Bankruptcy Issues Affecting County Treasurers

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Bankruptcy Basics: Automatic Stay, Discharge, Etc

Regardless of the type of bankruptcy filed—Chapter 7, Chapter 11, Chapter 12, or Chapter 13—Creditors have a duty to ascertain that a bankruptcy has been filed and to apprise themselves of information needed to enforce their rights, to file claims, or to otherwise participate in the bankruptcy process.

1. Knowledge – Duty of Creditor to Verify Bankruptcy: Through various collection procedures or correspondence with a debtor, a creditor may become aware that the Debtor is going to file for bankruptcy protection or that the debtor has already filed. The creditor should request specific information from the debtor including the date of the filing, the court within which the bankruptcy was filed, the chapter under which the debtor is seeking protection, and the case number assigned to the debtor's bankruptcy case. A Debtor who is a defendant in a collection or foreclosure action will often file a notice of bankruptcy filing in the foreclosure or collection case so that the court is aware of the filing. Whether or not the debtor provides a creditor with this information, the creditor should seek to verify that the filing did occur.

a. PACER and the Information Needed to Verify Filing

All Bankruptcy Courts have web sites with a link to PACER. PACER is the "Public Access to Court Electronic Records" providing users with case and docket information from appellate, district, and bankruptcy courts. In order to use PACER, a user must register. There is no cost for registering, however, users are charged a user fee and access to web-based PACER systems require a ten cents per-page charge. The web address for the main PACER web site is: http://pacer.pcs.uscourts.gov/. The PACER web page for the Southern District of Ohio is: http://pacer.ohsb.uscourts.gov/. In order to search for a particular case on PACER, users will need to know at least the name of a debtor, the case number, or the debtor's social security number. PACER will also provide the user with important dates and deadlines including the date by which a proof of claim (discussed in more detail below) must be filed, as well as deadlines for filing objections to confirmation or dischargeability actions. All bankruptcy attorneys will also have access to PACER and can easily conduct a search for a creditor in a matter of seconds to verify a bankruptcy filing or to get specific case information.

2. Helpful Information:

a. Court Web Site. The address for the U.S. Bankruptcy Court for the Southern District of Ohio home page is www.ohsb.uscourts.gov. Also as previously discussed, many of the bankruptcy court web pages will provide a link to the PACER for searching a case in more detail.

b. Chapter 13 Web Site. Most Chapter 13 trustees across the nation are involved with the Chapter 13 network which provides a link to the particular Chapter 13 trustee's web page. The main Chapter 13 network web site can be found at: www.13network.com. The Chapter 13 trustees for Ohio include Margaret A. Burks (Cincinnati), Jeffrey M. Kellner (Dayton), Frank M. Pees (Columbus), and Faye English (Columbus). The Chapter 13 network will take you directly to the web page of each individual trustee. The web site provides hours of operation, the office address of the Chapter 13 trustee, phone numbers, sample proof of claim forms and accessibility to the case information for a specific Chapter 13 case (for authorized users only).

In order to search the specifics of a Chapter 13 case through the particular trustee's web page, authorization is required--meaning that the user must sign up and register with the Chapter 13 trustee to search the database. The case inquiry allows the user to search for a particular case by using the debtor's case number or name. The user can review the attorney representing the debtor, specific dates, and specific information concerning plan payments and claims as well as receipts of payment by the trustee from the debtor, the plan payoff amount, and the status of the case in general.

This is a useful tool for creditors to be able to determine if the debtor is maintaining prompt plan payments or if they are falling behind, which may be a basis for dismissal or relief from stay. The Chapter 13 trustee collects payments from the debtor based upon the confirmed Chapter 13 plan and makes payments to creditors based upon the provisions of the plan (which must be submitted to the court for confirmation and approval).

3. Notice: Upon the filing of a Chapter 7, Chapter 11, or Chapter 13 bankruptcy case, any creditor that is listed within the debtor's bankruptcy schedules will be served with a notice of bankruptcy filing. The notice of bankruptcy filing provides a creditor with important information including the case number, the contact information for the debtor's attorney, important deadlines for filing proofs of claim, deadlines for filing objections to discharge, and the date of the meeting of creditors. In a Chapter 13, the notice will also provide the date that the confirmation hearing will be held and the date by which objections to confirmation must be filed with the court.

4. The Meeting of Creditors: The bankruptcy notice will also list the date and time for the meeting of creditors. Regardless of the Chapter under which a Debtor files, the Bankruptcy Codes mandates that a creditors meeting be held. Attendance by creditors at the meeting of creditors is not mandatory, but it is allowed. Frequently, secured creditors will appear at the meeting of creditors in inquire of the Debtor as to the status or location of collateral and to determine whether the collateral is insured properly. Unsecured creditors do not usually attend meetings of creditors, but if a creditor believes it may have a basis for objecting to the issuance of the Debtor's discharge or to the dischargeability of its debt, the meeting of creditors provides an opportunity for a creditor to examine the Debtor under oath. Because a trustee frequently has numerous meetings set at the same time, the trustee may only allow each creditor a few minutes to examine the Debtor. A creditor may appear at a meeting of creditors without an attorney.

Chapter 7, Chapter 11, and Chapter 13 Basics

Chapter 7 Issues

1. Generally

Chapter 7 of the Bankruptcy Code allows debtors to liquidate their assets and obtain a discharge of certain debts. Under a Chapter 7, the debtor's nonexempt property or its cash equivalent is subject to the claims of the Chapter 7 trustee. The filing of a Chapter 7 case, as with cases under any chapter of the Bankruptcy Code, invokes the automatic stay which prohibits the filing, prosecution, or conclusion of lawsuits, including foreclosure actions.

2. Property of the Estate and Surrender of Non-Exempt Assets

Section 521 of the Bankruptcy Code (11 U.S.C. §521) governs a debtor's duties in all bankruptcy cases, including Chapter 7. Under this section the debtor is required to, among other things, surrender to the Chapter 7 trustee all property of the estate and any recorded information, including books, documents, records, and papers relating to property of the estate.

Section 541 of the Bankruptcy Code (11 U.S.C. Section 541) defines property of the estate. In general, property of the estate is subject to administration by the Chapter 7 Trustee. Although the two concepts are often intertwined, determinations of what constitutes property of the bankruptcy estate are different from determinations of what property is exempt. Only if a given asset constitutes property of the bankruptcy estate does the issue of the propriety of a claim of exemption need to be addressed.

The definition of "property of the estate" is extremely broad and includes all legal or equitable interests of the debtor in property as of the commencement of the case, wherever that property is located and by whomever held. (11 U.S.C. Section 541(a)(1)). The definition of property of the estate is intended to be as broad as possible and includes both tangible and intangible interests, and both legal and equitable interests of the debtor. *In re Graham Square, Inc.*, 126 F. 3d 823 (6th Cir. 1997). The addition of the phrase "wherever located and by whomever held" is intended to specify, among other things, that the debtor does not need to be in possession of an asset for it to constitute property of the bankruptcy estate. *Graham*, *supra*.

Property of a Chapter 7 bankruptcy case is, for the most part, defined as of the commencement of the case. Section 541(a)(5), however, includes within a Chapter 7 estate any interest in property that would have otherwise been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition where the debtor acquires or becomes entitled to acquire such property within 180-days after the filing of the petition. This section applies only to property that the debtor acquires or becomes entitled to acquire by bequest, devise, or inheritance, as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree, or as a beneficiary of a life insurance policy or of a death benefit plan.

Property of the estate also includes any asset recovered by the Chapter 7 trustee pursuant to his avoidance powers. 11 U.S.C. Section 541(a)(4). If a Chapter 7 debtor makes a preferential or fraudulent transfer prior to the filing of his/her petition, and the trustee avoids that transfer, the asset or funds come back into the estate and are distributed by the trustee.

The debtor, therefore, has a duty to deliver to the trustee all non-exempt property of the estate. Section 521 also requires the debtor to file a Statement of Intention with respect to the retention or surrender of property securing debts. In this Statement of Intention, the debtor is to specify which property the debtor intends to redeem, which property the debtor intends to reaffirm, and which property the debtor intends to surrender. The Statement of Intention is to be served upon the secured creditors affected by the statement.

