

**BANKRUPTCY ABUSE  
PREVENTION and CONSUMER  
PROTECTION ACT OF 2005  
(Pub. L. 109-8)**

**DISCHARGE and DISMISSAL ISSUES**  
October 11, 2005

# OVERVIEW

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- DISCHARGE UNDER CHAPTER 7 and 13
- ISSUES PREVENTING DISCHARGE UNDER CHAPTER 7 & 13
- NONDISCHARGABILITY
- DISMISSALS
- ATTORNEY KEY ISSUES FOR CONSIDERATION

# DISCHARGE UNDER CHAPTER 7

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## ■ CHAPTER 7 - § 727

- § 727 (a)(1) – (7) remain unchanged under the new code
- § 727 (a)(8) has changed to allow for a discharge under §§ 727, 1141 of the Code and § 14, 371 and 472 of the Act every **8** years.
- § 727 (9) – (10) stay the same
- § 727 (11) **AFTER** filing the petition, the debtor must complete an approved instructional course concerning personal financial management unless:
  - Incapacitated, disabled, on active military duty in combat zone

# DISCHARGE UNDER CHAPTER 7 (cont.)

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- § 727 (12) Requires no reasonable grounds to believe that § 522(q)(1) applies to the debtor:
  - Not convicted or, or have charges pending for:
    - Federal securities law violation
    - Fraud as a fiduciary
    - Violation of the Federal Civil Rights Act (18 USC § 1964)
    - Criminal act, intentional tort, or willful or reckless misconduct causing serious physical injury or death to another individual in the preceding 5 years
      - Except to the extent the property is reasonably necessary for the support of the debtor/family.

# DISCHARGE UNDER CHAPTER 7 (cont.)

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- § 727 (b) – (d)(3) all remain the same
- Adds a §(d)(4) which allows the Court to revoke a discharge where the debtor has failed to explain satisfactorily:
  - A material misstatement in an audit referred to in 28 USC § 586(f); or
  - A failure to make available for inspection all necessary accounts, papers, documents, financial records, files, and all other papers, things, or property belonging to the debtor that are requested in a § 586(f) audit.

# DISCHARGE UNDER CHAPTER 13

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- CHAPTER 13 - § 1328

- § 1328(a) – After all payments under the Plan, and Domestic Support Obligations

Certification of Payment, the Court shall grant a discharge of all debts (except those to follow):

- Post-Petition Consumer Debt under 11 USC § 1305(a)(2)
- Secured and unsecured claims the last payment for which is due after the final payment under the plan.

# DISCHARGE UNDER CHAPTER 13 (cont.)

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- A tax required to be collected or withheld and for which the debtor is liable in whatever capacity [11 USC § 507 (a)(8)(C)]
- A debt as specified in 11 U.S.C. §§ 523 (a)(1)(B); (1)(C); (2); (3); (4); (5); (8); or (9) [covered in a later slide]
- Restitution for a criminal fine, including a sentence for conviction.
- Restitution for damages, awarded in a civil action against the debtor as a result of a willful or malicious injury by the debtor that caused personal injury or death to an individual.

# DISCHARGE UNDER CHAPTER 13 (cont.)

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- Hardship Discharge standards remain the same under 11 USC § 1328 (b) except to add that they are subject to § 1328(d) regarding post-petition consumer debt under § 1305 (a)(2) non-dischargeability.
- No discharge will be granted where the debtor has received a discharge:
  - Under Chapter 7, 11 or 12 in the 4 years preceding the Order of Relief under Chapter 13
  - Under Chapter 13 during the 2 year period preceding the Order of Relief

# DISCHARGE UNDER CHAPTER 13 (cont.)

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- Under § 1328 (g)(1) **AFTER** filing the petition, the debtor must complete an approved instructional course concerning personal financial management unless:
  - Incapacitated, disabled, on active military duty in combat zone [Same as § 727 (11)]
- Under § 1328 (h) requires no reasonable grounds to believe that § 522(q)(1) applies to the debtor:
  - Not convicted or, or have charges pending for:
    - Federal securities law violation
    - Fraud as a fiduciary
    - Violation of the Federal Civil Rights Act (18 USC § 1964)
    - Criminal act, intentional tort, or willful or reckless misconduct causing serious physical injury or death to another individual in the preceding 5 years

