

## COMMUNITY PROPERTY, DIVORCE AND BANKRUPTCY

Hon. Margaret Dee McGarity©  
U.S. Bankruptcy Judge  
517 East Wisconsin Avenue  
Milwaukee, Wisconsin 53202

### I. **Property of the estate** - 11 U.S.C. § 541.

- A. **Creation of estate.** The filing of a bankruptcy petition creates an estate, which includes all assets owned by the debtor, certain assets acquired by the debtor within 180 days of filing, certain assets transferred by the debtor before bankruptcy and recovered by the trustee in bankruptcy or by the debtor as debtor in possession, and income on property of the estate. § 541.
- B. **Community property included.** In addition, the estate includes all community property in which the debtor has sole, equal or joint management and control. § 541(a)(2)(A). *In re Fingado*, 113 B.R. 37 (Bankr. D. N.M. 1990), *aff'd*, 995 F.2d 175 (10<sup>th</sup> Cir. 1993); *In re Martell*, 349 B.R. 233 (Bankr. D. Idaho 2005); *In re Victor*, 341 B.R. 775 (Bankr. D. N.M. 2006); *In re Morgan*, 286 B.R. 678 (Bankr. E.D. Wis. 2002); *In re Kido*, 142 B.R. 924 (Bankr. D. Idaho 1993); *In re Burke*, 150 B.R. 660 (Bankr. E.D. Tex. 1992). *See also In re Maynard*, 264 B.R. 209, 214 (B.A.P. 9<sup>th</sup> Cir. 2001) (section 506 could be used to strip off lien because both halves of community property asset were in debtor's estate, even though only one spouse filed bankruptcy); *In re McCloy*, 296 F.3d 370 (5<sup>th</sup> Cir. 2002) (debtor's husband had right to encumber sole management community property, and foreclosure terminated wife's interest); *In re White*, 363 B.R. 157 (Bankr. D. Idaho 2007) (debtor/wife did not commit willful and malicious injury to horse later awarded to husband in divorce when she had it gelded as she had management and control at the time). Party attempting to prove spouse's property is not community property has burden of proof. *In re Cecconi*, 366 B.R. 83 (Bankr. N.D. Cal. 2007). Party claiming asset is separate property and not community property must prove classification by clear and convincing evidence. *In re McCarron*, 155 B.R. 14 (Bankr. D. Idaho 1993). Community property is in one debtor's estate after divorce if property has not been partitioned at time of bankruptcy. *In re Brassett*, 332 B.R. 748 (Bankr. M.D. La. 2005). If debtor acquires a community property interest in the other spouse's separate property, through application of labor or community property funds, that portion of value is in estate. *In re Petersen*, 352 B.R. 209 (Bankr. D. Ariz. 2006).
- C. **Other community property.** Community property not under the sole, equal or joint management and control of the debtor is included in the estate to the extent it is liable for a claim against the debtor or for a claim against the debtor and the debtor's spouse. § 541(a)(2)(B). It is not clear at what point

in the bankruptcy proceedings the "extent" is measured. Marital property assets under the sole management and control of the nondebtor spouse may be excluded from property of the estate under § 541(a)(2)(B) if they are exempt under state law and not "liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse."

- D. **Fractional interests.** If the debtor has a common law fractional interest in an asset, such as joint tenancy or tenancy in common, only the fraction owned by the debtor is property of the estate, not the entire asset. *In re Summers*, 278 B.R. 808 (B.A.P. 9<sup>th</sup> Cir. 2002), *aff'd*, 332 F.3d 1240 (9<sup>th</sup> Cir. 2003) (presumption of community property rebutted so only debtor's one half interest in joint tenancy asset was in estate); *In re Osborn*, 346 B.R. 204 (Bankr. N.D. Cal. 2006) (transmutation of community property asset to joint tenancy to keep half out of debtor's estate was not *per se* fraudulent as asset was exempt); *In re Xiong*, 2006 WL 1277129 (Bankr. E.D. Wis.) (only debtor's one-half interest in joint tenancy real estate located outside Wisconsin was in debtor's estate); *In re Murin*, 283 B.R. 588 (Bankr. D. Ariz. 2002) (one half of joint tenancy real estate included, applying Arizona law); *In re Pavich*, 191 B.R. 838 (Bankr. E.D. Cal. 1996) (applying California law, presumption of community property rebutted by holding in joint tenancy).
- E. **Joint case.** The filing of a joint case by a husband and wife creates two estates, even in a community property estate, unless the court orders substantive consolidation. *In re Knobel*, 167 B.R. 436 (Bankr. W.D. Tex. 1994). As a practical matter, most joint cases are administered together unless a party in interest objects. *See In re Knobel*, 167 B.R. 436 (Bankr. W.D. Tex. 1994); *In re Bennett*, 126 B.R. 869, 873 (Bankr. N.D. Tex. 1991); *In re Ageton*, 14 B.R. 833 (B.A.P. 9<sup>th</sup> Cir. 1981) (community property in both estates must be administered as if consolidated). *But see In re Hicks*, 300 B.R. 372 (Bankr. D. Idaho 2003) (spouses filed joint case, but estates had to be separately administered because wife had separate property in her estate, and community property was in both estates). *See also Matter of McDonald*, 1994 WL 160484 (E.D. La) (wife could not file joint petition without husband's consent, even though community property encumbered by community claims was in her estate); *Griffin v. Allstate Ins. Co.*, 920 F. Supp. 127 (C.D. Cal. 1996) (community property is in the estate of the first spouse to file bankruptcy). *See also* Steven J. Schwartz, *Marital Dissolution and Bankruptcy: The Rights of the Bankruptcy Trustee to Administer Community Property and to Avoid and to Recover Property Divisions*, 28 Cal. Bankr. J. 523 (2006).
- F. **Earned income.** Earned income of the debtor is not property of the estate under chapters 7 and 11, § 541(a)(6), but is property of the estate under chapters 12 and 13, and in an individual chapter 11 debtor's case under

BAPCPA. §§ 1115, 1207(a)(2), 1306(a)(2). Prior to confirmation of a plan, the debtor's spouse's income may be property of the estate, at least to the extent necessary to protect that income from recovery by creditors. *In re Reiter*, 126 B.R. 961 (Bankr. W.D. Tex. 1991); *see also In re Nahat*, 278 B.R. 108 (Bankr. N.D. Tex. 2002)(community property earned income is a “special” type of community property under Texas law and is not property of the estate as it is under the sole management and control of the nondebtor and cannot be recovered for claims against the debtor); *In re Markowicz*, 150 B.R. 461 (Bankr. D. Nev. 1993) (after plan confirmation, debtor's spouse's income was not property of the estate).

- G. **Ownership by entity.** Assets owned by an entity other than the debtor are not property of the debtor's estate. For example, if an individual debtor has an interest in a partnership that is classified as community property, only the partnership interest is property of the estate; the assets owned by the partnership are not. *In re Berlin*, 151 B.R. 719 (Bankr. W.D. Pa. 1993); *Matter of Lundell Farms*, 86 B.R. 582 (Bankr. W.D. Wis. 1988).
- H. **Co-owned property.** The trustee can, under certain circumstances, sell an entire asset owned by the estate and a co-owner. § 363(h). The co-owner has a right to acquire the asset by matching the highest bid. § 363(i). The spouse of a debtor also has the right to purchase a former community property asset, § 363(i), but has no right to the protections against sale available to a co-owner under § 363(h). *See In re Fingado*, 113 B.R. 37 (Bankr. D. N.M. 1990), *aff'd*, 995 F.2d 175 (10<sup>th</sup> Cir. 1993). *But see In re Beery*, 295 B.R. 385 (Bankr. D. N.M. 2003) (§ 363(h) protections applied to joint tenancy asset, determined under facts to be “hybrid community property” under New Mexico law, and insufficient evidence was presented to force sale). *See also In re Petersen*, 352 B.R. 209 (Bankr. D. Ariz. 2006) (estate included community property interest in non-filing spouse’s separate property).
- I. **Transferred assets.** Assets previously transferred by the debtor or the debtor's spouse may be brought into the estate under the trustee's avoiding powers. § 541(a)(3). These include, among others, preferences and fraudulent conveyances under § 548 or fraudulent conveyances that could be set aside by an actual unsecured creditor under § 544(b). *See In re Hinsley*, 201 F.3d 638 (5<sup>th</sup> Cir. 2000) (agreements to partition community property assets were void as fraudulent transfers, and all restored community property interests were in husband’s bankruptcy estate); *In re Beery*, 295 B.R. 385 (Bankr. D. N.M. 2003) (unrecorded agreement transmuted asset to separate property of wife not binding on creditors or trustee); *but see In re Robertson*, 203 F.3d 855 (5<sup>th</sup> Cir. 2000) (trustee could not set aside prepetition marital settlement agreement, applying Louisiana law).

