Collection Law from Start to Finish

I. PRE-SUIT COLLECTION STRATEGIES

A. How to Decide Whether to Pursue Collection.

1) What do you know about the debt?

A. Quality of the debt at the time of origination.

B. Type of debt - commercial, retail, credit card, auto deficiencies, services billed, goods purchased, secured by personal property, secured by real estate.

2) What do you know about the debtor?

A. Debtor information provided.

1. Name, age and address information.
2. Employment information.
3. Asset information obtained during the application process.

B. New information regarding the debtor.

1. Owns real property.
2. Employed and employment information is confirmed.
3. Bank account(s)
4. Securities, Mutual Fund accounts, Rents
5. Residential address - Income average where debtor lives

3) What data says?

A. Credit Scores and other scoring.

4) How much low cost effort has been tried in collecting the debt?

A. Utilization of call centers and collectors - in house or agency

placement?

B. Utilization of dunning letters - in house or agency placement?

B. Preventative Collection - Collecting Without Filing a Lawsuit.

1) Collectors and calling.

2) Letters, e-mails, texts, and messaging.

C. How to Discover Assets - Finding Property from Which to Collect.

1) Reviewing credit reports

2) Reviewing County Recorder records to determine real estate ownership.

3) Asking the debtor about ability to pay.

4) General debts.

To state a claim for breach of contract, a party must allege "(1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages." *Blair v. Axiom Design, LLC,* 2001 UT 20, ¶14, 20 P.3d 388. "In construing a contract, the intention of the contracting parties is controlling." *Peterson v. Sunrider Corp.,* 2002 UT 43, ¶18, 48 P.3d 918. In interpreting a contract, courts look to the writing itself to ascertain the parties' intentions and consider each contract provision in relation to all of the others, with a view toward giving effect to all and ignoring none. *WebBank v. Am. Gen. Annuity Serv. Corp.,* 2002 UT 88, ¶18, 54 P.3d 1139. When "the language of the contract is unambiguous, the intention of the parties may be determined as a matter of law based on the language of the agreement." *Peterson,* 2002 UT 43, **¶18.**

5) Medical and Dental Bills.

Contracts implied in fact are "established by conduct." *Knight v. Post,* 748 P.2d 1097, 1100 (Utah Ct.App.1988). To show the existence of a contract implied in fact, Plaintiff was required to prove that (1) Defendant Debtors requested the medical services provider to perform

the work, (2) the medical service provider expected Defendant to compensate it, and (3) Defendant knew or should have known that the medical services provider expected compensation. *Outsource Receivables Mgmt., Inc. v. Bishop,* 2015 UT App 41, ¶6,344 P.3d 1167, 1171.

The Utah State Legislature made a change in the law relating to Health Care Collections effective May 8, 2017. Specifically, the Utah legislature amended *Utah Code 31A-26-301.5,* and created a new sections found at *Utah Code 26-21-11.1, 58-1-508,* and *62A-2-112. See H.B. 128.* These new and amended sections change the circumstances under which a health care provider may make a report to a credit bureau or use the services of a third party collector to collect medical bills.

Specifically, a Health Care Provider is required to send a notice to the "insured" prior to referring the balance to a third party collector or reporting to a credit bureau. *Utah Code 3JA-26-301.5(4).* The notice must be sent certified mail return receipt requested. *Utah Code 31A-26-301.5(4)(a)(i)(A).* The Notice must state: (i) the amount that the insured owes; and (ii) the date by which the insured must pay the amount owed. *Utah Code 31A-26-301.5(4)(a)(ii)(B)(b).*

Then, the Health Care provider must wait 45 days. *Id.* After the notice is sent and after 45 days have past, then the Health Care Provider can place the bill with a collection agency or make a report to the credit bureaus. *Id.*

Now, to prove a medical debt, a collection attorney should request a copy of the "Notice", and proof that the notice was sent by certified mail, return receipt requested, or sent priority mail, or sent by text message.

HIPAA prevents the release of health information to someone other than the patient, without the patient's authorization. *45 C.F.R. § 164.508(a)(l).*

However, HIPAA allows a collection agency to disclose protected health information as necessary to obtain payment for health care services. *See 45 C.F.R. § 164.506(c).* Obtaining payment under HIPAA includes debt collection activities. *Id.§ 164.501.*

Zaborac v. Mut. Hosp. Serv., Inc., No. 1:03-CV-01199-LJMWTL, 2004 WL 2538643, at *2 **(S.D.** Ind. Oct. 7, 2004)(A collection attorney may disclose HIPAA protected information to the debtors attorney, if the debtors attorney requests validation of the debt.)

6) Auto Deficiencies

Utah has enacted Article 9 of the Uniform Commercial Code. Article 9 can be found at

Title 70A, Chapter 9. The Utah Code provisions that concern the repossession and re-sale of the collateral and the right to pursue a deficiency are found in *Utah Code§ 70A-9a-601 et. seq. Utah Code§ 70A-9a-609* gives a creditor the right "after default" to "take possession of the collateral." *Id.* A secured party may "take possession of the collateral" ... "pursuant to a judicial process" or "without judicial process, if it proceeds without breach of the peace." *Id.*

After the creditor Plaintiff obtains and deposes of the collateral, the creditor may pursue a deficiency judgment. Pursuing that deficiency is governed by *Utah Code§§ 70A-9a-607 through 610.*

Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. *See Utah Code § 70A-9a-610.*

Utah Code§ 70A-9a-627 provides that a sale is "commercially reasonable" if the disposition of the collateral: (a) is made "in the usual manner on any recognized market", or (b) is made "at the price current in any recognized market at the time of the disposition", or (c) is made "otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition". *Utah Code§ 70A-9a-627(2).*

Utah Code§§ 70A-9a-611 through 614 requires that notice of disposition be given to the debtor at least 10 days before disposition. In failing to comply with the disposition requirements, a debtor may have claims against the secured party. *See Utah Code§ 70A-9a-625.*

7) Credit Card accounts.

The acceptance of the terms of the credit card occurs when the cardholder uses the card. *See Citibank (South Dakota), NA. v. Santoro,* 150 P.3d 429,429, 432-3 (Or.App. 2006). Upon such use, the card holder agrees to all provisions in the cardholder agreement and the agreement becomes a binding contract between the cardholder and the issuer. *Id.* This principle of contract formation for credit card accounts was accepted by the Utah Court of Appeal in two unpublished cases, those being *Wells Fargo Bank Nevada, NA v. Toronto,* 2008 WL 2764638 (Utah App.), and *Capital One Bank (USA), NA. v. Wilkerson,* 2009 WL 3792434 (Utah App.).

8) NSF Checks.

Utah has enacted a law to apply to Dishonored Instruments. That law can be found at *Utah Code § 7-15-1 et. seq.* The Dishonored Instruments code section requires that, if a creditor wants the opportunity to obtain the "Bad Check" penalties available in *Utah Code§ 7-15-1,* the

creditor must first send out the Notice described in *Utah Code§ 7-15-2.* The Notice may be given orally or in writing. *Id.* The Notice can be mailed first class postage prepaid, or mailed certified or registered mail, return receipt requested. *Id.* If the notice is given orally or by regular mail, then there could be a factual issue as to whether Notice was actually given or received by the debtor. *Id.* But, if the notice is given by certified mail, return receipt requested, then the notice is conclusively presumed to have been given when the notice is deposited in the United States mail. *Id.*

Because the right to NSF fees, interest, court costs, attorneys' fees, actual costs of collection, and damages in an amount of triple the face value of the check, but not more than $500, is tied to the issue of "Notice," most all collection law firms send the required "Notice" by certified mail, return receipt requested, so that the creditor receives the presumption. *Id.*

The Notice allows the debtor to pay the face amount of the check plus $20.00 within the first 15 calendar days from when the notice was received. *Utah Code§§ 7-15-1 and 2.* Thereafter, the Notice allows the debtor to pay the face amount of the check plus $40 within the first 30 days from when the notice was received. *Id.* If the debtor does not pay the face amount of the check plus the appropriate "service charge," then 30 days after the notice is sent, the creditor may file a civil action and seek: (1) the check amount, (2) interest, (3) court costs, (4) attorneys' fees, (5) actual costs of collection, and (6) damages in an amount equal to triple the value of the check, but not to exceed $500. *Id.*

9) Personal Liability and Personal Guarantees.

To relieve an individual signer from liability, the signer's corporate capacity must be clear from the form of signature. *See Boise Cascade Corp. v. Stonewood Dev. Corp.,* 655 P.2d 668, 668 n. 1 (Utah 1982) (per curiam) ("Where it is not clear that a corporate officer signs a contract in a representative capacity, he is personally liable."). Individuals who fail to limit their signatures to their corporate capacity have consistently been held to be directly liable on corporate instruments. *See Bushnell Real Estate, Inc. v. Nielson,* 672 P.2d 746, 751- 52 (Utah 1983) (holding corporate officers liable on promissory note where they failed to signify their corporate capacity in their signatures).

Where a Personal Guarantee states the "undersigned unconditionally promise and guarantee" payment of corporate debts, the officers of a corporation are personally liable. *DBL Distrib., Inc. v. 1 Cache, L.L.*C., 2006 UT App 400, ¶17, 147 P.3d 478,482.

10) Statutes of Limitations.

Written agreements are governed by the six-year limitations period of *Utah Code§ 78B-2-309. Utah Code § 78B-2-309* states in pertinent part that "An action may be brought within six years, (2) upon any contract, obligation, or liability founded upon an instrument in writing...." By the plain language of *section 78B-2-309,* it is to apply to all written contracts, obligations, or liabilities.

Utah Code Section 78B-2-307 states:

"An action may be brought within four years:

(1) after the last charge is made or the last payment is received:

(a) upon a contract, obligation, or liability **not founded upon an instrument in writing;**

(b) on an open store account for any goods, wares, or merchandise;

or

(c) on an open account for work, labor or services rendered, or materials furnished;" (Emphasis added.)

When two statutory provisions appear to conflict, the more specific provision will govern over the more general provision." *Perry v. Pioneer Wholesale Supply Co.,* 681 P.2d 214, at 216 (Utah 1984)(internal citations omitted). As such, a "catch-all statute of limitations" will only apply when "the legislature has not enacted a more specific statute." *Quick Safe-T Hitch, Inc. v. RSB Systems L. C,* 12 P.3d 577, at 579 (Utah 2000).

Further, if "a substantial doubt exists as to which is the applicable statute of limitations, the longer rather than the shorter period of limitations is to be preferred." *Hardinge Co., Inc. v. Emco Corp.,* 266 P.2d 494,496 (Utah 1954) (internal citation omitted); *see also Juab County Dept. of Public Welfare v.*

Summers, 426 P.2d 1, 3 (Utah 1967)(stating that "generally the [Statute of Limitations] giving the longest period of limitation is to be preferred"); and *Grey Realty Co. v. Robinson,* 184 P.2d 237, 239 (Utah 1947)(stating that "the creditor may have the benefit of the section which permits the maximum length of time within which he must commence his action" in a probate case).

This policy of applying the longer statute of limitations serves to allow more issues to be adjudicated on the merits, "for the law does not look with favor upon the defeating of a just

obligation if it can be properly avoided." *Summers*, 426 P.2d at 3.

A debt collector that knowingly files suit in court to collect a time-barred debt violates the FDCPA. *See Phillips v. Asset Acceptance, LLC,* 736 F.3d 1076, 1079 (CA7 2013).

11) Attorney's Fees.

A. The Creditor's right to recover Attorney fees.

The Utah Courts will award attorney fees even on default judgments, if a creditor produces a written contract in which the debtor agreed to pay reasonable attorney fees if the debt went to collection. *Utah Code Ann.§ 78B-5-826.* Utah Courts will also award attorney fees on actions to collect NSF checks. *Utah Code § 7-15-1.* The Utah Courts will award a flat statutory amount for attorney fees, rather than requiring an attorney to file an affidavit establishing the actual time the attorney spent in the collection matter. *Rule 73 of the Utah R. of Civ. Proc.* For actions over $5,000.00, the flat rate for attorney fees is $775.00. *Id.*

B. Risk to the Creditor of paying the debtor's Attorney fees.

Pursuant to *Utah Code Ann. § 78B-5-826,* "a court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing .. [sic] .. when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney fees."

The Utah Supreme Court interpreted this provision such that if a contract contains an attorney fee provision, whereby the creditor is permitted to recover the creditor's attorney's fees, and, for whatever reason, the creditor is not the prevailing party in the lawsuit, then the debtor may recover his/her attorney fees. *See Bilanzich v. Lonetti*, 2007 UT 26, 160 P.3d 1041.

Thus, creditors need to understand that if they produce the written contract terms, then they must be prepared to support the lawsuit with credible and admissible evidence, and the creditor may even need to appear for trial, or accept the burden of paying the debtor's legal fees.

Filing the Lawsuit - Developing Definitive Strategies

III. FILING THE LAWSUIT - DEVELOPING DEFINITIVE STRATEGIES

A. Knowing the Debtor

It all begins with the initial collection file. Documentation is the key to recovery. The "must have" documents include: credit applications, signed contracts, invoices, personal guarantees and copies of payment checks. The "must have" personal information includes: the debtor's legal name, social security number, birth date, current address, address at the time of default, telephone numbers, and place of employment.

