

# GIPSON, NORMAN & ROOT

Attorneys at law  
450 N. Texas Ave., Ste. A  
Webster, TX 77598  
E-mail [admin@gipsonandnorman.com](mailto:admin@gipsonandnorman.com)

Thomas M. Root  
Partner

Jeffrey P. Norman (Retired)  
Partner

Ronald M. Gipson (1943-2008)  
Partner

Tele: (281) 332-4800  
[www.gipsonandnorman.com](http://www.gipsonandnorman.com)

Fax: (281) 332-4808  
[www.rootlaw.net](http://www.rootlaw.net)

## CHAPTER SEVEN INS AND OUTS

***This publication is designed as a resource for use by the public. The contents are not intended to be specific legal advice with regard to any particular matter. Users of the publication are advised to perform their own independent study of issues covered.***

I am honored that you have selected our office for the purpose of working with you to help resolve a financial crisis in your life. The concern, worry and frustration that come from not knowing what to do to resolve a particular problem can create an extremely critical and fragile time in your life, one to which I am very sensitive. Thus, I will always attempt to make myself available to respond to your questions and provide information that may be needed; give legal advice or answer questions, if that would be any help.

While I realize that these pages may be lengthy, I urge you to take the time to read them and let me know of any questions that may arise. I am not presenting these pages to you as a substitute for legal advice and counseling, but only as an attempt to fill the gaps, if any exist. It will become evident that certain parts of this are more relevant to you than others; however, if you believe any part of this discussion is relevant and has not been covered when we meet to discuss your individual situation, I urge you to bring it to my attention.

First, a word about legal fees and the costs of a bankruptcy the fee that we set is based upon the projected total amount of time that it will take us to effectively represent you through the three critical stages of your Chapter Seven bankruptcy.

The first stage is referred to as the credit counseling, information gathering and documentation stage. The second stage involves our joint attendance at the meeting of creditors, or what is usually nothing more than the meeting with your Court selected Trustee and the United States Trustee.

The third stage is the discharge stage, which signals the conclusion of your bankruptcy proceeding. The Bankruptcy Judge will enter your order of discharge upon receiving sufficient documentation that you have completed the entire process.

The legal fee that I quote you is a complete fee covering all of the applicable stages of a Chapter 7. It also includes any necessary phone conversations and office consultation after you have made a decision to file for relief under Chapter 7. I am happy to respond to any inquiries from creditors or third parties' contacts; this also is included in your flat fee. Your flat fee however does not include the cost of credit counseling but you may typically pay these fees through our office.

I urge you to read your Fee Agreement. It should be noted that, although rare, it may be necessary in certain bankruptcies to perform additional services for you, such as interacting with the Trustee in the event the Trustee may determine that your exemptions exceed the maximum amount provided by law, responding on your behalf as a creditor moves to modify the stay, regaining possession of property which has been pledged to secure that payment of a debt, responding if someone objects to your discharge or

dischargeability of a debt, or any other services which do not involve preparation and filing of the necessary documents and attendance at the meeting of creditors. If such events occur, we will discuss the flat or hourly fee applicable.

Any time there is a question as to what a fee covers or does not cover, I urge you to bring that question to my attention so that we may discuss it personally. Remember that we are a team, partners working together, in order to achieve a meaningful result, and that is a fresh financial start for you. This can never be achieved if one partner is not aware of the concerns of another. I will assume at all times that you understand what services are covered by the legal fees which you have agreed to and paid, unless you instruct me to the contrary.

### **IF I ELECT TO FILE UNDER CHAPTER 7, WHAT IS MY ROLE AND WHAT IS YOURS?**

I view your role as that of someone earnestly and honestly seeking relief as a Debtor under Chapter 7; thus, you have two very distinct responsibilities to yourself, your family and me as your attorney:

1. Educate yourself.

You simply cannot approach Chapter 7 without having a basic knowledge as to how it works. This can only occur if you take the time to read this booklet, ask questions and be willing to tell me frankly when you do not understand. My fee is based upon completing the job, not the amount of time involved. The reason for this is to urge you to take the time to provide yourself with basic knowledge about the process.

As you will see, the concepts are reasonably simple and easy to understand if you take the time. Unless you inform me to the contrary, I will assume that you have the necessary knowledge to truly benefit from Chapter 7.

Please avoid "curbstone" advice. This is the type of advice a person receives from well-intending friends, relatives or just bystanders who have a story to tell about what happened to them or what happened to their second cousin. While there is no question that these people mean well, my experience has repeatedly shown that such advice is wrong or slanted because of some prejudice. If you feel inclined to act upon any such advice, please discuss it first with me to determine if it fits your particular situation.

2. Provide me with complete, accurate and honest information.

As we begin, it is absolutely necessary for you to provide me irrefutable information. In addition to your moral obligation, you must provide accurate information for the following reasons:

- All documents that I prepare for you for filing under Chapter 7 will be signed by you under oath (you will swear to their accuracy).
- Failure to provide accurate information may result in your discharge being denied. It should be noted, however, that unintentional, honest mistakes can usually be corrected.
- Intentional misstatements in bankruptcy documents or false testimony may be a violation of Federal criminal laws which could result in a Federal indictment, prosecution, conviction, and imprisonment. Intentional mistakes are also considered perjury.

I will at all times assume that all bankruptcy information you provide me is totally accurate unless you advise me that a mistake has been made. Otherwise, I must decline to represent you.

My job is to educate you and to perform the mechanical functions necessary to accomplish your objective: your discharge and fresh financial start. I agree to do so as quickly as possible in order to protect you from loss of assets, harassment or anything that represents an impediment to you in reaching your goal.

### **WHY IS BANKRUPTCY NECESSARY FOR ME?**

Bankruptcy under Chapter 7 is the beginning of a new time for you. It is a fresh financial start. It is, however, to be used only when no other remedies are available to resolve an economic problem. I would never recommend filing a Chapter 7 when there is sufficient disposable income for a plan to be structured to pay your creditors without the necessity of such drastic action.

While the action is drastic, it should never be considered an event so traumatic that it will leave a permanent scar or a stigma of any kind. There is nothing negative, in my opinion, about Chapter 7. To the contrary, it represents a positive statement by you of your willingness to allow a new financial day to be born so that, free from the monumental load which comes with financial problems, you can again handle your affairs with confidence.

I only urge you to make a positive statement about your life and make a decision to resolve your financial problem, as opposed to doing what our friend the ostrich does quite well, that is to stick his head in the sand when the enemy surrounds him and pretend the problem does not exist.

The first step in this process is to determine if Chapter 7 bankruptcy can be filed as you must first determine your ability to qualify for a Chapter 7. Qualification is based on a "means test" and this test is different if your current monthly income, called CMI is above or below "median income" as defined by the federal government. Current "median income" is as follows:

**MEDIAN INCOME BY TIME PERIOD AND FAMILY SIZE FOR TEXAS  
(Cases filed on and after October 1, 2008)**

Family Size	Annual Income	Six Month Income	Monthly Income
1	\$37,120.00	\$18,560.00	\$3,093.33
2	\$52,878.00	\$26,439.00	\$4,406.50
3	\$54,943.00	\$27,471.50	\$4,578.58
4	\$63,945.00	\$31,972.50	\$5,328.75
5	\$70,845.00	\$35,442.50	\$5,903.75
6	\$77,745.00	\$38,872.50	\$6,478.75
7	\$84,645.00	\$42,322.50	\$7,053.75
8	\$91,545.00	\$45,772.50	\$7,628.75
9	\$98,445.00	\$49,222.40	\$8,203.75
10	\$105,345.00	\$52,672.50	\$8,778.75

Unfortunately CMI is neither current or sometimes even actual income but a six month historical average ending at the month before you file of most (but not all) funds derived from all sources that you have received in that last six months. It however, does not include social security or social security disability income. It also does not also include sporadic income such as gifts from parents or loans from a retirement plan. If your CMI is below "median income" as listed above then you qualify to file a Chapter 7 with no restrictions. If you're CMI is above "median income" you can still qualify to file a Chapter 7, if after deduction of allowed expenses and an allowance for expenses (allowed by the Internal Revenue Code) you typically have less than \$182.50 remaining. Actual expenses that are allowed expenses (that is totally deductible in the means test) include but are limited to all of the following: income taxes, social security taxes, Medicare taxes, health insurance (includes health, dental, vision and HSA accounts), disability insurance, life insurance (most mandatory deductions from your pay check), payments for secured debts including a house and cars, health care (either an allowance or actual expenditures whichever are more), child care, support of elderly parents or disabled children, child support, alimony, payments for protection against family violence, involuntary deductions for employment (union dues, uniform, etc) as well as limited educational expenses for children less than 18 (up to \$137.50 per month per child), charitable giving including tithing to your church, telecommunication services including call waiting, caller id, special long distance and internet service, home energy costs in excess of the amount allowed and up to 5% of

the allowed expense for food and clothing if you actually spend more than allowed. Allowance expenses come from tables provided by the Internal Revenue Service (available at [www.irs.gov](http://www.irs.gov)) they include allowance for food, clothing, and other items (subject to the additional 5% listed above), health care (you get the greater of the allowance or actual expenses), a housing and utilities non mortgage expense (utilities , repair, upkeep), a housing allowance (you get the greater of your allowance or actual secured house payment including taxes, insurance and HOA dues), a vehicle operation and public transportation expense (gas and repairs), a ownership expense for your car(s) (car payment or future replacement cost) and recreation.