- J. **Marital agreements.** The bankruptcy trustee is bound by rights created by state law, including the classification of assets by marital property agreement. See, e.g., *In re Robertson*, 203 F.3d 855 (5<sup>th</sup> Cir. 2000) (prepetition marital settlement agreement removed community property from debtor's estate under Louisiana law); *Matter of Geise*, 132 B.R. 908 (Bankr. E.D. Wis. 1991) (statutory form of marital property agreement providing for nonacquisition of marital property applied to classifications of assets); *Matter of Grady*, 128 B.R. 462 (Bankr. E.D. Wis. 1991) (marital property agreement held enforceable; no fraudulent transfer); *In re Pietri*, 59 B.R. 68 (Bankr. M.D. La. 1986) (a spouse has no property interest in future accumulations of community property, and giving up those rights by agreement was not a conveyance). See also *In re Kimmel*, 378 B.R. 630 (B.A.P. 9<sup>th</sup> Cir. 2007) (postpetition agreement transmuting debtor's income from community to separate property did not create new debt); *In re Hull*, 251 B.R. 726 (B.A.P. 9<sup>th</sup> Cir. 2000) (case remanded to determine effect of marital agreement and if chapter 13 debtor had community property interest in wife's income); *In re Beery*, 295 B.R. 385 (Bankr. D. N.M. 2003) (unrecorded agreement transmuting community property to wife's separate property was not binding on judgment lien creditor or trustee); *Schultz v. Sykes*, 2001 WI App 260, 248 Wis.2d 791, 638 N.W.2d 76 (App. 2001) (wife's judgment creditor not bound by marital property agreement without notice and could recover husband's wages in garnishment action).
- K. **Administration.** Chapter 7 estate is administered as sub-estates in which community claims and other claims can be paid from sub-estates holding funds derived from certain types of community property and other property. 11 U.S.C. § 726(c); *In re Provenza*, 316 B.R. 177, 213-15 (Bankr. E.D. La. 2003), *rev'd on other grounds*, 82 Fed. Appx. 101 (5<sup>th</sup> Cir. 2003); see also Part V, *infra*.
- L. **Domestic partnership.** The California Domestic Partner Rights and Responsibilities Act (DPPRA) appears not to bring all property of the partners into the estate, although property of the partners for most purposes in California is treated similarly to community property. See Cal. Fam. Code § 297.5(k). There are still certain distinctions between partners and spouses, even under California law, and the supremacy clause of the U.S. Constitution, art. VI, cl.2, invalidates state laws to the extent a law interferes with or is contrary to federal law. See *In re Rabin*, 359 B.R. 242 (B.A.P. 9<sup>th</sup> Cir. 2007).

II. **Claims** - 11 U.S.C. §§ 501, 502.

- A. **Definitions.** In general, a "claim" is a right to payment. § 101(5). A claim against the debtor includes a claim against the debtor's property. § 102(2).

A "community claim" is one for which property of the kind described in § 541(a)(2) is liable, whether or not there is such property in the estate. § 101(7). "Creditor" includes an entity that has a community claim. § 101(10)(C). See also *In re Rollinson*, 322 B.R. 879 (Bankr. D. Ariz. 2005) (note signed by both spouses to repay embezzlement by wife was community claim); *In re Silver*, 367 B.R. 795 (Bankr. D. N.M. 2007), *aff'd*, 378 B.R. 418 (B.A.P. 10<sup>th</sup> Cir. 2007) (tort committed by debtor's non-filing spouse was community claim under New Mexico law, giving creditor standing to move to revoke discharge).

- B. **Notice to community claimants.** Every holder of a community claim, i.e., all creditors having claims against the debtor or the debtor's spouse, are entitled to notice of the debtor's bankruptcy. § 342(a). *In re Sweitzer*, 111 B.R. 792, 798-99 (Bankr. W.D. Wis. 1990).
- C. **Proof of claim.** Filing a proof of claim, except in certain instances under ch. 11, is required for the creditor to receive a distribution from the estate. Fed. R. Bankr. P. 3002. Consequently, if filing is necessary in a particular case, a community creditor of either the debtor or the debtor's spouse should file a proof of claim. Claims are determined as of the commencement of a case. See *In re Nelson*, 308 B.R. 343 (Bankr. E.D. Wis. 2004) (chapter 13 debtor's spouse's chapter 7 discharge did not prevent payment of community claims under chapter 13 plan for case filed before chapter 7 case).
- D. **Claims against entity owned by debtor.** Claims against an entity that is property of the estate are not necessarily claims against the debtor. For example, a creditor having a claim against the corporation owned by the debtor, the stock of which is property of the debtor's estate, does not have a claim against the debtor.
- E. **Obligations under decree of dissolution.** Obligations assigned to the debtor under a decree of dissolution create personal liability and become a claim against the debtor. See also *In re Spirtos*, 154 B.R. 550 (B.A.P. 9<sup>th</sup> Cir. 1993), *aff'd*, 56 F.3d 1007 (9<sup>th</sup> Cir. 1995) (applying California law); *In re LeJeune*, 283 B.R. 398 (Bankr. E.D. La. 2002) (claim of debtor's husband for reimbursement of community expenses was not ripe as property division not determined).
- F. **Chapter 13 eligibility.** Community claims incurred by both spouses are considered in calculating eligibility for chapter 13. *In re Monroe*, 282 B.R. 219 (Bankr. D. Ariz. 2002) (large RICO judgment entered in Indiana against debtor's nonfiling spouse was community claim that disqualified Arizona debtor for chapter 13 relief). See also *In re Pfalzgraf*, 236 B.R. 390 (Bankr. E.D. Wis. 1999) (former wife of debtor's nonfiling spouse had community

claim for child support in debtor's chapter 13 case, but claim was not entitled to priority because it was not for children of debtor); *In re Oliphant*, 221 B.R. 506 (Bankr. D. Ariz. 1998) (embezzlement by debtor's former spouse was community claim as under Arizona law it could be satisfied from debtor's share of a new community to extent of debtor's contribution).

- G. **Claim by debtor's spouse.** A claim by one spouse for his/her share of community property assets is a community claim recoverable from community property sub-estate. *In re Provenza*, 316 B.R. 177 (Bankr. E.D. La. 2003), *rev'd on other grounds*, 82 Fed. Appx. 101 (5<sup>th</sup> Cir. 2003).

