

This final examination consists of three (3) essay questions, to be answered in the accompanying blue book(s). I suggest that you read each question carefully, circle or highlight each of the important issues that need to be discussed and discuss each issue as you progress through the fact pattern. Please do not repeat the facts unless you feel it is appropriate and necessary. Please write on only one side of each page in the blue book, in pen, as legibly as possible.

1. Gene and his wife Loretta own a 2 family house in Littleton, MA, which they purchased in 2000. In 2010, they refinanced the mortgage and granted ABC bank a new first mortgage in the sum of \$245,000. At the closing, the attorney paid off the balance of the existing mortgage in the sum of \$225,000 and after paying all closing costs and expenses gave Gene and his wife a check for \$18,000. Two weeks later, they decided to do some home improvements and borrowed an additional \$50,000, granting a second mortgage to "Mortgage Momma – Your Neighborhood Lender" to secure the payment of that \$50,000 promissory note. The note calls for 14% annual interest rate, but (of course) the mortgage broker at Mortgage Momma promised that after 5 years of regular on-time payments, he would guarantee that they could refinance for a lower interest rate. It's now 5 years later and though Mortgage Momma is still in business, that broker is nowhere to be found. The Vice-President of Mortgage Momma denies that any such promises were made. And he adds that even if such a promise to refinance was actually made, the property would have to be worth enough such that Mortgage Momma would be over-secured.

Well, the property value has gone through the floor and the house is now worth only \$175,000.

The first mortgage balance is \$240,000 and Gene and Loretta are finally realizing that they need to find out what options they have. That 14% second mortgage is killing them, they have accumulated over \$130,000 in credit card debt over the past 4 years and they have defaulted on most every financial obligation they have. They are current on the first mortgage but behind 5 months on the second mortgage

Gene owns a 2009 Mercedes E350 worth about \$20,000 with a loan balance of \$12,000. Loretta, (the more sensible one) owns a 2008 Subaru that she bought used – no loan. They have normal and ordinary household goods and personal items. The couple has two children together, ages 17 and 14, both of whom are good students in public school. Their after school activities consist of private scuba lessons and amateur rollerblade competition (for her, the 14 year old), and hockey for him. On a monthly basis, these activities cost \$400 and Gene wants that cost reduced. However, Loretta (the sensible one, remember) reminds Gene that their daughter won her last rollerblade competition and came home with a check for \$10,000 just last month. And their son has been offered a hockey scholarship at Boston College, if he can maintain his B average.

Gene owns his own landscaping business, which is doing ok. So far in 2015, his gross revenues have reached \$275,000 and his personal income is close to \$80,000. His payroll is up as are many of his other business expenses – otherwise he would have earned around the same as he did in 2014, around \$120,000. But he is "growing the business" and feels that in another year or

two, he will be able to take over \$150,000 personal income. Loretta works as a dental hygienist and earns about \$60,000 annually. Most of the credit card debt was accumulated over 4 years ago because Gene and Loretta spent well over their budgeted amounts for those home improvements. For the past 3 years, they have been paying \$2,300 per month in credit card bills (at an average of 18%) and have hardly reduced the principal balance on any of the cards. Some of the credit cards balances were also created by Loretta when she "invested" \$40,000 in a start-up business that went bust after 18 months. Her garage is half-full of Chinese teeth whitening gel. Seems that the FDA never approved the product for import into the US.

Gene and Loretta need some good news...got any for them?

2. John and Mary are married and live in Methuen, MA in a single family home, with their four children, ages 21, 19, 7 and 5. Both older children work full time but contribute nothing to the household income because they are each paying for their own cars and supporting their extensive social lives. Each dates regularly and often hits either John or Mary up for some additional cash when they have little beer money left. The five year old just landed a job as a model with an advertising agency because she "smiles upon request", which is a fabulous attribute for the photographer. Little Betsy earns as much as \$500.00 on a Saturday morning.

John and Mary own their house as tenants by the entirety and the house currently has one mortgage with a principal balance of \$88,000.00 and they have resisted every temptation to refinance over the past ten years, since they bought the home. They are current with the mortgage and all of the expenses relating to their house, including the taxes and insurance. At your request, (you spoke with them on the phone before the meeting) they obtained a Broker's Price Opinion which indicated that their beautiful home in an excellent section of Andover, even in this miserable real estate climate, has a current value of \$400,000.00.

Though John considers himself to be financially responsible, he borrowed money from his mother over the past two years and chose not to tell Mary. This past September, he used all of his \$5000.00 bonus to repay his mother the entire balance of what he owed her. Part of the reason why he needed to borrow money from his mom was to pay his ex-girlfriend to help support his two children (ages 6 and 4) that he had with Danielle. Mary knows nothing about Danielle or the two little kids. Danielle, unbeknownst to John, recently obtained a court order requiring John to pay \$500 per month support for each of the two little kids. He has not given Danielle any money since July 2012.

At your meeting with John and Mary, Mary tearfully admits that she has suffered from a secret shopping addiction and her credit card balances are quickly approaching \$90,000.00. Her most recent purchase last week was from Saks Fifth Avenue where she bought a designer t-shirt with contrasting long sleeves in each of the five available colors; cost: \$925.00 (!!). She has hidden these shirts from John. Two years ago, Discover Card sued her for \$24,000.00 alleging that to be the balance on her Discover Card. She allowed the case to go to default (no response filed), Discover recovered judgment and recorded the execution (via the deputy sheriff) at the local Registry of Deeds, effectively placing a valid judicial lien on the property. The attorney for Discover has scheduled a hearing in court to determine Mary's ability to pay and has also

threatened that he will instruct the sheriff to sell the house to collect on the judgment. Mary is now freaking out.

Finally, John is currently unemployed, having worked for Merrill Lynch as a financial advisor – that is where he met Danielle. He has been receiving \$2000.00 per month unemployment compensation since April 2015, but those checks will run out at the end of March 2016. His prospects for re-employment in his profession appear bleak, for the moment. Mary is working at Walmart as a cashier and is quite happy. No pressure, nice people, regular paycheck.

John and Mary have a meeting scheduled for later today and have emailed the above fact pattern to you in advance of that meeting. How will you handle the clients, what questions will you need to ask and how do you propose to create a strategy to assist John and Mary?

3. Joan owns her small but beautiful one bedroom condo in Andover. She has one mortgage with a current balance of \$150,000. The most recent valuation for the unit shows it to be worth \$225,000. However, Joan is 6 months behind on the mortgage and the bank has begun and threatened foreclosure if she doesn't get caught up. She would love to get caught up but only has a stable social security income of \$1400 a month since her medical condition prevents her from working. Her last full time or part time job was in late 2014. She has no other earned income, at this time and her prospects for future employment look bleak.

Over the course of the last three years, Joan has accumulated credit card debts and unpaid medical bills totaling over \$40,000 and these creditors are starting to hound her with phone calls and demand letters. This situation has exasperated her medical condition and she needs to stop the pressure. In fact, two of her creditors have sued her and have obtained real estate attachments against her condominium unit. They have recovered judgments against her for the full amounts of their claims, but they have done nothing further to enforce their remedies. When she last had her hair done at Joey's Hair Salon and Bowling Alley, her stylist suggested that she see you to find out how you can help.

Joan know that she cannot stay in the condominium, because she cannot continue to cover the combined mortgage payments, taxes, condominium fees and the necessary repairs and maintenance. She is blessed with a loving family and her daughter has invited her to settle in with her in Utah. Joan will celebrate her 83rd birthday in February.

Joan is embarrassed and frustrated since for most of her life, she was a wonderfully successful journalist. She gets a small monthly pension from the newspaper for which she worked for over 30 years.

She has heard about bankruptcy as an option and wonders whether or not you could do "magic" for her. In a perfect world, she would like to sell the condo and move in with her daughter, but she can no longer deal with the pressures of her financial situation. Your advice?