If after you deduct the allowed expenses and the allowance from your CMI and you have less than \$182.50 per month left you probably qualify to file a Chapter 7. If you are above \$182.50 and don't have "special circumstances" such as no actual income (remember CMI is an average of your past income, not what you are currently actually receiving) then you do not qualify. **This calculation is beyond the ability of most of our clients but do not be concerned we will be happy to inform you if you qualify.** Just however to give you some idea of it's complexity, the exact steps are detailed below but again let me remind you that you do not need to understand or even grasp this difficult subject as I will personally perform this calculation on your case but for you who are gluttons for punishment you may do the calculation as follows (the official form for means testing is an invaluable tool and is available on the United States Trustee web site. Use Google, Yahoo or the like and search "United States Trustee"):

1. If your debts are preliminary Consumer Debts that is 51% of the total value of your debts are consumer debts that is they are not business debts, then calculate Current Monthly Income, called CMI pursuant to § 101(10A) of the Bankruptcy Code. If your debts are not preliminary Consumer Debts, which means your debts are preliminary Business Debts as defined by the Bankruptcy Code then fortunately for you means testing does not apply and you have a free pass to file a Chapter 7. If you have a 30% or more disability from service in the armed forces you are also exempt from means testing and pass the means test. Recent legislation also exempts from means testing certain qualifying reserve component members of the Armed Services and National Guard members from the means test if a petition is filed within 540 days after they complete active duty
2. Compare Current Monthly Income (CMI) to Median State Income, if CMI is above Median State Income, go to step 3, if not you have passed the means test and can file a Chapter 7.
3. Subtract Monthly Expenses (both allowed and allowance expenses) per the Bankruptcy Code from CMI (again this is currently monthly income) these expenses are limited by IRS national standards for allowable living expenses, allowable living expenses for transportation and IRS local standards for housing and utilities. If what is left after you subtract monthly expenses from CMI is under \$109.58 you have passed the means test and can file a Chapter 7, if remainder is \$109.58 to \$182.50 then go to next step number 5, if you are over \$182.50, then under "means testing" you probably do not qualify for a Chapter 7 unless step 6 applies.
4. If Monthly Disposable Income \$109.58 to \$182.50 then, will this amount pay 25% to general unsecured creditors over 60 months, if no you pass the means test and can file a Chapter 7, if yes, you probably do not qualify for a Chapter 7 unless step 6 applies.
5. Are there special circumstances, if yes and US Trustee agrees, "means testing" does not apply and you can file a Chapter 7, if not, you probably don't qualify for a Chapter 7 but you are entitled to a hearing to prove that you should be exempt from "means testing" based on special circumstances.

**Again we will do a "means test" calculation as part of your Chapter 7 case. Should you fail to qualify we will advise you of this fact at that time. You do not need to understand this calculation**

Once you determine that you can file a Chapter 7 (that is you qualify) you then need to determine if you should file a Chapter 7 bankruptcy (that is it necessary for you to file). Not everyone who qualifies to file a Chapter 7 needs to file a Chapter 7. Fortunately for most individuals this is a simple question. Do you make enough to live, provide for your family, save for emergencies and retirement and pay all of your

outstanding debts timely as they become due? If yes you don't need a Chapter 7 or are you past due, not making ends meet, living without or simply struggling from pay check to pay check. If not a Chapter 7 should be contemplated. If you are unsure then a budget will aid you in your decision making process. To do so you must first determine the amount of your disposable income. Disposable income is computed very simply. You must add up the net take-home pay, the net dollars coming into the family from all sources, such as wages of the husband and wife, child support received, alimony received, interest on savings and the like. Then, after carefully budgeting the monthly outgo of the family, label that outgo "cost of living." Cost of living should include rent or mortgage payment, car payment, food expense, utility expense, automobile maintenance and upkeep, personal living costs, such as clothing, laundry, and the like, taxes, if the same are not deducted from your wages, insurance premiums, a modest amount for entertainment and pleasures (in a tight budget situation, this should never exceed 3% of your net monthly take-home pay) and other expenses which are particular to your family and occur on a regular monthly basis.

If the expenses occur quarterly, biyearly, or yearly, you should attempt to annualize those expenses so that a true monthly cost of living can be determined. After that total is arrived at, simply subtract that figure from the monthly take-home pay. What remains is the disposable income.

If you find it difficult to determine your cost of living, a very rough rule of thumb can be used. For a middle class living expense I would urge you to factor \$1,600.00 per month for the first person in the family and \$700.00 per month for each additional person. Thus, for a family of four, we can say that the cost of living each month is approximately \$3,700.00. If the number of people in the family exceeds four, for each additional person in the family, you should add \$500.00 instead of \$700.00 to this projected formula. This is simply an easy way of coming up with a reasonably accurate cost of living figure. Notice however that the median income for a family of four in Houston, Texas is \$4,689.84 a number higher than our estimation so don't be concerned if your actual number is different as there normally is a wide variation between families so just beware that nothing, is a good substitute for actual calculation and computations.

If your remaining disposable income does not allow you to project the repayment of all unsecured debts, those are debts which do not involve pledges of properties to secure the payment of them (for example, homes, automobiles, and the like), within a period of two, and not to exceed three, years at the present income level, then, relief under Chapter 7 should be contemplated as a possibility.

Never, however, accept projected formulas as a way of conclusively determining that your financial circumstances justify Chapter 7. You must first not only look at these analogies but also secure competent and detailed counseling, which I would personally be honored to provide.

As of October 17, 2005 the Bankruptcy Code requires credit counseling both prior to filing a Chapter 7 and also prior to being discharged. Failure to obtain the required credit counseling will lead to dismissal of your case if you do not obtain the pre-bankruptcy credit counseling and you cannot be discharged until you receive your post-filing credit counseling. Your credit counseling will be handled by third parties not related to our office and approved and monitored by the United States Trustee. The fees for obtaining this credit counseling are part of the expenses you will pay to this office for representation in a Chapter 7.

### **WHAT IS THE BASIC CONCEPT OF CHAPTER 7?**

The rules for Chapter 7 can be understood by anyone. The concept can be stated in one phrase: *The voluntary surrender by a Debtor filing a petition of all nonexempt assets in exchange for a discharge under Chapter 7.* By surrender, we mean give up willingly by the Debtor. Please understand that the word Debtor is not being used to apply a label. A Debtor is someone who owes a debt or bill, which means virtually everyone in the United States. We will presume, since you are concerned about your financial circumstances, that the word Debtor would be appropriate for this discussion.

In order to determine what non-exempt assets mean, we must first determine what is exempt. Exemptions are property interests which legislatures (at the state and/or federal level) have by statute listed as property free and clear of creditor claims. All of the possible exemptions which exist are in

statute form but some of them are antiquated and seldom used. In order for property to be exempt it must be listed in a statute. Any asset not listed by statute is not exempt.

Only people are entitled to exemptions. Corporations receive no exemptions. When a corporation files a Chapter 7, it gives up all of its assets and ceases to be, since it does not receive a discharge from its debts. Bankruptcy laws do not permit corporations to secure discharges in a Chapter 7. Individuals can select exemptions from one of two lists: state exemptions or federal exemptions.