### III. Exemptions - § 522(b).

- A. **State or federal exemptions.** In some states a debtor has the option of claiming exemptions available under nonbankruptcy law or exemptions available under bankruptcy law. § 522(b). Many states have passed laws requiring use of only the state exemptions, which federal law authorizes. If spouses have a choice of state or federal exemptions and file a joint case, or their cases are subject to joint administration, they must both choose either state or federal exemptions; one cannot choose state and the other federal exemptions. *Id.* If an exempt community property asset passes through the estate of one spouse, and the other spouse subsequently files and claims an exemption, the exemption is not necessarily lost *In re Bartlett*, 24 B.R. 605 (B.A.P. 9<sup>th</sup> Cir. 1982) (entire exempt homestead was in both estates, filed at different times, but total exemption was not expanded). See also § 522(b)(3), as amended by BAPCPA, applicable to cases filed on or after October 17, 2005 (venue for claim of exemptions); *In re Rabin*, 359 B.R. 242 (B.A.P. 9<sup>th</sup> Cir. 2007) (registered domestic partners bound by California law limiting them to one homestead exemption).
- B. **Claim by debtor.** Only an "individual debtor" can claim exemptions. § 522(b). This does not include a spouse who does not file a petition. *In re Homan*, 112 B.R. 356 (B.A.P. 9<sup>th</sup> Cir. 1989) (debtor's nonfiling spouse was not entitled to claim exemption in community property house in which she lived); *In re Manso*, 348 B.R. 74 (Bankr. E.D. La. 2005) (applying Louisiana exemptions, husband could not claim community property car used by wife, even though it was in his estate, and her income was necessary for plan); *In re Victor*, 341 B.R. 775 (Bankr. D. N.M. 2006) (debtor could claim exemption in only one half of community property assets in estate); *In re Bippert*, 311 B.R. 456 (Bankr. W.D. Tex. 2004) (husband could not claim personal injury claim exemption as claim was only in wife's estate, although he could claim exemption for damages to community); *In re Morgan*, 286 B.R. 678 (Bankr. E.D. Wis. 2002) (same); *In re DeHaan*, 275 B.R. 375 (Bankr. D. Idaho 2002) (filing spouse cannot claim exemptions on behalf of

nonfiling spouse, even though nonfiling spouse's interest in community property is in estate). Similarly, in *In re Page*, 171 B.R. 349 (Bankr. W.D. Wis. 1994), the debtor was allowed only to avoid the lien on his interest, i.e., one half of the marital property asset. The claim of exemption in the entire asset was not objected to, but a timely objection probably would have been sustained because an individual debtor choosing the federal exemptions can claim only "the debtor's interest" in the types of assets listed. § 522(d). See also *In re Bryan*, 126 B.R. 108 (Bankr. D. N.M. 1991) (co-debtor was not allowed a tools of the trade exemption under New Mexico law of her community property interest in tools because she was not in the business). But see *In re Perez*, 302 B.R. 661 (Bankr. D. Ariz. 2003) (debtor could claim exemptions for himself and nonfiling spouse because Arizona law allows either spouse to act for benefit of community); *In re Barnes*, 14 B.R. 788 (Bankr. N.D. Tex. 1981) (in a joint case the court allowed husband to claim exemption in community property income tax refund earned only by the wife because the refund was in both estates). See also *supra* I.C. A literal reading of § 522(b) appears to limit a debtor to one-half of the value of each potentially exempt community property asset; however, to allow a meaningful claim of exemption to a debtor who does not file a joint case, this might also be interpreted to allow an exemption in the entire asset, provided it cannot be divided, as a community property interest is indivisible. *In re Xiong*, 2006 WL 1277129 (Bankr. E.D. Wis.).

- C. **Claim by debtor's dependent.** If the debtor does not file a list of exemptions, a dependent of the debtor can do so. § 522(l); Fed. R. Bankr. P. 4003(a); § 522(a)(1) (definition of dependent includes the debtor's spouse, whether or not actually dependent); but see *In re Morgan*, 286 B.R. 678 (Bankr. E.D. Wis. 2002) (estranged nondebtor spouse could not claim homestead exemption in community property house because debtor had not done so, even though she resided in the house); *In re Homan*, 112 B.R. 356 (B.A.P. 9<sup>th</sup> Cir. 1989) (nondebtor spouse was not allowed to supplement exemptions claimed by the debtor, even though the list was incomplete); *In re Crouch*, 33 B.R. 271 (Bankr. E.D. N.C. 1983) (exemptions must be filed in good faith and not to defeat the other spouse's rights).
- D. **Liens.** Liens awarded to one spouse in divorce judgment dividing community property that secure that spouse's interest in the asset being awarded to the other are usually not avoidable under § 522(f). *Farrey v. Sanderfoot*, 500 U.S. 291, 111 S. Ct. 1825, 114 L. Ed. 2d 337 (1991); *In re Foss*, 200 B.R. 660 (B.A.P. 9<sup>th</sup> Cir. 1996); *In re Barnes*, 198 B.R. 779 (B.A.P. 9<sup>th</sup> Cir. 1996); *In re Mingo*, 189 B.R. 514 (Bankr. D. Idaho 1995). See also *In re Huskey*, 183 B.R. 218 (Bankr. S.D. Cal. 1995). However, liens of creditors that attach to community property that is later awarded to the debtor spouse may be subject to avoidance. See *In re Stoneking*, 225 B.R. 690 (B.A.P. 9<sup>th</sup> Cir. 1998); *In re Schmiedel*, 236 B.R. 393, 398-99 (Bankr. E.D. Wis. 1999). See

also *In re Maynard*, 264 B.R. 209 (B.A.P. 9<sup>th</sup> Cir. 2001) (entire value of community property real estate included in chapter 13 debtor's estate for purpose of determining lien avoidance under § 506, even though only one spouse filed bankruptcy); *In re Hegg*, 239 B.R. 833 (Bankr. D. Idaho 1999) (debtor's husband's tax lien that attached to community property residence was not extinguished when debtor was awarded residence in divorce).

IV. **Effect of the bankruptcy discharge and objections to the discharge and dischargeability of a debt - 11 U.S.C. § 524(a)(3).**

- A. **“Phantom” discharge.** The debtor's discharge operates as an injunction prohibiting recovery of property of the debtor of the kind described in § 541(a)(2) (community property) on account of an allowable community claim (§ 101(7)) in the debtor's case that is not excepted from the discharge. § 524(a)(3). See *In re Kimmel*, 378 B.R. 630 (B.A.P. 9<sup>th</sup> Cir. 2007); *In re Strickland*, 153 B.R. 909 (Bankr. D. N.M. 1993); *In re Costanza*, 151 B.R. 588 (Bankr. D. N.M. 1993); *In re Karber*, 25 B.R. 9 (Bankr. N.D. Tex. 1982); *In re Green*, 12 B.R. 594 (Bankr. D. N.M. 1981) (discharge injunction operated to prevent enforcement of community claims against the debtor's spouse as well as the debtor); *Norwest Fin. v. Lawver*, 849 P.2d 324 (Nev. 1993); 3 Collier on Bankruptcy ¶ 524.01[2]; see also *In re Maready*, 122 B.R. 378 (B.A.P. 9<sup>th</sup> Cir. 1991) (case remanded to determine if debt was a community claim). When only one spouse files a bankruptcy case, this may be referred to as a “phantom discharge” as it protects the interests of both the debtor and the debtor's spouse in community property acquired after the bankruptcy. See *In re Kimmel*, 367 B.R. 174 (Bankr. N.D. Cal. 2007), *aff'd*, 378 B.R. 630 (B.A.P. 9<sup>th</sup> Cir. 2007) (action time barred). In *In re Nelson*, 308 B.R. 343 (Bankr. E.D. Wis. 2004), the debtors filed a joint chapter 13 case, and the wife subsequently converted her case to chapter 7. The husband then moved to disallow community claims as being unenforceable under § 524(a)(3) since the plan was being funded by his community property income. The court held that claims were determined under § 502 in the chapter 13 case as of the filing of the case, which occurred before the wife's chapter 7 discharge, and payments were not community property once they were received by the trustee. Thus, his objection was overruled.
- B. **“Hypothetical” discharge.** The action objecting to the dischargeability of a debt incurred by the debtor's spouse must be filed within the same time that such actions must be filed against the debtor. § 524(a)(3); Fed. R. Bankr. P. 4007. This is the so-called “hypothetical discharge” of the debt. See *In re Schmeidel*, 236 B.R. 393 (Bankr. E.D. Wis. 1999) (creditors who were not scheduled but who had actual notice of the debtor's bankruptcy failed to file timely objection to hypothetical discharge of debtor's spouse and were bound by discharge with respect to community property only); *In re Costanza*, 151

B.R. 588 (Bankr. D. N.M. 1993) (creditor failed to object to hypothetical discharge in debtor's wife's earlier bankruptcy and was precluded from recovery of community property even though the debt was nondischargeable as to the debtor). If the conduct of the debtor spouse might result in an exception to the discharge, the other spouse is not a necessary party. *In re Maready*, 122 B.R. 378 (B.A.P. 9<sup>th</sup> Cir. 1991). However, if the conduct of the nondebtor might result in the exception, the nondebtor is a necessary party. *In re Braziel*, 127 B.R. 156 (Bankr. W.D. Tex. 1991). See also *In re Smith*, 140 B.R. 904 (Bankr. D. N.M. 1992) (nondischargeability action should have been brought in the debtor's spouse's case since the spouse had filed a separate case). Creditors of both spouses must receive sufficient notice that one spouse has filed a bankruptcy case, and some districts have local rules to this effect. See also *In re Sweitzer*, 111 B.R. 792, 798-99 (Bankr. W.D. Wis. 1990); Official Bankruptcy Forms.