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1. Randy is a single mother who purchased her three family house in Lawrence, MA in 2005, at the height of the real estate market. Since her purchase, she refinanced the house and currently has two mortgages; the first mortgage has a principal balance of \$329,000.00 and is currently four months in arrears at \$2,900.00 per month (principal, interest, taxes and insurance). The bank has sent her a notice of default and has threatened to begin foreclosure proceedings if she doesn't get the mortgage caught up.

Randy also has a second mortgage with a principal balance of approximately \$78,000.00, which is currently eight months in arrears, but the bank has not communicated with Randy in quite some time. Randy is unable to catch up on either or both of the mortgages because her income is limited.

Randy now works as an Administrative Assistant (just got the job two months ago) and earns approximately \$40,000.00 per year. Before that, she worked as a part time bartender in her local pub and earned \$15,000.00 per year, plus an additional \$15,000.00 in tips which she did not report. She has two children living at home with her, both of whom attend the Lawrence public schools. She receives occasional court-ordered support money from the father of her two minor children, but those payments are irregular. The total amount of money that she has received in the past six months from support was \$2,400.00.

A broker just last week determined that the house is only worth \$125,000.00, since it is in fair condition. However, Randy receives income from two tenants in the amounts of \$900.00 and \$1,000.00 respectively. These two tenants are stable and Randy feels that she can count on the rental income every month. The broker indicates that, based on current market conditions, she feels that the value of this three-family house, even in its present condition, will rise over the next few years.

At your meeting with Randy she indicates that she has accumulated approximately \$40,000.00 of general unsecured credit cards, overdue medical bills and some personal family loans. She is constantly being harassed by debt collectors on behalf of the credit card holders and she has been using some of the rent money to make the minimum monthly payments to the credit cards. However, she has become extremely frustrated because the credit card balances are not going down since the annual interest rates on the cards have now each reached 29.99% (the applicable default rate, per the credit card agreements).

Randy wants to know what options bankruptcy may provide. She wants desperately to keep the house and feels that she can keep current if only she can reduce the amount on the mortgage.

2) Harry owns a single family home in Peabody, MA, having purchased it from his brother in 2006 for \$375,000. His brother and his brother's (same sex) partner live with him. The agreement Harry made with his brother back in 2006 was that Harry's brother and his partner would pay a reduced rent to Harry and that Harry would refinance the house in his own name with a new mortgage that Harry could afford. This way, the house could stay in "the family" and everyone could live together as a cohesive group.

In 2012, Harry negotiated a successful home loan mortgage modification and, as a result, is completely current and up to date on his reduced monthly mortgage obligation. The arrears that he owed in 2012 were added to the mortgage principal, the bank brought him completely up to date and reduced his interest rate on a going forward basis. He feels that he can stay current, but it is getting a bit tougher these days, since he just recently lost a part-time weekend job, which he held in addition to his full-time job.

For the last 8 months, Harry has been driving a company vehicle, but he has just been informed by his boss that, as of the New Year, he will need to find his own wheels. He has located a good used car and has been offered a car loan at 18% annual interest rate (Harry's credit history has been less than stellar, and he is lucky he can get this loan).

Harry's personal property assets are pretty normal: normal and ordinary clothing, household goods, etc. The house has a current fair market value of approximately \$325,000 and the mortgage balance is currently \$300,000, but the payments are current. Harry owes a student loan totaling \$41,500, various credit cards totaling \$60,000, and the current balance on his 401K loan with his employer is \$10,500. He has a payroll deduction of \$210 every pay period (every two weeks) to pay down the 401K loan. He no longer makes new contributions to his 401K plan.

Harry's income, year to date, is \$58,000. While he is in your office, you have just checked to see what the current median income is for a household of one, and he is just over that level. However, is he really a household of one?

Discuss with Harry what options may be available to him and carefully explain to Harry how those options would work. What questions do you need to ask Harry – what additional information do you need from Harry? You want to be sure that Harry can make an intelligent decision about what to do to try to resolve his financial problems.

3. Dennis and Donna own a condominium in Boston. It is large and sumptuous, but well beyond what they need now that they are "empty nesters." Two years ago they hired Sammy, a bankruptcy lawyer, to help them cure the arrears on the mortgage because they thought at the time that they wanted to keep the condo. Donna also told Sammy that she owned an interest in another house with her 5 siblings, but the attorney failed to list anything in the schedules. The attorney missed deadlines for filing various papers and then filed motions to file documents late.

In each instance, the Court permitted the late filings and the motions, but Dennis and Donna are now convinced that their attorney does not have their best interests at heart.

Their Chapter 13 case is about to be dismissed because Sammy, yet again, did not comply with a Court Order to file some documents. Dennis and Donna call you to see if you can help. They got your card from another attorney who saw you in Court and was impressed with your efforts.

What would you discuss with your new clients? How would you try to resolve the matters at hand? What would you need to file? What information would you need? What questions would you ask Dennis and Donna? How would you deal with Sammy? Should they stay in the Chapter 13 case? What would their options be?

Massachusetts School of Law
December 2010

Bankruptcy
Final Examination

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1. Sam and his wife Mary own a single family home in Georgetown, MA. They live there with their 2 children, ages 22 and 14. The 22 year old son is going to school and working part-time; their 14 year old daughter is not working. The house has been recently valued at approximately \$300,000.00. The first mortgage to Chase calls for monthly payments of \$2795 and Sam and Mary are 4 months behind. The current balance on the mortgage is \$315,000.00. They have asked repeatedly for a loan modification and Chase has just approved a "trial modification" for 3 months to see if they can make the payments. There is a second mortgage in favor of Beneficial Finance and the balance due is just over \$74,000.00. Because the payments on the second mortgage are only \$247.00 per month (interest only), Sam has kept that mortgage current.

Sam and Mary owe about \$65,000 in credit card debt, about \$18,000 in past due tax liabilities to the IRS, \$10,000.00 for 2005 and \$8,000.00 for 2009 and some government guaranteed student loans for their son. Their son is on the 7 year degree program – he can't see the benefit of higher education because he is already making over \$50,000 per year playing in a rock band every other weekend as the "guest" drummer. Mary is furious, but thanks him for his regular help to the family finances.

Sam has been out of work for almost 9 months, having been laid off for the third time in the past 5 years. He is looking forward to getting another good paying job in his field (electromechanical biometrics and integrated physiognomy), but it's been tough. He is waiting for a company in Wisconsin to make him an offer. Mary wants to sell the house if Sam gets the job, move to Wisconsin and rent an apartment until they get themselves back on firm financial footing. She is currently working for a dentist and earns almost \$60,000.00 per year, having landed this job in the middle of the summer after being laid off herself for almost a

year. She loves the job, and feels that her skills are portable (usable and valuable in any similar office).

Sam wants to file a Chapter 7 bankruptcy case, start all over and hope for the best. Both Sam and Mary have read some articles about bankruptcy, but they are confused about the different chapters and want some guidance.

Sam and Mary are actually current with all but one of their credit card bills, though it is costing them almost \$900.00 per month in minimum payments. The interest rates are between 12% and 29%, depending on whether they defaulted at all during the past year. One creditor is threatening to sue Sam for a credit card balance of \$11,000.00, though Sam doesn't remember ever using that card. In reality, Sam's son took the card two years ago and charged the purchase of all of his drum equipment.

Mary owns a 2004 Toyota Matrix which has a current value of \$6,000.00. The balance on the car loan is \$12,000.00 because she rolled the old car loan into this car loan when she purchased this used car (and financed it) in mid 2007. Sam owns his Land Rover outright – free and clear. It's worth over \$20,000 and he cleans it every week, whether it needs it or not. It is meticulous and in really beautiful condition, but it only gets 14 miles per gallon and Mary wants Sam to trade it for a more efficient and "green" vehicle. Sam is ignoring Mary. When Sam and Mary were doing well, they purchased a small truck for their son, which he still uses. The truck has always been titled in Sam's name and Mary wants to know if it would be a good idea to transfer the truck to the son, since it's really "his" vehicle.