3. Equity Analysis and Realization of Equity

A Chapter 7 trustee will investigate the debtor's assets and attempt to determine which assets, in any, have equity that can be liquidated by the trustee. The trustee would then pay any funds recovered to the debtor's creditors to the extent possible. In deciding whether to administer an asset and in deciding whether to oppose a secured creditor's motion for relief from stay, a trustee will perform an equity analysis to determine if the asset can be liquidated for the benefit of creditors.

In the case of real estate, the trustee will analyze the following information:

1. Value of the real property: The starting point in this analysis is the value of the property. As evidence of the value of real property, the trustee will consult the debtor's schedules, which will contain an estimate as to the debtor's value of the real property. The trustee will also question the debtor at the Section 341 Meeting of Creditors with respect to the value. In some cases, the debtor may provide the trustee with an appraisal. Trustees may also consult county tax and real estate records or hire or consult a realtor or appraiser to get this information.

2. Encumbrances: The trustee will next determine the liens and mortgages against the real property. The starting point will again be the debtor's schedules, which should contain a list of all mortgages and liens against the property, together with the current payoff. The trustee may also consult real estate records or contact the secured creditors directly to obtain information regarding the existence of liens and their payoffs.

3. Costs of sale: The trustee will next attempt to estimate the costs to the bankruptcy estate of selling the real property. Such costs would include real estate commissions, real estate taxes, and other closing costs.

4. Tax Considerations: The bankruptcy estate is a taxable entity, so the trustee will need to determine the income tax consequences, if any, resulting from the sale of the debtor's real property. If the real estate at issue was the debtor's residence after the date of the filing of the petition, the trustee may utilize the exemption from the payment of tax upon the sale of a residence.

5. The Debtor's Claim of Exemption: The trustee will also consider what valid claims of exemption would be paid, if any, upon sale of the real property.

6. Trustee's Compensation: A Chapter 7 trustee receives compensation for the sale of assets. This compensation is a percentage of the value of the asset. The percentage is a sliding scale based upon the value of the property sold. In addition, if the sale of the real property requires the hiring of an attorney, the trustee would also consider any attorney fees that the estate would pay.

Chapter 11 Issues

Chapter 11 is primarily a reorganization chapter, although debtors may use Chapter 11 to conduct an orderly liquidation of assets. Traditionally, Chapter 11 debtors are corporations, LLC's or other entities, although individuals are eligible for Chapter 11 relief. Individuals or married couples who do not qualify for relief under Chapter 13, usually because of the Chapter 13 debt limitations, can file a Chapter 11 case. Chapter 11 cases are much more complicated, expensive and time consuming than Chapter 13 cases.

Chapter 11 Debtors will propose a plan of reorganization, which likely will be much more complex than a Chapter 13 plan. Debtors must also prepare and file a disclosure statement to accompany the plan. The requirements for confirmation of a Chapter 11 plan are extremely complex and are set forth in 11 U.S.C. Section 1129. The statute contains very detailed requirements for the treatment of secured and priority claims.

Chapter 13 Issues

1. Who May File Under Chapter 13? 11 U.S.C. § 109(e) dictates who may be a debtor under the Bankruptcy Code. An individual with regular income that owes on the date of the filing of the petition non-contingent, liquidated, unsecured debts of less than $419,275.00 and non-contingent, liquidated, secured debts of less than $1,257,850.00 may be a debtor under Chapter 13. These debt ceilings are increased every three years, with the next increase due in April 2022. An individual with regular income is defined in 11 U.S.C. § 101(3) as having income sufficiently regular to enable the individual to make payments under a Chapter 13 plan. The definition set forth in § 101 enables non-wage income such as Social Security and retirement benefits to satisfy the regular income requirement of the Code. *In re Murray*, 199 B.R. 165 (Bankr. N.D. Tenn. 1996).

The decision to file a Chapter 13 proceeding versus a Chapter 7 proceeding is based upon many factors. If a Debtor has secured debts and/or wants to retain assets which are collateral for the debts, a Chapter 13 offers an easier means for the retention of assets. In a Chapter 7 proceeding, the only way the debtor can retain assets that are subject to non-voidable liens is to either reaffirm the indebtedness as discussed previously or to redeem the property by way of a cash payment.

b. Bad Faith Filing and Serial Filers. In addition to the other requirements for filing a petition under Chapter 7, Chapter 11, or Chapter 13, there is an inherent requirement that a bankruptcy petition be filed in good faith and that the debtor proceed with the administration of its bankruptcy case in good faith. If a creditor believes that a debtor has not filed its petition in good faith, the creditor can seek the conversion or dismissal of the case. A few debtors, in an attempt to hold off a sheriff's sale, file several bad faith bankruptcy petitions in a row, a practice which the Bankruptcy Code seeks to prevent.

The issue of bad faith filings arises most commonly in Chapter 13 cases. In general, no one factor is determinative in the analysis as to whether a debtor has filed a bankruptcy in good faith. Clearly, a debtor who qualifies for relief under Chapter 13 and who can otherwise meet the requirements of Chapter 13, is not acting in bad faith by simply filing a petition on the eve of a foreclosure sale or other collection activity. Bankruptcy courts look to the totality of circumstances in determining a debtor's good faith in filing a Chapter 13 petition and plan. *In re Francis*, 273 B.R. 87 (6th Cir. BAP 2002). Attempts by a debtor to discharge debts under Chapter 13 which debts are not dischargeable under Chapter 7, are not conclusive evidence that a Chapter 13 plan has been proposed in good faith. Likewise, it is not conclusively bad faith for a debtor to seek to discharge debt incurred through criminal or tortious conduct through a Chapter 13 plan, but these factors may be considered. *In re Caldwell*, 895 F.2d 1123 (6th Cir. 1990). Courts generally consider the following factors in making a good faith/bad faith determination:

1. The amount of the proposed payments and the amount of the debtor's surplus;
2. The debtor's employment history, ability to earn, and likelihood of future increase in income;
3. The probable or expected duration of the plan;
4. The accuracy of the plan's statements of the debts, expenses, and percentage repayment of unsecured debt, and whether any inaccuracies are intended to mislead the court;
5. The extent of preferential treatment between classes of creditors;
6. The extent to which secured claims are modified;
7. The type of debt sought to be discharged and whether any such debt is non-dischargeable in Chapter 7;
8. The existence of special circumstances such as inordinate medical expenses;
9. The frequency with which the debtor has sought relief under the Bankruptcy Code;
10. The motivation and sincerity of the debtor in seeking Chapter 13 relief;
11. The burden which the plan's administration would place upon the trustee; and
12. Whether the debtor is attempting to abuse the spirit of the Bankruptcy Code. *In re Caldwell, supra,* citing *In re Okoreeh-Baah,* 836 F.2d 1030 (6th Cir. 1988); see also, *In re Francis, supra.*

The debtor has the burden of proof with respect to good faith. *Caldwell, supra.* The determination of good faith focuses mainly on the filing of the case and the actions that have occurred since the petition. The debtor's pre-petition bad acts will not necessarily mandate a finding of bad faith in the filing of the case. *Francis*, *supra.*

When a debtor files successive Chapter 13 cases in an attempt to prevent a foreclosure sale, the debtor's good faith and conduct are subject to additional scrutiny. Section 109(g) of the Bankruptcy Code (11 U.S.C. § 109(g)) states:

"Notwithstanding any other provision of this Section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title in any in the preceding 180 days if –

1. The case was dismissed by the court for willful failure of the debtor to abide by orders of the court or to appear before the court in proper prosecution of the case; or

2. The debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by § 362 of this title."

Under appropriate circumstances therefore, a creditor cannot only obtain the dismissal of a case but can also obtain a 180 day bar to re-filing. This bar to re-filing is a severe sanction, and courts will not impose it lightly. A creditor must show more than the debtor's inability to make payments into a prior Chapter 13 plan. *In re Jones*, 192 BR 289 (Bankr. M.D. Ga. 1996).