- C. **Exceptions to discharge.** If a debt is excepted from discharge, both spouses' interests in community property are subject to recovery, and assets available for recovery under state law are available notwithstanding the bankruptcy. *In re Hibbs*, 161 B.R. 259 (Bankr. C.D. Cal. 1993); *In re Giantvalley*, 14 B.R. 457 (Bankr. D. Nev. 1981); *In re Bernardelli*, 12 B.R. 123 (Bankr. D. Nev. 1981). This results even though the innocent spouse was also a debtor and received a discharge. See *Matter of Grimm*, 82 B.R. 989 (Bankr. W.D. Wis. 1988); *In re LeSueur*, 53 B.R. 414 (Bankr. D. Ariz. 1985).
- D. **Recovery of non-community property.** The discharge does not protect the assets of a liable spouse after divorce or death of the debtor since the assets are no longer classified as community property. *In re Strickland*, 153 B.R. 909 (Bankr. D. N.M. 1993); *In re Von Burg*, 16 B.R. 747 (Bankr. E.D. Cal. 1982). “[T]he Devil himself could effectively receive a discharge in bankruptcy if he were married to Snow White.’ To this I would add: if he does not treat her better than his creditors, she will, by divorcing him, deny his discharge.” *In re Costanza*, 151 B.R. 588, 590 (Bankr. D. N.M. 1993) (quoting Alan Pedlar, *Community Property and the Bankruptcy Act of 1978*, 11 St. Mary’s L.J. 349, 382 (1979)). The phantom discharge does not protect the noncommunity property of the liable, nonfiling spouse. *In re Strickland*, 153 B.R. 909; see also *Sanwa Bank California v. Chang*, 87 Cal.App.4th 1314, 105 Cal.Rptr.2d 330 (2001) (asset fraudulently transferred to wife and not administered in husband’s bankruptcy was not protected by discharge injunction).
- E. **Phantom discharge inapplicable.** The discharge injunction protecting community property from recovery for allowable community claims does not apply if:

1. The debtor's spouse filed a case within six years of the filing of the debtor's case and was not granted a discharge; or
2. The court would not grant the debtor's spouse a discharge if the debtor's spouse had filed a case at the same time the debtor filed, and the court makes the determination within the same time and in the same manner the court would have made a determination of whether to grant the debtor a discharge (objection to "hypothetical discharge"). § 524(b); Fed. R. Bankr. P. 4004; *In re Marusic*, 139 B.R. 727 (Bankr. W.D. Wash. 1992). The same chapter as the debtor's case must be applied to determine if the nonfiling spouse would be entitled to the hypothetical discharge. *In re Dyson*, 277 B.R. 84 (Bankr. M.D. La. 2002) (chapter 13 discharge would be available for nondebtor spouse's fraud debt, so the community property protection would apply to debtor's chapter 13 discharge).
3. Claims are allowed in a case before the § 524(a)(3) discharge applies. *In re Nelson*, 308 B.R. 343 (Bankr. E.D. Wis. 2004). See *supra* IV.A.

F. **Automatic stay.** Similarly, in *In re Passmore*, 156 B.R. 595 (Bankr. E.D. Wis. 1993), the court held that both halves of the chapter 7 debtor's interest in marital property were protected by the automatic stay before the discharge was issued. See 11 U.S.C. § 362(a)(6). See also *In re Chestnut*, 422 F.3d 298 (5<sup>th</sup> Cir. 2005) (stay covered non-debtor's property when debtor had "arguable" community property interest). The stay does not apply to recovery of the liable, nonfiling spouse's individual property. *Matter of Kastner*, 197 B.R. 620, 624 (Bankr. E.D. La. 1996). Likewise, it does not prevent discovery of individual property that might be recoverable by the creditor. *In re Moore*, 318 B.R. 679 (Bankr. W.D. Wis. 2004).

## V. **Distribution of Community Property** - 11 U.S.C. § 726.

A. **Sub-estates created.** Section 726(c) sets forth the rules for distribution of community property, or the proceeds of such property, in a chapter 7 case. It applies where the estate of the debtor holds community property, as defined in § 541(a)(2), as well as other property for distribution. Section 726(c) requires that community property be separated from other property of the estate and distributed in the order enumerated in subsections (c)(1) and (c)(2). Subsection (c)(1) provides that the first distributions from community property shall go toward administrative claims as defined in § 503: "Claims allowed under section 503 of this title shall be paid either from property of the kind specified in section 541(a)(2) [i.e., community property] of this title, or from other property of the estate, as the interest of justice requires."

- B. **Proration of administrative expenses.** Administrative expenses are paid from property of the estate “as the interest of justice requires.” In apportioning administrative expenses between community and other property of the estate, the court will consider the amount of each kind of property in the estate, the relative cost of preservation and liquidation of each kind of property, and whether any particular administrative expenses are attributable to one kind of property or another.
- C. **Chapters other than chapter 7.** Similar to other areas of § 726 regarding distribution, the rules will be relevant in reorganization cases under chapters 11, 12, and 13 for determining whether the best interests of the creditors are met by the proposed plan. See §§ 1129(a)(7), 1225(a)(4), 1325(a)(4); *In re Whitus*, 240 B.R. 705 (Bankr. W.D. Tex. 1999).
- D. **Distribution of sub-estates.** Under § 726(c)(2), claims are paid in the normal order for liquidations as described in § 726(a). The types of property used to satisfy those claims are distributed in the following order:
1. **Community Property Generally.** Community claims against either the debtor or nondebtor spouse are paid from any community property except to the extent such property is solely liable for the debts of the debtor.
  2. **Community Property; Special Liability.** Any community claims not satisfied under the previous distribution are paid from community property that is solely liable for the debts of the debtor.
  3. **Separate and Other Property.** Any remaining community claims, and all other claims against the debtor, are paid from the debtor's non-community property.
  4. **Any Remaining Property.** Any community claims against the debtor or debtor's spouse still remaining are satisfied with whatever property remains in the estate.

## Appendix to *Community Property, Divorce and Bankruptcy Outline*

### 11 U.S.C. § 501 Filing of proofs of claims or interests

- (a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest.
- (b) If a creditor does not timely file a proof of such creditor's claim, an entity that is liable to such creditor with the debtor, or that has secured such creditor, may file a proof of such claim.
- (c) If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.
- (d) A claim of a kind specified in section 502(e)(2), 502(f), 502(g), 502(h) or 502(i) of this title may be filed under subsection (a), (b), or (c) of this section the same as if such claim were a claim against the debtor and had arisen before the date of the filing of the petition.
- (e) A claim arising from the liability of a debtor for fuel use tax assessed consistent with the requirements of section 31705 of title 49 may be filed by the base jurisdiction designated pursuant to the International Fuel Tax Agreement (as defined in section 31701 of title 49) and, if so filed, shall be allowed as a single claim.

