

Module 1: Bankruptcy Overview

Pro Bono Bankruptcy Training Program Material

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Sources of Bankruptcy Law:

Bankruptcy Code

Federal Rules of Bankruptcy Procedure

Official Forms

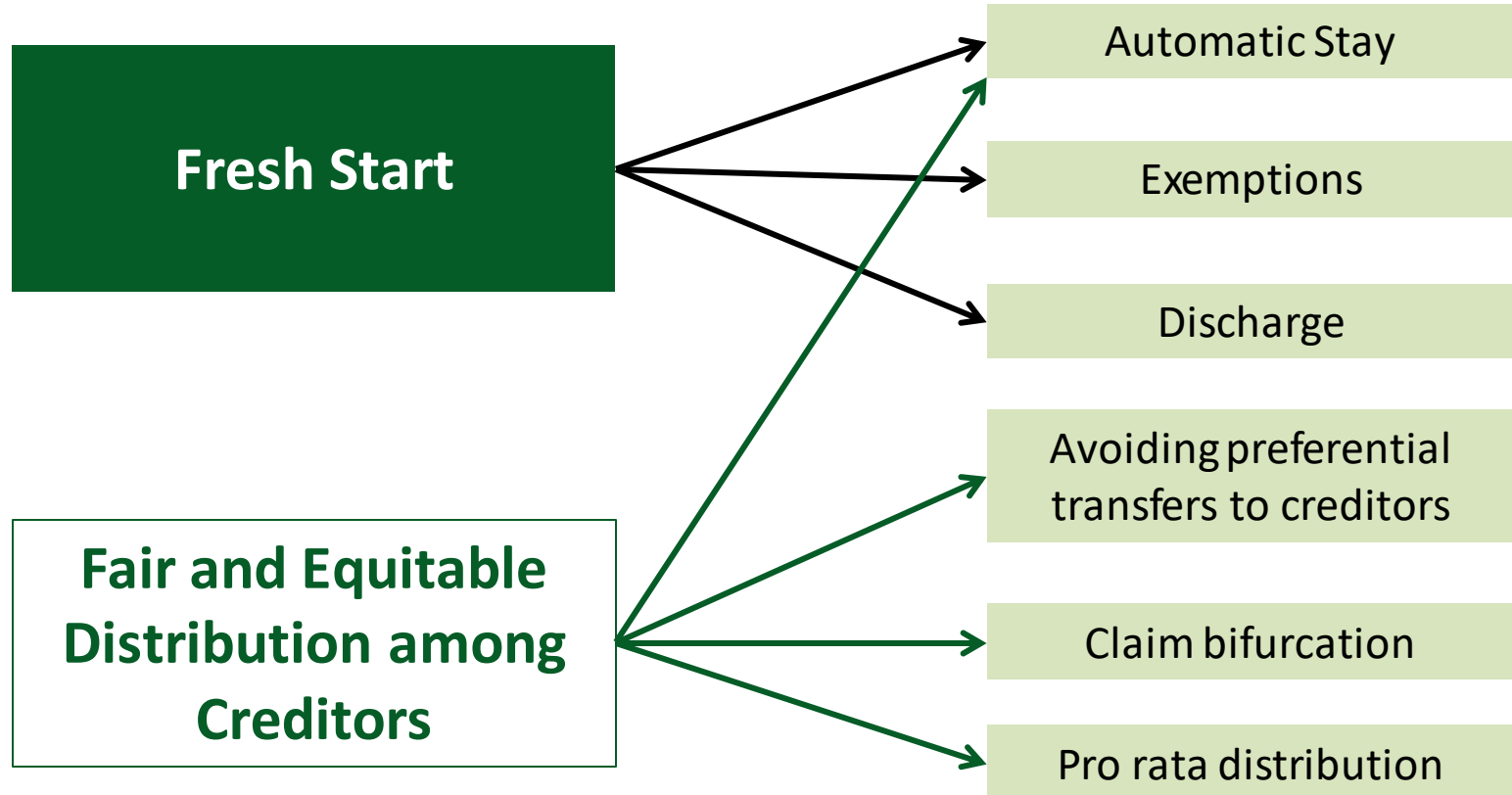
Local Rules and Standing Orders

Two Key Bankruptcy Concepts:

Fresh Start for Debtors

**Fair and Equitable Distribution of
Non-Exempt Assets to Creditors**

Key Bankruptcy Concepts



The Various Chapters

- **Chapter 7:** liquidation
- **Chapter 13:** consumer reorganization
(payment plan)
- **Chapter 11:** reorganization mostly used by
businesses (consumer may elect)

The Various Chapters

- **Chapter 12:** family farmers and fishermen
- **Chapter 9:** municipalities
- **Chapter 15:** cross-border cases involving debtors and assets in more than one country

Chapter 7 Overview

- Debtor files a petition for relief, automatic stay goes into effect;
- Debtor discloses all assets and debts on schedules filed with the court;
- Creditors are paid from proceeds of any nonexempt assets;
- Order is entered discharging debtor, except for certain nondischargeable debts (such as domestic support obligations).

Chapter 13 Overview

- Debtor files a petition for relief, automatic stay goes into effect;
- Debtor discloses all assets and debts on schedules;
- Debtor proposes a chapter 13 plan to pay all or part of the debt over three to five years from future income;

Chapter 13 Overview

- Creditors are paid generally from chapter 13 plan payments made by the debtor and disbursed by trustee;
- Debtor has opportunity to cure arrearages on secured debts – to save a home or car;
- Discharge order is entered when the plan is completed.

PROPERTY OF THE ESTATE AND EXEMPTIONS

The Bankruptcy Estate

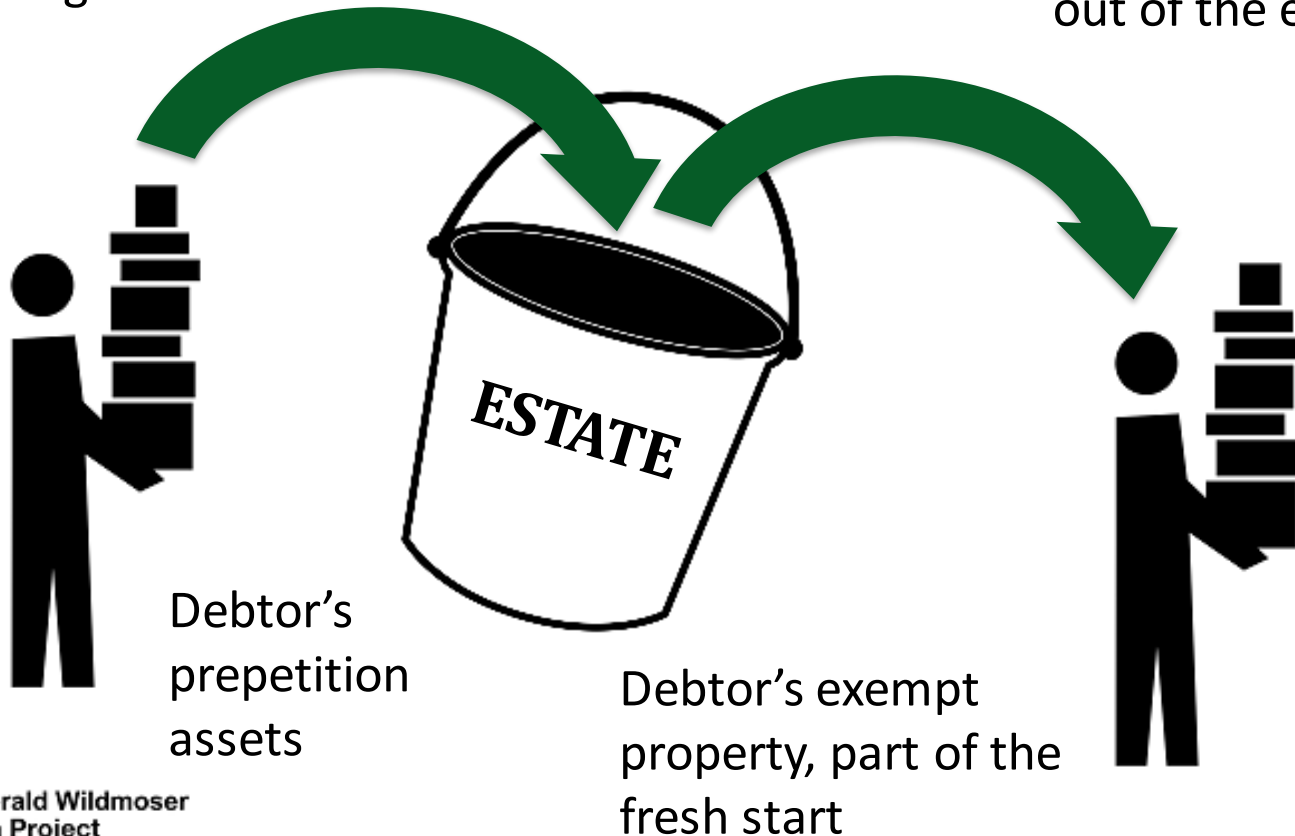
- Virtually all property debtor has interest in at time of filing goes into bankruptcy estate
 - includes intangible, contingent, and future property interests
 - examples include potential cause of action or anticipated tax refund
- Exempt property comes back out of estate
 - property the debtor gets to keep as part of the fresh start

