

Module 4: Getting to Discharge

Pro Bono Bankruptcy Training Program Material

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From Filing to Discharge

- Completing and amending schedules and required forms
- Representing the debtor at the meeting of creditors
- Complying with document production requirements
- Dealing with secured debt
- Satisfying the financial education course requirement
- Obtaining and enforcing the discharge

FIRST STEPS AFTER THE CASE IS FILED

File Outstanding Documents

- Initial required documents that were not filed with the petition must be filed within 14 days after the petition date
 - Use a checklist and calendar/tickler system
 - Send a letter to the debtor reminding of any additional information needed
 - Set an appointment to go over the final documents
- If additional time is needed, file a motion for extension of time – courts will often grant an additional 7 to 14 days for cause shown

Bankruptcy Rule 1007(c)

Counseling Certification

- **Pre-bankruptcy counseling certification:** if not filed with the petition, it must be filed within 14 days
- **Deferral of counseling:** In rare case where debtor has requested deferral based on exigent circumstances, attorney must verify whether motion was granted or whether court will require a hearing:
 - If the request is granted, debtor must complete briefing within 30 days after the petition date
 - The court may, for cause, extend this period by giving the debtor an additional 15 days **11 U.S.C. § 109(h)(3)(B)**
 - The certification from an approved agency will need to be filed once the briefing has been completed

Filing Fee Issues

- **Request for waiver:** Follow up to find out whether the motion was granted
 - Prepare debtor if hearing is required by the court
 - If waiver request is denied, the court will usually set a schedule for payment in installments
- **Request to pay in installments:** Follow up to make sure the debtor understands when payments are due and how they must be made:
 - Remind debtor that failure will result in dismissal of the case!
 - Most courts will not take personal checks or credit cards from the debtor – they require payment by cash, money order, or a cashier's check

Motion to Impose or Extend Stay

- WARNING for repeat filers: is the automatic stay limited?
- **One prior case dismissed in past year:**
 - automatic stay will only last 30 days unless extended
 - file a motion to extend the stay within 30 days after filing
 - hearing must be held within 30-day period, so file motion asap
- **Two prior cases dismissed in past year:**
 - automatic stay does not take effect upon filing!
 - file a motion to impose the stay
- Debtor must show case filed in good faith, usually by showing that circumstances have changed since prior case

Amendments to Schedules

- Debtors often forget things or make mistakes in the original schedules
- Bankruptcy Rule 1009 provides that the debtor may amend the initial papers as a matter of course at any time before the case is closed
- Simply file the amended document verified by the debtor
- Additional \$31 filing fee amendment adding creditors (unless filing fee waived)

Amendments to Schedules

- The debtor must give notice of the amendment to the trustee and to any entity affected by the amendment
 - for amendment to debtor's exemptions, notice should be sent to all creditors
 - if amendment involves addition of creditors on Schedules D through F, notice should be sent to creditors added (and any other creditors that may be affected)

Providing Tax Returns

- **Tax returns to trustee:** at least 7 days before the date first set for meeting of creditors, debtor must provide to the trustee a copy of most recent federal income tax return
 - return should be for tax year ending immediately before commencement of case and for which a return was filed
 - no need to provide tax return if debtor was not required under applicable law to file a return for most recent tax year (See IRS Form 9542)
 - debtor may give the trustee a written statement that such tax documentation does not exist
 - debtor is given option to provide copy of return or transcript of the return

11 U.S.C. § 521(e)(2)(A)(i); Bankruptcy Rule 4002(b)(3)

Providing Tax Returns

- **Tax returns to creditor:** if a creditor makes a timely request for a tax return or transcript that is to be provided to the trustee, debtor must give copy to creditor at same time provided to trustee
 - creditor's request must be made at least 14 days before the date first set for the meeting of creditors
 - such requests generally are not made in routine cases