The credit application is critical at all stages in the business-customer relationship. Every creditor should require a credit application at the beginning of the relationship. The credit application is the rational "first step" in determining who gets goods and services without upfront payment. The credit application continues to be important during the entire relationship cycle. If the customer becomes a "non-payor", then evaluating the next step starts with the credit application. Credit applications can make a substantial difference in legal collect ion. When an account turns "non-payor" and the customer must be forced to pay through litigation, judgment collection starts with a review of the credit application.

Keeping copies of payment information developed during the business relationship is critical to legal collection. Creditors should keep a copy of any checks they receive from the customer. If legal collection becomes the necessary "next step", then a copy of a check or other payment information provides the debt collection attorney with banking information which can be used for an immediate bank garnishment or a subpoena of banks statements and deposit instruments.

After you get the initial file, now the collection lawyer needs to verify the following:

1) Settlement. The account has not been satisfied, settled, or released.

The creditor did not receive a partial payment and send a 1099 to the debtor.

2) Litigation. There has not been any previous litigation to collect the account. If there was previous litigation, the dismissal was without prejudice.

3) Bankruptcy. The debtor does not have an active Bankruptcy file or a discharge order that covers the debt.

4) Deceased. The debtor is alive.

5) Fraud. The debtor has never asserted that the account was fraudulently originated or fraudulently used.

6) Placement. The debt is only with your firm. No other collection agencies or Jaw firms are working the debt.

7) Title. The creditor has the right to collect the debt. Title to the account has not been sold, transferred or assigned.

B. How to Effectively Get the Debtor's attention

Have an address and telephone number verification process such that you are reasonably sure that the debtor is receiving your letters and listening to your telephone messages.

C. Avoiding Counter-claims

1. Prove the debt before you have to.

Clients don't always tell you about a dispute before they send you a file. Clients understand that if the attorney knows about the dispute, it could change the fee arrangement. In your initial client engagement, you want to do two things: (1) Your engagement letter should make it clear that there is one fee arrangement for collection and a second fee arrangement for defending counter claims. (2) Require a supporting affidavit or declaration before you accept the file and begin collection.

If a collection attorney insists on a signed Declaration prior to commence collection efforts, then those conversations about whether the debtor is disputing the debt are more likely to come up. A creditor who knows about a dispute is less likely to sign a declaration under oath about an account without first having that conversation with the attorney about the nature of the debtor's claimed dispute. Thus, the requirement of a Declaration before collection will also lead to more informed decisions about the fee arrangement.

Now, with the recent amendment of *Utah R. Civ. P. 55*, the collection attorney has the perfect opportunity to get the Declaration done early in the process.

Rule 55 requires that to get a Verified Complaint or Declaration to get a default judgment. Specifically, *Rule 55* requires:

"Judgment by default may be entered ... by the clerk ... when the plaintiffs claim against a

defendant is for a sum certain, ... and.... plaintiff, through a verified complaint, an affidavit or a declaration ... sets forth facts necessary to establish the amount of the claim, ... " *Utah R. Civ. P. 55*

Does that mean that the *Rule 55(b)* Declaration or Verified Complaint must set forth all the elements of a legal cause of action?

At a minimum, a breach of contract claim must include allegations of when the contract was entered into by the parties, the essential terms of the contract at issue, and the nature of the defendant's breach. *American West Bank Members, L.*C. *v. State,* 2014 UT 49, ¶ 7, 342 P.3d 224, 231. These elements are required to fulfill the requirements of a "short and plan' statement under out pleading standard. *Id.* These minimal allegations will "give the defendant fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved. *Id.* If a complaint does not contain the "allegations outlined above", there can be no claim for breach of contract. *Id.*

Best Practice: The Declaration should authenticate all the necessary documents needed to prove the case. The Declaration should substantiate all the required elements for the cause of action. The Declaration should be in the file before the first FDCPA notice is sent or the first telephone call is made. The Declaration should state that the account has not been satisfied, settled, or released. The Declaration should state that the creditor has the right to payment of the debt.

An attorney who files a collection lawsuit supported by the client's affidavit of a debt owed, does not violate *15 U.S.*C. *§ 1692d,* which prohibits harassing, oppressing or abusive conduct or *15 U.S.C. § l 692e(10),* which prohibits false representations or deceptive means. *Harvey v. Great Seneca Financial,* 453 F.3d 324 (6th Cir.2006) *and see Williams v. Javitch, Block* & *Rathbone, LLP,* 480 F.Supp.2d 1016 **(S.D.** Ohio 2007).

2. Contact the debtor before filing suit

Every collection attorney should make an effort to find out if the account is disputed before you file suit. This means the attorney needs to send the demand letter or FDCPA notice to a valid address and make a couple of telephone calls to a valid telephone number before you file suit. If you get a dispute, either in writing or by phone, then the attorney should stop collection until the debtor's dispute is appropriately processed. If the collection lawyer cannot prove that the dispute is not valid, then don't sue the account.

3. Going beyond what is legally required.

The FDCPA requires that . . . "If the consumer notifies the debt collector in writing within the thirty-day period described ... that the debt, or any portion thereof, is disputed, ... the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt ... " *15 USC§ 1692d(b).* Verification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed. *Chaudhry v. Gallerizzo,* 174 F.3d 394 (4th Cir. 1999). The debt collector was not required to keep detailed files of the alleged debt. *Id.*

Best Practice: If a consumer gives a factual basis for a dispute, then the dispute should be investigated no matter when and how the dispute comes to the attorney's attention. This is especially true if the dispute relates to: (I) Account Paid or Settled;

(2) Previous Litigation; (3) Bankruptcy; (4) Death of the Consumer; (5) Fraud; and (6) Another Active Collection Agent.

D. Obtaining a Judgment

1. Rule 55 Declarations.

Utah R. Evid. 902(11) allows a collection attorney to go to trial without a witness. As long as your Affidavit or Declaration meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of a custodian of records. *Utah R. Evid. 902* Also, the creditor must give an adverse party reasonable written notice of the intent to offer the record at trial. *Id.*

Best Practice: The Declaration which the collection attorney obtains at the time of the initial opening of the account should be good enough to survive objections from a competent lawyer. The Declaration should be sufficient for Motions for Summary Judgment in contested cases and even at trial.

The Fourth District Court, American Fork Department, is requiring the following in Rule 55 Affidavits:

> "I reviewed the account documents in support of the amounts claimed, which may include any of the following: billing statements, itemized bill or account statement, and the same may be provided to the court upon request."

2. Pre-judgment Interest.

Under Utah statute, "parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their

contract." *Utah Code Ann.§ 15-1-1.* The Utah Courts will not intervene to save a contracting party from a bad bargain. *See The Cantamar, L.L.C. v. Carlton J Campagne,* 142 P.3d 140, 151-2 (2006 Utah *App.)(quoting Bekins Bar v. Ranch v. Huth,* 664 P.2d 455, 459 (Utah 1983). The law recognizes the right of people "to freely contract, establishing terms and allocating risks between them." *Id. quoting Ryan v. Dan's Food Stores, Inc.,* 972 P.2d 395, 402 (Utah 1998). Utah Courts will not "assume the paternalistic role of declaring that one who has freely bound himself need not perform because the bargain is not favorable . " *Bekins Bar v. Ranch v. Huth,* 664 P.2d 455, 459 (Utah 1983).

3. Judgment Interest.

Utah Code Ann. § 15-1-4 states:

(4) The postjudgment interest rate on a judgment under $10,000 m an action regarding

the purchase of goods and services shall bear interest as follows:

(a) except as provided in Subsection (4)(b), from the date on which the district court or

justice court enters the judgment, I 0% plus the federal postjudgment interest rate; or

(b) if the judgment is appealed and the appeal is successful, 2% plus the federal postjudgment interest rate made retroactive to the date on which the district court or justice court entered the judgment.

The case law that says if you get a judgment on a contract, the contract interest only applies to the contract balance. *See SFR, Inc. v. Control, Inc., 177 P.3d 629.*

Contract interest only applies to the principal amount and not the entire judgment amount. *Id. at ¶18.*

4. Attorney's fees in Default Judgments

"The trial court has broad discretion in determining what constitutes a reasonable fee, and we will consider that determination against an abuse-of-discretion standard." *Weber v. Mikarose, LLC,* 2015 UT App 276, 3, 362 P.3d 952, 953. In determining the amount of an attorney fees award, a district court "should find answers to four questions," which are (1) "what legal work was actually performed;" (2) "how much of the work performed was reasonably necessary to adequately prosecute the matter;" (3) "is the attorney's billing rate consistent with rates

customarily charged in the locality for similar services;" and (4) "are there circumstances which require consideration of additional factors, including those listed in the Utah Rules of Professional Conduct." *Id.*

Utah Court recognized the public policy that the basic purpose of attorney fees is to indemnify the prevailing party and not to punish the losing party by allowing the winner a windfall profit. *Kealamakia, Inc. v. Kealamakia,* 2009 UT App 148, ,r 12, 213

P.3d 13, 17. Attorney fee awards are means to vindicate personal claims rather than means to generate fees' for lawyers. *Id.* In *Kealamakia,* the Utah Court of Appeals upheld at 40% Contingency attorney fee award as reasonable.

Express Recovery sought a 50% contingency fee and a statutory attorney fee in a default judgment. *Express Recovery Servs., Inc. v. Shewell,* 2007 UT App 318, **,r** 3, 171 P.3d 451, 453. The trial court refused to grant the default judgment, and court required

Express Recovery to file an affidavit setting forth certain facts and details in order to recover both collection costs and attorney fees. *Id.* The trial court decided that it could not enforce the collection commission provision for public policy reasons unless Express Recovery presented evidence regarding the reasonableness of the percentage charged. *Id.* The Court of Appeals upheld the trial court's decision. *Id.*

After the *Shewell* case, the Utah State legislature amended *Utah Code Ann. § 12-1-11.* Now, *Utah Code Ann.§ 12-1-11* allows registered Utah Collection Agencies to require debtors to pay a collection fee in addition to the debt balance and in addition to attorney's fees. *See Utah Code Ann.§ 12-1-11(2).* But, the collection fee owing to the collection agency is capped at 40%. *See Utah Code Ann. § 12-1-11(3)(b).*

Rule 73 of the Utah R. of Civ. Proc. sets a schedule of fees allowed, based on the amount of damages.

Amount	Attorney fees
0.00 - 1,500.00	250.00
1,500.01 - 2,000.00	325.00
2,000.01 - 2,500.00	400.00
2,500.01 - 3,000.00	475.00
3,000.01 - 3,500.00	550.00
3,500.01 - 4,000.00	625.00

4,000.01 - 4,500.00	700.00
4,500.0 I or more	775.00

If the attorney fees are for services rendered to an assignee or a debt collector, a statement that the attorney will not share the fee in violation of Rule of Professional Conduct 5.4 is required in the affidavit. *Utah R. Civ. P. 73(/).* Courts are also requiring an Affidavit that, to the best of the attorney's knowledge, the principal amount prayed for in the complaint does not contain collection or attorney's fees.

Utah Code § 30-2-9(5) states that the family expenses doctrine does not create a right for the creditor to an award of collections fees or attorney's fees against the non-signing spouse. *Utah Code § 30-2-9(5)*

Collecting the Judgment

IV. COLLECTING THE JUDGMENT

A. Judgment liens on real property

Many jurisdictions provide that a judgment becomes a lien against real property. In Utah, you need to get a certified copy of the judgment or an abstract and record it with the County Recorder in the County where you think the Debtor owns property, together with the judgment information sheet. Then the creditor has a lien against any property of the Debtor. If it is not recorded, there is no lien against real property.

The biggest limitation on use of real property is that most people only have a home and few have those paid off. So not only is there a secured lender ahead of the typical judgment creditor, but most jurisdictions provide a certain amount of equity in a "homestead" as exempt. In Utah it is $30,000 per adult spouse (max $60,000 per household); I believe in Texas and Florida, the homestead exemption is unlimited.

Judgments shall continue for eight years from the date of entry in a court, §78B-5-

202. Don't make the mistake of thinking it runs from the date you get it recorded with the county recorder!

B. Use of judgment lien against personal property

If you have a judgment, you have the power of the Court to collect amounts due on the judgment. Usually, personal property will be seized and sold through a writ of execution which is further described below. While most people have personal property, much of it may be exempt (see Utah's list discussed hereafter) and there is not much value in a garage sale. Perhaps the best benefit of executing against a debtor's personal property is that you will get their attention and you will be able to work an acceptable payment plan.

C. Self Help Repossession

In Utah there are generally two types of repossession available: those performed by judicial process and "self-help" repossession. See Utah Code Ann. *§* 70A-9a-609(2) (West 2000) and *Murdock v. Blake*, 484 P.2d 164 , 169 (Utah 1971) (stating that a secured party "may proceed without judicial process....or may proceed by action").