A party moving for dismissal and a bar to refiling under § 109(g) has the burden of introducing evidence to support it allegations. The denial of eligibility will not be lightly or routinely imposed upon the debtor without evidence that the debtor knowingly and intentionally disobeyed an order of the court or knowingly and intentionally failed to appear in prosecution of the case. *In re Pike*, 258 B.R. 876 (Bankr. S.D. Ohio 2001). A creditor must show more that successive Chapter 13 filings, as such successive filings are not expressly prohibited by the Bankruptcy Code. A creditor must show that the debtor has made successive filings while refusing to fulfill a debtor's duties under the Bankruptcy Code. *Pike, supra.*

To further discourage serial filings, BAPCPA limits the automatic stay to 30 days if the Debtor files a second case within a year of the dismissal of the first case, unless the Debtor obtains an order further extending the stay. If the Debtor files a third case within one year, there is no automatic stay unless the Debtor obtains an order imposing a stay.

The Automatic Stay

1. Generally

11 U.S.C. § 362(a) provides that upon the filing of an involuntary or voluntary bankruptcy petition under any chapter of the Bankruptcy Code, a stay instantly and automatically arises which is applicable to all entities attempting any of the following actions:

a. The commencement or continuation of a judicial, administrative, or other type of action or proceeding against the debtor that was or could have been commenced before the bankruptcy filing or an order to recover a claim against the debtor that arose before the bankruptcy filing;

b. The enforcement of a judgment obtained before the bankruptcy filing against the debtor or against the property of the estate;

c. Any act to obtain possession of property of the estate or if property from the estate or to exercise control over property of the estate;

d. Any act to create, perfect, or enforce any lien against the property of the estate;

e. Any act or create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the bankruptcy case;

f. Any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the bankruptcy case;

g. The setoff of any debt owing to the debtor that arose before the bankruptcy case against any claim against the debtor;

h. The commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

Therefore, pursuant to § 362, a party may not take any of the above actions once the bankruptcy petition has been filed without being in violation of the automatic stay. Any action related to the collection of a debt or the foreclosure of a mortgage must be stopped upon the filing of the bankruptcy case and not continued until the stay is lifted either by the provisions of the Code or by court order after the filing of a motion.

The automatic stay is, as its name suggests, automatic and it arises immediately upon the filing of a petition. While the sanctions that may be imposed upon a violating creditor vary with the notice such creditor has of the filing, no formal or informal notice is required to protect a debtor from a given creditor. The automatic stay continues as to property of estate until such property is no longer property of the estate. The stay of any other act imposed under § 362 continues until the earliest of the closing of the case, the dismissal of the case, or the time a discharge is granted or denied. 11 U.S.C. § 362(c). If a discharge is granted, a debtor no longer needs the protection of the stay as the discharge injunction imposed by § 524(a) protects the debtor from personal liability on any discharged debt.

Under Chapters 7 and 11, the automatic stay applies only to the debtor. In a Chapter 13 case, 11 U.S.C. § 1301 also provides a co-debtor stay applicable to any individual that is liable on a consumer debt with the debtor unless the co-debtor became liable on such debt in the ordinary course of such individual's business. Chapter 12 contains an analogous provision in Section 1201. The co-debtor stay protects co-debtors on consumer debts and third party who own assets which are in the debtor's possession.

Although creditors are automatically stayed from foreclosing upon their collateral, any entity having an interest in property of the estate is entitled to adequate protection of its interests while it is stayed from realizing or foreclosing upon such property. 11 U.S.C. § 361 and 363. Adequate protection is intended to protect the secured creditor from depreciation of its interest in property of the estate resulting from the automatic stay, the debtor-in-possession's use, sale, or lease of property pursuant to 11 U.S.C. § 363, or the grant of any third party of a lien against the property under 11 U.S.C. § 364. Means of providing adequate protection include, but are not limited to, periodic cash payments pursuant to 11 U.S.C. § 361(1), additional or replacement security pursuant to 11 U.S.C. § 361(2), and granting the secured creditors such other relief as will result in the realization by the secured creditor of the equivalent of the secured creditor's interest in the security. A creditor may file a motion for adequate protection.

2. The Automatic Stay and Multiple Bankruptcy Filings

The Bankruptcy Code contains several provisions limiting the scope or duration of the automatic stay, especially in cases where a debtor has filed previous bankruptcy cases:

- If a case is filed by a debtor under Chapter 7, 11 or 13, and if another case of the debtor was pending within the preceding one year period, but was dismissed, the automatic stay, as it applies to any action taken with respect to a debt or property securing such debt, will terminate with respect to the debtor on the thirtieth (30^{th}) day following the filing of the second bankruptcy case. A party-in-interest, presumably the debtor, can file a motion seeking an extension of the stay, but only if the debtor demonstrates that the filing of the later case is in good faith as to the creditors to be stayed. (11 U.S.C. §362(c)(3)).

- If a debtor files a bankruptcy case under any chapter and if two (2) or more cases of the debtor were pending within the previous year, but were dismissed, no automatic stay shall go into effect upon the filing of the later case. On request of a party-in-interest, the court shall promptly enter an order confirming that no stay is in effect. Within thirty (30) days after the filing of the later case, the debtor can request an order imposing the automatic stay, but only if the debtor demonstrates that the filing of a later case is in good faith. (11 U.S.C. §(c)(4)).
- A bankruptcy court may grant *in rem* relief from the automatic stay as to a piece of real property, which would preclude the application of the automatic stay in any subsequent bankruptcy case. In order to impose this *in rem* relief, the bankruptcy court must find that the filing of the petition was part of a scheme to delay, hinder, and defraud creditors, which scheme involves either the transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval, or that involves multiple bankruptcy filings affecting the real property. The order of the bankruptcy court must be filed in the county recorder's office and the order would be binding in any subsequent bankruptcy case filed not later than two (2) years after the date of the entry of the order by the bankruptcy court. A debtor may move for relief from this order in a subsequent bankruptcy case only upon a showing of good cause or changed circumstances. (11 U.S.C. §362(d)(4)).
- The automatic stay will not apply in any action to enforce a lien against real property if the petition is filed by an ineligible debtor. A debtor could be ineligible by virtue of a prior dismissal imposing a bar to refiling under 11 U.S.C. Section 109(g), or where the filing was made in violation of a court order that prohibited the filing. (11 U.S.C. §362(b)(21)).
- If a debtor fails to file a statement of intent within thirty days after filing the petition or if the debtor fails to take action to implement the statement of intent within thirty days after the meeting of creditors, the automatic stay is lifted as to purchase money security interests in personal property, including motor vehicles. The creditor does not need to

file anything with the Court to accomplish this stay lift. A Chapter 7 Trustee often will seek to have the stay extended if he or she intends to administer such personal property. (11 U.S.C. §362(h) 11 U.S.C. 521(a)(6) and (a)(7)).

3. Obtaining Relief from Stay

A secured creditor may request that the court grant relief from the stay by terminating, annulling, modifying, or conditioning the stay under § 362(d). Creditors generally move for relief from the stay to repossess collateral, continue with foreclosure proceeding, or commence a state court proceeding to enforce their rights. The most common motions for relief ask for relief from the stay on secured loans such as car loans and mortgages. Commonly, motions for relief from stay ask for relief by lenders who want to foreclose on real estate so that property may be sold at a foreclosure sale and the proceeds applied to the outstanding loan balance. Even if a debtor intends to surrender collateral, the creditor must obtain an order for relief from stay in order to proceed.

Generally the court will grant relief from stay "for cause," which includes lack of adequate protection of an interest in property of the requesting party. 11 U.S.C. § 362(d)(1). Typically, "for cause" relief is requested by secured creditors. Cause for granting relief from stay may include:

- Collateral that is depreciating in value during the pendency of the stay, where the debtor cannot provide adequate protection for the decline in the value of the property;
- Failure to pay post-petition mortgage payments in a Chapter 13 plan either outside or inside the plan;
- Lapse of insurance on the collateral;
- Collateral is worth less than what is owed to the creditor.
- The debtor has no equity in the property and the property is not necessary to an effective reorganization.
- The debtor intends to surrender the collateral.

Grounds for relief from stay pursuant to 11 U.S.C. § 362(d) must be stated with particularity in the motion. Exhibits that may be necessary for a motion for relief from stay include the contract, proof of the security interest of the lender, and the proof of claim filed by the lender.

A request for relief from stay is made by motion pursuant to Federal Rule of Bankruptcy Procedure 4001(a). In addition, Local Bankruptcy Rule 4001-1 for the Southern District of Ohio provides further procedures for seeking relief from stay. Local Bankruptcy Rule 4001-1 requires that the motion for relief from stay be served upon the debtor, debtor's counsel, the trustee, all holders of liens or encumbrances that the movant is aware of or who are scheduled by the debtor on the property for which the relief is sought, all members of any committee appointed in the case and counsel for the committee, and the U.S. Trustee. This rule also mandates the use of Local Form 4001-1(a) in certain instances when the claim is secured by real estate.