11 U.S.C. § 521(e)(2)(A)(II); Bankruptcy Rule 4002(b)(3)

Providing Tax Returns

- **Tax return filed with court:** if a creditor or interested party requests, the debtor must file with the court a copy of a tax return filed with the IRS during the bankruptcy case
 - covers returns for tax years ending during the case or for a tax year ending in the three years before the petition
 - such requests generally are not made in routine cases

11 U.S.C. § 521(f)(1)-(3); Bankruptcy Rule 4002(b)(3)-(5)

Privacy Issues

- Compliance with the tax return requirements should be done in a manner that preserves the debtor's privacy
- Bankruptcy Rule 4002(b)(5) provides that tax returns or transcripts provided to the trustee, or to creditors who request them, are subject to the procedures for safeguarding the confidentiality of tax information set by the Director of Admin. Office of U.S. Courts
- Director's Guidance for Protection of Tax Information provides that interested parties seeking returns under section 521(f) must file a motion and show cause

Privacy Issues

- The Director's Guidance for Protection of Tax Information requires that tax information provided under § 521 be redacted to show only:
 - (1) the last four digits of Social Security and ITIN numbers,
 - (2) the initials and not the names of minor children,
 - (3) the year of any date of birth, and
 - (4) the last four digits of any financial account number.

The procedures do not permit tax returns filed with the court to be accessible to the public

Obtaining Returns or Transcripts

- Clients can download tax transcripts from the IRS website at: <http://www.irs.gov/Individuals/Get-Transcriptcan>
- They can also request transcripts on-line at the IRS website or by calling the IRS at (800) 908-9946, which initiates an automatic process that results in the transcript arriving by mail in about five to ten business days at the client's address found on the return
- Transcripts can also be obtained by the debtor by using Form 4506-T or 4506T-EZ. This process usually takes from one to two weeks
- The IRS also has procedures for attorneys to obtain transcripts on behalf of the debtor

Filing the Statement of Intent

- In chapter 7 cases the debtor must prepare and file a statement of intention (Official Form 108) regarding property securing debts and leased personal property
- The statement must be filed and served on the trustee and all creditors named in the statement:
 - within 30 days after the petition date, or
 - on or before the date of the meeting of creditors, whichever is earlier
- The court may extend the deadline for cause

11 U.S.C. § 521(a)(2); Bankruptcy Rule 1007(b)(2)

Dealing with Utility Deposits

- To ensure that utility service is continued, find out whether the debtor will need to pay a deposit within the 20-day period following the filing of the petition
- Creditors often require a deposit equal to two times the average monthly bill
- If required by the creditor/utility, this “adequate assurance” payment must be made within 20 days after filing the petition

11 U.S.C. § 366(b)

MEETING OF CREDITORS

Meeting of Creditors



Preparing for the Meeting

- Send the debtor a letter right away informing them of location, date and time of the meeting and reminding them of what they will need to bring
- Explain what to expect:
 - The trustee will ask questions under oath
 - Meeting is tape recorded
 - Trustee is checking to see if all the information filed is accurate and complete
- If joint case, both debtors must attend
- Usually no creditors attend the meeting

Typical Questions at the Meeting

- “Have you read and do you understand the Bankruptcy Information Sheet?”
- “Here is a copy of your petition. Is that your signature on the petition?”
- “Did you disclose all of your assets and all of your debts?”
- “Have you transferred any property in the last 2 years?”
- “Are you working?”
- “Do you have the right to sue anyone? From a slip and fall in the grocery store, car accident, employment discrimination, etc?”
- “How much do you think your house is worth? Based on what?”

