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This is the nineteenth in my series of newsletters. Due to your great interest, I plan to continue this quarterly report for my clients.

BANKRUPTCY LAW ALERT: A DEBTOR'S OBLIGATION REGARDING SECURED DEBTS IN CHAPTER 7

Under Section 521 (2) (A), a consumer debtor who owes secured debts shall file with the clerk a statement of his intention with respect to retention or surrender of said property and if applicable, specifying whether such property is exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property.

Section 521 (2) (B) provide that debtors must perform their stated intention within 45 days.

Section 521(2) (C) provides that “nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor’s or trustee’s rights with regard to such property under this title.”

An example where Sections 521 comes into play is if you’re in Chapter 7 and are financing an automobile. Under Section 521 if one takes a literal reading one either has to give back the car, redeem the car (pay the current market value) or reaffirm the debt. A reaffirmation agreement is a new promise to pay an antecedent debt which survives the bankruptcy discharge.

Currently there is a split in this country regarding whether a Chapter 7 debtor may retain property that is collateral for a secured debt by remaining current on their obligations under the original contract without reaffirming the debt. The First, Fifth, Seventh and Eleventh Circuits require one to sign a reaffirmation agreement or surrender the property while the Second, Fourth, Ninth, and Tenth Circuits allow debtors to retain the collateral without reaffirming if they are current on their obligation.

For example, the Ninth Circuit in In Re Parker, 139 F 3d 668 (9th Cir. 1998) found that the only action required by section 521 (2) is the filing of the statement of intention. The Court concluded that every thing else was governed by the phrase “if applicable” under 11USC 521 (2) (A). Thus, Parker follows a line of case, that creates a fourth option of allowing a debtor in Chapter 7 to keep collateral if he remain current under the original contract. See, In Re Belanger, 962 F. 2d 345 (4th Cir. 1992); In Re Boodrow, 126 F. 3d 43 (2nd Cir. 1997); Lowry Fed. Credit Union vs. West 882 F. 2d 1543 (10th Cir. 1989).

If you carefully read 11 USC 521 (2) it is ambiguous since 521 (2) (A) requires surrender, redemption or reaffirmation while 521 (2) (C) preserves the debtors rights to the property if the debtor has not defaulted.

The First Circuit in In Re Burr, 98-9007 (Nov. 25 1998) found Section 521 (2) as unambiguous and eliminates the Fourth option of keeping the collateral.

The First Circuit held that the “retain and keep current option” can not be performed with 45 days of filing pursuant to 11 USC 521 2(B).

Finally, regarding the “if applicable” language of 521 2(A), the First Circuit held that only applies if retention of the collateral is applicable; then one of the three options has to be chosen.

Finally, The Court in Burr acknowledged that as a practical matter, most consumer debtors who wish to retain collateral subject to a security interest will have to reaffirm or surrender the property.

See, Consumer Bankruptcy News, December 31, 1998, Volume 8, Issue 8 at pps 4-5.

I always counsel my clients to NEVER reaffirm debts since it goes against the whole notion of a fresh start since a reaffirmation agreement survives a bankruptcy discharge agreement.

There is only one case in our Circuit, In Re Bell, which follows the first, fifth, seventh, and eleventh circuits, however, that is an old case that may be reexamined under the current status of the law.

My other concern is that several of my clients don't realize they have secured claims from Sears, Best Buy, Circuit City and/or Levitz when they use those credit cards.

Since most of the collateral is worth substantially less than its fair market value, I would advise clients to surrender the collateral if they are not current.

Finally, if a debtor is not current and doesn't surrender, redeem or reaffirm, the creditor can file a replevin Action in State Court solely for the purpose of obtaining the collateral.—The creditor can't sue for monetary damage.

If you have any questions concerning this issue, always feel free to contact me.

PRESIDENT CLINTON SIGNS LEGISLATION ON OCTOBER 7, 1998 THAT MAKES ALL STUDENT LOANS NON-DISCHARGABLE

Prior to this new Act, if you had student loan obligations that were over 7 years old, the debt would be dischargeable in either Chapter 7 or Chapter 13.

However, now under no circumstances unless you can establish undue hardship will a student loan be dischargeable.

This makes it extremely difficult for clients who have student loan obligations since the Courts have found it improper to pay student loans in full in Chapter 13 and pay less to other unsecured creditors.

My advice is to either do a base plan or zero dividend (under certain circumstances) to all unsecured creditors including the student loan.

Please note the student loan cannot be discharged but while you are in Chapter 13 or Chapter 7, the bankruptcy Stay is in effect which prevents the creditor from going after you.

After you are discharged from Chapter 13, you can then refile Chapter 13 to pay back the student loans in full.

If you have any questions, feel free to contact me.

BANKRUPTCY REFORM LEGISLATION IS NOT DEAD – ONLY DELAYED

On October 9, 1998 The Conference Committee failed to pass the 3150 pending bankruptcy reforms due to the conflict between the House Bill H.R. and the Senate Bill S. 1301.

President Clinton made it very clear that he would have signed the Senate's version.

Also, in New Jersey Senators Lautenberg and Torricelli have written me making it very clear that they want to reform the bankruptcy law since they see too many filings in New Jersey.

It is urgent that you all write Senators Lautenberg and Toricelli since these reform proposals may have serious impact on whether you can save your homes or property regardless of the circumstances that created your financial difficulties.

The senators allegedly want to discourage predatory lending but the people who will get hurt are the working folks.

