

# **IMPACT OF BANKRUPTCY ON LITIGATION**

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## **I. BANKRUPTCY OVERVIEW**

The Bankruptcy Code is codified as Title 11 of the United States Code. The procedural aspects of bankruptcy cases are set forth in the Federal Rules of Bankruptcy Procedure. Bankruptcy cases are handled by Federal Bankruptcy Courts in each federal judicial district in the country and a bankruptcy judge may decide any matter connected with the bankruptcy case. Once bankruptcy is commenced, an estate is created and becomes the temporary legal owner of all debtors property as of the commencement of the estate.

There exist six types of bankruptcy under the Bankruptcy Code. A debtor must determine which type of bankruptcy is appropriate for their particular circumstances. The six different types of bankruptcies are traditionally referred to by their chapter number as codified in the Bankruptcy Code. The only chapters discussed herein are the most common bankruptcy filings and include Chapters 7, 11 and 13:

### **A. Chapter 7: Liquidation**

Chapter 7 contemplates an orderly, court supervised procedure by which a trustee takes over the assets of the debtor's estate, reduces the assets to cash and distributes to creditors. Individuals, partnership, corporation or other business entity may file under Chapter 7. After the Chapter 7 bankruptcy is filed, a Trustee is appointed by the Court to investigate the financial affairs of the debtor and liquidate the estate. A trustee is "the representative of the bankruptcy estates who exercises statutory powers, principally for the benefit of the unsecured creditors, under the general supervision of the U.S. trustee or bankruptcy administration. The trustee is a private individual or corporation appointed in all chapter 7 cases."<sup>1</sup>

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<sup>1</sup>*Bankruptcy Basics*, James C. Duff, Director, United States Courts, Revised Third Edition, April 2010, <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics.aspx>

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## **B. Chapter 11: Reorganization**

Chapter 11 bankruptcies are used by commercial enterprises that want to continue to operate their business and repay creditors concurrently through a court approved plan of reorganization. Upon filing, the debtor becomes the “debtor-in-possession.” The debtor-in-possession is placed in the position of a fiduciary and has the same rights and duties as a trustee. Trustees may be appointed if a creditor files a motion for the appointment of a trustee if there is evidence of fraud, dishonesty, incompetence, or gross mismanagement of the debtor’s affairs or if it is in the best interest of the creditor.

## **C. Chapter 13: Adjustments of Debts of an Individual with Regular Income**

Designed for individual debtor who has a regular source of income and enables the debtor to maintain assets while proposing a plan of repayment to creditors. Chapter 13 is often used if the debtor does not qualify to file under Chapter 7 and enables a debtor to remain in possession of the estate while making payments to creditors. The debtor proposes a repayment plan which must be approved by the Court. The debtor makes payments through a trustee. Unlike Chapter 7, a debtor does not receive an immediate discharge of debts. Discharge occurs when payments are completed. However, a debtor is protected from lawsuits, garnishment and other creditor actions while the plan is in effect.

## **II. ADVERSARY PROCEEDING**

An adversary proceeding is a lawsuit filed within the bankruptcy case. It is an action commenced by a plaintiff filing a complaint against one or more defendants. A party to a separate civil lawsuit may file an adversary complaint to litigate, in the bankruptcy court, a number of issues, including but not limited to the determination of a fraud claim or another nondischargeable debt. An adversary proceeding resembles a typical civil case from state court. The types of actions that can be commenced as an adversary proceeding are set forth in Fed. Bankr. R. 7001 and include the following:

- A. To recover money or property,
- B. To determine the validity, priority or extent of a lien or other interest in property,
- C. To obtain court approval for the sale of both the interest of the estate and of a co-owner in property.
- D. To object or revoke a discharge,
- E. To revoke an order of confirmation of a Chapter 11, 12, or 13 plan,
- F. To determine the dischargeability of a debt,
- H. To obtain an injunction or other equitable relief,

- I. To subordinate any allowed claim or interest, except when subordination is provided in a Chapter 9, 11, 12, or 13 plan,
- J. To obtain a declaratory judgment relating to any of the foregoing, or
- K. To determine a claim or cause of action removed pursuant to 28 U.S.C. §1452.

### **III. DISCHARGE**

#### **A. What is discharge?**

A bankruptcy discharge releases the debtor of personal liability for certain types of debts. It is a permanent order from the Court which prohibits creditors from taking any action against the debtor and includes any legal actions or communications with the debtor.