Except as is discussed below, the stay with respect to any act against property of the estate is terminated within thirty (30) days after request for such relief unless the Court orders the stay to be continued and in effect pending the conclusion of a preliminary hearing. 11 U.S.C. § 362(e)(1). A final hearing on a motion for relief from stay shall be concluded no later than 30 days following the conclusion of a preliminary hearing unless the period is extended by consent or upon the finding of compelling circumstances. 11 U.S.C. § 362(e)(1). In the case of an individual filing under Chapter 7, 11, or 13, the stay terminates 60 days after the filing of a motion, unless the parties agree or the Court orders otherwise before the expiration of this 60 day period. Section 362(e)(2).

The party requesting the relief from stay has the burden of proof on the issue of the debtor's equity in the property and the party opposing the relief from stay has the burden of proof on all other issues. 11 U.S.C. § 362(g).

Creditors should also note that Rule 4001(a)(3) provides that an order granting relief from stay is itself stayed for a period of 14 days after entry of the order, unless the court orders otherwise. For this reason, a creditor obtaining relief from stay must wait for the expiration of this 14 day period before commencing or reinstating any collection or foreclosure activities or litigation.

Counsel for a creditor should also keep in mind the distinction between abandonment and relief from stay because relief from stay alone may not provide the creditor with all the relief it needs under the circumstances.

Abandonment is the Chapter 7 trustee's declaration that he or she has no further interest in property. Once abandoned, property is no longer part of the bankruptcy estate. Abandonment of property of the estate is governed by 11 U.S.C. § 554, Bankruptcy Rule 6007, and Local Bankruptcy Rule 6007-1. Abandonment is appropriate when the value of the property is less than the amount of the valid liens against the property. In a Chapter 7 case, the trustee can unilaterally abandon property unless a party-in-interest requests notice. Local Bankruptcy Rule 6007-1(b) provides that the § 341 meeting notice shall inform creditors and other parties-in-interest that the trustee may abandon property listed on the debtor's schedules upon the request of any party-in-interest or upon the trustee's determination that there is no equity in the property for the benefit of the unsecured creditors and that the property is burdensome to the estate. The trustee is not required to provide any further notice to creditors unless a party-in-interest requests further notice prior to the conclusion of the § 341 meeting. The trustee cannot abandon property prior to the meeting of creditors without notice to creditors.

If the trustee is unwilling to abandon the property, a creditor may seek relief through a motion to compel abandonment. In general, a creditor should obtain abandonment of its collateral as well as relief from stay. In a foreclosure context, relief from stay merely grants the lender permission to initiate or proceed with a foreclosure action. The real estate, however, unless abandoned, remains subject to the trustee's administration and cannot be sold until abandoned. Until the property is abandoned, the creditor must provide the trustee with notice of any subsequent state court proceeding involving the collateral.

4. Determine if an Action Is or Is Not a Violation of the Stay

Determining whether an action constitutes a violation of the automatic stay requires a consideration of Section 362(a), which broadly defines actions covered by the stay, with Section 362(b), which carves out exceptions to the stay. Among other things, criminal actions, actions to establish paternity, actions to establish or modify domestic support obligations or child custody and visitation, and actions to collect domestic support obligations (from property that is not property of the estate) are not stayed.

5. How the Stay Affects a Statute of Limitations

Nothing in Section 362 affects a state-law statute of limitations. Statutes of limitation are addressed in Section 108. Section 108(a) provides that if a debtor has a state-law deadline for bringing a cause of action and that deadline has not expired pre-petition, the trustee may commence such action before the later of the expiration of the deadline or two years after the order for relief.

If a party possesses a cause of action against a debtor and that cause of action has not been asserted at the time of the debtor's bankruptcy filing, the statute of limitations is the later of the state-law statute of limitations or thirty days after the termination or expiration of the stay. This could include the date that on order granting relief from stay is entered, the date a discharge is granted, or the date of the closing of the case. Section 108 does not, of course, affect a debtor's discharge. Section 108 may extend the statute of limitation for a claim against the debtor but, if that claim has been discharged, the litigation may not be commenced.

7. <u>Violation of the Automatic Stay</u>

Violations of the automatic stay are punishable as contempt of court and most courts will impose sanctions for the knowing and willful violation of the automatic stay. Courts generally view the stay as the equivalent of a court order. *Jove Engineering, Inc. v. IRS*, 92 F.3d 778 (11th Cir 1996); *Hubbard v. Fleet Mortgage Co*., 810 F2d 778 (8th Cir. 1987). Inadvertent violations of the stay are not punished by contempt action generally, but a creditor should "undo" any actions taken in violation of the automatic stay to the extent possible.

An <u>individual</u> injured by a <u>willful</u> violation of the stay <u>shall</u> recover actual damages, including costs and attorney fees, and, in appropriate circumstances, <u>may</u> recover punitive damages. (362(k)(1)). If the stay violation is based upon a good faith belief that the debtor is subject to Section 362(h)(involving a secured interest in personal property), the damages are limited to actual damages.

In most jurisdictions, actions taken in violation of the automatic stay are void. In the Sixth Circuit, however, actions taken in violation of the stay are voidable "and shall be voided absent limited equitable circumstances," such as where a debtor intentionally withholds notice of the stay. *In re Easley*, 990 F.2d 905 (6th Cir. 1993). A creditor can be held in contempt of the automatic stay provisions if it has knowledge of the bankruptcy filing and proceeds anyway. *In re Flack*, 239 B.R. 155 (Bankr. S.D. Ohio 1999).

Filing Proofs of Claim

In order to participate in distributions in most bankruptcy cases, a creditor must file a proof of claim by the proof of claim bar date established in each case. As with anything filed in any Court, the proof of claim should be accurate and valid. Filing of an inaccurate claim could result in an objection to that claim. A false or fraudulent proof of claim can subject the claimant to a possible fine or imprisonment. See, 18 U.S.C. Section 152,157, and 3571.

A. Filing of Claims

In most cases, a creditor that wishes to participate in a bankruptcy case must file a proof of claim. The preparation and filing of claims is governed by 11 U.S.C. Section 502 and Rules 3001-3008 of the Federal Rules of Bankruptcy Procedure. Section 502(a) states that a proof of claim that has been filed is deemed allowed unless a party in interest objects to the claim.

Rule 3001, Federal Rules of Bankruptcy Procedure, addresses the contents of a proof of claim and requires that it be in writing and in conformance with the appropriate official form. Proof of claim forms are available from the websites of most bankruptcy courts. If the claim is based upon a writing, that writing must be attached to the proof of claim. Rule 3001(c). Such written documents generally include promissory notes, security agreements, UCC financing statements, mortgages, contracts, correspondence, statements of account, etc. In collection cases, a creditor would attach any contract giving rise to the debt as well as a current statement of account which matches the amount set forth on the proof of claim. If a creditor has obtained a judgment, a copy of the judgment should be filed with the proof of claim.

Pursuant to Rule 3001(f), a creditor's proof of claim, filed in accordance with the rules, constitutes prima facie evidence of the validity and amount of the claim. The party objecting to the claim has the burden of going forward and introducing evidence sufficient to rebut the presumption of validity. Such evidence must be sufficient to demonstrate a true dispute and must have probative force equal to the contents of the claim. Collier on Bankruptcy, Section 3001.09[2], *citing In re Wells*, 51 B.R. 563 (D. Colo. 1985); *Matter of Unimet Corp*., 74 B.R. 156 (Bankr. N.D. Ohio 1987). That burden is not satisfied by the mere filing of an objection. *In re Lanza*, 51 B.R. 125, 127 (Bankr. D.N.J. 1985).

The filing and timing of filing of claims is addressed in Rules 3002 and 3003. Rule 3002(c) states that for Chapter 7, 12, and 13 cases, the proof of claim must be filed within 90 days after the conclusion of the meeting of creditors. The bankruptcy notice issued by the clerk of courts at the beginning of a case will usually list the claims bar date. Since most Chapter 7 cases are no-asset cases that result in no distributions to creditors, the notice in a Chapter 7 case generally states that no bar date is being set. In the event the Chapter 7 Trustee liquidates assets, the court will then set a bar date at that time.

