WELCOME TO THE DEBTOR ASSISTANCE PROJECT

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Volunteer Opportunities

Our volunteer attorneys provide essential services for unrepresented consumers. Volunteering for the DAP offers attorneys the opportunity to make a difference in the lives of low-income *pro se* debtors who desperately need assistance. If you are an attorney interested in volunteering your time and expertise, please contact Magdalena Reyes Bordeaux at (213) 385-2977, ext. 115. You can also visit our website at <*www.publiccounsel.org*> to view *pro bono* opportunities.

Public Counsel
Debtor Assistance Project

(213) 385-2977
(213) 385-9089 Fax
www.publiccounsel.org

Public Counsel
Debtor Assistance Project
601 S. Ardmore Ave.
Los Angeles, CA 90005

Public Counsel
LAW CENTER

DEBTOR ASSISTANCE PROJECT

Protecting the Rights of
Low-Income Debtors in
Los Angeles County

Public Counsel

Public Counsel, founded in 1970, is the nation's largest *pro bono* law firm and the public interest law firm of the Los Angeles County and Beverly Hills Bar Associations, as well as the Southern California Affiliate of the Lawyer's Committee for Civil Rights Under the Law. The organization is dedicated to delivering *pro bono* legal services to indigent and unrepresented clients throughout Los Angeles County.

Debtor Assistance Project

Public Counsel's Debtor Assistance Project ("DAP") is committed to protecting the rights of low-income *pro se* debtors. The DAP provides free legal assistance and representation to low-income debtors by assisting indigent clients with their bankruptcy questions and pressing litigation matters.

Available Assistance

Public Counsel's DAP maintains a network of over 150 volunteer attorneys specializing in bankruptcy law. We match bankruptcy *pro bono* attorneys with qualifying low-income *pro se* clients who need bankruptcy legal assistance. The DAP staff and volunteer attorneys provide legal assistance in the following areas:

Chapter 7 Bankruptcy

- Evaluation and assessment of whether someone should file bankruptcy
- Assistance and representation of low-income *pro se* debtors

Non-Dischargeability Defense

- Representation of low-income *pro se* debtors in non-dischargeability cases

Reaffirmation Hearing Counseling

- Counsel and advice to debtors at reaffirmation hearings

Petition Preparer Fraud

- Provide clients with information regarding what constitutes the unauthorized practice of law

Identity Theft

- Provide clients with information about how to protect themselves from being victims of identity fraud

Educational Materials

The DAP provides informational materials on a range of bankruptcy and bankruptcy–related issues. They include:

- Chapter 7 and 13 bankruptcy
- Directory of Consumer and Financial Services in Los Angeles County
- Bankruptcy Petition Preparer Fraud
- Identity Theft

Bankruptcy Hotline

If you need assistance with a bankruptcy matter, please call the DAP Bankruptcy Hotline at (213) 385-2977, ext. 704. A phone intake will be conducted to determine eligibility.

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
OFFICE OF THE CLERK

JON D. CERETTO
Executive Officer
Clerk of Court

PUBLIC NOTICE

RE: REVISED INFORMATION REGARDING THE LOS ANGELES COUNTY BAR ASSOCIATION/PUBLIC COUNSEL BANKRUPTCY PRO BONO PROGRAM

The Los Angeles County Bar Association, in conjunction with Public Counsel, has implemented a Bankruptcy Pro Bono Program in the Los Angeles and San Fernando Valley divisions. Currently, this program is available only for defendants in § 523 non-dischargeability adversary proceedings who cannot afford an attorney. If the defendant cannot afford an attorney, he or she may apply for free legal representation with Public Counsel. All applicants will first be screened for eligibility. If found eligible, an attorney may be found who will represent the applicant in the § 523 non-dischargeability adversary proceeding free of charge.

To apply for legal representation under this program or for additional information, please contact Public Counsel. For contact information, please see the "Notice to Defendants of Availability of Los Angeles County Bar Association/Public Council Bankruptcy Pro Bono Program." The most current version of this notice can be obtained from our web site at *www.cacb.uscourts.gov*. To access the notice, double click on the "Pro Bono Program" button on the left-hand side of our web site. Then select the file named **DAP.PDF. Do not contact the Clerk's Office for information regarding your eligibility for this program**.

Plaintiffs in § 523 non-dischargeability adversary proceedings filed in the Los Angeles and San Fernando Valley divisions will be required to serve a notice of the availability of the above program on the defendants along with the Summons and Notice of Status Conference and to provide proof of such service with the Court. A sample of the notice of the availability of the program is attached to this Public Notice.

JON D. CERETTO
CLERK OF COURT

99-015

Public Counsel
LAW CENTER

THE PUBLIC INTEREST LAW OFFICE OF THE LOS ANGELES COUNTY AND BEVERLY HILLS BAR ASSOCIATIONS

IMMEDIATE ACTION REQUIRED!

Your creditor has initiated a lawsuit against you in bankruptcy court. You have been served with a Summons and Complaint. If you do not file a response to the Complaint by the court deadline, a default judgment may be entered against you. If a default is entered, your debt will not be discharged and you will be responsible for repaying the amount demanded in the Complaint.

You should contact your attorney immediately! Your attorney may be able to help you resolve the lawsuit favorably.

IF YOU DO NOT HAVE AN ATTORNEY AND CANNOT AFFORD TO HIRE ONE, YOU SHOULD CONTACT:

PUBLIC COUNSEL LAW CENTER
Debtor Assistance Project
P. O. Box 76900
Los Angeles, CA 90076-9812
(213) 385-2977, extension 704

Hotline Hours: 10:00 a.m.-12:00 p.m. and 2:00 p.m.-4:00 p.m.
Mondays and Wednesdays Only

You will be screened for eligibility. Not all applicants will qualify.

You may be required to leave a message. Be sure to leave your name, daytime telephone number, and the best time to reach you during hotline hours.

(Revised 6/8/01)

Public Counsel
LAW CENTER

THE PUBLIC INTEREST LAW OFFICE OF THE LOS ANGELES COUNTY AND BEVERLY HILLS BAR ASSOCIATIONS

¡SE REQUIERE ACCIÓN INMEDIATO!

Su acreedor ha iniciado una demanda contra usted en la corte de bancarrota. Usted ha recibido la Citación y Queja (Demanda). Si no responde a la demanda antes de la fecha indicada, un juicio será puesto contra usted. En este entonces, su deuda con este acreedor no será descargada en su bancarrota y será responsable por la cantidad del juicio.

¡Usted debe de comunicarse con su abogado inmediatamente!

SI NO TIENE ABOGADO Y NO TIENE LOS RECURSOS PARA RETENER UNO, DEBE COMUNICARSE CON:

PUBLIC COUNSEL LAW CENTER
Debtor Assistance Project
P. O. Box 76900
Los Angeles, CA 90076-9812
(213) 385-2977, extension 704

Horario: 10:00 AM-12:00 p.m. y 2:00 p.m.-4:00 p.m.
Lunes y Miércoles Solamente

Su llamada será revisada por razones de elegibilidad. No todos califican para nuestros servicios gratuitos.

Puede ser que cuando hable tenga que dejar un mensaje. Por favor asegure en dejar su nombre, numero de teléfono de día, y la mejor hora en cuando se puede comunicar con usted.

(Revised 6/8/01)

Notice to all Debtors Appearing for Reaffirmation Agreement Hearings

The Los Angeles County Bar Association has created a Debtor Assistance Program to provide free legal assistance to bankruptcy debtors who cannot afford an attorney. An attorney from this program will be available, free of charge, to answer questions which you may have regarding whether or not it is in your best interest to enter into the reaffirmation agreement. If you are interested in speaking with the attorney, please report to assigned courtroom ***one hour*** before the hearing.

AVISO PARA DEUDORES QUE CARGAN DEUDAS PRESENTANDOSE A UNA AUDENCIA PARA UN ACUERDO DE REAFIRMACIÓN

La Asociación de la Barra de Abogados del Condado de Los Angeles ha creado un programa para asistir a las personas que cargan deudas (Debtor Assistance Program) y que no están en la capacidad financiera para pagarle a un abogado. Un abogado de este programa estará disponible, gratituamente, para contestar preguntas que usted tenga sobre si sea en su mejor interés o no, entrar en un acuerdo de reafirmación. Si usted esta interesado para una consultacion con un abogado, porfavor presentese a la corte asignada una (1) hora antes de su audencia.

The Debtor Assistance Project

A joint project of Public Counsel and
Los Angeles County Bar's Commercial Law and Bankruptcy Section

Proudly Presents:

Nondischargeability Defense in Pro Bono Cases
A Brown Bag Lunchtime Seminar

Date: **Tuesday, February 13, 2001**

Time: **12:00 – 1:00 p.m.**

Location: **Roybal Federal Building**
Assembly Room
255 E. Temple Street
12th Floor, Room 1252
Los Angeles, California 90012

Cost: **Free**

Speakers

Andrew Goodman
Greenberg & Bass, LLP
Encino, California

Gail Higgins
Law Offices of Gail Higgins
Los Angeles, California

Jason Wallach
Berger, Kahn, Shafton, Moss,
Figler, Simon & Gladstone
Marina del Rey, California

Public Counsel
LAW CENTER

FREE BANKRUPTCY ASSISTANCE

ARE YOU HAVING FINANCIAL DIFFICULTY & NEED TO FILE BANKRUPTCY?

HAVE YOU ALREADY FILED BUT HAVE QUESTIONS ABOUT THE BANKRUPTCY PROCESS?

IS ONE OF YOUR CREDITORS CONTESTING THE DISCHARGE IN BANKRUPTCY COURT?

You may qualify for free* legal assistance. For further information, please call the:

Debtor Assistance Project Hotline at (213) 385-2977, extension 704.

Hotline hours are on Mondays & Wednesdays from 10:00AM-12:00PM and 2:00PM-4:00PM only.

You may be required to leave a message. Be sure to leave your name, daytime telephone number, and the best time to reach you.

* You will be screened for eligibility. Not all applicants will qualify for free legal assistance.

Public Counsel
LAW CENTER

ASISTENCIA DE BANCARROTA GRATUITA

¿ESTA TENIENDO PROBLEMAS ECONÓMICOS Y NECESITA DECLARAR BANCARROTA?

¿HA DECLARADO BANCARROTA PERO TIENE PREGUNTAS SOBRE EL PROCESO?

¿ALGUN CREDITOR ESTA PELEANDO EL DESCARGO EN LA CORTE DE BANCARROTA?

Usted puede calificar* para asistencia legal gratuita. Para mas información, por favor hable a:

La línea telefónica del Proyecto de Asistencia al Deudor al (213) 385-2977, extensión 704.

La línea de asistencia esta abierta los lunes y miércoles de 10:00 AM – 12:00 PM y de 2:00 PM – 4:00 PM.

Usted a lo mejor tendrá que dejar un mensaje. Por favor deje su nombre, número de teléfono donde se encuentre de día y la mejor hora de comunicarnos con usted.

* Su elegibilidad será determinada. No todos califican para asistencia legal gratuita.

FREE

The Los Angeles Clinic

Did you know that the place you trust for medical care also offers

LOW COST LEGAL HELP?

** NO RESIDENCY OR INCOME RESTRICTIONS**
ALL SERVICES ARE CONFIDENTIAL

We may be able to help you REPRESENT YOURSELF in matters of....

BANKRUPTCY

(Chapter 7)

If you do not own a business and
- you do not own a house or a mortgage on a house
- you are not being evicted
- your wages are not already being garnished

DIVORCE

(Simple and uncontested)

If there is no dispute over any issues of personal property, custody, visitation, child support or spousal support
- you have an exact address for your spouse or you can locate him or her
- neither you nor your spouse own a house or mortgage on a house or other piece of land
- neither you nor your spouse has a pension or a retirement plan
- either you or your spouse have lived in California for the past six months and in Los Angles County for at least three months

IMMIGRATION

(your confidentiality is assured)

In matters of citizenship, legalization, family immigration, political asylum and visas

RESPONSE TO COURT SUMMONS

(For consumer debt only)

If the response period of your summons has not expired

*For further information and to find out if you qualify to schedule an appointment** please call*

(323) 655-2697

Monday thru Friday from 12:00PM to 4:00PM ONLY

If we can't help you, we may be able to provide you with phone numbers and/or information about somewhere that can.

*** You will not be seen without an appointment. A $25 administrative fee may apply for each appointment. No one will be turned away due to inability to pay.*

What is a Reaffirmation Agreement?

You have signed a reaffirmation agreement with one of your creditors. It is not valid unless you come to Court and I approve it. You can still decide not to reaffirm this debt, so it is important for you to understand what the effect of the reaffirmation agreement is.

Your discharge in bankruptcy relieves you of a legal liability to pay debts that are discharged. You may decide that you voluntarily want to pay a debt that has been discharged, and there is no prohibition against your doing this. You are not required to reaffirm any debt or sign any agreement regarding a debt that has been or will be discharged in your bankruptcy in order to voluntarily repay a debt.

Even though the discharge means you do not have to pay the debts that are discharged, sometimes a creditor will have a security interest in some property the creditor will be able to take if you do not pay the debt. A creditor can have a security interest in real estate or in personal property (such as your furniture or car). Often, for example, a merchant who sells you something on its credit card has a security interest in the item or items purchased.

If a creditor has a security interest, it can enforce that security interest if the loan is in default. Usually that means it can foreclose upon or repossess the property that is subject to the security interest. Just going into bankruptcy is not a default that a creditor can enforce. Defaults usually arise out of missed payments, lack of insurance or something of that nature.

If I approve this reaffirmation agreement, the debt that you are reaffirming will not be discharged in the bankruptcy. You are still obligated to make the payments due on the debt. If you can't make the payments, the creditor can repossess the property in which it has a security interest (the collateral), can sell it, and may sue you for a judgment for the difference between the amount that it receives on the sale and the amount that you owe on the loan. If there is no collateral for the loan, the creditor can sue you and obtain a judgment for the balance owed and this is not affected by your bankruptcy discharge. For this reason, bankruptcy law requires me to speak with you to ascertain whether you understand what you are agreeing to, whether you are likely to be able to keep up with the agreement, whether the payments will be a hardship to you and your reason for reaffirming this debt.

Therefore, I need to know the answers to those and some other questions to help me decide whether to approve your agreement or not. At the hearing, I will ask you several questions. I will want to know if the creditor with whom you have made this reaffirmation agreement holds some kind of security for the debt. If so, I will want to know in what property the creditor has a security interest. Do you still have the property that is collateral for this debt? If so, do you want to keep it? Why? How much is it worth?

If the creditor does not have collateral for the debt, I will want to know why you would want to be legally obligated to pay it. What do you think you will get out of it? Has the creditor made any promises to you? If so, are they in writing?

Whether there is collateral for the debt or not, I will want to know whether you know what the terms of your agreement are. Do you know the interest rate? Do you know how long it will take you to pay off the debt you are reaffirming? Has the creditor filed suit against you to declare this debt non-dischargeable or has it threatened to file such a suit?

If you do not come to Court for the hearing, I will deny the motion to reaffirm the debt. If I deny the motion to reaffirm the debt, you are under no legal responsibility to pay the creditor, but the creditor can then seek to repossess the collateral (if there is any). However, the creditor cannot obtain a judgment against you for the amount you owe on this debt.

¿QUÉ ES UN ACUERDO DE REAFIRMACIÓN?

Usted ha firmado un acuerdo de reafirmación con uno de sus acreadores. El acuerdo no es valido si no se presenta a la corte para que sea aprovado. Usted todavía puede decidir no querer reafirmar su deuda, es muy importante que usted entienda cuales son los efectos de un acuerdo de reafirmación.

Su descargo en bancarrota lo ampara de su obligación legal para pagar sus deudas de las cuales usted ya ha sido perdonado. Uste puede decidir que pagara una deuda voluntariamente a la cual ya ha sido decargada. No hay ninguna prohibición que le impida hacer esto. Usted no sera exigido a reafirmar ninguna deuda o a firmar ningún acuerdo con respecto a ninguna deuda que ha sido o que sera descargada en su tramite de bancarrota para pagarla voluntariamente.

Aunque el descargo de su deuda significa que usted no tiene que pagar las deudas que ya han sido absueltas, algunas veces acreedores tendrán un interés asegurado en el titulo de alguna de sus pertenencias personales (como su carro, su casa, o sus muebles). Muchas de las veces algún comerciante que le venda algo en su tarjeta de crédito tiene un interés de titulo asegurado en los atículos que compro.

Si un acreedor tiene un interés de titulo asegurado, puede ejecutar ese interés de titulo asegurado que tiene si el préstamo esta sin cumplimiento. Esto casi siempre significa que el acreedor puede tomar posesión de la propiedad en la cual tiene un interés de titulo asegurado. El comienzo de tramites para bancarrota no pueden ser ejecutados por un acreedor. La falta de comparecencia casi siempre resulta de falta de aseguranza, falta de pagos, o algo de esa naturaleza.

Si el juez aprueba el acuerdo de reafirmación, la deuda que usted esta reafirmando no sera absuelta en su tramite de bancarrota. Usted aun estará obligado a hacer los pagos que aun debe en la deuda. Si usted no puede hacer los pagos, el acreedor puede reposesar la propiedad en la cual tiene interés de titulo asegurado (colateral), y puede venderlo, y hasta lo puede demandar por un juicio por la diferencia entre la cantidad que se recibe de la venta y la cantidad que usted debe en el préstamo. Si no hay un interes de aseguranza para el préstamo, el acreedor puede demandarlo y obtener un juicio por la cantidad que debe. Esto no sera afectado por la absolución de su bancarrota. Por esta razón, las leyes de bancarrota requieren que el juez hable con usted para asegurarse que usted entiende a lo que se esta comprometiendo. Así se determinar si usted podrá mantener el acuerdo, podrá hacer los pagos, y su razón por reafirmar dicha deuda.

Así es que el juez necesitara saber la respuesta a esas y otras preguntas para poder decidir si aprobar o negar el acuerdo. En la audiencia, el juez le hará varias preguntas. El quedrá saber si el acreedor con quien usted hizo este acuerdo de reafirmación tiene algún interés asegurado sobre la deuda.

Si es así, el juez quedrá saber que en cual de su propiedad el acreedor tiene el interés de titulo asegurado. Tambien quedre saber si todavia tiene la propiedad en la cual tiene interés de titulo asegurado para esta deuda, si usted tiene la propiedad que sirve de interes de titulo para esta deuda. Si es así, usted desea mantener la deuda? Porque? y cuanto esl el valor de tal propiedad.

Si el acreedor no tiene colateral para la deuda, el juez querrá saber por que usted quiere estar legalmente obligado a pagar dicha deuda. Como piensa usted que se beneficiara haciendose legalmente responsable por esa deuda.

Si el acreedor le ha hecho alguna promesa. Si es así, lo tiene por escrito? Aun si hay colateral por la deuda o no, el juez querrá saber si usted sabe cuales son las condiciones de su acuerdo. Si usted sabe cuales son las tarifas de los intereses. Si usted sabe cuanto tiempo le llevara pagar la deuda que esta reafirmando. Si usted ha sido demandado por alguno de sus acreedores y si su deuda ha sido declarada como “sin poderse absolver” o si lo ha amenazado con hacerlo.

Si usted no se presenta a la audiencia, el juez negara la moción para reafirmar cualquier deuda. Si el juez niega la moción para reafirmar la deuda, usted no tendrá ningúna responsabilidad para pagarle al acreedor, pero el acreedor puede intentar reposeer el colateral (si existe alguno). El acreedor no podrá obtener un juicio en contra suya por la cantidad que debe en esta cuenta.

Los Angeles County Bar
Association Members
(213) 683-9193

Los Angeles County Bar Association Members

RE: LACBA Bankruptcy *Pro Bono* Project

Dear Member:

The Los Angeles County Bar Association Commercial Law and Bankruptcy Section is delighted to announce the establishment of its program to provide *pro bono* services to indigent debtors in bankruptcy cases. As you have undoubtedly read many times in the past few years, consumer bankruptcy filings in the United States in general and in Los Angeles in particular have hit an all time high. Many of the individual debtors who file bankruptcy cases in Los Angeles cannot afford counsel to commence those cases. The Los Angeles County Bar Association, with assistance and cooperation of the judges of the United States Bankruptcy Court for the Central District of California, have established the program designed to provide representation to at least some of these individuals.

The first phase of the program will provide counsel to individual debtors who are sued by creditors seeking to establish that particular debts are not dischargeable in the bankruptcy case. In other jurisdictions in which such programs have been established, a significant number of these complaints have been quickly resolved on favorable terms shortly after an attorney undertakes the representation of the debtor. Our volunteers will be able to provide reasoned advice to these debtors regarding their rights and, where appropriate, to settle the case or defend those rights if necessary.

The Los Angeles County Bar Association is soliciting your participation as a volunteer to undertake the representation of one or more debtor/defendants each year. To support you in this endeavor, the Los Angeles County Bar Association will provide you with written materials on the substantive legal issues and pertinent authorities. The materials will also include forms of pleadings which might be useful. The Los Angeles County Bar Association will also schedule educational programs for volunteers and will solicit the participation of law students from local law schools to assist volunteers in the representation of these indigent clients. The goal of the Los Angeles County Bar Association is to provide sufficient resources to you so that you can freely undertake participation in this worthwhile project even if you do not specialize in bankruptcy. Nondischargeability litigation is, after all, just that: litigation, albeit in the bankruptcy court.

The Los Angeles County Bar Association intends and hopes to expand the program to provide counseling services for debtors prior to the commencement of bankruptcy cases. These services would include advising the debtors as to the benefits and detriments of filing bankruptcy cases, the choice between chapter 7 and chapter 13 cases, and, if appropriate, the commencement of a case under either chapter. We hope that the second phase of the program will be operational during 1998.

The Bankruptcy Court will require plaintiffs to send notices to *pro se* debtor/defendants informing them that they may qualify for *pro bono* representation. Public Counsel has agreed to screen potential applicants to determine which of them qualify for these *pro bono* services. **NOW ALL WE NEED IS YOU.**

If you are prepared to volunteer to participate in providing these worthwhile services, please fill out the enclosed form and return it to Jeff Krause, by telecopier or in the enclosed envelope. If you have questions regarding the scope of the program, the support that we will provide, or the fundamental need for such a program, please telephone Jeff Krause, Stutman, Treister & Glatt a Professional Corporation at (213) 251-5205 or fax at (213) 251-5288. E-mail address is JKrause@Stutman.com.

Very truly yours,

Jeffrey C. Krause

Enclosure

BANKRUPTCY *PRO BONO* PROGRAM

VOLUNTEER COMMITMENT FORM

Yes, I would like to help the Los Angeles County Bar Association's program for providing *pro bono* services to *in pro per* debtors in chapter 7 bankruptcy proceedings.

Name: _____

Firm: _____

Address: _____

City/State/Zip: _____

Phone: _____

Fax: _____

When completed, please send by facsimile to:

Jeff Krause, Esq.
Stutman, Treister & Glatt P.C.
3699 Wilshire Blvd., #900
Los Angeles, CA 90010
Telephone:(213) 251-5205
Facsimile:(213) 251-5288
E-mail: JKrause @Stutman.com

THANK YOU FOR YOUR SUPPORT!

1999 UPDATE TO TRAINING MATERIALS FOR PRO BONO REPRESENTATION OF LOW INCOME CHAPTER 7 DEBTORS

Mark S. Scarberry, Pepperdine University School of Law. Copyright © 1999 Mark S. Scarberry. Permission is granted for duplication of these materials for use in pro bono bankruptcy training programs conducted in affiliation with the L.A. County Bar Association.

1999 UPDATE TO TRAINING MATERIALS FOR PRO BONO REPRESENTATION OF LOW INCOME CHAPTER 7 DEBTORS

I. Errata:

The sample forms attached to the 1998 training materials do not include the Local Rule 104 Statement of Related Cases. A copy of the Statement of Related Cases form is attached to this update. Also, the discussion of section 727 objections to discharge on page 21 of the 1998 materials includes the sentence "Do not confuse with exemptions from discharge–see § 523." The word "exemptions" should be changed to "exceptions."

II. Student Loans

For discussion purposes the 1998 training materials include a fact situation involving a debtor named "Ms. Connie Johnson." (See pp. 16-17.) One issue raised by those facts is the dischargeability or nondischargeability of student loans under § 523(a)(8). In cases filed before October 7, 1998, student loans are dischargeable if they have been "in repayment for at least seven years" or if failure to discharge them would impose an undue hardship. Brown v. Sallimae Servicing Corp. (In re Brown), 227 B.R. 540 (Bankr. S.D. Cal. 1998). For cases filed on or after October 7, 1998, Congress' enactment of the Higher Education Amendments of 1998 eliminates the seven year provision of § 523(a)(8); student loans are dischargeable only if failure to discharge them would impose an undue hardship, no matter how old the loans may be.

The Ninth Circuit has now adopted the Second Circuit's three-part *Brunner* test for undue hardship. United Student Aid Funds, Inc. v. Pena (In re Pena), 155 F.3d 1108 (9th Cir. 1998).

> First, the debtor must establish "that she cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans." . . . Second, the debtor must show "that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans." . . . The third prong requires "that the debtor has made good faith efforts to repay the loans. . . ."

155 F.3d at 1111, quoting In re Brunner, 831 F.2d 395, 396 (2d Cir. 1987).

Brunner can be applied quite harshly, requiring a showing that the debtor will be in nearly abject poverty for the foreseeable future if required to pay and that the debtor has minimized expenses substantially in order to try to pay. Thus far it seems to have been applied in a "kinder and gentler" way in the Ninth Circuit. See Pena, 155 F.3d 1108; United Student Aid Funds Inc. v. Taylor (In re Taylor), 223 B.R. 747 (Bankr. 9th Cir. 1998); Brown v. Sallimae Servicing Corp. (In re Brown), 227 B.R. 540 (Bankr. S.D. Cal. 1998). All these cases held the student loans to be dischargeable. The analysis seems similar to the chapter 13 disposable income analysis; because the debtor could not make the payments on the student loans while keeping up the same kind of lifestyle permitted in chapter 13, the courts permitted discharge.

In addition, *Taylor* holds that the bankruptcy court has no power to grant a partial discharge of student loans. Many bankruptcy courts (and at least one circuit–the Sixth) have permitted partial discharge. In many cases they have found that there would be no undue

hardship as long as some portion of the student loans could be discharged, and have then gone on to grant a partial discharge or to modify the payment terms of the student loan obligations. See cases cited in *Taylor*. This in effect allows courts to split the difference, neither favoring the debtor with a complete discharge of student loans nor favoring the creditor with a complete exception of the loans from the discharge. *Taylor* removes that ability to reach a compromise. *Brown* holds that under its facts a partial discharge would not be appropriate, deferring to *Taylor* while reserving judgment on whether a BAP decision is binding on the bankruptcy courts in the circuit. Urging a court to follow *Taylor* is a calculated risk; if the loans cannot be partially discharged, then a finding of undue hardship is more likely, but the effect of a finding of no undue hardship is more severe.

III. Dismissal for Substantial Abuse–With Special Attention to Credit Card Debt

Section 707(b) permits the court to dismiss a chapter 7 case if "granting of [bankruptcy] relief would be a substantial abuse of the provisions of this chapter." Section 707(b) applies only where the debtor is an individual whose debts are primarily consumer debts. Creditors cannot move for dismissal under § 707(b); rather, dismissal under § 707(b) can be granted only on the court's own motion or on motion of the U.S. trustee. Section 707(b) provides further that "There shall be a presumption in favor of granting the relief requested by the debtor."

A typical application of § 707(b) would be to dismiss the chapter 7 case of a debtor with high current or anticipated income but little in the way of nonexempt assets. Such a debtor would give up little in exchange for a chapter 7 discharge, and would then be free to enjoy that high income. Congress wanted to steer such debtors into chapter 13, where § 1325(b)(1)(B) would force them to devote projected disposable income for three years to the payment of debts.

The leading Ninth Circuit case on § 707(b) is In re Kelly, 841 F.2d 908 (9th Cir. 1988). According to *Kelly*, the principal factor in determining whether use of chapter 7 us a substantial abuse is the debtor's ability to repay debts. "This is not to say that inability to pay will shield a debtor from section 707(b) dismissal where bad faith is otherwise shown. But a finding that a debtor is able to pay his debts, standing alone, supports a conclusion of substantial abuse." Id. at 915. On the other hand, the § 707(b) presumption in favor of granting bankruptcy relief "is an indication that in deciding the issue, the court should give the benefit of any doubt to the debtor and dismiss a case only when a substantial abuse is clearly present." Id. at 917. A debtor's debts are primarily consumer debts where more than 50% of the debts are consumer debts. Id. at 913.

Kelly does not make clear how much of the debts the debtor must be able to pay for dismissal to be justified. A BAP case holds that ability to repay 43% is by itself sufficient to justify dismissal. Gomes v. U.S. Trustee (In re Gomes), 220 B.R. 84 (Bankr. 9th Cir. 1998). Clients who qualify for pro bono assistance will likely not be able to repay any substantial part of their debts, and thus for our purposes it is more important to consider the other factors that may justify dismissal under § 707(b).

Those other factors may include the incurring of large credit card debts with no intent to repay. Many courts have held that a § 707(b) dismissal is justified where the debtor incurred credit card debt without the intent to repay it. See, e.g., In re Wolniewicz, 224 B.R. 302 (Bankr. W.D.N.Y. 1998); In re Gaskins, 85 B.R. 846 (Bankr. C.D. Cal. 1988). The court in In re Attanasio, 218 B.R. 180, 217 (Bankr. N.D. Ala. 1998), collects many such cases but also argues that § 707(b) should not be used as a substitute for a creditor's § 523(a)(2) complaint:

While a debtor's accumulation of consumer debt beyond an ability to repay may not be

> responsible, such an accumulation is not illegal and is not necessarily fraudulent, unless accompanied by the requisite intent. Why then should the bankruptcy court prosecute the credit card company's non-dischargeability case by way of 707(b)? If the credit card debt was incurred without the intent to repay, as evidenced by the debtor's complete inability to pay, then the debt, upon proof of those facts, may be adjudged non-dischargeable. However, in the absence of proof, the debt is dischargeable. Section 707(b) should not circumvent non-dischargeability sections with concomitant bypassing of procedural safeguards required for the prosecution and proof of the elements essential for a judgment of non-dischargeability.

Id. at 219 (footnote omitted). The court also noted that "Congress did not say that a case should be dismissed if it represents a substantial abuse of consumer credit, but said rather that the case should be dismissed if it represents a substantial abuse of Chapter 7." Id. Here is the cautious approach taken in a recent Central District case:

> In adhering to the rationale behind the enactment of § 707(b) as well as upholding the underlying principles of our bankruptcy system, this Court holds that if a debtor possesses excess income so that the debtor is able to pay his debts, dismissal is warranted. However, if evidence suggests the debtor is unable to meet a meaningful part of his financial obligations, the court must consider other relevant indicia of the debtor's honesty and good faith and whether there are lesser effective remedies to protect the creditor-body and/or the bankruptcy system from the effects of debtor's bad faith dealings.
>
> The substantial abuse to the system that is being prevented in cases involving credit-card abuse must be that § 523(a)(2) is not an effective remedy given the facts of the case. This is not meant as a bright-line test, but rather a case-by-case analysis as to when a motion might be granted. The issues to be considered by the court are as follows: (1) whether the overwhelming percentage of the debtor's unsecured debt is due to credit cards; (2) whether the debtor has used so many credit cards that it would multiply the workload of the court to adjudicate each § 523(a)(2) action separately; (3) whether there is no economic incentive to individual creditors to bring an action under § 523(a)(2) to have their debt declared non-dischargeable;[16] (4) whether the credit-card debt was obtained for luxury goods, high lifestyle or other improper purposes; and (5) whether the debtor has failed to make an honest effort to repay these obligations before filing bankruptcy. If the court finds that these facts are proven, then grounds exist to dismiss the case under § 707(b) even if the debtors lack the ability to make present or future payments.
>
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>
> [Court's footnote] 16. For example, whether the amounts owed on each credit card are relatively small or the creditors would have little hope of collection on a judgment during the coming 10 years.