11 U.S.C. § 541

The Bankruptcy Estate

1. Debtor's assets go into the estate upon filing

2. Property claimed as exempt comes out of the estate



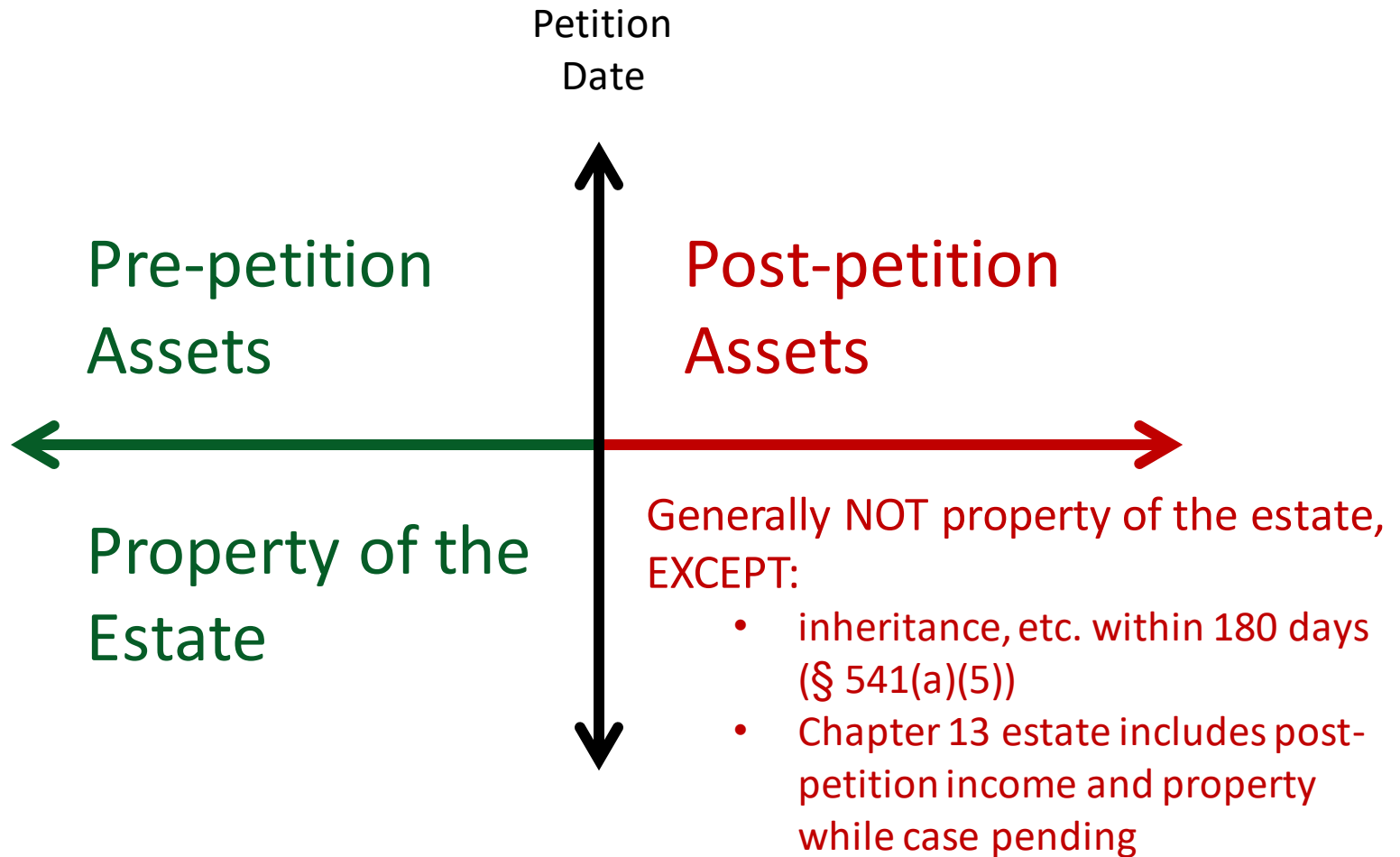
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The Bankruptcy Estate

- In chapter 7 cases, estate does not include property acquired post-petition, except -
 - certain types of property acquired within 180 days after filing:
 - by bequest or inheritance;
 - through a spousal property settlement or divorce decree; or
 - as a life insurance beneficiary
11 U.S.C. § 541(a)(5)
- In chapter 13 cases, includes property and earnings acquired while the case is pending

11 U.S.C. §§ 348(f), 1306

The Bankruptcy Estate



The Bankruptcy Estate

- Certain triggering events make property no longer property of the estate:
 - If the debtor fails to timely redeem, surrender, reaffirm or take other action regarding personal property as indicated by the debtor on Statement of Intention
11 U.S.C. §§ 362(h) and 521(a)(6)
 - Pawned personal property if property is held by lender (pawnshop) and debtor or trustee has not redeemed the property within the time period set under state law (as extended under § 108(b) for an additional 60 days after the petition is filed)
11 U.S.C. § 541(b)(8)

Commonly missed assets

- Tax refunds (when?)
- Alimony or support arrearages
- Security deposits
- Deposits in dormant savings accounts
- Personal injury or other legal claims -- any possible claims, even though law suit not filed (risk of judicial estoppel)
- Cash value in whole life insurance policies

Commonly missed assets

- Inherited real estate/heir property
- Cars being driven by someone else
- Pledged goods at pawnbrokers
- Voidable preferences (payments to creditors in past 90 days)
- Pension plans
- Burial plots

Exemption Choice

Generally, one of two schemes will apply:

- Exemptions available under § 522(d)

OR

- Exemptions available under state law

Exemption Choice

- If the state has “opted out,” then debtor must use state law exemptions
- If the state has not “opted out,” then debtor may choose exemptions under either § 522(d) or state law
 - In a joint case, both spouses must choose same exemption scheme

Exemption Choice

If state law exemption scheme is elected or required (as in an opt-out state), debtor may also exempt:

- Tenancy by entirety or joint tenancy property interest, if exempt from process under state law
- Property exempt under Federal nonbankruptcy law (e.g. Social Security benefits)
- Retirement funds, if exempt from taxation

11 U.S.C. §§ 522(b)(3)(B) and (b)(3)(C)

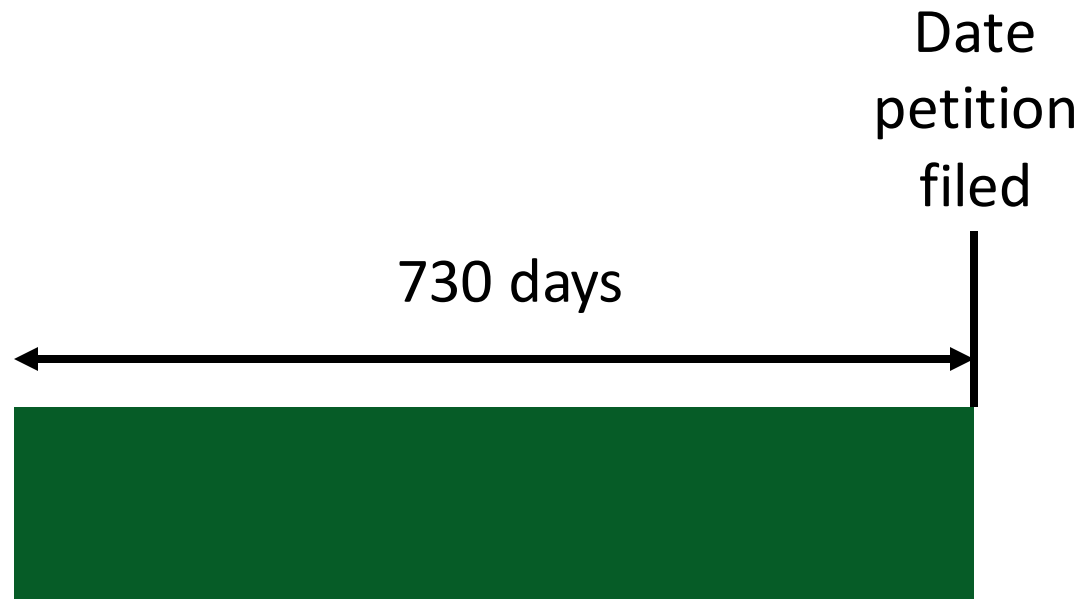
Which Exemptions Apply?

State law as to opt-out applies as follows:

- In most cases, controlling state law will be where debtor was domiciled for 730 days before filing
- If the debtor moved to a different state any time during the 730 days, look **instead** at where the debtor was domiciled for longest portion of the 180 days preceding the 730-day period
- Federal exemptions under § 522(d) apply if debtor ineligible for any state's exemptions

11 U.S.C. § 522(b)(3)(A)

Which Exemptions Apply?

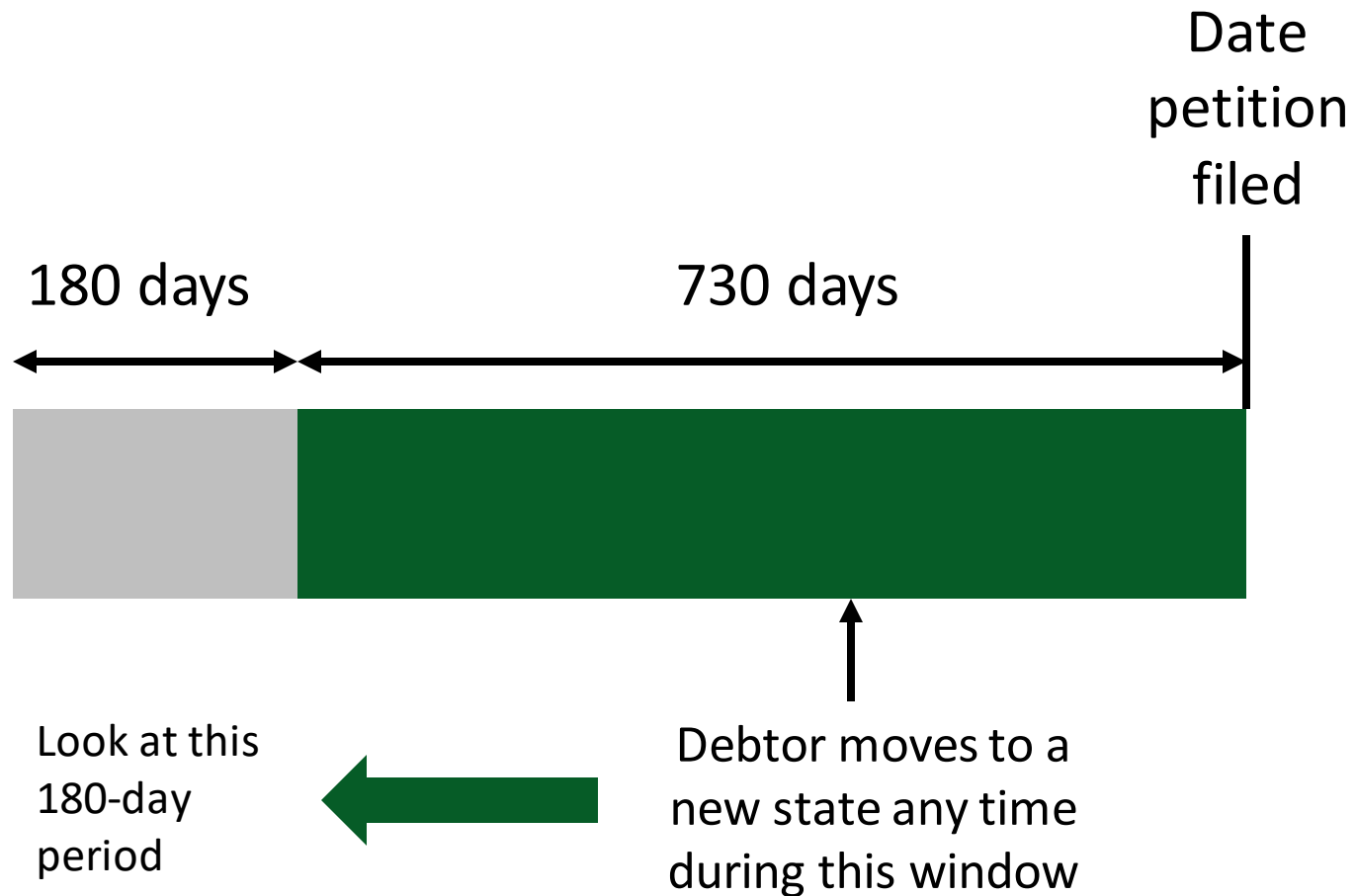


Apply State X exemption law



Lived in State X for past two years

Which Exemptions Apply?




Which Exemptions Apply?

What if Debtor cannot claim any state exemptions?

- Debtor moved from State X to State Y one year ago
- Debtor lived in State X for the entire 180 days prior to the 730 days before filing

Which Exemptions Apply?

- State X exemption law applies
 - BUT State X exemption statute says a debtor may only claim its exemptions if residing in State X (or only for property located in State X)... and debtor now lives in State Y

 Federal exemptions apply if debtor ineligible for any state's exemptions (even if this is an opt-out state!)