### 11 U.S.C. § 502 Allowance of claims or interests

- (a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.
- (b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that--
  - (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;
  - (2) such claim is for unmatured interest;
  - (3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;
  - (4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;
  - (5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;
  - (6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds--
    - (A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of--
      - (i) the date of the filing of the petition; and
      - (ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus
    - (B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;
  - (7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds--
    - (A) the compensation provided by such contract, without acceleration, for one year following the earlier of--
      - (i) the date of the filing of the petition; or
      - (ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus
    - (B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;
  - (8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor; or
  - (9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide, and except that in a case under chapter 13, a claim of a governmental unit for a tax with respect to a return filed under section 1308 shall be timely if the claim is filed on or before the date that is 60 days after the date on which such return was filed as required.
- (c) There shall be estimated for purpose of allowance under this section--

- (1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or
- (2) any right to payment arising from a right to an equitable remedy for breach of performance.
- (d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.
- (e)(1) Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that--
- (A) such creditor's claim against the estate is disallowed;
  - (B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or
  - (C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title.
- (2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of the filing of the petition.
- (f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.
- (g)(1) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.
- (2) A claim for damages calculated in accordance with section 562 shall be allowed under subsection (a), (b), or (c), or disallowed under subsection (d) or (e), as if such claim had arisen before the date of the filing of the petition.
- (h) A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.
- (i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(8) of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.
- (j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.
- (k)(1) The court, on the motion of the debtor and after a hearing, may reduce a claim filed under this section based in whole on an unsecured consumer debt by not more than 20 percent of the claim, if--
- (A) the claim was filed by a creditor who unreasonably refused to negotiate a reasonable alternative repayment schedule proposed on behalf of the debtor by an approved nonprofit budget and credit counseling agency described in section 111;
  - (B) the offer of the debtor under subparagraph (A)--
    - (i) was made at least 60 days before the date of the filing of the petition; and
    - (ii) provided for payment of at least 60 percent of the amount of the debt over a period not to exceed the repayment period of the loan, or a reasonable extension thereof; and
  - (C) no part of the debt under the alternative repayment schedule is nondischargeable.
- (2) The debtor shall have the burden of proving, by clear and convincing evidence, that--
- (A) the creditor unreasonably refused to consider the debtor's proposal; and
  - (B) the proposed alternative repayment schedule was made prior to expiration of the 60-day period specified in paragraph (1)(B)(i).

## 11 U.S.C. § 522 Exemptions

(a) In this section--

(1) "dependent" includes spouse, whether or not actually dependent; and

(2) "value" means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate.

(b)(1) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (3) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, one debtor may not elect to exempt property listed in paragraph (2) and the other debtor elect to exempt property listed in paragraph (3) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (2), where such election is permitted under the law of the jurisdiction where the case is filed.

(2) Property listed in this paragraph is property that is specified under subsection (d), unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize.

(3) Property listed in this paragraph is--

(A) subject to subsections (o) and (p), any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition or if the debtor's domicile has not been located at a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place;

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law; and

(C) retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.

If the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d).

(4) For purposes of paragraph (3)(C) and subsection (d)(12), the following shall apply:

(A) If the retirement funds are in a retirement fund that has received a favorable determination under section 7805 of the Internal Revenue Code of 1986, and that determination is in effect as of the date of the filing of the petition in a case under this title, those funds shall be presumed to be exempt from the estate.

(B) If the retirement funds are in a retirement fund that has not received a favorable determination under such section 7805, those funds are exempt from the estate if the debtor demonstrates that--

(i) no prior determination to the contrary has been made by a court or the Internal Revenue Service; and

(ii)(I) the retirement fund is in substantial compliance with the applicable requirements of the Internal Revenue Code of 1986; or

(II) the retirement fund fails to be in substantial compliance with the applicable requirements of the Internal Revenue Code of 1986 and the debtor is not materially responsible for that failure.

(C) A direct transfer of retirement funds from 1 fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986, under section 401(a)(31) of the Internal Revenue Code of 1986, or otherwise, shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such direct transfer.

(D)(i) Any distribution that qualifies as an eligible rollover distribution within the meaning of section 402(c) of the Internal Revenue Code of 1986 or that is described in clause (ii) shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such distribution.

(ii) A distribution described in this clause is an amount that--

(I) has been distributed from a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986; and

(II) to the extent allowed by law, is deposited in such a fund or account not later than 60 days after the distribution of such amount.

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except--

(1) a debt of a kind specified in paragraph (1) or (5) of section 523(a) (in which case, notwithstanding any provision of applicable nonbankruptcy law to the contrary, such property shall be liable for a debt of a kind specified in section 523(a)(5));

(2) a debt secured by a lien that is--

(A)(i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549, or 724(a) of this title; and

(ii) not void under section 506(d) of this title; or

(B) a tax lien, notice of which is properly filed;

(3) a debt of a kind specified in section 523(a)(4) or 523(a)(6) of this title owed by an institution-affiliated party of an insured depository institution to a Federal depository institutions regulatory agency acting in its capacity as conservator, receiver, or liquidating agent for such institution; or

(4) a debt in connection with fraud in the obtaining or providing of any scholarship, grant, loan, tuition, discount, award, or other financial assistance for purposes of financing an education at an institution of higher education (as that term is defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001)).

(d) The following property may be exempted under subsection (b)(2) of this section:

(1) The debtor's aggregate interest, not to exceed \$20,200 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's interest, not to exceed \$3,225 in value, in one motor vehicle.

(3) The debtor's interest, not to exceed \$525 in value in any particular item or \$10,775 in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed \$1,350 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest in any property, not to exceed in value \$1,075 plus up to \$10,125 of any unused amount of the exemption provided under paragraph (1) of this subsection.

(6) The debtor's aggregate interest, not to exceed \$2,025 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmaturing life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value \$10,775 less any amount of property of the estate transferred in the manner specified in section 542(d) of this title, in any accrued dividend or interest under, or loan value of, any unmaturing life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive--

(A) a social security benefit, unemployment compensation, or a local public assistance benefit;

(B) a veterans' benefit;

(C) a disability, illness, or unemployment benefit;

(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless--

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

(11) The debtor's right to receive, or property that is traceable to--

(A) an award under a crime victim's reparation law;

(B) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(C) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(D) a payment, not to exceed \$20,200, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or

(E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(12) Retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.

(e) A waiver of an exemption executed in favor of a creditor that holds an unsecured claim against the debtor is unenforceable in a case under this title with respect to such claim against property that the debtor may exempt under subsection (b) of this section. A waiver by the debtor of a power under subsection (f) or (h) of this section to avoid a transfer, under subsection (g) or (i) of this section to exempt property, or under subsection (i) of this section to recover property or to preserve a transfer, is unenforceable in a case under this title.

(f)(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is--

(A) a judicial lien, other than a judicial lien that secures a debt of a kind that is specified in section 523(a)(5); or

(B) a nonpossessory, nonpurchase-money security interest in any--

(i) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(ii) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or

(iii) professionally prescribed health aids for the debtor or a dependent of the debtor.

(2)(A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of--

(i) the lien;

(ii) all other liens on the property; and

(iii) the amount of the exemption that the debtor could claim if there were no liens on the property;

exceeds the value that the debtor's interest in the property would have in the absence of any liens.

(B) In the case of a property subject to more than 1 lien, a lien that has been avoided shall not be considered in making the calculation under subparagraph (A) with respect to other liens.

(C) This paragraph shall not apply with respect to a judgment arising out of a mortgage foreclosure.

