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***CONSUMER BANKRUPTCY BASICS***

*(They are not so basic).*

**Presented to San Francisco Federal Credit Union**

**Disclaimer:** The following outline contains general principles of law that cannot be applied to every case. Some issues covered are subject to developing law that cannot be forecast or predicted with certainty. In the event that you encounter issues covered in this outline, you should review the appropriate response with counsel experienced in this area of law. Entire presentations could be given on any number of subjects in this outline. The intention of the presenter is to give an overview of the issues covered and to highlight trends that are emerging not to provide advice applicable to any particular case.

**C:\Documents and Settings\sscheer\Local Settings\Temporary Internet Files\Content.IE5\83J3A4H1\MC900056784[1].wmf Bankruptcy (Chapter 7 & 13 Considerations):**

1. **Automatic Stay**: Stops you from taking any action to create, perfect or enforce lien or collect on debt.

**Question:** What is someone tells you they have retained an attorney and are going to file BK. What should you do?

**Question**: Which of the following are stayed: wage garnishments, collection calls, foreclosures?

1.  **Chapter 7**:
   * Two Automatic Stays? One for the Debtor, the other for the \_\_\_\_\_\_\_\_\_?
   * Liquidation or reorganization?
   * *Statement of Intentions*: Indicates what the Debtor intends on doing and what should be done.

**Key Points to Consider**:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Unsecured** | | **Automobile** | | **Real Property** | |
| **Reaff**: | Usually based on Non Discharge | **Reaff:** | * Non-Discharge * Retention member priv. * For Debt restructuring: “*Give a little*. *Get a lot*”. | **Reaff:** | * Non-Discharge   + Waste.   + Fraud.   + Retain member privileges * **Note**: Import for junior lienors who could sue after senior FC. |
| **Proof of Claim**: in Asset Cases only.[[1]](#footnote-1) | | In Asset Cases Only. | | In Asset Cases only. | |
| **MFR**: Where ins. or pending state court action. | | Where immediate jeopardy to security, or wait for discharge. | | Where immediate jeopardy to security or wait for discharge **and** Trustee release. [[2]](#footnote-2) | |
| **Non Discharge**: For Fraud etc. | | For fraud, intentional destruction to collateral or hiding collateral. | | For fraud, intentional destruction to collateral. | |
| **Effect of Discharge on Mortgage Servicing Rules:** | | Question re what communications, if any i.e. payment statements, should be made after BK Discharge Entered in Chapter 7 or 13.  **Note**: Protection afforded to post-discharge communications from lenders with liens on principal residence not applicable to auto loans. | | Question re what communications, if any i.e. payment statements should be made after BK Discharge Entered in Chapter 7 or 13.    **Note**: 11 USC §524(j) re payment statements after discharge on residence loans, provides some protection.[[3]](#footnote-3)  **Note**: Requirements of Dodd Frank New Mortgage Servicing Rules requiring that payment statements etc. continue.[[4]](#footnote-4) | |

1.  **Chapter 13**:

* Reorg. or Liquidation?: “ *I’m Flying the Friendly Skies*”
* File POC: ASAP and no later than 90 days from Meeting of Creditors.

**C.1 Key Points to Consider re the Plan:**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Unsecured** | | **Automobile** | | | **Real Property** | |
| Timely file POC | | Timely file POC | | | Timely file POC | |
| Discharge Issues?  **Note**: Establishing basis for fraud claim in BK essential[[5]](#footnote-5). | | Plan Terms:  **Quiz**  **Time!** | * Claim Amt: Cram down[[6]](#footnote-6). * Int. Rate. * Right to Receive Imed. Pmt[[7]](#footnote-7)[[8]](#footnote-8). * Length of Plan. | | Plan Terms: | * Claim Amount: Cram down[[9]](#footnote-9). * Interest on Arrearages? * Xten loan maturity date? * Change int. rate. * Terms re senior lienor and taxes |
| **Global Plan issues:** | Bad Faith, refile. | **Global Plan Issues** | | Bad Faith (Note Rees Levering)[[10]](#footnote-10), re-file, feasibility. | Bad Faith, refile, feasibility. | |

**C2. Proofs of Claim (Changes to BK Rules 3001(c) and 3002.1)**.

(Rules Affecting Lenders changed effective 12.1.11. Designed to prevent presentation of claims which have little or no substantiation and to finalize whether the claim was fully paid.