If a creditor has an unsecured claim arise out of a judgment taken in bankruptcy court against it, the proof of claim asserting that claim may be filed within 30 days after the judgment becomes final, even if the claims bar date set by the court has passed. Rule 3002(c)(3). This situation arises where a creditor does not file a proof of claim because it had been paid in full pre-petition, but the trustee later sues the creditors for the recovery of payments as preferences. In other cases, a creditor might not file a proof of claim because it has a security interest or mortgage. If the bankruptcy trustee avoids the lien or mortgage, causing the creditor to now have an unsecured claim, the creditor may file an unsecured claim.

Rule 3003 governs the filing of claims in Chapter 11 cases. Chapter 11 is unique in that if a debtor lists a creditor with a claim in its schedules and does not indicate that the claim is contingent, disputed or unliquidated, the creditor needs to file a proof of claim only if it disagrees with the amount scheduled by the debtor. A creditor must file a proof of claim in Chapters 7 and 13 cases, regardless of how their debt is scheduled. In a Chapter 11 case, the Court will set a claims bar date.

Rule 3002.1 also requires a Chapter 13 Trustee to file, within thirty (30) days after making the final payment of any cure amount on a claim secured by the debtor's principal residence, a notice stating that the cure amount has been paid in full. If the debtor believes that the cure amount has been paid in full and the Trustee does not issue the notice, the debtor may file and serve the notice. The notice must be served upon the creditor, debtor, and debtor's counsel. Within 21 days after service of this notice, the creditor must file a statement indicating whether it agrees that the debtor has paid the cure amount and whether the debtor is otherwise current on all payments. If the creditor believes that the debtor is not current or that the cure amount has not been paid in full, it must include an itemized statement setting forth the amounts the creditor contends have not been paid. This notice must be filed as a supplement to the creditor's proof of claim and this notice is not entitled to the prima facie presumption of validity established in Rule 3001(f). The debtor or Trustee then have 21 days to file a motion seeking a determination of any unpaid amounts.

If a creditor fails to comply with any of the requirements of Rule 3002.1, the creditor shall be precluded from presenting the omitted information, in any form, as evidence in any hearing or submission in any contested matter or adversary proceeding in the bankruptcy case, unless the court determines that the failure was substantially justified or is harmless. The court may also, after notice and hearing, award other appropriate relief, including reasonable expenses and attorney fees caused by the failure.

Real Estate Lien Issues

Mortgage foreclosures can be stopped by the filing of a bankruptcy proceeding any time prior to the date when the real property is actually sold at a sheriff's sale. A Chapter 7 filing will delay the sale and it will force the lender to obtain stay relief and abandonment. A Chapter 7 filing, however, does not allow for the reinstatement of the loan.

In a Chapter 13 case, however, the note can be decelerated and the Chapter 13 plan can provide for the curing of arrearages as part of a Chapter 13 plan with current monthly payments resuming either outside the plan or as a conduit through the Chapter 13 trustee. Therefore, when the case is over the mortgage should be current and the debtor will have averted the loss of the real property through the sheriff's sale proceeding.

Section 1322(c)(1) of the Bankruptcy Code prohibits a Debtor from curing a default with respect to a lien on the Debtor's principal residence after "such residence is sold at a foreclosure sale that is conducted in accordance with applicable non-bankruptcy law." Section 1322(c)(1) essentially codified the state of the law in the Sixth Circuit. In *In re Glenn*, 760 F.2d 1428 (6th Cir. 1985), the Court held that the cutoff date of the statutory right to cure defaults on real estate mortgages is the sale of the real property. See also, *In re Burgess*, 84 B.R. 104 (Bankr. N.D. Ohio 1988) (Date of the sheriff's sale of mortgaged premises was the cutoff date of a Chapter 13 Debtor's statutory right to cure a default. Purchaser at a foreclosure sale held one day prior to the filing of Debtor's Chapter 13 Petition was entitled to relief from the automatic stay in order to complete sale.)

Section 1322(c)(1) is clear that, once a sheriff's sale is held, the Debtor cannot use Chapter 13 to cure that default. Section 1322(c)(1) is not ambiguous and clearly provides that the cutoff point for a Debtor's ability to cure a default is when the gavel comes down on the last bid at the foreclosure sale. *In re Crawford*, 232 B.R. 92 (Bankr. N.D. Ohio 1999). A debtor's right to cure ends when the sheriff accepts a bid at the foreclosure sale, so long as the sale has been properly conducted under state law. *Crawford*, *supra.*, p. 96.

While a bankruptcy discharge relieves a debtor of personal liability upon all debts that have been discharged. 11 U.S.C. § 524(a)(1), a bankruptcy discharge does not, however, affect or avoid mortgages and liens that existed pre-petition. Johnson v. Home State Bank, 501 U.S. 78 (1991). Unless a lien or mortgage has been avoided or set aside as a part of the bankruptcy administration, the lien or mortgage will survive and remain effective. This means that a secured creditor can still file a foreclosure upon a mortgage, despite the debtor's discharge. The secured creditor cannot, however, seek to collect any deficiency from the debtors individually.

The Bankruptcy Code does empower bankruptcy trustees to avoid certain statutory liens. Section 545 of the Bankruptcy Code (11 U.S.C. Section 545) provides:

The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien—
(1) first becomes effective against the debtor—
(A) when a case under this title concerning the debtor is commenced;
(B) when an insolvency proceeding other than under this title concerning the debtor is commenced;
(C) when a custodian is appointed or authorized to take or takes possession;
(D) when the debtor becomes insolvent;
(E) when the debtor's financial condition fails to meet a specified standard; or
(F) at the time of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien;
(2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists, except in any case in which a purchaser is a purchaser described in section 6323 of the Internal Revenue Code of 1986, or in any other similar provision of State or local law;
(3) is for rent; or

(4) is a lien of distress for rent.

This provision is not applicable to real estate tax liens and such liens should survive a bankruptcy intact and remain effective during and after the bankruptcy. Subject to Bankruptcy Court approval, for example, a bankruptcy trustee may sell real estate which is owned by the debtor. The trustee is bound by any valid mortgage and must pay that mortgage at closing. The Trustee must also pay any real estate that are due at the time of the sale, the same as a seller outside of bankruptcy.

Discharge of Debt and Dischargeablity

1. Introduction. Debtors filing for bankruptcy protection, whether under Chapter 7 or Chapter 13, generally do so to take advantage of the automatic stay and to obtain a discharge of personal liability on their debts. The scope of the Chapter 7 discharge is governed by 11 U.S.C. §727 and is a narrower discharge than the Chapter 13 discharge afforded by 11 U.S.C. §1328. In addition, 11 U.S.C. §523 excepts certain debts from a discharge. A creditor or a bankruptcy trustee wanting to deny a debtor's discharge or to except certain debts from discharge must generally take action, in the form of filing an adversary proceeding in the bankruptcy case, to make this happen.

2. Chapter 7 Discharge. Section 524(a) (11 U.S.C. §524(a)) governs the effect of a discharge. A Chapter 7 discharge voids any judgment at any time obtained to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under §727. The discharge further operates as an injunction against the commencement or continuation of an action to collect, recover, or offset any such debt as a personal liability of the debtor. Finally, the discharge operates as an injunction against the commencement or continuation of action to collect or recover from property of the debtor that is acquired after the commencement of the case.

A discharge relieves a debtor of personal liability upon all debts that have been discharged. 11 U.S.C. § 524(a)(1). The Chapter 7 discharge does not, however, affect or avoid mortgages and liens that existed pre-petition. *Johnson v. Home State Bank*, 501 U.S. 78 (1991). Unless a lien or mortgage has been avoided or set aside as a part of the Chapter 7 administration, the lien or mortgage will survive and remain effective. This means that a secured creditor can still file a foreclosure upon a mortgage, despite the debtor's discharge. The secured creditor cannot, however, seek to collect any deficiency from the debtors individually.

While a creditor cannot seek to collect a discharged debt from the debtor personally, a creditor is allowed to raise a discharged debt as a setoff in any subsequent litigation brought by the debtor. 11 U.S.C. § 524(a)(2).