Federal Bankruptcy Exemptions

Examples of exemptions under § 522(d):

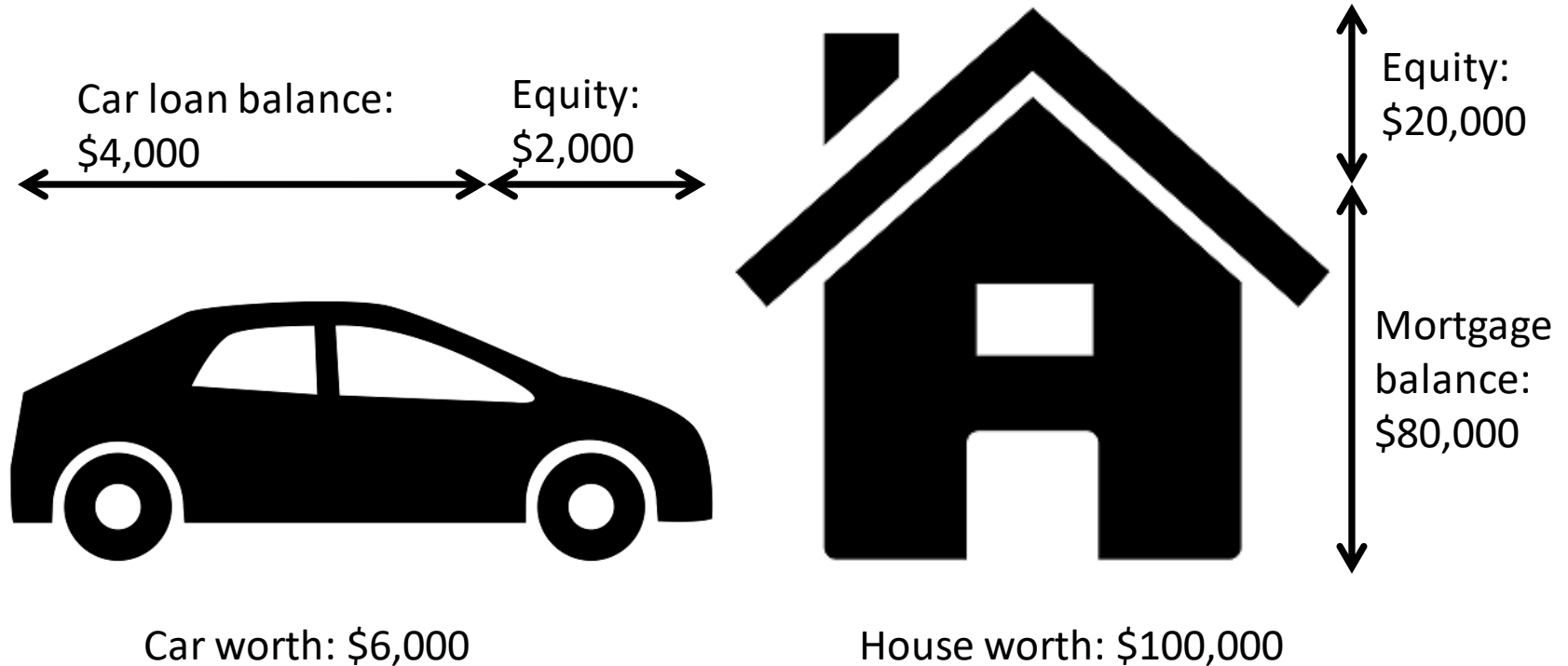
- Up to \$23,675 in real or personal property the debtor uses as a residence;
- Up to \$3,775 in value in one motor vehicle;
- Up to \$12,625 in aggregate value, but no more than \$600 in any particular item, of household furnishings, goods, clothing, appliances, etc;

Federal Bankruptcy Exemptions

- Up to \$1,600 in jewelry;
- Up to \$2,375 in tools of the debtor's trade
- Wild card exemption: \$1,250 plus any unused amount of the homestead exemption, up to \$11,850.
- Amounts are doubled if married couple filing jointly

Calculating Exemptions

Exemptions only apply to **equity** in the property



A \$2,000 vehicle exemption and a \$20,000 real estate exemption would fully exempt this car and house

Protection for Exempt Property

Exempt property is not liable **during or after** case for prepetition debts (even some nondischargeable debts), except:

- Debts for taxes, domestic support obligations
- Debts secured by liens not avoided during the bankruptcy
- Fraudulently obtained: student loan or aid and debt owed to insured bank

11 U.S.C. § 522(c)

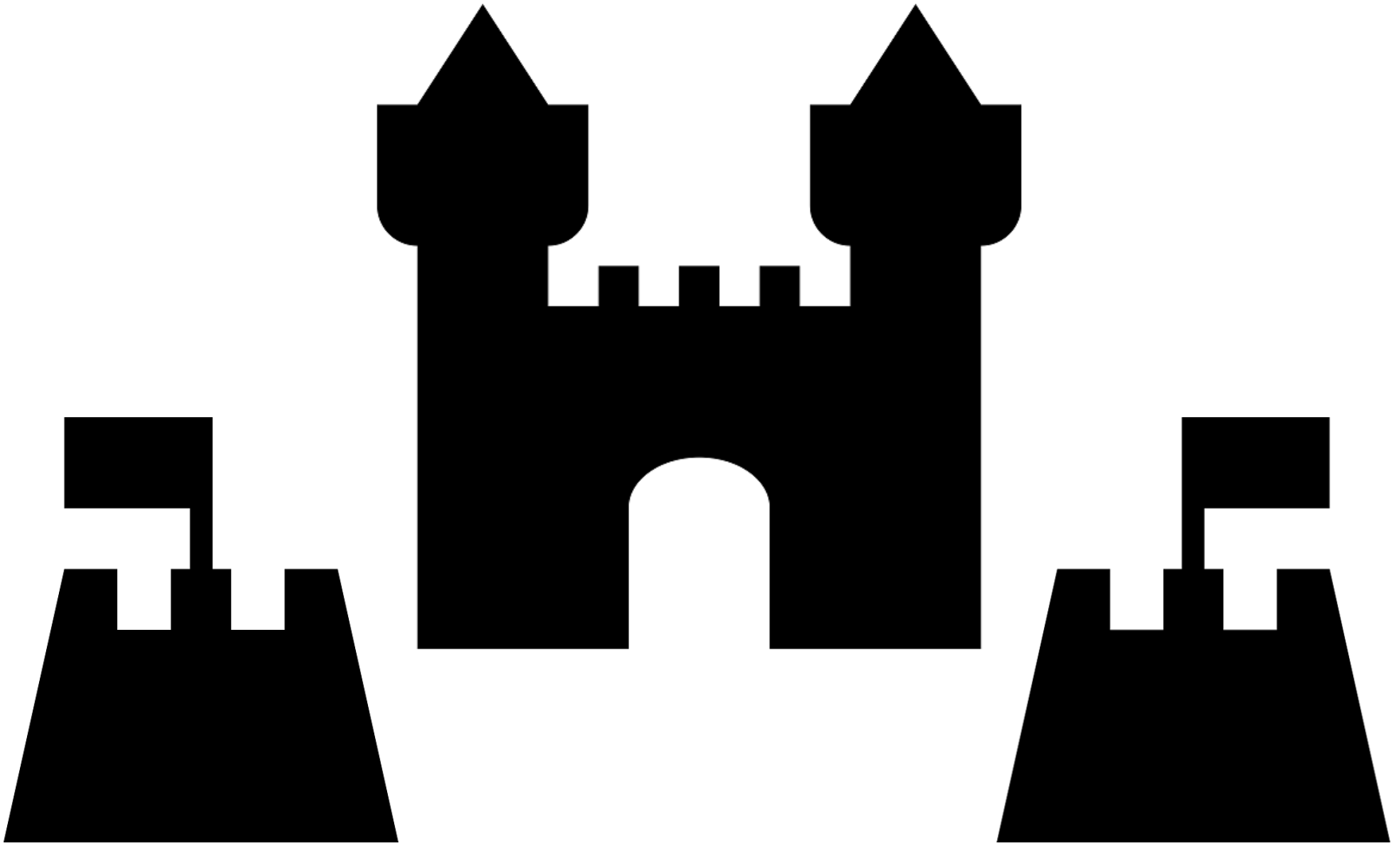
State Homestead Exemption

Limitations

- 522(o) – reduction to extent of fraudulent conversion within 10 years before filing of petition
- 522(p) - \$160,375 cap based on interest acquired within 1215 days before filing of petition
- 522(q) - \$160,375 cap based on certain criminal and wrongful conduct