Since October 17, 2005 your choice of exemptions is governed by and perhaps limited by how long you have lived in your state of domicile and how long you have owned your home (for real estate only). If you have been a domiciliary of the State of Texas for the last 30 months you may claim a Texas or a Federal Exemption, if you have lived in Texas less than this time your choice of exemptions is complex and is determined by the State(s) of your domicile during the 24<sup>th</sup> – 30<sup>th</sup> month period prior to your filing and that State's applicable State Law. In simple terms your exemption choice is provided by State law of the State that you have been domiciled in for the greater portion of the 180 days (six months) between the 24<sup>th</sup> to 30<sup>th</sup> month prior to your Chapter 7 filing. So again by example if you have lived in Texas for two years but in the six months prior to that two years you had been a resident of California then your exemption choices would be governed by California law. This may include your choice of that State's Exemption or Federal Exemption. It could also provide for no choice that is just that State's Exemption or just a Federal Exemption but you would always be allowed at least some exemption choice. Please remember that domicile and residence are not the same. You may be in the armed forces or travel for work and be a resident of Iraq but your domicile will still be the State to which you will return. Should you not qualify for a Texas exemption then other State exemptions are available.

In summary form, the Texas state exemption involve the ability of the Debtor to own and maintain a home, regardless of value (but only if you have owned the property for 1215 days or rolled over equity from a prior home and your combined ownership totals 1215 days), that is located on ten acres or less and land in a city, town, or village, or urban area (an area which is not necessarily a part of the city but which receives city services and effectively operates as if it were in a city) or if in a rural area (generally in an area where agriculture, mining, timber operations, farming, ranching, etc. are carried out), the Debtor is entitled to a homestead exemption of 100 acres if not married and 200 acres if married. In addition an exemption is allowed for burial lots for you and your family. You will be limited to \$125,000.00 per debtor, \$250,000.00 in a case with a husband and wife if you have owned the property for less than 1215 days but this is your equity interest that is the difference between value and what is owed and not the value of the property. So by example a property worth \$400,000.00 that has a \$350,000.00 mortgage has equity of \$50,000.00.

In addition to the real property exemption, a Debtor who is single is entitled to a personal property exemption for things used by the Debtor and or members of the Debtor's family as long as the aggregate fair market value at disposal (what the items could be sold for) is no more than \$30,000.00. If the Debtor is a married person, the limit is \$60,000.00.

These assets include home furnishings, provisions for consumption, farming or ranching vehicles and implements, tools, equipment, books, apparatus used in a profession or trade, wearing apparel, jewelry not to exceed 25% of the allowed exemption, two firearms, athletic and sporting equipment, a motor vehicle for each person who holds a license, two horses, 12 head of cattle, 60 head of other livestock, 120 fowl, household pets.

In addition retirement plans including most every type of plan which includes but are not limited to 401k, IRA, Roth IRA, 403b are also exempt in addition annuities are also exempt.

The primary benefit of the federal exemption package to a Debtor is that it allows the Debtor to partially exempt some cash or liquid assets. While the state exemptions do not permit a cash asset exemption, it is possible to exempt cash or other liquid assets under federal exemptions up to a maximum of \$9,650.00 if the individual is not married, or up to a maximum of \$19,300.00 if married and filing jointly.

The exemptions however are limited in other regards. The exemption under federal exemption is limited to the following (these exemptions can be doubled for a couple filing a joint petition):

1. The debtor's equity interest in real property used as a residence not to exceed \$18,450.00.

2. The federal exemptions consist of items kept primarily for personal or family use:

- Motor vehicles
- Real property (house and/or land)
- Household goods and furnishings
- Clothing
- Books and musical instruments
- Pets and animals producing family use products
- Crops such as garden produce
- Burial plots
- Tools or books necessary to make a living
- Cash value on life insurance policies
- Social security, unemployment, public assistance, veterans or disability benefits
- Pension, profit sharing, 401(K), IRA or other similar plan
- Alimony or child support necessary for support
- Certain personal injury settlements

Any asset not exempt except assets that are of no consequential value must be turned over to the Chapter 7 Trustee. To determine what must be "given up," one must look very carefully at the exemption statutes and determine what may be claimed as exempt. Any asset which is not exempt can be liquidated for the benefit of your creditors.

In the event that there is a question by a creditor, Trustee, or interested party, the Bankruptcy judge (in a hearing) will determine the value of the assets that you are claiming as exempt. Of course, in such a hearing, evidence on value will be considered from other sources, as well as those presented by the Debtor.

The final analysis as to the concept of Chapter 7 involves determination of what must be given up, if anything. More than 90% of the consumers who file Chapter 7's have no property interest that must be surrendered. I think that, if you would look around in your home, you might find few assets which are sellable, and those which are sellable I seriously doubt would be worth \$30,000.00 to \$60,000.00, the limit under state law.

### **WHAT ARE THE ADVANTAGES OF CHAPTER 7?**

There are really two advantages of a Chapter 7 filing. Both advantages are yours immediately upon filing.

First is the imposition of the automatic stay. The automatic stay is provided for under the Bankruptcy Code and stays any of your creditors from collecting or attempting to collect any debt that might be otherwise owed to them. This stay is perpetual if you are discharged; however, upon earlier order of the Court or upon validation of a lien on certain property that you hold (such as an automobile, computer, home, or the like) a creditor may exercise that lien and recover that property if payments are not properly made. Please note however that the automatic stay is limited if you file more than one case in a year. The automatic stay exists for only 30 days in a second case, unless extended by the Court and there is no automatic stay if you file a third or more cases in a year.

Since October 17, 2005 there are new exceptions to the automatic stay. These include divorces, child support matters, landlords who have obtained a judgment for possession. In addition the automatic stay does not stay criminal prosecution at any stage. Thus, if someone is charged with a crime because of some act occurring before or after filing a bankruptcy Code, generally the filing of a petition under any of

the chapters of the Bankruptcy Code simply does not stop or stay such prosecution. The most frequent type of prosecution involves hot checks.

Second is the advantage of a fresh financial start. Fresh financial start means that you will not be labored by oppressive debt and obligation but may take that deep breath of fresh air and begin your credit or economic life all over again. Innumerable former clients have told me that this is a type of relief that is hard to describe. One person said, "It is like being born all over again."

## WHAT ARE THE DISADVANTAGES OF A CHAPTER 7?

There are a number of disadvantages, some of which we may discuss later in this booklet in more depth, but the following are the five major disadvantages:

### 1. Impact on credit

We are a nation that thrives on credit. We know more how to use a credit card than to pay for goods and services with cash. This "credit happiness" has been ingrained in us, usually not by our parents, but by the proliferation of media hype, by fellow workers, and by numerous requests from banks, savings and loans and similar institutions to enjoy the many benefits that come from using their cards.

If you are going to make use of your fresh financial start, however, you must pledge to yourself that you will not use credit cards or attempt to obtain new credit cards for a minimum period of two years after bankruptcy has been filed. It may be most inconvenient to go to Sears, Wards, Foley's, Target, etc. and count on greenbacks to buy that new coat, but, believe me, there is no better regulation of one's will power than to buy and spend based only upon what is available and to resist spending what is not available, through credit.

Credit for durable goods, or large ticketed items, will be needed by everyone at one point in their life, such as when buying a home or car, etc. You should know how you are judged and will be judged as a credit risk.

When credit grantors check credit status, they consider four factors: history, disposable income, evidence of financial solvency (dollars in a bank account) and stability. Let's consider these factors:

#### a. History

This involves what you have done in the past with your life from a credit perspective, as well as such things as number of jobs held and the like. Your history will probably be bad because of what has occurred, including filing for bankruptcy. It is considered by many credit grantors that a notation on your credit record that bankruptcy has been filed is a negative statement.

From what we have been told by the credit community, the history element usually represents only about 25% of the credit equation, or the decision to grant you new credit.

#### b. Disposable income

Disposable income is the amount of income available for your family over and above the necessary cost of living as well as the amount of money that you have on deposit in financial institutions, which is referred to as evidence of financial solvency.

Usually credit problems after bankruptcy evolve because of low or non-existing disposable income or no evidence of financial solvency. I would suggest that you use the rule of thumb for cost of living mentioned earlier (net take-home pay minus cost of living equals disposable income), as well as accept a mandatory commitment to get at least

\$3,000 on deposit in any financial institution some type of committed investment before applying for credit.

c. Financial solvency

The most important factor in the entire credit equation is evidence of financial solvency, or moneys that are not pledged to any credit grantor to secure the payment of debt. While past history may be 25% of the decision to give you credit, disposable income and evidence of financial solvency are the remaining 75%.

d. Stability

Stability, or lack thereof, is a negative factor only and applies only in cases where a person may have moved repeatedly and, thus, might have received the designation of a person who is not stable. This designation might also be achieved if a person has frequently changed jobs and not held a job for more than a month or so.