In re Motaharnia, 215 B.R. 63, 72-73 (Bankr. C.D. Cal. 1997).

III. Other New Cases

Here are some new cases to consider in addition to those in the 1998 Supplement to the Training Materials:

A. Reaffirmation (discussed at pp. 9-14 of the 1998 materials)

1. McClellan Federal Credit Union v. Parker (In re Parker), 139 F.3d 668 (9th Cir.), cert. denied, 119 S. Ct. 592 (1998).

Parker holds that a debtor is not required under § 521(2) to reaffirm an automobile loan in order to keep the automobile, where the debtor has kept up the payments. The court relied on the plain language of the section, which requires the debtor to file a statement of intention with respect to the collateral but does not limit the debtor's options to reaffirmation, redemption, or surrender. "[I]f applicable," the debtor must specify one of those three options according to §

521(A), but the court holds that the requirement to specify one of them is only applicable if the debtor chooses one of them. That approach is required by § 521(2)(C), which provides that nothing in § 521(2)(A) "shall alter the debtor's rights." Because the debtor is not required to reaffirm by § 521(2) in order to keep the automobile, "[t]he bankruptcy court's refusal to approve the reaffirmation agreement, as not in Parker's best interest, was thus within its discretion." 139 F.3d at 673.

The problem with the court's analysis is that it only shows (if it is correct) that section 521(2) does not require the debtor to reaffirm in order to keep the automobile. The security agreement in *Parker* likely included a provision making the filing of a bankruptcy petition a default (as part of what is called an "ipso facto" clause). Perhaps the court assumes that any such provision would be unenforceable; certainly the court does not address that issue. (The court does quote the bankruptcy court's statement that "my understanding of the law is, that as long as you keep paying for that automobile, you–that probably would mean that the original monthly [*sic*] rate you get to keep it.") Perhaps the creditor had not suggested that a bankruptcy default clause would be used to repossess the automobile absent reaffirmation, and thus the court did not think it was in Parker's best interest to reaffirm.

Thus, on the surface it seems that *Parker* resolves the issue for the Ninth Circuit; debtors may keep their automobiles without reaffirming if they have kept up and continue to keep up their payments. But because the court did not reach the issue of enforceability of a bankruptcy default clause, the issue may not yet be resolved. In any case, automobile lenders in California, and those with a national business, seem reconciled to allowing debtors to keep their automobiles in such cases. Regional lenders based elsewhere may need education on the Ninth Circuit practice, because the circuits continue to be split on whether § 521(2) requires redemption, reaffirmation, or surrender–but even such lenders are not at this point attempting to enforce bankruptcy default clauses.

2. The Sears Reaffirmation Saga and Recent Cases Concerning Whether Reaffirmation Should Be Approved

Certain creditors' reaffirmation practices have come under severe attack recently. The attorney representing a low income debtor should be aware of those practices and counsel the client appropriately.

The most dramatic attack on such practices has involved Sears, whose reaffirmation practices have cost it dearly. According to the Wall Street Journal, Sears has paid over $200 million in settlements with all 50 states, the Federal Trade Commission, customers and shareholders. 1999 WL-WSJ 5440108 (Feb. 10, 1999). Sears' practices are recounted at length in In re Melendez, 224 B.R. 252 (Bankr. D. Mass. 1998), which is the basis of the following brief and inadequate account. Sears used nonattorneys to aggressively seek reaffirmation of its credit card debt at § 341 hearings, regardless of debtors' ability to pay and regardless of whether the supposed collateral was a refrigerator or eyeglasses. (A law firm hired by Sears was fined $10,000 for aiding unauthorized practice of law by using nonlawyers to negotiate reaffirmation agreements. See In re Carlos, 227 B.R. 535 (Bankr. C.D. Cal. 1998).) Initially Sears' reaffirmation agreements listed settlement of nondischargeability claims as a reason for reaffirmation, even though in most cases no nondischargeability complaint had been filed. In 1995 that was held to be a potential violation of Rule 9011. In 1996 Sears stopped filing many of its reaffirmation agreements with the courts, which rendered the agreements unenforceable. That was discovered by the courts in 1997, and Sears' practice of collecting discharged debts under

unfiled reaffirmation agreements was held to be a violation of the discharge injunction. Massive litigation, including class actions, ensued. As it turned out, in many cases the supposed collateral could not be identified. Sears' supposed security interests in the merchandise it sold was based on language contained on the charge slip signed by the customer; there were serious questions whether that language was sufficient to create a security interest. Debtors' counsel had often provided poor advice and filed highly questionable declarations to the effect that the reaffirmations were in the best interest of the debtors and did not impose an undue burden on them.

Debtors' attorneys, especially those representing low income debtors on a pro bono basis, will seldom be justified in signing declarations in support of reaffirmations and should usually counsel debtors against reaffirmations. In the absence of such a declaration, a reaffirmation agreement is unenforceable unless approved by the bankruptcy judge as being in the best interest of the debtor and as not imposing an undue hardship on the debtor or the debtor's dependents. See § 524(c)(6) (but note exception for consumer debts secured by real property). It seems that judges in the Central District of California will seldom approve reaffirmation agreements unless there is a good reason for the reaffirmation (such as retaining an automobile where there has been a default on the loan) *and* the creditor makes substantial concessions (such as writing down the amount of the debt to the value of the automobile and reducing monthly payments). In credit card cases there will often be serious doubt whether the creditor is secured, what the value of the collateral is, and whether any needed credit disclosures were given when the reaffirmation agreement was solicited. See, e.g., In re Carlos, 215 B.R. 52 (Bankr. C.D. Cal. 1997) (holding that Sears' credit card charge form was insufficient to grant Sears a security interest in merchandise purchased and that best interest of debtor ordinarily precludes reaffirmation of unsecured debt); In re Kamps, 217 B.R. 836 (Bankr. C.D. Cal. 1998) (refusing to approve reaffirmation of credit card debt where, inter alia, debtor did not appear at reaffirmation hearing, Regulation Z disclosures were not made, creditor did not disclose to debtor her right to redeem collateral for its value, creditor did not establish that it held a valid security interest and did not establish the value of the collateral, court did not have sufficient information to determine whether reaffirmation was in debtor's best interest, and reaffirmation would impose an undue hardship on the debtor).

Finally, in lieu of seeking formal reaffirmation, some creditors are asking debtors to settle supposed claims of nondischargeability by agreeing to pay all or part of the debt. Some courts will treat such settlements as reaffirmation agreements and require compliance with § 524(c). If there is no actual contemplation of filing a nondischargeability complaint, or if such "settlement offers" are made routinely without any reason to believe that the debts are nondischargeable, the making of such offers may violate the automatic stay. In any case, the debtor's attorney should make sure the debtor knows to contact the attorney before signing any agreement; you may wish the debtor to contact you if any such settlement offers are made so that you can determine whether to take action against the creditor.

B. Section 523(a)(2) Exception from Discharge (fraud)

Cohen v. De La Cruz, 523 U.S. 213, 118 S. Ct. 1212 (1998). The Court held that the entire claim resulting from the commission of fraud was nondischargeable under § 523(a)(2), including treble damages, attorneys' fees, and costs awarded pursuant to a rent control statute against a landlord who defrauded tenants by charging them illegally excessive rent. The effect is to overrule the Ninth Circuit's decision in In re Levy, 951 F.2d 196 (9th Cir. 1991), which had held that punitive damages awarded in a fraud action were dischargeable because they were not, in the words of § 523(a)(2), "obtained by" the fraud. The Court in *Cohen* held that once it is determined that something (e.g., money, property, services, credit, a renewal of credit) was obtained fraudulently, then the entire debt that results is nondischargeable.

Attorneys for credit card companies will seek to use *Cohen* to add attorneys' fees, interest through the date of judgment, and other collection costs to the amount of the nondischargeable debt. (Note that in the Ninth Circuit a creditor in a nondischargeability action may receive a judgment for the debt along with a determination of nondischargeability. Cowan v. Kennedy (In re Kennedy), 108 F.3d 1015 (9th Cir. 1997).) Ninth Circuit authority supports the inclusion of interest through the date of judgment. See Cobe v. Smith, 229 B.R. 15 (Bankr. 9th Cir. 1998). Attorneys' fees will not be part of the nondischargeable debt (in fact, they will not even be part of a *dischargeable* debt) in the absence of a statutory, contractual, Rule 9011, or similar basis for their award–*Cohen* does not create liability for attorneys' fees. See Clark & Gregory, Inc. v. Hanson (In re Hanson), 225 B.R. 366 (Bankr. W.D. Mich. 1998). One case holds that contractual claims for attorneys' fees fall outside the purview of *Cohen* and thus are dischargeable, but the case's reasoning is highly questionable. See Wegmans Food Markets, Inc. v. Lutgen (In re Lutgen), 225 B.R. 37 (Bankr. W.D.N.Y. 1998).

C. Section 523(a)(6) Exception from Discharge (willful and malicious injury)

Kawaauhau v. Geiger, 523 U.S. 57, 118 S. Ct. 974 (1998). The Court held that negligence or recklessness will not satisfy the "willful and malicious" standard. Thus a doctor's treatment of a patient which fell far below the standard of care was not willful and malicious, and the resulting malpractice judgment was dischargeable in the doctor's chapter 7 case. The Court held that it is not enough that an act be done intentionally, and that injury result. If that were the standard, many debts would be nondischargeable. Instead, for an injury to be willful and malicious, the debtor must have actual intent to cause the injury. What is needed is a "deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." 118 S. Ct. at 977. Several courts have stated that *Geiger* overrules the previous Ninth Circuit leading case of Impulsora Del Territorio Sur, S.A. v. Cecchini (In re Cecchini), 780 F.2d 1440 (9th Cir. 1986). See, e.g., Gill Distrib. Centers v. Banks, 225 B.R. 738 (Bankr. C.D. Cal. 1998).

What is not clear is how *Geiger* applies to cases in which a debtor converts a secured party's property by selling or giving away the collateral. These cases may come up often in low income debtor representations. The debtor may, for example, have purchased a television on secured credit. Later the debtor needs cash and therefore sells the television in a yard sale. Is this a willful and malicious injury to the secured creditor's property interest (namely, the security interest in the television)? *Cecchini* dealt with converted funds and held that "When a wrongful

act such as conversion, done intentionally, necessarily produces harm and is without just cause or excuse, it is 'willful and malicious' even absent proof of a specific intent to injure." The only question under *Cecchini* would have been whether the sale of the television necessarily causes harm; that in turn could depend on whether the issue is harm to the property interest (sale makes enforcement of the security interest so difficult that it is a conversion) or ultimate harm to the finances of the secured party (after all, the debtor might still pay off the debt). Under *Geiger* we must ask whether the debtor deliberately or intentionally injured the property interest (or the secured creditor's finances) by selling the television.

Presumably a debtor need not actually harbor ill will toward the other party or desire to injure the other party for the sake of causing injury. A result is usually considered intentional when the person engaging in the action either wants that result to occur or is substantially certain that it will occur; that approach was taken in the Eighth Circuit opinion which the Supreme Court affirmed in *Geiger*. See 113 F.3d 848. Thus, in a crowded bar, a patron who wants another's seat and knocks him out with a punch to the jaw in order to get the seat will almost certainly be found to have willfully and maliciously injured the victim. It should not matter whether the batterer harbored ill will or wanted to harm the victim apart from the desire to obtain the seat; the batterer knew that injury was substantially certain to occur from the intentional act of punching the victim, and that is enough to make the injury intentional. The Supreme Court may have signalled its acceptance of that approach in *Geiger* by describing unintentional injury as injury "neither desired nor in fact anticipated by the debtor." 118 S. Ct. at 977. See also Avco Financial Services v. Kidd (In re Kidd), 219 B.R. 278 (Bankr. D. Mont. 1998) (sufficient if debtor knew harm was substantially certain to flow from actions, but mental condition of consumer debtor at time of transfer of collateral prevented him from knowing with substantial certainty that creditor would be harmed by the conversion); but see Berger v. Buck (In re Buck), 220 B.R. 999 (Bankr. 10th Cir. 1998) (debt dischargeable because no evidence of motive to harm creditor).

The Court in *Geiger* notes that the language of § 523(a)(6) "triggers in the lawyer's mind the category 'intentional torts' as distinguished from negligent or reckless torts." 118 S. Ct. at 977. Conversion is a traditional intentional tort. The Court goes on to say that some, but not all, conversions are willful and malicious. Id. at 978. By citing favorably Davis v. Aetna Acceptance Co., 293 U.S. 328, 55 S. Ct. 151 (1934), for that proposition, the Court may be suggesting that most conversions are willful and malicious; note the following discussion in *Davis*:

> But a willful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances. There may be a conversion which is innocent or technical, an unauthorized assumption of dominion without willfulness or malice. [Citations omitted.] There may be an honest but mistaken belief, engendered by a course of dealing, that powers have been enlarged or incapacities removed. In these and like cases, what is done is a tort, but not a willful and malicious one.

Id. at 331, 55 S. Ct. at 153. It seems unlikely that our hypothetical debtor would have had "an honest but mistaken belief" that he or she had the right to sell the television, but that is possible.

PRO BONO REPRESENTATION OF LOW INCOME CHAPTER 7 DEBTORS: AN OVERVIEW

PRO BONO REPRESENTATION OF LOW INCOME CHAPTER 7 DEBTORS: AN OVERVIEW[1]

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The goal of this training program is to provide you with an overview of the issues that may arise in pro bono representation of low income chapter 7 debtors in the Central District of California. After providing a brief overview of bankruptcy law and procedure, we will focus on two hypothetical referrals which you might receive. Please note that the characters in the hypothetical referrals are wholly fictitious. Any resemblance of any of them to any actual person is entirely accidental and unintended. Unless otherwise noted, references to statutory sections are to sections of the Bankruptcy Code (title 11 of the United States Code), and references to Rules are to the Federal Rules of Bankruptcy Procedure.

A. BRIEF OVERVIEW OF BANKRUPTCY LAW

The United States Constitution authorizes Congress "To establish ... Uniform laws on the subject of Bankruptcies throughout the United States." U.S. Const., Art. I, § 8. The Bankruptcy Reform Act of 1978 replaced the old Bankruptcy Act of 1898 (which had been substantially revised in 1938); the new law is the Bankruptcy Code (the "Code"), which comprises title 11 of the United States Code.[2]

1. A Greatly Simplified Overview of Bankruptcy Jurisdiction

The Bankruptcy Reform Act of 1978 (the BRA of 1978) also amended title 28 (the Judicial Code) to give bankruptcy judges plenary power over bankruptcy cases and over matters related to bankruptcy cases. But bankruptcy judges do not have life tenure and thus are not "Article III" judges; they are appointed by each circuit court of appeals for 14 year terms. 28 U.S.C. § 152. The Supreme Court held in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), that non-Article III bankruptcy judges could not constitutionally wield the full judicial power granted them by the BRA of 1978. Eventually Congress amended the

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[2]Important amendments to the Code were enacted in 1984, 1986, and 1994. Recently the National Bankruptcy Review Commission completed its work and recommended to the Congress substantial additional amendments, including amendments that would restrict the availability of consumer bankruptcy relief.

bankruptcy jurisdictional provisions of title 28 in conformity with the *Marathon Pipe Line* decision. The district courts now have original and exclusive jurisdiction over "cases under title 11," and original but not exclusive jurisdiction over bankruptcy-related civil proceedings. 28 U.S.C. §1334(a) & (b). The active bankruptcy judges for a district "constitute a unit of the district court to be known as the bankruptcy court for that district." 28 U.S.C. § 151. Under 28 U.S.C. § 157(a) the district court may refer any or all such cases and bankruptcy-related civil proceedings to the bankruptcy judges for the district; district judges have enough other work and thus the district courts have referred these matters en masse to the bankruptcy courts. Thus the Bankruptcy Court for the Central District of California, as a unit of the District Court for the Central District, exercises the jurisdiction granted to the District Court by 28 U.S.C. § 1334.

To comply with *Marathon Pipe Line* Congress divided bankruptcy matters into two categories: (1) those in which the bankruptcy judge could enter judgments and orders subject to review only by way of appeal, and (2) those in which the bankruptcy judge could not (without consent of all parties) enter judgments and orders but could only submit proposed findings of fact and conclusions of law to the district judge--the district judge would then enter any order or judgment after de novo review of findings or conclusions to which a party specifically and timely objected. See § 157(b)(1) & (c)(1). Category (1) consists of "all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. § 157(b)(1). An example of an order in case under title 11 would be the order granting the debtor a discharge; the bankruptcy judge enters that order and does not simply send proposed findings and conclusions to the district judge. Section 157(b)(2) of title 28 provides a nonexclusive list of "core proceedings." For example, the bankruptcy judge can enter the judgment for plaintiff or defendant in an adversary proceeding filed to determine dischargeability of a debt. See 28 U.S.C. § 157(b)(2)(I).

2. Sources of Applicable Substantive Law and Procedural Rules

The Code is divided into "chapters." Chapter 1, for example, consists of the 100 series of sections (§§ 101 through 110.) There is no chapter 2; the even numbered chapters were reserved for future developments, and thus far the only even numbered chapter is chapter 12 (the 1200 series of sections), which was added to the Code in 1986 and applies to family farmer debt adjustment cases. Chapters 1, 3, and 5 of the Code (the 100 series, 300 series, and 500 series of sections) apply to all bankruptcy cases unless the Code provides otherwise. Each of the remaining chapters (7, 9, 11, and 13) applies to cases filed under that chapter. See § 103. Thus each bankruptcy petition designates the chapter under which it is filed. See §§ 301, 302, and 303; Official Forms 1 (voluntary petition) and 5 (involuntary petition).[3] Under § 103(b), the first two subchapters of chapter 7 (sections 701 through 728) apply to chapter 7 bankruptcy cases.[4]

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[3]The only exception is for cases that are ancillary to foreign insolvency proceedings. They need not be filed under any particular chapter of the Code. See § 304.

[4]The third and fourth subchapters of chapter 7 apply to chapter 7 cases involving respectively stockbrokers and commodity brokers. See § 103(c) & (d). Chapter 9 applies to

Chapter 7 is sometimes referred to as liquidation bankruptcy or "straight" bankruptcy. Thus in today's program we will consider provisions from:

--chapter 1, such as § 101, which defines many of the terms used elsewhere in the Code);

--from chapter 3, such as §362, which provides for an automatic stay of creditor activity on filing of a bankruptcy petition;

--from chapter 5, such as § 523, which provides that certain debts are not dischargeable; and

--from chapter 7, such as § 727, which lists grounds for objection to discharge in a chapter 7 case, describes the scope of the discharge which a debtor may obtain in chapter 7, and states the grounds and procedures for revoking a chapter 7 discharge.

We will also briefly note some of the provisions of chapter 13, because chapter 13 is the principal alternative chapter under which consumer debtors may obtain debt relief.

Bankruptcy procedure is governed by the Code, by provisions of Title 28 (the Judicial Code), and by the Federal Rules of Bankruptcy Procedure (the "Rules") prescribed by the Supreme Court under the authority of 28 U.S.C. § 2075. Rule 9029 permits the district judges in a district to adopt Local Bankruptcy Rules or to delegate adoption of such Local Bankruptcy Rules to the bankruptcy judges. References in these materials to the Local Bankruptcy Rules are references to the Local Bankruptcy Rules adopted by Bankruptcy Court for the Central District of California.[5] (Of course, individual bankruptcy judges may have additional rules or requirements; the attorney should inquire as to any such rules or requirements.) The Code takes precedence over the Rules if they conflict. In fact, 28 U.S.C. § 2075 limits the Rules to procedural matters by providing that the Rules "shall not abridge, enlarge, or modify any substantive right." Of course, if a party fails to follow the procedures set forth in the Rules, the party's substantive rights may be affected. (For example, Rule 4007 sets the deadline for creditors to file complaints alleging nondischargeability of debts under certain provisions of § 523; the debts are discharged unless the creditor files a timely complaint.)

Bankruptcy procedure also involves the use of Official Forms promulgated by the Judicial Conference and in some cases Local Rules Forms approved by the relevant Bankruptcy Court. (These materials include completed forms for filing of a chapter 7 case by the hypothetical Garcia debtors, as well as a motion by the Garcia's to avoid a security interest on personal property which impairs an exemption.) Rule 9009 requires use of the Official Forms "with alterations as may be appropriate." The Official Forms include the

--Voluntary Petition (Form 1);

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municipal bankruptcies (such as Orange County's). Chapter 11 applies to business reorganizations; please do not confuse chapter 11 (the 1100 series of sections in the Bankruptcy Code) with Title 11, which is the entire Bankruptcy Code. Chapter 12 applies to family farmer debt adjustments, and chapter 13 applies to adjustment of debts of individuals with regular income.

[5]Any attorney appearing before the Bankruptcy Court for the Central District should be prepared to state that he or she has read the Rules, the Federal Rules of Civil Procedure and of Evidence, and the Local Bankruptcy Rules in their entirety.

--Application and Order To Pay Filing Fees in Installments (Form 3);
--Schedules (Form 6) and Statement of Financial Affairs (Form 7), both of which must be filed with the petition or within 15 days after filing of the petition pursuant to Rule 1007;
--Chapter 7 Individual Debtor's Statement of Intention with regard to collateral securing consumer debts, which, pursuant to §521, must be filed within 30 days after the filing of the petition but no later than the date of the § 341 meeting of creditors;
--Notice of Commencement of Case (Form 9), which the clerk will send to all scheduled creditors, and which informs them of the automatic stay and of various deadlines (including the claims bar date, the deadline for filing complaints objecting to the grant of a discharge, and the deadline for the filing of complaints under § 523(a)(2), (4), (6) or (15) alleging that particular debts are excepted from the discharge);
--Proof of Claim (Form 10);
--versions of the Caption (Forms 16A, 16B, 16C, and 16D) to be used on papers filed in the case and on complaints and other papers filed in adversary proceedings;
--Notice of Appeal (Form 17); and
--Discharge of Debtor (Form 18) to be entered as an order if the debtor obtains a discharge of any debts in the case.

Some of the Official Forms may be purchased at stationery stores. Packets of forms for use in filing chapter 7 petitions (and petitions under other chapters of the Code) may be purchased at the commercial copy center located near the court clerk's office; the forms may also be downloaded from the court's World Wide Web site (http://www.cacb.uscourts.gov/). Many practitioners use computer programs that allow entry of information and that then generate the Official Forms with the appropriate information filled in.

Appendix IV to the Local Bankruptcy Rules includes approved Local Rules Forms. Use of most of the Local Rules Forms is optional.

Completed forms for the filing of a chapter 7 case by hypothetical debtors ("Mr. and Mrs. Garcia") are attached. Also attached is a completed Local Rules Form for a motion to avoid a security interest in otherwise exempt personal property under § 522(f).

3. A Brief Overview of Consumer Bankruptcy Law and Practice

a. The Automatic Stay

A bankruptcy case is commenced by the filing of a petition. The commencement of the case operates as a stay of virtually any actions creditors might wish to take in connection with the debtor's debts, other than actions taken to participate in the bankruptcy case. Collection suits are stayed, and new ones cannot be filed. See § 362(a)(1). Enforcement of prepetition judgments is stayed. See §362(a)(2). Creditors cannot enforce existing liens, cannot obtain new liens, and cannot exercise setoff rights. See § 362(a)(3)-(5), (7). Creditors cannot take any action to "collect, assess, or recover a [prepetition] claim against the debtor." Thus a creditor cannot permissibly telephone the debtor to demand payment or send a letter to the debtor demanding payment. (However, a creditor probably does not violate the stay by contacting the debtor to suggest that the debtor reaffirm a debt under § 524(c).)

Creditors (typically secured creditors) may seek relief from the stay under §362(d) by motion. Typically the relief sought is permission for a secured creditor to enforce a lien securing a debt that is in default. A secured creditor will be entitled to relief from the stay if, inter alia, (1) the value of its interest in the collateral is not adequately protected or (2) the collateral is not necessary for an effective reorganization and the liens on the property exhaust its value. See § 362(d)(1) & (2). Chapter 7 cases do not involve reorganization and thus secured creditors probably need only prove that the collateral is fully encumbered. However, relief from stay should not be granted if it would frustrate the debtor's right to redeem property under § 722. If necessary the court should invoke its broad powers under §105(a) to protect the redemption right.

In any event the automatic stay will terminate when the case is closed or dismissed, or when the debtor is granted or denied a discharge, whichever occurs first. See §362(c)(2).[6] If the debtor receives a discharge, the discharge injunction of §524(a) will come into effect as the automatic stay terminates.

b. The Bankruptcy Estate and the Debtor's Exemptions

The commencement of the case also creates a bankruptcy estate consisting initially of almost all of the debtor's interests in property; in California, the estate will also usually include all of the debtor's and debtor's spouse's interests in community property. See §541(a)(1) & (2). (But the estate does not include the debtor's interest in an ERISA qualified pension plan or the debtor's state law protected spendthrift trust interests. See §541(c)(2); Patterson v. Shumate, 504 U.S. 753 (1992).) The debtor exempts some or all of the property of the estate under § 522; the exempted property is no longer property of the estate. In the absence of timely objection to the debtor's claim of exemptions, the property claimed as exempt is exempt, even if there is no basis for the claim of exemption. See § 522(l); Taylor v. Freeland & Kronz, 503 U.S. 638 (1992). (But other sanctions can be imposed on the debtor or debtor's lawyer for making a baseless claim of exemption.)

Section 522(b) gives debtors the option to choose the exemptions that the debtor would have under nonbankruptcy debtor-creditor law or (unless a state opts out) the bankruptcy exemptions listed in §522(d).[7] California has opted out but still gives debtors a choice. In addition to nonbankruptcy federal exemptions (such as for Social Security benefits), debtors may use their nonbankruptcy state law exemptions (Cal. Code Civ. Proc. §§704.010 et seq.) or an alternative set of California law exemptions available only in bankruptcy. See Cal. Code Civ. Proc. §§703.130 & 703.140.

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[6]The automatic stay's prohibition of acts against property of the estate terminates as to an item of property when that property ceases to be property of the estate. See § 362(c)(1). But other aspects of the stay may continue in effect.

[7]The state or local law applicable to a debtor's exemptions is the state or local law of the place where the debtor was domiciled for more of the 180 days prior to the filing of the petition than anywhere else. See § 522(b).

Under § 522(m) each debtor in a joint case is entitled to his or her own exemptions. California has attempted to prevent that; where an exemption provision contains a dollar limit, Cal. Code Civ. Proc. § 703.110(a) purports to limit the married debtors jointly to that amount rather than allowing each to exempt property in that amount. For example, § 703.140(b)(5) allows a debtor to exempt $800 in interest in any property plus any unused amount of the $15,000 homestead exemption provided in §703.140(b)(1). A single debtor who does not exempt a homestead may thus exempt $15,800 of any property. Under § 703.110(a) a married couple has the same $15,800 exemption; arguably § 522(m) preempts this result and allows each spouse to exempt $15,800 each, for a total of $31,600. However, the Ninth Circuit has held that § 703.110(a) is not preempted by § 522(m), and that states which opt out are free to disregard § 522(m). Talmadge v. Duck (In re Talmadge), 832 F.2d 1120 (9th Cir. 1987); accord First National Bank of Mobile v. Norris, 701 F.2d 902, 905 (11th Cir.1983); but see Cheeseman v. Nachman, 656 F.2d 60 (4th Cir.1981) (holding that § 522(m) must be respected even where a state opts out of the § 522(d) exemptions). In your author's opinion, *Cheeseman* reaches the correct result. The Supreme Court's decision in Owen v. Owen, 500 U.S. 305 (1991), undercuts *Talmadge* by holding that states cannot opt out of the lien avoidance provisions of § 522(f); states thus have less freedom to shape exemption policy than the Ninth Circuit panel in *Talmadge* may have thought. Arguably states may not opt out of § 522(m) any more than they may opt out of § 522(f). In a proper case, the Ninth Circuit might be willing to revisit *Talmadge*, and because *Talmadge* has been undercut by later Supreme Court authority, a panel of the Ninth Circuit probably would be entitled to refuse to follow *Talmadge*; an en banc decision probably would not be required.

Even under *Talmadge*, however, most low income consumer debtors who are not homeowners can exempt all of their property using the specific exemptions in Cal. Code Civ. Proc. § 703.140(b) and the $15,800 "wildcard" exemption under § 703.140(b)(5).

c. Claims and Dividends

In each chapter 7 case, a trustee is appointed by the United States trustee. See §701(a). The trustee for the case (not the United States trustee) collects and liquidates the property of the estate (not including property exempted from the estate). See § 704(1). Property subject to an unavoidable lien will generally only be sold by the trustee if it can be sold for more than the amount of the lien (and of any exemption) so that value can be generated for the estate. The lien will be paid first out of the proceeds of sale of the property subject to the lien. (Where a lien or exemption or a combination of the two exhausts the value of an item of property, the trustee will abandon it under § 554 or else allow the debtor or the lien holder to take it under § 725.) Any remaining proceeds of liquidation of the estate will be used to pay administrative expenses in the bankruptcy case and other priority claims. See § 726. Then any remaining money is paid pro rata to holders of allowed general unsecured claims as a "dividend" on their claims. Id.

In chapter 7 cases a creditor generally must file a proof of claim in order for the claim to be allowed. See Rule 3002(a). The deadline (the "bar date") for filing a timely proof of claim is usually 90 days after the first date set for the meeting of creditors. See Rule 3002(c). However, in most consumer chapter 7 cases, there will be no money to pay anything on general unsecured

claims. If it appears from the debtor's schedules that no dividend will be paid, the notice of the meeting of creditors may include a statement that creditors need not file claims until and unless they are notified that a dividend may be paid. See Rule 2002(e). Thus in many consumer chapter 7 cases, there is no bar date for filing of claims.

d. The Discharge

If no complaint objecting to the granting of a discharge is timely filed, then the chapter 7 debtor receives a discharge of debts. See § 727; Rule 4004. (Note that only individuals–flesh and blood human beings–receive discharges in chapter 7 cases; partnerships and corporations do not. See §727(a)(1).) If such a complaint is filed, then the court tries the matter and determines whether a ground for denial of discharge under §727(a)(2)-(9) has been proven.