|  |  |  |  |
| --- | --- | --- | --- |
| **Bankruptcy Rule 3001 (c )** |  | **Bankruptcy Rule 3002.1** |  |
| **Issue** | **Provisions** | **Issue** | **Provisions** |
| **Itemized Claim:** | There must be an itemization of the claim i.e. breakdown of charges and amount to cure the default, as of date of BK**.** | **Covers Claims on Debtor’s Residence in Chapter 13 cases.** |  |
| **Use of Official Form.**  **(relatively) New General Form** | **\***If lien of creditor on residence an Official Form must be used**.**  **New Mortgage Proof of Claim Attachment Form.** | **Notice of Pmt. Changes**  **New Notice of Mortgage Payment Change.[[11]](#footnote-11)** | Must be served on Debtor, DC and Tee, 21 days before new payment due.[[12]](#footnote-12) **Note**: Failure to comply can stop creditor from providing the info at a later date or can be excused.[[13]](#footnote-13) |
| **When There is Escrow/Impound** | If there is an escrow/impound, an escrow account statement must be provided**.** [[14]](#footnote-14)  **Note:** New Mortgage Servicing Rules effective 1.10.14, covering Escrow/Impound Account requirements ( See 12 CFR 1024.37) | **Post BK Charges:**    **New Notice of Post-Pet Charges Form** | Must file a notice if you seek any post-bk fees, expenses or charges, within 180 days.[[15]](#footnote-15) The Debtor or trustee can object within 1 year. |
| **Annual Interest Rate** | Creditor must disclose the annual interest rate in effect when the BK is filed. **Note**: Variable rate loans will have to specify correct rate | **Notice of Final Cure Pmt. (Rule 3002.1 (f).** | Within 30 days of final payment of claim, Trustee must provide notice to creditors who must “scream or die”. |
| **Certification of Accuracy** | New POC form now includes a certification in the signature box that the information contained in the claim meets the requirements of BK Rule 9011(b). **Note**: This may limit or restrict attorneys from signing. | **Response to Final Cure Payment (Rule 3002.1 (g).** | Within 21 days of notice under subsection (f), the creditor must file a statement contesting or confirming the cure. |
| **Penalties** | Do not include disallowance of the claim, but if there is a subsequent hearing re the claim i.e. claim objection (11 USC§ 502(b), plan confirmation etc. a court can deny the creditor the right to present evidence of the missing information unless the creditor can show justification of that the omission was harmless. The court also has discretion to impose different sanctions | **Hearing on Dispute of Cure of Claim (Rule 3002.1 (h).** |  |
| **Privacy Concerns on POC** | Debtor’s counsel have been filing lawsuit for privacy rights violations, where confidential consumer information is provided in the POC. Must redact. |  |  |

**C.3 Motion for Relief from Stay:**

* Can be brought at any time (if “cause”).
* Most common reasons:

|  |  |  |
| --- | --- | --- |
| **Unsecured** | **Automobile** | **Real Property** |
| Not usually brought by unsecured creditors. Exception: To conclude pending state court action so claim can be finalized in bankruptcy court e.g. fraud claims.  **Note:** Generally a motion to dismiss is proper remedy. | * When refile and bad faith or refile that is prohibited by law. [[16]](#footnote-16) * When insurance not maintained. * When basis to argue no right to restructure clam due to Rees Levering Act * Failure to make payments to Trustee. * Failure to Confirm Plan.   **No Equity and Not Necessary for Reorg: Note[[17]](#footnote-17)** | **For Cause**: When refile and bad faith or refile that is prohibited by law. [[18]](#footnote-18)   * Failure to make post-petition payments to creditor or trustee. * Failure to pay taxes or insurance/ * Misuse of Rents.   **No Equity and Not Necessary for Reorg:**   * Must have valuation.**[[19]](#footnote-19)** |

C.3 Annulling the Stay: What about foreclosure sales or repossessions that violate the stay? Annulling the stay should not be used as a substitute for complying with the stay.

* Re: Real Property: Generally, as long as foreclosure sale held **before** BK, trustee can record TDUS and purchaser at sale can move to annul stay (*See* Civil Code [§ 2924h(c)](https://www.lexis.com/research/buttonTFLink?_m=2d365e16e06653b54b04d4967678cada&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b248%20B.R.%20820%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=60&_butInline=1&_butinfo=CAL.%20CIV.%20CODE%202924H&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzB-zSkAb&_md5=a8ebb73dabc2fc24d64e306a63d35fe9) and *In re Garner*, 208 B.R. 698 (Bankr. N.D. Cal. 1997) and *Shirazi v. Bank of Am., N.A. (In re Shirazi)*, 2013 U.S. Dist. LEXIS 85654 (C.D. Cal. June 18, 2013))**.** However, there is contra authority.
* Re: Vehicles**:** There is no state law statute that allows validation of repo before sale. While you can move to annul stay in appropriate cases (e.g. See Civil Code § 2983.3, prohibiting reinstatement in certain cases i.e. 2nd repo in one year etc.), withholding a vehicle can and will lead to stay violation claims.