Sam has a 401K retirement account with his former employer and the value is \$129,525.00. He rolled over each 401K account from employer to employer as he moved from job to job and has never borrowed from the fund. He made regular contributions and most employers matched those contributions dollar for dollar. Mary has an IRA, but the value has dwindled to just under \$19,000.00 from a high of \$37,000.00 - the market has not been kind to Mary's choice of investments.

Mary last week visited Attorney Buzz Lightyear to discuss her work related injury. Last year she slipped on a tomato that had been left on the floor in the small kitchen where she worked. She lost 4 months of work (no pay), though the workers compensation insurance company paid all the medical bills. And while she was in the hospital, she alleges that she was sexually harassed by a male nurse, who wouldn't take no for an answer, until his floor supervisor walked into the room and firmly told that nurse to leave. The supervisor offered Mary \$1,000.00 to

“forget what just happened”, but Mary made no promises. She did not take the money, but said she would consider \$10,000.00. She never heard any further from the floor supervisor.

Finally (had enough yet?) Sam and Mary inform you that they just received a letter from a law firm informing them that the firm has been engaged to begin foreclosure proceedings because they are 7 months in arrears on the house mortgage. They don't know whether to fight (they are 4 months in arrears), argue, hope that the loan modification people finally talk to the foreclosure people, keep the house, sell the house, let it go to foreclosure, stay in Mass or move...file a bankruptcy now or later or what!!

Advise Sam and Mary about the issues, how you can help them and the details they need to consider so that they can make a reasonably informed decision.

2. John and Liz are married and live in Methuen, MA in a single family home, with their four children, ages 21, 19, 7 and 5. Both older children work full time but contribute nothing to the household income because they are each paying for their own cars and supporting their extensive social lives. Each dates regularly and often hits either John or Liz up for some additional cash when they have little beer money left. The five year old just landed a job as a model with an advertising agency because she “smiles upon request”, which is a fabulous attribute for the photographer. Little Betsy earns as much as \$500.00 on a Saturday morning.

John and Liz own their house as tenants by the entirety and the house currently has one mortgage with a principal balance of \$88,000.00 and they have resisted every temptation to refinance over the past ten years, since they bought the home. They are current with the mortgage and all of the expenses relating to their house, including the taxes and insurance. At your request, (you spoke with them on the phone before the meeting) they obtained a Broker's Price Opinion which indicated that their beautiful home, in an excellent section of Methuen, even in this miserable real estate climate, has a current value of \$400,000.00.

Though John considers himself to be financially responsible, he borrowed money from his mother over the past two years and chose not to tell Liz. This past September, he used all of his \$5000.00 bonus to repay his mother the entire balance of what he owed her. Part of the reason why he needed to borrow money from his mom was to pay his ex-girlfriend Danielle to help support his two

children (now ages 6 and 4) that he had with her. Liz knows nothing about Danielle or the two little kids. Danielle, unbeknownst to John, recently obtained a court order requiring John to pay \$500 per month support for each of the two little kids. He has not given her any money since July 2009.

At your meeting with John and Liz, Liz tearfully admits that she has suffered from a secret shopping addiction and her credit card balances are quickly approaching \$90,000.00. Her most recent purchase last week was from Saks Fifth Avenue where she bought 2 pairs of designer skinny jeans - cost: \$600.00. She has hidden these jeans from John. Two years ago, Discover Card sued her for \$24,000.00 alleging that to be the balance on her Discover Card. She allowed the case to go to default (no response filed), Discover recovered judgment and recorded the execution (via the deputy sheriff) at the local Registry of Deeds, effectively placing a valid judicial lien on the real estate she and John own. The attorney for Discover has scheduled a hearing in court (Supplementary proceedings) to determine Liz's ability to pay and has also threatened that he will instruct the sheriff to sell the house to collect on the judgment. Liz is now freaking out.

Finally, John is currently unemployed, having worked for Merrill Lynch as a financial advisor – that is where he met Danielle. He has been receiving \$2000.00 per month unemployment compensation since March 2010, but those checks will run out at the end of March 2011. His prospects for re-employment in his profession appear bleak for the moment, but he feels confident for the future. Liz is currently working as a retail sales person at a high end specialty store and has been told that she needs to be concerned about the prospects for bonuses or raises. Otherwise, her job is stable. She earns \$32,000.00 a year. She has trouble not spending some of her paycheck on the latest fashions at the store where she works.

Discuss the various issues arising during your meeting with John and Liz and advise them.

3. Steve owns a three family home in Lawrence, MA . The house has a current market value of \$125,000, but has 3 mortgages totaling \$257,000, \$70,000, and \$125,000 respectively. The third mortgage was granted by Steve as security for a commercial business loan that he personally guaranteed to ABC Bank and the Small Business Administration (SBA). Steve, in 2006, set up a corporation and opened a bar/restaurant in downtown Haverhill. Initially, the business was quite successful but as the economy faltered, so did the business revenues. In

December, 2009 a fight broke out at the restaurant, patrons lit the place on fire and the business and the building were destroyed. Steve's insurance policy had lapsed the week before and no coverage was available.

Steve is currently unemployed and would like to rebuild his business. He has no capital with which to do that and, as mentioned above, no insurance proceeds. He would also like desperately to keep his home but he is now 5 months behind on each of the three mortgages. Even his live-in girlfriend has offered to help, but she feels that she needs most of her \$100,000 income (she is a very successful prostitute) to support her three children, who live with her mother in California. She sends money to them regularly.

Steve is current with his child support obligations to his two children from his first marriage, who live with his ex-wife in Worcester. However, he just last week found out that he is also father to 7 year old twins. Their mother has scheduled a hearing in probate court and is seeking retroactive support.

Steve owns a 2005 Ford Focus, on which there is a car loan. His regular monthly payments have been \$258 but he has not made any payments since September. The current balance on the car loan is \$7,950, but the vehicle is in poor condition and has a current fair market value of approximately \$3,000. Last week, the bank repossessed the vehicle and told Steve that under Mass law, he has 20 days to "redeem the vehicle" or it will be sold thereafter, likely at the car auction.

Any advice for Steve? He is currently looking for job and has been promised a terrific position managing his friend's dry cleaning business (6 locations) in the greater Boston area.

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1. Randy is a single mother who purchased her three family house in Lawrence, MA in 2006, at the height of the real estate market. Since her purchase, she refinanced the house and currently has two mortgages; the first mortgage has a principal balance of \$289,000.00 and is currently four months in arrears at \$2,900.00 per month (principal, interest, taxes and insurance). The bank has sent her a notice of default and has threatened to begin foreclosure proceedings if she doesn't get the mortgage caught up.

Randy also has a second mortgage with a principal balance of approximately \$78,000.00, which is currently eight months in arrears, but the bank has not communicated with Randy in quite some time. Randy is unable to catch up on either or both of the mortgages because her income is limited.

Randy now works as an Administrative Assistant (just got the job two months ago) and earns approximately \$40,000.00 per year. Before that, she worked as a part time bartender in her local pub and earned \$15,000.00 per year, plus an additional \$15,000.00 in tips which she did not report. She has two children living at home with her, both of whom attend the Lawrence public schools. She receives occasional support money from the father of her two minor children, but those payments are irregular. The total amount of money that she has received in the past six months from support was \$2,400.00.

A broker just last week determined that the house is only worth \$145,000.00, since it is in fair to poor condition. However, Randy receives income from two tenants in the amounts of \$900.00 and \$850.00 respectively. These two tenants are stable and Randy feels that she can count on the rental income every month.

At your meeting with Randy she indicates that she has accumulated approximately \$40,000.00 of general unsecured credit cards, overdue medical bills and some personal family loans. She is constantly being harassed by debt collectors on behalf of the credit card holders and she has been using some of the rent money to make the minimum monthly payments to the credit cards. However, she has become extremely frustrated because the credit card balances are not going down since the annual interest rates on the cards have now each reached 29.99% (the applicable default rate, per the credit card agreements).