Document Production

Debtor must bring the following to the meeting:

- Picture ID (such as a driver's license or state-issued photo ID)
- Proof of debtor's Social Security number, or written statement that documentation does not exist
- Unless trustee or U. S. trustee instructs otherwise, statements for each of the debtor's depository and investment accounts (such as checking, savings, money market, mutual fund, and brokerage accounts) for time period that includes petition date
- Proof of current income such as most recent pay stub
- Documentation of any additional expenses claimed on Official Form 22 under the means test, when required by section 707(b)(2)(A) or (B)

Bankruptcy Rule 4002(b)

DEALING WITH SECURED DEBT

Statement of Intention – Follow Up

- Debtor must perform stated intention within 30 days after first date set for meeting of creditors
 - Failure to timely perform may result in termination of the automatic stay as to the personal property subject to the statement
- **Secured debt:** Retain or Surrender?
 - If retaining, debtor will:
 - Reaffirm the debt;
 - Redeem the property;
 - Exempt the property and avoid lien; or
 - “Other”: e.g., “retain and pay” (home mortgage, if current).
- **Leased personal property:** Assume the lease?
 - Creditor may condition assumption on curing any pre-petition default

11 U.S.C. §§ 362(h); 521(a)(2)(B); 521(a)(6)

Reaffirmation

- Debtor agrees to remove debt from the discharge
 - Debtor remains personally liable – may be sued if property repossessed and deficiency
- To be enforceable, the reaffirmation agreement:
 - must be signed and filed with court before discharge is entered
 - court must find that reaffirmation will not pose an undue hardship
 - attorney may certify no undue hardship; otherwise court will hold a hearing
- Reaffirmation agreement may be canceled any time before entry of discharge order OR sixty days after agreement is filed with court, whichever occurs later. No reason is required.

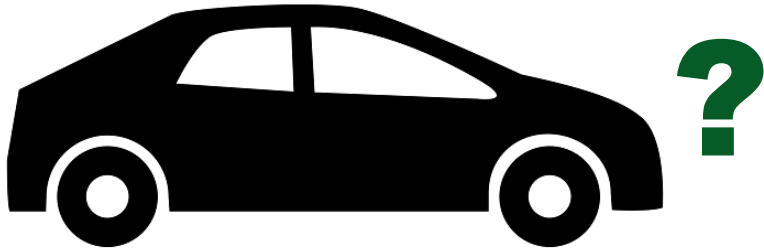
Reaffirmation

- Usually NOT a good idea if:
 - Amount owed exceeds value of collateral and creditor refuses to reaffirm at a lower amount
 - Debtor has defenses to owing the debt
 - Debt is a high-cost loan or contains unfavorable credit terms and creditor refuses to negotiate more reasonable terms
 - Debtor has no interest in keeping the collateral or has no ability to maintain payments
 - Debtor is behind on payments and creditor refuses to include as part of reaffirmation an affordable payment plan to cure the default

Reaffirmation

- May be a good idea if:
 - Creditor gives something valuable in return, such as agreeing to let debtor get caught up in a manageable way, or reducing secured debt to value of property
 - Debtor wants to keep needed collateral, such as motor vehicle, and creditor or court will not permit debtor to keep it without reaffirming
- Some creditors will allow debtor to retain collateral and keep paying even if no reaffirmation agreement is signed
- It is generally never a good idea to reaffirm a credit card debt, even if credit card is secured or the creditor offers to keep the account open based on reaffirmation

Should the debtor reaffirm...?



Maybe (most common;
consider the risks and other
options)



Probably not



No

Undue hardship?

- If debtor's attorney negotiates the reaffirmation, must sign a certification stating that:
 - debtor has been fully advised about consequences of the reaffirmation agreement
 - agreement is voluntary act of a fully informed debtor, and
 - agreement does not impose an “undue hardship” on the debtor or the debtor's dependents. **11 U.S.C. § 524(c)(3)**
- If the debtor's attorney does not sign the reaffirmation agreement (and debt not secured by real property), court must approve the reaffirmation **11 U.S.C. § 524(c)(6)**

Undue hardship?

- Debtor must sign a statement that debtor believes he/she can afford the payments, based on income and expenses listed in Schedules I and J
- If I and J show insufficient income, presumption of undue hardship, and debtor must explain how he/she will pay
- Court may disapprove the reaffirmation if presumption not rebutted

Retain and Keep Paying (without reaffirmation)

- **For mortgage on debtor's principal residence**, this option is recognized by section 524(j)
 - creditor permitted to seek and accept payments rather than enforce *in rem* rights, without violating the discharge injunction
- **For personal property secured loan**: this option generally not available unless creditor allows it; might not be in creditor's best interest to repossess the collateral if debtor keeps paying
- If debtor later defaults on payments and the creditor repossesses the collateral, debtor will not be on the hook for any deficiency

Reaffirm a Home Mortgage?