The chapter 7 discharge covers prepetition debts and debts that are treated as though they arose prepetition. See § 727(b). A debt is discharged whether or not the creditor files a proof of claim and whether or not the claim is allowed. Id. However, certain debts are not dischargeable in a chapter 7 case. See § 523. Creditors seeking to except debts from the discharge under

–§ 523(a)(2) (fraud);

–§ 523(a)(4) (fraud or defalcation of a fiduciary, embezzlement, or larceny);

–§ 523(a)(6) (willful and malicious injury to person or property); or

–§ 523(a)(15) (certain marital dissolution property settlement obligations)

must file a timely complaint in the bankruptcy court alleging nondischargeability. See § 523(c); Rule 4007. If no timely complaint is filed, the debt will be discharged. If one of the other subsections of §523(a) is the basis for a claim of nondischargeability, then the creditor need not raise the matter at all in the bankruptcy case, but can simply proceed (once the automatic stay terminates) to collect the debt. The debtor may wish in such cases to file a complaint in the bankruptcy court to determine dischargeability or to seek to have the creditor held in contempt for violation of the discharge injunction under §524. (The case can be reopened for such purposes if it has been closed. See § 350.) The debtor's other choice is to plead the discharge as an affirmative defense in the creditor's collection suit, in which case the court handling that case (typically a state court) will determine whether the debt was discharged in the chapter 7 case.

The chapter 7 discharge voids judgments to the extent they would impose personal liability on the debtor for discharged debts, §524(a)(1), and prevents any such void judgments from being the basis for creation of additional liens on the debtor's property. The discharge also acts as an injunction against any creditor activity seeking to hold the debtor personally liable for the discharged debts. See §524(a)(2). It also protects the future community property interests of the debtor and the debtor's spouse from liability for a discharged debt, even if the spouse did not file a bankruptcy petition and is personally liable for the debt.[8] This is one of the few exceptions in the Code to the rule that only the person who files for bankruptcy is entitled to the benefit of the discharge. Note that the spouse pays a price for this benefit: the spouse's interest in the

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[8]But this protection is available only to the extent the spouse could have discharged the debt had he or she filed a bankruptcy petition. See § 524(a)(3) & (b)(2).

community property comes into the estate even though the spouse does not file a bankruptcy petition.

e. The Avoiding Powers

The avoiding powers usually operate to the benefit of the unsecured creditors as a body. Preferences and fraudulent transfers are recovered; liens are avoided; fraudulently incurred obligations are eliminated. The effect may be to increase the dividend paid on general unsecured claims. The issue here, however, is the effect of the avoiding powers on the chapter 7 debtor. If the trustee recovers property the debtor may be able to exempt it under § 522(g). If the trustee fails to utilize the avoiding powers to recover property that the debtor could exempt, then the debtor may utilize those powers. See §522(h).

In addition, §522(f) gives the debtor the right to avoid certain liens that impair the debtor's exemptions. Under § 522(f)(1)(A) the debtor can avoid judicial liens that would prevent the debtor from obtaining the full benefit of the exemptions to which the debtor would have been entitled in the absence of the lien. (But judicial liens securing family support obligations cannot be avoided under §522(f).) Suppose the debtor has $8,000 worth of General Motors stock, none of which can be exempted outside bankruptcy but all of which could be exempted under Cal. Civ. Code § 703.140 in the debtor's bankruptcy case. Suppose a creditor with a $20,000 judgment obtained an execution lien on the stock 92 days before the debtor filed his petition. Under § 522(f)(1)(A) the debtor could avoid the execution lien so that he could enjoy his full $8,000 exemption in the stock.

Section 522(f)(2) also gives the debtor the right under certain circumstances to avoid consensual liens (typically Article 9 security interests) that impair the debtor's exemptions. Exemptions ordinarily do not affect consensual liens. Exemptions simply protect property from being taken for payment of judgments. A debtor who gives a consensual lien on property ordinarily cannot use an exemption to defeat the consensual lien. In effect consensual liens have priority over a debtor's exemptions under nonbankruptcy law. However, if

–the property encumbered by the consensual lien is of a kind listed in § 522(f)(1)(B) (including inter alia household furnishings, household goods, musical instruments, clothing and jewelry); and

–if the security interest is nonpossessory (i.e., the collateral is not in the possession of the secured creditor); and

–if the security interest is not a purchase money security interest,

then the debtor can avoid the lien to the extent needed to enjoy the full exemption to which she would have been entitled had the lien not existed. We will discuss this further below in the context of our hypothetical Mrs. Garcia's piano.

Finally, the debtor's right to redeem certain property under §722 may be seen as a kind of avoiding power. An undersecured claim is divided by §506(a) into a secured claim portion and an unsecured claim portion. For example, if a creditor's $7,000 debt is secured only by a security interest in a car worth $4,000, the creditor will have a $4,000 secured claim and a $3,000 unsecured claim. The trustee will not be interested in the car; there is no value for the estate. The discharge will eliminate the debtor's personal liability on the $7,000 debt, but it will not

affect the $7,000 lien on the car. In order to keep the car, the debtor would have to pay off the full $7,000 lien. (If there has been no default, the debtor might have the right to pay it off in accordance with the amortization schedule in the security agreement, but the full debt would still need to be paid.) Section 506(d) might on its face seem to provide that the lien would be stripped down to the $4,000 value of the car, with the other $3,000 of lien being voided. But the Supreme Court has held that § 506(d) does not have that effect. Dewsnup v. Timm, 502 U.S. 410 (1992). However, the debtor may be able to accomplish the same thing using § 722.

Under § 722 the debtor may redeem certain kinds of personal property from liens securing dischargeable consumer debts by paying the amount of the allowed secured claim. Thus, for example, if the debtor owes $5,000 on a loan secured by an automobile valued at $3,000, the debtor may redeem the automobile from the lien (and thus own it free and clear) by paying the secured creditor $3,000. In effect, then, § 722 allows the lien to be stripped down to the value of the collateral if the debtor redeems the collateral. Note that § 722 applies to consumer goods which are exempted by the debtor or abandoned by the trustee. It does not apply to real estate. The cases hold that redemption must be accomplished by a lump sum payment; the debtor is not entitled to redeem property by making installment payments. See, e.g., In re Polk, 76 B.R. 148 (Bankr. 9th Cir. 1987).

f. Reaffirmation

A reaffirmation is a promise by the debtor to pay a debt which would otherwise be unenforceable due to the discharge. Under the common law, a new promise to pay all or part of a debt which has become unenforceable due to a bankruptcy discharge or the passing of a statute of limitations would be enforceable even without additional consideration. (The creditor need not give any additional value for the new promise, which can be made unilaterally by the debtor.) In many states such a promise must be made in a signed writing. Under the old Bankruptcy Act debtors reaffirmed so many debts under postdischarge pressure from creditors that the fresh start policy of the law was substantially undercut. As a result, Congress severely limited the enforceability of such promises when it enacted § 524(c) of the Bankruptcy Code.

Section 524(c) provides conditions for enforceability of "[a]n agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable ...."[9] Under § 524(c) an agreement to pay all or part of a debt which would

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[9]Courts have held that the reference to "agreement" § 524(c) means that the debtor cannot reaffirm a debt without the creditor's agreement, even though at common law a reaffirmation was a unilateral promise by the debtor. See In re Lindley, __ B.R. __, 1998 WL 25582 (Bankr. N.D. Ill. 1998); In re Turner, 208 B.R. 434 (Bankr. C.D. Ill. 1997), aff'd sub. nom. Turner v. Hopper, No. 97-CV-2149 (C.D. Ill. September 29, 1997). More likely the reference to agreement reflects the possibility that (1) a debtor will settle nondischargeability litigation by agreeing to reaffirm all or part of a debt or (2) obtain a secured creditor's agreement to permit satisfaction of a lien on property by payment of part of the debt in installments. In any case, the well-counseled debtor will likely seek concessions of some kind from the creditor in exchange for reaffirming all or part of the debt, and thus there will usually in fact be an agreement.

otherwise be discharged is enforceable only to the extent it is enforceable under nonbankruptcy law. Even then it is enforceable only if (1) the promise is made before the discharge is granted, (2) the agreement contains the required disclosures of a rescission right and of the absence of any obligation to reaffirm, (3) the agreement is filed with the court (along with a declaration of the debtor's attorney if the attorney represented the debtor in negotiating the agreement), (4) the debtor has not rescinded the agreement within the rescission period, (5) the court at a hearing informs the debtor of the effect and consequences of reaffirmation and that reaffirmation is not required, and (6) if the debtor was not represented by an attorney in negotiating the reaffirmation, the court approves the reaffirmation as not imposing an undue hardship and as being in the best interest of the debtor.

The declaration which the attorney must file if the attorney represents the debtor in negotiating the reaffirmation agreement is onerous. The attorney must swear that the agreement is a fully informed and voluntary agreement, that the agreement does not impose an undue hardship on the debtor or a dependent of the debtor, and that the attorney has fully advised the debtor of the legal effect and consequences of the agreement and of any default under the agreement. Most attorneys will be very reluctant to swear to such matters, especially to the absence of undue hardship. It is difficult for an attorney to be sure that the agreement will not impose an undue burden, and now an attorney has been sanctioned for failing to counsel the debtor sufficiently and for declaring that there would not be an undue hardship when an investigation of the facts would have shown that there would be an undue hardship. In re Bruzzese, 214 B.R. 444 (Bankr. E.D.N.Y. 1997).

The rescission period lasts until the discharge is entered or until 60 days after the agreement is filed with the court, whichever is later. As a result, creditors must be cautious in agreeing to reaffirmation in lieu of filing a nondischargeability complaint under § 523(a)(2), (4), (6), or (15). If no complaint is filed by the Rule 4007 deadline, the debtor can rescind the reaffirmation agreement and perhaps leave the creditor without a remedy. It is possible that a debtor commits fraud by signing a reaffirmation agreement with the intent to rescind once the Rule 4007 deadline passes.

In most cases you will likely want to counsel your low income clients not to reaffirm any debts. Debtors sometimes wish to repay debts out of a sense of moral obligation. You should tell the client that he or she is free to repay discharged debts; reaffirmation is not necessary. See § 524(f). The consequence of a reaffirmation is that the debtor will be required to repay the debt on pain of wage garnishment or other creditor's remedy. Even if the debtor loses his or her job or becomes ill, the reaffirmed debt will be legally owed. When that is explained, most debtors will decide that moral obligation does not require them to reaffirm debts.[10]

Usually the only case in which reaffirmation makes sense is the case in which the debtor wants to keep property that would otherwise be lost to a secured creditor. Suppose the debtor

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[10]However, a failure to reaffirm may create a moral hazard for the debtor who has a serious moral commitment to repay a particular debt. The debtor may later decide not to pay the debt, in the absence of a legal obligation to do so. The debtor's desire to avoid a situation in which the debtor may be led to violate his or her moral standards or sense of integrity may lead the debtor to choose to be legally bound. The choice must be the debtor's.

owns an automobile worth $3,000[11] and owes $2,500 on a debt secured by the car. Suppose the debtor missed three monthly car payments and that the secured creditor accelerated the debt prior to the debtor's chapter 7 bankruptcy filing. Once the automatic stay terminates, the creditor will be entitled to repossess the car unless the debtor pays the $2,500 immediately. The debtor does not have $2,500 and thus will lose the car unless an agreement can be reached with the creditor. If the debtor is willing to reaffirm the debt, the creditor may be willing to allow it to be paid off installments; perhaps the creditor will agree to give the debtor six months to make up the arrearages if the debtor meanwhile will make the regular monthly payments.

It would be possible for the debtor not to reaffirm and then, once the debt is discharged, to propose to pay the $2,500 off in voluntary installment payments. The creditor could agree that as long as the debtor kept up the installments (and kept insurance on the car) the creditor would not repossess the car. But note that the debtor could at any time simply stop making payments without incurring any personal liability; the debtor cannot make an enforceable agreement to pay the debt without complying with § 524(c), which requires, inter alia, that the agreement be made before the debt is discharged. Thus the creditor's only remedy would be to repossess the car, which might well have depreciated substantially by the time the debtor decides to stop making payments. That makes it unlikely that the creditor would agree to forbear from repossessing the car. (As a matter of economics, it might make sense for the creditor to agree so long as the voluntary payments pay down the debt faster than the car depreciates in value, but given that the

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[11]If the debtor proposes to keep the car, it appears that the car should be valued at its replacement cost. See Assoc. Comm'l Corp. v. Rash, __ U.S. __, 117 S.Ct. 1879 (1997). That is not necessarily the "retail" blue book value, nor is it the "wholesale" blue book value. The question is what the debtor would have to pay in a market accessible to the debtor for a similar automobile. It seems likely the debtor could purchase a similar car from a private party for somewhere between the retail and wholesale blue book values. As the Supreme Court recognized, the retail price at which a used automobile can be purchased from a dealer may be higher than the true replacement cost of the debtor's automobile, because the dealer may recondition cars it sells or provide warranties or other services:

> Our recognition that the replacement-value standard, not the foreclosure-value standard, governs in cram down cases leaves to bankruptcy courts, as triers of fact, identification of the best way of ascertaining replacement value on the basis of the evidence presented. Whether replacement value is the equivalent of retail value, wholesale value, or some other value will depend on the type of debtor and the nature of the property. We note, however, that replacement value, in this context, should not include certain items. For example, where the proper measure of the replacement value of a vehicle is its retail value, an adjustment to that value may be necessary: A creditor should not receive portions of the retail price, if any, that reflect the value of items the debtor does not receive when he retains his vehicle, items such as warranties, inventory storage, and reconditioning.

Id. at 1886 n. 6.

debtor was already in default and that the creditor had already accelerated the debt before the debtor filed the chapter 7 petition, the creditor is not likely to be willing to forbear in return for the possibility of voluntary payments.) Thus, by reaffirming a secured debt, the debtor may be able to retain possession of property which the debtor would otherwise lose. (As we note below, however, where the collateral is difficult for the creditor to repossess or has little resale value, the creditor may not bother repossessing even if the debtor does not reaffirm the debt; thus reaffirmation may provide little benefit to the debtor in such cases.)

In addition, reaffirmation negotiations may lead to a reduction in the amount of the lien on such property. Suppose in the example that the car was worth only $2,000, and thus the creditor's $2,500 debt was undersecured. The debtor might well be able to convince the creditor to reduce the amount of the lien on the car to $2,000 in exchange for the debtor's reaffirmation of $2,000 of the debt.

Another legitimate use of reaffirmation is in connection with settlement of nondischargeability litigation. Suppose a creditor has a $5,000 claim which, according to the creditor, is for a loan obtained by way of the debtor's fraud. The creditor and debtor could litigate the dischargeability of the debt under § 523(a)(2), but instead they may choose to settle. The settlement could take the form of a reaffirmation by the debtor of part of the debt, for example, a reaffirmation of $3,000 of it.

The debtor may also want to reaffirm a debt in order to not to disrupt a relationship with the creditor, although reaffirming is usually not necessary. For example, if the debtor owes $800 to her sister, she may choose to reaffirm to avoid estrangement from the sister. On the other hand, the sister will probably be satisfied with an oral assurance that the debtor intends to repay the debt voluntarily under § 524(e). Similarly, the debtor may want a particular physician to continue to provide treatment. A reaffirmation of the debt owed to the physician for past services will likely cause the physician to continue to see the debtor. (Note that if the physician demands payment of a discharged debt, the physician violates the discharge injunction under § 524(a)(2), but a mere refusal to provide service not coupled with an overt demand for payment probably does not violate the discharge injunction.) Once again, however, the physician will likely be satisfied with an oral assurance that the debtor intends to pay the discharged debt voluntarily, especially if the oral assurance is coupled with a partial payment on the discharged debt. In these cases any benefits of reaffirming a debt will usually be outweighed by the burdens: the time and cost involved in complying with § 524(c) so as to form a binding reaffirmation agreement, and the legally enforceable duty to pay which results.

A desire to obtain postpetition credit leads many debtors to reaffirm debts to credit card issuers. Again, in most cases the benefits of such a reaffirmation do not justify the costs. A credit card issuer may say that if the debtor reaffirms the debt, then the issuer will not cancel the card and will continue to allow the debtor to use it. But usually this is extremely expensive credit. A debtor may reaffirm a $1,000 debt owed to a credit card issuer and in return get to use a credit card with a $500 credit limit! The effective interest rate on the new credit is astronomical. Debtors should be counseled against such improvident reaffirmations and told that they may be able to get other credit. After all, a debtor who receives a chapter 7 discharge has been freed of all or most of his or her debts and cannot receive another chapter 7 discharge without waiting at least seven years (from the filing of the petition) before filing another petition. The debtor may

well be considered credit worthy by other credit card issuers.

Finally, we must consider § 521(2). This provision was the result of a political compromise in Congress. On the one hand it requires the debtor:

> –to make a statement of intention with respect to property securing consumer debts (specifying whether the property will be retained or surrendered and "if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property"); and
> –then to carry out that intention within 45 days.

See § 521(2)(A) & (B). But then § 521(2)(C) provides that "nothing in subparagraphs (A) and (B) * * * shall alter the debtor's * * * rights with regard to such property." It is possible to read § 521(2) as requiring debtors to either redeem, reaffirm, or surrender property securing consumer debts. It is also possible to read it as simply requiring the debtor to state whatever the debtor's intentions are.

For example, suppose a debtor did not default prepetition on her car loan; again assume a $2,500 debt secured by a $3,000 automobile. If she files a chapter 7 petition, must she redeem, reaffirm or surrender the automobile? Or can she just keep on making payments (out of postpetition earnings, which under §541(a)(6) are not property of the estate) and keep the car? If she must redeem, reaffirm, or surrender the car, then she will either have to pay $2,500 in a lump sum to the creditor, or obtain the creditor's agreement to a reaffirmation,[12] or lose the car. It is hard to understand why Congress would have wanted to put the debtor to these choices where the debtor has not missed any payments on the car; and it seems that § 521(2)(C) prohibits courts from reading § 521(2)(A) & (B) to have such a substantive effect on the debtor's property rights. On the other hand, if the debtor does not have to redeem, reaffirm, or surrender, the debtor would be permitted to keep the car even after discharging the debtor's personal obligation on the car loan; in effect the loan will have been turned into a nonrecourse obligation. The debtor could at any time walk away from the car no matter how much it has depreciated, give the creditor the keys, and have no personal liability. That places the creditor in a difficult position. If the debtor is required to reaffirm the debt in order to keep the car, then the creditor once again will have the bargained-for personal liability of the debtor.

The Circuits are split on the meaning of § 521(2), and the Ninth Circuit has not yet spoken. See Mayton v. Sears, Roebuck & Co. (In re Mayton), 208 B.R. 61 (Bankr. 9th Cir. 1997). There is however a Ninth Circuit Bankruptcy Appellate Panel decision speaking to the issue. Id. The BAP held that the debtor is not limited to the options of redeeming, reaffirming, or surrendering and that § 521(2) "is essentially a notice statute." Id. at 68. The result is that if the debtor is not in default, the debtor need not reaffirm the debt in order to retain the collateral.

Thus it seems that in the Central District there is no need for debtors to reaffirm secured consumer debts in order to keep the collateral where the debtors have not missed payments. When the automatic stay terminates on grant of the discharge, the secured creditor still will not be able to repossess the collateral, because the debtor will not be in default.

There is, however, one additional wrinkle: what if the security agreement provides that

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[12]See discussion above in fn. __ of the cases holding that the creditor's agreement is necessary for a reaffirmation, and also of the author's view critical of those cases.

the debtor's filing of a bankruptcy petition or discharge of personal liability on the debt will be considered an event of default? If such a provision is enforceable, then once the automatic stay terminates, the secured creditor would be entitled to repossess the collateral even if the debtor has kept current on all payments. Secured loans are not executory contracts, and thus the § 365(e)(1) prohibition on enforcement of bankruptcy default clauses does not control. There is, in fact, no express provision of the Bankruptcy Code which prohibits enforcement of such a default clause. It is possible that enforcement of such a provision violates the policies behind the bankruptcy laws, or that courts could extend the nondiscrimination policy of § 525 to cover such cases. See Lowry Fed. Credit Union v. West, 882 F.2d 1543 (10th Cir. 1989) (refusing to allow enforcement of bankruptcy default clause where creditor did not show that debt exceeded value of collateral or that collateral was depreciating more quickly than debt would be paid off); In re Winters, 69 B.R. 145 (Bankr. D. Ore. 1986). But the secured lender can argue that it is substantially prejudiced by conversion of the loan to a nonrecourse obligation, and that its interests also deserve to be given weight. Some courts have allowed such bankruptcy default clauses to be enforced. See, e.g., GMAC v. Bell (In re Bell), 700 F.2d 1053 (1983).

Thus far it does not seem that secured creditors in the Central District are attempting to use bankruptcy default clauses to repossess collateral where the debtor keeps up payments. Thus, at this time it seems that the prudent course for debtors who are not in default is to simply keep on making payments and not to reaffirm the secured debt.

The panelists at the training program will also discuss the recent Sears controversy over unfiled reaffirmation agreements and two important recent decisions by Judge Bufford dealing with reaffirmation.

B. FACTS CONCERNING THE HYPOTHETICAL DEBTORS

Assume the date is the present (February 21, 1998), and that your interviews with the clients have developed the following facts.

1. Mr. and Mrs. Garcia

Al and Beth Garcia have been married for fifteen years and have three children. Mrs. Garcia earns $7 per hour working part-time for FashionCo, a retail clothing store. Mr. Garcia is a highly skilled machinist but has been out of work for about six months. His former employer, MetalCo, laid him off after its defense-related orders fell. The COBRA health insurance coverage he could have purchased seemed very expensive, and thus he declined it. Then the Garcias' youngest child (Teresa) developed pneumonia and nearly died. Teresa is well now, but the unpaid medical bills total $30,000.

When Mr. Garcia learned that he would be laid off, he borrowed $10,000 from the MetalCo credit union, giving the credit union a security interest in the family's 1986 Plymouth Voyager and in a piano owned by Mrs. Garcia. (The piano was an antique, had been owned by Mrs. Garcia's great grandmother, and was Mrs. Garcia's pride and joy. Mrs. Garcia signed the security agreement but did not obligate herself personally on the $10,000 debt.) Mr. Garcia deposited the money in a savings account at First Bank, bringing the account balance to $14,000.

After the layoff he looked diligently for two months for another job. He found nothing, in part because he could not get a favorable recommendation from MetalCo; when Mr. Garcia found out that his supervisor (Mr. Vincent) had recommended that Mr. Garcia be one of the employees to be laid off, Mr. Garcia got into a fistfight with Mr. Vincent. In fact, Mr. Vincent then sued Mr. Garcia and obtained a $15,000 default judgment for battery.

After failing to find work, Mr. Garcia in desperation withdrew $5,000 from the First Bank savings account and took it to Las Vegas. He hoped to strike it rich at the blackjack tables but instead lost it all. He was so disgusted that he threw away all the receipts he had pertaining to the trip and to his losses. Since then the Garcia's have run up $20,000 in credit card debt. They have made minimum payments on their credit cards out of Mrs. Garcia's earnings and out of their savings account. They failed to pay the $900/month rent on their modest three bedroom apartment last month and are about to fail to pay it for a second month.

Mrs. Garcia recently held a yard sale to raise money. At the sale she sold the family's dining room set for $500 cash. She did not get any identifying information about the purchasers. The Garcia's had purchased the dining room set from Furniture Store on secured credit and still owed $1,500 on it, including the amounts of two monthly payments which were overdue.

In addition to the Voyager, the Garcia's owned a 1992 Ford Escort (which was titled in Mr. Garcia's name alone). Concerned that creditors would somehow take the Escort from them, he retitled it in the name of their first child, Rick. They also took $2,000 from the savings account and put it a savings account in the name of their second child, Stephanie.

Other than the assets mentioned above, the Garcias' assets consist of a modest amount of furniture, clothing, and other household goods, their interest in MetalCo's ERISA qualified pension plan (worth approximately $40,000), and jewelry (including wedding rings) worth about $2,000 retail. The First Bank savings account is nearly exhausted; it has only $700 in it now. The Garcia's expect to receive a $3,000 Earned Income Tax Credit from the federal government for 1997. They also think that Mrs. Garcia's uncle Antonio may pass away soon and leave her $100,000.

Other than the debts mentioned above, the Garcias owe $500 in past due gas and electric bills, and $300 in past due telephone bills. The gas, electric, and telephone companies all have threatened to terminate service.

The Garcia's say that they have little in the way of documentation of their financial affairs. They do not keep credit card charge slips, and they throw away bills after paying them.

Mr. Garcia has never been a debtor in bankruptcy before. However, Mrs. Garcia filed a chapter 7 petition on March 20, 1992 and received a discharge. That bankruptcy will remain on her credit record until 2002. Creditors have therefore been reluctant to extent credit to her. As a result, Mr. Garcia is the only debtor on most of the debts. For example, he is the only person listed as the "responsible party" in Teresa's hospital admissions forms, and all but two of the credit card accounts are in his name alone.

2. Ms. Connie Johnson

On January 5, 1998 Connie Johnson filed a pro per chapter 7 bankruptcy petition. The meeting of creditors was set for February 4. Ms. Johnson failed to attend. She then realized that

she needed professional advice and was referred to you.

Ms. Johnson has a low paying job as a computer salesperson at PC Store; her gross pay each month is about $1,000. She owes $8,000 in student loans to Technical College, where she has completed one year of academic work. She also owes $12,000 to National Bank for loans taken out to finance her education and which are guaranteed by the U.S. government. Three years ago she left school for financial reasons; nine months later she was required to begin repaying the loans. She made the first two monthly payments on each of the student loans but then defaulted and has made no more payments.

Ms. Johnson wants to continue her education at night at the local community college but needs an official transcript of her work at Technical College to do so. She would also like to get a better paying job, but will also likely need an official transcript to show to potential employers. Technical College will not release her transcript until and unless she pays the $8,000 owed it. In fact, Technical College's and National Bank's representatives have been calling her frequently at PC Store to demand payment. Her supervisor reprimanded her for receiving personal calls at work. Ms. Johnson is worried that she might be fired if the calling continues. She is also worried that she may not be able to get additional student loans so that she can continue her education.

Even though she makes little money, Ms. Johnson regularly receives pre-approved credit card applications in the mail. She now has eight credit cards and a total credit card debt of $40,000. In her signed application for the eighth card (a Galactic Bank Visa Card) she overstated her income, filling in the blank for gross salary with a figure of $1,600 per month. She also wrote "-0-" in the blank for "monthly payment on other debts." Until two months ago she managed to make the minimum payments required on each card by getting cash advances on the other cards. However, as of two months ago all of her cards were "maxed out," and when she applied for a ninth card she was turned down; apparently Technical College and National Bank had reported her default to the various credit reporting agencies.

Ms. Johnson also owes child support and property settlement obligations to Hank Johnson, her ex-husband. When their marriage was dissolved, Mr. Johnson obtained custody of their infant son, largely because of proof that Ms. Johnson has a serious alcohol problem. The child support obligation is $300 per month, and she is five months in arrears. She also owes Mr. Johnson $3,000 as a property settlement obligation. In the dissolution the court assigned more of the couple's debts to Mr. Johnson than to Ms. Johnson and allowed her to keep the 1994 Chevy Malibu which the couple had owned free and clear. Under the court's order, the $3,000 debt is a lien on the Chevy. As of January 5, Mr. Johnson had not garnished Ms. Johnson's wages and there was no wage assignment order in effect with respect to PC Store.

Six months ago Ms. Johnson was driving with a blood alcohol level of .16% when she recklessly passed another car on a two lane highway. Phil Parsley, the driver of an oncoming car, swerved to avoid her and rolled his vehicle. Mr. Parsley was seriously injured. Ms. Johnson stopped to help. When Highway Patrol officers arrived, they arrested her for driving under the influence and related crimes. In the criminal case she received a $10,000 fine and a suspended sentence of five years in prison. She has not yet paid the fine. Mr. Parsley has not yet sued. Ms. Johnson's auto liability insurance policy limit is $25,000.

In 1997 Ms. Johnson filed a federal income tax return for 1996 and claimed that she was

entitled to a $3,000 refund. The IRS paid the refund but later determined that she was entitled only to a $200 refund. The IRS tax assessment was made in October, 1997; of course Ms. Johnson could not pay the $2,800 demanded by the IRS. The IRS filed its Notice of Tax Lien the day after Ms. Johnson filed her chapter 7 petition.

In the Schedules which she filed with her petition, Ms. Johnson failed to list her $4,000 IRA account as an asset on Schedule B. She listed all of her other assets, which consisted of the Chevy and a modest amount of household goods and clothing. She failed to list Galactic Bank as a creditor with an unsecured claim on Schedule F. She also failed to list her month to month one-bedroom apartment lease on Schedule G. She is current on her rent and plans to stay in the rent-controlled apartment. (Neither did she list the landlord on Schedule F.)

C. ISSUES RAISED BY THE GARCIAS' HYPOTHETICAL CASE

At the training session, the panelists will discuss the Garcias' hypothetical case and Ms. Johnson's hypothetical case. Here, however, are some initial observations on the Garcias' case.

Mr. and Mrs. Garcia must decide whether bankruptcy is the right course for them. They must also consider when to file, under what chapter to file, and whether both of them should file. For Ms. Johnson the decision whether to file is in the past. The decision to do so may not have been prudent, but she cannot now have the case dismissed without showing cause. See § 707(a). She does, however, have an absolute right under § 706(a) to convert her case to chapter 13; thus which chapter is best for Ms. Johnson is a question that must be explored.

As we will see, the Garcia's will probably benefit greatly from a chapter 7 filing. They will likely be entitled to

--receive a discharge of most of their debts;
--exempt all of their assets from the bankruptcy estate;
--prevent a shutoff of utilities;
--avoid all or part of the lien on the piano; and
--redeem the Voyager van by paying its value.

There are, however, dangers that they may face if they file a chapter 7 petition.

One danger is that they may be denied a discharge. The sale of the furniture and the transfers to their children, Rick and Stephanie, may have been intentionally fraudulent transfers that trigger § 727(a)(2). Their failure to keep records may raise an issue under § 727(a)(3). They may be unable to explain to the court's satisfaction what happened to the $14,000 they had in savings (part of which Mr. Garcia says he lost at the blackjack tables). See §727(a)(5). Mrs. Garcia would not receive a discharge if she filed a chapter 7 case now, because she received a discharge in a chapter 7 case filed within six years ago. See § 727(a)(8); see also § 524(b).

Another danger is that some of their debts may be nondischargeable in a chapter 7 case. They may have willfully and maliciously injured Furniture Store's property by selling its collateral, which was a conversion. See § 523(a)(6). The judgment for battery may be nondischargeable as a willful and malicious injury to Mr. Vincent's person. Id. Some of their credit card debts may also be nondischargeable under the fraud exception in § 523(a)(2)(A).

Finally, a chapter 7 filing could cost them some of their assets or potential assets. The transfers of the Ford and of the $2,000 to Rick and Stephanie may be avoidable under § 548 or §

544(b). If the trustee avoids the transfers, the Garcia's will not be able to exempt the property, because the transfers were voluntary. See § 522(g). If Mrs. Garcia files and then within the next 180 days Uncle Antonio dies, Mrs. Garcia's inheritance will become property of the estate. See § 541(a)(5). To the extent she is personally liable on the debts and unable to exempt the inheritance, it would go to pay her creditors. She probably could disclaim the inheritance, so that it would go to other relatives rather than to her creditors, but that is not an ideal outcome from her point of view.

Under these facts you should explore whether Mr. and Mrs. Garcia should both file, or whether perhaps only Mr. Garcia should file. You would also want to consider whether chapter 13 would be a better choice than chapter 7. We deal with those questions below.

