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§ 1.1 Summary of Part 1

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Rev: Apr. 14, 2009

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[1] Avoiding a Chapter 13 filing when less drastic alternatives are available and filing only for a debtor who is eligible and likely to realize confirmation of a plan are important prefiling considerations for bankruptcy counsel. This chapter begins with a discussion of when Chapter 13 is an effective solution to debt problems. There follows a detailed review of eligibility for Chapter 13 with particular attention to debt limitations. Prefiling planning and strategies are covered. Counseling and collecting information from Chapter 13 clients are examined from the perspective of debtors' and creditors' counsel. The discussion of preparation of the documents necessary to commence a Chapter 13 case begins in **Part 2**.

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§ 3.1 Nonbankruptcy Alternatives Are Exhausted

Rev: Mar. 4, 2009

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[1] Chapter 13 (or any bankruptcy) should be a last resort. There is little pleasure to being a debtor or a claim holder in a bankruptcy case. All debtors' counsel have a professional responsibility to advise a client of the nonbankruptcy alternatives before plunging into a Chapter 13 case.

[2] Potential Chapter 13 debtors typically find a lawyer's office when they are one step from financial Armageddon: There is a foreclosure sale of the debtor's home the next day; the debtor's only car was mysteriously repossessed in the dark of last night; a garnishment has reduced the debtor's take-home pay below the ordinary requirements of food and rent. Instantaneous relief is expected, if not necessary.

[3] Many times it is simpler for debtor's counsel to file a bankruptcy petition, invoke the automatic stay and freeze the debtor's situation for some future contemplation of remedies. But simpler is not better for individuals with debt problems that can be solved with less drastic action than a bankruptcy filing.

[4] Bankruptcy is rarely the long-term best choice for consumer debtors in ordinary financial distress. Chapter 13 is not the appropriate solution for the consumer debtor who just needs a breather from collection pressures. It is often possible to get control of the debtor's finances without a bankruptcy petition.

[5] A debtor with relatively few really nagging creditors is a candidate for a nonbankruptcy alternative. Chapter 13 is a model for the things that can be offered to creditors without filing.

[6] Often, nonbankruptcy efforts become a test of the knowledge of the players involved. Well-informed claim holders will know their likely outcomes in a bankruptcy case and will be willing to negotiate toward that least favorable position. Offering the mortgage company, even on the eve of foreclosure, what the company is likely to receive in treatment of its arrearage in a Chapter 13 case can produce a contractual settlement less expensive and less traumatic for the debtor. A telephone offer to extend the car note on a fixed repayment schedule, with interest if necessary, can stop a repossession if the creditor is accurately informed of the effect of a "write down" and "stretch out" in a Chapter 13 case.¹ A strategic surrender of some collateral can stop execution on other collateral, and even a trickle of payments over time with a written commitment from the debtor can release a garnishment if the unsecured claim holder knows its fate if bankruptcy results. Debtor's counsel must be willing to explain Chapter 13 to the uninformed claim holder. When available, creditor's counsel can help the process of negotiation and persuasion.

[7] There are for-profit and not-for-profit services and agencies that specialize in counseling financially troubled individuals. These organizations restructure debt by contractual and quasi-contractual arrangements with creditors. Some services are free; some charge a flat fee; some charge a percentage of the debt involved. Some are actually funded by the credit community from a portion of the debt payments. Where credit counseling services have become well known to the credit community, they can be a two-way referral resource for debtors' counsel: a source of cases that won't resolve by agreement, a place to

send debtors who do not need bankruptcy relief.

[8] For the potential Chapter 13 debtor, the use of an attorney to explore nonbankruptcy alternatives is limited by cost. For less than two thousand dollars in many jurisdictions, debt restructuring is available in a Chapter 13 case. In a perfect world, nonbankruptcy alternatives would be attempted in every case. In the real world, it makes economic sense for a debtor's lawyer to attempt a nonbankruptcy solution in cases in which the financial distress is confined to a small group of claim holders that are easily identifiable and easily contacted. When financial distress emanates from a chorus of creditors geographically dispersed and of uncertain or no bankruptcy sophistication, the Chapter 13 alternative becomes more attractive.