3. Denial or Revocation of Discharge. Debtors may act or fail to act prior to or during a Chapter 7 case in such a manner that warrants a complete denial or revocation of their discharge. A complaint objecting to discharge must be filed within 60 days after the meeting of creditors. Rule 4004. Grounds for denial and revocation of discharge are set forth in §727 of the Bankruptcy Code 11 U.S.C. §727. Briefly, grounds for denial of discharge are as follows:

a. The debtor is not an individual. Corporations, partnerships, and other legal entities do not receive Chapter 7 discharges. 11 U.S.C. §727(a)(1).

b. The debtor has, with intent to hinder, delay, or defraud a creditor or the trustee, transferred, removed, or destroyed property of the debtor within one (1) year before the date of the filing of the petition or property of the estate after the filing of the petition. 11 U.S.C. § 727(a)(2). The Sixth Circuit Court of Appeals has held that a discharge may be denied even where the debtor fraudulently transfers property more than one (1) year prior to the filing of his petition under the doctrine of "continuing concealment". Continuing concealment involves a debtor's transfer of legal title to the property where the debtor remains in possession of the property. *In re Keeney*, 227 F.3d 679 (6th Cir. 2000).

c. The debtor has concealed, destroyed, falsified, or failed to keep or preserve books any records from which the debtor's financial condition or business transactions might be ascertained. 11 U.S.C. § 727(a)(3).

d. The debtor knowingly and fraudulently made a false oath or account, presented a false claim, gave or received money or property for acting or forbearing to act, or withheld from the trustee any books or records or other financial information. 11 U.S.C. § 727(a)(4).

e. The debtor has failed to explain satisfactorily any loss of assets or deficiency of assets to meet the debtor's liabilities. 11 U.S.C. § 727(a)(5).

f. The debtor has refused, in the Chapter 7 bankruptcy case, to obey any lawful order of the court. 11 U.S.C. § 727(a)(6).

g. The debtor has been granted a Chapter 7 discharge within eight years before the date of the filing of the petition. 11 U.S.C. § 727(a)(8).

h. The debtor received a Chapter 12 or 13 discharge within the past six years unless the debtor paid either 100% of the allowed unsecured claims or 70% of the allowed unsecured claims in a case where the debtor proposed a plan in good faith. 727(a)(9).

i. The debtor failed to complete a post-petition financial management course. 727(a)(11).

Section 727(d) governs the circumstances under which a debtor's discharge can be revoked once it has been entered. If the debtor's discharge was obtained through the fraud of the debtor, if the debtor failed to obey a court order, or if the debtor acquired property of the estate and knowingly and fraudulently failed to report the acquisition or entitlement to such property or to deliver such property to the trustee, the debtor's discharge may be revoked. The discharge may also be revoked if the debtor failed to obey any lawful order of the court.

4. Nondischargeability of Debts. Section 727 addresses circumstances under which the debtor's discharge can be denied or revoked in its entirety. If a trustee or creditor is successful in prosecuting a § 727 action, none of the debtor's debts are discharged. Section 523 of the Bankruptcy Code provides a mechanism by which creditors can object to the discharge of their particular debts, while still allowing the debtor's other debts to be discharged. Nondischargeability actions under § 523 are brought by creditors. A complaint to determine the dischargeability of a debt under § 523 must be filed by no later than sixty (60) days after the first date set for the meeting of creditors under § 341. Rule 4007 of the Federal Rules of Bankruptcy Procedure.

Debts excluded from discharge include:

a. Certain income taxes and property taxes for which a return was not filed or for which a return was filed after the date upon which the return was due and within two (2) years of the filing of the petition, and for taxes with respect to which the debtor made a fraudulent return or willfully attempted to evade or defeat such tax. 11 U.S.C. § 523(a)(1).

b. A debt for money, property, services or refinancing of credit to the extent obtained by false pretenses, a false representation, or actual fraud of any statements reflecting the debtor's or an insider's financial condition. 11 U.S.C. § 523(a)(2).

c. Debts resulting from the use of a statement in writing that is materially false with respect to the debtor's or an insider's financial condition. 11 U.S.C. § 523(a)(2).

d. Debts neither listed nor scheduled. 11 U.S.C. § 523(a)(3).

e. Debts for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. 11 U.S.C. § 523(a)(4).

f. Debts for a domestic support obligation. 11 U.S.C. § 523(a)(5).

g. Debts resulting from the willful and malicious injury by the debtor to another entity or to the property of another entity. 11 U.S.C. § 523(a)(6). To find a debt nondischargeable under this provision, the court must find both a willful and malicious action and a deliberate or intentional injury, not merely a deliberate or intentional act that causes an injury. *Kawaauhau v. Geiger*, 523 U.S. 57 (1998). *See also, In re Markowitz*, 190 F.3d. 455 (6th Cir. 1999).

h. For a student loan that is issued or guaranteed by a governmental unit or that is a qualified educational loan under the Internal Revenue Code, unless excepting such debt from discharge would impose an undue hardship on the debtor and the debtor's dependents. 11 U.S.C. § 523(a)(8). To prevail in an action to have a student loan found to be nondischargeable, a debtor must prove that he cannot maintain, based upon current income and expenses, a minimal standard of living for himself and his dependents if forced to repay the loan, that additional circumstances exist indicating that the debtor's current financial state is likely to persist for a significant portion of the repayment period, and that the debtor has made a good faith effort to repay the loan. *In re Cheesman*, 25 F.3d. 356 (6th Cir. 1994).

i. Debts arising out of the death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or other substance. 11 U.S.C. § 523(a)(9).

Certain debts identified in § 523 are presumed to be dischargeable unless a creditor files a complaint asking that the debt be found to be nondischargeable. Other debts are presumed to be nondischargeable and will be discharged only if the debtor files an adversary proceeding seeking a holding that the debt is discharged. See, 11 U.S.C. § 523(c)(1). Debts for fraud under subsections (a)(2) and (4), as well as alimony, child support, and related domestic obligations in subsections (a)(5) and (15) will be discharged unless a creditor files a complaint prior to the deadline. Other obligations, such as student loans, will not be discharged unless the debtor files a complaint prior to the deadline asking that the debt be discharged.

One of the most common bases for asserting the nondischargeability of a debt is the fraud or false pretenses provisions of § 523(a)(2). This section states that a discharge is not effective with respect to any debt:

"(1) 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:
(B) Use of a statement in writing –
(i) that is materially false;
(ii) Respecting the debtor's or an insider's financial condition;
(iii) On which the creditor to whom the debtor is liable for such money, property, services or credit reasonably relied; and
(iv) That the debtor caused to be made or published with intent to deceive."

For a debt to be excepted from discharge under § 523(a)(2)(A), the debtor must obtain money, property or services by false pretenses or representations or by means of actual fraud. *In re Cunningham*, 163 BR 657 (Bankr. Mass. 1994). In order to meet its burden of proof, the creditor must establish that the false representations were knowingly and fraudulently made. *In re McAllen*, 3 F.3d 958 (6th Cir. 1993). The creditor must also establish that it relied upon the representation. The United States Supreme Court has held that the creditor's reliance on the false representations must be justifiable under the circumstances. A court will focus on whether the falsity of the representation was or should have been readily apparent to the creditor. The Supreme Court rejected a lesser standard of "reasonable" reliance, which would have required courts to determine whether the reliance of the creditor would have been reasonable to the hypothetical average person. *Field v. Mans*, 116 S. Ct. 437 (1995).

The Supreme Court has held that "actual fraud" under Section 523(a)(2)(A) does not require a false representation and can include a fraudulent transfer. *Husky Int'l Electronics, Inc. v. Ritz*, 136 S.Ct.1581 (2016).

To prevail under § 523(a)(2)(B), the use of a materially false financial statement, a creditor must prove that the debt at issue was obtained by use of a statement in writing that is materially false, respecting the debtor's or an insider's financial condition, that the creditor reasonably relied upon that statement, and that the debtor made the statement with the intent to deceive. *In re Cohn*, 54 F.3d 1108 (3rd Cir. 1995).