The facts also raise serious issues concerning the timing of any filing. The Garcia's have not yet come under great pressure from their creditors. Thus they may not need to file a petition immediately. In fact, before filing a petition they should try to reverse the transfers which they made to Rick and Stephanie, which might remove the § 727(a)(2) ground for denial of a discharge. If possible they also should wait to file at least until March 21, 1998, so that the filing will not be within six years of the March 20, 1992 date on which Mrs. Garcia filed her prior chapter 7 case. On the other hand, if Mrs. Garcia is going to file a petition, she may want to do so soon in order to minimize the chance that Uncle Antonio will die within 180 days after the filing date.

The Garcias' landlord may begin the eviction process soon. They may hope that bankruptcy will permit them to stay in their apartment without paying rent, but the filing of a petition will delay an eviction by only perhaps a week or two. In a chapter 7 case the landlord will likely be able to obtain relief from the stay on shortened notice. (And there is some authority that if (1) the landlord has served the three day notice to pay or quit, (2) the three days have passed without payment being made, and (3) the landlord has filed an unlawful detainer action, all before the debtors file their bankruptcy petition, the automatic stay may not apply to the unlawful detainer action. See In re Smith, 105 B.R. 50 (Bankr. C.D. Cal. 1989).) In a chapter 13 case, the debtors' plan could provide for assumption of the lease, with the arrearages to be paid through the plan over a period of a few months. However, the Garcia's do not at this time have enough income to make such a chapter 13 plan feasible; they do not even have enough income to pay the future rent as it comes due each month. If they want to stay in the apartment, they will be well-advised to find a way to pay the back rent soon or to convince the landlord to let them pay off the arrearages over time.

D. NOTES ON SOME KEY BANKRUPTCY CODE AND BANKRUPTCY RULE PROVISIONS FOR REPRESENTATION OF LOW INCOME CONSUMER DEBTORS IN CHAPTER 7

1. THE CODE

§101 Definitions: community claim, consumer debt, creditor, individual with regular income, judicial lien, security interest.

§109(e) & (g) Debt limits for chapter 13: 250K unsecured / 750K secured. Limits on serial filings.

§§301 & 302 Commencement of voluntary case by filing of petition by individual or by individual and spouse.

§§341 & 343 Meeting of creditors and examination of debtor under oath.

§350 Closing and reopening cases.

§362 Automatic stay.

§366 Utility service.

§502 Allowance of claims, including interest only up to petition date. See § 506(b) for different rule for oversecured claims.

§506(a) & (b) Division of undersecured claim into secured and unsecured portions; limited guidance on valuation. Postpetition interest accrues on oversecured claims (as do agreed upon charges such as attorneys' fees).

§507(a) Priority claims. Cf. §1322(a)(2) (requiring that chapter 13 plan provide for payment in full in deferred payments of section 507 priority claims).
§507(c) Erroneous tax refunds or credits have same priority that the related tax would have had.

§521 Debtor's duties: (1) filing lists and schedules; (2) filing statement of intention regarding secured consumer debt; (3) supposed duty to surrender property of estate to trustee (in chapter 7), which usually does not occur in low-income consumer chapter 7 cases because all property usually can be exempted from estate.

§522 Exemptions. See discussion above of exemptions available in California. Under §522(e) waivers of exemptions in favor of unsecured claim holders are void. Under §522(f) many liens that impair exemptions can be avoided. §522(g)-(i) governs exemption of property recovered by use of the avoiding powers by trustee or debtor. Under §522(l) the property claimed as exempt by the debtor is exempt unless there is an objection; the Supreme Court has held that absent a timely objection even a baseless claim of exemption will prevail, Taylor v. Freeland & Kronz, 503 U.S. 638 (1992), but other sanctions might be imposed on debtor or debtor's attorney for making such a claim.

§523 Exemptions from the discharge--particular debts that are not discharged even though the debtor receives a discharge of other debts. Do not confuse with objections to discharge (§727) which if established prevent the debtor from receiving a discharge of any debts.

Note that certain exemptions from the discharge must be raised timely in the bankruptcy court or lost. See §523(c)(1).

§524 Effect of discharge, including the broad discharge injunction. Note that community claims usually cannot be collected from after-acquired community property even if only one spouse files a petition and obtains a discharge. See §524(a)(3) & (b). Limits on reaffirmation agreements. The discharge hearing. Right of debtors to repay discharged debts voluntarily; this is an important alternative to reaffirmation for the debtor who wishes to repay debts on moral grounds.

§525 Protection against discrimination: (1) By governmental units. For example, a state cannot deny a debtor a driver's license for nonpayment of a discharged traffic accident judgment. (2) By private employers. (3) By persons involved in making student loans. A probable drafting error allows the argument that a financial institution that makes student loans may not deny loans of any kind to persons who have been in bankruptcy simply because of the bankruptcy or because of the nonpayment of discharged debts.

§ 541 Property of the estate. Does not include postpetition personal service income [§ 541(b)(6)]; spendthrift trusts to extent protected under state law, and ERISA qualified pension plan interests [§ 541(c)(2), Patterson v. Shumate, 504 U.S. 753 (1992)]. Does include following property to which debtor may become entitled within 180 days after petition date: bequests, inheritances, life insurance or death benefit proceeds, property from marital dissolution property settlement.

§704 Duties of trustee (including duty to investigate debtor's financial affairs and "if advisable, oppose the discharge of the debtor").

§706 Debtor's absolute right to convert from chapter 7 to chapter 13 (unless case previously was converted from another chapter to chapter 7).

§707 Grounds for dismissal: only cause or substantial abuse of chapter 7. The debtor does not have the right to dismiss without showing cause.

§722 Redemption. Allows tangible consumer goods to be redeemed from liens for the amount of the § 506(a) secured claim where the liens secure dischargeable consumer debts and the property is exempted by debtor or abandoned by trustee. In effect it allows debtors to strip down liens to the value of the consumer goods. But redemption must be by lump sum payment, not by installments, per the cases. Low income debtors may lack the necessary cash.

§727 The discharge. Grounds for denying the debtor a discharge (objections to discharge). Do not confuse with exemptions from discharge--see §523. Grounds for revoking a discharge.

THE RULES (Fed.R.Bankr.Proc.)

Rule 1002 Case is commenced by filing petition with clerk of the bankruptcy court. See Rule 9001(2).

Rule 1007 Time for filing schedules, etc. Debtor must file schedules of assets and liabilities, schedule of current income and expenditures, schedule of executory contracts and unexpired leases, and a statement of financial affairs. Schedules are Official Form 6; statement of financial affairs is Official Form 7. Schedules and statement must be filed with petition or within 15 days after; if schedules are not filed with petition then a list of creditors' names and addresses must be filed with petition. Requirement that schedules be supplemented within 10 days if debtor becomes entitled to property that would come into estate under §541(a)(5) (e.g., inheritance).

Rule 1009 Debtor's right to amend petition, lists, schedules, statement of financial affairs as a matter of course at any time. (But note that amendment of knowingly fraudulent statement may not prevent debtor from being denied a discharge under §727(a)(4)(A).)

Rule 2002(e) Twenty days' notice must be given to debtor, trustee, and creditors of date of meeting of creditors. Notice of creditors' meeting may state that assets appear to be insufficient for payment of a dividend to creditors and that proofs of claim therefore need not be filed.

Rule 2003 Meeting of creditors, including examination of debtor under oath. U.S. Trustee shall call meeting between 20 and 40 days after order for relief (which is petition filing date in voluntary case).

Rule 2017 Scrutiny of debtor's transactions with attorneys for possibly excessive fees related to bankruptcy services

Rule 3012 Court determination of value of collateral

Rule 4001 Procedures for motion for relief from stay; treated as contested matter governed by Rule 9014.

Rule 4002 Duties of debtor, including duty to submit to examination as ordered by court and duty to cooperate with trustee in various ways.

Rule 4003 Exemptions. Claims of exemptions are to be made on schedule of assets. See Official Form 6, Schedule C. Objections to exemptions may be filed within 30 days after conclusion of meeting of creditors or within 30 days after debtor amends claim of exemptions. Objecting party has burden of proof. Lien avoidance proceedings under §522(f) are contested matters governed by Rule 9014.

Rule 4004 Complaint objecting to discharge is an adversary proceeding governed by Part VII

of the Rules. Deadline for filing of complaint objecting to discharge: 60 days following first date set for §341(a) meeting of creditors (extendable only for cause pursuant to motion made during the 60 day period). Court "shall forthwith grant the discharge" if deadline passes and no complaint has been filed objecting to discharge (unless debtor has waived discharge or failed to pay the filing fee or a motion to extend time or to dismiss for substantial abuse is pending). Thus discharge normally should be granted within 100 to 120 days after filing of chapter 7 petition. On debtor's motion the court may defer entry of discharge order; this is typically done to provide time for reaffirmation agreement to be reached. Note that once the discharge is granted, no binding reaffirmation of the debt is possible. See §524(c)(1).

Rule 4005 Party objecting to discharge has burden of proving objection at trial.

Rule 4007 Complaint for determination of dischargeability of debt is an adversary proceeding. Deadline in chapter 7 case for filing of complaint alleging that a debt is nondischargeable under §523(a)(2), (4), (6) or (15) (all listed in §523(c)) is the same as for complaint objecting to discharge: 60 days after first date set for meeting of creditors. Note that the debtor should never initiate a complaint with respect to those grounds for nondischargeability , because the grounds are lost and the debts are discharged if a timely complaint is not filed. With respect to other grounds for a claim of nondischargeability, there is no time limit for the filing of a complaint to determine dischargeability. The case can even be reopened for that purpose. The debtor will often prefer to have dischargeability determined in such cases by the bankruptcy court rather than by a state court. A creditor may wish to have it determined in the bankruptcy court to avoid a charge of violation of the discharge injunction in the event that the debt is held to have been discharged.

Rule 4008 Time for the discharge and reaffirmation hearing.

Part VII (Rules 7001 et seq.): The rules governing adversary proceedings (full blown trial matters).

Part VIII (Rules 8001 et seq.): The rules governing appeals to the district court or to the bankruptcy appellate panel.

Part IX (Rules 9001 et seq.): General provisions. Rule 9009: Official Forms shall be used "with alterations as may be appropriate." Rule 9014: the rules applicable to motion practice (contested matters). Rule 9029: authorization for local bankruptcy rules.

1998 SUPPLEMENT TO TRAINING MATERIALS FOR PRO BONO REPRESENTATION OF LOW INCOME CHAPTER 7 DEBTORS

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1998 Supplement

Supplement To Training Materials for Pro Bono Representation of Low Income Chapter 7 Debtors

The Hypothetical Garcia Debtors:

<u>Issues concerning exceptions from the discharge:</u>

I. Generally applicable authorities:

A. Rule 4007 (deadline for filing complaint under § 523(c): 60 days after first date set for meeting of creditors)

B. § 523(c)(1) (requirement that complaints alleging nondischargeability under §523(a)(2), (4), or (6) be brought timely in bankruptcy court or else debts will be discharged):

> (c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15), as the case may be, of subsection (a) of this section. * * *

C. Grogan v. Garner, 498 U.S. 279 (1991) (holding that collateral estoppel principles apply in dischargeability actions, thus precluding debtors from relitigating issues such as whether the debtor had fraudulent intent that were established in a prior suit) (also holding that the creditor's burden of proof in nondischargeability actions is preponderance of the evidence--nondischargeability need not be shown by clear and convincing evidence).

II. Did the Garcia's fraudulently incur their credit card debts so as to make them nondischargeable under § 523(a)(2)(A)?

A. Code provision:

§ 523. Exceptions to discharge
(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt -

* * *

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the

extent obtained by -

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

* * *

(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $1,000 for "luxury goods or services" incurred by an individual debtor on or within 60 days before the order for relief under this title, or cash advances aggregating more than $1,000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 60 days before the order for relief under this title, are presumed to be nondischargeable; "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act;

* * *

B. Key Cases:

1. Field v. Mans, 516 U.S. 59 (1995) (holding that only justifiable reliance--not reasonable reliance--is required to satisfy § 523(a)(2)(A)).

2. American Express Travel Related Services Co. v. Hashemi (In re Hashemi), 104 F.3d 1122 (9th Cir. 1996, as amended 1997); cert. denied, 117 S.Ct. 1824.
Hashemi holds that there is no right to jury trial in nondischargeability actions. It also recounts the five elements needed to show nondischargeability under §523(a)(2)(A):

(1) the debtor made ... representations;
(2) that at the time he knew they were false;
(3) that he made them with the intention and purpose of deceiving the creditor;
(4) that the creditor relied on such representations; [and]
(5) that the creditor sustained the alleged loss and damage as the proximate result of the misrepresentations having been made.

Id. at 1125. *Hashemi* quotes *Anastas* and holds that "Each time a 'card holder uses his credit card, he makes a representation that he intends to repay the debt.... When the card holder uses the card without an intent to repay, he has made a fraudulent representation to the card issuer. Id. [*Anastas*] at 1285." *Hashemi* follows the approach set out in *Eashai* for determining whether the card holder had no intent to repay:

> "[A] court may infer the existence of the debtor's intent not to pay if the facts and circumstances of a particular case present a picture of deceptive conduct by the debtor." In re Eashai, 87 F.3d at 1087. In Citibank South Dakota v. Dougherty (In re Dougherty), 84 B.R. 653 (9th Cir. BAP 1988), our Bankruptcy Appellate Panel enumerated twelve factors relevant to determining a debtor's intent.[2] These factors are nonexclusive; none is dispositive, nor must a debtor's conduct satisfy a minimum number in order to prove fraudulent intent. So long as, on balance, the evidence supports a finding of fraudulent intent, the creditor has satisfied this element. See *Grogan*, 498 U.S. at 291, 111 S.Ct. at 661. We adopted *Dougherty* 's twelve-factor test as the law of the circuit in In re Eashai, 87 F.3d at 1087-88.

Applying the test set out in *Dougherty* and *Eashai*, as did the bankruptcy court, there is ample evidence to support the finding that appellant intended to defraud American Express. Appellant made nearly 170 charges totaling more than $60,000 during a six-week trip with his family to France. These charges exceeded appellant's annual income and, even before the trip, appellant already owed more than $300,000 in unsecured credit card debt. Appellant did have one major asset when he made the charges--a one-half ownership interest in an eight-unit condominium project. He claims the purpose of his trip was to borrow money from his mother-in-law to support this real estate venture. This does not explain why appellant stayed in France for six weeks, took his wife and two children with him, took a side-trip to the French Riviera, purchased cosmetics, expensive meals and other luxury items, and ultimately charged almost as much on his credit cards as he claims he planned to borrow. Moreover, while appellant was away, the holder of the second mortgage on his condominium project initiated foreclosure proceedings. This should have alerted appellant that he would not be able to repay his debt by selling his interest in the property. Given these facts, the bankruptcy court could reasonably infer that appellant tried to have a last hurrah at American Express's expense.

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[2]The factors are: (1) the length of time between the charges and the bankruptcy filing; (2) whether or not an attorney had been consulted concerning the filing of bankruptcy before the charges were made; (3) the number of charges made; (4) the amount of the charges; (5) the financial condition of the debtor at the time the charges were made; (6) whether the charges were above the credit limit of the account; (7) whether the debtor made multiple charges on the same day; (8) whether or not the debtor was employed; (9) the debtor's prospects for employment; (10) the financial sophistication of the debtor; (11) whether there was a sudden change in the debtor's buying habits; and (12) whether the purchases made were luxuries or necessities. See In re Dougherty, 84 B.R. at 657.

104 F.3d at 1125-26 (one footnote omitted).

3. Anastas v. American Savings Bank (In re Anastas), 94 F.3d 1280 (9th Cir. 1996) (see discussion of *Hashemi* above). *Anastas* moved Ninth Circuit law in a pro-creditor direction by holding that every time a person uses a credit card, that person impliedly represents that he or she intends to pay for the goods, services, or cash advance received. In 1988 the BAP in *Dougherty* had refused to go that far. Some courts had held that use of a credit card was an implied representation of intent and ability to pay; a few others had held that so long as the debtor did not exceed the credit limit or use the card with notice that it had been canceled, then the use of the card was not fraudulent--the card issuer had assumed the risk that the debtor would use the card with neither the intent nor the ability to pay. The BAP sought a middle way, based on a consideration of the total circumstances, including, but not limited to the 12 factors noted above. In 1996 the Ninth Circuit decision in *Eashai* (below) recognized that the Dougherty 12 factor approach did not provide a good basis for deciding when there had been a representation. Thus *Eashai* used the 12 factor approach to determine whether the debtor had the intent not to pay, but not whether the debtor had made a representation of intent to pay. Later in 1996 *Anastas* took the next step by holding that credit card users make implied representations of intent to pay. When a person obtains a credit card, the person impliedly represents that he or she intends at that time to pay the charges that will be made in the future on the card. Then, each time the person uses the card, the user impliedly represents that he or she intends at that time to pay for the goods, services, or cash advance obtained at that time. Thus any use of the card by a person who does not intend to pay is fraudulent. The approach in *Anastas* (and in *Hashemi*) does not seem

consistent with the approach in *Eashai*; it might be possible to argue that they are inconsistent and that because *Anastas* was not an en banc decision, the *Eashai* approach should still be followed.

4. Citibank v. Eashai (In re Eashai), 87 F.3d 1082 (9th Cir. 1996) (see discussion above in quote from *Hashemi*):

> In the case of credit card kiting, the debtor makes a false representation: 1) by creating the facade that all of his accounts are in good standing; and 2) by failing to disclose to the creditor his intent not to pay his credit card debt. This facade gives the debtor the appearance of an honest debtor, who is servicing his credit card debt in a timely manner by making minimum payments each month. Thus, the kiting scheme enables a dishonest debtor to hide his fraudulent intentions and engage in a spending spree which results in increasing amounts of credit card debt. Long before there were credit cards, the Supreme Court recognized that it is fraud when "a party not intending to pay ... induces the owner to sell him goods on credit by fraudulently concealing his insolvency and his intent not to pay for them...." Donaldson v. Farwell, 93 U.S. 631, 633, 23 L.Ed. 993 (1876) (emphasis added).
>
> ***
>
> An omission gives rise to liability for fraud only when there is a duty to disclose. In a credit card kiting case, the debtor's duty to disclose is triggered by the debtor's creation of a facade which conceals his fraudulent intentions. When a debtor, with intent to defraud the creditor, makes minimum payments with cash advances from other credit cards, the debtor has a duty to disclose to the creditor that he no longer intends to pay his credit card debt. If the debtor fails to make this disclosure, then he commits actual fraud.
>
> Clearly, it is not actual fraud simply to make a minimum payment with a cash advance from another credit card. This action on the part of the debtor must also be coupled with a lack of intent to repay the debt. The admonition of the Bankruptcy Appellate Panel in Karelin v. Bank of America Nat'l Trust & Sav. Ass'n (In re Karelin), 109 B.R. 943 (9th Cir. BAP 1990), is instructive:
>
>> Care must be taken to stop short of a rule that would make every desperate, financially strapped debtor a guarantor of his ability to repay, on pain of nondischargeability. Such a rule would unduly expand the "actual fraud" discharge exception by attenuating the intent requirement. A substantial number of bankruptcy debtors incur debts with hopes of repaying them that could be considered unrealistic in hindsight. This by itself does not constitute fraudulent conduct warranting nondischarge.
>
> Id. 947-48. In hard financial times, people may engage in the practice of using cash advances to solve their short-term cash flow problems or to deal with sporadic and seasonal income. See Citibank (N.Y.State) v. Davis (In re Davis), 176 B.R. 118 (Bankr.W.D.N.Y.1994). Moreover, we recognize the fragility of human nature. "[H]uman experience tells us debtors can be unreasonably optimistic despite their financial circumstances." In re Cox, 182 B.R. 626, 635 (Bankr.D.Mass.1995). Nonetheless, a credit card kiter is easily distinguishable from a bad luck debtor. A credit card kiter manipulates the credit card system to gain money, property, and services with no intention of ever paying for them.

Id. at 1088-90. Note the emphasis on the kiter's active concealment of his intent; arguably *Eashai* is not consistent with *Anastas*.

5. In re Candland, 90 F.3d 1466, 1469 (9th Cir.1996).

II. To what extent are the debts owed to Vincent and to Furniture Store nondischargeable as willful and malicious injuries to Vincent's person and to Furniture Store's property under § 523(a)(6)?

A. Code Provision:

§ 523. Exceptions to discharge
(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt -

* * *

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

* * *

B. Key Cases:

1. Murray v. Bammer (In re Bammer), 131 F.3d 788 (9th Cir. 1997) (en banc) (son's liability for participation in fraudulent transfer was nondischargeable as a willful and malicious injury to property because it made it harder for his mother's judgment creditor to collect his judgment--and desire to help mother was not "just cause or excuse"); but see Quarre v. Saylor (In re Saylor), 108 F.3d 219 (9th Cir. 1997) (fraudulent transfer that hinders creditors from collecting does not injure any property of the creditors and thus does not trigger § 523(a)(6)); McCrary v. Barrack (In re Barrack), 201 B.R. 985 (Bankr. S.D. Cal. 1996) (holding that a fraudulent misrepresentation which does not satisfy the requirements of § 523(a)(2) cannot be the basis of a § 523(a)(6) nondischargeability judgment, and disagreeing with cases that allow general financial loss to serve as the injury to property for purposes of § 523(a)(6).) *Bammer* and similar cases suggest that any willful and malicious causing of financial loss satisfies § 523(a)(6); *Saylor*, *Barrack* and similar cases require that the debtor willfully and maliciously directly damage the creditor's interest in a specific item of property.

2. Britton v. Price (In re Britton), 950 F.2d 602 (9th Cir. 1991).

3. Transamerica Comm'l Fin. Corp. v. Littleton (In re Littleton), 942 F.2d 551 (9th Cir.1991) (holding that conversion of secured party's collateral did not give rise to nondischargeable debt because conversions was part of effort by debtor to rehabilitate business so that he could pay debts, and thus at the time the conversion was not an act which would necessarily cause harm to the secured party).

4. Impulsora del Territorio Sur, S.A. v. Cecchini (In re Cecchini), 780 F.2d 1440 (9th Cir.1986) (holding that the debtor need not intend or desire to injure the person or property of the creditor for the debt to be nondischargeable; it is enough that a wrongful act is done intentionally without just cause or excuse and necessarily causes harm; thus conversion of secured party's collateral gave rise to nondischargeable debt).

5. Krishnamurthy v. Nimmagadda (In re Krishnamurthy), 209 B.R. 714 (Bankr. 9th Cir.), aff'd

125 F.3d 858 (9th Cir. 1997) (unpublished table opinion affirming for reasons stated in BAP opinion). The BAP opinion applies collateral estoppel to preclude the debtor from relitigating the issue whether he willfully and maliciously injured his partner's property or was a fiduciary who committed fraud. The award of punitive damages showed that the state court found fraud, malice, or oppression. Malice or oppression would satisfy the willful and malicious standard of § 523(a)(6); fraud would satisfy the fraud element of § 523(a)(4) ("fraud or defalcation while acting in a fiduciary capacity").

Issues concerning objections to discharge:

I. Will the Garcia's be denied a discharged because of alleged fraudulent transfers made within one year before the filing of the petition, pursuant to § 727(a)(2)?

A. Code Provision:

§ 727. Discharge
(a) The court shall grant the debtor a discharge, unless--

* * *

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed--

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

* * *

B. Key Cases:

1. In re Adeeb, 787 F.2d 1339, 1345-46 (9th Cir.1986):

> [A] debtor who transfers property within one year of bankruptcy with the intent penalized by section 727(a)(2)(A) may not be denied discharge of his debts if he reveals the transfers to his creditors, recovers substantially all of the property before he files his bankruptcy petition, and is otherwise qualified for a discharge. * * * [A] debtor who has disclosed his previous transfers to his creditors and is making a good faith effort to recover the property transferred at the time an involuntary bankruptcy petition is filed is entitled to a discharge of his debts if he is otherwise qualified.

But see Davis v. Davis (In re Davis), 911 F.2d 560 (11th Cir.1990) (per curiam) (denying discharge despite retransfer of fraudulently transferred property). *Adeeb* also holds that it is irrelevant under § 727(a)(2) whether the fraudulent transfer caused loss to creditors.

2. Hughes v. Lawson (In re Lawson), 122 F.3d 1237 (9th Cir. 1997) (applying continuing concealment doctrine to hold that transfer made more than one year prior to petition filing date may still be the basis for denial of discharge where the debtor retained secret interest in the property within the one year look back period).

3. Bernard v. Sheaffer (In re Bernard), 96 F.3d 1279 (9th Cir. 1996) (withdrawal of funds from bank account in order to make funds harder for creditors to reach was a fraudulent transfer sufficient to justify denial of discharge even though debtors did not dispose of the money).

4. Aubrey v. Thomas (In re Aubrey), 111 B.R. 268 (Bankr. 9th Cir. 1990).

II. Will the Garcias' failure to keep good records of their financial affairs be grounds for an objection to discharge under § 727(a)(3)?

A. Code Provision:

§ 727. Discharge
(a) The court shall grant the debtor a discharge, unless--

* * *

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

* * *

B. Key Case:

1. Lansdowne v. Cox (In re Cox), 41 F.3d 1294 (9th Cir. 1994) (husband's failure to keep records did not require denial of discharge to wife whose reliance on husband to keep records was reasonable).

III. Will one or both of the Garcia's be denied a discharge under § 727(a)(5) for failure to explain satisfactorily what happened to the funds that were in their savings account?

A. The Code Provision:

§ 727. Discharge
(a) The court shall grant the debtor a discharge, unless--

* * *

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

* * *

B. The Key Cases:

1. Devers v. Bank of Sheridan (In re Devers), 759 F.2d 751 (9th Cir. 1985) (briefly discussing § 727(a)(5) and citing *Reed* infra) (footnote 1 in the opinion erroneously concludes that the filing of a joint petition results in denial of discharge to both spouses if there are grounds for denying one of them a discharge; see Lansdowne v. Cox (In re Cox), 41 F.3d 1294 (9th Cir. 1994) (refusing to impute grounds for denial of discharge from one spouse to the other))

2. Hawley v. Cement Indus. (In re Hawley), 51 F.3d 246, 249 (11th Cir.1995) (per curiam):

> In its § 727(a)(5) action, Appellee had the initial burden of proving its objection to Appellant's discharge. *Chalik*, 748 F.2d at 619. Appellee sustained this burden by showing the vast discrepancies between Appellant's 1989 financial statement and his 1990 Chapter 7 schedules. Once the party objecting to the discharge establishes the basis for its objection, the burden then shifts to the debtor "to explain satisfactorily the loss." Id. (citations omitted). "To be satisfactory, 'an explanation' must convince the judge." Id. (citing In re Shapiro & Ornish, 37 F.2d 403, 406

(N.D.Tex.1929), aff'd, 37 F.2d 407 (5th Cir.1930)). "Vague and indefinite explanations of losses that are based on estimates uncorroborated by documentation are unsatisfactory." Chalik, 748 F.2d at 619 (citations omitted).").

3. Farouki v. Emirates Bank Int'l, Ltd., 14 F.3d 244 (4th Cir.1994) (applying same approach as in *Hawley* and holding that creditor's burden of proof is preponderance of the evidence).

4. Dolin v. Northern Petrochemical Co. (In re Dolin), 799 F.2d 251, 253 (6th Cir. 1986):

> The Bankruptcy Court held that Dolin's general, unsubstantiated statements about his lifestyle did not "explain satisfactorily" the disposition of more than $500,000 in the three years preceding his bankruptcy. See Baum v. Earl Millikin, Inc., 359 F.2d 811, 814 (7th Cir.1966). We agree. Dolin could only allege that he had used the money to support his cocaine habit and to gamble. The actual expenditures, to whom and when made, are unknown. We recognize that Dolin would not want to keep records of his cocaine purchases and gambling because the drug purchases were illegal and the gambling may have been illegal. The mere fact that a debtor has spent money illegally does not satisfactorily explain the debtor's deficiency of assets. In particular, we hold that neither Dolin's chemical dependency nor his compulsive gambling satisfactorily explain his deficiency of assets. Consequently, the Bankruptcy Court did not err in denying the discharge of Dolin's debts under 11 U.S.C. § 727(a)(5).

5. Chalik v. Moorefield (In re Chalik), 748 F.2d 616 (11th Cir.1984) (a much cited opinion).

6. First Tex. Sav. Ass'n v. Reed (In re Reed), 700 F.2d 986 (5th Cir. 1983) (noting ambiguity in statute as to whether the explanation must show that what happened was reasonable or whether the explanation must just be a convincing explanation of whatever actually happened to the property).

7. Clark v. Clark (In re Clark), 211 B.R. 105 (Bankr. M.D. Fla. 1997):

> This Court has stated that a debtor's explanation of loss of assets "requires more than undocumented, unsupported vague generalities ... An explanation must convince the court of the debtor's good faith and businesslike conduct." [Citation omitted.] Additionally, the debtor's explanation should not arouse suspicion as to how the assets were lost. Id. Vague assertions that money was spent on living expenses or lost through gambling, without corroborating documentation, are unacceptable. [Citation omitted.]
>
> * * * To substantiate his claim that he lost over $80,000 gambling, Defendant produced several hotel reservation slips, casino identification cards, and theater ticket stubs. However, Defendant failed to produce sufficient evidence to prove that he lost $80,000 on those gambling trips.
>
> The Court finds the documentary evidence presented by the Defendant is insufficient to corroborate his testimony as to how the money was utilized. Defendant's assertions that he used the money for living expenses, travel, golf, and gambling are vague and indefinite. The Court finds that Plaintiff has met his burden of proving that Defendant's discharge should be denied for his failure to explain the loss of cash assets.

8. Minsky v. Silverstein (In re Silverstein), 151 B.R. 657 (Bankr. E.D.N.Y. 1993) (following *Riso*) but denying discharge under § 727(a)(2) & (4).

9. Francis v. Riso (In re Riso), 74 B.R. 750 (Bankr. D.N.H. 1987) (holding that what happened

to the property need not be satisfactory but only that the explanation must be satisfactorily convincing as to what actually did happen).

10. Koppey v. Hirsch (In re Hirsch), 36 B.R. 643, 645 (Bankr. S.D. Fla. 1984):

> The most serious of plaintiffs' arguments against granting the debtors their discharges are that they failed to keep adequate records under 11 U.S.C. § 727(a)(3) and that they failed to satisfactorily explain any loss of assets to meet their liabilities under § 727(a)(5). The two issues are related in that it is usually difficult for a debtor to account for losses unless adequate records have been kept.
>
> *Gambling is an activity for which records are seldom kept. It is therefore a good way for a* debtor to try to explain the disappearance of funds which may be secreted elsewhere. For this reason, where a debtor's explanation for the loss of substantial assets is that he lost them gambling, a discharge has often been denied. The courts have required corroborating evidence, which did not exist in some cases, or they simply did not believe the debtor's story. [Citations omitted.] In this case there was more than simply Alan Hirsch's testimony that he lost money on gambling. His pattern of actions over a substantial period is consistent with the explanation that he was a compulsive gambler. His wife's story corroborated his, and both witnesses seemed credible after extensive examination on two trial dates which were almost two months apart. Finally, the pattern of stock market trading, for which there are records, corroborates the debtor's explanation of his gambling tendencies. The court concludes that Alan Hirsch satisfactorily accounted for his losses through the explanation of losses in gambling.