Randy wants to know what options bankruptcy may provide. She wants desperately to keep the house and feels that she can keep current if only she can reduce the amount on the mortgage.

2. John and Mary are married and live in Methuen, MA in a single family home, with their four children, ages 21, 19, 7 and 5. Both older children work full time but contribute nothing to the household income because they are each paying for their own cars and supporting their extensive social lives. Each dates regularly and often hits either John or Mary up for some additional cash when they have little beer money left. The five year old just landed a job as a model with an advertising agency because she "smiles upon request", which is a fabulous attribute for the photographer. Little Betsy earns as much as \$500.00 on a Saturday morning.

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Finally, John is currently unemployed, having worked for Merrill Lynch as a financial advisor – that is where he met Danielle. He has been receiving \$2000.00 per month unemployment compensation since August 2009, but those checks will run out at the end of March 2010. His prospects for re-employment in his profession appear bleak, for the moment, but he feels confident for the future. Mary is currently working as a retail sales person at a high end specialty store and has been told that she needs to be concerned about the prospects for bonuses or raises. Otherwise, her job is stable. She earns \$32,000.00 a year.

Discuss issues arising during your meeting with John and Mary and advise them.

Question 3

Roberto owns a single family home in Dorchester, MA . The house has a current market value of \$195,000, but has 3 mortgages totaling \$257,000, \$70,000, and \$125,000 respectively. The third mortgage was granted by Roberto as security for a commercial business loan that he personally guaranteed to ABC Bank and the Small Business Administration (SBA). Roberto, in 2004, set up a corporation and opened a bar/restaurant around the corner from his home. Initially, the business was quite successful but as the economy faltered, so did the business revenues. In December, 2008 a fight broke out at the restaurant, patrons lit the place on fire and the business and the building were destroyed. Roberto's insurance policy had lapsed the week before and no coverage is available.

Roberto is currently unemployed and would like to rebuild his business. He has no capital with which to do that and, as mentioned above, no insurance proceeds. He would also like desperately to keep his home but he is now 5 months behind on each of the three mortgages. Even his live in girlfriend has offered to help, but she feels that she needs most of her \$100,000 income (she is a very successful prostitute) to support her three children, who live with her mother in California. She sends money to them regularly.

Roberto is current with his child support obligations to his two children from his first marriage, who live with his ex-wife in Lawrence. However, he just last week found out that he is also father to 7 year old twins. Their mother has scheduled a hearing in probate court and is seeking retroactive support.

Roberto owns a 2004 Ford Taurus, on which there is a car loan. His regular monthly payments have been \$258 but he has not made any payments since September 2009. The current balance on the car loan is \$7,950, but the vehicle is in fair condition and has a current fair market value of approximately \$3,000. Last week, the bank repossessed the vehicle and told Roberto that under MA law, he has 20 days to "redeem the vehicle" or it will be sold thereafter, likely at the car auction.

Any advice for Roberto? He is currently looking for job and has been promised a terrific position managing his friend's dry cleaning business (6 locations) in the greater Boston area.

This final examination consists of three (3) essay questions, to be answered in the accompanying blue book(s). I suggest that you read each question carefully, circle or highlight each of the important issues that need to be discussed and discuss each issue as you progress through the fact pattern. Please do not repeat the facts unless you feel it is appropriate and necessary. Please write on only one side of each page in the blue book, in pen, as legibly as possible.

Question 1

Five years ago, Iddy (husband) operated a Boston taxicab. He owned a taxi medallion issued by the city of Lawrence and was making monthly payments of \$1000. The payments were made to a private lender with the understanding (as is typical in any bank transaction) that upon payment in full of the underlying loan, the collateral (the taxi medallion) will then be released from the lender's security interest and Iddy will own it free and clear. 5 years ago, he and his wife Marie decided to buy a house where they and their 4 children could live.

At that time, in 2005, the real estate market in the Boston suburbs was booming and Iddy and Marie worked with a mortgage broker to finance the purchase of their first home, in Melrose. They paid \$500,000 (a beautiful 2-family) and granted a first mortgage and a second mortgage to Wells Fargo Bank. They hired an attorney to assist them at the closing because they did not understand the procedure, this being their first real estate purchase.

At the closing, they signed a note for \$420,000, which was secured by a first mortgage on the premises; they also signed another note for \$100,000, which was secured by a second mortgage on the same house. Since then, they have been blessed with a tenant who pays regular rent for the sum of \$1,200 a month.

Unfortunately, after they purchased the home, they realized that homes need care and love – the house became somewhat of a money pit and by 2008, Iddy was unable to keep up with the obligations on his taxi medallion. The lender foreclosed but agreed that he would not look to Iddy for any deficiency.

While Iddy and Marie were doing quite well, before they purchased the home in 2005, they rented an apartment in Cambridge, where they raised their family. In fact, in 2002, they purchased a buildable lot in a small town in Florida where the weather more closely resembled their Caribbean hometown. Their intention was to eventually build a retirement house. They were also, around that time, able to visit their families (on a beautiful Caribbean island) on a regular basis, but that has not occurred for at least a few years. However, Iddy recently learned that his father deeded the family farm to Iddy and his 12 siblings. Iddy discloses all this information to you at your initial meeting.

Both Iddy and Marie are despondent because they just received a notice from the holder of the first mortgage (Wells Fargo) that the bank intends to accelerate the note (current balance approximately \$450,000) because they have not made payments since October 2008. Iddy has heard that he can request a mortgage modification. Marie has heard (from her hair dresser) that a Chapter 13 bankruptcy may well be able to assist her and Iddy with the house situation. Marie is currently working as a nurse's aid and earns \$32,000 gross per year. Iddy just set up a limo business, purchased a 2005 Lincoln Continental, but is really making no take-home money yet, after the expenses of operating the limo service. By the way, none of the kids is working, but everyone is in good health.

After you analyze Iddy and Marie's situation, tell them what they need to know.

3. Lisa is now divorced almost 3 years. She has an 8 year old little girl, whose father, Ben, is her ex-husband. Ben has been very well employed for some years now and until March 2010, was earning over \$200,000 per year. He has taken a leave of absence from work to deal with some medical issues, but he is ready to return to work in June. When Lisa got divorced, she and Ben signed an agreement whereby he would pay her \$2,000 per month support and she waived any claim for alimony. At the time, she was earning \$55,000 as a service writer for a Mercedes-Benz dealer, and her income has been steady ever since.

Three months ago, Ben informed Lisa that he had been served with papers from the Probate Court and his first ex-wife was asking that her support order be increased substantially, to the same level as what Lisa is receiving, for EACH of her two children she had with Ben. Lisa is fearful that if a Probate Judge increases the first wife's support, Ben will not be able to continue to pay her (Lisa) the same amount as she is used to getting.

When Lisa and Ben were married, they had purchased a single family home in No. Andover, MA. After the divorce, Ben did not keep up the mortgage payments, primarily because his new girlfriend preferred not to live in that house. They moved into an apartment in Wilmington. Lisa and her daughter had moved out some time before the divorce and are presently living in an apartment in Methuen. Ben and Lisa had granted two mortgages on the house and the first mortgagee foreclosed in May 2008 after payment demands were ignored. Both Lisa and Ben were just served with a suit filed by Bank of America seeking \$80,000, but Lisa does not know if this represents the deficiency due to the first mortgagee after the foreclosure, or the amount due the second mortgagee.

Lisa has a 2001 Mercedes E class, which she purchased from the dealership. She is current on her car loan (\$570.00 per month) and the balance due on the loan is about \$18,000. The car is worth considerably less. She uses the car regularly in her business and has been helpful to the dealership in closing sales, because of her personality and her perfectly maintained vehicle – she often picks up customers at their places of business or homes, as part of her “customer service program”.