If stability is a negative factor, there may well be a reasonable explanation that could be placed in a credit bureau file to lessen the effect of any such report.

Credit grantors, of course, are free to consider any of the four factors (history, disposable income, evidence of financial solvency, and stability) with any weight they wish to give. Some credit grantors believe that history is 90% of the credit equation, yet many others believe it is much less.

2. Tax obligations

Tax obligations (obligations owed to federal, state, or county taxing authorities) are generally not forgiven or discharged in bankruptcy, but income taxes may be generally discharged if for a tax assessed more than three years prior to filing if there is not a tax lien and tax returns have been filed for at least two years.

Taxes for personal property or real property owed to a county, city, or school district are generally dischargeable if over one year old or for a tax year more than one year prior to filing. Taxes owed to the IRS for employer's taxes growing out of a business formerly operated (representing moneys withheld from employee's wages) or sales taxes are almost never dischargeable.

Taxes are a very complex issue, and the dischargeability of taxes can only be determined after we have had an opportunity to review thoroughly all of the factual elements concerning your individual tax situation.

3. Other Non-dischargeable Debts:

The following is a list of other debts that are non-dischargeable:

a. Student Loans

Generally, loans for education at the college, university, or grade school level or even special education loans are not dischargeable in bankruptcy. An exception to this rule is that student loans may be discharged if the non-dischargeability of the loans would be an undue hardship on the Debtor. Again this issue is very complex, and the dischargeability of taxes can only be determined after a thorough factual review.

b. Divorce/Family Law Obligations

Debts that relate to child support, alimony or spousal support or debts incurred pursuant to a marital property division are non-dischargeable.

c. Criminal Fines and Restitution

Obligations for criminal fines and restitution are non-dischargeable. This includes speeding tickets, criminal NSF charges as well as other more serious criminal activity.

d. Debts that are incurred by acts of fraud, deceit and misrepresentation are non-dischargeable.

Generally, unintentional minor inaccuracies in information are not contemplated here. What are contemplated are direct misstatements that were given with the intention to mislead or deceive the credit grantor. An example would be a statement to a loan officer in a credit application or financial statement that certain assets were worth more than they were actually worth.

We will discuss at length objections to the discharge of a debt and to the overall discharge of the Debtor as to any debt, but it should be recognized that a disadvantage to filing is that in certain factual situations, there may be debts that might have been incurred by giving wrongful information (usually intentionally). If an objection is filed by a creditor and sustained by a Court, that particular debt may be held non-dischargeable.

This disadvantage includes "charge ups", a term not defined by the bankruptcy code but generally meaning debts incurred prior to the filing of a Chapter 7.

As a general rule any debt for purchases of luxury items of greater than \$500.00 within 90 days of the date of your filing or \$750.00 of ordinary goods with 70 days of your date of filing are presumed to be nondischargeable. However I would caution that charges greater than \$1,500.00 within 120 days of the date of your filing or \$3,000.00 within 180 days of your filing can be considered a "charge up" and non-dischargeable.

"Charge ups" may be non-dischargeable because the court recognizes an "implied representation" theory in the use of a credit line. Generally speaking, use of a credit line by a debtor implies an ability to pay at the time the line is used. If that implied representation is false, because a bankruptcy is filed just after the borrowing occurs, then the debt may be rendered non-dischargeable by the Court. I would never encourage you to file a Chapter 7 if you have charges greater than \$500.00, \$750.00, \$1500.00 or \$3,000.00 within the time periods stated above.

e. Debts that relate to defalcation in a fiduciary capacity are nondischargeable.

This simply means that if a debt was incurred because a person squandered money left in their care or used it for their own purpose without the owner's consent, the resulting debt may not be dischargeable. This can be as elaborate as a bank teller who embezzles from a bank or simply someone who has been entrusted with some property (cash or other) and loses it or uses it for his own benefit.

This simply means that these types of debts are non-dischargeable and must be repaid.

f. Debts that relate to a willful and malicious injury by the debtor to another

Generally debts arising from willful injuries you inflict on another, such as assault, are non-dischargeable.

4. Inheritances

If the Debtor receives an inheritance because of a death occurring, either before, during the filing or within six months after the discharge date, any moneys received as a result of the death or inheritance becomes property of the estate and must be surrendered, unless a portion of the inheritance may be claimed as exempt under either the state or federal exemption statutes.

Again, the key is when the death occurred. If the death occurred more than the six-month period (such as six months and one day after discharge), none of the inheritance or money received is available to pay creditors. The same rule also applies whether the money is received from a direct inheritance (such as a will), by operation of state law.

Thus, a wise and prudent Debtor contemplating the filing of bankruptcy in a situation involving large assets which could be inherited or where relatives are of advanced age, should give thought to structuring the will of the person who might die so that the property may be given to someone other than the Debtor.

This also applies to any large sums of money that you come into within this timeframe. (Ex.-winning the lottery)

5. You may receive a discharge under Chapter 7 no more often than once each eight years or four years after a Chapter 13 or Chapter 11

While this is a very minor factor to anyone facing a large amount of indebtedness, it should be recognized that a discharge under Chapter 7 may only be obtained once each eight years. If a Chapter 7 discharge was obtained within the last eight years, a person is not eligible to proceed under Chapter 7. However, this limitation does not relate to other types of bankruptcy actions, such as Chapter 11 and Chapter 13 where the limit is four years. For the usual consumer situation, if a discharge was granted in the last eight years, Chapter 13 or Chapter 11 should be considered to resolve a financial problem.

**WHAT ARE THE MAJOR STAGES IN A CHAPTER 7 AND THE TIME BETWEEN EACH?**

There are three major stages to a Chapter 7, and they are referred to as follows:

1. The Documentary Phase

This phase involves credit counseling, obtaining credit reports and preparing and filing all the necessary statements and schedules with the Court. This phase normally takes as long as it takes you to complete the credit counseling class and completing our bankruptcy questionnaire and providing necessary documents. Your schedules and statements can be prepared, signed and filed within few days of the date you complete your required tasks. (Providing the questionnaire is filled out correctly and all requested documents have been provided.)

2. The Meeting of Creditors

This is a time when the Debtor meets the Court appointed Trustee, whose job is primarily to make sure that all of the provisions of the law have been complied with, and, as such, the Debtor is entitled to a discharge. This normally takes 40 to 80 days after the date of filing.

3. The Discharge Phase

This is when the Court enters the Order of Discharge. This normally occurs five months after the filing and requires that you obtain the necessary pre-discharge credit counseling.

The usual time between stages one and two is one to two months and between stages two and three, about two to three months. The entire time frame from stage one to stage three is usually five to six months, calculated from the day of filing.

In reviewing the stages, you should remember that Chapter 7 bankruptcy is totally retrospective in nature, all pegged upon the date of filing. The date of filing, by reason of the imposition of the automatic stay, effectively terminates any legal obligation to pay dischargeable debts, which, as we have said, are all debts except debts provided for by law as non-dischargeable.

Unless a creditor successfully urges an objection to discharge or dischargeability, which is extremely rare, the debt is never renewed.

**IF A CREDITOR, TRUSTEE OR UNITED STATES TRUSTEE DOES NOT FILE AN OBJECTION, AM I AUTOMATICALLY OR CONSTITUTIONALLY ENTITLED TO A DISCHARGE IN BANKRUPTCY UNDER CHAPTER 7?**

The answer is basically yes, however you must after October 17, 2005 complete your credit counseling, obtain your certificate and file the same with the Court prior to being discharged.

**WHAT DOCUMENTS MUST BE FILED WHEN I FILE A CHAPTER 7?**

There are a number of documents which must be filed, all of which we will prepare for you and make ready for your signature. These documents are generally referred to as disclosure documents, or documents which are designed to provide information to the Court concerning a particular case. Generally these documents are:

1. A petition requesting relief under Chapter 7
2. A "means test" calculation
3. A list of all debts that are secured debts and the proposed disposition of those debts
4. A list of monthly expenses and income on the date of filing
5. A statement as to the attorney's fees that are being paid to me and how they are paid
6. A statement of affairs, which is a questionnaire having many questions concerning your past
7. Applicable schedules

The schedules are lists of debts that are owed as well as assets that are owned. There is also a place for the Debtor to sign the statements and schedules. They are signed under oath or verified as if an oath were orally administered,

There is no penalty for simple inadvertence to list an asset or liability. However, if there is a purposeful cover-up, or failure to disclose relevant information deliberately, prosecution could be had in the federal Courts by the United States Attorney.

