discharge, because the 11 USC §1328(a)(1)-(4) list of debts NOT discharged by a Chapter 13 discharge does NOT §523(a)(15) in it. Consequently, divorce property division debts can still be discharged in Chapter 13, so long as the Court finds debtor and debtors plan are in good faith, confirms the plan, the debtor fully performs the plan, and the plan provides the property division debt will be discharged to extent not paid through plan.

36. Under the New Law, what effect do **alimony and child support** that come due **during** the Chapter 11 or 13 case have on debtor's ability to **confirm a plan**, and **get a discharge** in Chapter 11 or 13?

g. Per New Law 11 USC §1325(a)(8) and §1129(a)(4), can't confirm a Chapter 13 or 11 plan unless debtor is current on domestic support that came due after filing, as of date plan is being confirmed.

h. Debtor **can't get a discharge** in Chapter 13 unless the debtor **certifies** that all alimony and child support ordered by a court or administrative order that came due **during the Chapter 11 or 13** case has been paid by the debtor. [11 USC §1328(a) and §1141 ] Is a similar certification required before discharge in 11? [No similar provision I could find].

37. Are there additional changes to nondischargeability in the New Law?

a. Yes, the presumption that changes for luxury goods are nondischargeable under existing law is presumption that consumer debts owed to a single creditor and aggregating more than \$1,225 for luxury goods or services incurred within 60 days before the bankruptcy is filed are **presumed** to be nondischargeable; and that cash advances aggregating more than \$1225 incurred within 60 days before filing bankruptcy are presumed to be nondischargeable; and under the New Law, lower amounts, incurred during a longer period before bankruptcy are presumed to be nondischargeable.

b. What amounts, what periods? Under the New Law, luxury goods aggregating \$500, owed to a single creditor, charged within 90 days of filing bankruptcy, are presumed to be nondischargeable; and cash advances aggregating more than \$750, charged within 70 days before bankruptcy, are presumed to be nondischargeable.

c. What else is added to 523(a) nondischargeability:

i. The types of educational loans that are nondischargeable are expanded, so that its NOT just "federally insured" education loans that are covered by 11 USC §523(a)(8) "nondischargeability" standard of can't discharge unless undue hardship to pay back. Now all educational loans fall under 523(a)(8), even where NOT federally insured loans.

(1) And if you take out a loan to pay tax that would be nondischargeable, that loan is nondischargeable. [11 USC §523(a)(14A)].

(2) And loans owed to pension and profit sharing plans are nondischargeable [11 USC §523(a)(18)].

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