IV. Will Mrs. Garcia be denied a discharge under § 727(a)(8) if she files a chapter 7 petition (or joins in a joint one with Mr. Garcia) today, 2/21/98?

A. Code Provision:

We include § 727(a)(9) to contrast the effect of a prior chapter 13 case with Mrs. Garcia's prior chapter 7 case. Note also that if Mrs. Garcia files a chapter 13 petition, her eligibility for discharge will be unaffected by her prior chapter 7 case.

§ 727. Discharge
(a) The court shall grant the debtor a discharge, unless--

* * *

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition;
(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least--

(A) 100 percent of the allowed unsecured claims in such case; or
(B) (i) 70 percent of such claims; and
(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; * * *

Los Angeles County Bar
Association Members
(213) 683-9193

Los Angeles County Bar Association Members

RE: LACBA Bankruptcy *Pro Bono* Project

Dear Member:

The Los Angeles County Bar Association Commercial Law and Bankruptcy Section is delighted to announce the establishment of its program to provide *pro bono* services to indigent debtors in bankruptcy cases. As you have undoubtedly read many times in the past few years, consumer bankruptcy filings in the United States in general and in Los Angeles in particular have hit an all time high. Many of the individual debtors who file bankruptcy cases in Los Angeles cannot afford counsel to commence those cases. The Los Angeles County Bar Association, with assistance and cooperation of the judges of the United States Bankruptcy Court for the Central District of California, have established the program designed to provide representation to at least some of these individuals.

The first phase of the program will provide counsel to individual debtors who are sued by creditors seeking to establish that particular debts are not dischargeable in the bankruptcy case. In other jurisdictions in which such programs have been established, a significant number of these complaints have been quickly resolved on favorable terms shortly after an attorney undertakes the representation of the debtor. Our volunteers will be able to provide reasoned advice to these debtors regarding their rights and, where appropriate, to settle the case or defend those rights if necessary.

The Los Angeles County Bar Association is soliciting your participation as a volunteer to undertake the representation of one or more debtor/defendants each year. To support you in this endeavor, the Los Angeles County Bar Association will provide you with written materials on the substantive legal issues and pertinent authorities. The materials will also include forms of pleadings which might be useful. The Los Angeles County Bar Association will also schedule educational programs for volunteers and will solicit the participation of law students from local law schools to assist volunteers in the representation of these indigent clients. The goal of the Los Angeles County Bar Association is to provide sufficient resources to you so that you can freely undertake participation in this worthwhile project even if you do not specialize in bankruptcy. Nondischargeability litigation is, after all, just that: litigation, albeit in the bankruptcy court.

The Los Angeles County Bar Association intends and hopes to expand the program to provide counseling services for debtors prior to the commencement of bankruptcy cases. These services would include advising the debtors as to the benefits and detriments of filing bankruptcy cases, the choice between chapter 7 and chapter 13 cases, and, if appropriate, the commencement of a case under either chapter. We hope that the second phase of the program will be operational during 1998.

The Bankruptcy Court will require plaintiffs to send notices to *pro se* debtor/defendants informing them that they may qualify for *pro bono* representation. Public Counsel has agreed to screen potential applicants to determine which of them qualify for these *pro bono* services. **NOW ALL WE NEED IS YOU.**

If you are prepared to volunteer to participate in providing these worthwhile services, please fill out the enclosed form and return it to Jeff Krause, by telecopier or in the enclosed envelope. If you have questions regarding the scope of the program, the support that we will provide, or the fundamental need for such a program, please telephone Jeff Krause, Stutman, Treister & Glatt a Professional Corporation at (213) 251-5205 or fax at (213) 251-5288. E-mail address is JKrause@Stutman.com.

Very truly yours,

Jeffrey C. Krause

Enclosure

The Los Angeles Free Clinic

PRO BONO OPPORTUNITIES

The Los Angeles Free Clinic ("LAFC") is the country's oldest free clinic and has been in continuous operation since 1967. We are a non-partisan, non-profit organization that offers free or low-cost legal, medical, mental health, dental, and youth services.

Volunteer attorneys provide assistance in group worshops or one-on-one meetings in the following areas of law:

BANKRUPTCY
DIVORCE
IMMIGRATION
RESPONSE TO COURT SUMMONS
YOUTH ISSUES

*** We provide malpractice insurance for all volunteers**

COMMITMENT NEEDED: Volunteers are asked to teach one clinic per month (equivalent to 2-3 hours) for at least one year. If under strict time contraints, however, volunteers may teach every other month. Scheduling of volunteers is extremely flexible and is based according to the attorney's schedule.

The LAFC offers a unique opportunity for attorneys to provide much needed services to the community. To become a volunteer, please call:

(323) 653-8622 ext. 208

BANKRUPTCY *PRO BONO* PROGRAM

VOLUNTEER COMMITMENT FORM

Yes, I would like to help the Los Angeles County Bar Association's program for providing *pro bono* services to *in pro per* debtors in chapter 7 bankruptcy proceedings.

Name: _____

Firm: _____

Address: _____

City/State/Zip: _____

Phone: _____

Fax: _____

When completed, please send by facsimile to:

Jeff Krause, Esq.
Stutman, Treister & Glatt P.C.
3699 Wilshire Blvd., #900
Los Angeles, CA 90010
Telephone:(213) 251-5205
Facsimile:(213) 251-5288
E-mail: JKrause @Stutman.com

THANK YOU FOR YOUR SUPPORT!

What is a Reaffirmation Agreement?

You have signed a reaffirmation agreement with one of your creditors. It is not valid unless you come to Court and I approve it. You can still decide not to reaffirm this debt, so it is important for you to understand what the effect of the reaffirmation agreement is.

Your discharge in bankruptcy relieves you of a legal liability to pay debts that are discharged. You may decide that you voluntarily want to pay a debt that has been discharged, and there is no prohibition against your doing this. You are not required to reaffirm any debt or sign any agreement regarding a debt that has been or will be discharged in your bankruptcy in order to voluntarily repay a debt.

Even though the discharge means you do not have to pay the debts that are discharged, sometimes a creditor will have a security interest in some property the creditor will be able to take if you do not pay the debt. A creditor can have a security interest in real estate or in personal property (such as your furniture or car). Often, for example, a merchant who sells you something on its credit card has a security interest in the item or items purchased.

If a creditor has a security interest, it can enforce that security interest if the loan is in default. Usually that means it can foreclose upon or repossess the property that is subject to the security interest. Just going into bankruptcy is not a default that a creditor can enforce. Defaults usually arise out of missed payments, lack of insurance or something of that nature.

If I approve this reaffirmation agreement, the debt that you are reaffirming will not be discharged in the bankruptcy. You are still obligated to make the payments due on the debt. If you can't make the payments, the creditor can repossess the property in which it has a security interest (the collateral), can sell it, and may sue you for a judgment for the difference between the amount that it receives on the sale and the amount that you owe on the loan. If there is no collateral for the loan, the creditor can sue you and obtain a judgment for the balance owed and this is not affected by your bankruptcy discharge. For this reason, bankruptcy law requires me to speak with you to ascertain whether you understand what you are agreeing to, whether you are likely to be able to keep up with the agreement, whether the payments will be a hardship to you and your reason for reaffirming this debt.

Therefore, I need to know the answers to those and some other questions to help me decide whether to approve your agreement or not. At the hearing, I will ask you several questions. I will want to know if the creditor with whom you have made this reaffirmation agreement holds some kind of security for the debt. If so, I will want to know in what property the creditor has a security interest. Do you still have the property that is collateral for this debt? If so, do you want to keep it? Why? How much is it worth?

If the creditor does not have collateral for the debt, I will want to know why you would want to be legally obligated to pay it. What do you think you will get out of it? Has the creditor made any promises to you? If so, are they in writing?

Whether there is collateral for the debt or not, I will want to know whether you know what the terms of your agreement are. Do you know the interest rate? Do you know how long it will take you to pay off the debt you are reaffirming? Has the creditor filed suit against you to declare this debt non-dischargeable or has it threatened to file such a suit?

If you do not come to Court for the hearing, I will deny the motion to reaffirm the debt. If I deny the motion to reaffirm the debt, you are under no legal responsibility to pay the creditor, but the creditor can then seek to repossess the collateral (if there is any). However, the creditor cannot obtain a judgment against you for the amount you owe on this debt.

AVISO PARA DEUDORES QUE CARGAN DEUDAS PRESENTANDOSE A UNA AUDENCIA PARA UN ACUERDO DE REAFIRMACIÓN

La Asociación de la Barra de Abogados del Condado de Los Angeles ha creado un programa para asistir a las personas que cargan deudas (Debtor Assistance Program) y que no están en la capacidad financiera para pagarle a un abogado. Un abogado de este programa estará disponible, gratituamente, para contestar preguntas que usted tenga sobre si sea en su mejor interés o no, entrar en un acuerdo de reafirmación. Si usted esta interesado para una consultacion con un abogado, porfavor presentese a la corte asignada una (1) hora antes de su audencia.

¿QUÉ ES UN ACUERDO DE REAFIRMACIÓN?

Usted ha firmado un acuerdo de reafirmación con uno de sus acreadores. El acuerdo no es valido si no se presenta a la corte para que sea aprovado. Usted todavía puede decidir no querer reafirmar su deuda, es muy importante que usted entienda cuales son los efectos de un acuerdo de reafirmación.

Su descargo en bancarrota lo ampara de su obligación legal para pagar sus deudas de las cuales usted ya ha sido perdonado. Uste puede decidir que pagara una deuda voluntariamente a la cual ya ha sido decargada. No hay ninguna prohibición que le impida hacer esto. Usted no sera exigido a reafirmar ninguna deuda o a firmar ningún acuerdo con respecto a ninguna deuda que ha sido o que sera descargada en su tramite de bancarrota para pagarla voluntariamente.

Aunque el descargo de su deuda significa que usted no tiene que pagar las deudas que ya han sido absueltas, algunas veces acreedores tendrán un interés asegurado en el titulo de alguna de sus pertenencias personales (como su carro, su casa, o sus muebles). Muchas de las veces algún comerciante que le venda algo en su tarjeta de crédito tiene un interés de titulo asegurado en los atículos que compro.

Si un acreedor tiene un interés de titulo asegurado, puede ejecutar ese interés de titulo asegurado que tiene si el préstamo esta sin cumplimiento. Esto casi siempre significa que el acreedor puede tomar posesión de la propiedad en la cual tiene un interés de titulo asegurado. El comienzo de tramites para bancarrota no pueden ser ejecutados por un acreedor. La falta de comparecencia casi siempre resulta de falta de aseguranza, falta de pagos, o algo de esa naturaleza.

Si el juez aprueba el acuerdo de reafirmación, la deuda que usted esta reafirmando no sera absuelta en su tramite de bancarrota. Usted aun estará obligado a hacer los pagos que aun debe en la deuda. Si usted no puede hacer los pagos, el acreedor puede reposesar la propiedad en la cual tiene interés de titulo asegurado (colateral), y puede venderlo, y hasta lo puede demandar por un juicio por la diferencia entre la cantidad que se recibe de la venta y la cantidad que usted debe en el préstamo. Si no hay un interes de aseguranza para el préstamo, el acreedor puede demandarlo y obtener un juicio por la cantidad que debe. Esto no sera afectado por la absolución de su bancarrota. Por esta razón, las leyes de bancarrota requieren que el juez hable con usted para asegurarse que usted entiende a lo que se esta comprometiendo. Así se determinar si usted podrá mantener el acuerdo, podrá hacer los pagos, y su razón por reafirmar dicha deuda.

Así es que el juez necesitara saber la respuesta a esas y otras preguntas para poder decidir si aprobar o negar el acuerdo. En la audiencia, el juez le hará varias preguntas. El quedrá saber si el acreedor con quien usted hizo este acuerdo de reafirmación tiene algún interés asegurado sobre la deuda.

Si es así, el juez quedrá saber que en cual de su propiedad el acreedor tiene el interés de titulo asegurado. Tambien quedre saber si todavia tiene la propiedad en la cual tiene interés de titulo asegurado para esta deuda, si usted tiene la propiedad que sirve de interes de titulo para esta deuda. Si es así, usted desea mantener la deuda? Porque? y cuanto esl el valor de tal propiedad.

Si el acreedor no tiene colateral para la deuda, el juez querrá saber por que usted quiere estar legalmente obligado a pagar dicha deuda. Como piensa usted que se beneficiara haciendose legalmente responsable por esa deuda.

Si el acreedor le ha hecho alguna promesa. Si es así, lo tiene por escrito? Aun si hay colateral por la deuda o no, el juez querrá saber si usted sabe cuales son las condiciones de su acuerdo. Si usted sabe cuales son las tarifas de los intereses. Si usted sabe cuanto tiempo le llevara pagar la deuda que esta reafirmando. Si usted ha sido demandado por alguno de sus acreedores y si su deuda ha sido declarada como “sin poderse absolver” o si lo ha amenazado con hacerlo.

Si usted no se presenta a la audiencia, el juez negara la moción para reafirmar cualquier deuda. Si el juez niega la moción para reafirmar la deuda, usted no tendrá ningúna responsabilidad para pagarle al acreedor, pero el acreedor puede intentar reposeer el colateral (si existe alguno). El acreedor no podrá obtener un juicio en contra suya por la cantidad que debe en esta cuenta.

1999 UPDATE TO TRAINING MATERIALS FOR PRO BONO REPRESENTATION OF LOW INCOME CHAPTER 7 DEBTORS

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1999 UPDATE TO TRAINING MATERIALS FOR PRO BONO REPRESENTATION OF LOW INCOME CHAPTER 7 DEBTORS

I. Errata:

The sample forms attached to the 1998 training materials do not include the Local Rule 104 Statement of Related Cases. A copy of the Statement of Related Cases form is attached to this update. Also, the discussion of section 727 objections to discharge on page 21 of the 1998 materials includes the sentence "Do not confuse with exemptions from discharge–see § 523." The word "exemptions" should be changed to "exceptions."

II. Student Loans

For discussion purposes the 1998 training materials include a fact situation involving a debtor named "Ms. Connie Johnson." (See pp. 16-17.) One issue raised by those facts is the dischargeability or nondischargeability of student loans under § 523(a)(8). In cases filed before October 7, 1998, student loans are dischargeable if they have been "in repayment for at least seven years" or if failure to discharge them would impose an undue hardship. Brown v. Sallimae Servicing Corp. (In re Brown), 227 B.R. 540 (Bankr. S.D. Cal. 1998). For cases filed on or after October 7, 1998, Congress' enactment of the Higher Education Amendments of 1998 eliminates the seven year provision of § 523(a)(8); student loans are dischargeable only if failure to discharge them would impose an undue hardship, no matter how old the loans may be.

The Ninth Circuit has now adopted the Second Circuit's three-part *Brunner* test for undue hardship. United Student Aid Funds, Inc. v. Pena (In re Pena), 155 F.3d 1108 (9th Cir. 1998).

> First, the debtor must establish "that she cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans." . . . Second, the debtor must show "that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans." . . . The third prong requires "that the debtor has made good faith efforts to repay the loans. . . ."

155 F.3d at 1111, quoting In re Brunner, 831 F.2d 395, 396 (2d Cir. 1987).

Brunner can be applied quite harshly, requiring a showing that the debtor will be in nearly abject poverty for the foreseeable future if required to pay and that the debtor has minimized expenses substantially in order to try to pay. Thus far it seems to have been applied in a "kinder and gentler" way in the Ninth Circuit. See Pena, 155 F.3d 1108; United Student Aid Funds Inc. v. Taylor (In re Taylor), 223 B.R. 747 (Bankr. 9th Cir. 1998); Brown v. Sallimae Servicing Corp. (In re Brown), 227 B.R. 540 (Bankr. S.D. Cal. 1998). All these cases held the student loans to be dischargeable. The analysis seems similar to the chapter 13 disposable income analysis; because the debtor could not make the payments on the student loans while keeping up the same kind of lifestyle permitted in chapter 13, the courts permitted discharge.

In addition, *Taylor* holds that the bankruptcy court has no power to grant a partial discharge of student loans. Many bankruptcy courts (and at least one circuit–the Sixth) have permitted partial discharge. In many cases they have found that there would be no undue

hardship as long as some portion of the student loans could be discharged, and have then gone on to grant a partial discharge or to modify the payment terms of the student loan obligations. See cases cited in *Taylor*. This in effect allows courts to split the difference, neither favoring the debtor with a complete discharge of student loans nor favoring the creditor with a complete exception of the loans from the discharge. *Taylor* removes that ability to reach a compromise. *Brown* holds that under its facts a partial discharge would not be appropriate, deferring to *Taylor* while reserving judgment on whether a BAP decision is binding on the bankruptcy courts in the circuit. Urging a court to follow *Taylor* is a calculated risk; if the loans cannot be partially discharged, then a finding of undue hardship is more likely, but the effect of a finding of no undue hardship is more severe.

III. Dismissal for Substantial Abuse–With Special Attention to Credit Card Debt

Section 707(b) permits the court to dismiss a chapter 7 case if "granting of [bankruptcy] relief would be a substantial abuse of the provisions of this chapter." Section 707(b) applies only where the debtor is an individual whose debts are primarily consumer debts. Creditors cannot move for dismissal under § 707(b); rather, dismissal under § 707(b) can be granted only on the court's own motion or on motion of the U.S. trustee. Section 707(b) provides further that "There shall be a presumption in favor of granting the relief requested by the debtor."

A typical application of § 707(b) would be to dismiss the chapter 7 case of a debtor with high current or anticipated income but little in the way of nonexempt assets. Such a debtor would give up little in exchange for a chapter 7 discharge, and would then be free to enjoy that high income. Congress wanted to steer such debtors into chapter 13, where § 1325(b)(1)(B) would force them to devote projected disposable income for three years to the payment of debts.

The leading Ninth Circuit case on § 707(b) is In re Kelly, 841 F.2d 908 (9th Cir. 1988). According to *Kelly*, the principal factor in determining whether use of chapter 7 us a substantial abuse is the debtor's ability to repay debts. "This is not to say that inability to pay will shield a debtor from section 707(b) dismissal where bad faith is otherwise shown. But a finding that a debtor is able to pay his debts, standing alone, supports a conclusion of substantial abuse." Id. at 915. On the other hand, the § 707(b) presumption in favor of granting bankruptcy relief "is an indication that in deciding the issue, the court should give the benefit of any doubt to the debtor and dismiss a case only when a substantial abuse is clearly present." Id. at 917. A debtor's debts are primarily consumer debts where more than 50% of the debts are consumer debts. Id. at 913.

Kelly does not make clear how much of the debts the debtor must be able to pay for dismissal to be justified. A BAP case holds that ability to repay 43% is by itself sufficient to justify dismissal. Gomes v. U.S. Trustee (In re Gomes), 220 B.R. 84 (Bankr. 9th Cir. 1998). Clients who qualify for pro bono assistance will likely not be able to repay any substantial part of their debts, and thus for our purposes it is more important to consider the other factors that may justify dismissal under § 707(b).

Those other factors may include the incurring of large credit card debts with no intent to repay. Many courts have held that a § 707(b) dismissal is justified where the debtor incurred credit card debt without the intent to repay it. See, e.g., In re Wolniewicz, 224 B.R. 302 (Bankr. W.D.N.Y. 1998); In re Gaskins, 85 B.R. 846 (Bankr. C.D. Cal. 1988). The court in In re Attanasio, 218 B.R. 180, 217 (Bankr. N.D. Ala. 1998), collects many such cases but also argues that § 707(b) should not be used as a substitute for a creditor's § 523(a)(2) complaint:

While a debtor's accumulation of consumer debt beyond an ability to repay may not be

> responsible, such an accumulation is not illegal and is not necessarily fraudulent, unless accompanied by the requisite intent. Why then should the bankruptcy court prosecute the credit card company's non-dischargeability case by way of 707(b)? If the credit card debt was incurred without the intent to repay, as evidenced by the debtor's complete inability to pay, then the debt, upon proof of those facts, may be adjudged non-dischargeable. However, in the absence of proof, the debt is dischargeable. Section 707(b) should not circumvent non-dischargeability sections with concomitant bypassing of procedural safeguards required for the prosecution and proof of the elements essential for a judgment of non-dischargeability.

Id. at 219 (footnote omitted). The court also noted that "Congress did not say that a case should be dismissed if it represents a substantial abuse of consumer credit, but said rather that the case should be dismissed if it represents a substantial abuse of Chapter 7." Id. Here is the cautious approach taken in a recent Central District case:

> In adhering to the rationale behind the enactment of § 707(b) as well as upholding the underlying principles of our bankruptcy system, this Court holds that if a debtor possesses excess income so that the debtor is able to pay his debts, dismissal is warranted. However, if evidence suggests the debtor is unable to meet a meaningful part of his financial obligations, the court must consider other relevant indicia of the debtor's honesty and good faith and whether there are lesser effective remedies to protect the creditor-body and/or the bankruptcy system from the effects of debtor's bad faith dealings.
>
> The substantial abuse to the system that is being prevented in cases involving credit-card abuse must be that § 523(a)(2) is not an effective remedy given the facts of the case. This is not meant as a bright-line test, but rather a case-by-case analysis as to when a motion might be granted. The issues to be considered by the court are as follows: (1) whether the overwhelming percentage of the debtor's unsecured debt is due to credit cards; (2) whether the debtor has used so many credit cards that it would multiply the workload of the court to adjudicate each § 523(a)(2) action separately; (3) whether there is no economic incentive to individual creditors to bring an action under § 523(a)(2) to have their debt declared non-dischargeable;[16] (4) whether the credit-card debt was obtained for luxury goods, high lifestyle or other improper purposes; and (5) whether the debtor has failed to make an honest effort to repay these obligations before filing bankruptcy. If the court finds that these facts are proven, then grounds exist to dismiss the case under § 707(b) even if the debtors lack the ability to make present or future payments.
>
> ---
>
> [Court's footnote] 16. For example, whether the amounts owed on each credit card are relatively small or the creditors would have little hope of collection on a judgment during the coming 10 years.

In re Motaharnia, 215 B.R. 63, 72-73 (Bankr. C.D. Cal. 1997).

III. Other New Cases

Here are some new cases to consider in addition to those in the 1998 Supplement to the Training Materials:

A. Reaffirmation (discussed at pp. 9-14 of the 1998 materials)

1. McClellan Federal Credit Union v. Parker (In re Parker), 139 F.3d 668 (9th Cir.), cert. denied, 119 S. Ct. 592 (1998).

Parker holds that a debtor is not required under § 521(2) to reaffirm an automobile loan in order to keep the automobile, where the debtor has kept up the payments. The court relied on the plain language of the section, which requires the debtor to file a statement of intention with respect to the collateral but does not limit the debtor's options to reaffirmation, redemption, or surrender. "[I]f applicable," the debtor must specify one of those three options according to §

521(A), but the court holds that the requirement to specify one of them is only applicable if the debtor chooses one of them. That approach is required by § 521(2)(C), which provides that nothing in § 521(2)(A) "shall alter the debtor's rights." Because the debtor is not required to reaffirm by § 521(2) in order to keep the automobile, "[t]he bankruptcy court's refusal to approve the reaffirmation agreement, as not in Parker's best interest, was thus within its discretion." 139 F.3d at 673.

The problem with the court's analysis is that it only shows (if it is correct) that section 521(2) does not require the debtor to reaffirm in order to keep the automobile. The security agreement in *Parker* likely included a provision making the filing of a bankruptcy petition a default (as part of what is called an "ipso facto" clause). Perhaps the court assumes that any such provision would be unenforceable; certainly the court does not address that issue. (The court does quote the bankruptcy court's statement that "my understanding of the law is, that as long as you keep paying for that automobile, you–that probably would mean that the original monthly [*sic*] rate you get to keep it.") Perhaps the creditor had not suggested that a bankruptcy default clause would be used to repossess the automobile absent reaffirmation, and thus the court did not think it was in Parker's best interest to reaffirm.

Thus, on the surface it seems that *Parker* resolves the issue for the Ninth Circuit; debtors may keep their automobiles without reaffirming if they have kept up and continue to keep up their payments. But because the court did not reach the issue of enforceability of a bankruptcy default clause, the issue may not yet be resolved. In any case, automobile lenders in California, and those with a national business, seem reconciled to allowing debtors to keep their automobiles in such cases. Regional lenders based elsewhere may need education on the Ninth Circuit practice, because the circuits continue to be split on whether § 521(2) requires redemption, reaffirmation, or surrender–but even such lenders are not at this point attempting to enforce bankruptcy default clauses.

2. The Sears Reaffirmation Saga and Recent Cases Concerning Whether Reaffirmation Should Be Approved

Certain creditors' reaffirmation practices have come under severe attack recently. The attorney representing a low income debtor should be aware of those practices and counsel the client appropriately.

The most dramatic attack on such practices has involved Sears, whose reaffirmation practices have cost it dearly. According to the Wall Street Journal, Sears has paid over $200 million in settlements with all 50 states, the Federal Trade Commission, customers and shareholders. 1999 WL-WSJ 5440108 (Feb. 10, 1999). Sears' practices are recounted at length in In re Melendez, 224 B.R. 252 (Bankr. D. Mass. 1998), which is the basis of the following brief and inadequate account. Sears used nonattorneys to aggressively seek reaffirmation of its credit card debt at § 341 hearings, regardless of debtors' ability to pay and regardless of whether the supposed collateral was a refrigerator or eyeglasses. (A law firm hired by Sears was fined $10,000 for aiding unauthorized practice of law by using nonlawyers to negotiate reaffirmation agreements. See In re Carlos, 227 B.R. 535 (Bankr. C.D. Cal. 1998).) Initially Sears' reaffirmation agreements listed settlement of nondischargeability claims as a reason for reaffirmation, even though in most cases no nondischargeability complaint had been filed. In 1995 that was held to be a potential violation of Rule 9011. In 1996 Sears stopped filing many of its reaffirmation agreements with the courts, which rendered the agreements unenforceable. That was discovered by the courts in 1997, and Sears' practice of collecting discharged debts under

unfiled reaffirmation agreements was held to be a violation of the discharge injunction. Massive litigation, including class actions, ensued. As it turned out, in many cases the supposed collateral could not be identified. Sears' supposed security interests in the merchandise it sold was based on language contained on the charge slip signed by the customer; there were serious questions whether that language was sufficient to create a security interest. Debtors' counsel had often provided poor advice and filed highly questionable declarations to the effect that the reaffirmations were in the best interest of the debtors and did not impose an undue burden on them.

Debtors' attorneys, especially those representing low income debtors on a pro bono basis, will seldom be justified in signing declarations in support of reaffirmations and should usually counsel debtors against reaffirmations. In the absence of such a declaration, a reaffirmation agreement is unenforceable unless approved by the bankruptcy judge as being in the best interest of the debtor and as not imposing an undue hardship on the debtor or the debtor's dependents. See § 524(c)(6) (but note exception for consumer debts secured by real property). It seems that judges in the Central District of California will seldom approve reaffirmation agreements unless there is a good reason for the reaffirmation (such as retaining an automobile where there has been a default on the loan) *and* the creditor makes substantial concessions (such as writing down the amount of the debt to the value of the automobile and reducing monthly payments). In credit card cases there will often be serious doubt whether the creditor is secured, what the value of the collateral is, and whether any needed credit disclosures were given when the reaffirmation agreement was solicited. See, e.g., In re Carlos, 215 B.R. 52 (Bankr. C.D. Cal. 1997) (holding that Sears' credit card charge form was insufficient to grant Sears a security interest in merchandise purchased and that best interest of debtor ordinarily precludes reaffirmation of unsecured debt); In re Kamps, 217 B.R. 836 (Bankr. C.D. Cal. 1998) (refusing to approve reaffirmation of credit card debt where, inter alia, debtor did not appear at reaffirmation hearing, Regulation Z disclosures were not made, creditor did not disclose to debtor her right to redeem collateral for its value, creditor did not establish that it held a valid security interest and did not establish the value of the collateral, court did not have sufficient information to determine whether reaffirmation was in debtor's best interest, and reaffirmation would impose an undue hardship on the debtor).

Finally, in lieu of seeking formal reaffirmation, some creditors are asking debtors to settle supposed claims of nondischargeability by agreeing to pay all or part of the debt. Some courts will treat such settlements as reaffirmation agreements and require compliance with § 524(c). If there is no actual contemplation of filing a nondischargeability complaint, or if such "settlement offers" are made routinely without any reason to believe that the debts are nondischargeable, the making of such offers may violate the automatic stay. In any case, the debtor's attorney should make sure the debtor knows to contact the attorney before signing any agreement; you may wish the debtor to contact you if any such settlement offers are made so that you can determine whether to take action against the creditor.

B. Section 523(a)(2) Exception from Discharge (fraud)

Cohen v. De La Cruz, 523 U.S. 213, 118 S. Ct. 1212 (1998). The Court held that the entire claim resulting from the commission of fraud was nondischargeable under § 523(a)(2), including treble damages, attorneys' fees, and costs awarded pursuant to a rent control statute against a landlord who defrauded tenants by charging them illegally excessive rent. The effect is to overrule the Ninth Circuit's decision in In re Levy, 951 F.2d 196 (9th Cir. 1991), which had held that punitive damages awarded in a fraud action were dischargeable because they were not, in the words of § 523(a)(2), "obtained by" the fraud. The Court in *Cohen* held that once it is determined that something (e.g., money, property, services, credit, a renewal of credit) was obtained fraudulently, then the entire debt that results is nondischargeable.

Attorneys for credit card companies will seek to use *Cohen* to add attorneys' fees, interest through the date of judgment, and other collection costs to the amount of the nondischargeable debt. (Note that in the Ninth Circuit a creditor in a nondischargeability action may receive a judgment for the debt along with a determination of nondischargeability. Cowan v. Kennedy (In re Kennedy), 108 F.3d 1015 (9th Cir. 1997).) Ninth Circuit authority supports the inclusion of interest through the date of judgment. See Cobe v. Smith, 229 B.R. 15 (Bankr. 9th Cir. 1998). Attorneys' fees will not be part of the nondischargeable debt (in fact, they will not even be part of a *dischargeable* debt) in the absence of a statutory, contractual, Rule 9011, or similar basis for their award–*Cohen* does not create liability for attorneys' fees. See Clark & Gregory, Inc. v. Hanson (In re Hanson), 225 B.R. 366 (Bankr. W.D. Mich. 1998). One case holds that contractual claims for attorneys' fees fall outside the purview of *Cohen* and thus are dischargeable, but the case's reasoning is highly questionable. See Wegmans Food Markets, Inc. v. Lutgen (In re Lutgen), 225 B.R. 37 (Bankr. W.D.N.Y. 1998).

C. Section 523(a)(6) Exception from Discharge (willful and malicious injury)

Kawaauhau v. Geiger, 523 U.S. 57, 118 S. Ct. 974 (1998). The Court held that negligence or recklessness will not satisfy the "willful and malicious" standard. Thus a doctor's treatment of a patient which fell far below the standard of care was not willful and malicious, and the resulting malpractice judgment was dischargeable in the doctor's chapter 7 case. The Court held that it is not enough that an act be done intentionally, and that injury result. If that were the standard, many debts would be nondischargeable. Instead, for an injury to be willful and malicious, the debtor must have actual intent to cause the injury. What is needed is a "deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." 118 S. Ct. at 977. Several courts have stated that *Geiger* overrules the previous Ninth Circuit leading case of Impulsora Del Territorio Sur, S.A. v. Cecchini (In re Cecchini), 780 F.2d 1440 (9th Cir. 1986). See, e.g., Gill Distrib. Centers v. Banks, 225 B.R. 738 (Bankr. C.D. Cal. 1998).