THE AUTOMATIC STAY

The Automatic Stay



Scope of the Stay

The Automatic Stay prohibits:

- Attempts to collect pre-petition debts
- Commencement or continuation of judicial or other proceedings to collect pre-petition debts (e.g., foreclosure, garnishment)
- Efforts to create, perfect or enforce liens on property of the estate or of the debtor, if relating to a pre-petition claim

Scope of the Stay

The Automatic Stay prohibits:

- Efforts to take possession of or assume control of property of the estate (e.g., repossession of a car)
- Enforcement against the debtor or property of the estate of a pre-petition judgment
- Setoff of pre-petition debts

11 U.S.C. § 362(a)

Exceptions to Automatic Stay

Section 362(b) contains 28 exceptions to the stay, including:

- Criminal actions or proceedings
- Enforcement of domestic support obligations
- Enforcement of police or regulatory powers

Exceptions to Automatic Stay

- Petition filed in violation of § 109(g) or prior court order
- *In Rem Order* in a prior case related to real property
- Residential tenant eviction if judgment for possession was entered prepetition
- Repeat bankruptcy filings (within prior year)

Repeat Filings

ONE PRIOR CASE DISMISSED WITHIN ONE YEAR BEFORE THIS FILING:

- Automatic stay expires 30 days after petition date in individual chapter 7, 11, or 13 case
- No effect on codebtor stay under § 1301 in chapter 13 cases
- Motion to extend stay must be filed and heard before 30 days expires

Repeat Filings

- Debtor must demonstrate case filed in good faith with respect to creditors to be stayed
- Debtor may need to rebut presumption of bad faith
- Court may extend stay as to all or some creditors, and may impose conditions on extension

11 U.S.C. § 362(c)(3) – *motions to extend stay covered in Module 4*

Repeat Filings

TWO OR MORE PRIOR CASES DISMISSED WITHIN ONE YEAR BEFORE THIS FILING:

- Automatic stay does NOT go into effect upon filing
- No effect on codebtor stay under § 1301
- Court may impose the stay as to all or some creditors (upon motion by debtor)

11 U.S.C. § 362(c)(4) – *motion to impose stay covered in Module 4*

Residential Tenant Evictions

PREPETITION JUDGMENT FOR POSSESSION:

- Actions to obtain possession may continue
 - Exception may not apply if bankruptcy filed before eviction judgment is final (e.g., if judgment appealed)
 - Some landlords file motion for relief from the stay when not needed, out of caution
 - Collection of money judgment must stop

Residential Tenant Evictions

- **Stay for 30 days if debtor:**
 - Certifies that debtor has right to cure monetary default under applicable non-bankruptcy law, and
 - Deposits with clerk all rent due during 30-day period after petition is filed
- **Stay beyond 30 days if debtor:**
 - Certifies within 30 days after filing that monetary default is completely cured
- Lessor may file an objection to debtor's certification(s)

11 U.S.C. § 362(b)(22)

Residential Tenant Evictions

Illegal Use of Controlled Substances or Endangerment of Property

- Lessor's act to obtain possession not stayed 15 days after lessor files certification stating:
 - eviction based on illegal use of controlled substances or endangerment to property has been brought against the debtor, or
 - debtor has within 30 days before certification either endangered the property or illegally used or allowed to be used controlled substances at the property

Residential Tenant Evictions

- Debtor has 15 days to object to lessor's certification; hearing must be held within 10 days of filing of objection
- Debtor must prove situation alleged in certification did not exist or has been remedied

11 U.S.C. 362(b)(23)

Duration of Stay

- Stay against property of the estate continues until earlier of:
 - Date property is no longer property of the estate (usually when deemed abandoned upon close of case), or
 - Effective date of order terminating stay

Duration of Stay

- Stay against all other acts continues until earliest of:
 - Case is closed;
 - Case is dismissed;
 - Discharge is granted or denied (court may defer entry under Rule 4004(c)(2)); or
 - Effective date of order terminating stay

11 U.S.C. 362(c) and (d)

Violation of Automatic Stay

- Actions taken in violation of automatic stay generally are void
- Debtor may recover actual damages, including attorneys' fees, if willful violation
 - Willful – act done intentionally with knowledge of the filing
 - Split of authority on whether emotional distress damages may be recovered
- Punitive damages may be recovered in “appropriate” circumstances

11 U.S.C. 362(k)

Motion for Relief from Stay

COURT MAY TERMINATE, ANNUL, MODIFY, OR CONDITION THE STAY

- For cause, including lack of adequate protection
- Lack of equity and property not necessary for effective reorganization
- Burden of proof
 - Equity – burden is on party requesting relief
 - All other issues – burden is on party opposing relief

11 U.S.C. 362(d)

Utility Service

During first 20 days after the petition date:

- Utility service may not be shut off
- If terminated prepetition, service should be restored
- Prepetition arrearage is dischargeable debt and utility may not refuse future service because of discharge of pre-petition arrearage

11 U.S.C. §366(a)

Utility Service

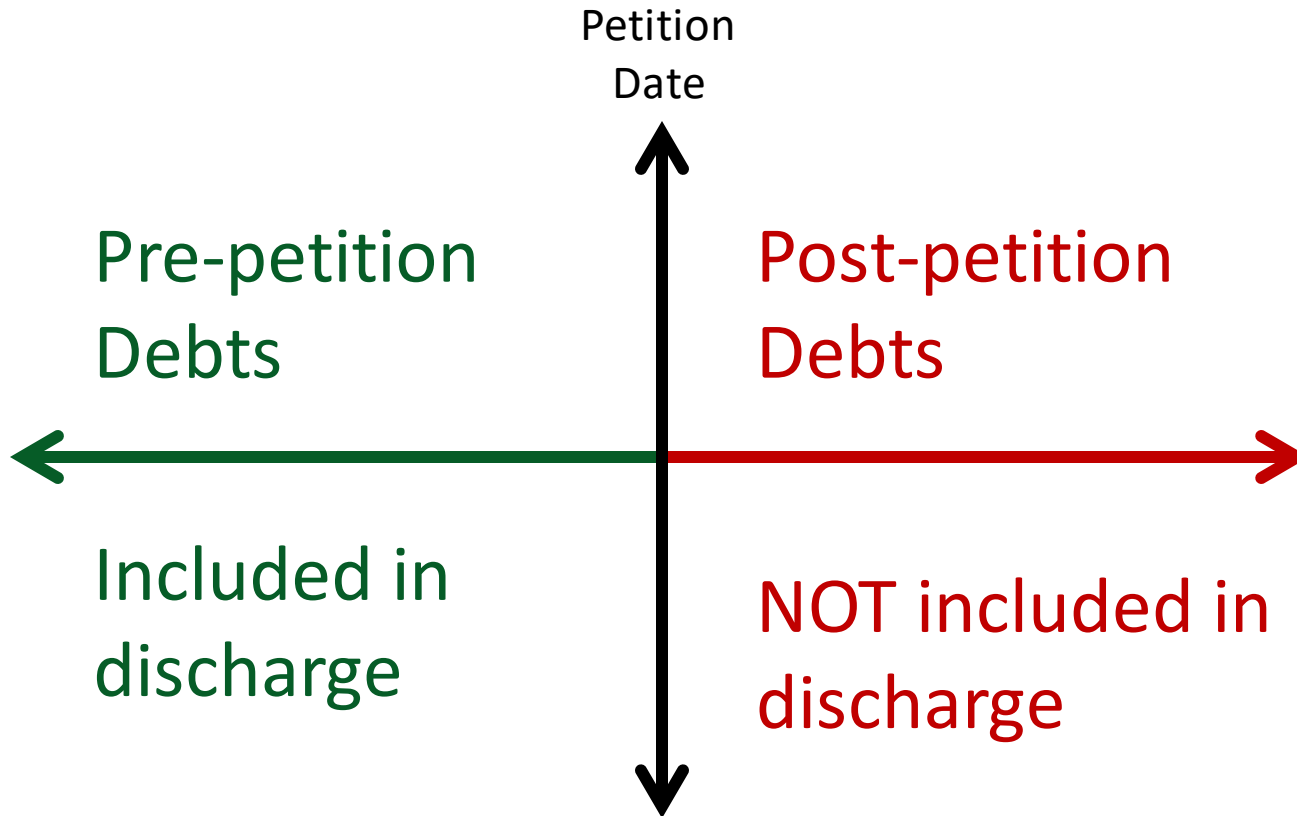
After first 20 days from the petition date:

- Utility may condition continued service on receipt within 20 days after the petition date of “adequate assurance” deposit
- Post-bankruptcy deposit is typically similar to deposit required for new customers
- Utility may terminate service for nonpayment of postpetition usage or nonpayment of adequate assurance

11 U.S.C. § 366(b)

DISCHARGE AND DISCHARGEABILITY

The Fresh Start



Discharge of Debts

- Court enters a Discharge Order
 - In chapter 7, any time after 60 days after first scheduled meeting of creditors;
 - In chapter 13, upon plan completion
- Operates as an injunction preventing creditors from attempting to collect discharged debts in the future as personal liability of debtor
- Violations of the discharge injunction may be punished by contempt

11 U.S.C. § 524(a)

Exceptions to the Discharge

Debts that are *not* dischargeable:

- Most taxes;
- Debts the debtor failed to list in the schedules (unless creditor had notice, or no-asset case);
- Domestic support obligations (child support and alimony);
- Most fines and penalties owed to government agencies;

Exceptions to the Discharge

- Student loans, unless the debtor can prove to the court that repaying them will be an “undue hardship;”
- Debts incurred by driving while intoxicated;
- Debts the debtor has formally agreed to repay by entering into a reaffirmation agreement.

11 U.S.C. §523(a)

Exceptions to the Discharge

Debts *potentially* non-dischargeable if a timely adversary proceeding is filed:

- **Debts incurred by fraud – 523(a)(2)**

Presumption of fraud:

Luxury goods - \$675 within 90 days pre-petition

Cash advances - \$950 within 70 days pre-petition

Exceptions to the Discharge

- Fraud as fiduciary, embezzlement, larceny – 523(a)(4)
- Willful and malicious injury to person or property (applicable only in chapter 7 cases) - 523(a)(6)

11 U.S.C. § 523(c)(1); Bankruptcy Rule 4007(c)

Grounds for Denial of Discharge:

A party may object to the discharge within 60 days after the first scheduled meeting of creditors

Court can deny the discharge if debtor has done any of the following (or other conduct in § 727):

- Transferred or concealed property with intent to hinder, delay, or defraud a creditor or trustee within one year prior to filing;
- Destroyed or concealed financial records;

Grounds for Denial of Discharge:

- Made a false oath or account, presented or used a false claim, or withheld books and records from the trustee;
- Failed to explain satisfactorily the loss or deficiency of assets;
- Received a prior discharge in the too-recent past;
- Failed to complete an approved financial education course after filing the petition.

11 U.S.C. § 727(a)

OVERVIEW OF CHAPTER 7

Eligibility to File Chapter 7

- Any individual who lives in the United States or has property or a business in the United States
- Debtor must obtain briefing from an approved credit counseling agency within 180 days before filing (covered in Module 2)

Eligibility to File Chapter 7

- Under § 109(g), debtor must not within the 180-day period prior to filing:
 - have had a prior case dismissed by the court for willful violation of court order or failure to prosecute prior case; or
 - have voluntarily dismissed a prior case after the filing of a motion for relief from the automatic stay.

Eligibility for Chapter 7 Discharge

- A debtor is disqualified from receiving a chapter 7 discharge if the debtor got a prior discharge:
 - under chapter 7 in a case filed within 8 years before the filing of this case; or
 - under chapter 13 in a case filed within 6 years before the filing of this case, unless:
 - unsecured claims were paid in full in the ch. 13
 - payments under the ch. 13 plan totaled at least 70% of allowed secured claims, court finds best effort and good faith.

The Means Test

- Bankruptcy judge can dismiss chapter 7 case if filing is an abuse of bankruptcy system
- “Means test” creates a presumption that the filing was abusive if the debtor fails the means test
- Most debtors represented by pro bono attorneys are exempt from the means test
 - consumers with household income below state **median family income** are protected by a “safe harbor” and not subject to the means test

11 U.S.C. § 707 – *covered in Module 2*

The Means Test

- Consumers with income above median complete Official Form that compares monthly income with actual and assumed expenses in variety of categories
- Some expenses are based on IRS collection guidelines
- If Form shows that consumer should have a certain amount left over to pay unsecured creditors, presumption applies and bankruptcy court may decide consumer can not file chapter 7 case, unless there are “special circumstances”

Filing Initial Documents

- Voluntary petition
- Schedules (listing debtor's property, debts, income, and expenses) and other required forms
- Means test form
- Creditor matrix

Filing Initial Documents

- Debtor's paystubs for the 60 days before filing
- Certificate showing debtor did the mandatory credit counseling
- Filing fee (may request to pay in installments or seek waiver if under 150% poverty level)

11 USC § 521 - covered in Modules 2 and 3

Chapter 7 Trustee

- After the case is filed, a chapter 7 trustee is appointed as representative of debtor's bankruptcy estate
 - Selected from a panel of private trustees established by the U.S. Trustee
- Duties include:
 - examining debtor at meeting of creditors;
 - collecting any nonexempt property that can be sold;
 - distributing proceeds from sale of nonexempt property to creditors with valid claims; and
 - making a final accounting to the court.