."Self-help" repossession is permitted so long as the creditor or its agents do not "breach the peace." See Utah Code Ann. *§* 70A-9a-609(2) (West 2000) and *Cottam v. Heppner*, 777 P.2d 468, 472 (Utah 1989) (stating that by negative implication, section 503 (now 609) prohibits repossessions that involve a breach of the peace). What it means to "breach the peace" is not defined under statute and Utah courts have never decided on the matter. Id. However, the Utah Supreme Court in *Cottam* did not determine what had to occur for a creditor's trespass made pursuant to repossession of collateral on a defaulted loan to rise to the level of breaching the peace, it did state (albeit in dicta) that typically two factors are considered in making such a determination: first, the potential for immediate violence and second, the nature of the premises intruded upon. Id. Though Utah courts have not yet decided what exactly constitutes a breach of the peace, courts in most other jurisdictions have decided on one of three definitions. See 42 Am. Jur. 3d Proof of Facts 355 §6 (2010).

First, some courts rely on the Restatement (Second) of Torts, *§* 116 defining breach of the peace as either an "offense done by violence" or "[an offense] causing or likely to cause an immediate disturbance of public order." Other courts have relied on a different section of the Restatement, specifically Restatement (Second) of Torts §183, which states that a party entitled to legal possession of an object may enter the land of the person in default for the purposes of taking possession of the object. When relying on *§* I 83, courts view any unreasonable act performed during such repossession may to constitute a breach of the peace. 42 Am. Jur. 3d Proof of Facts 355 §6 (2010). Finally, some courts have held that "breach the peace" means the

same thing it does in criminal law. Id.

If the peace is breached by its agent, the creditor may be held liable. See *Clark v. Associates Commercial Corp.*, 877 F. Supp. 1439, 1447 (D. Kan., I 994) (stating that a creditor choosing self-help repossession assumes the risk a breach of the peace might occur) and Restatement (Second) of Torts § 424 (describing banks as being liable for breaches of the peace committed by their independent contractors). Utah law sets forth a list of potential remedies for situations where a party has broken the law by breaching the peace in Utah Code Ann. § 70A-9a-625 (West 2000), which states that the Court may restrain collection or disposition of the collateral by the secured party, and also that "a person is liable for damages in the amount of any loss caused by a failure to comply with this chapter." Comment 3 elaborates by stating that damages should be "those reasonably calculated to put an eligible claimant in the position that it would have occupied had no violation occurred," and specifically states that this measure of damages applies to situations where a breach of the peace has occurred. Id.

It is also possible that a Court will use the Restatement §183 definition whereby any unreasonable act may constitute a breach of the peace. The likely outcome under this definition will vary depending on additional facts which will be made available during the discovery process.

Finally, the Court may choose to adopt Utah's criminal law definition for "breach the peace," the closest applicable statute being *Utah Code Ann.* §76-9-102, which governs disorderly conduct and defines it as engaging in violent or threatening behavior, making unreasonable noises in a public place, or making unreasonable noises in a private place which can be heard in a public place. Because a street counts as a public place, and because there was almost certainly a street outside of plaintiff’s residence, it is very likely that under this definition defendant would be found by the Court to have breached the peace.

Most of the above tests which have been adopted by other jurisdictions seem to have implications that are favorable to the plaintiff. It seems probable that the Court would find that a creditor had breached the peace under any one of the above tests.

D. Writs of Execution, Seize and Sale by Sheriff, CreditorPriority

In Utah, Rule of Civil Procedure 64E governs writs of execution. A writ of execution is available to seize property in the possession or under the control of the defendant following entry of a final judgment or order requiring the delivery of property or the payment of money. The

seizure and sale of property of the defendant is governed by Rules 69A and 69B.

Proceedings on Sale of Real Property. Prior to a sale of real property, the sheriff's notice of sale must be posted on the property (and in certain other public locations) for at least 21 days (Rule 69(i)(l)) , and must be published in a local newspaper once a weeks for 3 consecutive weeks. At sale, a Certificate of Sale is provided to the successful bidder. That's all the successful bidder gets until the redemption period (discussed below) expires.

When preparing a writ of execution, the creditor needs to prepare an application for writ of execution which meets the criteria set forth in Rule 64E, and should also include a "praecipe" that describes the personal property that the creditor wants to sheriff or constable to sell. Depending upon what the property is, the creditor may want to make arrangements for the sheriff or constable to move and store the property. Otherwise the enforcing authority will have the debtor sign a "keeper's receipt" stating that the debtor will hold the property until the time and place set for sale.

Redemption. Rule 69C provides that after sale of real property on execution, there is a 180 day period within which the judgment debtor and junior lienholders have the right to redeem the property by paying the purchase amount plus 6% plus out of pocket costs (such as maintenance and repair or taxes) incurred by the purchaser (Rule 69(e)). If there is a dispute as to the amount needed to redeem, the redemptioner shall deposit into court, within 21 days , the amount it believes is required and then file a petition for redemption. At the hearing, the judge will determine the amount to be redeemed. If it is more than was deposited, the redemptioner must pay the balance within 7 days (Rule 69C(f)).

During the redemption period, the purchaser is entitled to any rents on the property, but the amount needed to redeem is then reduced by the amount of rents received by the purchaser during the redemption period.

The court approved forms and notices that need to be served on the debtor can be found at https://www.utcourts.gov/howto/judgment/Execution/index.html

E. Wage and Bank Garnishments

1. Garnishments

Utah Rule of Civil Procedure 64D governs writs of garnishment. A writ of garnishment is available to seize property of the defendant in the possession or under the control of a person other than the defendant. A writ of garnishment is available after final judgment or after the

claim has been filed and prior to judgment.

Before serving a **Writ** of Garnishment, the creditor must exercise reasonable diligence to make sure that the property to be withheld is in fact the debtor's property. If the creditor fails to do this, and the property belongs to someone other than the debtor, the creditor might be liable to the owner for up to $1000. §78A-2-216.

The creditor can verify the debtor's employment before garnishing the debtor's wages, and avoid the risk of liability if the employer does not respond. §78A-2-216.

a. **One Time Garnishments** (bank accounts)

After the judgment creditor has identified a person who may owe the judgment debtor money, or who may be holding the judgment debtor's property, the judgment creditor must cause a writ of garnishment to be served on the "garnishee." The writ of garnishment is served together with interrogatories inquiring, among other things: (I) whether the garnishee is indebted to the judgment debtor and the nature of the indebtedness; (2) whether the garnishee possesses or controls any property of the judgment debtor and, if so, the nature, location and estimated value of the property; (3) whether the garnishee knows of any property of the defendant in the possession, custody or control of another; (4) whether the garnishee asserts any claims in setoff or recoupment against the judgment debtor, which claims it intends to deduct from any amounts it owes to or is holding for the judgment debtor; (5) the date and manner of serving a copy of the writ of garnishment and the answers to interrogatories upon the judgment debtor; (6) the dates on which previously served writs of continuing garnishment were served; and (7) any other relevant information that the judgment creditor may request. See Utah R. Civ. Pro. 64D(e). The judgment creditor also must provide to the garnishee a notice of exemptions form and two copies of a request for hearing form, which the garnishee later is required to serve upon the judgment debtor.

The garnishee is required to answer the interrogatories under oath or affirmation, to serve the answers upon the judgment creditor, to serve the writ, answers notice of exemptions and two copies of the request for hearing form upon the judgment debtor, and to file the answers with a court. See Utah R. Civ. Pro. 64D(g).

The judgment debtor has 14 days after it is served with the writ, answers to interrogatories and other documents to file a response or reply and to request a hearing. See Utah R. Civ. Pro. 64D(h).

The garnishee must freeze the funds or property subject to the writ of garnishment and

must hold the property for at least 21 days after service of the judgment debtor. If the judgment debtor notifies the garnishee of a response or request for hearing within that time, then the garnishee is required to continue to hold the property pending further order of the court. If no response or request for hearing is filed or served, "the garnishee shall deliver the property [to the judgment creditor] as provided in the writ." Utah R. Civ. Pro. 64D(i).

b. **Continuing Garnishments** Rule 640(1) (wages)

A writ of continuing garnishment applies to payments to the judgment debtor of any non-exempt periodic payments. The writ of garnishment is in effect from the date it is served on the garnishee and continues for 120 days unless a subsequent writ is served.

Within seven days after the end of each payment period, the garnishee is required to (A) answer the interrogatories, (B) serve the answers on the judgment creditor and the judgment debtor, and anyone else with an interest in the property; and, (C) deliver the property to the judgment creditor as provided in the writ. They no longer need to file the answers with the Court.

If the Garnishee does not respond to the garnishment, the creditor can serve the garnishee with a Garnishee Order to Show Cause, asking the court to enter judgment against the garnishee for the amount that would have been garnished plus attorney's fees.

Court approved forms and notices to be served for Writs of Garnishment can be found at https://www.utcourts.gov/resources/forms/garnishment/index.html#ownership.

F. Attachments

Attachments of personal property, sometimes referred to as execution against personal property, are available to seize property in the possession or under the control of the defendant. The difficulty with executing against personal property is that even if it is not exempt, rarely does the value of the personal property exceed the cost of executing on it. While that may not be true with luxury items, ATVs, Boats, etc., there is little financial advantage in executing and holding a sale of a person's personal property. The primary value in such an attachment or execution is putting pressure on the debtor to make payments on the debt.

Court approved forms, including notices that should be included when executing against personal property are located at:

https://www.utcourts.gov/howto/judgment/Execution/

G. Debtor's examination (a/k/a Supp Orders)

Rule 64(c), Procedures in aid of writs, sets forth a procedure by which you can require a debtor to come to court and identify property and to apply the property toward the satisfaction of the judgment or order. Witnesses may be subpoenaed to appear, testify and produce records. The court may permit discovery.

H. Exemptions by Debtor

Every State has different exemptions. While there are federal exemptions, it is the author's understanding that most state law exemptions are more generous than are the federal exemptions. The idea behind having exemptions is that we do not want homeless debtors, and that even if they can't pay their past due bills, they should not be deprived of the basic essentials of life. Let's look at Utah's exemptions.

In general, a debtor may claim as exempt, his homestead and certain personal property from attachment and execution of a judgment, or in a bankruptcy proceeding.

Under the Utah Exemption Act (Utah Code 78B-5-501, et seq), a person's homestead is exempt from judicial lien and from levy, execution, or forced sale except for statutory liens for property taxes and assessments on the property, security interests in the property and judicial liens for debts created for the purchase price of the property, judicial liens obtained on debts created by failure to provide support or maintenance for dependent children, and consensual liens obtained on debts created by mutual contract.

A homestead may consist of a dwelling or mobile home and the land surrounding it, not exceeding one acre, which is being used as his primary personal residence. The amount of homestead exemption an individual may claim in its primary residence cannot exceed $30,000 in value. If the property claimed as exempt is jointly owned, each joint owner is entitled to a homestead exemption, however the maximum exemption may not exceed $60,000. To preserve the exemption, the debtor should file a declaration of homestead with the county recorder. (78B-5-504). If the exemption is not claimed, it is waived.

Personal property which may be exempt under the Utah Exemption Act (78B-5-505) may include those that are exempt without value limitation, exempt to the extent necessary for the support of the debtor, and exempt as to a limited value.

Property that is exempt without value limitation may include:

* a burial plot,

* health aids reasonably necessary to enable the individual or a dependent to work or sustain health,
* benefits the individual or his dependent have received or are entitled to receive because of disability, illness, or unemployment from any source,
* benefits paid or payable for medical, surgical, or hospital care to the extent they are used by an individual or his dependent to pay for that care,
* veterans benefits,
* money or property received, and rights to receive money or property for child support,
* one: clothes washer and dryer,
refrigerator,
freezer,
stove,
microwave oven,
sewing machine,
* all carpets in use,
* provisions sufficient for 12 months actually provided for individual or family use,
* all wearing apparel, not including jewelry or furs, and
* all beds and bedding, works of art depicting the debtor or the debtor and his resident family, or produced by the debtor or the debtor and his resident family, except works of art held by the debtor as part of a trade or business,
* proceeds of insurance, a judgment, or a settlement, or other rights accruing as a result of bodily injury of the individual or of the wrongful death or bodily injury of another individual of whom the individual was or is a dependent to the extent that those proceeds are compensatory, and
* retirement plans qualified under Section 401(a), 401(h), 40l(k), 403(a), 403(b), 408, 408A, 409, 414(d), or 414(e) of the United States Internal Revenue Code of 1986, as amended.
* one handgun; one shotgun, one shoulder arm, and up to 1000 rounds of ammunition per weapon.

Personal property which may be exempt to the extent necessary for the support of a debtor and his dependents may include:

* money or property received, and rights to receive money or property for alimony or separate maintenance,
* proceeds or benefits paid or payable on the death of an insured, if the individual was the spouse or a dependent of the insured,
* assets held, payments, and amounts payable under a stock bonus, pension, profit-sharing, annuity, or similar plan providing benefits other than by reason of illness or disability.

Personal property which are exempt as to a limited value may include:

* sofas, chairs, and related furnishings reasonably necessary for one household up to an aggregate value of $1,000.00;
* dining and kitchen tables and chairs reasonably necessary for one household up to an aggregate value of $1,000.00;
* unmatured life insurance;
* animals, books, and musical instruments, if reasonably held for the personal use of the individual or his dependents up to an aggregate value of $1,000.00; and
* heirlooms or other items of particular sentimental value to the individual up to an aggregate value of $1,000.00;
* implements, professional books or tools of trade, including a vehicle if used in trade or profession, not exceeding $5,000 in aggregate value; and
* one motor vehicle not exceeding $3,000 in value (does not include off road vehicles). (Utah Code 78B-5-506.)