Lisa owes approximately \$15,000 to credit cards, plus about \$25,000 balance on a series of student loans, which she incurred when she was going to school for a nursing degree. She changed her mind about her career choice.

Lisa is very upset about her current situation and seeks your advice. Ask her the appropriate questions, discuss the issues with her and advise her regarding her choices.

BANKRUPTCY

Spring, 2001

Jeff Kitaeff

5 Chapters in Bankruptcy Code: 7, 9, 11, 12, 13

- Chapt. 7: Liquidation chapter → NO ASSET Bankruptcy usually
 - . a **"straight bankruptcy"**
 - . a **Trustee** will be appointed
 - . everything not exempt in the estate is liquidated & distributed to creditors
 - . You discharge and go on
 - . Trustee doesn't touch **"exemptions."**
 - A. Look at Fed exemptions under 522, → No Homestead
 - B. Look at state exemptions, → Homestead
 - C. Then decide which you will use to maximize the exemptions
 - . **Only individuals** can claim exemptions, not corporations
 - . **Not all debt is dischargeable** (not alimony, debts incurred by fraud, taxes within last 3 yrs., student loans)
 - . **Goals:**
 - 1. Maximize exemptions
 - 2. Discharge as much debt as possible
 - . can be filed every **6 years**
 - . no required minimum amount of debt or maximum earnings
 - . Debtor in a Ch. 7 can:
 - **reaffirm** the debt, w/creditor approval, or
 - **redeem** the property (pay some value in lump sum), or
 - **surrender** the property & owe nothing

Ch. 13
Property of estate is extended
by Rule 541 + 1306

17425

- Chapt. 13: Like a personal reorganization

- . Available to any individual who has a **regular source of income** ; *stockbroker or a commodity broker may not fi*
- . **Voluntary only**

- . Available to **individuals only**

Advantages:

- . You make plan to **extend the time for paying** your debts, usually to 3-5 years
- . Amount in mortgage arrears c/b spread out over 12 mo. or more
- . debtor can **keep home, car & other possessions**
- . debtor gets **broader discharge**
- . You make periodic **payments to Trustee** who distributes to creditors (deducted from your pay if you are employed).
- . **Creditors lose less**
- . less complex & less time consuming than Chapt. 11
- . You can seek court's approval to incur new debt if reasonable.
- . Plan can provide for any provision not prohibited by the Code (c/b creative.
Ex.: Plan can provide that debtor will refinance property in last 6 months of plan to pay off debt within the plan period.)

Disadvantages:

- earnings must go into plan for 3-5 yrs.
- debtor must remain committed
- property doesn't revert back to debtor till plan is done.
- to sell exempt property while in a Ch. 13, you have to file a motion to engage a professional (broker), then file motion of intent to sell & notice of intended sale.
- Must get court permission for any transaction outside the normal course.

Two tests of Ch 13 Plan:

1. **Best efforts of client** (How much can he afford monthly?)
2. **Best interests of creditors** (The must get no less than if it were a Ch 7)

- . You can modify the plan prior to confirmation by the court, as long as no objection.
- . No confirmation hearings in MA in a Ch. 13, but its optional.
- . You file your plan with all creditors and w/court (+ certificate of service). Court sends back a proposed order of confirmation. If a creditor files an objection, hearing w/b scheduled.)
- . Nothing is distributed by trustee until confirmation is received.
- . fed tax lien: you can't avoid. Back 9 yrs.
- . judicial lien: you can get rid of it if it impairs your exemption. (sec. 522(f) - file a motion.)

Chapt 13 Liquidation Tests

In your plan, state what Creditors will get.

Must meet 2 tests:

A. **Best Interests of Creditors Test** → 1325 (A)(4)

- It must be no less than under Chapt. 7.

B. **Best Efforts Test** 1325 (b)(1B)

- Debtor must pay as much as he can reasonably afford to.

- Both Chapt 7 & 13:

. **automatic stay order** issues immediately & stops foreclosures, lawsuits, garnishments, repossessions & phone calls.

- Chapt. 11

. Creditors vote on your plan, unlike a Chapt. 13

. **Secured debt** = one you owe w/collateral involved. **Unsecured** = all others.

. A secured creditor is only secure to the extent of the value of the collateral. Any overflow is unsecured.

Parties in a Bankruptcy

- **Debtor** Formerly, "the bankrupt." One who owes. Proponent of plan.
- **Creditor** People who are owed by the debtor.
- **Trustee** Fiduciary appointed by Office of Bankruptcy Trustee. Interim Trustee becomes the Trustee unless Creditors object & vote out.
- **Court** Implements the Chapt. 13. Makes all judicial determinations.

. Fed Bankruptcy Court is an arm of the **US District Ct.**

. You can't split fees in a bankruptcy case. No referral fees.

. Trial only if a creditor objects and files complaint to revoke discharge.

. 235 MGL sec. 34: Mass list of exempt property

. 32 MGL sec. 19: Retirement accounts for municipal employees are exempt.

. 175 MGL sec. 119: Some insurance policies are exempt (group annuities).

Advantages of Chapt. 13 Over Chapt. 7:

Chapt 13

- . Debtor can keep home, possessions
Contemplates continued use & deferred redemption of exempt & non-exempt property
- . Creditors get more
- . No creditors committee
- . No vote taken on debtor's plan
- . No mandatory disclosure statement
- . Co-debtor stay (protected during course of your plan only)
- . Voluntary only
- . Absolute right to dismissal by debtor
- . Discharge is much broader (except child support, alimony, taxes)
- . No prohibition against multiple filings of Chapt. 13
- . Home mortgage defaults may be cured
- . Helps avoid stigma of bankruptcy
- . Helps debtor's credit rating
- . As soon as you file, the interest stops on unsecured claims & taxes
- . You may be able to get rid of taxes over 3 yrs. old
- . Moral imperative: You don't screw your creditors.
- . Less complex, less costly than 7
- . Plan c/b modified prior to confirmation
(Valuation of collateral, interest rate factors)

Chapt. 7

- . Debtor can only keep "exempt" possessions. All else is liquidated by Trustee
- . Creditors get less
- . A creditors committee w/fees
- . Creditors vote on debtor's plan
- . A mandatory disclosure statement
- . No co-debtor stay
- . Voluntary or involuntary
- . Debtor must file notice to obtain dismissal
- . Can only file once
- . Debtor's credit rating ruined → *UNTIL 6 YEARS PAST*
- . You can't get rid of taxes at all
- . Your creditors are screwed

Advantages of Chapt. 7 Over Chapt. 13

Chapter 13

- . Debtor must file plan w/in 15 days of filing
- . You remain in payment plan 3-5 yrs.
- . Debtor must submit post-petition earnings

Chapt. 7

- . You are discharged quickly (4-5 months)
- . Debtor keeps post-discharge earnings

Upon Filing:

1. **Automatic stay** goes into effect immediately on filing.
May be annulled for cause.
2. **Co-debtor stay** goes into effect on filing to prevent co-debtors from being pressured into paying.
3. **"Estate"** is created.
4. **Trustee is appointed**, who
 - is disbursing agent
 - appears at hearings
 - role in meeting of creditors
5. **Repayment plan** must be filed within 15 days.
6. **Creditors meeting** called.
7. **Plan is confirmed**.
8. **Debtor is discharged** after plan is successfully completed.

Diff Between Schedule I and Schedule J will determine whether debtor can file a Ch. 13:

- If income is greater than expenses so client can make payments then Ch 13.
- If income is less than expenses, client needs to realign budget to live within means!