- Usually not a good idea
- Option to retain and keep paying, § 524(j)
- **Benefits of NOT Reaffirming:**
 - No liability for a deficiency if later default and foreclosure
 - Debtor should still be able to apply for a loan mod if needed
- **Benefits of Reaffirming:**
 - Debtor may continue to receive mortgage statements
 - Payment information more likely to be reported on credit report, improving chances of refinancing later
 - Debtor may have better chance of getting a loan mod later (especially with FHA loans)

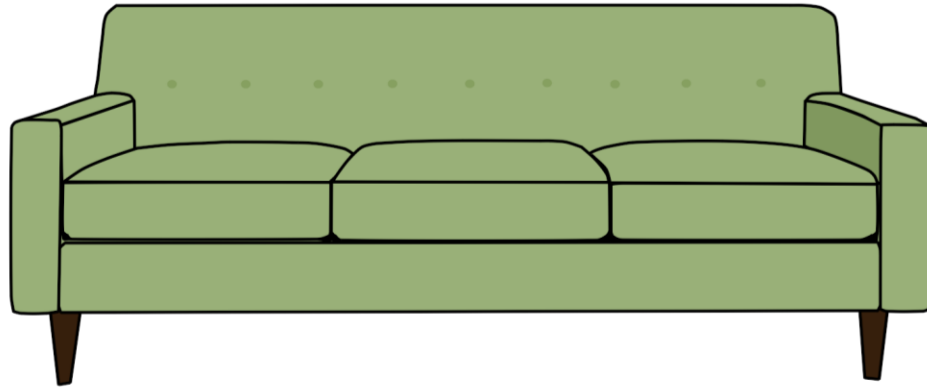
Redemption

- Section 722 provides for a right of redemption - debtor may eliminate a creditor's lien by paying the creditor the value of the collateral securing the lien
- Redemption right available only:
 - to individual debtors in chapter 7 cases
 - for dischargeable consumer debts secured by tangible personal property that has been either:
 - exempted by the debtor, or
 - abandoned by the trustee

Redemption

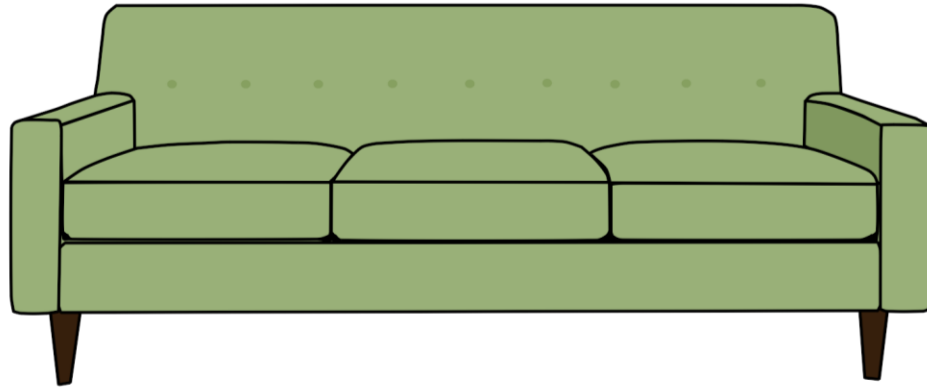
- Not available for real estate or intangible liquid assets
- Valuation should be based on replacement value given the property's age and condition at the time the value is determined
- HUGE potential benefit if the secured claim greatly exceeds the value of the property
- Debtor must be prepared to pay redemption amount in lump-sum payment (unless creditor agrees to installments)