(3) In a case in which State law that is applicable to the debtor--

(A) permits a person to voluntarily waive a right to claim exemptions under subsection (d) or prohibits a debtor from claiming exemptions under subsection (d); and

(B) either permits the debtor to claim exemptions under State law without limitation in amount, except to the extent that the debtor has permitted the fixing of a consensual lien on any property or prohibits avoidance of a consensual lien on property otherwise eligible to be claimed as exempt property;

the debtor may not avoid the fixing of a lien on an interest of the debtor or a dependent of the debtor in property if the lien is a nonpossessory, nonpurchase-money security interest in implements, professional books, or tools of the trade of the debtor or a dependent of the debtor or farm animals or crops of the debtor or a dependent of the debtor to the extent the value of such implements, professional books, tools of the trade, animals, and crops exceeds \$5,475 .

(4)(A) Subject to subparagraph (B), for purposes of paragraph (1)(B), the term "household goods" means--

(i) clothing;

(ii) furniture;

(iii) appliances;

(iv) 1 radio;

(v) 1 television;

(vi) 1 VCR;

(vii) linens;

(viii) china;

(ix) crockery;

(x) kitchenware;

(xi) educational materials and educational equipment primarily for the use of minor dependent children of the debtor;

- (xii) medical equipment and supplies;
- (xiii) furniture exclusively for the use of minor children, or elderly or disabled dependents of the debtor;
- (xiv) personal effects (including the toys and hobby equipment of minor dependent children and wedding rings) of the debtor and the dependents of the debtor; and
- (xv) 1 personal computer and related equipment.

(B) The term "household goods" does not include--

- (i) works of art (unless by or of the debtor, or any relative of the debtor);
- (ii) electronic entertainment equipment with a fair market value of more than \$550 in the aggregate (except 1 television, 1 radio, and 1 VCR);
- (iii) items acquired as antiques with a fair market value of more than \$550 in the aggregate;
- (iv) jewelry with a fair market value of more than \$550 in the aggregate (except wedding rings); and
- (v) a computer (except as otherwise provided for in this section), motor vehicle (including a tractor or lawn tractor), boat, or a motorized recreational device, conveyance, vehicle, watercraft, or aircraft.

(g) Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if--

(1)(A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did not conceal such property; or

(2) the debtor could have avoided such transfer under subsection (f)(1)(B) of this section.

(h) The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if--

(1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title or recoverable by the trustee under section 553 of this title; and

(2) the trustee does not attempt to avoid such transfer.

(i)(1) If the debtor avoids a transfer or recovers a setoff under subsection (f) or (h) of this section, the debtor may recover in the manner prescribed by, and subject to the limitations of, section 550 of this title, the same as if the trustee had avoided such transfer, and may exempt any property so recovered under subsection (b) of this section.

(2) Notwithstanding section 551 of this title, a transfer avoided under section 544, 545, 547, 548, 549, or 724(a) of this title, under subsection (f) or (h) of this section, or property recovered under section 553 of this title, may be preserved for the benefit of the debtor to the extent that the debtor may exempt such property under subsection (g) of this section or paragraph (1) of this subsection.

(j) Notwithstanding subsections (g) and (i) of this section, the debtor may exempt a particular kind of property under subsections (g) and (i) of this section only to the extent that the debtor has exempted less property in value of such kind than that to which the debtor is entitled under subsection (b) of this section.

(k) Property that the debtor exempts under this section is not liable for payment of any administrative expense except--

(1) the aliquot share of the costs and expenses of avoiding a transfer of property that the debtor exempts under subsection (g) of this section, or of recovery of such property, that is attributable to the value of the portion of such property exempted in relation to the value of the property recovered; and

(2) any costs and expenses of avoiding a transfer under subsection (f) or (h) of this section, or of recovery of property under subsection (i)(1) of this section, that the debtor has not paid.

(l) The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. If the debtor does not file such a list, a dependent of the debtor may file such a list, or may claim property as exempt from property of the estate on behalf of the debtor. Unless a party in interest objects, the property claimed as exempt on such list is exempt.

(m) Subject to the limitation in subsection (b), this section shall apply separately with respect to each debtor in a joint case.

(n) For assets in individual retirement accounts described in section 408 or 408A of the Internal Revenue Code of 1986, other than a simplified employee pension under section 408(k) of such Code or a simple retirement account under section 408(p) of such Code, the aggregate value of such assets exempted under this section, without regard to amounts attributable to rollover contributions under section 402(c), 402(e)(6), 403(a)(4), 403(a)(5), and 403(b)(8) of the Internal Revenue Code of 1986, and earnings thereon, shall not exceed \$1,095,000 in a case filed by a debtor who is an individual, except that such amount may be increased if the interests of justice so require.

(o) For purposes of subsection (b)(3)(A), and notwithstanding subsection (a), the value of an interest in--

- (1) real or personal property that the debtor or a dependent of the debtor uses as a residence;
- (2) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;
- (3) a burial plot for the debtor or a dependent of the debtor; or
- (4) real or personal property that the debtor or a dependent of the debtor claims as a homestead;

shall be reduced to the extent that such value is attributable to any portion of any property that the debtor disposed of in the 10-year period ending on the date of the filing of the petition with the intent to hinder, delay, or defraud a creditor and that the debtor could not exempt, or that portion that the debtor could not exempt, under subsection (b), if on such date the debtor had held the property so disposed of.

(p)(1) Except as provided in paragraph (2) of this subsection and sections 544 and 548, as a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of interest that was acquired by the debtor during the 1215-day period preceding the date of the filing of the petition that exceeds in the aggregate \$136,875 in value in--

- (A) real or personal property that the debtor or a dependent of the debtor uses as a residence;
- (B) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;
- (C) a burial plot for the debtor or a dependent of the debtor; or
- (D) real or personal property that the debtor or dependent of the debtor claims as a homestead.

(2)(A) The limitation under paragraph (1) shall not apply to an exemption claimed under subsection (b)(3)(A) by a family farmer for the principal residence of such farmer.

(B) For purposes of paragraph (1), any amount of such interest does not include any interest transferred from a debtor's previous principal residence (which was acquired prior to the beginning of such 1215-day period) into the debtor's current principal residence, if the debtor's previous and current residences are located in the same State.

(q)(1) As a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of an interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1) which exceeds in the aggregate \$136,875 if--

(A) the court determines, after notice and a hearing, that the debtor has been convicted of a felony (as defined in section 3156 of title 18), which under the circumstances, demonstrates that the filing of the case was an abuse of the provisions of this title; or

(B) the debtor owes a debt arising from--

- (i) any violation of the Federal securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws;
- (ii) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 or under section 6 of the Securities Act of 1933;
- (iii) any civil remedy under section 1964 of title 18; or
- (iv) any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding 5 years.

(2) Paragraph (1) shall not apply to the extent the amount of an interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1) is reasonably necessary for the support of the debtor and any dependent of the debtor.

## 11 U.S.C. § 524 Effect of discharge

(a) A discharge in a case under this title--

(1) 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 section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

(b) Subsection (a)(3) of this section does not apply if--

- (1)(A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six years of the date of the filing of the petition in the case concerning the debtor; and
- (B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or
- (2)(A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and
- (B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge.
- (c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if--
- (1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;
- (2) the debtor received the disclosures described in subsection (k) at or before the time at which the debtor signed the agreement;
- (3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that--
- (A) such agreement represents a fully informed and voluntary agreement by the debtor;
- (B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and
- (C) the attorney fully advised the debtor of the legal effect and consequences of--
- (i) an agreement of the kind specified in this subsection; and
- (ii) any default under such an agreement;
- (4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;
- (5) the provisions of subsection (d) of this section have been complied with; and
- (6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as--
- (i) not imposing an undue hardship on the debtor or a dependent of the debtor; and
- (ii) in the best interest of the debtor.
- (B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.
- (d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under section 727, 1141, 1228, or 1328 of this title, the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section and was not represented by an attorney during the course of negotiating such agreement, then the court shall hold a hearing at which the debtor shall appear in person and at such hearing the court shall--
- (1) inform the debtor--
- (A) that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement not made in accordance with the provisions of subsection (c) of this section; and
- (B) of the legal effect and consequences of--
- (i) an agreement of the kind specified in subsection (c) of this section; and
- (ii) a default under such an agreement; and
- (2) determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c)(6) of this section, if the consideration for such agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor.
- (e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.
- (f) Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt.
- (g)(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.
- (B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust

described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.