Chapt. 13 Plan

Requirements

1. Must **contribute future earnings and assets**
2. Must **pay in full the priority claims** (no interest)
3. **No unfair discrimination** between creditors of a similar class

Optional

1. **Classification of unsecured claims** (non-dischargeability alone is not enough to distinguish). For ex., where there's a co-debtor you can have those unsecured creditors receive 100 cents on dollar.
2. Can modify (pay less) to most creditors, but not priority or tax creditors. Cannot modify home mortgage debt on single family home unless bank has some other collateral in addition. Sec. 1322(b)(2) - no cram downs.
3. Can provide that payment of arrearages will cure and/or waive default.
4. Concurrent payment to secured & unsecured creditors
5. Payment of allowed claims that arise after case is filed (e.g, for illness)
6. Assumption or rejection of executory K's
7. Option of selling exempt property to pay debt
8. Any provision not included in Code (allows for creativity)

Non-dischargeability

Sec. 727: debts of client not dischargeable because client's bankruptcy claim is fraudulent.

Sec. 523: particular debts that aren't dischargeable (alimony, student loans unless extreme hardship)

You still owe after plan ends if not paid in full.

Tax liabilities - you must pay 100% but interest stops running.

ch. 7
ch. 13
1328 disc 1

Cram Down

= In chapt. 13, where value of collateral drops below debt, you may be able to bifurcate a secured debt into a secured portion and an unsecured portion.

the portion over the current value is the now unsecured portion; goes into kitty w/other unsecured debts & you pay a percentage.

You must pay the secured portion in full w/interest during plan.

You must file a motion

Only available if it's a multi-family or commercial property or car, not debtor's primary residence.

Exemptions

You can take either Code or Non-code (state and other fed law, which you can mix); but you can't mix Code and Non-Code.

ex: retirement plan c/b exempt to the extent reasonably necessary under Code sec.

522(d)(10). If you are younger, better to choose MA exemption sec. 235-34(a) - 7% of gross income for past 5 yrs.

Valuations

Cars

Have appraised or use Kelly's Bluebook.

Household goods

What someone would expect to pay for used good + what client would expect to sell it for.

Clothing

A general gross value; what trustee would get if liquidating.

Have client assess. Expensive suits? Or mostly jeans?

Automatic perfection on consumer goods when you charged them.

When you have a consumer debt you can:

1. **Redeem** the collateral

(Pay off present value or balance due, whichever is less), or

2. **Reaffirm** the debt

(Agreement by client to be legally obligated to pay despite bankruptcy), or

3. **Surrender** the collateral, or

4. Retain the collateral and continue to pay → ?

Fair Market Value
what a reasonable buyer would pay for
what a reasonable seller would sell for

ch. 7
① Reaffirm
② Redeem
③ Surrender

State EXEMPTION
 Fed exemption only
 \$11,945 → per person

Homestead Act - allows you to protect your primary residence, going forward, up to \$300,000 equity.

- . If you put a Homestead on, then file bankruptcy, Code says you can go backward and protect pre-existing debt as well because fed law pre-empts state law.
- . Only one spouse can take a Homestead

Chap. 11

- includes a **plan** (like 13), plus
- a detailed **disclosure statement** (5-50 pgs) that gives creditors info on why they should approve, plus
- a detailed **liquidation analysis** (more detailed than in 13).
- when plan is confirmed, debtor has **K w/creditors** and is **discharged** (unlike a 13 where you must complete the plan first)

Chapt. 13 Timing:

1. do analysis
2. draw up plan
3. file petition
4. you can file an emergency skeleton petition, if nec., then have 3 days to file matrix and 12 more days to file remaining schedules, statements, plan.
5. you get immediate stay
6. creditors meeting
7. if no objections, plan is approved
8. order of confirmation is issued

After Filing Chapt. 13

- If case is met w/objection, full case must be heard. Rules of evidence apply.
- If no objection + trustee's recommendation + appropriate records delivered, then confirmation hearing held & plan is **confirmed**.
- Order of confirmation is issued.

Effect of order = **debtor & creditors are bound to the plan; trustee has duty to collect, distribute & monitor.**

Universal in Bankruptcy proceedings.

What Debts are **Not Dischargeable** (sec. 523 & 1328)

1328

- 13
- alimony, child supp.
- student loans
- judgment/claim based on use of alcohol in m.v. accident
- mortgage on home
- fraud, embezzlement etc.

- 7
- alimony, child supp.
- student loans
- judgment/claim based on use of alcohol in m.v. accident
- mortgage on home
- Not in 7

Confirmation Hearing:

- this is when judge first sees the plan
- 6 requirements of Sec. 1325 apply:

1. Plan **must comply w/all Ch 13 provisions**, including
Sec. 109(e) - maximum debt limits for a ch 13 debtor
(Has regular income + liquidated noncontingent unsecured debts of no
290,525 more than \$269,250 and secured of under \$807,750)
Liquidated = a sum certain 871,550
Noncontingent = you're not just a guarantor
2. Fees have been paid
3. Plan is in **good faith** (generally, 10% is min.) & not forbidden by law.
(If a creditor objects, court will ensure debtor is supplying all disposable
income reasonable to meet obligations. Income of non-debtor spouse must
be included in determining what's reasonable.)
4. Plan is in **best interests of creditors**
(They receive no less than if under ch 7)
5. Holder of **secured claims has accepted the plan or is paid value in full**
satisfaction.
6. Plan must be **feasible**.

Conversion

- debtor has absolute right to convert from 13 to 7. Court order not required.
- it's then as if you had filed a 7 in the first place.
- undisbursed funds still held by trustee are returned to debtor in MA.
- new debt created during the 13 is then rolled into the 7 debt, t/b discharged.

Motion to Dismiss

- Will be filed by trustee under 2 circumstances:
 1. Debtor **not keeping up w/payments**, or
 2. **Unfeasibility**
(Creditor claims can't be pd based on claims filed - debtor's atty failed to tally claims correctly after the 90 day period for creditors to file claims (180 days for govt).)
- If you fail to comply w/plan, you w/b dismissed *with prejudice* by court & can't file again for 6 months. All prior creditor rights re-established.
- **debtor in 13 has absolute right to dismiss**. But automatic stay w/b lifted.
- if debtor dies, becomes insane, may be dismissed or further administration as tho death hadn't occurred if in best interest of parties. Rule 1016.

Discharge

- can seek a hardship discharge in some circumstances (illness)
Creditors can file complaint for nondischargeability.
- Some debts still can't be discharged (sec. 523)

If discharged in 13, debts for fraud, etc. are open again. → dischargeability of debts (1328)

- court can revoke discharge within 1 year, if obtained thru fraud. Sec. 1328(e).
- debts for luxury items incurred within 60 days exceeding \$1,150 can't be discharged.

1,150

Post-confirmation Modification

— usually for illness, layoff

What is the "Estate" for Bankruptcy Purposes? (threshold question)

= everything the debtor owns, has an interest in or is entitled to as of the date of commencement of the case,

You must be entitled to the assets to the assets pre-petition

+ assets that may be recovered and property he's entitled to within 180 days as a result of inheritance (date of death rules) or property settlement w/spouse. (In a ch 13, it's any entitled to during time of plan.)

Within 180 days or 6 months, property of estate

if you are receiving assets, you need to file

ASSETS YOU NEED TO FILE RECOVERABLE TO FILE

and are asset of the estate

- 401K not part of estate while debtor is working because it's ERISA qualified so not accessible.

IF you can not get at your retirement plan Neither can the trustee.

Consumer Bankruptcy

In re Palmer p. 221

I: Whether a post petition year end bonus paid by debtor's employer is property of estate or belongs to the debtor.

H: Not part of estate because debtor wasn't entitled to it until after the filing + it was discretionary in the co. depending on post petition events. The \$ hadn't been earned prior to date of bankruptcy, he couldn't have sued for it. But if you have done work and are entitled to be paid for it & then you file, it's an account receivable & an asset of the estate.

In re Orkin p. 227

F: Debtor was sole proprietor w/own retirement plan; claimed it was not part of the estate.

I: Was it ERISA qualified & therefore not part of the estate?