What is not clear is how *Geiger* applies to cases in which a debtor converts a secured party's property by selling or giving away the collateral. These cases may come up often in low income debtor representations. The debtor may, for example, have purchased a television on secured credit. Later the debtor needs cash and therefore sells the television in a yard sale. Is this a willful and malicious injury to the secured creditor's property interest (namely, the security interest in the television)? *Cecchini* dealt with converted funds and held that "When a wrongful

act such as conversion, done intentionally, necessarily produces harm and is without just cause or excuse, it is 'willful and malicious' even absent proof of a specific intent to injure." The only question under *Cecchini* would have been whether the sale of the television necessarily causes harm; that in turn could depend on whether the issue is harm to the property interest (sale makes enforcement of the security interest so difficult that it is a conversion) or ultimate harm to the finances of the secured party (after all, the debtor might still pay off the debt). Under *Geiger* we must ask whether the debtor deliberately or intentionally injured the property interest (or the secured creditor's finances) by selling the television.

Presumably a debtor need not actually harbor ill will toward the other party or desire to injure the other party for the sake of causing injury. A result is usually considered intentional when the person engaging in the action either wants that result to occur or is substantially certain that it will occur; that approach was taken in the Eighth Circuit opinion which the Supreme Court affirmed in *Geiger*. See 113 F.3d 848. Thus, in a crowded bar, a patron who wants another's seat and knocks him out with a punch to the jaw in order to get the seat will almost certainly be found to have willfully and maliciously injured the victim. It should not matter whether the batterer harbored ill will or wanted to harm the victim apart from the desire to obtain the seat; the batterer knew that injury was substantially certain to occur from the intentional act of punching the victim, and that is enough to make the injury intentional. The Supreme Court may have signalled its acceptance of that approach in *Geiger* by describing unintentional injury as injury "neither desired nor in fact anticipated by the debtor." 118 S. Ct. at 977. See also Avco Financial Services v. Kidd (In re Kidd), 219 B.R. 278 (Bankr. D. Mont. 1998) (sufficient if debtor knew harm was substantially certain to flow from actions, but mental condition of consumer debtor at time of transfer of collateral prevented him from knowing with substantial certainty that creditor would be harmed by the conversion); but see Berger v. Buck (In re Buck), 220 B.R. 999 (Bankr. 10th Cir. 1998) (debt dischargeable because no evidence of motive to harm creditor).

The Court in *Geiger* notes that the language of § 523(a)(6) "triggers in the lawyer's mind the category 'intentional torts' as distinguished from negligent or reckless torts." 118 S. Ct. at 977. Conversion is a traditional intentional tort. The Court goes on to say that some, but not all, conversions are willful and malicious. Id. at 978. By citing favorably Davis v. Aetna Acceptance Co., 293 U.S. 328, 55 S. Ct. 151 (1934), for that proposition, the Court may be suggesting that most conversions are willful and malicious; note the following discussion in *Davis*:

> But a willful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances. There may be a conversion which is innocent or technical, an unauthorized assumption of dominion without willfulness or malice. [Citations omitted.] There may be an honest but mistaken belief, engendered by a course of dealing, that powers have been enlarged or incapacities removed. In these and like cases, what is done is a tort, but not a willful and malicious one.

Id. at 331, 55 S. Ct. at 153. It seems unlikely that our hypothetical debtor would have had "an honest but mistaken belief" that he or she had the right to sell the television, but that is possible.

PRO BONO REPRESENTATION OF LOW INCOME CHAPTER 7 DEBTORS: AN OVERVIEW

PRO BONO REPRESENTATION OF LOW INCOME CHAPTER 7 DEBTORS: AN OVERVIEW[1]

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The goal of this training program is to provide you with an overview of the issues that may arise in pro bono representation of low income chapter 7 debtors in the Central District of California. After providing a brief overview of bankruptcy law and procedure, we will focus on two hypothetical referrals which you might receive. Please note that the characters in the hypothetical referrals are wholly fictitious. Any resemblance of any of them to any actual person is entirely accidental and unintended. Unless otherwise noted, references to statutory sections are to sections of the Bankruptcy Code (title 11 of the United States Code), and references to Rules are to the Federal Rules of Bankruptcy Procedure.

A. BRIEF OVERVIEW OF BANKRUPTCY LAW

The United States Constitution authorizes Congress "To establish ... Uniform laws on the subject of Bankruptcies throughout the United States." U.S. Const., Art. I, § 8. The Bankruptcy Reform Act of 1978 replaced the old Bankruptcy Act of 1898 (which had been substantially revised in 1938); the new law is the Bankruptcy Code (the "Code"), which comprises title 11 of the United States Code.[2]

1. A Greatly Simplified Overview of Bankruptcy Jurisdiction

The Bankruptcy Reform Act of 1978 (the BRA of 1978) also amended title 28 (the Judicial Code) to give bankruptcy judges plenary power over bankruptcy cases and over matters related to bankruptcy cases. But bankruptcy judges do not have life tenure and thus are not "Article III" judges; they are appointed by each circuit court of appeals for 14 year terms. 28 U.S.C. § 152. The Supreme Court held in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), that non-Article III bankruptcy judges could not constitutionally wield the full judicial power granted them by the BRA of 1978. Eventually Congress amended the

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[2]Important amendments to the Code were enacted in 1984, 1986, and 1994. Recently the National Bankruptcy Review Commission completed its work and recommended to the Congress substantial additional amendments, including amendments that would restrict the availability of consumer bankruptcy relief.

bankruptcy jurisdictional provisions of title 28 in conformity with the *Marathon Pipe Line* decision. The district courts now have original and exclusive jurisdiction over "cases under title 11," and original but not exclusive jurisdiction over bankruptcy-related civil proceedings. 28 U.S.C. §1334(a) & (b). The active bankruptcy judges for a district "constitute a unit of the district court to be known as the bankruptcy court for that district." 28 U.S.C. § 151. Under 28 U.S.C. § 157(a) the district court may refer any or all such cases and bankruptcy-related civil proceedings to the bankruptcy judges for the district; district judges have enough other work and thus the district courts have referred these matters en masse to the bankruptcy courts. Thus the Bankruptcy Court for the Central District of California, as a unit of the District Court for the Central District, exercises the jurisdiction granted to the District Court by 28 U.S.C. § 1334.

To comply with *Marathon Pipe Line* Congress divided bankruptcy matters into two categories: (1) those in which the bankruptcy judge could enter judgments and orders subject to review only by way of appeal, and (2) those in which the bankruptcy judge could not (without consent of all parties) enter judgments and orders but could only submit proposed findings of fact and conclusions of law to the district judge--the district judge would then enter any order or judgment after de novo review of findings or conclusions to which a party specifically and timely objected. See § 157(b)(1) & (c)(1). Category (1) consists of "all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. § 157(b)(1). An example of an order in case under title 11 would be the order granting the debtor a discharge; the bankruptcy judge enters that order and does not simply send proposed findings and conclusions to the district judge. Section 157(b)(2) of title 28 provides a nonexclusive list of "core proceedings." For example, the bankruptcy judge can enter the judgment for plaintiff or defendant in an adversary proceeding filed to determine dischargeability of a debt. See 28 U.S.C. § 157(b)(2)(I).

2. Sources of Applicable Substantive Law and Procedural Rules

The Code is divided into "chapters." Chapter 1, for example, consists of the 100 series of sections (§§ 101 through 110.) There is no chapter 2; the even numbered chapters were reserved for future developments, and thus far the only even numbered chapter is chapter 12 (the 1200 series of sections), which was added to the Code in 1986 and applies to family farmer debt adjustment cases. Chapters 1, 3, and 5 of the Code (the 100 series, 300 series, and 500 series of sections) apply to all bankruptcy cases unless the Code provides otherwise. Each of the remaining chapters (7, 9, 11, and 13) applies to cases filed under that chapter. See § 103. Thus each bankruptcy petition designates the chapter under which it is filed. See §§ 301, 302, and 303; Official Forms 1 (voluntary petition) and 5 (involuntary petition).[3] Under § 103(b), the first two subchapters of chapter 7 (sections 701 through 728) apply to chapter 7 bankruptcy cases.[4]

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[3]The only exception is for cases that are ancillary to foreign insolvency proceedings. They need not be filed under any particular chapter of the Code. See § 304.

[4]The third and fourth subchapters of chapter 7 apply to chapter 7 cases involving respectively stockbrokers and commodity brokers. See § 103(c) & (d). Chapter 9 applies to

Chapter 7 is sometimes referred to as liquidation bankruptcy or "straight" bankruptcy. Thus in today's program we will consider provisions from:

--chapter 1, such as § 101, which defines many of the terms used elsewhere in the Code);

--from chapter 3, such as §362, which provides for an automatic stay of creditor activity on filing of a bankruptcy petition;

--from chapter 5, such as § 523, which provides that certain debts are not dischargeable; and

--from chapter 7, such as § 727, which lists grounds for objection to discharge in a chapter 7 case, describes the scope of the discharge which a debtor may obtain in chapter 7, and states the grounds and procedures for revoking a chapter 7 discharge.

We will also briefly note some of the provisions of chapter 13, because chapter 13 is the principal alternative chapter under which consumer debtors may obtain debt relief.

Bankruptcy procedure is governed by the Code, by provisions of Title 28 (the Judicial Code), and by the Federal Rules of Bankruptcy Procedure (the "Rules") prescribed by the Supreme Court under the authority of 28 U.S.C. § 2075. Rule 9029 permits the district judges in a district to adopt Local Bankruptcy Rules or to delegate adoption of such Local Bankruptcy Rules to the bankruptcy judges. References in these materials to the Local Bankruptcy Rules are references to the Local Bankruptcy Rules adopted by Bankruptcy Court for the Central District of California.[5] (Of course, individual bankruptcy judges may have additional rules or requirements; the attorney should inquire as to any such rules or requirements.) The Code takes precedence over the Rules if they conflict. In fact, 28 U.S.C. § 2075 limits the Rules to procedural matters by providing that the Rules "shall not abridge, enlarge, or modify any substantive right." Of course, if a party fails to follow the procedures set forth in the Rules, the party's substantive rights may be affected. (For example, Rule 4007 sets the deadline for creditors to file complaints alleging nondischargeability of debts under certain provisions of § 523; the debts are discharged unless the creditor files a timely complaint.)

Bankruptcy procedure also involves the use of Official Forms promulgated by the Judicial Conference and in some cases Local Rules Forms approved by the relevant Bankruptcy Court. (These materials include completed forms for filing of a chapter 7 case by the hypothetical Garcia debtors, as well as a motion by the Garcia's to avoid a security interest on personal property which impairs an exemption.) Rule 9009 requires use of the Official Forms "with alterations as may be appropriate." The Official Forms include the

--Voluntary Petition (Form 1);

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municipal bankruptcies (such as Orange County's). Chapter 11 applies to business reorganizations; please do not confuse chapter 11 (the 1100 series of sections in the Bankruptcy Code) with Title 11, which is the entire Bankruptcy Code. Chapter 12 applies to family farmer debt adjustments, and chapter 13 applies to adjustment of debts of individuals with regular income.

[5]Any attorney appearing before the Bankruptcy Court for the Central District should be prepared to state that he or she has read the Rules, the Federal Rules of Civil Procedure and of Evidence, and the Local Bankruptcy Rules in their entirety.

--Application and Order To Pay Filing Fees in Installments (Form 3);
--Schedules (Form 6) and Statement of Financial Affairs (Form 7), both of which must be filed with the petition or within 15 days after filing of the petition pursuant to Rule 1007;
--Chapter 7 Individual Debtor's Statement of Intention with regard to collateral securing consumer debts, which, pursuant to §521, must be filed within 30 days after the filing of the petition but no later than the date of the § 341 meeting of creditors;
--Notice of Commencement of Case (Form 9), which the clerk will send to all scheduled creditors, and which informs them of the automatic stay and of various deadlines (including the claims bar date, the deadline for filing complaints objecting to the grant of a discharge, and the deadline for the filing of complaints under § 523(a)(2), (4), (6) or (15) alleging that particular debts are excepted from the discharge);
--Proof of Claim (Form 10);
--versions of the Caption (Forms 16A, 16B, 16C, and 16D) to be used on papers filed in the case and on complaints and other papers filed in adversary proceedings;
--Notice of Appeal (Form 17); and
--Discharge of Debtor (Form 18) to be entered as an order if the debtor obtains a discharge of any debts in the case.

Some of the Official Forms may be purchased at stationery stores. Packets of forms for use in filing chapter 7 petitions (and petitions under other chapters of the Code) may be purchased at the commercial copy center located near the court clerk's office; the forms may also be downloaded from the court's World Wide Web site (http://www.cacb.uscourts.gov/). Many practitioners use computer programs that allow entry of information and that then generate the Official Forms with the appropriate information filled in.

Appendix IV to the Local Bankruptcy Rules includes approved Local Rules Forms. Use of most of the Local Rules Forms is optional.

Completed forms for the filing of a chapter 7 case by hypothetical debtors ("Mr. and Mrs. Garcia") are attached. Also attached is a completed Local Rules Form for a motion to avoid a security interest in otherwise exempt personal property under § 522(f).

3. A Brief Overview of Consumer Bankruptcy Law and Practice

a. The Automatic Stay

A bankruptcy case is commenced by the filing of a petition. The commencement of the case operates as a stay of virtually any actions creditors might wish to take in connection with the debtor's debts, other than actions taken to participate in the bankruptcy case. Collection suits are stayed, and new ones cannot be filed. See § 362(a)(1). Enforcement of prepetition judgments is stayed. See §362(a)(2). Creditors cannot enforce existing liens, cannot obtain new liens, and cannot exercise setoff rights. See § 362(a)(3)-(5), (7). Creditors cannot take any action to "collect, assess, or recover a [prepetition] claim against the debtor." Thus a creditor cannot permissibly telephone the debtor to demand payment or send a letter to the debtor demanding payment. (However, a creditor probably does not violate the stay by contacting the debtor to suggest that the debtor reaffirm a debt under § 524(c).)

Creditors (typically secured creditors) may seek relief from the stay under §362(d) by motion. Typically the relief sought is permission for a secured creditor to enforce a lien securing a debt that is in default. A secured creditor will be entitled to relief from the stay if, inter alia, (1) the value of its interest in the collateral is not adequately protected or (2) the collateral is not necessary for an effective reorganization and the liens on the property exhaust its value. See § 362(d)(1) & (2). Chapter 7 cases do not involve reorganization and thus secured creditors probably need only prove that the collateral is fully encumbered. However, relief from stay should not be granted if it would frustrate the debtor's right to redeem property under § 722. If necessary the court should invoke its broad powers under §105(a) to protect the redemption right.

In any event the automatic stay will terminate when the case is closed or dismissed, or when the debtor is granted or denied a discharge, whichever occurs first. See §362(c)(2).[6] If the debtor receives a discharge, the discharge injunction of §524(a) will come into effect as the automatic stay terminates.

b. The Bankruptcy Estate and the Debtor's Exemptions

The commencement of the case also creates a bankruptcy estate consisting initially of almost all of the debtor's interests in property; in California, the estate will also usually include all of the debtor's and debtor's spouse's interests in community property. See §541(a)(1) & (2). (But the estate does not include the debtor's interest in an ERISA qualified pension plan or the debtor's state law protected spendthrift trust interests. See §541(c)(2); Patterson v. Shumate, 504 U.S. 753 (1992).) The debtor exempts some or all of the property of the estate under § 522; the exempted property is no longer property of the estate. In the absence of timely objection to the debtor's claim of exemptions, the property claimed as exempt is exempt, even if there is no basis for the claim of exemption. See § 522(l); Taylor v. Freeland & Kronz, 503 U.S. 638 (1992). (But other sanctions can be imposed on the debtor or debtor's lawyer for making a baseless claim of exemption.)

Section 522(b) gives debtors the option to choose the exemptions that the debtor would have under nonbankruptcy debtor-creditor law or (unless a state opts out) the bankruptcy exemptions listed in §522(d).[7] California has opted out but still gives debtors a choice. In addition to nonbankruptcy federal exemptions (such as for Social Security benefits), debtors may use their nonbankruptcy state law exemptions (Cal. Code Civ. Proc. §§704.010 et seq.) or an alternative set of California law exemptions available only in bankruptcy. See Cal. Code Civ. Proc. §§703.130 & 703.140.

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[6]The automatic stay's prohibition of acts against property of the estate terminates as to an item of property when that property ceases to be property of the estate. See § 362(c)(1). But other aspects of the stay may continue in effect.

[7]The state or local law applicable to a debtor's exemptions is the state or local law of the place where the debtor was domiciled for more of the 180 days prior to the filing of the petition than anywhere else. See § 522(b).

Under § 522(m) each debtor in a joint case is entitled to his or her own exemptions. California has attempted to prevent that; where an exemption provision contains a dollar limit, Cal. Code Civ. Proc. § 703.110(a) purports to limit the married debtors jointly to that amount rather than allowing each to exempt property in that amount. For example, § 703.140(b)(5) allows a debtor to exempt $800 in interest in any property plus any unused amount of the $15,000 homestead exemption provided in §703.140(b)(1). A single debtor who does not exempt a homestead may thus exempt $15,800 of any property. Under § 703.110(a) a married couple has the same $15,800 exemption; arguably § 522(m) preempts this result and allows each spouse to exempt $15,800 each, for a total of $31,600. However, the Ninth Circuit has held that § 703.110(a) is not preempted by § 522(m), and that states which opt out are free to disregard § 522(m). Talmadge v. Duck (In re Talmadge), 832 F.2d 1120 (9th Cir. 1987); accord First National Bank of Mobile v. Norris, 701 F.2d 902, 905 (11th Cir.1983); but see Cheeseman v. Nachman, 656 F.2d 60 (4th Cir.1981) (holding that § 522(m) must be respected even where a state opts out of the § 522(d) exemptions). In your author's opinion, *Cheeseman* reaches the correct result. The Supreme Court's decision in Owen v. Owen, 500 U.S. 305 (1991), undercuts *Talmadge* by holding that states cannot opt out of the lien avoidance provisions of § 522(f); states thus have less freedom to shape exemption policy than the Ninth Circuit panel in *Talmadge* may have thought. Arguably states may not opt out of § 522(m) any more than they may opt out of § 522(f). In a proper case, the Ninth Circuit might be willing to revisit *Talmadge*, and because *Talmadge* has been undercut by later Supreme Court authority, a panel of the Ninth Circuit probably would be entitled to refuse to follow *Talmadge*; an en banc decision probably would not be required.

Even under *Talmadge*, however, most low income consumer debtors who are not homeowners can exempt all of their property using the specific exemptions in Cal. Code Civ. Proc. § 703.140(b) and the $15,800 "wildcard" exemption under § 703.140(b)(5).

c. Claims and Dividends

In each chapter 7 case, a trustee is appointed by the United States trustee. See §701(a). The trustee for the case (not the United States trustee) collects and liquidates the property of the estate (not including property exempted from the estate). See § 704(1). Property subject to an unavoidable lien will generally only be sold by the trustee if it can be sold for more than the amount of the lien (and of any exemption) so that value can be generated for the estate. The lien will be paid first out of the proceeds of sale of the property subject to the lien. (Where a lien or exemption or a combination of the two exhausts the value of an item of property, the trustee will abandon it under § 554 or else allow the debtor or the lien holder to take it under § 725.) Any remaining proceeds of liquidation of the estate will be used to pay administrative expenses in the bankruptcy case and other priority claims. See § 726. Then any remaining money is paid pro rata to holders of allowed general unsecured claims as a "dividend" on their claims. Id.

In chapter 7 cases a creditor generally must file a proof of claim in order for the claim to be allowed. See Rule 3002(a). The deadline (the "bar date") for filing a timely proof of claim is usually 90 days after the first date set for the meeting of creditors. See Rule 3002(c). However, in most consumer chapter 7 cases, there will be no money to pay anything on general unsecured

claims. If it appears from the debtor's schedules that no dividend will be paid, the notice of the meeting of creditors may include a statement that creditors need not file claims until and unless they are notified that a dividend may be paid. See Rule 2002(e). Thus in many consumer chapter 7 cases, there is no bar date for filing of claims.

d. The Discharge

If no complaint objecting to the granting of a discharge is timely filed, then the chapter 7 debtor receives a discharge of debts. See § 727; Rule 4004. (Note that only individuals–flesh and blood human beings–receive discharges in chapter 7 cases; partnerships and corporations do not. See §727(a)(1).) If such a complaint is filed, then the court tries the matter and determines whether a ground for denial of discharge under §727(a)(2)-(9) has been proven.

The chapter 7 discharge covers prepetition debts and debts that are treated as though they arose prepetition. See § 727(b). A debt is discharged whether or not the creditor files a proof of claim and whether or not the claim is allowed. Id. However, certain debts are not dischargeable in a chapter 7 case. See § 523. Creditors seeking to except debts from the discharge under

–§ 523(a)(2) (fraud);

–§ 523(a)(4) (fraud or defalcation of a fiduciary, embezzlement, or larceny);

–§ 523(a)(6) (willful and malicious injury to person or property); or

–§ 523(a)(15) (certain marital dissolution property settlement obligations)

must file a timely complaint in the bankruptcy court alleging nondischargeability. See § 523(c); Rule 4007. If no timely complaint is filed, the debt will be discharged. If one of the other subsections of §523(a) is the basis for a claim of nondischargeability, then the creditor need not raise the matter at all in the bankruptcy case, but can simply proceed (once the automatic stay terminates) to collect the debt. The debtor may wish in such cases to file a complaint in the bankruptcy court to determine dischargeability or to seek to have the creditor held in contempt for violation of the discharge injunction under §524. (The case can be reopened for such purposes if it has been closed. See § 350.) The debtor's other choice is to plead the discharge as an affirmative defense in the creditor's collection suit, in which case the court handling that case (typically a state court) will determine whether the debt was discharged in the chapter 7 case.

The chapter 7 discharge voids judgments to the extent they would impose personal liability on the debtor for discharged debts, §524(a)(1), and prevents any such void judgments from being the basis for creation of additional liens on the debtor's property. The discharge also acts as an injunction against any creditor activity seeking to hold the debtor personally liable for the discharged debts. See §524(a)(2). It also protects the future community property interests of the debtor and the debtor's spouse from liability for a discharged debt, even if the spouse did not file a bankruptcy petition and is personally liable for the debt.[8] This is one of the few exceptions in the Code to the rule that only the person who files for bankruptcy is entitled to the benefit of the discharge. Note that the spouse pays a price for this benefit: the spouse's interest in the

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[8]But this protection is available only to the extent the spouse could have discharged the debt had he or she filed a bankruptcy petition. See § 524(a)(3) & (b)(2).

community property comes into the estate even though the spouse does not file a bankruptcy petition.

e. The Avoiding Powers

The avoiding powers usually operate to the benefit of the unsecured creditors as a body. Preferences and fraudulent transfers are recovered; liens are avoided; fraudulently incurred obligations are eliminated. The effect may be to increase the dividend paid on general unsecured claims. The issue here, however, is the effect of the avoiding powers on the chapter 7 debtor. If the trustee recovers property the debtor may be able to exempt it under § 522(g). If the trustee fails to utilize the avoiding powers to recover property that the debtor could exempt, then the debtor may utilize those powers. See §522(h).

In addition, §522(f) gives the debtor the right to avoid certain liens that impair the debtor's exemptions. Under § 522(f)(1)(A) the debtor can avoid judicial liens that would prevent the debtor from obtaining the full benefit of the exemptions to which the debtor would have been entitled in the absence of the lien. (But judicial liens securing family support obligations cannot be avoided under §522(f).) Suppose the debtor has $8,000 worth of General Motors stock, none of which can be exempted outside bankruptcy but all of which could be exempted under Cal. Civ. Code § 703.140 in the debtor's bankruptcy case. Suppose a creditor with a $20,000 judgment obtained an execution lien on the stock 92 days before the debtor filed his petition. Under § 522(f)(1)(A) the debtor could avoid the execution lien so that he could enjoy his full $8,000 exemption in the stock.

Section 522(f)(2) also gives the debtor the right under certain circumstances to avoid consensual liens (typically Article 9 security interests) that impair the debtor's exemptions. Exemptions ordinarily do not affect consensual liens. Exemptions simply protect property from being taken for payment of judgments. A debtor who gives a consensual lien on property ordinarily cannot use an exemption to defeat the consensual lien. In effect consensual liens have priority over a debtor's exemptions under nonbankruptcy law. However, if

–the property encumbered by the consensual lien is of a kind listed in § 522(f)(1)(B) (including inter alia household furnishings, household goods, musical instruments, clothing and jewelry); and

–if the security interest is nonpossessory (i.e., the collateral is not in the possession of the secured creditor); and

–if the security interest is not a purchase money security interest,

then the debtor can avoid the lien to the extent needed to enjoy the full exemption to which she would have been entitled had the lien not existed. We will discuss this further below in the context of our hypothetical Mrs. Garcia's piano.

Finally, the debtor's right to redeem certain property under §722 may be seen as a kind of avoiding power. An undersecured claim is divided by §506(a) into a secured claim portion and an unsecured claim portion. For example, if a creditor's $7,000 debt is secured only by a security interest in a car worth $4,000, the creditor will have a $4,000 secured claim and a $3,000 unsecured claim. The trustee will not be interested in the car; there is no value for the estate. The discharge will eliminate the debtor's personal liability on the $7,000 debt, but it will not

affect the $7,000 lien on the car. In order to keep the car, the debtor would have to pay off the full $7,000 lien. (If there has been no default, the debtor might have the right to pay it off in accordance with the amortization schedule in the security agreement, but the full debt would still need to be paid.) Section 506(d) might on its face seem to provide that the lien would be stripped down to the $4,000 value of the car, with the other $3,000 of lien being voided. But the Supreme Court has held that § 506(d) does not have that effect. Dewsnup v. Timm, 502 U.S. 410 (1992). However, the debtor may be able to accomplish the same thing using § 722.

Under § 722 the debtor may redeem certain kinds of personal property from liens securing dischargeable consumer debts by paying the amount of the allowed secured claim. Thus, for example, if the debtor owes $5,000 on a loan secured by an automobile valued at $3,000, the debtor may redeem the automobile from the lien (and thus own it free and clear) by paying the secured creditor $3,000. In effect, then, § 722 allows the lien to be stripped down to the value of the collateral if the debtor redeems the collateral. Note that § 722 applies to consumer goods which are exempted by the debtor or abandoned by the trustee. It does not apply to real estate. The cases hold that redemption must be accomplished by a lump sum payment; the debtor is not entitled to redeem property by making installment payments. See, e.g., In re Polk, 76 B.R. 148 (Bankr. 9th Cir. 1987).

f. Reaffirmation

A reaffirmation is a promise by the debtor to pay a debt which would otherwise be unenforceable due to the discharge. Under the common law, a new promise to pay all or part of a debt which has become unenforceable due to a bankruptcy discharge or the passing of a statute of limitations would be enforceable even without additional consideration. (The creditor need not give any additional value for the new promise, which can be made unilaterally by the debtor.) In many states such a promise must be made in a signed writing. Under the old Bankruptcy Act debtors reaffirmed so many debts under postdischarge pressure from creditors that the fresh start policy of the law was substantially undercut. As a result, Congress severely limited the enforceability of such promises when it enacted § 524(c) of the Bankruptcy Code.

Section 524(c) provides conditions for enforceability of "[a]n agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable ...."[9] Under § 524(c) an agreement to pay all or part of a debt which would

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[9]Courts have held that the reference to "agreement" § 524(c) means that the debtor cannot reaffirm a debt without the creditor's agreement, even though at common law a reaffirmation was a unilateral promise by the debtor. See In re Lindley, __ B.R. __, 1998 WL 25582 (Bankr. N.D. Ill. 1998); In re Turner, 208 B.R. 434 (Bankr. C.D. Ill. 1997), aff'd sub. nom. Turner v. Hopper, No. 97-CV-2149 (C.D. Ill. September 29, 1997). More likely the reference to agreement reflects the possibility that (1) a debtor will settle nondischargeability litigation by agreeing to reaffirm all or part of a debt or (2) obtain a secured creditor's agreement to permit satisfaction of a lien on property by payment of part of the debt in installments. In any case, the well-counseled debtor will likely seek concessions of some kind from the creditor in exchange for reaffirming all or part of the debt, and thus there will usually in fact be an agreement.

otherwise be discharged is enforceable only to the extent it is enforceable under nonbankruptcy law. Even then it is enforceable only if (1) the promise is made before the discharge is granted, (2) the agreement contains the required disclosures of a rescission right and of the absence of any obligation to reaffirm, (3) the agreement is filed with the court (along with a declaration of the debtor's attorney if the attorney represented the debtor in negotiating the agreement), (4) the debtor has not rescinded the agreement within the rescission period, (5) the court at a hearing informs the debtor of the effect and consequences of reaffirmation and that reaffirmation is not required, and (6) if the debtor was not represented by an attorney in negotiating the reaffirmation, the court approves the reaffirmation as not imposing an undue hardship and as being in the best interest of the debtor.

The declaration which the attorney must file if the attorney represents the debtor in negotiating the reaffirmation agreement is onerous. The attorney must swear that the agreement is a fully informed and voluntary agreement, that the agreement does not impose an undue hardship on the debtor or a dependent of the debtor, and that the attorney has fully advised the debtor of the legal effect and consequences of the agreement and of any default under the agreement. Most attorneys will be very reluctant to swear to such matters, especially to the absence of undue hardship. It is difficult for an attorney to be sure that the agreement will not impose an undue burden, and now an attorney has been sanctioned for failing to counsel the debtor sufficiently and for declaring that there would not be an undue hardship when an investigation of the facts would have shown that there would be an undue hardship. In re Bruzzese, 214 B.R. 444 (Bankr. E.D.N.Y. 1997).

The rescission period lasts until the discharge is entered or until 60 days after the agreement is filed with the court, whichever is later. As a result, creditors must be cautious in agreeing to reaffirmation in lieu of filing a nondischargeability complaint under § 523(a)(2), (4), (6), or (15). If no complaint is filed by the Rule 4007 deadline, the debtor can rescind the reaffirmation agreement and perhaps leave the creditor without a remedy. It is possible that a debtor commits fraud by signing a reaffirmation agreement with the intent to rescind once the Rule 4007 deadline passes.