5. Chapter 13 Discharge. Chapter 13 discharges are governed by § 1328 of the Bankruptcy Code (11 U.S.C. § 1328). Chapter 13 offers two types of discharges, the full-compliance

discharge and the hardship discharge. Section 1328(a) states that as soon as practicable after completion by the debtor of all payments provided for under the plan, a court shall grant a debtor a discharge of all debts provided for the by plan except any debt of the kind specified in §507(a)(8)(C) and § 523(a)(5), (a)(8), or (a)(9), or any debt for restitution or criminal fine. The debts referenced in §507 are priority taxes and those in § 523 are related to alimony and child support, student loans, and injuries and damages caused by the debtor's operation of a motor vehicle while intoxicated.

To be discharged under Chapter 13, the debt must be "provided for" by the plan. The Bankruptcy Code does not specifically define what is meant by "provided for". Courts have rejected the argument that if a plan does not propose to make a payment on a debt, the plan does not provide for that debt. These courts have held that to "provide for" a claim, a plan need only make a provision for it, that is deal with it or refer to it. *In re Gregory*, 705 F.2d 1118 (9th Cir. 1983); *In re Hydorn*, 94 B.R. 608 (Bankr. W. D. Mo. 1988). *See also, Rake v. Wade*, 508 U.S. 464 (1993). As long as the claimants have proper notice of the bankruptcy case and an opportunity to object to confirmation, their claims are discharged under § 1328(a). *Rake v. Wade, supra*.

A full compliance Chapter 13 discharge does not discharge certain long-term debts provided for under § 1322(b)(5) of the Bankruptcy Code. This section permits the debtor to make special arrangements for curing a default and maintaining payments under the plan on a secured or unsecured claim on which the last contract payment becomes due after the final payment required under the plan. Courts have held that it would be inequitable to provide for the payment of a long-term debt extending beyond the term of the plan, and still discharge that debt upon completions of payments under the plan. *In re Chappell*, 984 F.2d 775 (7th Cir. 1993).

Section 1328(b) offers a hardship discharge to debtors who are unable to complete payments under their plan. This section states that a court may grant a discharge to a debtor that has not completed payments under the plan but only if the debtor's failure to complete such payment is due to circumstances for which the debtor should not be held accountable, where the value, as of the effective date of the plan, of property actually distributed under the plan to unsecured creditors is not less than the amount that those creditors would receive under a Chapter 7 liquidation, and where modification of the plan is not practicable.

The death of a debtor has been held to justify a hardship discharge. *In re Graham*, 63 B.R. 95 (Bankr. E.D. Pa 1986). Less catastrophic circumstances also support the granting of a hardship discharge, including the loss of income due to the involuntary termination of employment. *In re Edwards*, 207 B.R. 728 (Bankr. N.D.Fla 1997). Other courts, however, impose a higher standard, holding that economic hardship short of catastrophe, resulting from the husband's loss of work due to two injuries and the wife's decision to stay home with children is insufficient for a hardship discharge. *In re Cummins*, 266 B.R. 852 (Bankr. N.D. Iowa 2001). *See also, In re Bandilli*, 231 B.R. 836 (First Cir. BAP 1999) (hardship discharge not justified despite assertion of debtor that she had suffered from a serious medical condition that deteriorated shortly after confirmation where debtor suffered from that condition for 34 years).

The hardship discharge, if granted, relieves the debtor of liability for all unsecured debts provided for by the plan, except for debts enumerated in 11 U.S.C. § 523(a) and long-term debts that are to be cured under § 1322(b)(5). Secured debts, whether or not provided for by the debtor's plan, are not discharged unless the allowed secured claim has been paid in full.

The debtors Chapter 13 discharge may be revoked upon the request of a creditor within one year after the granting of the discharge if the discharge was obtained by the debtor through fraud and if the requesting creditor did not know of such fraud until after the discharge was granted.

5. Violations of Discharge Injunction

As discussed above, the discharge prohibits any action on the part of a creditor to collect a discharged debt as a personal liability of the debtor. The sanctions for violation of the discharge injunction are not set forth by statute, but rather are found in the court's equitable powers of 11 U.S.C. §105(a). *In re Hamilton Allied Corp*., 87 B.R. 43 (Bankr. S.D. Ohio 1988). There is no private right of action for violating a discharge, but rather the debtor's remedy is to move the court to hold the creditor in contempt of court. *Pertuso v. Ford Motor Credit Co*., 233 F.3d 417 (6th Cir. 2000). When a creditor violates the discharge, the debtor is entitled to actual damages if an injury can be proven. *In re Perrin*, 361 B.R. 853 (6th Cir. B.A.P. 2007).

Attorney's fees are almost always appropriate to the extent they are needed to resolve a violation. See, e.g., *In re Braun*, 152 B.R. 466, 474 (N.D. Ohio 1993). Given the similarity between violating the automatic stay and violating the discharge order, the courts have given similar remedies to the violation of either statute.

Although attorney's fees are available to a debtor for the creditor's violation of the discharge injunction, they are only appropriate to the extent that the matter could have been resolved in a non-litigious manner. The Court in *In re Roush*, 88 B.R. 163 (Bankr.S.D. Ohio 1988), sets forth the proper procedure for resolving a discharge violation without the court's assistance. First, the debtors must first request their attorney to communicate directly with the creditor before filing a motion to hold creditor in contempt. Then, if this communication is successful, the debtor may move for "attorney's fees sufficient to compensate [debtor] for the time required for the communication and for preparation of the application an order allowing the fee award." In *Roush*, the Court stated that this should take no more 1 to 1½ hours. If the communication is unsuccessful, then the debtor has to document its efforts to achieve compliance, request a hearing to hold the creditor in contempt, and if successful will be awarded actual damages, attorney's fees for all time spent on resolving the violation, and damages for emotional distress if warranted.

In order for the Debtor to recover punitive damages, the debtor must have committed "willful violation" of the discharge order. *In re Lafferty*, 229 B.R. 707, 713 (Bankr. N.D. Ohio 1998). The courts have interpreted "willful" to mean that the creditor knew or was on notice of the stay or discharge, not that the creditor intended to violate the stay or injunction, or had malice is doing so. Id. at 713. The prevailing standard in the Southern District of Ohio is that ""'[w]illful" behavior also occurs if a party has knowledge or notice of sufficient facts "to cause a reasonably prudent person to make an additional inquiry to determine whether a bankruptcy petition has been filed" and fails to do so. Id., quoting In re Roush, 88 B.R. 163, 164.

However, Courts are not immune to arguments that although the violation may technically have been "willful" under the Roush standard, some showing of bad faith or an egregious violation may be required. In *In re Price*, 179 B.R. 70 (Bankr.S.D. Ohio 1995), debtor's counsel brought a motion for contempt against a creditor for sending a $62.00 collection notice on a discharged debt. The Court held that, given the creditor's mechanisms to cease collection efforts, the creditor simply erred in sending out the bill. Therefore, the Court declined to award punitive damages because creditor's actions were not in bad faith, creditor was not recalcitrant, and this was not an egregious violation.

Nothing in Section 524 prohibits a debtor from voluntarily paying a debt that has been discharged. Creditors must be aware, however, that Court interpret the term "voluntarily" very narrowly and generally limit it to situations where the creditor plays no part in the decision to repay the discharged debt. *See, e.g. Van Meter v. American State Bank*, 89 B.R. 32 (Bankr. W.D. AR 1988) and *In re Davis*, 1995 Bankr Lexis 2209 (Bankr. S.C 1995).

Avoidance Actions

1. Preferential Transfers

Section 547 of the Bankruptcy Code allows a trustee or a debtor-in-possession to avoid preferential transfers. In order to avoid a transfer as a preference, the trustee or debtor in possession must show:

- The transfer of an interest of the debtor in property;
- To or for the benefit of a creditor;
- For or on account of an antecedent debt owed by the debtor before such transfer was made;
- Made while the debtor was insolvent;
- Made on or within ninety (90) days before the date of the filing of the petition or within one (1) year prior to the filing of the date of the petition if the creditor was an insider of the debtor; and
- That enables the creditor to receive more than the creditor would receive in a Chapter 7 liquidation if the transfer had not been made.

Transfers or payments made by check are made, for preference purposes, when the check is honored, rather than when it is delivered or any other time. *Barnhill v. Johnson*, 503 U.S. 393 (1992).