# EXCEPTIONS TO DISCHARGE 11

## USC § 523 – Ch. 7

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- (A)(1) – Income Tax returns not filed prior to the filing the petition are non-dischargeable. Including interest that accrues on federal, state and local returns which are included under § 507(a)(8)
- (a)(2) – Consumer debt to a single creditor for luxury goods or services aggregating more than **\$500** on or within **90** days before the Order of Relief.
- (a)(2) – Cash advances aggregating more than **\$700** under an open end credit plan obtained on or within **70** days of the Order of Relief
  - Each of these is ***presumed to be nondischargeable.***

# EXCEPTIONS TO DISCHARGE 11

## USC § 523 – Ch. 7 (cont.)

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- (a) (3) & (4) remain unchanged
- (a)(5) Makes DSO's as defined in § 101(14A) nondischargeable
- (a) (6) & (7) remain the unchanged
- (a)(8) – Educational Loans – Section rewritten leaving the “absent undue hardship” language; can't discharge education loans ***as defined in § 221 (d)(1) of Internal Revenue Code***
- (a)(9) – Adds vessels and aircraft to the provision regarding nondischargeability of claims for death or personal injury due to intoxication.

# EXCEPTIONS TO DISCHARGE 11

## USC § 523 – Ch. 7 (cont.)

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- (a) (10) – (14) remain the same
- (a)(14A) – Debts incurred to pay a tax to a governmental unit other than the United States
- (a)(14B) – Debts incurred to pay fines and penalties imposed under Federal election laws
- (a)(15) – All debts owed to a spouse or former spouse or child and not defined under the DSO provisions

# EXCEPTIONS TO DISCHARGE 11

## USC § 523 – Ch. 7 (cont.)

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- (a)(16) – Condo, Co-Op and Homeowner Association fees or assessments that are incurred after the Order of Relief, but not for amounts incurred before entry of the Order of Relief.
- (a)(17) – Prison inmates will not receive a discharge for the filing fees on complaints, motions, appeals, etc. filed regardless of an assertion of poverty.

# EXCEPTIONS TO DISCHARGE 11

## USC § 523 – Ch. 7 (cont.)

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- (a)(18) – ***Harshbarger*** is no longer the law – Loans on retirement plans are now non-dischargeable
- (a)(19) re: fraud, etc. remains, generally, unchanged. However, it adds the language “*before, on or after the date on which the petition was filed*” to the provision.
- In an undesignated section the new Code then defines the term “return” as relates to tax returns.
- *Remainder is unchanged*

# EXCEPTIONS TO DISCHARGE 11

## USC § 523 – Ch. 13

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- As provided in § 1328(a)(2) the following Sections of § 523(a) apply to Chapter 13 cases:
  - (1)(B)
  - (1)(C)
  - (2)
  - (3)
  - (4)
  - (5)
  - (8)
  - (9)
- Also, § 507(a)(8)(C) – Taxes for which debtor liable

# Some § 523 Debts Are Dischargeable in Chapter 13 Cases

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- Willful and malicious damage to ***property***
- Debts incurred to pay non-dischargeable tax obligation
- Debts arising from property settlements in divorce or separation agreements that are not within the definition of DSO's [§ 101(14A)]

# CAUSES FOR DISMISSAL

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- 11 USC § 707
  - Remains basically unchanged but for the inclusion of the “means test” which will be reviewed by another group.
- 11 USC § 1307
  - Generally remains the same but adds several items:
    - (c)(11) – Failure to pay any DSO that first becomes payable after the date of filing of the petition.
    - (e) – Failure to file a tax return under § 1308 (pre-petition tax returns).

# 11 USC § 1308 – Pre-Petition Tax Returns

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- Tax returns for the 4 years period ending on the date of the filing of the petition have to be filed no later than the day before the **FIRST** scheduled § 341 Hearing.
  - If not filed the Trustee can hold open the meeting for a reasonable period, not to exceed 120 days
  - Thereafter, if the debtor can show that the returns were not filed due to circumstances beyond their control the court can grant an additional 30 day extension.

# ISSUES FOR ATTORNEYS

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- What is a Tax Return?
  - Look to Internal Revenue Code § 1620(a) and (b)
    - A return filed under (b) – one filed on behalf of the taxpayer by the Secretary may not be considered a “filed” return.
- Does a Discharge release an Attorney From Duty To Represent the debtor?
  - Will the attorney be required to continue to represent the debtor if that case is selected for audit by the U.S.T. after discharge?

# ISSUES FOR ATTORNEYS (cont.)

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- Debtors may not come to you seeking a “super-discharge” under chapter 13, but only seek some relief from the current financial stress.
  - How would the seeking of a delay in the foreclosure/levy actions, and the subsequent dismissal, effect the future financial options/choices for the debtor?

# DISCHARGE and DISMISSAL ISSUES

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■ **QUESTIONS?**