Redemption: Example 1



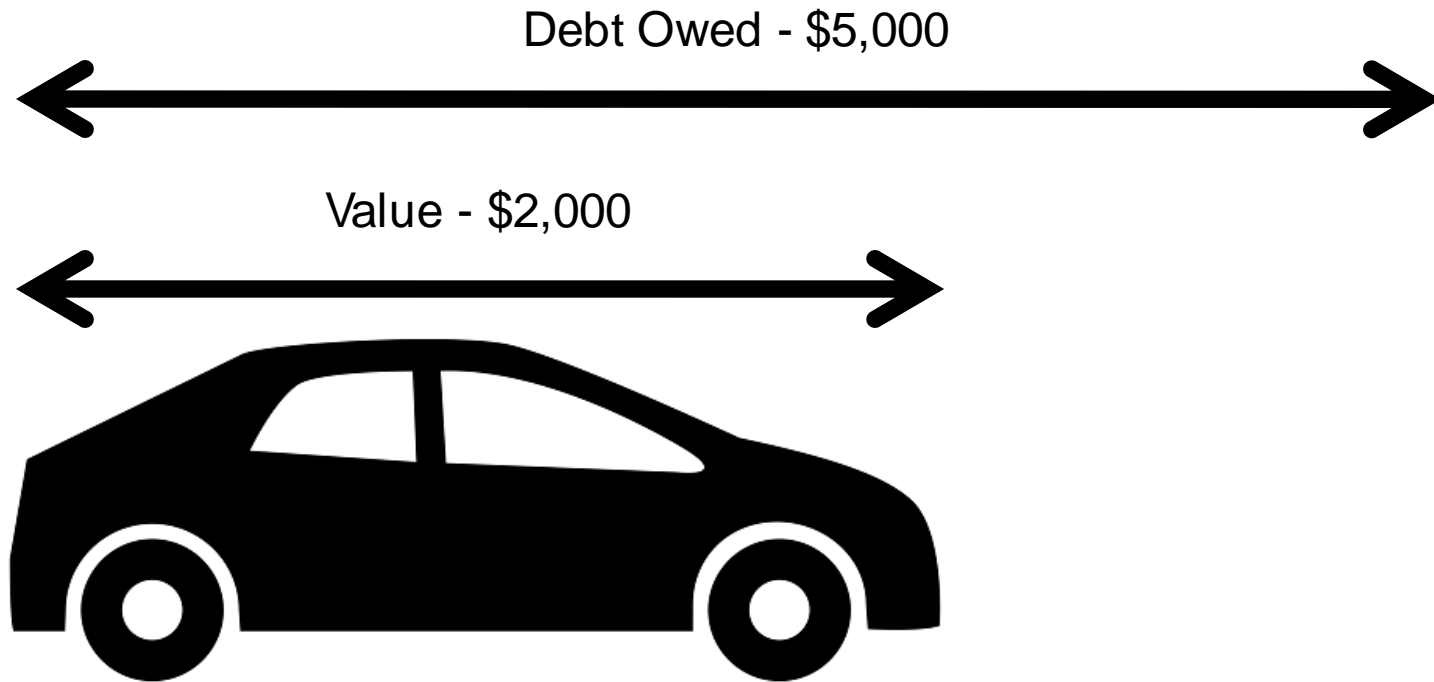
- Couch was purchased on credit (loan secured by the couch)
- Balance owed on petition date = \$1,250
- Value of the couch = \$250

Redemption: Example 1



- Creditor has a secured claim for \$250 and an unsecured claim for \$1,000
- Debtor may redeem the couch by paying \$250 to the creditor
- Debtor keeps the couch free and clear of the lien
- Creditor's unsecured claim for \$1,000 is discharged

Redemption: Example 2



Debtor may redeem by paying \$2,000; unsecured claim for \$3,000 will be discharged.