(2)(A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that--

(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization--

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of--

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or

(cc) a subsidiary of each such debtor that is also a debtor; and

(IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (h), the court determines that--

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan--

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

(3)(A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan--

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

- (B) Subparagraph (A) shall not be construed to--
- (i) imply that an entity described in subparagraph (A)(ii) or (iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);
  - (ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or
  - (iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.
- (4)(A)(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.
- (ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of--
    - (I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;
    - (II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;
    - (III) the third party's provision of insurance to the debtor or a related party; or
    - (IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to--
      - (aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or
      - (bb) acquiring or selling a financial interest in an entity as part of such a transaction.
  - (iii) As used in this subparagraph, the term "related party" means--
    - (I) a past or present affiliate of the debtor;
    - (II) a predecessor in interest of the debtor; or
    - (III) any entity that owned a financial interest in--
      - (aa) the debtor;
      - (bb) a past or present affiliate of the debtor; or
      - (cc) a predecessor in interest of the debtor.
- (B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if--
- (i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and
  - (ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.
- (5) In this subsection, the term "demand" means a demand for payment, present or future, that--
- (A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;
  - (B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and
  - (C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).
- (6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

- (7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.
- (h) Application to existing injunctions.--For purposes of subsection (g)--
- (1) subject to paragraph (2), if an injunction of the kind described in subsection (g)(1)(B) was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered before such date, then the injunction shall be considered to meet the requirements of subsection (g)(2)(B) for purposes of subsection (g)(2)(A), and to satisfy subsection (g)(4)(A)(ii), if--
    - (A) the court determined at the time the plan was confirmed that the plan was fair and equitable in accordance with the requirements of section 1129(b);
    - (B) as part of the proceedings leading to issuance of such injunction and confirmation of such plan, the court had appointed a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands described in subsection (g)(4)(B) with respect to such plan; and
    - (C) such legal representative did not object to confirmation of such plan or issuance of such injunction; and
  - (2) for purposes of paragraph (1), if a trust described in subsection (g)(2)(B)(i) is subject to a court order on the date of the enactment of this Act staying such trust from settling or paying further claims--
    - (A) the requirements of subsection (g)(2)(B)(ii)(V) shall not apply with respect to such trust until such stay is lifted or dissolved; and
    - (B) if such trust meets such requirements on the date such stay is lifted or dissolved, such trust shall be considered to have met such requirements continuously from the date of the enactment of this Act.
      - (i) The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.
- (j) Subsection (a)(2) does not operate as an injunction against an act by a creditor that is the holder of a secured claim, if--
- (1) such creditor retains a security interest in real property that is the principal residence of the debtor;
  - (2) such act is in the ordinary course of business between the creditor and the debtor; and
  - (3) such act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.
- (k)(1) The disclosures required under subsection (c)(2) shall consist of the disclosure statement described in paragraph (3), completed as required in that paragraph, together with the agreement specified in subsection (c), statement, declaration, motion and order described, respectively, in paragraphs (4) through (8), and shall be the only disclosures required in connection with entering into such agreement.
- (2) Disclosures made under paragraph (1) shall be made clearly and conspicuously and in writing. The terms "Amount Reaffirmed" and "Annual Percentage Rate" shall be disclosed more conspicuously than other terms, data or information provided in connection with this disclosure, except that the phrases "Before agreeing to reaffirm a debt, review these important disclosures" and "Summary of Reaffirmation Agreement" may be equally conspicuous. Disclosures may be made in a different order and may use terminology different from that set forth in paragraphs (2) through (8), except that the terms "Amount Reaffirmed" and "Annual Percentage Rate" must be used where indicated.
  - (3) The disclosure statement required under this paragraph shall consist of the following:
    - (A) The statement: "Part A: Before agreeing to reaffirm a debt, review these important disclosures:";
    - (B) Under the heading "Summary of Reaffirmation Agreement", the statement: "This Summary is made pursuant to the requirements of the Bankruptcy Code";
    - (C) The "Amount Reaffirmed", using that term, which shall be--
      - (i) the total amount of debt that the debtor agrees to reaffirm by entering into an agreement of the kind specified in subsection (c), and
      - (ii) the total of any fees and costs accrued as of the date of the disclosure statement, related to such total amount.
    - (D) In conjunction with the disclosure of the "Amount Reaffirmed", the statements--
      - (i) "The amount of debt you have agreed to reaffirm"; and
      - (ii) "Your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your credit agreement."
    - (E) The "Annual Percentage Rate", using that term, which shall be disclosed as--

(i) if, at the time the petition is filed, the debt is an extension of credit under an open end credit plan, as the terms "credit" and "open end credit plan" are defined in section 103 of the Truth in Lending Act, then--

(I) the annual percentage rate determined under paragraphs (5) and (6) of section 127(b) of the Truth in Lending Act, as applicable, as disclosed to the debtor in the most recent periodic statement prior to entering into an agreement of the kind specified in subsection (c) or, if no such periodic statement has been given to the debtor during the prior 6 months, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of each such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under subclause (I) and the simple interest rate under subclause (II); or

(ii) if, at the time the petition is filed, the debt is an extension of credit other than under an open end credit plan, as the terms "credit" and "open end credit plan" are defined in section 103 of the Truth in Lending Act, then--

(I) the annual percentage rate under section 128(a)(4) of the Truth in Lending Act, as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to the entering into an agreement of the kind specified in subsection (c) with respect to the debt, or, if no such disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under (I) and the simple interest rate under (II).

(F) If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act, by stating "The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower."

(G) If the debt is secured by a security interest which has not been waived in whole or in part or determined to be void by a final order of the court at the time of the disclosure, by disclosing that a security interest or lien in goods or property is asserted over some or all of the debts the debtor is reaffirming and listing the items and their original purchase price that are subject to the asserted security interest, or if not a purchase-money security interest then listing by items or types and the original amount of the loan.

(H) At the election of the creditor, a statement of the repayment schedule using 1 or a combination of the following--

(i) by making the statement: "Your first payment in the amount of \$\_\_\_ is due on \_\_\_ but the future payment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable.", and stating the amount of the first payment and the due date of that payment in the places provided;

(ii) by making the statement: "Your payment schedule will be:", and describing the repayment schedule with the number, amount, and due dates or period of payments scheduled to repay the debts reaffirmed to the extent then known by the disclosing party; or

(iii) by describing the debtor's repayment obligations with reasonable specificity to the extent then known by the disclosing party.

(I) The following statement: "Note: When this disclosure refers to what a creditor 'may' do, it does not use the word 'may' to give the creditor specific permission. The word 'may' is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. If you don't have an attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held."

(J)(i) The following additional statements:

"Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

"1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).

"2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.

"3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C.

"4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.

"5. The original of this disclosure must be filed with the court by you or your creditor. If a separate reaffirmation agreement (other than the one in Part B) has been signed, it must be attached.

"6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship as explained in Part D.

"7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.

"Your right to rescind (cancel) your reaffirmation agreement. You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

"What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

"Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

"What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A 'lien' is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the security property if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State's law or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you make a single payment to the creditor equal to the current value of the security property, as agreed by the parties or determined by the court."

(ii) In the case of a reaffirmation under subsection (m)(2), numbered paragraph 6 in the disclosures required by clause (i) of this subparagraph shall read as follows:

"6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court."

(4) The form of such agreement required under this paragraph shall consist of the following:

"Part B: Reaffirmation Agreement. I (we) agree to reaffirm the debts arising under the credit agreement described below.

"Brief description of credit agreement:

"Description of any changes to the credit agreement made as part of this reaffirmation agreement:

"Signature: Date:

"Borrower:

"Co-borrower, if also reaffirming these debts:

"Accepted by creditor:

"Date of creditor acceptance:".