One of the most important changes would be section 321 (A) WHO MAY BE A DEBTOR – "... An individual may not be a debtor under this title unless that individual has, during the 90 day period preceding the date of filing of the petition of that individual received credit counseling...through a credit counseling program (offered through an approved credit counseling service) described in Section III (A) that has been approved by ---

(A) The United State trustee; or

(B) The bankruptcy administrator for the district in which the petition is filed"

Thus, even though most of my clients have thought a long time about filing bankruptcy, the Government is now making it MANDATORY to receive credit counseling before you file bankruptcy.

In light of the fact that many clients I represent have no credit card problems but have filed due to foreclosure, motor vehicle surcharges, tax liabilities, eviction and several other reasons, this just does not make sense when credit counseling won't resolve issues that don't concern credit cards.

Secondly, my fear is that presently the credit card companies are behind Consumer Credit Counseling whose goal is to pay back as much to the creditors as possible.

It is true that section 321 a (3) (A) states "...The requirements of paragraph

- (1) shall not apply with respect to a debtor who submits to the court a certification that –
- (i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1);
 - (ii) state that the debtor requested credit counseling services referred to in paragraph (1) during the 5- day period beginning on the date on which the debtor made that request; and
 - (iii) is satisfactory to the court

Thus, the whole concept of getting a waiver goes against the process of getting a fresh start.

This means that if you filed bankruptcy because of a sheriff sale, eviction or repossession, you would most likely get a waiver but you would still have to get this authorized by the Court.

The next section that may have a devastating impact on many of my clients is Section 303 Discouragement of Bad Faith Repeat Filings.

303 (4) A case shall be presume to have not been filed in good faith (except that such presumption may be rebuffed by clear and convincing evidence to the contrary) –

- (A) with respect to the creditors involved, if –
- (i) more than one previous case under any of Chapters 7, 11 or 13 in which the individual was a debtor was pending during the one year period described in paragraph (1)
 - (ii) A previous case under any of Chapters 7, 11 or 13 in which the individual was a debtor was dismissed in paragraph (2) after –

- (I) The debtor; after having received from the court a request to do so failed to file or amend the petition or other documents as required by this title or;
- (II) The debtor, without substantial excuse, failed to perform the term of a plan that was confirmed by the court; or
- (III) (I) during the period commencing with the dismissal of the next most previous case under 7, 11, or 13, there has not been a substantial change in the financial or personal affairs of the debtor;

In essence this provision is going to backlog the court since everyone who refiles is going to have to go through a full blown hearing dealing with change of circumstances.

Presently, creditors have a right to challenge a subsequent filing on bad faith and the Judge will then make a determination whether there was bad faith or the debtor's case failed due to circumstances outside of his control, i.e., illness, loss of job, unusual expenses etc.

The Senate has also proposed limiting the Chapter 13 discharge under section 1328(A) by eliminating a discharge for fraud under 11 USC 523 (A) (2) or defalcation under 11 USC 523 (A) (4).

Also, any restitution or damages awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual.

These exceptions are cutting into the broader discharge provisions of Chapter 13 and will seriously hurt clients with gambling problems or those who have taken large cash advances to survive. Since there is a presumption of non – dischargeability for cash advances within 60 days, this could seriously hurt a lot of clients on fixed incomes who are especially senior citizens.

Another major provision is Section 319: Adequate Protection of lessors and purchase Money Secured Creditors.

Under the present state of the law, if you payoff your vehicle through the Chapter 13 Plan, the creditor would obtain the payoff plus interest over the life of plan or the replacement value of the vehicle plus interest over the life of the plan.

Under the new law the debtor would not only have to pay the trustee payments if the car was included in the plan but would also have to make adequate protection payments to the finance company until the finance company started receiving payments from the trustee.

The amount of the adequate protection payment shall not be less than the reasonable depreciation of the personal property described in subsection (a)(1) determined on a month to month basis.

Thus, this would be an extreme burden to a debtor since he would have to make adequate protection payments in addition to trustee payments until the plan was confirmed.

Finally, one of the most major reform proposals is the whole basis of needs – based bankruptcy.

If a Chapter 7 trustee brings a Motion for Dismissal or Conversion under Section 707 and the Court grants the motion finding that the debtor was not substantially justified, the Court shall sanction counsel for the debtor.

This will naturally have a chilling effect on myself and all other attorneys representing debtors in Chapter 7 since there could always be the fear of sanctions pending. In addition, if Congress establishes a set number without regard to expenses that a family incurs, it would be extremely unfair and burdensome for families who have substantial expenses, due to medical needs and other extenuating circumstances by classifying them by their national median income.

The Senate is also setting up a median income of equal or less than the national median household income to make a determination whether the debtor would have to pay back creditors under Chapter 13.

In light of these serious proposals that can affect your current rights under the law, I urge you to contact Senators Lautenberg and Toricelli as soon as possible since Congress will definitely consider bankruptcy reform in 1999.

LET ME ANSWER ALL YOUR LEGAL QUESTION

As my law practice continues to grow, I hope to help you in all areas of the law where I have helped my other clients. Remember, even if I am not familiar with a specific area of the law, I work with other lawyers who are well qualified to handle these matters. Therefore, if you have any question on any legal matter whatsoever, please ask me about it.

IF YOU LIKE MY WORK, SPREAD THE WORD.

I appreciate the confidence my clients show by referring new business to me. Such referrals are my largest and best source of new clients. Please let me know if you have a friend or relative who needs legal assistance or who would like to receive one of my quarterly newsletters.

I sincerely appreciate all the referrals from so many of you over the past several years. Thank you for your continued confidence and good will.

If you would like me to speak at your organization or place of worship, feel free to contact me.