H: Because he was the employer and sole participant both, it wasn't ERISA qualified so part of estate. Purpose of ERISA is to protect the retirement funds from unscrupulous employers. Here he could terminate any time so he had control. To be ERISA qualified, participant must have no right to withdraw, such as a 401K (not IRA or Keogh).

↓
Can not control Plans

Threshold Questions:

1. Is it property of the estate?
2. If so, can it be exempted?
3. If not, disclose it but you don't have to worry about losing it.

Automatic Stay

Andrews Univ. v. Merchant p. 236

F: Student had loan from University & defaulted. She filed ch.7, then asked school for copy of her transcript.

I: Whether school's refusal to provide transcript for her failure to pay violates the automatic stay provision. Sec. 523(a)(8).

H: Refusal to provide the transcript is an act to collect a debt - a viol of the auto stay.

Sec. 362. The **Automatic Stay** exceptions. Everything stops once you file *except*: criminal actions, paternity actions, alimony proceedings, etc.

Rule: You can no longer get rid of student loans in bankruptcy just because 7 yrs old. Must show **undue hardship**.

Knaus v. Concordia Lumber p. 238

F: Merchant bought lumber on credit, then couldn't pay. Creditor obtained judgment, attached his equipment. Before sheriff's sale, merchant filed ch. 11 & merchant's atty demanded return of the equipment. Merchant refused.

I: Whether the refusal was a willful violation of the autom. stay.

H: Creditor's refusal to return the property of the "estate" was a violation of the auto stay.

Secure transaction = a transaction where some collateral secures the repayment.

Rule: A secured party is only secure to the value of the collateral.

Preference = a payment or transfer on account of an antecedent (old & cold) debt, made within 90 days of the bankruptcy, whereby a creditor gets a leg up over the other unsecured creditors. (To be fair, any payment s/b pro-rata.)

If the recipient is an "insider" then trustee looks back one year.

Trustee will demand return of any preferential payment. Sec. 546.

This creates a relatively level playing field for creditors.

The time for calculation starts when the check is paid, not when it's written.

Lots of exceptions to the Preference Rule.

- If a payment was made on account of a new debt (new value give), then its not a Preference.

CHAPT. 7: Liquidation

Exemptions

Taylor v. Freeland p. 247

F: Davis listed in her bkrcy petition, then exempted, monies anticipated from a pending discrimination lawsuit. The trustee failed to object within 30 days.

H: The settlement was deemed exempt property because trustee failed to timely object. Rule 522.
- exemptions & limits:

In re Walsh p. 251

F: A dispute re: valuation of property the debtor claimed as exempt. Trustee seeks fair market value, not liquidation value.

I: Whether the property s/b valued at fair market or liquidation value.

H: **Value for exemption purpose = fair market value as of the date of filing bankruptcy.**
Definition of FMV varies w/the circumstances. Here, court said FMV *same* as liquidation value.

Fair Market Value = the price at which a willing seller and willing buyer will trade in an open market for a reasonable period of time.

In re Rubeck (MA) "Rubeck Decision"

H: A bank that liquidates its collateral (here, a house) has obligation to sell at max price to minimize debtor's loss. Bank must get fair price or it's not fair to the other creditors. Approx. 70% of appraised value is reasonable. Result of this case was greater effort in foreclosure auctions.

Rubeck Rule has changed: Now a creditor only has to do what the state requires:

- just a tombstone ad in paper (**reasonable effort**)

- **sale in a commercially reasonable manner.** (not held in a snowstorm)

Any deficiency is the bank's unsecured claim in a bankruptcy.

Bank will take out a larger ad to improve bids and ensure "commercially reasonable."

Value is defined for different purposes in different ways.

Value is not necessarily the liquidation value, not necessarily the FMV - probably in between.

- Household goods: what you would reasonably expect to get if you exposed it to the market in a reasonable manner with reasonable effort.

- Car: Mid value in Kelly blue book (for ex., the trade in value)

In re Mitchell

F: Dispute over valuation of debtors' ring. Debtor claimed \$7800, the alleged liquidation value; creditor claimed \$36,000, the FMV.

H: Appropriate **valuation standard is FMV**, exposure of the item to the appropriate market for a reasonable period of time.

Disputed Claims

In re Lanza p. 264

F: When a couple filed bankruptcy, a dispute arose over the amount and security of 3 loans in their names. H died and W had no financial records and no knowledge of the transactions. But the bank also had poor records.

H: Court held **burden of proof is on the objecting party** - here the debtor - to dispute the claim, for which there is a presumption of validity. Bank got lesser amount it could prove.

Sec. 507: Priorities

- Most bankruptcies are "no asset" cases - no assets for distribution to creditors because of secured or exempt property. But if there *are* assets, Sec. 507 sets priorities for distribution.

1. Administrative Expenses

- trustees, appraisers, attorneys, brokers, etc.

- every professional must have their **application to be engaged** approved before they do the work.

A. debtor's application to engage accountant

B. **Certificate of disinterestedness**

C. **Fee sharing affidavit** (no splitting allowed)

2. Claims in involuntary cases that are created between date the case is filed & date he is declared a debtor.

- in these cases, an individual is served w/a summons & complaint

3. Parties w/wage claims against the debtor

- debtor usually a corp.

- claims by former employees

- up to limit of \$4,300

- must have been earned w/in 90 days of filing (unsecured as to the rest)

4. Contributions to employee benefit plans w/in 180 days before filing (up to limit)

5. Consumer security deposits

- up to \$1,950 - the rest is unsecured

- rent deposits, layaways, etc.

6. Alimony, child support w/o limit

7. Taxes

Unsecured creditors

Shareholders

Discharge

In re Harron p. 274

F: A discharge case. Debtor was sole stockholder in 3 service corps. His creditors objected to his discharge in bankruptcy because he c-mingled business and personal funds, listed corp. debt as his personally and suspicious undocumented loans to or from family members and poor recordkeeping.

H: Discharge was *disallowed*. Rule 727.

NEED to keep but
and adequate
records

Proof of Claim Form:

- must be filed by a creditor in timely fashion to get paid a dividend, whether secured, unsecured or general creditor
- in chapt. 7, 11 or 13
- when you mail in a proof of claim, send dup copy for time stamping & SASE
- if a creditor doesn't file, his portion inures to the other creditors
- date for filing **objections to exceptions** = 30 days from 341 meeting. Rule 4003.
- **Bar date:** date by which you must file it or be barred from claiming.

A. Chapt. 7: 60 days from the 341 meeting

Most ch 7's are no asset cases so notice goes out that no assets and no need to file proof of claim until you receive notice. So no bar date set in that case.

B. Chap. 13: 90 days from 341 meeting

Except **govt claims - 180 days from filing of case**

Notice goes to creditors

- Case # is assigned.
 - 0-1 YY-1xxxx Eastern div. (Boston)
 - 0-4 YY-4xxxx Western div.
 - Adversary proceedings get 2nd case #

In re Dorsey p. 278

F: **Creditor objection to discharge of debt.** An unemployed woman w/2 children on S.S. received 7 credit cards and charged \$100,000 on luxury items. AMEX objected to her ch 7 discharged.

H: **Creditor's objection to discharge under sec. 523 allowed. Burden of proof is on the objecting creditor.** Here proved debtor knew when she ran up cards that she couldn't pay.

Sec. 523 = objection to the particular debt

Sec. 727 = objection to the entire case. Hard to burden to meet.

> ch. 7

In re Reed p. 283

F: Sole prop got loan, guaranteed by the SBA. When business went sour he began converting nonexempt business property to exempt. So less available for trustee.

H: **Discharge denied for fraud.**

Q: Is it fraud or just use of allowed protections of assets?