#### **B. When does it occur?**

Discharge in Chapter 7 cases usually occurs approximately 4 months after the bankruptcy is filed. In Chapter 11 and 13 cases, the discharge does not occur until the debtor completes all payments under the repayment plan previously approved by the Court.

#### **C. Dischargeable Debts**

Various debts are discharged depending upon which Chapter the debtor filed for bankruptcy. While most assets of individuals are dischargeable in bankruptcy, partnerships and corporations are not entitled to discharge. 11 U.S.C. §727(a)(1). Although variations exist between the Chapters of the Bankruptcy Code, a summary of dischargeable, nondischargeable and possible dischargeable debts are as follows:

1. *Dischargeable Debts:*

- Personal loans
- Credit Cards
- Repossession deficiencies
- Auto accident claims
- Medical bills
- Judgments
- Business Debts
- Leases
- Guaranties
- Negligence claims

Tax penalties over 3 years old  
Income taxes that aren't priority taxes

2. *Nondischargeable Debts:*

Recent taxes  
Trust fund taxes  
Child or family support  
Criminal fine or restitution  
Accident claims involving intoxication  
Debts not scheduled  
Penalties payable to the government other than tax penalties  
Student loans  
Debts listed in prior bankruptcy where debtor was denied a discharge  
Taxes for years where return unfiled or filed for less than 2 years

3. *Possible Dischargeable Debts:*

There are some debts which are not automatically dischargeable or nondischargeable. However, to contest the dischargeability of the debt, a creditor must promptly contest the following types of debt:

Willful and malicious injuries to others  
Embezzlement  
Debts incurred by fraud or dishonesty  
Debts arising from breach of fiduciary duty

To be non-dischargeable, the creditor must show that the debtor's actions were deliberate or intentional and the debtor intended to cause the injury. *Kawaauhau v. Geiger* (1998), 523 U.S. 57, 61-62, 118 S. Ct. 974.

### III. PREFERENCE PAYMENTS

#### A. Definition

Under certain circumstances, a creditor who was paid by a debtor prior to the debtor filing for bankruptcy, may be required by the trustee to return the payment to the estate. These payments are called "preference payments" and are defined by the bankruptcy code as follows:

- (b) \*\*\*the trustee may avoid any transfer of an interest of a debtor in property

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made
  - (A) on or within 90 days before the date of the filing of the petition; or
  - (B) between 90 days and 1 year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if
  - (A) the case were a case under chapter 7 of this title \*\*\*;
  - (B) the transfer had not been made; and
  - (C) such creditor received payment of such debt to the extent provided by the provisions of this title\*\*\*

11 U.S.C. §547 (b). The trustee must prove each element of section (b) in order to avoid the transfer. 11 U.S.C. §547(g). Whether the payment received by the debtor constitutes a “preference payment” is dependent upon the nature of the relationship between the debtor and creditor, the timing of the payment and value of the payment.

1. *Antecedent debt.* A debt is “antecedent” if it was incurred before the allegedly preferential transfer occurred. A debt is incurred on the date upon which the debtor first become legally bound to pay. *In re Jones Truck Lines, Inc.* 130 F.3d 323, 329 (8th Cir., 1998). A debtor becomes liable to the creditor when a resource is consumed or a service performed, not when the debtor is billed.
2. *Insolvency.* In order to be deemed insolvent, the debtors liabilities must exceed their assets. There is a presumption that the debtor is insolvent 90 days before they file for bankruptcy. 11 U.S.C. §547(f). This presumption can be overcome by evidence presented by the creditor. *In re Lids Corporation*, 281 B.R. 535 (Bankr. D. Del. 2002). Expert testimony is usually required to measure the solvency of a debtor on the date the transfer was made. *Id.*
3. *Insider.* An insider of an individual debtor may include any relative of the debtor or of a general partner of the debtor; partnership in which the debtor

is a general partner; general partner of the debtor; or a corporation of which the debtor is a director, officer, or person in control. An insider of a corporate debtor may include a director, officer, or person in control of the debtor; a partnership in which the debtor is a general partner; a general partner of the debtor; or a relative of a general partner, director, officer, or person in control of the debtor.<sup>2</sup>

## **B. Exception to Trustee's Avoiding Power**

If the trustee proves the five elements of 11 U.S.C. §547(b), a creditor may invoke several defenses codified at 11 U.S.C. §547(C) which include but are not limited to the following:

1. *Contemporaneous Exchange.* If the transfer involved was intended by the parties to be a contemporaneous exchange for new value and was in fact substantially contemporaneous, the payment to the creditor cannot be avoided by the trustee. Courts vary on their interpretation of what transactions are “substantially contemporaneous.” However, it is generally accepted that payments made more than 30 days from the exchange of new value are not contemporaneous. *In re General Office Furniture Wholesalers, Inc.* (BC ED Va 1984), 37 BR 180 (payments 64-79 days between date of exchange and consideration is not contemporaneous); *In re Arctic Air Conditioning* (BC ED Tenn 1983), 35 BR 107 (more than 30 days not contemporaneous); *In re Hillcrest Foods, Inc* (BC DC Me 1984), 40 BR 360 (two and a half months not contemporaneous).
2. *Ordinary Course of Business.* If the transfer was made in the ordinary course of business or of financial affairs, the trustee may not be able to avoid such transaction. The creditor has the burden of proving that the terms under which the debtor remitted the payments were objectively ordinary and must establish that the payment terms are prevailing among similarly situated companies within the relevant industry with respect to the type of transaction at issue. *In re Bridge Information Systems* (Bankr. E.D. Mo, 2003 ), 331 B.R. 774. However, expert testimony is not needed to prove that the terms of the payment agreement between debtor and creditor are ordinary in the industry. *Id.* Courts interpretation of this defense vary and are fact intensive.

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<sup>2</sup> U.S. District Court Bankruptcy Basics Glossary,  
<http://www.uscourts.gov/bankruptcycourts/bankruptcybasics/glossary.html#>

## IV. DEFENDANTS (DEBTOR) BANKRUPTCY

### A. Automatic Stay

Upon filing a petition for bankruptcy, a debtor is entitled to a stay of litigation pursuant to 11 U.S.C. §362(a), which provides in pertinent part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of –

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title . . . .

“The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws.” *In re State Airlines, Inc.*, 873 F.2d 264, 268 (11th Cir. Fla. 1989) quoting H.Rep. No. 95-595, 95th Cong., 2d Sess. 340, reprinted in 1978 U.S.Code Cong. & Admin. News at 6296; S.Rep. No. 95-989, 95th Cong., 2d Sess. 54, reprinted in 1978 U.S.Code Cong. & Admin.News at 5787, 5840. The debtor’s fundamental right of an automatic stay affords a debtor the time and money to litigate and participate in his own bankruptcy action without the need to waste those resources on civil suits. See *Id.*

The automatic stay does not apply to judicial proceedings, such as counterclaims or cross claims initiated by the debtor or claims against other defendants. “According to the plain language of the statute, the filing of a bankruptcy petition only initiates a stay with respect to actions or proceedings against a debtor, not actions or proceedings pursued by a debtor against another party. \*\*\*It is well established that a counterclaim brought by a debtor is not an action or proceeding against the debtor. *Madison Capital Co., LLC v. Smith* (E.D. Ky. Apr. 27, 2009), 2009 U.S. Dist. LEXIS 36662, 3-4, (citing *Matter of U.S. Abatement Corp.* (5<sup>th</sup> Cir. 1994), 39 F.3d 563, 568; *Maritime Elec. Co., Inc. v. United Jersey Bank* (3<sup>rd</sup> Cir. 1991), 959 F.2d 1194, 1204-05; *Merchants & Farmers bank of Dumas, Ark v. Hill* (E.D. Ark. 1990), 122 B.R. 539, 541-42; *In re Regal Constr. Co., Inc.* (Bkrtcy, Md. 1983), 28 B.R. 413, 416).

## **B. Relief From Stay**

A Creditor may seek relief from this stay under the provisions of 11 U.S.C. § 362(d) which provides that on request of a party in interest and after notice and a hearing, the court shall grant relief from the stay “for cause,” which includes the lack of adequate protection of an interest in property of the party in, if the debtor does not have any equity in the property at issue and property is not necessary for debtor’s reorganization or in a “single asset real estate” case where relief from stay may be granted to those parties whose claims are secured by an interest in the real property.

Success of a motion for relief from stay is fact specific and is dependant upon several factors:

1. Whether litigant can proceed against other defendants without the debtor’s participation.
2. Whether bankruptcy court can adjudicate.
3. Whether there is insurance coverage.
4. The debtor entity, i.e. is it a large corporation?