¹ See §§ 451.1–541.6 for changes made by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) to a debtor's ability to modify certain secured loans, in particular vehicles purchased for personal use within 910 days of filing bankruptcy.

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§ 38.1 When to File Petition

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[1] Debtor's counsel often has little discretion when to file the Chapter 13 case because financial catastrophe is imminent, and filing must occur as quickly as a naked petition can be prepared. Chapter 13 is sometimes filed on the eve of a foreclosure sale because filing before the sale in most circuits preserves sufficient rights in the debtor to permit the curing of default and reinstatement of a home mortgage.¹ If the debtor is in immediate danger of being evicted from an apartment, filing quickly may be important to preserve the leasehold and permit rehabilitation of the lease under 11 U.S.C. § 365.² New exceptions to the automatic stay enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)³ make it especially imperative to file sooner rather than later when eviction proceedings are pending in state court with respect to residential property.⁴ Filing the Chapter 13 petition before a claim against the debtor is reduced to judgment may characterize the claim as contingent or unliquidated and help the debtor satisfy the debt limitations for eligibility.⁵

[2] Detailed elsewhere,⁶ BAPCPA added an important timing consideration with respect to the petition and the prepetition briefing now required by § 109(h).⁷ Although controversial, a few courts have held that the prepetition briefing condition for eligibility to be a Chapter 13 debtor must be received by the debtor at least one calendar day before the day on which a Chapter 13 petition is filed.⁸ When a foreclosure or other imminent creditor action is pending, that calendar-day delay can significantly prejudice important rights. Whenever counsel has the choice, filing the petition at least one calendar day after the debtor receives the § 109(h) briefing eliminates the risk that the debtor is not eligible to file on the same day as the briefing.

[3] If there is time for pre-filing strategies, counsel may wish to delay filing the Chapter 13 case until exemption planning is accomplished.⁹ If the debtor is unemployed, the debtor may need time to find a job before the Chapter 13 case is commenced.¹⁰ Aggressive debtor's counsel may delay filing the Chapter 13 case to allow time for cleaning up a partnership or corporation involving the debtor.¹¹

[4] Electronic Case Filing (ECF) has decreased the uncertainty of determining exactly when a petition is filed. When not using ECF, counsel should not take risks with respect to when a Chapter 13 petition is filed: mailing the petition does not file the petition; if timing is important, get the petition time-stamped by the bankruptcy court clerk's office. The reported cases demonstrate that traps abound when a Chapter 13 debtor is in a race to get a petition filed. An attorney "committed legal malpractice by negligently delaying the filing of the Debtors' bankruptcy petition," when the attorney advised the debtors to stop making payments to creditors but then delayed filing the

petition until after repossession of the debtors' vehicle, an IRS levy and overdraft charges.¹²

[5] In *In re Delong*,¹³ a foreclosure sale on the debtors' residence was scheduled for 9:00 A.M. on Wednesday, September 17. Counsel mailed a Chapter 13 petition to the bankruptcy court in what appeared to be plenty of time—on the previous Friday, September 12. The petition was never received by the bankruptcy court.

[6] Counsel realized that the mailed petition was lost in space and rushed a hand-delivered petition to the bankruptcy court clerk at 10:24 A.M. on September 17. The foreclosure sale was completed at 9:30 A.M. The bankruptcy court held that the mailed but never-received petition was not filed for purposes of § 301 of the Code and Bankruptcy Rule 1002. The "mailbox rule" does not apply to the filing of a bankruptcy petition because "a filing is effective when it is received by the court, not when it is mailed to the court."¹⁴ The debtors lost their home.

[7] And when is a Chapter 13 petition filed—when it is tendered to the bankruptcy court clerk, or when it is file-stamped? The answer to this question saved the debtor's home in *In re Schleier*.¹⁵ There was no dispute in *Schleier* that the debtor tendered a Chapter 13 petition to the bankruptcy court clerk at 9:05 A.M. The time stamp on the petition read 9:36 A.M. On that same morning, a foreclosure sale of the debtors' home concluded between 9:15 and 9:20. Testimony explained that a deputy clerk took the petition from the debtor and then spent some 40 minutes discussing problems with the papers. That conversation almost cost the debtor her home.