In most cases you will likely want to counsel your low income clients not to reaffirm any debts. Debtors sometimes wish to repay debts out of a sense of moral obligation. You should tell the client that he or she is free to repay discharged debts; reaffirmation is not necessary. See § 524(f). The consequence of a reaffirmation is that the debtor will be required to repay the debt on pain of wage garnishment or other creditor's remedy. Even if the debtor loses his or her job or becomes ill, the reaffirmed debt will be legally owed. When that is explained, most debtors will decide that moral obligation does not require them to reaffirm debts.[10]

Usually the only case in which reaffirmation makes sense is the case in which the debtor wants to keep property that would otherwise be lost to a secured creditor. Suppose the debtor

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[10]However, a failure to reaffirm may create a moral hazard for the debtor who has a serious moral commitment to repay a particular debt. The debtor may later decide not to pay the debt, in the absence of a legal obligation to do so. The debtor's desire to avoid a situation in which the debtor may be led to violate his or her moral standards or sense of integrity may lead the debtor to choose to be legally bound. The choice must be the debtor's.

owns an automobile worth $3,000[11] and owes $2,500 on a debt secured by the car. Suppose the debtor missed three monthly car payments and that the secured creditor accelerated the debt prior to the debtor's chapter 7 bankruptcy filing. Once the automatic stay terminates, the creditor will be entitled to repossess the car unless the debtor pays the $2,500 immediately. The debtor does not have $2,500 and thus will lose the car unless an agreement can be reached with the creditor. If the debtor is willing to reaffirm the debt, the creditor may be willing to allow it to be paid off installments; perhaps the creditor will agree to give the debtor six months to make up the arrearages if the debtor meanwhile will make the regular monthly payments.

It would be possible for the debtor not to reaffirm and then, once the debt is discharged, to propose to pay the $2,500 off in voluntary installment payments. The creditor could agree that as long as the debtor kept up the installments (and kept insurance on the car) the creditor would not repossess the car. But note that the debtor could at any time simply stop making payments without incurring any personal liability; the debtor cannot make an enforceable agreement to pay the debt without complying with § 524(c), which requires, inter alia, that the agreement be made before the debt is discharged. Thus the creditor's only remedy would be to repossess the car, which might well have depreciated substantially by the time the debtor decides to stop making payments. That makes it unlikely that the creditor would agree to forbear from repossessing the car. (As a matter of economics, it might make sense for the creditor to agree so long as the voluntary payments pay down the debt faster than the car depreciates in value, but given that the

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[11]If the debtor proposes to keep the car, it appears that the car should be valued at its replacement cost. See Assoc. Comm'l Corp. v. Rash, __ U.S. __, 117 S.Ct. 1879 (1997). That is not necessarily the "retail" blue book value, nor is it the "wholesale" blue book value. The question is what the debtor would have to pay in a market accessible to the debtor for a similar automobile. It seems likely the debtor could purchase a similar car from a private party for somewhere between the retail and wholesale blue book values. As the Supreme Court recognized, the retail price at which a used automobile can be purchased from a dealer may be higher than the true replacement cost of the debtor's automobile, because the dealer may recondition cars it sells or provide warranties or other services:

> Our recognition that the replacement-value standard, not the foreclosure-value standard, governs in cram down cases leaves to bankruptcy courts, as triers of fact, identification of the best way of ascertaining replacement value on the basis of the evidence presented. Whether replacement value is the equivalent of retail value, wholesale value, or some other value will depend on the type of debtor and the nature of the property. We note, however, that replacement value, in this context, should not include certain items. For example, where the proper measure of the replacement value of a vehicle is its retail value, an adjustment to that value may be necessary: A creditor should not receive portions of the retail price, if any, that reflect the value of items the debtor does not receive when he retains his vehicle, items such as warranties, inventory storage, and reconditioning.

Id. at 1886 n. 6.

debtor was already in default and that the creditor had already accelerated the debt before the debtor filed the chapter 7 petition, the creditor is not likely to be willing to forbear in return for the possibility of voluntary payments.) Thus, by reaffirming a secured debt, the debtor may be able to retain possession of property which the debtor would otherwise lose. (As we note below, however, where the collateral is difficult for the creditor to repossess or has little resale value, the creditor may not bother repossessing even if the debtor does not reaffirm the debt; thus reaffirmation may provide little benefit to the debtor in such cases.)

In addition, reaffirmation negotiations may lead to a reduction in the amount of the lien on such property. Suppose in the example that the car was worth only $2,000, and thus the creditor's $2,500 debt was undersecured. The debtor might well be able to convince the creditor to reduce the amount of the lien on the car to $2,000 in exchange for the debtor's reaffirmation of $2,000 of the debt.

Another legitimate use of reaffirmation is in connection with settlement of nondischargeability litigation. Suppose a creditor has a $5,000 claim which, according to the creditor, is for a loan obtained by way of the debtor's fraud. The creditor and debtor could litigate the dischargeability of the debt under § 523(a)(2), but instead they may choose to settle. The settlement could take the form of a reaffirmation by the debtor of part of the debt, for example, a reaffirmation of $3,000 of it.

The debtor may also want to reaffirm a debt in order to not to disrupt a relationship with the creditor, although reaffirming is usually not necessary. For example, if the debtor owes $800 to her sister, she may choose to reaffirm to avoid estrangement from the sister. On the other hand, the sister will probably be satisfied with an oral assurance that the debtor intends to repay the debt voluntarily under § 524(e). Similarly, the debtor may want a particular physician to continue to provide treatment. A reaffirmation of the debt owed to the physician for past services will likely cause the physician to continue to see the debtor. (Note that if the physician demands payment of a discharged debt, the physician violates the discharge injunction under § 524(a)(2), but a mere refusal to provide service not coupled with an overt demand for payment probably does not violate the discharge injunction.) Once again, however, the physician will likely be satisfied with an oral assurance that the debtor intends to pay the discharged debt voluntarily, especially if the oral assurance is coupled with a partial payment on the discharged debt. In these cases any benefits of reaffirming a debt will usually be outweighed by the burdens: the time and cost involved in complying with § 524(c) so as to form a binding reaffirmation agreement, and the legally enforceable duty to pay which results.

A desire to obtain postpetition credit leads many debtors to reaffirm debts to credit card issuers. Again, in most cases the benefits of such a reaffirmation do not justify the costs. A credit card issuer may say that if the debtor reaffirms the debt, then the issuer will not cancel the card and will continue to allow the debtor to use it. But usually this is extremely expensive credit. A debtor may reaffirm a $1,000 debt owed to a credit card issuer and in return get to use a credit card with a $500 credit limit! The effective interest rate on the new credit is astronomical. Debtors should be counseled against such improvident reaffirmations and told that they may be able to get other credit. After all, a debtor who receives a chapter 7 discharge has been freed of all or most of his or her debts and cannot receive another chapter 7 discharge without waiting at least seven years (from the filing of the petition) before filing another petition. The debtor may

well be considered credit worthy by other credit card issuers.

Finally, we must consider § 521(2). This provision was the result of a political compromise in Congress. On the one hand it requires the debtor:

> –to make a statement of intention with respect to property securing consumer debts (specifying whether the property will be retained or surrendered and "if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property"); and
> –then to carry out that intention within 45 days.

See § 521(2)(A) & (B). But then § 521(2)(C) provides that "nothing in subparagraphs (A) and (B) * * * shall alter the debtor's * * * rights with regard to such property." It is possible to read § 521(2) as requiring debtors to either redeem, reaffirm, or surrender property securing consumer debts. It is also possible to read it as simply requiring the debtor to state whatever the debtor's intentions are.

For example, suppose a debtor did not default prepetition on her car loan; again assume a $2,500 debt secured by a $3,000 automobile. If she files a chapter 7 petition, must she redeem, reaffirm or surrender the automobile? Or can she just keep on making payments (out of postpetition earnings, which under §541(a)(6) are not property of the estate) and keep the car? If she must redeem, reaffirm, or surrender the car, then she will either have to pay $2,500 in a lump sum to the creditor, or obtain the creditor's agreement to a reaffirmation,[12] or lose the car. It is hard to understand why Congress would have wanted to put the debtor to these choices where the debtor has not missed any payments on the car; and it seems that § 521(2)(C) prohibits courts from reading § 521(2)(A) & (B) to have such a substantive effect on the debtor's property rights. On the other hand, if the debtor does not have to redeem, reaffirm, or surrender, the debtor would be permitted to keep the car even after discharging the debtor's personal obligation on the car loan; in effect the loan will have been turned into a nonrecourse obligation. The debtor could at any time walk away from the car no matter how much it has depreciated, give the creditor the keys, and have no personal liability. That places the creditor in a difficult position. If the debtor is required to reaffirm the debt in order to keep the car, then the creditor once again will have the bargained-for personal liability of the debtor.

The Circuits are split on the meaning of § 521(2), and the Ninth Circuit has not yet spoken. See Mayton v. Sears, Roebuck & Co. (In re Mayton), 208 B.R. 61 (Bankr. 9th Cir. 1997). There is however a Ninth Circuit Bankruptcy Appellate Panel decision speaking to the issue. Id. The BAP held that the debtor is not limited to the options of redeeming, reaffirming, or surrendering and that § 521(2) "is essentially a notice statute." Id. at 68. The result is that if the debtor is not in default, the debtor need not reaffirm the debt in order to retain the collateral.

Thus it seems that in the Central District there is no need for debtors to reaffirm secured consumer debts in order to keep the collateral where the debtors have not missed payments. When the automatic stay terminates on grant of the discharge, the secured creditor still will not be able to repossess the collateral, because the debtor will not be in default.

There is, however, one additional wrinkle: what if the security agreement provides that

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[12]See discussion above in fn. __ of the cases holding that the creditor's agreement is necessary for a reaffirmation, and also of the author's view critical of those cases.

the debtor's filing of a bankruptcy petition or discharge of personal liability on the debt will be considered an event of default? If such a provision is enforceable, then once the automatic stay terminates, the secured creditor would be entitled to repossess the collateral even if the debtor has kept current on all payments. Secured loans are not executory contracts, and thus the § 365(e)(1) prohibition on enforcement of bankruptcy default clauses does not control. There is, in fact, no express provision of the Bankruptcy Code which prohibits enforcement of such a default clause. It is possible that enforcement of such a provision violates the policies behind the bankruptcy laws, or that courts could extend the nondiscrimination policy of § 525 to cover such cases. See Lowry Fed. Credit Union v. West, 882 F.2d 1543 (10th Cir. 1989) (refusing to allow enforcement of bankruptcy default clause where creditor did not show that debt exceeded value of collateral or that collateral was depreciating more quickly than debt would be paid off); In re Winters, 69 B.R. 145 (Bankr. D. Ore. 1986). But the secured lender can argue that it is substantially prejudiced by conversion of the loan to a nonrecourse obligation, and that its interests also deserve to be given weight. Some courts have allowed such bankruptcy default clauses to be enforced. See, e.g., GMAC v. Bell (In re Bell), 700 F.2d 1053 (1983).

Thus far it does not seem that secured creditors in the Central District are attempting to use bankruptcy default clauses to repossess collateral where the debtor keeps up payments. Thus, at this time it seems that the prudent course for debtors who are not in default is to simply keep on making payments and not to reaffirm the secured debt.

The panelists at the training program will also discuss the recent Sears controversy over unfiled reaffirmation agreements and two important recent decisions by Judge Bufford dealing with reaffirmation.

B. FACTS CONCERNING THE HYPOTHETICAL DEBTORS

Assume the date is the present (February 21, 1998), and that your interviews with the clients have developed the following facts.

1. Mr. and Mrs. Garcia

Al and Beth Garcia have been married for fifteen years and have three children. Mrs. Garcia earns $7 per hour working part-time for FashionCo, a retail clothing store. Mr. Garcia is a highly skilled machinist but has been out of work for about six months. His former employer, MetalCo, laid him off after its defense-related orders fell. The COBRA health insurance coverage he could have purchased seemed very expensive, and thus he declined it. Then the Garcias' youngest child (Teresa) developed pneumonia and nearly died. Teresa is well now, but the unpaid medical bills total $30,000.

When Mr. Garcia learned that he would be laid off, he borrowed $10,000 from the MetalCo credit union, giving the credit union a security interest in the family's 1986 Plymouth Voyager and in a piano owned by Mrs. Garcia. (The piano was an antique, had been owned by Mrs. Garcia's great grandmother, and was Mrs. Garcia's pride and joy. Mrs. Garcia signed the security agreement but did not obligate herself personally on the $10,000 debt.) Mr. Garcia deposited the money in a savings account at First Bank, bringing the account balance to $14,000.

After the layoff he looked diligently for two months for another job. He found nothing, in part because he could not get a favorable recommendation from MetalCo; when Mr. Garcia found out that his supervisor (Mr. Vincent) had recommended that Mr. Garcia be one of the employees to be laid off, Mr. Garcia got into a fistfight with Mr. Vincent. In fact, Mr. Vincent then sued Mr. Garcia and obtained a $15,000 default judgment for battery.

After failing to find work, Mr. Garcia in desperation withdrew $5,000 from the First Bank savings account and took it to Las Vegas. He hoped to strike it rich at the blackjack tables but instead lost it all. He was so disgusted that he threw away all the receipts he had pertaining to the trip and to his losses. Since then the Garcia's have run up $20,000 in credit card debt. They have made minimum payments on their credit cards out of Mrs. Garcia's earnings and out of their savings account. They failed to pay the $900/month rent on their modest three bedroom apartment last month and are about to fail to pay it for a second month.

Mrs. Garcia recently held a yard sale to raise money. At the sale she sold the family's dining room set for $500 cash. She did not get any identifying information about the purchasers. The Garcia's had purchased the dining room set from Furniture Store on secured credit and still owed $1,500 on it, including the amounts of two monthly payments which were overdue.

In addition to the Voyager, the Garcia's owned a 1992 Ford Escort (which was titled in Mr. Garcia's name alone). Concerned that creditors would somehow take the Escort from them, he retitled it in the name of their first child, Rick. They also took $2,000 from the savings account and put it a savings account in the name of their second child, Stephanie.

Other than the assets mentioned above, the Garcias' assets consist of a modest amount of furniture, clothing, and other household goods, their interest in MetalCo's ERISA qualified pension plan (worth approximately $40,000), and jewelry (including wedding rings) worth about $2,000 retail. The First Bank savings account is nearly exhausted; it has only $700 in it now. The Garcia's expect to receive a $3,000 Earned Income Tax Credit from the federal government for 1997. They also think that Mrs. Garcia's uncle Antonio may pass away soon and leave her $100,000.

Other than the debts mentioned above, the Garcias owe $500 in past due gas and electric bills, and $300 in past due telephone bills. The gas, electric, and telephone companies all have threatened to terminate service.

The Garcia's say that they have little in the way of documentation of their financial affairs. They do not keep credit card charge slips, and they throw away bills after paying them.

Mr. Garcia has never been a debtor in bankruptcy before. However, Mrs. Garcia filed a chapter 7 petition on March 20, 1992 and received a discharge. That bankruptcy will remain on her credit record until 2002. Creditors have therefore been reluctant to extent credit to her. As a result, Mr. Garcia is the only debtor on most of the debts. For example, he is the only person listed as the "responsible party" in Teresa's hospital admissions forms, and all but two of the credit card accounts are in his name alone.

2. Ms. Connie Johnson

On January 5, 1998 Connie Johnson filed a pro per chapter 7 bankruptcy petition. The meeting of creditors was set for February 4. Ms. Johnson failed to attend. She then realized that

she needed professional advice and was referred to you.

Ms. Johnson has a low paying job as a computer salesperson at PC Store; her gross pay each month is about $1,000. She owes $8,000 in student loans to Technical College, where she has completed one year of academic work. She also owes $12,000 to National Bank for loans taken out to finance her education and which are guaranteed by the U.S. government. Three years ago she left school for financial reasons; nine months later she was required to begin repaying the loans. She made the first two monthly payments on each of the student loans but then defaulted and has made no more payments.

Ms. Johnson wants to continue her education at night at the local community college but needs an official transcript of her work at Technical College to do so. She would also like to get a better paying job, but will also likely need an official transcript to show to potential employers. Technical College will not release her transcript until and unless she pays the $8,000 owed it. In fact, Technical College's and National Bank's representatives have been calling her frequently at PC Store to demand payment. Her supervisor reprimanded her for receiving personal calls at work. Ms. Johnson is worried that she might be fired if the calling continues. She is also worried that she may not be able to get additional student loans so that she can continue her education.

Even though she makes little money, Ms. Johnson regularly receives pre-approved credit card applications in the mail. She now has eight credit cards and a total credit card debt of $40,000. In her signed application for the eighth card (a Galactic Bank Visa Card) she overstated her income, filling in the blank for gross salary with a figure of $1,600 per month. She also wrote "-0-" in the blank for "monthly payment on other debts." Until two months ago she managed to make the minimum payments required on each card by getting cash advances on the other cards. However, as of two months ago all of her cards were "maxed out," and when she applied for a ninth card she was turned down; apparently Technical College and National Bank had reported her default to the various credit reporting agencies.

Ms. Johnson also owes child support and property settlement obligations to Hank Johnson, her ex-husband. When their marriage was dissolved, Mr. Johnson obtained custody of their infant son, largely because of proof that Ms. Johnson has a serious alcohol problem. The child support obligation is $300 per month, and she is five months in arrears. She also owes Mr. Johnson $3,000 as a property settlement obligation. In the dissolution the court assigned more of the couple's debts to Mr. Johnson than to Ms. Johnson and allowed her to keep the 1994 Chevy Malibu which the couple had owned free and clear. Under the court's order, the $3,000 debt is a lien on the Chevy. As of January 5, Mr. Johnson had not garnished Ms. Johnson's wages and there was no wage assignment order in effect with respect to PC Store.

Six months ago Ms. Johnson was driving with a blood alcohol level of .16% when she recklessly passed another car on a two lane highway. Phil Parsley, the driver of an oncoming car, swerved to avoid her and rolled his vehicle. Mr. Parsley was seriously injured. Ms. Johnson stopped to help. When Highway Patrol officers arrived, they arrested her for driving under the influence and related crimes. In the criminal case she received a $10,000 fine and a suspended sentence of five years in prison. She has not yet paid the fine. Mr. Parsley has not yet sued. Ms. Johnson's auto liability insurance policy limit is $25,000.

In 1997 Ms. Johnson filed a federal income tax return for 1996 and claimed that she was

entitled to a $3,000 refund. The IRS paid the refund but later determined that she was entitled only to a $200 refund. The IRS tax assessment was made in October, 1997; of course Ms. Johnson could not pay the $2,800 demanded by the IRS. The IRS filed its Notice of Tax Lien the day after Ms. Johnson filed her chapter 7 petition.

In the Schedules which she filed with her petition, Ms. Johnson failed to list her $4,000 IRA account as an asset on Schedule B. She listed all of her other assets, which consisted of the Chevy and a modest amount of household goods and clothing. She failed to list Galactic Bank as a creditor with an unsecured claim on Schedule F. She also failed to list her month to month one-bedroom apartment lease on Schedule G. She is current on her rent and plans to stay in the rent-controlled apartment. (Neither did she list the landlord on Schedule F.)

C. ISSUES RAISED BY THE GARCIAS' HYPOTHETICAL CASE

At the training session, the panelists will discuss the Garcias' hypothetical case and Ms. Johnson's hypothetical case. Here, however, are some initial observations on the Garcias' case.

Mr. and Mrs. Garcia must decide whether bankruptcy is the right course for them. They must also consider when to file, under what chapter to file, and whether both of them should file. For Ms. Johnson the decision whether to file is in the past. The decision to do so may not have been prudent, but she cannot now have the case dismissed without showing cause. See § 707(a). She does, however, have an absolute right under § 706(a) to convert her case to chapter 13; thus which chapter is best for Ms. Johnson is a question that must be explored.

As we will see, the Garcia's will probably benefit greatly from a chapter 7 filing. They will likely be entitled to

--receive a discharge of most of their debts;
--exempt all of their assets from the bankruptcy estate;
--prevent a shutoff of utilities;
--avoid all or part of the lien on the piano; and
--redeem the Voyager van by paying its value.

There are, however, dangers that they may face if they file a chapter 7 petition.

One danger is that they may be denied a discharge. The sale of the furniture and the transfers to their children, Rick and Stephanie, may have been intentionally fraudulent transfers that trigger § 727(a)(2). Their failure to keep records may raise an issue under § 727(a)(3). They may be unable to explain to the court's satisfaction what happened to the $14,000 they had in savings (part of which Mr. Garcia says he lost at the blackjack tables). See §727(a)(5). Mrs. Garcia would not receive a discharge if she filed a chapter 7 case now, because she received a discharge in a chapter 7 case filed within six years ago. See § 727(a)(8); see also § 524(b).

Another danger is that some of their debts may be nondischargeable in a chapter 7 case. They may have willfully and maliciously injured Furniture Store's property by selling its collateral, which was a conversion. See § 523(a)(6). The judgment for battery may be nondischargeable as a willful and malicious injury to Mr. Vincent's person. Id. Some of their credit card debts may also be nondischargeable under the fraud exception in § 523(a)(2)(A).

Finally, a chapter 7 filing could cost them some of their assets or potential assets. The transfers of the Ford and of the $2,000 to Rick and Stephanie may be avoidable under § 548 or §

544(b). If the trustee avoids the transfers, the Garcia's will not be able to exempt the property, because the transfers were voluntary. See § 522(g). If Mrs. Garcia files and then within the next 180 days Uncle Antonio dies, Mrs. Garcia's inheritance will become property of the estate. See § 541(a)(5). To the extent she is personally liable on the debts and unable to exempt the inheritance, it would go to pay her creditors. She probably could disclaim the inheritance, so that it would go to other relatives rather than to her creditors, but that is not an ideal outcome from her point of view.

Under these facts you should explore whether Mr. and Mrs. Garcia should both file, or whether perhaps only Mr. Garcia should file. You would also want to consider whether chapter 13 would be a better choice than chapter 7. We deal with those questions below.

The facts also raise serious issues concerning the timing of any filing. The Garcia's have not yet come under great pressure from their creditors. Thus they may not need to file a petition immediately. In fact, before filing a petition they should try to reverse the transfers which they made to Rick and Stephanie, which might remove the § 727(a)(2) ground for denial of a discharge. If possible they also should wait to file at least until March 21, 1998, so that the filing will not be within six years of the March 20, 1992 date on which Mrs. Garcia filed her prior chapter 7 case. On the other hand, if Mrs. Garcia is going to file a petition, she may want to do so soon in order to minimize the chance that Uncle Antonio will die within 180 days after the filing date.

The Garcias' landlord may begin the eviction process soon. They may hope that bankruptcy will permit them to stay in their apartment without paying rent, but the filing of a petition will delay an eviction by only perhaps a week or two. In a chapter 7 case the landlord will likely be able to obtain relief from the stay on shortened notice. (And there is some authority that if (1) the landlord has served the three day notice to pay or quit, (2) the three days have passed without payment being made, and (3) the landlord has filed an unlawful detainer action, all before the debtors file their bankruptcy petition, the automatic stay may not apply to the unlawful detainer action. See In re Smith, 105 B.R. 50 (Bankr. C.D. Cal. 1989).) In a chapter 13 case, the debtors' plan could provide for assumption of the lease, with the arrearages to be paid through the plan over a period of a few months. However, the Garcia's do not at this time have enough income to make such a chapter 13 plan feasible; they do not even have enough income to pay the future rent as it comes due each month. If they want to stay in the apartment, they will be well-advised to find a way to pay the back rent soon or to convince the landlord to let them pay off the arrearages over time.

D. NOTES ON SOME KEY BANKRUPTCY CODE AND BANKRUPTCY RULE PROVISIONS FOR REPRESENTATION OF LOW INCOME CONSUMER DEBTORS IN CHAPTER 7

1. THE CODE

§101 Definitions: community claim, consumer debt, creditor, individual with regular income, judicial lien, security interest.

§109(e) & (g) Debt limits for chapter 13: 250K unsecured / 750K secured. Limits on serial filings.

§§301 & 302 Commencement of voluntary case by filing of petition by individual or by individual and spouse.

§§341 & 343 Meeting of creditors and examination of debtor under oath.

§350 Closing and reopening cases.

§362 Automatic stay.

§366 Utility service.

§502 Allowance of claims, including interest only up to petition date. See § 506(b) for different rule for oversecured claims.

§506(a) & (b) Division of undersecured claim into secured and unsecured portions; limited guidance on valuation. Postpetition interest accrues on oversecured claims (as do agreed upon charges such as attorneys' fees).

§507(a) Priority claims. Cf. §1322(a)(2) (requiring that chapter 13 plan provide for payment in full in deferred payments of section 507 priority claims).
§507(c) Erroneous tax refunds or credits have same priority that the related tax would have had.

§521 Debtor's duties: (1) filing lists and schedules; (2) filing statement of intention regarding secured consumer debt; (3) supposed duty to surrender property of estate to trustee (in chapter 7), which usually does not occur in low-income consumer chapter 7 cases because all property usually can be exempted from estate.

§522 Exemptions. See discussion above of exemptions available in California. Under §522(e) waivers of exemptions in favor of unsecured claim holders are void. Under §522(f) many liens that impair exemptions can be avoided. §522(g)-(i) governs exemption of property recovered by use of the avoiding powers by trustee or debtor. Under §522(l) the property claimed as exempt by the debtor is exempt unless there is an objection; the Supreme Court has held that absent a timely objection even a baseless claim of exemption will prevail, Taylor v. Freeland & Kronz, 503 U.S. 638 (1992), but other sanctions might be imposed on debtor or debtor's attorney for making such a claim.

§523 Exemptions from the discharge--particular debts that are not discharged even though the debtor receives a discharge of other debts. Do not confuse with objections to discharge (§727) which if established prevent the debtor from receiving a discharge of any debts.

Note that certain exemptions from the discharge must be raised timely in the bankruptcy court or lost. See §523(c)(1).

§524 Effect of discharge, including the broad discharge injunction. Note that community claims usually cannot be collected from after-acquired community property even if only one spouse files a petition and obtains a discharge. See §524(a)(3) & (b). Limits on reaffirmation agreements. The discharge hearing. Right of debtors to repay discharged debts voluntarily; this is an important alternative to reaffirmation for the debtor who wishes to repay debts on moral grounds.

§525 Protection against discrimination: (1) By governmental units. For example, a state cannot deny a debtor a driver's license for nonpayment of a discharged traffic accident judgment. (2) By private employers. (3) By persons involved in making student loans. A probable drafting error allows the argument that a financial institution that makes student loans may not deny loans of any kind to persons who have been in bankruptcy simply because of the bankruptcy or because of the nonpayment of discharged debts.

§ 541 Property of the estate. Does not include postpetition personal service income [§ 541(b)(6)]; spendthrift trusts to extent protected under state law, and ERISA qualified pension plan interests [§ 541(c)(2), Patterson v. Shumate, 504 U.S. 753 (1992)]. Does include following property to which debtor may become entitled within 180 days after petition date: bequests, inheritances, life insurance or death benefit proceeds, property from marital dissolution property settlement.

§704 Duties of trustee (including duty to investigate debtor's financial affairs and "if advisable, oppose the discharge of the debtor").

§706 Debtor's absolute right to convert from chapter 7 to chapter 13 (unless case previously was converted from another chapter to chapter 7).

§707 Grounds for dismissal: only cause or substantial abuse of chapter 7. The debtor does not have the right to dismiss without showing cause.

§722 Redemption. Allows tangible consumer goods to be redeemed from liens for the amount of the § 506(a) secured claim where the liens secure dischargeable consumer debts and the property is exempted by debtor or abandoned by trustee. In effect it allows debtors to strip down liens to the value of the consumer goods. But redemption must be by lump sum payment, not by installments, per the cases. Low income debtors may lack the necessary cash.

§727 The discharge. Grounds for denying the debtor a discharge (objections to discharge). Do not confuse with exemptions from discharge--see §523. Grounds for revoking a discharge.

THE RULES (Fed.R.Bankr.Proc.)

Rule 1002 Case is commenced by filing petition with clerk of the bankruptcy court. See Rule 9001(2).

Rule 1007 Time for filing schedules, etc. Debtor must file schedules of assets and liabilities, schedule of current income and expenditures, schedule of executory contracts and unexpired leases, and a statement of financial affairs. Schedules are Official Form 6; statement of financial affairs is Official Form 7. Schedules and statement must be filed with petition or within 15 days after; if schedules are not filed with petition then a list of creditors' names and addresses must be filed with petition. Requirement that schedules be supplemented within 10 days if debtor becomes entitled to property that would come into estate under §541(a)(5) (e.g., inheritance).

Rule 1009 Debtor's right to amend petition, lists, schedules, statement of financial affairs as a matter of course at any time. (But note that amendment of knowingly fraudulent statement may not prevent debtor from being denied a discharge under §727(a)(4)(A).)

Rule 2002(e) Twenty days' notice must be given to debtor, trustee, and creditors of date of meeting of creditors. Notice of creditors' meeting may state that assets appear to be insufficient for payment of a dividend to creditors and that proofs of claim therefore need not be filed.

Rule 2003 Meeting of creditors, including examination of debtor under oath. U.S. Trustee shall call meeting between 20 and 40 days after order for relief (which is petition filing date in voluntary case).

Rule 2017 Scrutiny of debtor's transactions with attorneys for possibly excessive fees related to bankruptcy services

Rule 3012 Court determination of value of collateral

Rule 4001 Procedures for motion for relief from stay; treated as contested matter governed by Rule 9014.

Rule 4002 Duties of debtor, including duty to submit to examination as ordered by court and duty to cooperate with trustee in various ways.

Rule 4003 Exemptions. Claims of exemptions are to be made on schedule of assets. See Official Form 6, Schedule C. Objections to exemptions may be filed within 30 days after conclusion of meeting of creditors or within 30 days after debtor amends claim of exemptions. Objecting party has burden of proof. Lien avoidance proceedings under §522(f) are contested matters governed by Rule 9014.

Rule 4004 Complaint objecting to discharge is an adversary proceeding governed by Part VII

of the Rules. Deadline for filing of complaint objecting to discharge: 60 days following first date set for §341(a) meeting of creditors (extendable only for cause pursuant to motion made during the 60 day period). Court "shall forthwith grant the discharge" if deadline passes and no complaint has been filed objecting to discharge (unless debtor has waived discharge or failed to pay the filing fee or a motion to extend time or to dismiss for substantial abuse is pending). Thus discharge normally should be granted within 100 to 120 days after filing of chapter 7 petition. On debtor's motion the court may defer entry of discharge order; this is typically done to provide time for reaffirmation agreement to be reached. Note that once the discharge is granted, no binding reaffirmation of the debt is possible. See §524(c)(1).

Rule 4005 Party objecting to discharge has burden of proving objection at trial.

Rule 4007 Complaint for determination of dischargeability of debt is an adversary proceeding. Deadline in chapter 7 case for filing of complaint alleging that a debt is nondischargeable under §523(a)(2), (4), (6) or (15) (all listed in §523(c)) is the same as for complaint objecting to discharge: 60 days after first date set for meeting of creditors. Note that the debtor should never initiate a complaint with respect to those grounds for nondischargeability , because the grounds are lost and the debts are discharged if a timely complaint is not filed. With respect to other grounds for a claim of nondischargeability, there is no time limit for the filing of a complaint to determine dischargeability. The case can even be reopened for that purpose. The debtor will often prefer to have dischargeability determined in such cases by the bankruptcy court rather than by a state court. A creditor may wish to have it determined in the bankruptcy court to avoid a charge of violation of the discharge injunction in the event that the debt is held to have been discharged.

Rule 4008 Time for the discharge and reaffirmation hearing.

Part VII (Rules 7001 et seq.): The rules governing adversary proceedings (full blown trial matters).

Part VIII (Rules 8001 et seq.): The rules governing appeals to the district court or to the bankruptcy appellate panel.