Meeting of Creditors

- Also known as the “section 341” meeting, as it is required by 11 U.S.C. § 341
- Scheduled about 30 days after the case is filed
- Chapter 7 trustee and creditors have the opportunity to examine the debtor under oath
 - Creditors rarely attend the meeting
- Debtor must provide a copy of last year’s federal income tax return to the chapter 7 trustee no later than 7 days before the meeting

Meeting of Creditors

Unless otherwise provided by local rule, debtor must bring to the meeting:

- A photo ID
- Social security card or other proof of social security number
- Copy of debtor's most recent bank statement
- Proof of current income, such as most recent pay stub

Bankruptcy Rule 4002

Retention of Exempt Property

- On initial schedules, debtor must list all property, estimate its value, and select which property to claim as exempt
- Unless trustee or party in interest makes a timely objection, the debtor's exemptions are allowed
- Objections must be filed within 30 days after conclusion of the meeting of creditors
- If debtor claims only a certain dollar amount as exempt, and property is worth more, trustee can still go after it even if timely objection was not filed

Trustee Looks For Assets To Liquidate For Benefit Of Creditors

- Nonexempt assets must be turned over to the Trustee
- If none, Trustee files report of no distribution
11 U.S.C. § 704(a)(9)

Trustee may go after:

- Undisclosed property of the estate
- Legal claims the debtor may have that are not fully exempt

Trustee Looks For Assets To Liquidate For Benefit Of Creditors

- **Fraudulent transfers:** **11 U.S.C. §§ 544 and 548**
 - Any transfer within the 2 years prior to filing (or longer under state statutes) -
 - for less than reasonably equivalent value, while insolvent, or
 - with intent to hinder, delay or defraud a creditor
- **Voidable preferences:** **11 U.S.C. § 547**
 - Payments made to a creditor totaling \$600 or more within 90 days prior to the filing of the petition, if the transfer enables the creditor to get more than it otherwise would have gotten

General Rule: Secured Creditors Stay Secured

- Personal liability on secured debts is wiped out (no deficiency after foreclosure, for example)
- Unless a court orders otherwise, the lien (or security interest) survives the bankruptcy
- Thus, secured creditors will still be able to foreclose on a home or seize other property if consumer is in default
 - They may file a motion for relief from stay or wait for the discharge to be entered

Avoiding Liens That Impair The Debtor's Exemptions

- Debtor may avoid a judgment lien that impairs the debtor's exemptions
- If a creditor has a judgment lien, the debtor may file a motion to avoid (or remove) the lien to the extent the lien attaches to value that would otherwise be exempt
- Debtor may also avoid nonpossessory, nonpurchase-money security interests in certain exempt personal property listed in § 522(f) (such as household goods or furnishings)

11 USC § 522(f) - covered in Module 4

Redemption

- “An individual debtor may redeem tangible personal property intended for personal, family, or household use, from a lien. . . by paying the holder of such lien the amount of the allowed secured claim. . .”
- Available only in chapter 7 cases
- Debtor may file a motion to redeem the asset, pay the creditor an amount equal to the value of the asset, and eliminate the lien

11 USC § 722 - covered in Module 4

Reaffirmation

- Debtor agrees to remove a debt from the discharge
 - It is as if bankruptcy never happened for this debt
- Debtor must decide whether to reaffirm
 - Car loans?
 - Mortgage loans? (usually not)
- If attorney does not certify that the reaffirmation will not impose undue hardship, court will hold a hearing on that question

Discharge

- Can be entered any time after 60 days after the first date scheduled for meeting of creditors
 - Time from filing until entry of discharge is usually 3-4 months
- Debtor must certify that she has completed a financial management course by an approved provider after the petition is filed in order to receive discharge
- Discharge may be delayed if a court review of a reaffirmation agreement is pending

In Summary: When is Chapter 7 a Good Option?

- The debtor has significant dischargeable unsecured debt
- The debtor does not have nonexempt assets that the debtor wants to keep
- The debtor is not behind on debts secured by collateral the debtor wants to keep;
- The debtor's debt load has peaked.

OVERVIEW OF CHAPTER 13

How is Chapter 13 Different?

- Instead of getting paid from sale of non-exempt assets, creditors get paid from the debtor's future income – through the chapter 13 plan
- Debtor may keep nonexempt assets
- The chapter 13 plan gives the debtor an opportunity to cure arrearages on secured debts – to save a home or car
- Generally, no discharge until the plan is completed

How is Chapter 13 Different?

- The bankruptcy estate is bigger – includes the debtor's future income
- Debtor has more control over property of the estate (standing to raise legal claims)
 - Debtor has same standing as chapter 7 Trustee to do things like going after preferences, fraudulent transfers, etc.
- The discharge is slightly broader **11 U.S.C. § 1328(a) and 523(a)**
- Some postpetition debts can be included in the plan **11 U.S.C. § 1305**

Chapter 13 Eligibility

- Chapter 13 is available to “individuals with regular income” who live in the United States or have a place of business or property in the United States.
 - Regular income includes government benefits, child support
- Debt limits to file chapter 13:
 - \$394,725 in unsecured debts;
 - \$1,184,200 in secured debts (amounts are adjusted for inflation every three years)

Chapter 13 Eligibility

- Debtor must obtain briefing from an approved credit counseling agency within 180 days before filing (same as chapter 7)
- Debtor must not have dismissals described in § 109(g) in past 180 days

11 U.S.C. § 109

Eligibility for Ch. 13 Discharge

- A debtor is disqualified from receiving a chapter 13 discharge if the debtor got a prior discharge:
 - under chapter 7, 11, or 12 in a case filed within 4 years before the filing of this case; or
 - under chapter 13 in a case filed within 2 years before the filing of this case
- Unlike chapter 7, there may still be reason to file chapter 13 case even if not eligible for discharge
 - *e.g.*, debtor may use the plan to cure and reinstate secured claims

11 USC § 1328(f)

Filing Initial Documents

- Voluntary petition
- Schedules and other required forms
- Statement of current monthly income and calculation of commitment period
- Statement of disposable income (if above-median debtor)
- Creditor matrix
- Debtor's paystubs for the 60 days before filing

Filing Initial Documents

- Certificate showing debtor did the mandatory credit counseling
- Filing fee (may apply to pay in installments; no waiver)
- Chapter 13 plan (local rules in most districts require use of a model plan)
- Tax returns must be filed with state and federal taxing authorities

11 USC § 521 - covered in Modules 2 and 3

Codebtor Stay

- Unlike chapter 7, chapter 13 case puts into effect a stay preventing creditors from taking any action against codebtors (cosigners) who have not filed for bankruptcy
- Applies to “consumer debt” (debt incurred for a personal, family, or household purpose)
- Prevents a creditor from pursuing collection against the cosigner
- Remains in place until the case is closed, dismissed, or converted to another chapter; or until the codebtor stay is lifted by the court upon a creditor’s motion

Chapter 13 Trustee

- Has more to do than a chapter 7 trustee
- Must review the debtor's chapter 13 plan to ensure that it is feasible and complies with the law, object to confirmation if it does not
- If the plan is confirmed, chapter 13 trustee collects payments from the debtor and distributes money to creditors who have filed claims
- Both debtor and chapter 13 trustee may object to claims

Chapter 13 Plan

- Plan sets out how much debtor pays each month, how much each class of creditors will get, and the treatment of secured claims
- Debtor must make first chapter 13 payment to the trustee within 30 days after filing
- Plan must propose to pay priority claims in full, such as tax debts and domestic support obligations

Chapter 13 Plan

- Below-median debtors may propose a three year plan, or up to five years to make plan payments affordable
- Debtors with income above the state median income may be required to remain in chapter 13 for five years – the “Applicable Commitment Period”

11 USC § 1325

Plan Confirmation Tests

- **Best Interest of Creditors:** Are unsecured creditors getting at least as much as they would get if the debtor filed chapter 7 (and the trustee liquidated any nonexempt assets)?
- **Good Faith:** Is the plan proposed in good faith?

Plan Confirmation Tests

- **Ability to Pay:** Is the debtor paying all disposable income into the plan (if unsecured creditors are getting paid less than 100%)?
 - Below median: consider reasonably necessary expenses
 - Above median: consider expenses provided by the means test
- **Feasibility:** Can the debtor afford the plan payment?