It is important to note that although a waiver of exemptions before levy is unenforceable, the claim of exemption is the functional equivalent to an affirmative defense and can be waived by the Debtor by failure to make a timely demand or claim. In §78B-5-504, the Utah statute specifically states that if the Debtor fails to timely file his homestead exemption with the County Recorder, then title to property shall pass at the sale.

If a Creditor has a claim against property that is jointly owned by the Debtor and another, the Creditor may have the property partitioned or the individual's interest severed.

I. Fraudulent Conveyances of Assets

Some of the most frustrating Debtors are those that hide behind a business entity, or hide assets in someone else's name. They are typically experienced in debt avoidance, and almost always are broke, have no money, etc. A thorough investigation of the debtor's transfers prior to your filing suit or the project going belly up, can be quite enlightening. Although fraudulent transfers require the filing of an additional complaint, just the filing may bring the Debtor to the table in an attempt to resolve the dispute before you sue their wife or children, parents, etc.

Utah recently enacted the Uniform Voidable Transactions Act (effective 5/9/2017). It provides:

25-6-202 Voidable transfer or obligation -- Present or future creditor -- Determination of intent -- Burden of proof.

(1) A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(b) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

(2) To determine "actual intent" under Subsection (1)(a), consideration may be given, among other factors, to whether:

(a) the transfer or obligation was to an insider;

(b) the debtor retained possession or control of the property transferred after the transfer;

(c) the transfer or obligation was disclosed or concealed;

(d) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(e) the transfer was of substantially all the debtor's assets;

(f) the debtor absconded;

(g) the debtor removed or concealed assets;

(h) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(i) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(j) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(k) the debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor.

(3) A creditor making a claim for relief under Subsection (1) has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

25-6-203 Transfer or obligation voidable -- Present creditor -- Burden of proof.

()) A transfer made or obligation incurred by a debtor is voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if:

(a) the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation; and

(b) the debtor was insolvent at the time or became insolvent as a result of the transfer or obligation.

(2) A transfer made by a debtor is voidable as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at the time, and the insider had reasonable cause to believe that the debtor was insolvent.

(3) Subject to Subsection 25-6-103(2), a creditor making a claim for relief under Subsection (1) or (2) has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

The Impact of Bankruptcy on Collections

THE IMPACT OF BANKRUPTCY ON COLLECTIONS

I. Overview.

A. Bankruptcy Courts.

Article I, Section 8 of the United States Constitution grants Congress the exclusive power to create laws pertaining to bankruptcy proceedings. Significant bankruptcy statutes date back to as early as 1800, but the statutory scheme known as the "Bankruptcy Code" was passed in 1978. Amendments have occurred from time to time. The most recent significant amendments were enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").

Aside from the Bankruptcy Code, there is also a set of Federal Bankruptcy Rules that govern particular processes, procedures and litigation in bankruptcy courts. While many of these rules largely track the Federal Rules of Civil Procedure, there are significant differences in the Federal Bankruptcy Rules, and this additional set of rules should not be overlooked when appearing in bankruptcy courts. In addition, each bankruptcy district will typically have its own set of local rules which may alter certain processes, procedures or application of the Federal Bankruptcy Rules. Utah has formally adopted a set of local rules, and they can be found on the court's website (www.utb.uscourts.gov).

Jurisdiction over bankruptcy matters is vested in the United States federal district courts, and bankruptcy courts operate as a unit or subset of the federal districts courts. Unlike state courts and federal district courts, bankruptcy courts have nationwide jurisdiction over parties and assets. That is not to say that bankruptcy court jurisdiction is unlimited. There are limitations, and the nature and extent of those limitations has been the subject of significant litigation in recent years. Matters that may not be heard by the bankruptcy court can be referred to the federal district court or to state courts for further proceedings.

Bankruptcy court decisions may be appealed to the federal district court, to a bankruptcy appellate panel ("BAP") or to the circuit court of appeals covering the district in which the bankruptcy court sits. Utah is in the Tenth Circuit. The decisions of BAPs and district courts may be further appealed to the applicable circuit court of appeals, and finally to the United States Supreme Court.

Utah has only one main bankruptcy court, which is located in Salt Lake City. While some hearings are conducted in other parts of the state, such as St. George, all of the cases are centered

in Salt Lake City. Utah currently has four bankruptcy judges, 13 standing Chapter 7 trustees and one Chapter 13 trustee.

B. Bankruptcy Cases -- General.

There are several types of bankruptcy cases that can be filed under the Bankruptcy Code. These materials address only Chapter 7 and Chapter 13 cases, which are the most common types of cases that debtors file. While many concepts in Chapter 7 and Chapter 13 crossover into other types of cases, one should not assume that all cases are subject to the same rules. It should not be assumed that these comments pertain to other types of bankruptcy cases, unless specifically stated.

A debtor may file bankruptcy for a variety of reasons. Contrary to popular opinion, a debtor does not need to be insolvent to file bankruptcy. However, the typical reason for a debtor to file bankruptcy is that the debtor cannot afford to its debts, and the debtor wants to obtain a discharge of those debts. This is also typically referred to as a debtor's 'fresh start.'

As a general matter, there are certain eligibility requirements that a debtor must meet in order to file for bankruptcy. Some of those eligibility requirements include who can be a debtor (e.g. individual, corporation). The eligibility requirements also dictate what type of case a debtor can file, such as the frequency with which the debtor has previously obtained a discharge or the amount of debt the debtor may have.

Bankruptcy affects a creditor's ability to collect its debt in a variety of ways. The filing of a bankruptcy case by a debtor can stay a wide variety of state court proceedings. The filing of a bankruptcy petition can render certain actions taken in litigation or outside of litigation void or unenforceable. It can have the effect of discharging claims and debts, and it can avoid liens created by contract or statute. The filing of a bankruptcy may also create a scenario where a creditor could be required to return money or property that the creditor received from the debtor prior to the bankruptcy filing. The bankruptcy case may also have the effect of extending certain statutory, judicial or contractual time periods within which certain actions may be taken, such as the tolling of the statute of limitations under state law.

Issues that a creditor may face in bankruptcy can be wide-ranging and quite complex,

depending on the type of bankruptcy case a debtor files and the type of claim the creditor holds. These materials are intended to provide only a brief overview of some of the issues a creditor may face. Further questions should always be directed to a competent attorney that specializes in creditor rights issues in bankruptcy.

II. Steps to Take When a Debtor Files Bankruptcy.

A. Verify the Case Filing. As obvious as it may sound, the first thing to do is verify that the debtor actually filed a bankruptcy case. Some debtors will say they have filed when they really mean that they *intend* to file for bankruptcy. Sometimes this is done to mislead a creditor into ceasing collection efforts, but more often because the debtor mistakenly thinks that just intending to file for bankruptcy means something. Intending to file for bankruptcy is not the same thing as actually filing a bankruptcy petition, and a creditor does not have to stop collection efforts just because a debtor says they intend to file bankruptcy or that they have met with a bankruptcy attorney. Also, there are many situations where a debtor says they intend to file bankruptcy, but then do not actually file a case until many months, or perhaps not at all.

Any time a debtor says a bankruptcy case has been filed, the creditor should immediately stop all actions being taken against the debtor and verify the case filing. If the debtor does not have the case number, a bankruptcy case filing can be verified by calling the bankruptcy court or through the PACER system (which requires an account). Searches for bankruptcy cases in the PACER system can be done for any bankruptcy district in the United States, and can even be done as one search on a nationwide basis. Searches are best performed using the debtor's social security number, but can also be done with the debtor's name.

B. Determine Who Has Filed. Each debtor must file its own bankruptcy case in order to receive a discharge. Individuals may file a joint case, but they must both be named as debtors on the bankruptcy petition. If one debtor files a bankruptcy case and receives a discharge, the co-debtor who has not filed for bankruptcy does not receive a discharge and still owes the joint debts. However, the creditor should be aware of the co-debtor stay imposed in Chapter 13 cases (see discussion below regarding the automatic stay).

One common area of confusion is the distinction between a bankruptcy filing by a company and a bankruptcy filing by one of the owners of the company. A bankruptcy filing by an incorporated company is not the same thing as a bankruptcy filing by its owners. Similarly, a bankruptcy filing by an individual owner of the company does not constitute a bankruptcy filing

by the company. An individual cannot file a joint case with a business, and the individual must still file their own case. The exception to this would be if an individual is doing business under an unincorporated business name (a "dba"), in which case the individual and the company are legally treated as one and the same.

The confusion usually arises because the name on the case filing itself might list the name of the individual filing the petition, as well as the names of certain corporate entities with which the debtor is associated. This is done to help the creditor identify what account or loan the bankruptcy filing might pertain to, but it does not mean the company listed has filed for bankruptcy. It is still just a filing for the individual.

For example, a trade creditor might have an open credit account for a business that it sells products to, with the owner personally guaranteeing payment. The creditor will typically think of that account as the business account, and the person's account. When a bankruptcy notice comes in just for the owner, the creditor may not immediately link it to the company account and may not be able to determine if it is owed any money and if it should file a proof of claim. To avoid defending against objections for lack of notice, a good debtor's attorney will often list the affiliated business names for the debtor so the creditor can tie the bankruptcy filing to the right account. But again, it is still only an individual filing, and not a company filing. Knowing who has filed and who has not filed will impact whether the debt will be entirely discharged or still owed by someone after the completion of the case.

C. Determine Type of Case Filed and Applicable Deadlines. Once it has been determined that a debtor has filed for bankruptcy, it is important to determine the type of case the debtor has filed and any relevant deadlines that have been set in the case. Different types of bankruptcy cases can have different impacts on a creditor's claims, and the type of case filed will dictate what a debtor or creditor can do. These issues are discussed in more detail below.

When a bankruptcy case is filed, the court sends out a notice of bankruptcy filing to each creditor listed by the debtor in the bankruptcy case. It is not uncommon for this notice to come many days or even a few weeks after the actual bankruptcy case has been filed. If a creditor knows that a bankruptcy case has been filed but has not yet received a formal notice of the filing from the bankruptcy court, it may be prudent to obtain the relevant dates from the bankruptcy court so that no important deadlines are missed. It is also not uncommon for a debtor to forget to list a particular creditor, in which case that creditor may not receive the formal notice at all. Keep

in mind that even if the creditor does not receive formal notice of the case filing from the bankruptcy court, the creditor can still be bound by the deadlines in the case. Sample notices of a Chapter 7 and a Chapter 13 case filing are included at the end of these materials.

The notice of the case filing contains several important dates that the creditor should carefully review and calendar. In particular, the notice will identify the bankruptcy case number, the district in which the case was filed, and the judge assigned. Do not always assume that the case was filed in Utah, just because you have historically dealt with the debtor in Utah. Many debtors move around, and may file a bankruptcy case in another jurisdiction. As noted above, bankruptcy courts have nationwide jurisdiction, and a case pending in another state is still binding on a creditor in Utah. Also, do not always assume that the bankruptcy courts in other states are the same as Utah. Although the Bankruptcy Code is federal law and should theoretically be the same applied the same everywhere in the county, certain Bankruptcy Code provisions or rules are not always interpreted or applied the same way in each bankruptcy district. Each bankruptcy court may have adopted its own procedures as to how cases are handled. Here are some of the key dates that the creditor should pay attention to in the notice of bankruptcy filing:

(1) *Meeting of Creditors.* This is required in each type of bankruptcy case, and the debtor's refusal to participate can be grounds for dismissal of the case. When a debtor files for bankruptcy, the debtor must file a package of documents generally referred to as 'Statements and Schedules' which contain various items of information such as the debtor's assets, income and liabilities. The meeting/hearing is conducted by the trustee assigned to the case. The meeting of creditors is conducted with the debtor under oath, but it not conducted at the bankruptcy court (at least not in Utah). The trustee will question the debtor about the Statements and Schedules filed, and attempt to clear up any incomplete, vague or missing information in what the debtor has filed. Creditors are then given a brief opportunity to ask questions of the debtor that may pertain to the creditor's claim, the collateral securing a debt with the creditor (e.g. location of collateral; is it being insured; whether ·the debtor intends to try to keep the collateral). Even though it is called the meeting of creditors, creditors are usually given a very short amount of time to ask questions. If the creditor has more questions than time

allows, the creditor seek to schedule a Rule 2004 examination of the debtor, which is essentially a deposition of the debtor.

(2) *Deadline for Filing Proof of Claims.* This date is this date by which a creditor must file a claim if it wants to participate in any potential distributions in the case. This will typically only be present in a Chapter 13 case. Chapter 7 cases are presumed to be 'no asset' cases where no money will be paid to unsecured creditors. If the Chapter 7 trustee determines there is money to be paid to creditors, a separate notice of assets and deadline to file claims will be sent out which identifies the deadline to file claims. Typically if the deadline is missed, the creditor loses its opportunity to participate in the distribution, with very few exceptions.