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Assuming Lease on Personal Property

- Chapter 7 debtor may assume a personal property lease if it is not assumed by trustee - common with car leases
- **Step 1:** Debtor must notify lessor in writing that intends to assume lease, which can be done on Statement of Intention
- **Step 2:** Lessor may say willing to allow assumption and may condition assumption on cure of any outstanding default
- **Step 3:** Debtor notifies the lessor in writing within 30 days after the first notice that the lease is assumed
 - debtor then assumes liability under lease and has right to retain property if payments are maintained
- Court review and approval of the lease assumption are not required

11 U.S.C. § 365(p)

Lien Avoidance

- Debtor may avoid “fixing of a lien” on interest of debtor in property to the extent lien impairs an exemption
- This applies to:
 - **Judicial liens** on any exempt property, including home, vehicle, household goods , garnished wages, etc.
 - except liens for domestic support obligation
 - **Non-possessory, non-purchase money liens** on certain personal property, including:
 - household furnishings, household goods , wearing apparel, jewelry, appliances, books, animals, crops, or musical instruments held primarily for personal, family, or household use of the debtor or debtor’s dependents;
 - implements, professional books, or tools of the trade
 - professionally prescribed health aids

Lien Avoidance

- Some math is required to determine if the lien can be avoided – if it “impairs an exemption”
- A lien shall be considered to impair an exemption to the extent that the sum of –
 - the lien;
 - all other liens on the property; and
 - 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
- Courts have held that this formula is to be applied literally

11 U.S.C. § 522(f)(2)

Example

In re Jochum, 309 B.R. 327 (Bankr. E.D. Mo. 2004)

Homecomings First Deed of Trust	\$ 76,405
Concord Judicial Lien	\$ 16,305
Portfolio Judicial Lien	\$ 14,156
Homestead Exemption	<u>\$ 8,000</u>
TOTAL	\$114,866

Value of
home
\$100,000



Portfolio Judicial Lien
\$ 14,156

Concord Judicial Lien
\$ 16,305

Homecomings
First Mortgage
\$76,405

Homestead
Exemption \$8,000

Example

Homecomings First Deed of Trust	\$ 76,405
Concord Judicial Lien	\$ 16,305
Portfolio Judicial Lien	\$ 14,156
Homestead Exemption	<u>\$ 8,000</u>
TOTAL	\$114,866

Portfolio Judicial Lien:

- Value debtor's interest in property without any liens is \$100,000.
- Total of all liens plus debtor's homestead exemption exceeds value of debtor's interest by amount of \$14,866.
- Amount of Portfolio's debt that is secured by its judicial lien (\$14,156) is less than \$14,866.
- Portfolio lien therefore impairs debtor's exemption and is void

Example

Homecomings First Deed of Trust	\$ 76,405
Concord Judicial Lien	\$ 16,305
Portfolio Judicial Lien	\$ 14,156
Homestead Exemption	<u>\$ 8,000</u>
TOTAL	\$114,866

Concord Judicial Lien:

- Total of all remaining liens plus debtor's homestead exemption exceeds value of the debtor's interest by amount of \$710.
- Debtor may avoid the judicial lien of Concord in the amount of \$710 and the lien remains in the amount of \$15,595.

Lien Avoidance Process

- The lien avoidance procedure is generally initiated by the filing of a motion- **Bankruptcy Rule 4003(d)**
- Motions to avoid liens may be brought in both chapter 7 and chapter 13 cases
- These motions are rarely contested; usually only when there is a dispute over the value of the property or the debtor's claim of exemption
- No time limit in the rules, but best to initiate the proceeding soon after the case is filed
- Order avoiding the lien can be recorded in the appropriate real estate recording offices

What to do with a residential lease?

- If debtor is current on rent and wishes to stay in premises, debtor should be advised to just keep paying
 - unexpired lease should be listed on Schedule G
 - debtor cannot assume residential lease in chapter 7 case
 - chapter 7 trustee could assume the lease, but rarely happens because no value for estate
 - if not assumed, lease is deemed “rejected” – but this does not mean that the lease is terminated

What to do with a residential lease?