Section 547(c) contains a number of affirmative defenses that can be raised by a defendant. If the defendant can show that the transfer was intended by the debtor and the creditor to be a contemporaneously exchange for new value given and if, in fact, a substantially contemporaneously exchange occurred, the defendant would have a defense. §547(c)(1). See also, e.g. *In re Jones Truck Lines, Inc.,* 130 F. 3d 323 (8th Cir. 1997); *In re Dorholt, Inc.*, 224 F. 3d 871 (8th Cir. 2000). *In re Arnett*, 731 F. 2d 358 (6th Cir. 1984).

The ordinary course of business defense is contained in Section 547(c)(2). To prevail under this defense, a defendant must show that the transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee. This issue is rarely litigated and is generally assumed that the debt was incurred in the ordinary course of business. The disputes and the litigation under this defense formerly revolved around the two (2) remaining prongs of the ordinary course of business defense. Prior to the Bankruptcy Reform Act of 2005, a defendant would also have to show that the transfer at issue was made in the ordinary course of business or financial affairs of the debtor and the transferee and that the transfer was made according to ordinary business terms. *In re Fred Hawes, Inc.*, 957 F. 2d 239 (6th Cir. 1992); *In re Fulghum Construction Corp.*, 872 F. 2d 739 (6th Cir. 1989).

Under the revised provision, the defendant can now prevail on an ordinary course of business defense if it can show either that the payment was made in the ordinary course of business of the debtor and the transferee, or that the payment was made according to ordinary business terms. Because proof of the history of payments between the two parties at issue is generally easier and less costly to prove, most defendants likely will rely on this prong as a defense. Proof that the payments were made according to ordinary business terms generally requires the retention of an expert witness to testify as to payment terms and history in a particular industry.

The "enabling loan" defense is set forth in Section 547(c)(3). This defense is available to purchase money secured creditors. To prevail on this defense, the defendant must show that the transfer sought to be avoided is the creation of a security interest in property acquired by the debtor on a purchase money loan and that the security interest is perfected on or before thirty (30) days after the debtor receives possession of such property. *In re Arnett*, 731 F. 2d 358 (6th Cir. 1984); *In re Winnett*, 102 B.R. 635 (Bankr. S.D. Ohio 1989).

In Chapter 7 cases, Chapter 7 Trustees frequently seek to avoid a lender's lien against a motor vehicle if the lien was noted within ninety (90) days of the filing of the petition. Under the enabling loan defense, however, if the lien was perfected within thirty (30) days after the date the debtor took possession, the lien is not avoidable.

Section 547(c)(4) contains the "subsequent new value" defense. This defense provides a defendant with a credit for goods, money, or services provided by the defendant to the debtor after the transfer at issue was made. The application of this defense does not, however, involve merely adding up all of the transfers, adding up all of the new value, and then subtracting. The defense requires that the new value at issue be given after such transfer. A split of opinion has developed in the case law as to whether the subsequent new value must remain unpaid in order for the defense to apply. See, e.g., *In re Kroh Brothers*, 930 F. 2d 648 (8th Cir. 1991) and *Matter of Toyota of Jefferson, Inc*., 14 F. 3d 1088 (5th Cir. 1994).

Section 547(c)(9) establishes a $6,225.00 minimum threshold for the trustee or debtor in possession to initiate a preference avoidance action for the transfer of non-consumer debts. This figure is an aggregate amount. So, if the amount of transfers at issue in a non-consumer context do not equal or exceed $6,225.00, no preference action may be initiated. The consumer threshold amount is $600.00. This is also an aggregate amount. *In re Hailes*, 77 F.3d 873 (5th Cir. 1996).

Section 547(h) prohibits a trustee or debtor in possession from seeking to avoid a transfer if the transfer was made as a part of an alternative repayment schedule created by an approved non-profit budgeting and credit counseling agency.

In the collection context, Chapter 7 Trustees will investigate any pre-petition collection action taken against the debtor within the 90 days prior to the bankruptcy filings. Trustees often will attempt to avoid wage and bank garnishments as preferences, provide the amounts at issue warrant such action. Trustees may also seek to avoid certificates of judgment recorded or filed within 90 days prior to the filing of the bankruptcy case.

2. Fraudulent Transfers

Section 548 of the Bankruptcy Code governs fraudulent transfers and obligations. Section 548(a) provides that a trustee or a debtor in possession may avoid any transfer of an interest of the debtor in property incurred by the debtor that was made or incurred within two (2) years before the date of the filing of the bankruptcy petition if the debtor voluntarily or involuntarily made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date of such transfer, indebted. In addition, a trustee may avoid transfers if the debtor receives less than a reasonably equivalent value in exchange for such transfer or obligation and if the debtor was insolvent on the date of the transfer or became insolvent as the result of such transfer, or if the debtor was engaged to make business or transaction for which any property remaining with the debtor was an unreasonably small capital, or if the debtor intended to incur or believe that the debtor would incur debts that would be beyond the debtor's ability to pay as such debts matured.

In addition, Section 548(e) gives a trustee the power to avoid any transfer of an interest of the debtor in property that was made on or within ten (10) years before the date of the filing of the petition if the transfer was made to a self-settled trust or similar device, the transfer was made by the debtor, the debtor is a beneficiary of such trust or similar device, and the debtor made such transfer with actual intent to hinder, delay, or defraud any creditor. Section 548(e)(2) also specifically states that a transfer under this section includes a transfer made in anticipation of any money judgment, settlement, civil penalty, equitable order, or criminal fine incurred by or which the debtor believes would be incurred by any violation of securities law.

In addition to the powers afforded to a trustee or debtor in possession under Section 548, trustees and debtors in possession may also take advantage of applicable state laws. Section 544(b) of the Bankruptcy Code allows the trustee to avoid any transfer of an interest that is avoidable under applicable law by a creditor holding an unsecured claim or by a bona-fide purchaser of real estate. Trustees can utilize this section, for example, to pursue the avoidance of fraudulent transfers under state fraudulent transfer statutes, including Ohio Revised Code Chapter 1334. Because the state law remedies often have a longer look back period (Ohio's period is four years), the trustee has the ability to review and recover additional transfers.

3. Post-petition transactions

Trustees also have the power to avoid post-petition transfers of property of the estate. Section 549(a) authorizes the Trustee to avoid a transfer of property of the estate that occurs after the commencement of the case and that is not authorized by the Bankruptcy Code or by the Bankruptcy Court

4. Statutes of Limitations

Section 546(a) contains a statute of limitations applicable to adversary proceedings under Section 544, 545, 547, 548, and 553 of the Bankruptcy Code. Such actions must be commenced by the later of two (2) years after the entry of the order for relief or one (1) after the appointment or election of the first trustee under Chapters 7, 11, 12, and 13. Section 549(d) contains a statute of limitations for the avoidance of post-petition transactions. Such actions may not be commenced after the earlier of two (2) years after the date of the transfer sought to be avoided or the time the case is closed or dismissed.

5. Liability on and Recovery of Avoided Transfers

Sections 547, 548, and 549 only provide for the avoidance of a particular transfer.

Section 550 of the Bankruptcy Code establishes liability for transfers that are avoided. Section 550(a) states that the trustee may recover for the benefit of the estate, the property transferred under any of these avoidance sections or, if the court so orders, the value of such property, from the initial transferee of such transfer or any entity for whose benefit such transfer was made, or any immediate or mediate transferee of such initial transferee.

A trustee is limited in his ability to recover from any immediate or mediate transferee of the initial transferee in that the trustee cannot recover from a subsequent transferee where that transferee takes for value, in good faith, and without knowledge of any avoidability of the transfer avoided. Section 550(b)(2).

A good faith transferee is granted a lien on the property to be recovered to secure the lesser of the cost to the transferee of any improvement made after the transfer, less any profit realized or accruing to the transferee from such property and any increase in the value of such property as a result of such improvement of the property transferred. Section 550(e). The statute specifically defines "improvement" to include physical additions or changes to the property, repairs to the property, the payment of any tax on the property, the payment of any debts secured by a lien on the property that is superior to or equal to the rights of the trustee, and preservation of the property.

Although a trustee will normally include a cause of action to recover the transfer or to establish liability of the transferee as a part of the initial complaint to avoid the transfer, the trustee can file a separate action seeking recovery for liability on an avoided transfer. An action or proceeding under Section 550 may not be commenced after the earlier of one (1) year after the avoidance of the transfer or the time the case is closed or dismissed. Section 550(f).