(3) *Date of Confirmation Hearing.* This date pertains only to Chapter 13 cases, and will not be present on a notice of Chapter 7 case filing. This date stated is the date upon which the debtor's proposed Chapter 13 plan will be heard by the court for confirmation. This date is very important because if a creditor has grounds to object to how its claim is being treated in the debtor's plan, then the creditor must file an objection to the plan within the required time period before confirmation of the plan.

(4) *Date to Object to Discharge of a Debt.* There are certain circumstances where a creditor may objection to the debtor receiving discharge - meaning the debtor still owes the debt even after the debtor successfully completes a bankruptcy case. Not all types of objections to discharge require further filing by the creditor. But, if the creditor is required to file an action to preserve its claim, it must be done by the stated deadline. This date is 60 days after the date set for the first meeting of creditors, and is a very strict deadline that is enforced by the courts almost without exception. This date can be extended in some situations to allow for additional time, but only if the request for an extension is filed by the creditor before the stated deadline. These issues are discussed further below

D. Determine the Type of Debt Involved. Understanding the type of claim a creditor holds can greatly impact its ability to receive payment on its claim. Secured and unsecured creditors are treated very differently in Chapter 7 and Chapter 13 cases. Secured

creditors are almost always in a better position to receive payment, even if it is just a return of their collateral; whereas unsecured creditors very often receive little or nothing. Also, there are certain types of claims that receive a preferred or priority treatment over other types of debt, which allows those types of claims to be paid ahead other types of claims. Some of these preferred or priority claims also cannot be discharged by the debtor.

III. Chapter 7 - Liquidation

A Chapter 7 bankruptcy is a liquidation bankruptcy. "Persons" eligible to file a Chapter 7 case include both individuals and incorporated business entities. Upon the filing of the case, a bankruptcy estate is created and a Chapter 7 trustee is appointed. All of the debtor's non-exempt assets are part of the bankruptcy estate, and are subject to liquidation to pay creditors. The Chapter 7 trustee can also pursue litigation on behalf of the bankruptcy estate to recover money or property to pay creditors. Aside from determining whether there is any money or property available to pay to creditors, the Chapter 7 trustee will examine creditor claims and object to claims, if necessary. The Chapter 7 trustee will seek to oppose the debtor's discharge if advisable.

A Chapter 7 is initially presumed to be a 'no asset' case where no money will be distributed to creditors. If the Chapter 7 trustee determines there may be money available to distribute to creditors, then a notice of assets and request for creditors to file claims will be sent out to all known creditors. This notice will identify a specific deadline for creditors to file claims. A failure to file a claim will usually result in the creditor not receiving any payment. Unlike Chapter 13 cases, secured creditors typically do not receive payment in a Chapter 7 case. An exception is where the Chapter 7 trustee is selling an asset subject to valid liens, in which case the trustee must satisfy the liens out of the proceeds.

Income and property that a debtor acquires after a Chapter 7 case is filed are not typically subject to seizure or liquidation by the trustee, and the debtor is usually free to do what it wants with such after-acquired income and property. Exceptions would be where the debtor has a right to such income or property when the case was filed, but the debtor did not actually receive the income or property until after the case was filed - e.g. earned but unpaid commissions, tax refunds, distributions to beneficiaries of a trust, etc.

In addition, the liabilities subject to discharge in a Chapter 7 case are determined as of the

date the case is filed. If the debtor acquires new debt after the petition date, that debt is not subject to receive distributions in the case and is also not subject to discharge, even if the Chapter 7 case is still ongoing.

Chapter 7 cases are typically very short in duration. Under normal circumstances they last about 4 to 6 months. Although both individuals and business entities can file a Chapter 7, only individuals receive a discharge of their debts in Chapter 7. Business entities that file for Chapter 7 do not receive a discharge. As such, many businesses do not file for Chapter 7, but a Chapter 7 case can still be an effective way to wind down a corporation and provide for an orderly liquidation of assets.

With respect to secured debts, there are a few key concepts that a creditor should understand. With respect to property securing a debt with the creditor, the debtor has primarily three options (and a limited fourth option):

(1) *Reaffirm Debts.* Reaffirmation is governed by 11 U.S.C *§* 524. When a debtor reaffirms a debt, the debtor agrees to continue to remain legally liable for the debt and it will not be discharged in the debtor's bankruptcy case. This means the debtor will still owe the amount reaffirmed even if the collateral securing the debtor is later repossessed by the creditor or surrendered by the debtor.

Reaffirmation can be on the same terms as the original debt, or any alternate terms the parties agree to. For example, a creditor may allow a debtor to reaffirm a lesser amount or at a reduced interest rate. But the debtor cannot force the creditor to accept different terms than the underlying debt; the creditor must agree. A creditor can require the debtor to bring the loan current as a condition of reaffirmation. A creditor can also enforce cross-collateralization provisions to require the debtor to reaffirm on other loans or accounts secured by the same collateral.

The reaffirmation agreement is done under a specific form approved by the bankruptcy court which contains all the required disclosures to the debtor. In order to be valid, the reaffirmation agreement must be signed by all parties and filed with the court before the debtor receives a discharge. 11 U.S.C. *§* 524(c). If the debtor is *pro se* (without an attorney), then a hearing must be scheduled with the court to approve the terms of the reaffirmation agreement. Even after the reaffirmation agreement is filed with the court, the automatic stay still applies until it is terminated. Moreover, if the debtor changes her mind about reaffirming the debt, the

debtor can rescind or cancel the reaffirmation agreement any time before a discharge is entered or 60 days after the reaffirmation agreement is filed with the court, whichever is later. As such, a creditor may want to consider what actions to take during the rescission period, or it may cause a debtor to elect to rescind the agreement.

(2) *Redeem Collateral.* Debtor "buys out" the creditor by paying the fair market value of the collateral. The creditor can require a Jump sum payment, and does not have to accept payments over time. If the parties cannot agree on a value, the parties can schedule an evidentiary hearing with the court to determine the value of the collateral.

(3) *Surrender Collateral.* This one is pretty self-explanatory - the debtor surrenders the collateral to the creditor. The creditor will still need to obtain relief from the automatic stay to repossess and sell the collateral, or wait until the automatic stay is otherwise terminated through the closure of the case. Assuming the debtor receives a discharge in the case, the creditor will only receive whatever monies it receives from the sale of the collateral or distributions in the case from the Chapter 7 trustee, and debtor with be discharged of any remaining deficiency balance.

(4) *Retain and Keep Current.* This used to be an option for debtors where they could keep the collateral and stay current on the ongoing payments, without reaffirming the debt. However, this option has been eliminated, with the exception of real property.

IV. Chapter 13 - Individual Reorganization

A. Eligibility. Chapter 13 cases are reorganization cases, and they can only be filed by an "individual with regular income" as defined by 11 U.S.C. § 101(30), which means an individual "whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13." Incorporated entities cannot file for reorganization under Chapter 13, but can file under Chapter 11. In addition, the secured and unsecured debts of the debtor cannot exceed certain statutory requirements. These numbers tend to change over time. Currently, an individual cannot file for Chapter 13 unless the debtor has (i) noncontingent, liquidated, unsecured debts of less than $394,725.00 and (ii) noncontingent, liquidated, secured debts of Jess than $1,184,200.00. If the debtor exceeds these limitations, the debtor may need to file a case under Chapter 11. 11 U.S.C. § I 09(e).

B. Chapter 13 Trustee vs. Chapter 7 Trustee. A Chapter 13 trustee serves a vital role in Chapter 13 cases, but the role is significantly different than a Chapter 7 trustee. In a

Chapter 7, the trustee is deemed to step into the debtor's shoes in terms of the right to possess, sell or abandon assets. The Chapter 7 trustee can file lawsuits against third parties to recover money and property, and controls the settlement or compromise of the debtor's claims against third parties. The Chapter 7 trustee also reviews creditor claims, and mostly controls the settlement or compromise of those claims against the bankruptcy estate. The debtor has very little say in what the Chapter 7 trustee does with the assets and claims in a case.

In a Chapter 13 case, the debtor is deemed to be a 'debtor-in-possession' and still possesses and largely controls the assets. The Chapter 13 trustee exercises very little control over the debtor's assets, other than to determine if the debtor is paying a sufficient amount of money into the plan. The Chapter 13 trustee does not file lawsuits against third parties to recover money or property for creditors, and does not control the settlement or compromise of the debtor's claims against third parties. The Chapter 13 trustee will review claims filed by creditors to see if they are consistent with what has been proposed in the plan, but the Chapter 13 trustee does not typically file objections to the claims. Once the plan is confirmed, the Chapter 13 trustee primarily just ensures the debtor is making the required plan payments, and then disburses those monies to creditors as dictated by the confirmed plan.

C. Plan Filing and Modification. The debtor must propose and confirm a plan of reorganization for repayment (or partial repayment) of its debts. The debtor has the exclusive right to file a plan, and must file a plan within 14 days of the date the case is filed. The debtor may modify the plan any time before confirmation. Creditors who have not objected to the plan are deemed to have accepted the proposed treatment of their claim in the plan. The plan, as modified, becomes the plan the bankruptcy court considered for confirmation. Once the plan is confirmed, it becomes binding on the debtor, the Chapter 13 trustee and creditors, and may only be further modified by motion and approval of the court.

D. Plan Contents. The debtor's plan will set forth how the debtor intends to classify and pay debts. The Bankruptcy Code sets out a priority scheme as to which types of claims get paid, and in what order of priority (e.g. administrative claims, secured claims, unsecured claims). The plan will require the debtor to make monthly payments over a period of 3 to 5 years. The payments are typically made to the Chapter 13 trustee who in turn disburses payments to creditors in accordance with the creditor's treatment under the plan. Debtors will be required to start making plan payments to the Chapter 13 trustee before the plan is confirmed,

but payments are not disbursed to creditors until the plan is confirmed.

Non-exempt real property and personal property assets that the debtor intends to retain are required to be listed in appropriate sections of the plan, with sufficient disclosure as to how the debtor intends to treat the claims related to property. In some circumstances the debtor can make payments directly to a particular creditor, but the plan will still need to disclose such payments. These payments are often referred to as 'payments outside the plan,' but they are still part of the debtor's proposed plan.

A claim secured by personal property can be bifurcated into two parts under the debtor's plan - secured and unsecured - but only one proof of claim needs to be filed. The secured portion of the claim is the value of the collateral securing the claim. The debtor must pay 100% of the secured portion of the claim, with interest, but can pay the unsecured portion of the claim at whatever percentage is being paid to other general unsecured creditors. For example, if a debtor owes $14,000.00 on a car loan, and the vehicle is worth $10,000.00, then claim will be treated as a secured claim for $10,000.00 (paid in full with interest) and a general unsecured claim of $4,000.00. Reducing the creditor's secured claim to the value of the collateral is often referred to as "cram down."

Mortgage claims can also be bifurcated under the debtor's plan, but in a different way than personal property. If the real property securing a mortgage is the debtor's primary residence, the debtor cannot cram down a mortgage to the value of the real property. As such, mortgage claims are not broken up by secured and unsecured amounts, but rather by the amount in arrears on the date of filing and then the ongoing payments owed on the mortgage. If there is an arrearage (a past due amount) owed as of date of the bankruptcy filing, the debtor pays the arrearage through the Chapter 13 trustee under the plan. The debtor is then required to make ongoing payments directly to the creditor in accordance with the loan terms, beginning with the first monthly payment that comes after the bankruptcy filing. The only exception to this is if the entire mortgage debt would mature during the life of the Chapter 13 plan, then the debtor can pay the debt through the plan in monthly payments that do not match the mortgage contract (so long as the debt is still otherwise paid in full over the life of the plan). Some bankruptcy districts require debtors to also pay the ongoing monthly payments through the Chapter 13 trustee (sometimes referred to as "conduit" plan), but Utah does not follow this approach.

E. Plan Objections. Any party in interest may object to the debtor's proposed

plan. The deadline to object to the original plan is 7 days before confirmation, and is set forth in the notice of filing. This is not a long period of time to object since confirmation hearings are typically set less than 90 days after the case was filed. Utah's local rule 2083-1(j)(]) provides that an objection to an amended plan must also be filed 21 days after the service of the amended plan. This can be a potential pitfall for creditors because it can have the effect of shortening the time period a creditor might have otherwise had to object to the plan. An objection to the plan is often the creditor's only opportunity to contest the debtor's treatment of its claim. As such, a creditor should carefully review the debtor's plan, as well as any subsequent amendments or modifications, and determine if there are grounds to object to the proposed plan.

A creditor's failure to timely objection to the plan will bind the creditor to the proposed treatment in the plan, and may allow discharge of the creditor's claim on less favorable grounds than might have been available to the creditor under the Bankruptcy Code. While there are a wide variety of objections a creditor could file to a plan, here are a few common objections:

(1) *Value of Collateral.* If the debtor is going to retain personal property securing a debt, the debtor has to fully pay the fair market value of the lien. If the creditor believes the debtor is proposing a value that is too low, the creditor can object to the proposed valuation. A creditor can enforce cross-collateralization provisions to utilize available equity in collateral to secure some or all of another debt owed to the creditor. If the parties cannot agree to a value, the debtor and/or creditor may commission an appraisal of the property and schedule an evidentiary hearing with the court to set a value.