Part IX (Rules 9001 et seq.): General provisions. Rule 9009: Official Forms shall be used "with alterations as may be appropriate." Rule 9014: the rules applicable to motion practice (contested matters). Rule 9029: authorization for local bankruptcy rules.

1998 SUPPLEMENT TO TRAINING MATERIALS FOR PRO BONO REPRESENTATION OF LOW INCOME CHAPTER 7 DEBTORS

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1998 Supplement

Supplement To Training Materials for Pro Bono Representation of Low Income Chapter 7 Debtors

The Hypothetical Garcia Debtors:

<u>Issues concerning exceptions from the discharge:</u>

I. Generally applicable authorities:

A. Rule 4007 (deadline for filing complaint under § 523(c): 60 days after first date set for meeting of creditors)

B. § 523(c)(1) (requirement that complaints alleging nondischargeability under §523(a)(2), (4), or (6) be brought timely in bankruptcy court or else debts will be discharged):

> (c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15), as the case may be, of subsection (a) of this section. * * *

C. Grogan v. Garner, 498 U.S. 279 (1991) (holding that collateral estoppel principles apply in dischargeability actions, thus precluding debtors from relitigating issues such as whether the debtor had fraudulent intent that were established in a prior suit) (also holding that the creditor's burden of proof in nondischargeability actions is preponderance of the evidence--nondischargeability need not be shown by clear and convincing evidence).

II. Did the Garcia's fraudulently incur their credit card debts so as to make them nondischargeable under § 523(a)(2)(A)?

A. Code provision:

§ 523. Exceptions to discharge
(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt -

* * *

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the

extent obtained by -

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

* * *

(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $1,000 for "luxury goods or services" incurred by an individual debtor on or within 60 days before the order for relief under this title, or cash advances aggregating more than $1,000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 60 days before the order for relief under this title, are presumed to be nondischargeable; "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act;

* * *

B. Key Cases:

1. Field v. Mans, 516 U.S. 59 (1995) (holding that only justifiable reliance--not reasonable reliance--is required to satisfy § 523(a)(2)(A)).

2. American Express Travel Related Services Co. v. Hashemi (In re Hashemi), 104 F.3d 1122 (9th Cir. 1996, as amended 1997); cert. denied, 117 S.Ct. 1824.
Hashemi holds that there is no right to jury trial in nondischargeability actions. It also recounts the five elements needed to show nondischargeability under §523(a)(2)(A):

(1) the debtor made ... representations;
(2) that at the time he knew they were false;
(3) that he made them with the intention and purpose of deceiving the creditor;
(4) that the creditor relied on such representations; [and]
(5) that the creditor sustained the alleged loss and damage as the proximate result of the misrepresentations having been made.

Id. at 1125. *Hashemi* quotes *Anastas* and holds that "Each time a 'card holder uses his credit card, he makes a representation that he intends to repay the debt.... When the card holder uses the card without an intent to repay, he has made a fraudulent representation to the card issuer. Id. [*Anastas*] at 1285." *Hashemi* follows the approach set out in *Eashai* for determining whether the card holder had no intent to repay:

> "[A] court may infer the existence of the debtor's intent not to pay if the facts and circumstances of a particular case present a picture of deceptive conduct by the debtor." In re Eashai, 87 F.3d at 1087. In Citibank South Dakota v. Dougherty (In re Dougherty), 84 B.R. 653 (9th Cir. BAP 1988), our Bankruptcy Appellate Panel enumerated twelve factors relevant to determining a debtor's intent.[2] These factors are nonexclusive; none is dispositive, nor must a debtor's conduct satisfy a minimum number in order to prove fraudulent intent. So long as, on balance, the evidence supports a finding of fraudulent intent, the creditor has satisfied this element. See *Grogan*, 498 U.S. at 291, 111 S.Ct. at 661. We adopted *Dougherty* 's twelve-factor test as the law of the circuit in In re Eashai, 87 F.3d at 1087-88.

Applying the test set out in *Dougherty* and *Eashai*, as did the bankruptcy court, there is ample evidence to support the finding that appellant intended to defraud American Express. Appellant made nearly 170 charges totaling more than $60,000 during a six-week trip with his family to France. These charges exceeded appellant's annual income and, even before the trip, appellant already owed more than $300,000 in unsecured credit card debt. Appellant did have one major asset when he made the charges--a one-half ownership interest in an eight-unit condominium project. He claims the purpose of his trip was to borrow money from his mother-in-law to support this real estate venture. This does not explain why appellant stayed in France for six weeks, took his wife and two children with him, took a side-trip to the French Riviera, purchased cosmetics, expensive meals and other luxury items, and ultimately charged almost as much on his credit cards as he claims he planned to borrow. Moreover, while appellant was away, the holder of the second mortgage on his condominium project initiated foreclosure proceedings. This should have alerted appellant that he would not be able to repay his debt by selling his interest in the property. Given these facts, the bankruptcy court could reasonably infer that appellant tried to have a last hurrah at American Express's expense.

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[2]The factors are: (1) the length of time between the charges and the bankruptcy filing; (2) whether or not an attorney had been consulted concerning the filing of bankruptcy before the charges were made; (3) the number of charges made; (4) the amount of the charges; (5) the financial condition of the debtor at the time the charges were made; (6) whether the charges were above the credit limit of the account; (7) whether the debtor made multiple charges on the same day; (8) whether or not the debtor was employed; (9) the debtor's prospects for employment; (10) the financial sophistication of the debtor; (11) whether there was a sudden change in the debtor's buying habits; and (12) whether the purchases made were luxuries or necessities. See In re Dougherty, 84 B.R. at 657.

104 F.3d at 1125-26 (one footnote omitted).

3. Anastas v. American Savings Bank (In re Anastas), 94 F.3d 1280 (9th Cir. 1996) (see discussion of *Hashemi* above). *Anastas* moved Ninth Circuit law in a pro-creditor direction by holding that every time a person uses a credit card, that person impliedly represents that he or she intends to pay for the goods, services, or cash advance received. In 1988 the BAP in *Dougherty* had refused to go that far. Some courts had held that use of a credit card was an implied representation of intent and ability to pay; a few others had held that so long as the debtor did not exceed the credit limit or use the card with notice that it had been canceled, then the use of the card was not fraudulent--the card issuer had assumed the risk that the debtor would use the card with neither the intent nor the ability to pay. The BAP sought a middle way, based on a consideration of the total circumstances, including, but not limited to the 12 factors noted above. In 1996 the Ninth Circuit decision in *Eashai* (below) recognized that the Dougherty 12 factor approach did not provide a good basis for deciding when there had been a representation. Thus *Eashai* used the 12 factor approach to determine whether the debtor had the intent not to pay, but not whether the debtor had made a representation of intent to pay. Later in 1996 *Anastas* took the next step by holding that credit card users make implied representations of intent to pay. When a person obtains a credit card, the person impliedly represents that he or she intends at that time to pay the charges that will be made in the future on the card. Then, each time the person uses the card, the user impliedly represents that he or she intends at that time to pay for the goods, services, or cash advance obtained at that time. Thus any use of the card by a person who does not intend to pay is fraudulent. The approach in *Anastas* (and in *Hashemi*) does not seem

consistent with the approach in *Eashai*; it might be possible to argue that they are inconsistent and that because *Anastas* was not an en banc decision, the *Eashai* approach should still be followed.

4. Citibank v. Eashai (In re Eashai), 87 F.3d 1082 (9th Cir. 1996) (see discussion above in quote from *Hashemi*):

> In the case of credit card kiting, the debtor makes a false representation: 1) by creating the facade that all of his accounts are in good standing; and 2) by failing to disclose to the creditor his intent not to pay his credit card debt. This facade gives the debtor the appearance of an honest debtor, who is servicing his credit card debt in a timely manner by making minimum payments each month. Thus, the kiting scheme enables a dishonest debtor to hide his fraudulent intentions and engage in a spending spree which results in increasing amounts of credit card debt. Long before there were credit cards, the Supreme Court recognized that it is fraud when "a party not intending to pay ... induces the owner to sell him goods on credit by fraudulently concealing his insolvency and his intent not to pay for them...." Donaldson v. Farwell, 93 U.S. 631, 633, 23 L.Ed. 993 (1876) (emphasis added).
>
> ***
>
> An omission gives rise to liability for fraud only when there is a duty to disclose. In a credit card kiting case, the debtor's duty to disclose is triggered by the debtor's creation of a facade which conceals his fraudulent intentions. When a debtor, with intent to defraud the creditor, makes minimum payments with cash advances from other credit cards, the debtor has a duty to disclose to the creditor that he no longer intends to pay his credit card debt. If the debtor fails to make this disclosure, then he commits actual fraud.
>
> Clearly, it is not actual fraud simply to make a minimum payment with a cash advance from another credit card. This action on the part of the debtor must also be coupled with a lack of intent to repay the debt. The admonition of the Bankruptcy Appellate Panel in Karelin v. Bank of America Nat'l Trust & Sav. Ass'n (In re Karelin), 109 B.R. 943 (9th Cir. BAP 1990), is instructive:
>
>> Care must be taken to stop short of a rule that would make every desperate, financially strapped debtor a guarantor of his ability to repay, on pain of nondischargeability. Such a rule would unduly expand the "actual fraud" discharge exception by attenuating the intent requirement. A substantial number of bankruptcy debtors incur debts with hopes of repaying them that could be considered unrealistic in hindsight. This by itself does not constitute fraudulent conduct warranting nondischarge.
>
> Id. 947-48. In hard financial times, people may engage in the practice of using cash advances to solve their short-term cash flow problems or to deal with sporadic and seasonal income. See Citibank (N.Y.State) v. Davis (In re Davis), 176 B.R. 118 (Bankr.W.D.N.Y.1994). Moreover, we recognize the fragility of human nature. "[H]uman experience tells us debtors can be unreasonably optimistic despite their financial circumstances." In re Cox, 182 B.R. 626, 635 (Bankr.D.Mass.1995). Nonetheless, a credit card kiter is easily distinguishable from a bad luck debtor. A credit card kiter manipulates the credit card system to gain money, property, and services with no intention of ever paying for them.

Id. at 1088-90. Note the emphasis on the kiter's active concealment of his intent; arguably *Eashai* is not consistent with *Anastas*.

5. In re Candland, 90 F.3d 1466, 1469 (9th Cir.1996).

II. To what extent are the debts owed to Vincent and to Furniture Store nondischargeable as willful and malicious injuries to Vincent's person and to Furniture Store's property under § 523(a)(6)?

A. Code Provision:

§ 523. Exceptions to discharge
(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt -

* * *

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

* * *

B. Key Cases:

1. Murray v. Bammer (In re Bammer), 131 F.3d 788 (9th Cir. 1997) (en banc) (son's liability for participation in fraudulent transfer was nondischargeable as a willful and malicious injury to property because it made it harder for his mother's judgment creditor to collect his judgment--and desire to help mother was not "just cause or excuse"); but see Quarre v. Saylor (In re Saylor), 108 F.3d 219 (9th Cir. 1997) (fraudulent transfer that hinders creditors from collecting does not injure any property of the creditors and thus does not trigger § 523(a)(6)); McCrary v. Barrack (In re Barrack), 201 B.R. 985 (Bankr. S.D. Cal. 1996) (holding that a fraudulent misrepresentation which does not satisfy the requirements of § 523(a)(2) cannot be the basis of a § 523(a)(6) nondischargeability judgment, and disagreeing with cases that allow general financial loss to serve as the injury to property for purposes of § 523(a)(6).) *Bammer* and similar cases suggest that any willful and malicious causing of financial loss satisfies § 523(a)(6); *Saylor*, *Barrack* and similar cases require that the debtor willfully and maliciously directly damage the creditor's interest in a specific item of property.

2. Britton v. Price (In re Britton), 950 F.2d 602 (9th Cir. 1991).

3. Transamerica Comm'l Fin. Corp. v. Littleton (In re Littleton), 942 F.2d 551 (9th Cir.1991) (holding that conversion of secured party's collateral did not give rise to nondischargeable debt because conversions was part of effort by debtor to rehabilitate business so that he could pay debts, and thus at the time the conversion was not an act which would necessarily cause harm to the secured party).

4. Impulsora del Territorio Sur, S.A. v. Cecchini (In re Cecchini), 780 F.2d 1440 (9th Cir.1986) (holding that the debtor need not intend or desire to injure the person or property of the creditor for the debt to be nondischargeable; it is enough that a wrongful act is done intentionally without just cause or excuse and necessarily causes harm; thus conversion of secured party's collateral gave rise to nondischargeable debt).

5. Krishnamurthy v. Nimmagadda (In re Krishnamurthy), 209 B.R. 714 (Bankr. 9th Cir.), aff'd

125 F.3d 858 (9th Cir. 1997) (unpublished table opinion affirming for reasons stated in BAP opinion). The BAP opinion applies collateral estoppel to preclude the debtor from relitigating the issue whether he willfully and maliciously injured his partner's property or was a fiduciary who committed fraud. The award of punitive damages showed that the state court found fraud, malice, or oppression. Malice or oppression would satisfy the willful and malicious standard of § 523(a)(6); fraud would satisfy the fraud element of § 523(a)(4) ("fraud or defalcation while acting in a fiduciary capacity").

Issues concerning objections to discharge:

I. Will the Garcia's be denied a discharged because of alleged fraudulent transfers made within one year before the filing of the petition, pursuant to § 727(a)(2)?

A. Code Provision:

§ 727. Discharge
(a) The court shall grant the debtor a discharge, unless--

* * *

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed--

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

* * *

B. Key Cases:

1. In re Adeeb, 787 F.2d 1339, 1345-46 (9th Cir.1986):

> [A] debtor who transfers property within one year of bankruptcy with the intent penalized by section 727(a)(2)(A) may not be denied discharge of his debts if he reveals the transfers to his creditors, recovers substantially all of the property before he files his bankruptcy petition, and is otherwise qualified for a discharge. * * * [A] debtor who has disclosed his previous transfers to his creditors and is making a good faith effort to recover the property transferred at the time an involuntary bankruptcy petition is filed is entitled to a discharge of his debts if he is otherwise qualified.

But see Davis v. Davis (In re Davis), 911 F.2d 560 (11th Cir.1990) (per curiam) (denying discharge despite retransfer of fraudulently transferred property). *Adeeb* also holds that it is irrelevant under § 727(a)(2) whether the fraudulent transfer caused loss to creditors.

2. Hughes v. Lawson (In re Lawson), 122 F.3d 1237 (9th Cir. 1997) (applying continuing concealment doctrine to hold that transfer made more than one year prior to petition filing date may still be the basis for denial of discharge where the debtor retained secret interest in the property within the one year look back period).

3. Bernard v. Sheaffer (In re Bernard), 96 F.3d 1279 (9th Cir. 1996) (withdrawal of funds from bank account in order to make funds harder for creditors to reach was a fraudulent transfer sufficient to justify denial of discharge even though debtors did not dispose of the money).

4. Aubrey v. Thomas (In re Aubrey), 111 B.R. 268 (Bankr. 9th Cir. 1990).

II. Will the Garcias' failure to keep good records of their financial affairs be grounds for an objection to discharge under § 727(a)(3)?

A. Code Provision:

§ 727. Discharge
(a) The court shall grant the debtor a discharge, unless--

* * *

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

* * *

B. Key Case:

1. Lansdowne v. Cox (In re Cox), 41 F.3d 1294 (9th Cir. 1994) (husband's failure to keep records did not require denial of discharge to wife whose reliance on husband to keep records was reasonable).

III. Will one or both of the Garcia's be denied a discharge under § 727(a)(5) for failure to explain satisfactorily what happened to the funds that were in their savings account?

A. The Code Provision:

§ 727. Discharge
(a) The court shall grant the debtor a discharge, unless--

* * *

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

* * *

B. The Key Cases:

1. Devers v. Bank of Sheridan (In re Devers), 759 F.2d 751 (9th Cir. 1985) (briefly discussing § 727(a)(5) and citing *Reed* infra) (footnote 1 in the opinion erroneously concludes that the filing of a joint petition results in denial of discharge to both spouses if there are grounds for denying one of them a discharge; see Lansdowne v. Cox (In re Cox), 41 F.3d 1294 (9th Cir. 1994) (refusing to impute grounds for denial of discharge from one spouse to the other))

2. Hawley v. Cement Indus. (In re Hawley), 51 F.3d 246, 249 (11th Cir.1995) (per curiam):

> In its § 727(a)(5) action, Appellee had the initial burden of proving its objection to Appellant's discharge. *Chalik*, 748 F.2d at 619. Appellee sustained this burden by showing the vast discrepancies between Appellant's 1989 financial statement and his 1990 Chapter 7 schedules. Once the party objecting to the discharge establishes the basis for its objection, the burden then shifts to the debtor "to explain satisfactorily the loss." Id. (citations omitted). "To be satisfactory, 'an explanation' must convince the judge." Id. (citing In re Shapiro & Ornish, 37 F.2d 403, 406

(N.D.Tex.1929), aff'd, 37 F.2d 407 (5th Cir.1930)). "Vague and indefinite explanations of losses that are based on estimates uncorroborated by documentation are unsatisfactory." Chalik, 748 F.2d at 619 (citations omitted).").

3. Farouki v. Emirates Bank Int'l, Ltd., 14 F.3d 244 (4th Cir.1994) (applying same approach as in *Hawley* and holding that creditor's burden of proof is preponderance of the evidence).

4. Dolin v. Northern Petrochemical Co. (In re Dolin), 799 F.2d 251, 253 (6th Cir. 1986):

> The Bankruptcy Court held that Dolin's general, unsubstantiated statements about his lifestyle did not "explain satisfactorily" the disposition of more than $500,000 in the three years preceding his bankruptcy. See Baum v. Earl Millikin, Inc., 359 F.2d 811, 814 (7th Cir.1966). We agree. Dolin could only allege that he had used the money to support his cocaine habit and to gamble. The actual expenditures, to whom and when made, are unknown. We recognize that Dolin would not want to keep records of his cocaine purchases and gambling because the drug purchases were illegal and the gambling may have been illegal. The mere fact that a debtor has spent money illegally does not satisfactorily explain the debtor's deficiency of assets. In particular, we hold that neither Dolin's chemical dependency nor his compulsive gambling satisfactorily explain his deficiency of assets. Consequently, the Bankruptcy Court did not err in denying the discharge of Dolin's debts under 11 U.S.C. § 727(a)(5).

5. Chalik v. Moorefield (In re Chalik), 748 F.2d 616 (11th Cir.1984) (a much cited opinion).

6. First Tex. Sav. Ass'n v. Reed (In re Reed), 700 F.2d 986 (5th Cir. 1983) (noting ambiguity in statute as to whether the explanation must show that what happened was reasonable or whether the explanation must just be a convincing explanation of whatever actually happened to the property).

7. Clark v. Clark (In re Clark), 211 B.R. 105 (Bankr. M.D. Fla. 1997):

> This Court has stated that a debtor's explanation of loss of assets "requires more than undocumented, unsupported vague generalities ... An explanation must convince the court of the debtor's good faith and businesslike conduct." [Citation omitted.] Additionally, the debtor's explanation should not arouse suspicion as to how the assets were lost. Id. Vague assertions that money was spent on living expenses or lost through gambling, without corroborating documentation, are unacceptable. [Citation omitted.]
>
> * * * To substantiate his claim that he lost over $80,000 gambling, Defendant produced several hotel reservation slips, casino identification cards, and theater ticket stubs. However, Defendant failed to produce sufficient evidence to prove that he lost $80,000 on those gambling trips.
>
> The Court finds the documentary evidence presented by the Defendant is insufficient to corroborate his testimony as to how the money was utilized. Defendant's assertions that he used the money for living expenses, travel, golf, and gambling are vague and indefinite. The Court finds that Plaintiff has met his burden of proving that Defendant's discharge should be denied for his failure to explain the loss of cash assets.

8. Minsky v. Silverstein (In re Silverstein), 151 B.R. 657 (Bankr. E.D.N.Y. 1993) (following *Riso*) but denying discharge under § 727(a)(2) & (4).

9. Francis v. Riso (In re Riso), 74 B.R. 750 (Bankr. D.N.H. 1987) (holding that what happened

to the property need not be satisfactory but only that the explanation must be satisfactorily convincing as to what actually did happen).

10. Koppey v. Hirsch (In re Hirsch), 36 B.R. 643, 645 (Bankr. S.D. Fla. 1984):

> The most serious of plaintiffs' arguments against granting the debtors their discharges are that they failed to keep adequate records under 11 U.S.C. § 727(a)(3) and that they failed to satisfactorily explain any loss of assets to meet their liabilities under § 727(a)(5). The two issues are related in that it is usually difficult for a debtor to account for losses unless adequate records have been kept.
>
> *Gambling is an activity for which records are seldom kept. It is therefore a good way for a* debtor to try to explain the disappearance of funds which may be secreted elsewhere. For this reason, where a debtor's explanation for the loss of substantial assets is that he lost them gambling, a discharge has often been denied. The courts have required corroborating evidence, which did not exist in some cases, or they simply did not believe the debtor's story. [Citations omitted.] In this case there was more than simply Alan Hirsch's testimony that he lost money on gambling. His pattern of actions over a substantial period is consistent with the explanation that he was a compulsive gambler. His wife's story corroborated his, and both witnesses seemed credible after extensive examination on two trial dates which were almost two months apart. Finally, the pattern of stock market trading, for which there are records, corroborates the debtor's explanation of his gambling tendencies. The court concludes that Alan Hirsch satisfactorily accounted for his losses through the explanation of losses in gambling.

IV. Will Mrs. Garcia be denied a discharge under § 727(a)(8) if she files a chapter 7 petition (or joins in a joint one with Mr. Garcia) today, 2/21/98?

A. Code Provision:

We include § 727(a)(9) to contrast the effect of a prior chapter 13 case with Mrs. Garcia's prior chapter 7 case. Note also that if Mrs. Garcia files a chapter 13 petition, her eligibility for discharge will be unaffected by her prior chapter 7 case.

§ 727. Discharge
(a) The court shall grant the debtor a discharge, unless--

* * *

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition;
(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least--

(A) 100 percent of the allowed unsecured claims in such case; or
(B) (i) 70 percent of such claims; and
(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; * * *

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Directing Attorney, Consumer Law Project
Public Counsel
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DIRECTORY OF CONSUMER & FINANCIAL SERVICES IN LOS ANGELES COUNTY

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U.S. Department of Justice ..... (213) 894-6811
Office of U.S. Trustee, Fraud Section www.usdoj.gov
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Los Angeles, CA 90014

Ms. Edwina E. Dowell ..... (213) 996-4400
700 South Flower Street, Suite 1950
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California State Attorney General ..... (800) 952-5225
Public Inquiry Unit (916) 322-3360
P.O. Box 944255 www.caag.state.ca.us
Sacramento, CA 94244-2550

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Los Angeles, CA 90024

Los Angeles County Department of Consumer Affairs ..... (213) 974-1452
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500 West Temple Street, Room B96
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Sacramento, CA 95814

California Department of Motor Vehicles ..... (818) 897-3886
Investigation Unit www.dmv.ca.gov

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Los Angeles, CA 90010

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Dallas, TX 75234

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P.O. Box 740241 www.equifax.com
Atlanta, GA 30374-0241

Experian ..... (889) 397-3742
National Consumer Assistance Center — www.experian.com
P.O. Box 949
Allen, TX 75002-0949

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P.O. Box 390 — (610) 933-1200
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Los Angeles, CA 90024-3672

Federal Trade Commission ..... (877) ID-THEFT
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Los Angeles Police Department ..... (213) 485-3795
Financial Crimes Division — www.lapdonline.org
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Los Angeles, CA 90012

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Los Angeles, CA 90013

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Real Estate, Home Equity & Home Improvement Fraud

California Department of Corporations ..... (213) 576-7500
Financial Services Division www.corp.ca.gov
320 West 4th Street, Suite 750
Los Angeles, CA 90013

California Department of Real Estate ..... (213) 620-2072
320 West 4th Street, Suite 350 (800) 235-6393
Los Angeles, CA 90013 www.dre.cahwnet.gov

Contractors State Licensing Board ..... (714) 994-7430
7001 Village Drive, Suite 260 www.cslb.ca.gov
Buena Park, CA 90621

Los Angeles County District Attorney ..... (213) 580-3373
Consumer Protection Division
201 South Figueroa Street
Los Angeles, CA 90012

Los Angeles County Sheriff ..... Complaints by Mail Only
Forgery/Fraud Detail www.la-sheriff.org
1515 South Colima Road, Room M104
Whittier, CA 90604

Los Angeles Police Department ..... (213) 485-3795
Forgery Division
150 North Los Angeles Street
Los Angeles, CA 90012

U.S. Department of Housing & Urban Development ..... (800) 347-3735
Office of Inspector General Hotline (202) 708-2451 (TTY)
Assistant Inspector General for Investigations www.hud.gov/oig
451 7th Street, S.W., Room 8270
Washington, DC 20410

U.S. Department of Housing & Urban Development ..... (888) 466-3487
Title 1 – Home Improvement Loans - Fraud & Abuse Hotline (703) 734-1444 (TTY)

Securities Fraud

California Department of Corporations ..... (213) 576-7500
www.corp.ca.gov

National Association of Securities Dealers ..... (800) 289-9999
www.nasdr.com

Securities & Exchange Commission ..... (800) SEC-0330
(323) 965-3998
www.sec.gov

Seniors/Financial Elder Abuse

American Association of Retired Persons ..... (800) 424-3410
601 East Street, N.W. www.aarp.org
Washington, DC 20049

California Department of Aging ..... (800) 231-4024
Long Term Care
1600 K Street
Sacramento, CA 95814

Community Eldercare Hotline ..... (800) 677-1116
www.ageinfo.org

Los Angeles City Attorney ..... (213) 485-1080
Elder Crimes Unit
200 North Main Street, Room 1600
Los Angeles, CA 90012

Los Angeles County Elder Abuse Hotline ..... (800) 992-1660

Los Angeles District Attorney Elder Abuse Hotline ..... (213) 974-3783

National Institute on Aging Information Center ..... (800) 222-2225
(800) 222-4225 (TTY)

Telemarketing & Internet Fraud

Federal Bureau of Investigation ..... (310) 477-6565
Telemarketing Victim Call Center

Federal Trade Commission – Regional Office ..... (877) FTC-HELP
Bureau of Consumer Protection www.ftc.gov
11000 Wilshire Boulevard
Los Angeles, CA 90024

kNOw Fraud ..... (877) 987-3728
P.O. Box 45600 www.consumer.gov/knowfraud
Washington D.C. 20026-5600

National Fraud Information Center ..... (800) 876-7060
P.O. Box 65868 www.fraud.org
Washington, DC 20035

Utilities, Mail, Cable, & Telephone Problems

Cable Television Franchising ..... (213) 974-2323
Los Angeles Department of Consumer Affairs www.consumer-affairs.co.la.ca.us
Kenneth Hahn Hall of Administration
500 West Temple Street, Room B96
Los Angeles, CA 90012

California Public Utilities Commission ..... (800) 649-7570
www.cpuc.ca.gov

Federal Communications Commission ..... (888) 322-8255

Mail Order Action Line ..... (212) 768-7277
111 - 19th Street N.W., Suite 1100
Washington, DC 20036

Mail Preference Service ..... Mail Written Request
P.O. Box 9008 (to remove name from most mailing lists)
Farmingdale, NY 11735-9008

Postal Inspection Service ..... (626) 405-1200
www.usps.gov

Telephone Preference Service ..... Mail Written Request
P.O. Box 9014 (to remove name from most telemarketing lists)
Farmingdale, NY 11735-9014

Toward Utility Rate Normalization ..... (800) 355-8876
10825 Woodward Avenue (818) 951-8876
Sunland, CA 91040 www.turn.org

The Utilities Consumer Action Network ..... (619) 696-6966
1717 Kettner Boulevard, Suite 105
San Diego, CA 92101

Vocational School Fraud & Student Loan Problems

California Bureau for
Private Postsecondary & Vocational Education ..... (916) 445-3427
1027 10th Street, Fourth Floor
Sacramento, CA 95814-3517

California Student Aid Commission ..... (800) 367-1590
P.O. Box 510845 www.csac.ca.gov
Sacramento, CA 94245

U.S. Department of Education ..... www.ed.gov

Defaulted Loans/Debt Collection Services ..... (800) 621-3115
(800) 730-8913 (TTY)

Federal Student Aid Information Center ..... (800) 4FED-AID
(800) 730-8913 (TTY)
www.ed.gov/finaid/html

Office of the Inspector General ..... (800) MIS-USED
Fraud, Waste & Abuse Hotline oig_hotline@ed.gov

Student Loan Ombudsman ..... (877) 557-2575
sfahelp.ed.gov

William D. Ford Federal Direct Loan Consolidation Center ..... (800) 557-7392
(800) 557-7395 (TTY)
www.ed.gov/DirectLoan

Consumer Legislative Advocacy & Resources

Consumer Federation of America ..... (202) 387-6121
1424 16th Street, N.W., Suite 604
Washington, DC 20036

Consumers Union ..... (415) 431-6747
1535 Mission Street — www.consumersunion.org
San Francisco, CA 94103-2512

National Consumer Law Center ..... (617) 523-8010
18 Tremont Street, Suite 400 — www.consumerlaw.org
Boston, MA 02108

DEBT & CREDIT COUNSELING

Consumer Credit Counseling Services of Los Angeles ..... (800) 750-2227
1605 West Olympic Boulevard, Suite 9023 — www.ccsla.org
Los Angeles, CA 90015

Legal Aid Foundation of Los Angeles ..... (213) 640-3964
Debt Crisis Clinic
8601 South Broadway
Los Angeles, CA 90003

New Economics for Women ..... (213) 483-2060
303 South Loma Drive
Los Angeles, CA 90003

Operation Hope ..... www.operationhope.org

Central Los Angeles ..... (323) 290-2410
3721 South La Brea Avenue
Los Angeles, CA 90016

Southeast Los Angeles ..... (213) 607-0404
4449 East Slauson Avenue
Maywood, CA 90270

Watts/Willowbrook ..... (323) 249-7699
11858 South Wilmington Avenue
Los Angeles, CA 90059

U.S. Department of Housing & Urban Development ..... (800) 569-4287
Housing Counseling Hotline — www.hud.gov

MEDIATION & ALTERNATIVE DISPUTE RESOLUTION

Center for Conflict Resolution ..... (213) 736-1145
Loyola Law School — www.lls.edu/community/ccr.htm
919 South Albany Street
Los Angeles, CA 90015

KCBS-TV's Trouble Shooter ..... (800) 882-5833
6121 Sunset Boulevard www.channel2000.com/dcbs2/bogey
Los Angeles, CA 90028

Los Angeles County Dispute Settlement Service ..... (213) 974-0825
500 West Temple Street, Room B96
Los Angeles, CA 90012

TAX ASSISTANCE

Internal Revenue Service ..... (800) 829-1040
Volunteer Income Tax Assistance (800) 829-4059 (TTY)
www.irs.gov

Tax Counseling for the Elderly Program ..... (800) 829-1040
TCE: Taxpayer Service Division
300 North Los Angeles Street, Room 5202
Los Angeles, CA 90012

VETERAN INFORMATION

Veteran Benefits Administration ..... (800) 827-1000
Department of Veterans Affairs www.vba.va.gov
810 Vermont Avenue, N.W.
Washington, DC 204220

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