8. Tax Return Transcripts
9. Your credit counseling certificate

There may be additional papers that would have to be signed, depending upon the type and complexity of the case.

## WHAT IS THE AUTOMATIC STAY?

The automatic stay applies not only in a Chapter 7 bankruptcy but also in all other types of bankruptcy, and it is a stay against the commencement or continuation of all action of any type to collect a debt and obligation by a creditor. Specifically it prevents:

1. The commencement or continuation, including the issuance or employment of process if there is a lawsuit of any type to recover a claim of any nature.
2. The enforcement against the Debtor or property of the Debtor of a judgment obtained before the commencement of the case.
3. Any act to obtain possession of property of the estate, or to exercise control of the property of the estate.
5. Any setoff of any debt owed by the Debtor that arose before the filing of the case. (Generally "setoff" refers to actions by depositories or lending institutions to attempt to charge a debt against property that might be on deposit, for example, a bank account balance.)
6. The commencement or continuation of any proceeding in the United States Tax Court concerning the Debtor.

There are several points that should be remembered concerning the automatic stay. The automatic stay under Chapter 7 generally does not aid or protect a third party, or person obligated with the Chapter 7 Debtor, on an obligation. Thus, if a person is obligated with the Chapter 7 Debtor, that obligation can be collected and usually will be, by suit or otherwise.

The automatic stay relates only to debts or actions that arose on or before the commencement of the bankruptcy proceeding. Thus, if the debt was incurred subsequent to the filing of the bankruptcy, the automatic stay would offer no protection, nor would that debt be discharged.

In addition, it is important to remember that the automatic stay does not stay certain other defined actions:

1. Commencement or continuation of any criminal action. (This also can involve action to collect on a hot check.)
2. Collection of any alimony, maintenance, or support from property that is not property of the estate. Actions for divorce, child support or modification of custody or child support that do not effect property of the estate are also not stayed.
3. Enforcement of a governmental unit's police or regulatory power, including enforcement of a judgment that does not involve the payment of money, such as an injunction or cease and desist order obtained in an action or proceeding by a governmental unit.
4. The tax issuance to the Debtor by a governmental unit of a notice of a tax deficiency.
5. Action by a lessor to obtain possession of leased real property after a Court has entered judgment for possession.

There are other specific provisions relating to the continuation of the automatic stay and qualifications for the automatic stay that may apply in certain business situations; however, these points generally cover the ways in which a consumer will be affected by the automatic stay.

A consumer may see a secured creditor, such as a mortgage holder on a home, automobile or the like, file a motion to modify the stay to permit recovery of such property during the term of the bankruptcy proceeding. It is very important for an individual filing under Chapter 7 to understand the options concerning, and if payments are not current, they will likely do so.

Remember that there is an automatic stay only in the first case you file in any given 12 month period. On a second case filed within that twelve months the stay only lasts for 30 days unless extended by the Court upon timely filed motion and signed Order. There is no automatic stay on any case after the second case filed within a year.

### WHAT OPTIONS EXIST AS TO SECURED DEBT?

First, it must be understood what secured debt is. Secured debt is a situation where a security interest has been retained by a creditor to permit that creditor to foreclose on certain described property or to recover possession if payments are not made. Generally, when talking about property, we must determine whether it is real property (land and buildings) or personal property (things and/or cash on deposit of some nature).

As to real property, there are three possibilities that exist under Chapter 7. The Debtor may:

1. Agree to surrender the property and thus seek a discharge

The surrender, or loss, of the property should usually be contemplated within 90 to 120 days after filing the bankruptcy action and involves a giving back of the property by the Debtor. A creditor may ask that the period of time to give it back be shortened, but the filing of the Chapter 7 gives to the Debtor a minimum period of time in order to make arrangements to substitute some other property for that being surrendered. Even if the motion to modify stay is filed immediately after the Debtor's petition, the minimum period of post petition use of the property should still be 60 to 90 days.

If the creditor holding the lien does not file a motion to modify the stay, possession of the property can be maintained until discharge (five to six months after filing).

2. Reaffirm the debt and obligation

On the date of filing a Chapter 7, debts and obligations generally come to an end and are not revived unless the debts are non-dischargeable automatically under law (child support, alimony, etc.) or the Court enters an order denying discharge of a certain debt or permits reaffirmation by Court order.

The process of reaffirmation came into the Bankruptcy Code in 1979. It involves the Court entering an order that gives "new life" through the process of reaffirmation to the debt that existed prior to bankruptcy.

Reaffirmation is a process that grants to creditors the right to sue for any post bankruptcy deficiency. Deficiency means the amount of debt remaining after the collateral or property has been sold and applied against it, and thus reaffirmation is sought by many creditors to accomplish that objective.

In addition, many Debtors desire reaffirmation because of a perceived "moral" commitment. Of course, I cannot comment on the moral aspects of reaffirmation or of any need to reaffirm purely on a moral basis. It is a decision that must be made by the individual Debtor in consideration of such personal factors as may be deemed appropriate and necessary.

I would suggest that the best course of action that a person can pursue is not to be concerned about "moral commitments," but instead, to primarily support family and present living obligations. Remember nothing prevents a Debtor from paying any debts that existed prior to bankruptcy. That is, of course, your free right. You should, however, understand legal significance of such payments.

While debts existed prior to bankruptcy, they do not technically exist during the term of the automatic stay and never exist after discharge; therefore payments on pre-existing debts after the date of filing constitute nothing more than the giving of free will gifts to people and entities that were formerly creditors.

As to personal property, that is a property interest that is mortgaged or pledged to secure the payment of the debt, the options are basically the same, with one additional option added. The options, again, are:

1. To make payments as they become due and payable
2. To surrender the property and seek a discharge
3. To reaffirm the debt (discussion as set out above)
4. To redeem the property

The process of redemption provides a Debtor the right to pay to the creditor the fair market value of the property at the date the bankruptcy action was filed. The fair market value is paid in one lump sum as opposed to stretched out or time payments; therefore, where the property is of value of more than several hundred dollars, it is very difficult for redemption to be used in that the funds to redeem the property interest are rarely available.

Redemption should only be contemplated when there is sufficient cash on hand to compensate the creditor for the value of the property without otherwise endangering the economic stability of the family. As you can readily see, where the value of the property is more than several hundred dollars, this is extremely difficult to do. Upon appraisal of the property, the redemption value is agreed to by the Debtor and Creditor (lien holder); however, if they cannot agree then the Court appraises the redemption value. It is payable in the one lump sum as soon as the process is brought to an end.

There is a special provision relating to non-purchase money security interest in personal property. It is found under Section 522(f) of the Bankruptcy Code. It provides that the Debtor may avoid a lien that impairs an exemption if the lien is a lien growing out of a note and security agreement and if it is non-possessory, non-purchase money security interest in any household furnishing, wearing apparel, books, animals, crops, musical instruments, or jewelry primarily used by the family for personal or household use as well as any implements, professional books or tools of the trade of the Debtor, or professionally prescribed health aids for the Debtor or a dependent of the Debtor.

In order to avoid such a lien, it must be non-purchase money (proceeds of loan not being used to buy the property) and must necessarily relate to a lien which was granted to secure the payment of a debt, such as an individual borrowing money on household goods and furnishings and/or jewelry.

A separate motion with accompanying notice to the creditor and Court order must be sought in order to avoid such lien. If such a motion is required, a nominal additional cost will be charged to you, unless originally quoted to you at the time of our initial consultation.

In many cases, a finance company taking a lien upon household goods and furnishings does so with little intention to secure the return of this property, and a formal lien and validation process may not be necessary. However, care should be taken to determine whether or not the lien is truly non-possessory, non-purchase money.

## WHO IS THE TRUSTEE AND WHAT DOES HE DO?

The Trustee is an individual, not necessarily an attorney, who is charged by the Court to do basically three things:

1. Examine the statements, schedules and documents filed by the Debtor to determine if the rules have been followed.

The Trustee determines, primarily from the Debtor's testimony and information received from any interested creditors that the statements and schedules have been properly prepared and that the Debtor's duty has been discharged. If there are any additions, corrections, or deletions that are deemed necessary, the Trustee can request such amendments be made.