(2) *Characterization of Secured Claims - "910 Claim" vs. Cram Down.* If the creditor holds a purchase money security interest in an automobile purchased for the debtor's personal use within 910 days of the bankruptcy filing, or a debt secured by other collateral acquired within 1 year of the bankruptcy filing, then the debtor must pay the debt in full. 11 U.S. C. § 1325(b)(5). This means the debt is not subject to "cram down." Debtor-s sometimes mischaracterize by the debt as one subject to cram down , rather than one that must be paid in full. But, even if it is an innocent mistake by the debtor, the creditor will be bound by the proposed treatment if the creditor does not object.

(3) *Interest Rate.* A debtor must usually pay interest on secured claims. The amount of interest the debtor is required to pay can be a contested issue, and may draw objections from creditors. If the creditor holds an oversecured claim (meaning the debt owed is

less than the value of the collateral securing the claim), then the creditor is usually entitled to receive its contract rate of interest up to the point where the equity in the collateral would be exhausted.

If the claim is undersecured (the amount owed is more than the value of the collateral), then the United States Supreme Court case of In re T ill , 541 U.S. 465 (2004), provides that the creditor is entitled to receive an interest rate under a " prime plus approach." This means the court starts with the federal prime rate of interest and adds a "risk factor" based upon the relevant circumstances of the case. A normal Till interest rate is considered to be 1-2% over the federal prime interest rate. A creditor can argue for a higher rate, but the burden of proof is on the creditor and it generally requires expert testimony. Except for very large cases, the cost of attempting to prove a rate higher than 1-2% over prime is simply not economically feasible. Consequently, this issue is rarely litigated.

(4) *Adequate Protection Payments.* A creditor can require a debtor to make monthly adequate protection payments to help guard against anticipated depreciation of collateral until the creditor begins receiving regular plan payments from the trustee. These payments are typically only available if the creditor is undersecured. In an oversecured situation, the equity in the collateral is usually deemed to be sufficient protection for the creditor's interest in the collateral. There is no bright line rule on the amount the debtor must pay as adequate protection. The customary practice in Utah is to make monthly payments equivalent to 1% of the value of the collateral, unless the parties otherwise agree or the court determines a higher amount. Adequate protection payments come out of the plan payments made to the Chapter 13.

F. Plan Confirmation. There several requirements for a plan to be confirmed by the court. These requirements are found in 11 U.S.C § 1325, and corresponding case law. Among other things, the value of the property to be distributed under the plan must not be less than the amount the claimant would receive in a Chapter 7 liquidation. 11 U.S.C. § 1325(a)(4). Also, each holder of a secured claim must (1) accept the plan; (2) retain its lien and the value of the allowed amount of its claim; or (3) receive the property securing its claim from the debtor. 11 U.S.C. § I 325(a)(5). In addition, the debtor's plan must be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. §l 325(a)(3). The Tenth Circuit case of Flygare v. Boulden, 709 f. 2d 1344 (10th Cir. 1983), sets forth a non-exhaustive list of 11 factors indicative of whether the debtor's plan was proposed in good faith. Other factors for confirmation include submitting a

plan that complies with the provisions of the Bankruptcy Code; filing of all required tax returns and staying current on domestic support obligations.

Once the court has determined the proposed plan meets the requirements for confirmation; an order is entered confirming the plan. The terms of the plan then become binding on all interested parties, such as the debtor, creditors and the Chapter 13 trustee. Failure of the debtor to abide by the terms of the plan constitutes grounds for dismissal of the case or conversion to a Chapter 7 case.

G. Completion of Plan - Discharge. In a Chapter 13 case, a debtor does not receive a discharge until the confirmed plan has been fully performed. 11 U.S.C. § 1328. Since Chapter 13 plans can last 3 to 5 years, the debtor and the creditors may be waiting a long period of time to determine if a debt is discharged. In Utah, less than 50% of the Chapter 13 cases get completed to discharge. If the case is not completed to discharge, the creditor can resume collection of its claim. However, once the plan is fully performed, the debtor then receives a discharge of the debts that existed as of the date the case was filed, unless such debt was excepted from discharge by the Bankruptcy Code, a provision in the confirmed Chapter 13 plan or as a result of litigation with a creditor.

V. Automatic Stay.

A. Effect and Scope of Automatic Stay. Perhaps one of the most significant and powerful benefits a debtor receives when a bankruptcy case is filed is the imposition of the automatic stay under 11 U.S.C. § 362. The automatic stay is created immediately upon the filing of a bankruptcy petition without further order from the court. The automatic stay also applies to involuntary cases.

The automatic stay is exceptionally broad 111 scope, and prohibits almost everything a creditor would do to collect a debt. The stay provides the debtor with some breathing room, allowing the debtor protection from its creditors while the debtor attempts to orderly liquidate collateral or reorganize itself. At the same time, the automatic stay forces some equality of distribution among creditors by placing creditors on a level playing field and eliminating a 'race to the courthouse' that would otherwise ensue without the automatic stay in place.

The automatic stay is limited to actions that could have been taken prior to the filing of the bankruptcy case. It does not cover claims or debts arising post-petition.

Section 362(a) contains a list of 8 types of actions or proceedings that are prohibited by

the automatic stay, including:

(i) commencement or continuation of any action or proceeding against the debtor that was or could have been commenced prior to the filing of the bankruptcy case or to recover a pre-petition claim against the debtor

(ii) enforcement of a pre-petition judgment against the debtor or property of the bankruptcy estate

(iii) any act to obtain possession of or control over estate property

(iv) any action to create, perfect or enforce any lien against property of the estate

(v) any act to create, perfect or enforce a lien against property of the debtor to the extent such lien secures a pre-petition claim

(vi) any act to collect, assess or recover a claim against the debtor that arose prior to the filing of the bankruptcy petition

(vii) setoff of any pre-petition debt owing to the debtor against any claim against the debtor

[however, a creditor can put an administrative freeze on funds while the creditor seeks relief from the automatic stay to setoff the funds. Citizens Bank of Maryland v. Strumpf, 516 U.S. 16 (1995)]

(viii) commencement or continuation of a proceeding before the U.S. Tax Court concerning the debtor

Contained within § 362(b) are 17 enumerated exceptions to the automatic stay. Most of them apply in certain narrow circumstances such as criminal proceedings; certain actions to establish paternity or collect domestic support obligations; actions by the government to enforce its "police or regulatory power;" actions to perfect a purchase money security interest within the initial time allowed for doing so; and actions by a lessor of non-residential property to obtain possession after the expiration of a lease.

B. Co-Debtor Stay. 11 U.S.C. § 1301 creates a unique extension of the automatic stay in Chapter 13 cases which protects individuals who are jointly obligated on a debt, even though that co-debtor has not filed for bankruptcy. This co-debtor stay applies only in Chapter 13 cases, and is not found in other types of bankruptcy cases. However, the co-debtor stay is limited only to consumer debts owed by co-debtors that are individuals. The co-debtor stay does not apply to business debt, and does not protect business entities that may also be obligated for the

debt. 11 U.S.C. § 1301(a). Upon request to the court, the co-debtor stay can be terminated if the co-debtor received consideration for the creditor's claim; the debtor in bankruptcy is not proposing to pay the debt in full or the creditor's interest would be irreparably harmed by continuation of such stay. 11 U.SC. § 1301(c).

C. Duration of the Automatic Stay. The automatic stay is not permanent. The automatic stay remains in effect against property of the bankruptcy estate until such property is no longer property of the estate. 11 U.S.C. § 362(c)(I). The automatic stay remains in effect as to any other act until the earliest of: (a) the time the case is closed;

(b) the time the case is dismissed; or (c) the time a discharge is granted or denied. 11 U.S.C. § 362(c)(2).

D. Repeat Filings. If a bankruptcy case is dismissed, and the debtor files a new case, the automatic stay is once again imposed and collection efforts must cease. However, if the debtor has had more than one case pending within a one-year time period, there are some limitations on the automatic stay.

(1) *Second Case Pending Within One* Year. If the debtor files a bankruptcy case, but the debtor also had another case that was pending in the one-year period prior to the filing, the automatic stay expires after 30 days. 11 U.S.C. § 363(c)(3). Prior to the expiration of the 30-day period, any party in interest can file a motion requesting an extension of the automatic stay for a longer period of time.

What does ' pend in g' mean for purposes of evaluating a repeat filing? Our courts have considered 'pending' to extend up to the point when the case was dismissed, and not when the case was closed. There are many situations where the court has not officially closed a case, even though it was previously dismissed. The later date of closing does not extend the time period for calculating when a case is 'pending' for purposes of repeat filings.

Unfortunately, the termination of the stay on a second case filing is a bit of a hollow victory for creditors because the specific Code language says the stay is only terminated as to property securing a debt and leases. Thus, the automatic stay is not

terminated as to all debts or for all purposes. Many courts, including our 101 Circuit

BAP, have determined that this section terminates the automatic stay as to the debtor and property of the debtor, but not property of the bankruptcy estate. In re Holcomb, 380 B.R. 813 (10th Cir. BAP 2008). Thus, since essentially all non-exempt property of the debtor becomes

property of the bankruptcy estate, a creditor will still need to seek further termination of the automatic stay to recover the property.

(2) *Third Case Pending Within One Year*. If the debtor files a bankruptcy case, but the debtor also had at least two others cases pending within the one-year period prior to the filing, there is no automatic stay imposed in the new filing. 11 U.S.C. § 363(c)(4). Unlike a second case pending within a year, the language under this Code section states the automatic stay does not come into effect at all. This applies to all debts and all property of the debtor, and the creditor is free to continue to pursue collection efforts without violating the automatic stay. However, any party in interest can still request to have the court impose an automatic stay if sufficient grounds are met.

(3) *Comfort Order*. If there is any question as to whether an automatic stay has been imposed in a repeat filing, the creditor can file an application with the court asking the court to certify there is no automatic stay in effect. 11 U.S.C. § 362(j). This application is commonly referred to as a "comfort order." Since the sanctions for violation the automatic stay can be severe, it would be wise for a creditor to seek a comfort order before taking further action if there is any question whether the automatic stay is in effect.

E. Terminating the Automatic Stay. Upon request to the court, and notice to interested parties, a creditor can obtain relief from the automatic stay based upon the enumerated grounds under 11 U.S.C. § 363(d), including:

(l) 11 U.S.C. § 362(d)(l) -- "for cause," including lack of adequate protection of the creditor's interest in property. *(See also* 11 U.S.C. § 361 regarding adequate protection). The terms 'for cause' or 'lack of adequate protection' are pretty broad and largely undefined terms, and can include any grounds upon which the creditor can convince the court should justify termination of the automatic stay. Any action or inaction by a debtor that jeopardizes a creditor's collateral can be cause for termination of the automatic stay. Common examples that constitute "cause" for relief from the automatic stay include:

a. failure to preserve collateral and/or insure it

b. failure to make direct payments identified in Chapter 13 plan

[however our local courts require the debtor to miss three post-petition to be considered cause for relief from stay]

c. surrender of collateral by debtor and/or failure to provide for

payment of secured debt in Chapter 13 plan

d. failure to comply with federal or state laws

e. failure to pay taxes ·or actions to commit 'waste' of the property

f. continuation of pending litigation more suitable to another forum besides bankruptcy court

g. Chapter 13 plan not fully paying a consumer debt for which another individual is liable (termination of co-debtor stay)

h. bad faith

(2) 11 U.S.C. *§* 362(d)(2) -- debtor lacks equity in certain property and such property is not necessary for an effective reorganization. The term "equity" takes into consideration all of the liens and encumbrances against the property (both consensual and non-consensual), and not just the moving creditor's lien. Valuation of the collateral becomes critical in a contested motion.

(3) 11 U.S.C. *§* 362(d)(3) -- if debtor is in a "single asset real estate" case and the debtor has failed, within 90 days of filing of the bankruptcy petition to (a) file a plan of reorganization; and (b) commence to make monthly interest payments to the creditor at the current non-default market rate.

(4) 11 U.S.C. *§* 362(d)(4) -- with respect to debt secured by real estate, and the court finds the case filing was part of a scheme to hinder, delay or defraud creditors that involves a transfer of some or all of the debtor's interest in the real property or there have been multiple bankruptcy filings affecting the real property. Creditor can obtain *in rem* relief from the automatic stay which prevents the real property from being subject to the automatic stay in another bankruptcy case for 2 years.

F. Process for Terminating Automatic Stay. If the creditor believes it has grounds to seek termination of the automatic stay, it must file a motion with the court. A notice of the motion and opportunity to object to the motion must also be served on the debtor and all interested parties. If no objections have been filed, the court will usually grant the motion without the need for further hearing. If an objection is filed, the parties must appear and make arguments to the court in prosecution or defense of the motion. If necessary, the court can allow limited discovery to occur regarding the grounds for the motion or the defenses to the motion, and then schedule an evidentiary hearing on the motion.

It is important to note that once the motion is granted, the automatic stay still remains in

effect for a period of 14 days after the order is entered unless otherwise waived by the court. Bankruptcy Rule 400l(a)(3).