Secured Claims

Treatment of secured claims:

- If debtor **does not wish to keep** the collateral, plan may provide for its surrender;
- If debtor **wishes to keep** the collateral, the plan may be confirmed if:
 - Secured creditor accepts the plan, OR
 - Plan provides for the creditor to retain its lien and receive the present value of its allowed secured claim during the plan

11 USC § 1325(a)(5) – covered in Module 4

Modifying Secured Claims

- The plan may “modify the rights” of holders of secured claims, except:
 - Claims secured only by real property that is the debtor’s principal residence, and
 - Claims that may not be bifurcated based on the “hanging paragraph” of § 1325(a):
 - Purchase-money security interest in a motor vehicle for personal use, incurred with 910 days before filing;
 - Purchase-money security interest in any other thing of value, incurred within 1 year before filing

Modifying Secured Claims

- For secured claims that may be modified, if the amount of the claim exceeds the value of the collateral, the claim will be “bifurcated” into a secured and unsecured claim;
 - Interest rate may be reduced to prime plus a margin for risk;
 - Repayment may be stretched out through the term of the plan

11 USC §§ 506(a), 1322(b)(2); 1325(a)(5) – covered in Module 4

Mortgage Secured by Principal Residence: Cure and Maintain

- For most mortgages secured by the debtor's principal residence, modification will not be an option
 - Except: stripping off totally unsecured junior mortgages
- Still, chapter 13 provides great benefits:
 - Stop foreclosure (automatic stay, immediate upon filing)
 - Cure arrearage through the chapter 13 plan
 - Maintain ongoing payments – either directly to the creditor or through chapter 13 plan (depends on local practice)

Mortgage Secured by Principal Residence: Cure and Maintain

- Important: Debtor must be able to make regular periodic mortgage payments going forward, plus the chapter 13 plan payment!
- Alternative: Seek a loan modification while bankruptcy is pending

11 USC § 1322(b)(5) – covered in Module 4

Chapter 13 Discharge

- Will be entered after plan payments are completed
 - Debtor must complete a financial management course by an approved provider before final plan payment
- If debtor cannot complete the chapter 13 plan, consider:
 - Modification of the plan (by motion)
 - Hardship discharge
 - Conversion to chapter 7
 - Dismissal of the case (voluntary or by court) without discharge

Chapter 13 Discharge

Debts discharged in chapter 13 but not chapter 7:

- Debts for willful and malicious injury to property (and in some cases to individuals)
- Certain civil fines and penalties, including some tax penalties
- Certain debts for which discharge was denied in a previous case

Chapter 13 Discharge

- Debts incurred to pay nondischargeable tax debts
- Non-support debts arising from property settlements in divorce
- HOA debts incurred postpetition if the debtor has vacated the property

Debts not discharged in chapter 13:

- long-term debts, like home mortgages, that the debtor elects to cure and maintain through plan

11 USC § 1328(a)

**COUNSELING THE CONSUMER DEBTOR
WHY BANKRUPTCY?**

What Bankruptcy Can Do

- Eliminate the legal obligation to pay most debts
- Stop foreclosure on a home and allow the debtor an opportunity to cure a default
- Prevent repossession of an automobile or other personal property (and force creditor to return property even after repossession)
- Prevent termination of utility service or restore service after a shutoff

What Bankruptcy Can Do

- Stop garnishment of wages or a bank account (and get back money taken in the 90 days before filing)
- Prevent government agencies from collecting overpayments (such as Social Security), unless the overpayment was obtained by fraud
- Lower the monthly payments on some secured debts such as car loans

What Bankruptcy Cannot Do

- Force a modification of a mortgage secured by the debtor's principal residence, except that a chapter 13 debtor can:
 - cure a default, but will have to make the regular postpetition payments on time
 - modify a mortgage that is wholly unsecured, secured by additional property, or has the final payment due before the end of the chapter 13 plan

What Bankruptcy Cannot Do

- Discharge certain debts, such as:
 - child support and alimony
 - most student loans
 - court restitution orders and criminal fines
 - most taxes
- Discharge the liability of a cosigner who doesn't file bankruptcy
- Discharge debts that are incurred after bankruptcy has been filed

Counseling the Judgment-Proof Debtor

- If client's income and assets are exempt under state or federal law, the property cannot be attached even if creditor gets a judgment
 - Social Security benefits are exempt from attachment (other than for child support, alimony, tax debts, student loans, and public benefits overpayments)
- But being judgment-proof does not protect debtor from being sued or receiving collection calls

Counseling the Judgment-Proof Debtor

- Bankruptcy may provide peace of mind
 - or you could recommend sending the creditor a “stop contact” letter under the FDCPA, 15 U.S.C. § 1692c(c)
- If client is likely to have other (garnishable) income in the future, bankruptcy may be worthwhile
 - If the debtor may incur more debt, waiting to file may be the better choice

Pros and Cons of Bankruptcy

- **Advantages of Bankruptcy**

- Fresh start
- Automatic stay
- Deal with secured debts
- Affordable repayment plan
- Raise claims and defenses against creditors

- **Disadvantages of Bankruptcy**

- Loss of certain property
- Impact on credit rating
- Moral obligation
- Discrimination

Alternatives to Bankruptcy

- **Credit Counseling**
- **Debt Management Plan**
 - Debtor sends monthly payment, distributed each month among creditors
 - Usually no cancellation of principal
 - Creditors may waive some fees
 - If plan is not affordable and debtor fails to complete it, all debts revert to original contract terms

Alternatives to Bankruptcy

- **Debt Settlement** (*beware!)
 - For-profit businesses
 - Collect money from the consumer, but do not send regular payments to the creditors; hold money until a debt can be settled
 - Often make false or unrealistic claims about their ability to settle debts
 - If debts are settled for less than the amount owed, consumer may owe taxes based on cancellation of debt income (not so if discharged in bankruptcy)

Alternatives to Bankruptcy

Reverse Mortgage

- Borrower must be at least 62 years old
- Loan proceeds taken as a lump sum, annuity, or line of credit
- No required monthly payment of principal or interest; loan balance increases over time
- High closing costs
- May help some homeowners with low income and substantial home equity

Debt Consolidation Loan

- Usually not a good idea to use a mortgage to pay off credit card and other unsecured debt

Alternatives – Saving a Home

Does client qualify for:

- **Repayment plan:** client can afford regular payment plus extra to catch up
- **Forbearance agreement:** client has no permanent income (unemployed, medical hardship)
 - Homeowner makes a low payment or no payment for limited time (3-12 months) while looking for work
 - Full arrearage is due at the end (try for a mod)
- **Loan modification:** client has permanent income at a reduced level – needs permanent reduction in payment

Making Home Affordable Program

Available through Dec. 31, 2016 from participating servicers:

- HAMP (Home Affordable Modification Program) Tier 1 and Tier 2
- 2MP (Second Mortgage Program)
- UP (Unemployment Program)
- HAFA (Home Affordable Foreclosure Alternatives)
- HARP (Home Affordable Refinance Program)

Loss Mitigation Options

- Rules depend on whether the mortgage is:
 - FHA insured (HUD mortgagee letters), VA or USDA insured
 - FHA loan # on monthly statements and on the mortgage
 - Fannie Mae owned (Fannie Servicing Guide)
 - <https://knowyouroptions.com/loanlookup>

Loss Mitigation Options

- Freddie Mac owned (Freddie Servicing Guide)
 - <https://ww3.freddiemac.com/loanlookup/>
- Serviced by a HAMP participating servicer (Treasury's MHA Handbook)
 - <http://www.makinghomeaffordable.gov/get-started/contact-mortgage/Pages/default.aspx>

Advice for Homeowners

- Work with a HUD-certified housing counselor
 - Their services are free
 - Knowledgeable about existing loan mod programs
 - Help the client gather docs and create an accurate budget

Advice for Homeowners

- Never pay a company to help you apply for a loan modification
 - Usually a scam; free help is available!
- New regulations govern the process, see 12 C.F.R. § 1024.41
- If foreclosure is scheduled, have a back up plan
 - Chapter 13 bankruptcy (file before the sale date)