2. Sell and dispose of non-exempt property for the benefit of creditors.

In the event there is property which is not exempt, or property which cannot be exempted under the applicable federal or state statute, the Trustee will accumulate that property and sell and dispose of it for the benefit of your creditors by taking the proceeds from the sale and, after depositing it in a special trust bank account at the conclusion of the case, paying it in equal shares, depending upon the amount of their claim, to creditors who have timely filed a Proof of Claim.

Even if you admittedly owe a debt to a creditor, and that creditor fails to file a Proof of Claim form, then the Trustee cannot pay that creditor any money. All payments can only be made based upon the claim forms properly filed. The notice of meeting of creditors, in addition to setting out the date and time of the meeting, will also indicate the date for filing a Proof of Claim.

3. Determine if any third parties have received unfair advantage and, if so, take action to set aside such advantage.

Such action usually falls into two categories:

- a. Transfer to third parties within certain time periods (usually one year prior to filing the petition).

Transfers that can be avoided are limited to transfers for no or inadequate consideration, such as giving to a friend, relative, or even a creditor a property interest prior to filing bankruptcy which would otherwise be available for sale, with the proceeds distributed to creditors.

- b. Recovery of preferential payments to creditors prior to filing bankruptcy.

The regular, reoccurring monthly payments on prior debts or payments on the monthly utility bills are not the type or debt we are considering. Preferential payments in the consumer sense usually relate to payments on past due antecedent debts which were made by the Debtor at a time of insolvency or which rendered the Debtor insolvent and were made within one year of filing the petition or within one year of filing if the beneficiary is someone defined as an insider.

The definition of insider is difficult, but it generally relates to someone who, because of a particular circumstance, bears a different or close relationship to the Debtor.

The Trustee has little or no discretion. The Trustee is not given discretion under the Bankruptcy Code, but is required to do certain things or take certain action if, upon investigation, facts and circumstances appear to be present. The Bankruptcy Judge has the only discretion under the law.

Trustees are frequently criticized for taking action or not taking action, but again, the Trustee's decision to act or not act is based solely upon the information that is discovered. For example, that the Trustee's investigation reveals only "exempt assets." Even though creditors may have a hunch or strong belief that other assets are present, the Trustee cannot proceed unless their hunch can be supported by a "willing witness" who stands ready to give evidence.

On the other hand, if a third party comes forward supported by the opinion of competent counsel, the Trustee must pursue the claim, regardless of his or her personal reservation and/or friendship with any of the individuals who may be involved.

Once a claim has been commenced, the settlement of the claim is left to the Court. If a Trustee wishes to settle a pending claim, this is accomplished by Court hearing and order. All the Trustee can do is make a recommendation.

### **WHO IS THE UNITED STATES TRUSTEE AND WHAT DOES HE DO?**

The United States Trustee is an arm of the Department of Justice. They were created by Congress to be the administrative oversight of the bankruptcy process. The United States Trustee can appear in any case and take any legal action necessary for the preservation of the Bankruptcy Code or to stop abuse in the bankruptcy process. They are the main "gatekeepers" of the bankruptcy "means test" and can bring action against any debtor who fails that test to dismiss the case. They can take action to stop fraudulent activity and beginning in 2006 will be required to audit one in every 250 Chapter 7 cases filed. These audits will assure compliance with the Bankruptcy Code just like tax audits assure compliance with the Tax Code.

### **WHAT CAN I EXPECT AT MY MEETING OF CREDITORS AND WHAT IS A SECTION 341 MEETING?**

"Section 341 Meeting" or "First Meeting of Creditors" are terms that have come into bankruptcy law over the last several years. It is a result of the provisions of the Bankruptcy Code of 1978, which became official in 1979. It provides that all Debtors shall attend a meeting of creditors and provides generally the procedure of such a meeting. From thence came the reference to the Section 341 Meeting. A Section 341 Meeting is this meeting of creditors.

As we pointed out before, a meeting of creditors is a somewhat misleading name. It is not an occasion where creditors get together for a meeting. It relates primarily to a session between the Debtor and the Court appointed Trustee, whose job is to determine whether or not the Debtor has followed all of the applicable rules, regulations, and statutory provisions.

The Section 341 Meeting will generally occur within 30 days after the case is filed. Both the Debtor and attorney will receive notification of the meeting of creditors, usually at the same time, as will all of the parties in interest listed in the Chapter 7 bankruptcy papers who are creditors or parties holding a claim against the Debtor.

The notice that is sent out invites all interested parties to attend; however, on the national average, less than half of 1% of all creditors ever attends. In my opinion, the number attending appears significantly less than that. Generally, the Trustee will ask only those questions which are designed to allow the Trustee to perform his or her statutory obligation under the Trustee's three basic functions.

Creditors who appear only ask questions to:

1. Establish that they have the right Debtor.

Frequently, creditors, or representatives from large credit card companies, such as Sears, Discover, Visa and Mastercard, will appear who are simply trying to verify that the person who has filed bankruptcy is, in fact, the one owing them a certain amount of money.

2. Present information or evidence to the Trustee concerning certain assets that the Debtor had an interest in at some prior time, such as at the time a financial statement would have been given. This is generally referred to as asset investigation.

3. Determine the position of the Debtor or to determine whether or not the Debtor will reaffirm an otherwise secured debt.

Remember that a secured creditor can never impose one of the three options on the Debtor. It is the Debtor's choice, but the creditor is likely to want to determine which choice is to be pursued and how likely the Debtor will treat the collateral.

4. Determine relevant facts to object to the discharge of the Debtor or dischargeability of a debt.

Inquiries relating to discharge and dischargeability primarily involve detailed questioning concerning property values on financial statements given some time previous to bankruptcy, at times when the Debtor was attempting to borrow money or obtain the extension of credit.

5. Present information to the Trustee as to transactions concerning the Debtor's property that might aid the Trustee in recovering property of the estate either through preference recovery property or securing the return of property transferred by the Debtor pre-petition without consideration (money flowing to the Debtor) or inadequate consideration.

The appearance of a creditor at a meeting of creditors should not be viewed by the Debtor as something that is bad or ominous. Frequently such visits are only to obtain information, with little other impact related to them. In the unusual case, the creditor may appear for the purpose of obtaining information leading to a decision as to whether or not to file an objection to the discharge of the Debtor or dischargeability of the indebtedness.

**HOW SHOULD I HANDLE CREDITORS WHO CONTINUE TO HARASS ME WITH PHONE CALLS AND MAIL IMMEDIATELY AFTER I HAVE FILED FOR BANKRUPTCY AND LATER ON EVEN AFTER MY DISCHARGE HAS BECOME FINAL?**

I have always felt that the best way to resolve any of the problems of life is with a sympathetic, understanding approach to an issue. It is often better to deal with an entity that may hold an adverse or antagonistic interest directly, positively, and with a very friendly attitude. With this in mind, I would recommend the following:

1. Calls from creditors

In calls from creditors, collection agencies, or representatives of creditors concerning past due payments, if the property interests which they are calling about are to be surrendered, or the debt is unsecured (where no property interest is pledged for the payment of it), I would recommend that you simply give them your case number and date of filing and state very clearly and succinctly, "UNDER ADVICE OF COUNSEL, I HAVE BEEN INSTRUCTED NOT TO DISCUSS THE MATTER WITH YOU FURTHER. I HAVE FILED BANKRUPTCY. PLEASE CALL MY COUNSEL, THOMAS M. ROOT FOR FURTHER INFORMATION. HIS PHONE NUMBER IS 281-332-4800." If any persistence is noted, then the creditor should be referred to my office for further inquiry and response.

If the call concerns a secured debt, or one where the creditor holds a security interest in property which you, the Debtor intend to keep, my recommendation is that the caller be treated with dignity and, in addition to providing the information which would be provided to an unsecured creditor, that the caller be told that payment will be forthcoming and when such payment can be anticipated.

It may be necessary to deal with a secured creditor to try to work out some type of an extension of payment terms or rearrangement of debt in order to make the payments easier to handle. I urge you to discuss with your secured creditors, who hold a security interest on properties that you wish to maintain, your present economic situation and what payment arrangement would be better as opposed to the ones currently in existence.