[8] The bankruptcy court first determined that "the date and time-stamp on a bankruptcy petition creates a rebuttable presumption as to when it was filed. To rebut that presumption, a debtor must submit evidence that the petition was filed at a different time."¹⁶ The bankruptcy court then found from the evidence that the debtor delivered the papers to a deputy clerk, at 9:05 A.M., not sometime later when the clerk actually stamp-filed those papers: "Bankruptcy Rule 1002(a) provides . . . '[a] petition commencing a case under the Code shall be filed with the clerk.' . . . [T]he petition here was filed when the deputy clerk took it into his custody."¹⁷

[9] That the debtor won in *Schleier* after a trial on the merits only punctuates that counsel should take no chances when a Chapter 13 petition must be filed to stop some impending creditor action. Don't mail a Chapter 13 petition that absolutely has to be filed by a certain date and time. If you can—and you can in almost every district and circumstance—use the ECF system and you will always have an instantaneous record of the moment of filing. If a paper filing is necessary and if minutes are at issue, file-stamp first and talk later. The importance of tendering any filing fee with the petition when you are in a race is discussed below.¹⁸

[10] In courts that have adopted ECF, a petition can be filed electronically at any time, on any day, effectively eliminating disputes over when the petition was mailed or received by the clerk.

¹ See § 130.1. The Bankruptcy Reform Act of 1994 increased the

incentives for Chapter 13 debtors to file before a foreclosure sale under state law. Section 301 of the 1994 Act amended 11 U.S.C. § 1322(c)(1) to provide that a Chapter 13 debtor can cure defaults with respect to claims secured by a principal residence “until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law.” 11 U.S.C. § 1322(c)(1), *as amended by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 301, 108 Stat. 4106 (1994).

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² See § 172.1.

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³ Pub. L. No. 109-8, 119 Stat. 23 (2005).

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⁴ See 11 U.S.C. § 362(22) and (I), discussed in §§ 382.1 and 431.1.

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⁵ See §§ 12.1, 15.1, 15.5, 15.7 and 16.1.

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⁶ See § 369.3.

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⁷ See 11 U.S.C. § 109(h), discussed in §§ 369.1–369.15.

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⁸ See § 369.3.

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⁹ See § 25.3.

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¹⁰ See *In re Smith*, 234 B.R. 852, 854–55 (Bankr. M.D. Ga. 1999) (Debtor's attorney sanctioned \$150 under Bankruptcy Rule 9011 for filing a Chapter 13 petition for an ineligible, unemployed debtor. "[T]he Court intends to address the notion that every individual, regardless of eligibility at the time of filing the case, is entitled to have a chance to succeed in a Chapter 13 case. No such notion will be recognized as an adequate defense to a motion for sanctions In order for a debtor to be eligible to be a debtor in Chapter 13, the requirements of 11 U.S.C. § 109(e) must be satisfied at the time of the filing of the case, not at some future time. . . . It is conceivable that the concept of 'regular income' could be interpreted to include an individual who is not employed at the time of the filing of the case if that individual's employment history reflects a record of satisfactory and continuous prior employment so as to provide reasonable assurances that replacement employment will be obtained in the immediate future. Even that case should not be filed unless the circumstances of the debtor would be irreparably altered by some intervening circumstance such as a foreclosure or repossession.").

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11 See § 5.2.

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12 *Wadley v. Jacobs (In re Wadley)*, No. 07-4158, 2008 WL 2227498, at *5 (Bankr. N.D. Cal. May 29, 2008) (unpublished) (Tchaikovsky).

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13 No. 03-74355, 2003 WL 22989682 (Bankr. C.D. Ill. Dec. 16, 2003) (unpublished).

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14 2003 WL 22989682, at *2.

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15 290 B.R. 45 (Bankr. S.D.N.Y. 2003).

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16 290 B.R. at 50.

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17 290 B.R. at 52.

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18 See § 38.3.

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