G. Violations of the Automatic Stay. Actions taken in violation of the automatic stay are generally considered to be void. This is true even if the creditor was not aware that a bankruptcy case was filed. In re Kline, 472 B.R. 98 (10th Cir. BAP 2012). As such, there is no litigation advantage to a creditor for ignoring the possibility that the automatic stay applies. Moreover, the bankruptcy court is authorized to award sanctions for violations of the stay. However, the courts typically do not award sanctions for violation of the stay unless the creditor knew a bankruptcy case was filed or failed to take reasonable corrective action after learning of the bankruptcy filing.

Willful or knowing violations of the automatic stay are proven by a preponderance of the evidence standard. The debtor bears the burden of proving the violation of the automatic stay, and need only prove the creditor knew of the automatic stay and intended the actions that constituted the violation. In re Johnson, 501 F.3d 1163 (101 Cir. 2007). Furthermore, notice to the creditor of the bankruptcy filing need not be formal or official to put the creditor on notice of the bankruptcy filing. Id. Verbal notice of the case filing or information received from other sources can be considered sufficient to put the creditor on notice of the automatic stay.

Even if the creditor initially committed an innocent violation of the stay without knowledge that a bankruptcy case had been filed, the violation can still be found to be "willful" if the creditor fails to remedy the violation after receiving notice of the automatic stay. In re Kline, 472 B.R. 98 (101 Cir. 2012); In re Diviney, 225 B.R. 762 (101 Cir. BAP 1998) (a party's good faith belief that it had a right to the property is not relevant to whether the act was "willful" or whether compensation must be awarded).

Our local courts have held that creditors have an absolute duty under 11 U.S.C. § 542 to return repossessed collateral to a debtor as soon as possible after learning of the bankruptcy filing, and a failure to return such property can be sanctioned as a violation of the automatic stay. The creditor must return the property with no strings attached, and then seek relief from the automatic stay as appropriate. In re Jackson, 251 B.R. 597 (Bankr. D. Utah 2000) (cannot condition return of vehicle upon proof of insurance; creditor counsel also sanctioned for violation). *See also* In re Yates, 332 B.R. l (10th Cir. BAP 2005) (perceived lack of need by debtor of vehicle with no engine not basis for refusing to turnover vehicle). The recent case of In

re Cowen, 849 F.3d 943 (10th Cir. 2017), took the minority approach that a passive holding of property did not constitute a violation of the automatic stay, but also noted that the creditor may still be obligated to turnover the property under § 542 and subject to sanctions under§ 105.

The statutory basis for damages for violations of the automatic stay is found in 11 U.S.C. § 362(k). Except as provided in paragraph (2), the court can award actual damages, including attorney fees and costs, and punitive damages for violating the stay. There is some precedent for limiting the recovery of damages to an actual individual person. In re C.W. Mining, 477 B.R. 176 (10th Cir. BAP 2012) (trustee acting on behalf of a bankruptcy estate, which is an artificial entity, cannot recover damages for violation of the automatic stay). However, there may still be a basis for a trustee to see contempt sanctions under the court's broad power found in 11 U.S.C. § 105. In re Skinner, 917 F.2d 444 (10111 Cir. 199 0).

The amount of damages that can be awarded for a violation of the automatic can be significant and unpredictable. There is no specific amount that can or must be awarded, and the award is within the judge's discretion based upon the facts and circumstances of the case. Some cases have also allowed recovery of damages for emotional distress, but typically only upon a showing of some corresponding economic harm. However, there is no remedy for an automatic stay violation if there is no harm. In. re C. W. Mining, 477 B.R. 176 (10th Cir. BAP 2012).

VI. Dischargeability of Debts.

A. Discharge of Debts in Chapter 7 Cases. Individual debtors are generally entitled to receive a discharge of most of their debts in a case filed under Chapter 7. Corporations are not entitled to receive a discharge under Chapter 7. The discharge is subject to the conditions set forth in 11 U.S.C. § 727(a) and the exceptions to discharge set forth in 11 U.S.C. § 523(a). The discharge also applies only to debts that existed on the date the bankruptcy case was filed, and does not apply to debts incurred after the case was filed.

1. General Denial of Discharge. A creditor, a trustee or the U.S. trustee may object to the debtor's discharge under 11 U.S.C. § 727(c)(l). If a successful objection is made under this this section, it means that the debtor will not receive a discharge of any of its debts. This is sometimes referred to as "global" denial of discharge. There are twelve enumerated grounds to object to discharge under § 727(a). Many of them deal with a debtor's attempt to conceal assets from creditors or the trustee or to falsify records or give false testimony about the debtor's financial condition. Some of the other objections address eligibility requirements such as

the debtor is not an individual, or that the debtor previously obtained a discharge in prior Chapter 7 or Chapter 11 case within 8 years of the when the current case was commenced.

An objection seeking a denial of discharge under § 727 must be pursued through the filing of an adversary proceeding. The burden of proof lies on the party prosecuting the adversary action, and burden of proof is a preponderance of the evidence standard.

For certain conduct of the debtor that is not discovered during the case, there can be grounds to seek a revocation of the debtor's discharge under 11 U.S.C. § 727(d). If the discharge was obtained through fraud and the moving party did not know of the fraud until after the discharge was granted, then the action seeking to revoke the discharge must be brought within one year after the discharge is granted. If the offending conduct involves property that should have been property of the estate, then the action seeking to revoke the discharge must be brought within one year of the date the discharge is granted or the date the case is closed, whichever is later.

2. Denial of Discharge of Specific Debts. 11 U.S.C. § 523(a) lists out 19 grounds for objecting to the discharge of specific debts owed by the debtor. A denial of discharge under one of these grounds pertains only to the specific debt involved in the objection, and the debtor can still receive a discharge of its other debts. Some types of debts automatically excepted from discharge under § 523 without any further action by the creditor, such as tax obligations owed to the government, student loans and obligations for child support or alimony. However, other types of debts listed in § 523 require further action by a creditor to avoid discharge . These include:

(1) debts incurred by fraud, false pretenses or a false statement in writing about the debtor's financial condition. § 523(a)(2)(a) & (B)

(2) consumer debts owed to a single creditor aggregating more than $675 for luxury goods or services that were incurred within 90 days of the bankruptcy filing. § 523(a)(2)(C)(i)(I).

3. cash advances within 70 days of the bankruptcy filing aggregating more than $950 that are extensions of consumer credit under an open end credit plan. § 523(a)(2)(C)(i)(II).

4. fraud or defalcation while acting in a fiduciary capacity, embezzlement or

larceny. § 523(a)(4).

5. willful and malicious injury by the debtor to another entity or to the property of another entity. § 523(a)(6).

If a creditor wishes to object to discharge of a debt under § 523(a)(2), (4) or (6), the creditor must file a formal adversary proceeding objecting to the discharge of the debt within 60 days after the first date set for the meeting of creditors. Bankruptcy Rule 4007(c). The deadline to object to discharge is one of the key dates listed in the notice of bankruptcy filing. If a creditor fails to timely file an adversary proceeding, the debtor will be allowed to discharge the debt, even if it would have otherwise been excepted from discharge. Since there is a short deadline to file an adversary proceeding, a creditor should act diligently in order to preserve its claim.

B. Discharge of Debts in Chapter 13 Cases. Debtors in Chapter 13 cases do not receive discharge until they have completed all of the payments required under their confirmed Chapter 13 plan. 11 U.S.C. *§* 1328(a). Chapter 13 plans can last 3-5 years. The discharge under Chapter 13 is slightly broader than under Chapter 7. For example, a debtor can discharge debts resulting from willful and malicious conduct (otherwise excepted from discharge under *§* 523(a)(6) in a Chapter 7 case). *See* 11 U.S.C. *§* l 328(a)(2).

If a creditor holds a claim that is not subject to discharge under 523(a)(2) or (4), the creditor must still file an adversary complaint in the Chapter 13 case to preserve the claim. The deadline for filing the adversary complaint in a Chapter 13 case is the same deadline as a Chapter 7 case (60 days after the first date set for the meeting of creditors).

VII. Means Testing and "Abusive Filing." The means test is designed to be an objective standard of weighing whether an individual debtor can file a Chapter 7 bankruptcy case (where perhaps no money is paid to creditors) or whether the debtor must file a Chapter 13 case (where some money is paid over time through the plan). Prior to the BAPCPA amendments of 2005, the debtor was free to choose whether to file a Chapter 7 case or a Chapter 13 case, subject to standards of good faith. However, to counteract some perceived inconsistent standards and to curb potentially "abusive filings," the BAPCPA amendments of 2005 imposed the means test for debtors. If the debtor wants to file a Chapter 7 case, the debtor must pass the means test. The means test applies only to individuals, and does not apply to businesses.

The first part of the means test assesses the debtor's average monthly income for the six-month period prior to the case filing with the median family income for the debtor's state. If the

debtor's income is less than or equal to the state median income, the debtor can file a Chapter 7 case. However, there is still a chance that the trustee may later determine the debtor has enough income to pay creditors in a Chapter 13 plan, and the trustee may seek to have the court convert the case to a Chapter 13 case.

If the debtor's income is above the state median income, then the debtor must complete the second part of the means test which focuses on the debtor's expenses. If after deducting the allowed expenses, the debtor has enough residual disposable income to make payments to creditors under a plan, then the debtor does not qualify for Chapter

7. Challenges can be made to the calculation of the debtor's income and expenses under the means test. If it is determined the debtor has failed to report all if her income, then the debtor may fail the means test and cannot file under Chapter 7. Similarly, if the debtor attempts to include excessive deductions, then the debtor may be found to have a higher amount of disposable income that must be contributed to the Chapter 13 plan.

VIII. § 707(a) and § 707(b) Dismissal.

A. Dismissal under§ 707(a). 11 U.S.C. § 707(a) provides that a Chapter 7 case can be dismissed "for cause." The non-exhaustive lists of grounds specified are:

(1) unreasonable delay by the debtor that is prejudicial to creditors

(2) nonpayment of any fees and charges required under chapter 123 of title 28

(3) failure of the debtor in a voluntary case to file, within 15 days, or such additional time as the court allows, after the filing of the petition commencing the case, the information required by § 521(a)(l), but only on motion of the U.S. trustee

Dismissal under (1) for unreasonable delay is intended to prevent the debtor from filing a bankruptcy case just to take advantage of the automatic stay or other protections under the Bankruptcy Code, and then failing to reasonably prosecute the case. In additional to the specific ground listed in § 707(a), any other grounds constituting "cause" may be submitted to the court for consideration.

B. Dismissal Under § 707(b). Under this section, a case filed by an individual "whose debts are primarily consumer debts" can be dismissed or converted to a Chapter 13 case

if the bankruptcy court determines that "the granting of relief would be an abuse" of the Bankruptcy Code. To prevail on a motion to dismiss under§ 707(b), the moving party must prove the two quoted sections above - e.g. that the debts of the debtor are primarily consumer debts, and that granting the debtor a discharge under Chapter 7 would be an abuse of the system. According to the 10th Circuit case of In re Stewart, 175 F.3d 796 (I 0111 Cir. 1999), "consumer debt" is distinguished from "non-consumer" debt based upon the existence of lack of a profit motive, and "primarily" means consumer debt exceeding 50% of the total debt.

With respect to the second prong, the court is to use a "totality of the circumstances" test, on a case-by-case basis. A primary factor is the debtor's ability to repay his debts out of future earnings, but other factors can include unique hardships upon the debtor such as sudden illness; calamity; disability or unemployment; case advances and consumer purchases far exceeding the ability to pay; the stability of future income; ability to reduce expenses without depriving the debtor of adequate food clothing, shelter and other necessities. In re Stewart.

IX. Exemption Planning. There are a set of federal exemptions, as well as a set of exemptions set by each state. Certain states allow the debtor to choose between the state or the federal set of exemptions, but most states require the debtor to use the state exemptions. In Utah, debtors have to use the Utah set of exemptions with a few supplemental federal exemptions (such as federal retirement accounts and veterans' benefits). The Utah exemptions are found in the Utah Exemptions Act,§§ 78B-5-501, *et. seq.* Some types of personal property items are completely exempt, such as health aids, burial plot, child support, retirement accounts, life insurance proceeds, certain appliances, etc. Other types of exemptions set an exempt dollar amount for the type of property, such as the homestead exemption for principal residence ($30,000); homestead exemption other real property ($5,000); motor vehicles ($3,000 in equity), etc. In most situations debtors filing jointly may double the allowed exemptions unless otherwise stated.

Since a bankruptcy filing subjects the debtor's non-exempt assets to payment of creditors, some pre-bankruptcy planning can maximize a debtor's exemptions and increase the amount of property a debtor can keep. Exemption planning can involve converting non-exempt assets into exempt assets. It can also involve a permissible level of estate planning prior to filing. However, any actions deemed to be excessive or done with the intent to defraud creditors are subject to attack by creditors or trustees. There is no bright line standard for when exemption planning

becomes fraud, and a debtor proceeds at its own risk. An often used adage is "pigs get fat, and hogs get slaughtered." Crossing the line may subject the debtor to a dismissal of the bankruptcy case, a denial of discharge, sanctions or even criminal liability.