- If debtor behind on the rent when case filed:
 - past-due rent is a dischargeable unsecured debt listed on Schedule F
 - landlord cannot sue to recover back rent
 - but state law may permit landlord to bring eviction action based on a lease violation for nonpayment of rent, so if debtor wishes to stay in premises, may need to pay back rent
- If the landlord doesn't evict, a new month-to-month tenancy may be created under state law

Completing the Financial Management Course

- To receive a discharge debtor must submit proof of completion of “instructional course concerning personal financial management” - **11 U.S.C. § 727(a)(11) and § 1328(g)**
 - approved providers at www.justice.gov/ust
 - debtor must take the course after the petition is filed
- Debtor must file Form 423 (certification of completion), unless course provider has filed notification with the court already – **Bankruptcy Rule 1007(b)(7)**
- Deadline to file certification or notification of course completion:
 - in chapter 7: 60 days after first scheduled meeting of creditor
 - in chapter 13: before final plan payment or motion for hardship discharge

OBTAINING AND DEFENDING THE DISCHARGE

Obtaining the Discharge

- Once debtor files all of required documents and attends meeting of creditors, getting discharge is pretty simple
- In chapter 7 case, it is usually entered shortly after deadline for creditors to object to entry of discharge, which is 60 days after first date set for meeting of creditors
- Court may hold a discharge hearing, but most elect not to
 - discharge hearing may be held if debtor indicates intent to reaffirm personal property
- Court ordinarily will close the case shortly after discharge is entered

Discharge of Student Loans

- Usually, student loans are not dischargeable
- Debtor may be able to discharge student loan debts if can show undue hardship - courts weigh three factors:
 - do the student loans prevent the debtor from maintaining a “minimal” standard of living?
 - is the hardship likely to continue for a “significant portion” of the repayment period?
 - has debtor made a good-faith effort to repay the loans (and to maximize income and limit expenses)?
- Debtor must file an adversary proceeding to have the student loans discharged
 - No deadline for doing this, so a closed case may be reopened for this purpose

Revocation of Discharge

- An interested party may request revocation of the discharge; must show that:
 - debtor obtained the discharge by fraud, and
 - this fraud was not known to the party until after the discharge was granted
- Complaint seeking revocation of discharge must be filed within one year after the discharge was granted, though additional time may be allowed

11 U.S.C. §§ 727(d), (e), 1328(e)

Debtor Audits

- U.S. Trustee started random audits in 2006. At least one out of every 1,000 individual chapter 7 and chapter 13 cases is randomly selected for audit
 - there are other targeted audits of cases in which debtors have unusually high income or expenses
- Audits attempt to determine the accuracy, veracity, and completeness of debtors' petitions, schedules, and other information required by sections 521 and 1322
- Debtor will be notified by letter early in the case if selected
 - attorney may give permission for auditor to communicate directly with debtor
 - debtor must provide requested documents to the audit firm within 21 days

Enforcing the Discharge

- Debtor should be advised to contact you (or seek legal advice) if there are any attempts to collect discharged debts
- Debtor should be advised about section 525 prohibition on discrimination by:
 - government agencies
 - private employers
 - student loan lenders
- Violators of the section 524(a) discharge injunction may be held in contempt of court
 - actual damages, attorney's fees and possibly punitive damages may be awarded
 - if case closed, motion to reopen should be filed to enforce the discharge (a reopening fee should not be charged in this instance)

Clearing up Credit Reports

- Advise debtor to check credit reports 60-90 days after discharge to make sure creditors are properly reporting information about discharged debts as required by the Fair Credit Reporting Act (FCRA) - **15 U.S.C. §§ 1681-1681x**
- All debts discharged in the bankruptcy case should show a zero balance and be noted as having been included in the bankruptcy
- Debtor may request reports at www.annualcreditreport.com (one free report per year)
- If incorrect information is shown, debtor should notify both furnishers (creditors) and credit bureaus of the errors
 - If the error is not corrected, debtor may have a claim under the Fair Credit Reporting Act