(5) The declaration shall consist of the following:

(A) The following certification:

"Part C: Certification by Debtor's Attorney (If Any).

"I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

"Signature of Debtor's Attorney: Date:".

(B) If a presumption of undue hardship has been established with respect to such agreement, such certification shall state that in the opinion of the attorney, the debtor is able to make the payment.

(C) In the case of a reaffirmation agreement under subsection (m)(2), subparagraph (B) is not applicable.

(6)(A) The statement in support of such agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

"Part D: Debtor's Statement in Support of Reaffirmation Agreement.

"1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is \$\_\_\_\_, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total \$\_\_\_\_, leaving \$\_\_\_\_ to make the required payments on this reaffirmed debt. I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: \_\_\_\_.

"2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement."

(B) Where the debtor is represented by an attorney and is reaffirming a debt owed to a creditor defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act, the statement of support of the reaffirmation agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

"I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement."

(7) The motion that may be used if approval of such agreement by the court is required in order for it to be effective, shall be signed and dated by the movant and shall consist of the following:

"Part E: Motion for Court Approval (To be completed only if the debtor is not represented by an attorney.). I (we), the debtor(s), affirm the following to be true and correct:

"I am not represented by an attorney in connection with this reaffirmation agreement.

"I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (provide any additional relevant reasons the court should consider):

"Therefore, I ask the court for an order approving this reaffirmation agreement."

(8) The court order, which may be used to approve such agreement, shall consist of the following:

"Court Order: The court grants the debtor's motion and approves the reaffirmation agreement described above."

(I) Notwithstanding any other provision of this title the following shall apply:

(1) A creditor may accept payments from a debtor before and after the filing of an agreement of the kind specified in subsection (c) with the court.

(2) A creditor may accept payments from a debtor under such agreement that the creditor believes in good faith to be effective.

(3) The requirements of subsections (c)(2) and (k) shall be satisfied if disclosures required under those subsections are given in good faith.

(m)(1) Until 60 days after an agreement of the kind specified in subsection (c) is filed with the court (or such additional period as the court, after notice and a hearing and for cause, orders before the expiration of such period), it shall be presumed that such agreement is an undue hardship on the debtor if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's completed and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt. This presumption shall be reviewed by the court. The presumption may be rebutted in writing by the debtor if the statement includes an explanation that identifies additional sources of funds to make the payments as agreed upon under the terms of such agreement. If the presumption is not rebutted to the satisfaction of the court, the court may disapprove such agreement. No agreement shall be disapproved without notice and a hearing to the debtor and creditor, and such hearing shall be concluded before the entry of the debtor's discharge.

(2) This subsection does not apply to reaffirmation agreements where the creditor is a credit union, as defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act.

### 11 U.S.C. § 541 Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date--

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include--

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that--

(A)(i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

- (B)(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and
  - (ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 542 of this title;
- (5) funds placed in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title, but--
  - (A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;
  - (B) only to the extent that such funds--
    - (i) are not pledged or promised to any entity in connection with any extension of credit; and
    - (ii) are not excess contributions (as described in section 4973(e) of the Internal Revenue Code of 1986); and
  - (C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed \$5,475 ;
- (6) funds used to purchase a tuition credit or certificate or contributed to an account in accordance with section 529(b)(1)(A) of the Internal Revenue Code of 1986 under a qualified State tuition program (as defined in section 529(b)(1) of such Code) not later than 365 days before the date of the filing of the petition in a case under this title, but--
  - (A) only if the designated beneficiary of the amounts paid or contributed to such tuition program was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were paid or contributed;
  - (B) with respect to the aggregate amount paid or contributed to such program having the same designated beneficiary, only so much of such amount as does not exceed the total contributions permitted under section 529(b)(7) of such Code with respect to such beneficiary, as adjusted beginning on the date of the filing of the petition in a case under this title by the annual increase or decrease (rounded to the nearest tenth of 1 percent) in the education expenditure category of the Consumer Price Index prepared by the Department of Labor; and
  - (C) in the case of funds paid or contributed to such program having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed \$5,475 ;
- (7) any amount--
  - (A) withheld by an employer from the wages of employees for payment as contributions--
    - (i) to--
      - (I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;
      - (II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or
      - (III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;
 except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2); or
    - (ii) to a health insurance plan regulated by State law whether or not subject to such title; or
  - (B) received by an employer from employees for payment as contributions--
    - (i) to--
      - (I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;
      - (II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or
      - (III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;
 except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2); or
    - (ii) to a health insurance plan regulated by State law whether or not subject to such title;

(8) subject to subchapter III of chapter 5, any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where--

(A) the tangible personal property is in the possession of the pledgee or transferee;

(B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and

(C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b); or

(9) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made--

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor),

unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law--

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

(e) In determining whether any of the relationships specified in paragraph (5)(A) or (6)(A) of subsection (b) exists, a legally adopted child of an individual (and a child who is a member of an individual's household, if placed with such individual by an authorized placement agency for legal adoption by such individual), or a foster child of an individual (if such child has as the child's principal place of abode the home of the debtor and is a member of the debtor's household) shall be treated as a child of such individual by blood.

(f) Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

## **11 U.S.C. § 726** Distribution of property of the estate

(a) Except as provided in section 510 of this title, property of the estate shall be distributed--

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title, proof of which is timely filed under section 501 of this title or tardily filed on or before the earlier of--

(A) the date that is 10 days after the mailing to creditors of the summary of the trustee's final report; or

(B) the date on which the trustee commences final distribution under this section;

(2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is--

(A) timely filed under section 501(a) of this title;

(B) timely filed under section 501(b) or 501(c) of this title; or

(C) tardily filed under section 501(a) of this title, if--

- (i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and
    - (ii) proof of such claim is filed in time to permit payment of such claim;
  - (3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection;
  - (4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim;
  - (5) fifth, in payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection; and
  - (6) sixth, to the debtor.
- (b) Payment on claims of a kind specified in paragraph (1), (2), (3), (4), (5), (6), (7), or (8) of section 507(a) of this title, or in paragraph (2), (3), (4), or (5) of subsection (a) of this section, shall be made pro rata among claims of the kind specified in each such particular paragraph, except that in a case that has been converted to this chapter under section 1112, 1208, or 1307 of this title, a claim allowed under section 503(b) of this title incurred under this chapter after such conversion has priority over a claim allowed under section 503(b) of this title incurred under any other chapter of this title or under this chapter before such conversion and over any expenses of a custodian superseded under section 543 of this title.
- (c) Notwithstanding subsections (a) and (b) of this section, if there is property of the kind specified in section 541(a)(2) of this title, or proceeds of such property, in the estate, such property or proceeds shall be segregated from other property of the estate, and such property or proceeds and other property of the estate shall be distributed as follows:
- (1) Claims allowed under section 503 of this title shall be paid either from property of the kind specified in section 541(a)(2) of this title, or from other property of the estate, as the interest of justice requires.
  - (2) Allowed claims, other than claims allowed under section 503 of this title, shall be paid in the order specified in subsection (a) of this section, and, with respect to claims of a kind specified in a particular paragraph of section 507 of this title or subsection (a) of this section, in the following order and manner:
    - (A) First, community claims against the debtor or the debtor's spouse shall be paid from property of the kind specified in section 541(a)(2) of this title, except to the extent that such property is solely liable for debts of the debtor.
    - (B) Second, to the extent that community claims against the debtor are not paid under subparagraph (A) of this paragraph, such community claims shall be paid from property of the kind specified in section 541(a)(2) of this title that is solely liable for debts of the debtor.
    - (C) Third, to the extent that all claims against the debtor including community claims against the debtor are not paid under subparagraph (A) or (B) of this paragraph such claims shall be paid from property of the estate other than property of the kind specified in section 541(a)(2) of this title.
    - (D) Fourth, to the extent that community claims against the debtor or the debtor's spouse are not paid under subparagraph (A), (B), or (C) of this paragraph, such claims shall be paid from all remaining property of the estate.