Avoiding Ethical Tangles in Collections

A. ELIMINATING ETHICAL PROBLEMS FROM YOUR PRACTICE

1. CONFLICTS OF INTEREST

i. **Representation of Multiple Creditors Against A Common Debtor** Conflict arises in situation where debtor has limited assets to satisfy claims of creditors in full - there is only so much pie to divide amongst creditors. Can a lawyer or law firm represent multiple creditors against a mutual debtor?

BRIEF ANSWER: An attorney may represent multiple creditors simultaneously as long as there is no inherent ethical conflict in a lawyer representing more than on creditor and so long as the multiple representation is disclosed and each client gives its informed consent - unlikely first creditor will consent.

> Rule of Professional Conduct 1.7. Conflict of Interest: Current Clients.
> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
> (a)(l) The representation of one client will be **directly adverse** to another client; or
> (a)(2) There is a significant risk that the **representation of one or more clients will be materially limited** by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
> (b)(l) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (b)(2) the representation is not prohibited by law;
> (b)(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (b)(4) each affected client gives informed consent, confirmed in writing.

A material limitation on a lawyer's representation of a client attributable to the lawyer's responsibilities to another client, to a former client, to a third person, or arising from a personal interest of the lawyer will be present any time two parties are dividing up a limited pie from the debtor. When a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests, the representation will be adversely affected and must be declined or terminated. The conflict in effect forecloses alternatives that would otherwise be available to the client such as garnishment of a finite paycheck or execution on limited assets.

Resolution of a conflict of interest problem under this Rule requires the lawyer to: (a) clearly identify the client or clients; (b) determine whether a material limitation on the representation of the client exists; (c) decide whether the representation may be undertaken despite the material limitation, i.e., whether the conflict is consentable; and (d) if so, consult with the clients affected and obtain their consent.

The clients affected include any clients whose representations might be adversely affected. The critical questions are the likelihood that a material limitation will eventuate and, if it does, the likelihood the conflict will interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Special Considerations in Common Representation

We should be mindful that if the common representation fails the result can be additional cost, embarrassment, and recrimination. Likely, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained.

With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications,

and the clients should be so advised.

As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1 .2(c).

2. "MEANINGFUL INVOLVEMENT" IN CONSUMER COLLECTION FILES

The FDCPA prohibits the use of "false, deceptive, or misleading representations or means in connection with the collection of a debt. 15 U.S.C. § l 692e. The non-exhaustive list in Section 1692e includes sixteen debt collection practices that constitute false, deceptive, or misleading representations or means and include "the false representation or implication that a communication is from an attorney". 15 U.S.C. § 1692e(3). To be safe pleadings should include disclaimer language such as "At this time, no attorney with this firm has personally reviewed the particular circumstances of your account."

Some courts hold that it is a violation of 15 U.S.C. §l 692e(3) for an attorney to allow letterhead to be used in connection with consumer debt collection cases without being directly and personally involved or "meaningfully involved" with a debtor's account before the demand letter is sent. ***(Avila** v. **Rubin,*** 84 F. 3s 222 (7th Cir 1996); ***Clomon** v. **Jackson,*** 988 F.2d 1314 (2d. Cir. 1994).

B. ZEALOUS REPRESENTATION OR VEXATIOUS PRACTICES

1. NEGOTIATING WITH A *PRO SE* PERSON IN COURT

i. Truthfulness In Statements to Others (R.P.C. 4.1)

In the course of representing a client a lawyer shall not make a statement to a third person of fact or law that the lawyer knows to be false. A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can

also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.

ii. Dealing with Unrepresented Person (R.P.C. 4.3)

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

C. SOCIAL MEDIA ETHICAL ISSUES

Nationwide the rules on Social Media investigation and use vary but the large concesus of jurisdictions follow the conclusion reached by New York State Bar Association Opinion 843 (2010) and prior decisions which provides that a lawyers may view a person's social media website, profile or post, whether represented or not , for the purpose of obtaining information about a person including impeaching material for use in litigation as long as the lawyer does not "friend" the other party or direct third parties to do so. "Public information" means information available to anyone viewing a social media network without the need for permission from the person while the account is being viewed. "Public information" also includes content available to all members of a social media network and content that is assessable without authorization to non-members. **NYSBA Opinion 843 (2010).** Comments to the New York Rules of Professional Conduct Rule 4.1, provides unintentional communications with a representative party may occur if social media automatically notifies that person when someone views their account. Social media network may also allow the person whose account was viewed to see the entire profile of the viewing lawyer. Such automatic messages have been specifically found to lead to an ethical violation when seeking to investigate or monitor jurors. See comments to N.Y. Ethics Guidelines No. 3.A.

Guideline No 3.B issued by the New York State Bar Association provides that a lawyer may request permission to view the restricted portion of an unrepresented person's social media website or profile. However, the lawyer must use their own name and accurate profile, and may not create a different or false profile in order to mask their identity. Id. If the

unrepresented person asks for additional information from the lawyer in response to the request that seeks permission to view the person's social media profile, the lawyer must accurately provide the information requested by the person or withdraw the request. Id. New York City Bar Association has opined that it is permissible for a lawyer for a join a social media network to obtain information concerning a witness. Id. However, a lawyer shall not friend an unrepresented individual using "deception". See NH Bar Association Ethics Advisory Opinion 2012-13/05 (2012) and New York City Bar Association Formal Opinion 2010-2 (2010).

The New York Bar Association Guidelines No 3.C provides that a lawyer shall not contact a represented person to seek to review the restricted portion of the person's social media profile unless the expressed authorization has been furnished by that person. New York Bar Association Guideline No. 3.C viewing a represented party's restrictive social media website provides that caution should be used by a lawyer before deciding to view a potentially private or restricted social media account or profile of a represented person in situation the lawyer has the right to view such as a professional group where the lawyer and represented person are members as a result of being a friend of a friend of such represented person.

New York State Bar Association Guideline No. 3.D (relating to viewing a person's social media account) states a lawyer shall not order or direct an agent to engage in specific conduct in which the conduct violates a lawyer's ethics rules had the lawyer performed the specific conduct. Id. This prohibition extends to the lawyer's investigator, legal assistant, secretary, and arguably to the lawyer's client. Id.

D. LAWYER LIABILITY

1. DISCIPLINE FOR VIOLATIONS OF FDCPA

i. Discovery Violations.

The FDCPA applies to attorneys engaged in legal activities. ***Fox v. Citi Corp. Credit Service, Inc.,*** 15 F. 3d 1507, 1511-12 (9th Cir. 1994). (FDCPA applies to filing of an application for writ of a garnishment.) The FDCPA applies to service upon the debtor of a complaint to facilitate a debt collection effort. ***Donohue*** *v.* ***Quick Collect, Inc.,*** 592 F. 3d I 027, J 031-32 (9th Cir. 2010). The FDCPA covers both the filing of a complaints as well as services of settlement correspondence during the course of litigation. Id. The FDCPA applies in all types of litigation activities and written discovery. ***McCollough*** *v.* ***Johnson, Rodenburg & Lauinger, LLC,*** 201 l

WL 746892 (9th Cir. 2011). In ***Sayyed v. Wolpoff and Abramson,*** 45 F. 3d 226, 228, 230-32 (4th Cir. 2007), the court held that the FDCPA applies to erroneous statements made by law firm in interrogatories and summary judgment motions. Numerous cases have held that ordinary and routine litigation activities of attorneys are actionable under FDCPA. Id. The ***McCollough*** case is one of the first cases that discusses actual wording of discovery requests themselves as forming the basis for potential liability under the FDCPA. Id.

ii. Bankruptcy Court Automatic Stay Violations.

FDCPA applies to attorneys who have violated the automatic stay or seek to collect a discharged debt. ***Randolph v. IMBS, Inc.,*** 368 F. 3d 726 (7th Cir. 2004); ***Turner v. JVDB & Associates,*** 330 F. 3d 997 (7th Cir. 2003). Seeking to collect on a debt discharged falsely represents the amount or the legal status of the debt. Id. Previously, some courts have held a FDCPA violation occurs for filing a time barred claim in a bankruptcy proceeding. ***Simmons v. Roundup Funding, LLC,*** 622 F. 3d 93 (3d Cir. 2010); however, just this last month in ***Midland Funding, LLC v. Johnson,*** The United States Supreme Court recently held that the filing of a proof of claim that is obviously time barred is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the Fair Debt Collection Practices Act.

iii. Real Estate Foreclosure.

In the case of ***Holm v. Wells Fargo Home Mortgage, Inc. and Federal Home Loan Mortgage Corporation,*** (Mo. Case #08CN-CV-00944) (January 26, 2015), the court awarded damages to the homeowners in an amount in excess of $2.9 million for an improper foreclosure. The court found that Wells Fargo was deceitful in its dealing with the borrowers and expressed complete and total disregard for the rights of the borrowers.

iv. Judgment Liens.

In ***Currier v. First Resolution Investment Corp.,*** 762 F. 3d 529 (8th Cir. 2014), First Resolution, debt collector, commenced an action in Kentucky State Court against Currier to collect a charged off credit card debt of $1,000.00. The court held that filing the lien is also comparable to taking or threatening take non-judicial action to affect the disposition or property in which the debt collector had no forcible security interest. The court further found that the filing and maintaining an invalid lien for a month can also fairly be characterized as a threat to take action that cannot legally be taken within the meaning of Title 15 U.S.C. §

1692(e)(5). Court held that Currier's complaint stated a valid cause of action against the collection agency and could proceed forward with a FDCPA claim. The court cited numerous authority for its position that the FDCPA applied to litigation. ***Gionis v. Javitch, Block, Rathbone, LLP,*** 238 Fed. App. 24, 28-29, 30 (6th Cir. 2007) (court filings can be a threat under the FDCPA).

2. THE "MINI MIRANDA"

Since it appears from case law that FDCPA applies to virtually all aspects of litigation, all litigation documents should contain the mini Miranda warning:

"THIS COMMUNICATION IS AN ATTEMPT TO COLLECT BY A DEBT COLLECTOR AND ANY INFORMATION WE OBTAINED WILL BE USED FOR THAT PURPOSE."

3. THE "MAXI MIRANDA"

The maxi Miranda warning should be sent with every initial communication with the debtor or debtor's legal counsel which reads as follows:

FAIR DEBT COLLECTION PRACTICES ACT NOTICE

TO:

NAME OF CREDITOR TO
WHOM THE DEBT IS OWED: **AMOUNT OF DEBT:**

YOUR ACCOUNT HAS BEEN PLACED WITH THIS OFFICE FOR COLLECTION. TO PREVENT US FROM CONTACTING YOU AGAIN FOR PAYMENT IN FULL, PLEASE MAIL YOUR PAYMENT TO THE UNDERSIGNED AT _____.

_____ IS THE CURRENT CREDITOR FOR THIS DEBT. UNLESS YOU NOTIFY THIS OFFICE WITHIN THIRTY (30) DAYS AFTER RECEIVING THIS NOTICE THAT YOU DISPUTE THE VALIDITY OF THIS DEBT OR ANY PORTION THEREOF, THIS OFFICE WILL ASSUME THE DEBT IS VAUD. IF YOU NOTIFY THIS OFFICE IN WRITING WITHIN THIRTY (30) DAYS FROM RECEIVING THIS NOTICE, THIS OFFICE WILL OBTAIN VERIFICATION OF THE DEBT OR OBTAIN A COPY OF THE JUDGMENT, OR SOME OTHER DOCUMENT EVIDENCING THE DEBT, AND MAIL YOU A COPY OF THE VERIFICATION. IF YOU REQUEST THIS OFFICE IN WRITING WITHIN THIRTY (30) DAYS AFTER RECEIVING THIS NOTICE, THIS OFFICE WILL PROVIDE YOU WITH THE NAME AND ADDRESS OF THE ORIGINAL CREDITOR, IF DIFFERENT FROM THE CURRENT CREDITOR.

THIS IS AN ATTEMPT TO COLLECT A DEBT, AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE. THIS COMMUNICATION IS FROM A DEBT COLLECTOR.

Dated this ___ day of April, 2017.

_____
Timothy Dance
Snell and Wilmer L.L.P.

E. ATTORNEY'S FEES

1. Fee Arrangements and Getting Paid (Fee Agreements (R.P.C. 1.5))

(a) A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
(a)(l) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;

(a)(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(a)(3) the fee customarily charged in the locality for similar legal services;

(a)(4) the amount involved and the results obtained;

(a)(S) the time limitations imposed by the client or by the circumstances; (a)(6) the nature and length of the professional relationship with the client;

(a)(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and .

(a)(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph

(d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted fr.om the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge or collect:

(d)(l) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(d)(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(e)(l) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(e)(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and(e)(3) the total fee is reasonable.

The rule requires fees that must reasonable under the circumstances . The factors specified are not exclusive, nor will each factor be relevant in each instance. Ordinarily , when the lawyer has regularly represented a client, they will have an understanding concerning the basis or rate of the fee. In a new lawyer-client relationship, however, an understanding as to the fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding. The written statement may be a copy of the lawyer's customary fee schedule or a simple memorandum setting forth the basis, rate or amount of the fee.

Contingent fees, like any other fees, are subject to the reasonableness standard of

paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.