“A creditor, in seeking the relief from the automatic stay, has the burden to show that a relief of the automatic stay is necessary to ease the creditor’s burden. *In re Metro Transp. Co.*, 82 B.R. 351, 353 (Bankr. E.D. Pa. 1988) [T]he test is whether or not: a) any “great prejudice” to either the bankruptcy estate or the debtor will result from continuation of the civil suit, b) the hardship to the plaintiff by maintenance of the stay considerably outweighs the hardship to the debtor, and c) the creditor-plaintiff has a probability of prevailing on the merits of his case”. *Matter of McGraw*, 18 B.R. 140 (Bkcy. W.D. Wis. 1982). See also, *Matter of Holtkamp*, 669 F.2d 505 (7th Cir. 1982).” *In re Bock Laundry Machine Co.*, 37 B.R. 564, 566 (Bankr. N.D. Ohio 1984).

## **C. Proof of Claim**

A proof of claim is an official form which is used by creditors in bankruptcy cases in order to receive payment from the trustee. In addition to the creditor, the trustee or debtor, can file a proof of claim on behalf of the creditor. If a creditor fails to file a proof of claim, they will not be paid. In Chapter 7 and Chapter 13 cases, a proof of claim must be filed by a creditor within 90 days after the meeting of the creditors. If the proof of claim is not filed during that time period, it will be barred pursuant to Bankruptcy Rule 3002. *In re Schneider*, 51 BR 196 (DC Colo, 1984).

## V. PLAINTIFF'S (DEBTOR'S) BANKRUPTCY

### A. Debts and Assets Must be Scheduled

11 U.S.C. §521(1) of the Bankruptcy Code requires a debtor to file "a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs." A cause of action is an asset that must be scheduled under 521(1). See, *Eubanks v. CBSK Financial Group, Inc.* (6<sup>th</sup> Cir. 2004), 385 F.3d 894, 897; *Cusano v. Klein* (9<sup>th</sup> Cir. 2001), 264 F.3d 936, 945. "The disclosure obligations of consumer debtors are at the very core of the bankruptcy process and meeting these obligations is part of the price debtors pay for receiving the bankruptcy discharge." *In re Colvin* (Bankr. E.D. Mich. 2003), 288 B.R. 477, 481; *Browning Mfg. v. Mims (In re Coastal Plains, Inc)* (5<sup>th</sup> Cir. 1999), 179 F.3d 197, 208 (citing *Oneida Motor Freight, Inc. v. United Jersey Bank* (3<sup>rd</sup> Cir. 1988), 848 F.2d 414) ("Viewed against the backdrop of the bankruptcy system and the ends it seeks to achieve, the importance of this disclosure duty cannot be overemphasized.").

### B. Judicial Estoppel

In event that a plaintiff/ debtor files for bankruptcy and fails to disclose a potential or existing lawsuit which exists at the time the bankruptcy is filed, and the bankruptcy is subsequently closed, a defendant may move to dismiss the case on the basis of judicial estoppel. Judicial estoppel "prevents a party from staking out a position in a subsequent action that is inconsistent with the position taken in a prior action." *Sciotto Mem. Hos. Assn. Inc. v. Price Waterhouse*, 74 Ohio St.3d 474, 481, 1996-Ohio-365. Judicial estoppel is applied to maintain:

the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment. \* \* \* The doctrine applies only when a party shows that his opponent: (1) took a contrary position; (2) under oath in a prior proceeding; and (3) the prior position was accepted by the court.

*Smith v. Dillard Department Stores, Inc.* (2000), 139 Ohio App.3d 525, 533. See, also, *Teledyne Indus. Inc. v. National Labor Relations Board* (6<sup>th</sup> Cir. 1990), 911 F.2d 1214, 1218.

The Sixth Circuit has specifically noted that judicial estoppel should be utilized to avoid the evil of, what they colorfully describe as "the perversion of the judicial machinery," "playing fast and loose with the courts," "blowing hot and cold as the occasions demand," and "having [one's] cake and eating it too." *Reynolds v. Comm-*

*R* (6<sup>th</sup> Cir. 1988), 861 F.2d 469, 472. Courts throughout the country (state, federal and bankruptcy) all are in agreement that a failure to disclose a claim in the bankruptcy schedules triggers the doctrine of judicial estoppel, and precludes a subsequent attempt to prosecute the action. See, *Oneida, supra*, at 414; *In Re: H. R. P. Auto Center, Inc.* (Bankr. N.D. Ohio 1991), 130 B.R.. 247. In fact, if the debtor has enough information prior to confirmation to suggest that it may have a possible cause of action, then that is a known cause of action such that it must be disclosed. See, *In Re: Coastal Plains* (5<sup>th</sup> Cir. 1999), 179 F.3d 197, 208.