It should, however, be underscored that if any creditor is persistent, antagonistic, rude or makes direct or veiled threats of any kind, the conversation should be halted and the creditor referred to my office. In no event should the conversation with an unsecured creditor go any further than the bankruptcy, "name, rank, and serial number."

## 2. Correspondence from creditors

It is extremely important that creditors secure the basic background information, case number, name of case, date of filing and my name and address. When a statement, delinquent notice or the like is received, simply mark on the envelope: Delivery Refused Return to Sender—In Bankruptcy Case No. (insert case number), Filed in the United States Bankruptcy Court for the Southern District of Texas, Houston Division, on (date), No-Asset, Chapter 7.

If you are not certain as to the content of a letter or otherwise do not know what may be occurring, you should open such correspondence and simply drop the creditor a note, giving the same information as I have recommended above. Only if creditors have that information can we be sure that they will comply with the law.

## 3. Harassment by creditors

In the unlikely event that a creditor may persist in efforts to contact you and demand payment for a debt which was owed by you at the date of filing bankruptcy, you should make note of all such conversations, determine the name of the representative (not just the company involved), make careful written record of the day, date and time of any such antagonistic communication and, as clearly as you can recall, state word for word what was said by both of you.

It is possible to seek judicial sanctions for the antagonistic actions of creditors in attempting to collect debt, but it can only be done if we can prove what actually occurred. Sanctions are tantamount to civil contempt penalties that can be used by judges to protect people who are in bankruptcy and have the protection of the automatic stay.

If problems exist concerning persistent phone communications, please do not hesitate to let me know. I will try to intercede on your behalf before we reach the possibility of sanctions and try to prevent you from having to suffer any additional harassment. Please understand that it is my continuing desire to assist you, and only if I am aware of a problem can I do so.

### **WILL MY EMPLOYER DEMOTE OR FIRE ME BECAUSE I HAVE FILED FOR BANKRUPTCY?**

The Bankruptcy Code of 1978, as amended, specifically prohibits job action against you because you have been a Debtor under the provisions of Chapter 7. If a creditor who is your employer does take such job action against you, you have the right to file a suit to secure a temporary injunction or permanent injunction in Federal Court, plus the right to seek sanctions, penalties and damages for willful violation of the anti-discrimination provisions of the Bankruptcy Code.

Most employers are aware of these provisions and will not take action against you. If you sense that you are being mistreated on the job or someone is acting differently to you and believe that it is due to your filing bankruptcy, you should keep careful record of what is said, who said it, what is done, who did it (with specific attention to detail) and the date and time involved in order that an appropriate action may be commenced before the Bankruptcy Judge to protect your rights.

## **MAY I KEEP MY BANK ACCOUNT IN MY PRESENT BANK AFTER I COMPLETE MY CHAPTER 7?**

The Bankruptcy Code does not provide for anti-discrimination provisions or procedures to redress grievances in the event your bank account would unilaterally choose that you could not transact business with them. Practically speaking, a bank or any commercial institution or private enterprise concern has the right to select who they are going to do business with, which is the essence of free enterprise.

While a bank can "offset," a legal term meaning, "take from your account," the moneys owed by you prior to bankruptcy, they may very well also decide that you are not a desirable customer and close your account. There is virtually no way to prevent this from occurring.

My recommendation to you is that if your banking relationship with the bank is long and well-established and does not involve a bank which lost money to the discharge of an unsecured debt, you should be able to carry on your banking relationship as if nothing happened. If, however, a bank is an entity that has lost funds because of debts that you have not been able to pay it is very reasonable to anticipate that such a bank may not be interested in your business in the future. If this is your situation, in order to avoid sudden closure of your account or other embarrassment, I recommend that you consider closing your bank account and opening new accounts at "neutral" banks contemporaneously with the filing of your bankruptcy.

## **IF I FILE CHAPTER 7 AND THEN QUICKLY DECIDE THAT I DO NOT WANT TO PROCEED WITH MY CHAPTER 7, CAN IT BE DISMISSED?**

The answer is generally "yes"; however, in order to dismiss a Chapter 7 petition, it is necessary for the Court to give its consent. The Court does so by a motion and notice to all the creditors. It is conceivable that a creditor could object, as well as the Trustee or any party in interest, but it is highly unlikely. Only in a Chapter 13 does a Debtor have the absolute right to dismiss a case without the court blocking the dismissal for some reason.

It has been my experience, though, that a Debtor who states that he or she wants to pay all debts and obligations as they become due meets the requirements of the law, and as such, the case should be dismissible without delay.

## **WHAT DEBTS ARE NOT DISCHARGEABLE?**

When we talk about debts that are not dischargeable, it is different from cases where a debtor may be denied a discharge of all his or her debts, which, of course, we will deal with in more detail later. I believe it is important, however, to understand as generally as possible the exceptions to discharge that are set out in Section 523 of the Bankruptcy Code.

1. Taxes for a tax period less than three years old where returns were properly filed when due

For example, if we are contemplating filing bankruptcy on April 16, 2005, and the Debtor owes taxes for 2001 (a return would have been due on April 15, 2002), assuming that the return was properly filed and no extension agreements had been arranged or agreed to, then taxes would generally be dischargeable. There are exceptions if tax liens have been filed or if the taxes are due to a fraudulent return.

2. Taxes that are for trust fund payments are never discharged

For example, the Debtor had operated a business and had withheld taxes from employees' pay and never paid those to the IRS. Such an obligation is not dischargeable at any point in time. No matter what Chapter might be filed, the Debtor would always owe those taxes. All that could occur would be a plan for repayment under Chapter 11 and Chapter 13.

The same would apply in situations involving sales tax withheld from sales and not remitted to the comptroller of public accounts. Of course, any fraudulent tax reporting is generally never dischargeable.

3. False statements when credit was obtained.

False statements when credit was obtained, such as in the case of false pretenses, false representations or fraud and/or the use of a statement in writing that is materially false to obtain credit constitute an exception to discharge.

4. Purchases or incurring of debt in contemplation of bankruptcy

Generally, purchases or incurring of debt in contemplation of bankruptcy may not be discharged. For example, one runs up substantial debt with the intent in mind of "getting the creditor" or "getting a free ride" with no intention of repaying the debt. Such debts are non-dischargeable. These are generally called charge ups.

5. Consumer debts owed to a single creditor and aggregating more than \$500.00 for "luxury goods or services" including cash advances incurred by an individual debtor on or within 60 days before filing are presumed not to be dischargeable. Purchases of "non-luxury or ordinary goods and services" aggregating more than \$750.00 on or within 70 days before filing are presumed not to be dischargeable.

6. Creditors whose names and addresses are not listed in the schedules or whose names and addresses are listed inaccurately.

7. Fraudulent acts by a person acting in a fiduciary capacity, such as through embezzlement or larceny

8. Alimony or child support due to a separation agreement, divorce or order of a Court, as well as debts incurred during a divorce or separation or due to a marital property division.

9. For willful and malicious injury by the Debtor to another entity

10. A debt for a fine, penalty or forfeiture payable to and for the benefit of a governmental unit

11. An educational loan unless there is a showing of "undue hardship".

12. A debt that arises from a judgment or consent decree entered in a Court of record against the Debtor, wherein liability was incurred by such Debtor's operation of a motor vehicle while legally intoxicated, is not dischargeable.

13. There is a provision that prevents a debt from being discharged if the Debtor had been denied a discharge in a prior case within eight full years.

It is impossible in these few pages to provide all of the legal intricacies of issues such as discharge of certain indebtedness. This is designed as a guide for you to follow and must be treated as such. There is no substitute for detailed legal advice. If you recognize in your particular situation the existence of any debt that might be subject to the dischargeability rules, I urge you to bring it to my attention so that we may discuss it. Unless I hear from you concerning such situations, I will assume they do not exist.

### **WHEN MAY A DEBTOR BE DENIED A DISCHARGE?**

Generally, there are limited situations when a Debtor may be denied a discharge. First, we must determine who is entitled to a discharge under Chapter 7 and that is only an individual, not corporation, partnership, joint stock company, municipality, utility company or the like.