## Don’t forget Factor 11 on : iTunes, Amazon and CD Baby (<http://www.cdbaby.com/cd/factor11>).

1. BK. Rule 3002 [↑](#footnote-ref-1)
2. This is often a title company issue. Many title companies will not proceed with foreclosure unless the case is closed, relief from stay is granted or the Trustee abandons the property. Some may proceed with a discharge and No Asset Report. [↑](#footnote-ref-2)
3. 11 USC § 524(J), generally provides that the BK discharge injunction does not prohibit a secured creditor which has a security interest in the principal residence of the debtor from communicating in the ordinary course of business if the communication is limited to seeking or obtaining period payments on a valid security interest in lieu of pursuing in rem relief to enforce the lien. [↑](#footnote-ref-3)
4. As of 1.10.14, the effective date of the implementation of the new Dodd-Frank Mortgage Servicing Rules, there is known case law or CFPB guidance on whether complying with payment notification requirements etc. would be excused by a BK discharge. [↑](#footnote-ref-4)
5. [↑](#footnote-ref-5)
6. Remember special protection afforded to purchase-money “910” loans (See 11 USC §1325 (a). [↑](#footnote-ref-6)
7. This consideration is even more important in jurisdictions where-**post-petition** payments are made to the Chapter 13 Trustee for disbursement to the creditor. [↑](#footnote-ref-7)
8. Note 11 USC §1326 (a) (1) (C) requiring payments to PM auto lenders within 30 days. [↑](#footnote-ref-8)
9. Remember special protection to owner-occupied residential properties (See 11 USC § 1322 (b)), but remember: claim valuation (11 USC §506) can override: “In for a dollar, in for the whole amount” (*See In re Lam*, 211 B.R. 36, 40-41 (B.A.P. 9th Cir. 1997). [↑](#footnote-ref-9)
10. [Cal Civ. Code § 2983.3](http://www.lexis.com/research/xlink?app=00075&view=full&searchtype=get&search=Cal+Civ+Code+%A7+2983.3) (RLA), prohibits right to reinstate contract under certain circumstances i.e. borrower transfers vehicle to third party, 2nd repo in 12 months. While BK law may override provisions of RLA, they should be argued in respect to confirmation and adequate protection issues. [↑](#footnote-ref-10)
11. Applies to loans secured by principal residence, and provided for in plan. [↑](#footnote-ref-11)
12. There will be an Official Form to provide the notice. [↑](#footnote-ref-12)
13. See BK Rule 3002.1 (g). [↑](#footnote-ref-13)
14. The escrow/impound statement must be prepared in a form consistent with the requirements of nonbankruptcy law. See, e.g., [12 U.S.C. § 2601](https://www.lexis.com/research/buttonTFLink?_m=cc98a4a80ee597f4ed2ed7eb2b375cca&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5bUSCS%20Bankruptcy%20R%203001%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=8&_butInline=1&_butinfo=12%20USC%202601&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzB-zSkAb&_md5=2f26930d4f39e250577aa78c8ecf0708) et seq. (Real Estate Settlement Procedure Act). Thus the holder of the claim may provide the escrow account statement using the same form it uses outside of bankruptcy for this purpose. [↑](#footnote-ref-14)
15. E.G. attorney’s fees, property inspection fees, appraisal fees. if you don’t and seek to get them after the BK, there will be problems, as BK Rule 3002.1 (f) provides a ‘scream or die” on the finality of any amounts due on the claim. There will be an Official Form to provide the notice. [↑](#footnote-ref-15)
16. See generally 11 USC §362 (c). [↑](#footnote-ref-16)
17. Generally, there is no equity in a vehicle and “cause” for relief from stay (See above) is the primary issue. Generally, Kelly Blue Book or other online valuation will show value of vehicle. You should consider each court and requirements to establish valuation separately. [↑](#footnote-ref-17)
18. *See generally* 11 USC §362 (c). [↑](#footnote-ref-18)
19. Can use Debtor’s schedules, appraisal, BPO etc. You should consider each court and requirements separately. [↑](#footnote-ref-19)