In *Bruck Manufacturing Company v. Mason* (1992), 84 Ohio App. 3d 398, the debtor failed to identify a claim in the bankruptcy schedules. The Bruck trust brought suit against Mason for repayment of a loan. Mason filed a third party complaint against individual members of the Bruck family. After the third party complaint was filed, Mason went into bankruptcy and was reorganized. The Brucks sought summary judgment on Mason's claim because Mason failed to identify the claim asserted against the Brucks on the bankruptcy schedule. The court concluded that the doctrine of judicial estoppel barred the third party complaint. Specifically, the court opined:

In the present case, appellant asserted a claim by way of a counter-claim and third party claim prior to his petition for Chapter 13 protection. Appellant failed to state his claim as an asset on his "Chapter 13 statement" or at any time during the bankruptcy proceedings \* \* \*. However, appellant's failure to disclose the relevant claim estops him from asserting it now. Accordingly, the trial court did not err in ruling that the doctrine of equitable and/or judicial estoppel applies.

Thus, defense attorneys may move to dismiss a lawsuit on the basis of judicial estoppel where the debtor does not disclose to the court the potential asset of the non-bankruptcy lawsuit or claim and the bankruptcy case is subsequently closed.

#### **C. Separate Lawsuit Scheduled**

Where a plaintiff/debtor has scheduled a separate lawsuit against a defendant as a bankruptcy asset, the trustee and the plaintiff's attorney can come to some agreement with regard to any settlement or judgment. Any agreement between the attorney and trustee must be approved by the bankruptcy court.

#### **D. Separate Lawsuit Not Scheduled**

If the bankruptcy is open and the debtor did not schedule as a potential asset a separate lawsuit, the debtor may amend the schedules and add the asset. However,

if the lawsuit was not disclosed in bankruptcy and the bankruptcy is closed, the claim is barred by judicial estoppel as described above.

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF _____		<b>PROOF OF CLAIM</b>
Name of Debtor _____		Case Number _____
NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.		
Name of Creditor (The person or other entity to whom the debtor owes money or property): _____		<input type="checkbox"/> Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars. <input type="checkbox"/> Check box if you have never received any notices from the bankruptcy court in this case. <input type="checkbox"/> Check box if the address differs from the address on the envelope sent to you by the court.
Name and address where notices should be sent: _____		
Telephone number: _____		
Account or other number by which creditor identifies debtor: _____		THIS SPACE IS FOR COURT USE ONLY  Check here if this claim <input type="checkbox"/> replaces a previously filed claim, dated: _____ <input type="checkbox"/> amends
<b>1. Basis for Claim</b> <input type="checkbox"/> Goods sold <input type="checkbox"/> Services performed <input type="checkbox"/> Money loaned <input type="checkbox"/> Personal injury/wrongful death <input type="checkbox"/> Taxes <input type="checkbox"/> Other _____		
<input type="checkbox"/> Retiree benefits as defined in 11 U.S.C. § 1114(a) <input type="checkbox"/> Wages, salaries, and compensation (fill out below) Your SS #: _____ Unpaid compensation for services performed from _____ (date) to _____ (date)		
<b>2. Date debt was incurred:</b> _____		<b>3. If court judgment, date obtained:</b> _____
<b>4. Total Amount of Claim at Time Case Filed:</b> \$ _____ If all or part of your claim is secured or entitled to priority, also complete Item 5 or 6 below. <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.		
<b>5. Secured Claim.</b> <input type="checkbox"/> Check this box if your claim is secured by collateral (including a right of setoff). Brief Description of Collateral: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other _____  Value of Collateral: \$ _____  Amount of arrearage and other charges <u>at time case filed</u> included in secured claim, if any: \$ _____		<b>6. Unsecured Priority Claim.</b> <input type="checkbox"/> Check this box if you have an unsecured priority claim Amount entitled to priority \$ _____ Specify the priority of the claim: <input type="checkbox"/> Wages, salaries, or commissions (up to \$4,650)* earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3). <input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4). <input type="checkbox"/> Up to \$2,100* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6). <input type="checkbox"/> Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7). <input type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8). <input type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(____). <small>*Amounts are subject to adjustment on 4/1/04 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.</small>
<b>7. Credits:</b> The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. <b>8. Supporting Documents:</b> Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary. <b>9. Date-Stamped Copy:</b> To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.		THIS SPACE IS FOR COURT USE ONLY
Date _____	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any): _____	
Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.		

# INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In particular types of cases or circumstances, such as bankruptcy cases that are not filed voluntarily by a debtor, there may be exceptions to these general rules.

## — DEFINITIONS —

### **Debtor**

The person, corporation, or other entity that has filed a bankruptcy case is called the debtor.

### **Creditor**

A creditor is any person, corporation, or other entity to whom the debtor owed a debt on the date that the bankruptcy case was filed.

### **Proof of Claim**

A form telling the bankruptcy court how much the debtor owed a creditor at the time the bankruptcy case was filed (the amount of the creditor's claim). This form must be filed with the clerk of the bankruptcy court where the bankruptcy case was filed.

### **Secured Claim**

A claim is a secured claim to the extent that the creditor has a lien on property of the debtor (collateral) that gives the creditor the right to be paid from that property before creditors who do not have liens on the property.

Examples of liens are a mortgage on real estate and a security interest in a car, truck, boat, television set, or other item of property. A lien may have been obtained through a court proceeding before the bankruptcy case began; in some states a court judgment is a lien. In addition, to the extent a creditor also owes money to the debtor (has a right of setoff), the creditor's claim may be a secured claim. (See also *Unsecured Claim*.)

### **Unsecured Claim**

If a claim is not a secured claim it is an unsecured claim. A claim may be partly secured and partly unsecured if the property on which a creditor has a lien is not worth enough to pay the creditor in full.

### **Unsecured Priority Claim**

Certain types of unsecured claims are given priority, so they are to be paid in bankruptcy cases before most other unsecured claims (if there is sufficient money or property available to pay these claims). The most common types of priority claims are listed on the proof of claim form. Unsecured claims that are not specifically given priority status by the bankruptcy laws are classified as *Unsecured Nonpriority Claims*.

## Items to be completed in Proof of Claim form (if not already filled in)

### **Court, Name of Debtor, and Case Number:**

Fill in the name of the federal judicial district where the bankruptcy case was filed (for example, Central District of California), the name of the debtor in the bankruptcy case, and the bankruptcy case number. If you received a notice of the case from the court, all of this information is near the top of the notice.

### **Information about Creditor:**

Complete the section giving the name, address, and telephone number of the creditor to whom the debtor owes money or property, and the debtor's account number, if any. If anyone else has already filed a proof of claim relating to this debt, if you never received notices from the bankruptcy court about this case, if your address differs from that to which the court sent notice, or if this proof of claim replaces or changes a proof of claim that was already filed, check the appropriate box on the form.

### **1. Basis for Claim:**

Check the type of debt for which the proof of claim is being filed. If the type of debt is not listed, check "Other" and briefly describe the type of debt. If you were an employee of the debtor, fill in your social security number and the dates of work for which you were not paid.

### **2. Date Debt Incurred:**

Fill in the date when the debt first was owed by the debtor.

### **3. Court Judgments:**

If you have a court judgment for this debt, state the date the court entered the judgment.

### **4. Total Amount of Claim at Time Case Filed:**

Fill in the total amount of the entire claim. If interest or other charges in addition to the principal amount of the claim are included, check the appropriate place on the form and attach an itemization of the interest and charges.

### **5. Secured Claim:**

Check the appropriate place if the claim is a secured claim. You must state the type and value of property that is collateral for the claim, attach copies of the documentation of your lien, and state the amount past due on the claim as of the date the bankruptcy case was filed. A claim may be partly secured and partly unsecured. (See DEFINITIONS, above).

### **6. Unsecured Priority Claim:**

Check the appropriate place if you have an unsecured priority claim, and state the amount entitled to priority. (See DEFINITIONS, above). A claim may be partly priority and partly nonpriority if, for example, the claim is for more than the amount given priority by the law. Check the appropriate place to specify the type of priority claim.

### **7. Credits:**

By signing this proof of claim, you are stating under oath that in calculating the amount of your claim you have given the debtor credit for all payments received from the debtor.

### **8. Supporting Documents:**

You must attach to this proof of claim form copies of documents that show the debtor owes the debt claimed or, if the documents are too lengthy, a summary of those documents. If documents are not available, you must attach an explanation of why they are not available.