An individual may be denied a discharge if any of the following conditions exist:

1. Debtor, with intent to hinder, delay or defraud a creditor, has transferred, removed, destroyed or mutilated property of the estate within one year after filing.
2. Debtor has failed to maintain or has mutilated records that are necessary to determine the Debtor's financial condition or business transactions.
3. Debtor knowingly made a false oath or account, presented a false claim or gave, offered, or received or attempted to obtain money or property for acting or failing to act as the code requires, including withholding from any officer of the Court (Trustee or other appointed individual) any recorded information, including books, documents, records and papers relating to the Debtor's property or financial affairs.
4. Debtor has failed to explain satisfactorily the loss of any asset or deficiencies in assets.
5. Debtor has refused to obey any lawful order of the Court or to respond to any material question.
6. Debtor has been granted a discharge under either Chapter 7, 11, 12, or 13 within the last six years.

It is important to note, however, that in the case of discharge or dischargeability, these are issues to be determined by Courts upon trials, hearing all relevant evidence and information. If a person wishes to object to the dischargeability of the debt or the discharge of the Debtor, the Court must first conduct a trial and determine from competent, factual evidence whether or not the discharge or dischargeability of the debt as sought against the Debtor.

The number of discharge or dischargeability objections which are annually filed are a very small percentage of the number of bankruptcy cases filed, probably equaling less than 1/10<sup>th</sup> of 1% of all such cases. Unless you as a Debtor or prospective Debtor are aware of some particular circumstance or some particular factor that would lead you to believe that someone has cause to object to the discharge or dischargeability of a debt, I believe that it is not worth the amount of mental energy needed to seriously consider the possibility of this occurring.

#### **WHEN WILL I RECEIVE MY DISCHARGE?**

Discharges are usually entered by the Court, assuming no objection to discharge or dischargeability has been filed and you have filed the required credit counseling certificate. It can be anticipated that such an order of discharge will be entered 90 days after the date of the creditors' meeting; thus, unless other factors become apparent, a discharge can be contemplated within the 90 day scenario. Other than possible clerical or mechanical errors that could conceivably occur in the bankruptcy clerk's office, there are limited factors or circumstances that could delay a discharge other than a formal objection.

#### **WHAT WILL YOU AS THE ATTORNEY DO AND WHAT WILL BE EXPECTED OF ME?**

Although we have touched on this previously, it is my job as your attorney to provide (1) knowledge and (2) procedure. On the other hand, you must provide the facts in written format to me. I will rely totally on written lists and facts you give me; thus, you should exercise the highest degree of care to make sure the facts are accurate. I will assume the total accuracy of all information you give me unless you advise me to the contrary.

I must continually reiterate that unpleasant surprises can only develop in a bankruptcy proceeding because of inadequate information. You must make sure that I have all relevant facts.

## **HOW LONG WILL IT TAKE TO COMPLETE MY CHAPTER 7?**

The entire Chapter 7 process usually takes from five to six months; however, the time should not be of concern to you, in that your fresh financial start begins the day after your Chapter 7 is filed. On that "day after," you do not effectively owe any debts and you can begin again.

## **I HAVE FILED BANKRUPTCY AND HAVE RECEIVED MY DISCHARGE BUT MY CREDIT RECORD AT THE CREDIT BUREAU REFLECTS THAT I OWE A NUMBER OF DEBTS WHICH HAVE BEEN DISCHARGED. WHAT CAN I DO ABOUT IT? SHOULD I EMPLOY ONE OF THE MANY SERVICES WHO OFFER TO STRAIGHTEN UP MY CREDIT?**

Credit reports in a Credit Bureau are primarily made up of two elements: a listing of debts that have been paid and past paying procedure. Thus, if you have been chronically late, there is a notation as to paying procedure. If you have not paid, resulting in foreclosure, that is a procedural notation. Bankruptcy will allow you to rid yourself of debts which cannot be paid and which negatively impact your credit record. This cleanup is accomplished through the discharge in bankruptcy, in that you no longer owe your previous debts.

Most of the individuals and companies who promise to clean up credit do so by writing letters on your behalf to the credit agencies and providing them with information that the debts have been discharged. Other than a periodic phone call, this is basically all such firms or agencies actually do. You can accomplish the same thing, and probably even better, by taking about half a day after you have received your order of discharge and going to the credit agencies, showing the negative information and requesting that they clean up your credit.

It is a violation of the Fair Credit Reporting Act for an agency to maintain on your credit record information that represents debts that are not owed. Debts that have been discharged in bankruptcy are not owed, therefore, would not be listed.

## **WHAT IS THE DIFFERENCE BETWEEN PRE-EXISTING LIENS (PRIOR TO BANKRUPTCY) AND DEBTS WHICH SUPPORT THOSE LIENS?**

Liens themselves are generally not affected by bankruptcy and remain in existence. Of course, that is assuming the liens are valid and are not subject to being avoided because they are not for the purchase money of certain items of personal property. If, for example, a lien is filed by the IRS or you owe the finance company for the refrigerator that was bought three years ago (again assuming that all of the documentation has been properly prepared), those liens generally survive bankruptcy, while the underlying debt does not.

After the discharge is entered, the credit grantor holding the lien may seek to recover the collateral by repossessing the property, obtaining it through a Court order or any other legal and lawful means available to them, but they may not seek to collect the debt, which usually means a deficiency (the difference between the value of the property when repossessed and the amount owed).

If the lien is not for the purchase money of any item, the item is personal property, it does not represent a tax lien, such as one to the IRS, or it is possible for the Debtor to claim Federal exemptions, it is possible to avoid the lien (eradicate it), allowing the property to be kept after the bankruptcy is completed.

## **WHAT ARE MY RIGHTS IF SOMEONE HARASSES ME AFTER I FILE BANKRUPTCY ABOUT A DEBT THAT I OWED?**

While we have discussed this issue before, I think it is important to state the information again. Once the automatic stay has been imposed (effective automatically with the filing of the bankruptcy petition), the creditor is enjoined and restrained from contacting you or making any efforts to collect the indebtedness.

Let's assume that you are dealing with an overzealous creditor and have been contacted after bankruptcy was filed. My recommendation is that, in very clear, slow terms, regardless of what the party on other end of the line may be saying, the statement be made three times that you are in bankruptcy. Then the case number should be stated, as well as the date of filing. After this is stated, the question can be asked as to whether any of this need be repeated. Assuming repetition is not necessary, the conversation should terminate at that time.

If you are, however, dealing with a secured debt, such as the amount owed to XYZ department store on the new refrigerator, when the question is asked as to what your intentions are, assuming those intentions are clear, my recommendation is to state, "I am returning the refrigerator," or "I am keeping the refrigerator," or "I seek to redeem the refrigerator for its fair market value at the date that I filed bankruptcy."

I would strongly recommend that no clarification be given subsequent to that and that the caller be referred to me for further questions. Simply give them my name and phone number and decline further comment.

In the very unlikely event that a creditor seeks to harass you because you have filed bankruptcy by either making derogatory statements or saying things that are offensive to you, my recommendation is that you terminate the conversation as quickly as possible. Then, immediately make a note as to what was said, precise quote if remembered, the date the conversation occurred, the time of day and any identification given to you by the person making the statements. Only with that type of information can we hope to be able to consider some kind of sanction by the Bankruptcy Court.

The sanctions that I have spoken of are basically penalties in the form of a fine or civil penalties handed out for violation of the Bankruptcy law.

In addition, a creditor who intentionally violates the law can be punished through contempt of Court, which also could involve imprisonment. It is doubtful that the Bankruptcy Judge has the authority to hold anyone in contempt; however, in an aggravated situation, the matter can be referred to the District Court through the process of "withdrawing reference." When the reference is withdrawn, the United States District Judge has the whole gamut of contempt powers to consider.

## **CONCLUSION**

Again I am honored that you have selected my office for representation in your Chapter 7 Bankruptcy. I encourage you to call either myself or my legal assistant at 281-332-4800 should you have any questions. For your information our regular office hours are 8:30 a.m. until 5:30 p.m. Monday through Thursday, and 8:30 a.m. until 4:00 p.m. Friday.

## **CONTACT INFORMATION**

**Thomas M. Root, Attorney at Law**  
***GIPSON & NORMAN***  
**450 N. Texas Avenue, Suite A**  
**Webster, Texas 77598**

**Tel.: (281) 332-4800**

**Fax: (281) 332-4808**

**Email [admin@gipsonandnorman.com](mailto:admin@gipsonandnorman.com)**

**VISIT OUR WEB SITE AT [www.gipsonandnorman.com](http://www.gipsonandnorman.com) or [www.rootlaw.net](http://www.rootlaw.net)**