Discharge Under Ch 7:

- unless there's an objection by a creditor, its automatic
- Rule 4004: A creditor wishing to object must do so no later than 60 days after the 1st day set for the meeting of creditors.
- 60-90 days after 341 meeting, discharge will come

Objection to Discharge under sec. 727:

- sec. 727 is objection to discharge altogether
- anyone has standing to object - trustee or a creditor
- grounds include: fraud, concealment of financial records
- also see sec. 523: objection to discharge of a *particular* debt

Appeals Process

- Bankruptcy court is an Article I court - can't issue final orders, decisions are subject to review by an Art. III court.
- always a right of appeal to Bankruptcy Appellate Panel or to US Dist. Ct.

To Object to a Discharge:

- Rule 7001: adversary proceedings
- Rule 9014: contested matters
- Contested matters (e.g., relief from autom. stay) - by motion practice
- Adversarial matters (e.g., objection to discharge) - by complaint. Summary judgment, discovery, etc. apply.

In re D'Ettore p. 294 (an adversary proceeding)

F: Debtor plaintiff asking whether a particular debt w/b discharged.

Debtor w/student loans couldn't find employment in her field, sought discharge of her student loan debt under Ch 7.

H: Not discharged. **Some debts are per se nondischargeable, including student loans.** Can only be discharged by showing of extreme hardship & court said this was garden variety.

In re Hill p. 297

F: Debtor husband had some debts under a divorce settlement agreement, sought to have them discharged. Plaintiff ex-wife challenged the dischargeability because his indemnification of her for this debt in the agreement was in exchange for a reduction in alimony.

H: Discharge allowed. This was a property settlement, not alimony & support (which are nondischargeable). **Prop. settlement can be discharged if inability to pay.** Wife's remedy is to file bankruptcy herself.

In re Millbank

H: Bankruptcy debts of ex-husband held **not dischargeable** where the **loans from his ex-wife and ex-father in law were obtained under false pretenses**. (He was having an affair at the time.)

Taxes:

- are given priority
- some are dischargeable under Ch 7, some not
- If the tax is dischargeable, so are the interest & penalties, & vice versa.
- Auto stay prevents IRS collection activity but post petition interest continues to accrue.

Effect of Discharge on an Old Secured Debt:

Krikava p.308

F: Farmer w/bank loan secured by his farm & hogs got behind in payments & sold some hogs under another family member's name in violation of security agreement. In bankruptcy proceedings he lied, was sentenced for perjury.

H: Because of the **perjury, loan held not dischargeable**.

Rule: Only the debt is discharged in bankruptcy, not the lien. (If farmer above had sold the pigs, bank would still be secure in the amount of the proceeds.)

In re Robinson p. 314

F: Tenant in public housing paying \$22/mo. got behind in rent. Housing Authority got judgment on same day she filed bankruptcy. Tenant claims their refusal to renew her lease is a discrimination for reason of bankruptcy.

H: Housing authority didn't violate the Code because they commenced the action before she filed her petition. (A private person is not subject to this Code bar against discrimination, only a govt authority.)

4 Options for Ch 7 Debts After Discharge

1. **Reaffirm** the debt & again become bound, notwithstanding the discharge.
2. **Redeem** the collateral - pay for it's 506 value. 506 → Secured to the amount of the collateral
3. **Surrender** the collateral
4. **Keep** the collateral w/o a reaffirmation, pay in installments (not allowed in MA)

In re Pendlebury p. 324

F: To avoid surrendering their mobile home to creditor bank, debtor filed motion for court to strike a provision in their reaffirmation agreement, which they'd signed voluntarily.

H: Bank allowed to foreclose. **Court won't intercede in a reaffirmation agreement.** Parties have right to bargain & K.

Ch 7/Ch 13: 2 main differences:

1. Ch 13: repayment plan and discharged after 3-5 yrs.
Ch 7: liquidation & immediate discharge
2. Ch 13: debtor keeps property
Ch 7: debtor gives all nonexempt property to trustee for liquidation

CHAPT 13: Reorganization

Payments to Unsecured Creditors

In re Radden p. 340

F: Debtor bought car on installment K, failed to pay, bank lawfully repossessed. Then debtor filed ch 13 & sought return of car, saying he needed it for effective reorganization. His ch 13 plan called for bifurcation of the debt - payment in full on the secured amt, 70 cents on dollar on unsecured.

H: Turnover of car to debtor ordered.

Code: Ch 13 plan *must* provide for full payment of priority claims; *may* provide for modification of other claims (unsecured). See sec. 1322.

Preference = \$ paid by the debtor to a creditor within 90 days of filing bankruptcy (1 yr. for "insiders") on account of an antecedent debt.

Exceptions to the 90 day Preference Rules:

- If new value was given
 - Shipping new product and not getting paid
- Ordinary course of dealing between the parties
 - Where normal payment terms between these parties is payment delayed by more than 90 days.

Sec. 326:

- trustee gets paid a percentage
- trustee gets paid for administrative work
- if legal work is needed, trustee can either hire an atty or do it himself, but 1st must file an application to engage counsel.

TRUSTEES

Chapt. 7:

Trustee is automatically appointed by clerk at time of filing, on rotational basis. Person filing isn't told who is trustee, to prevent "trustee shopping". Gets notice of creditors meeting w/name of trustee.

Chapt. 11:

No trustee.

Every debtor is automatically a debtor-in-possession.

If you see a trustee appointed, it indicates a management problem.

Chapt. 13:

Standing trustees in every jurisdiction:

Boston: Doreen Sullivan

West: Denise Papallardo

MLBR = MA Local Bankruptcy Rules

- every jurisdiction has its own local rules

- ex: In MA, bankrupt can avoid 1) a judicial lien other than a 1st mortgage, to the extent it impairs his equity or 2) a security interest, if the security interest is a non-purchase \$ or non-possessory interest that impairs an exemption. But bankrupt must file a very specifically drafted motion to avoid under MLBR 4003-1.

Rule 522(b): You get either Code or nonCode exemptions.

← NonCode includes: Homestead.

Fed case law (non-Code) says Homestead protection is both prospective and retroactive if you put it on before filing.

State case law (non-Code) says Homestead is only prospective. Fed trumps.

Elements of an Acceptable Ch 13 Plan

In re Smith p. 344 (1984)

F: Debtor bought car, financed by Hub Motor & secured. Debtor filed bankruptcy. Debtor disputed 1) valuation of car by trustee @ bluebook price since he'd received 2 offers @ lesser amount, and 2) 22% interest rate set for the monthly payments under the plan. Court's expert appraiser said value is even more than bluebook.

I: What rate of interest can a Ch 13 debtor be required to pay on a purchase \$ car loan?

H: Rule: Debtor has power to modify the terms of a secured debt in a Ch 13, but Code restricts that power by setting minimum terms to which the secured creditor is entitled.

Trustee establishes the valuation and interest rate, but debtor can file an objection. Interest rate held reasonable here in light of the extension of time debtor given for payment and the risks

involved for the creditor. Rule: The amount allowed on a Ch 13 secured claim is limited to the value of the collateral.

Very important

Rule: Code exempts home mortgages from the power of a Ch 13 debtor to modify. The only relief in Ch 13 for a home mortgage is "cure and maintain."

Payments to Home Mortgagee

In re Taddeo p. 352

F: Debtor bought home from creditor who took a 2nd mortgage. Debtor found defects in home & told creditor they'd only deposit monthly payments w/their atty until resolved. Creditor refused to negotiate & accelerated the loan for default. Debtor filed ch 13, got automatic stay. Plan called for cure of arrearages over 3 yrs + reinstatement of original pmt schedule going forward. Creditor filed for relief from stay to foreclose.

H: Favor of debtors. ~~Even tho Code exempts home mortgage debt from debtor's right to restructure, Code allows for "cure and maintain."~~

Chapt. 13 Plan Example

<u>Debt</u>	<u>Monthly Payment</u>
A. Arrears due mortgagee \$60,000	60 mo. = \$100/mo.
B. Priority (no interest or penalties going forward) IRS \$1,000 DOR \$ 500 Total \$1,500	60 mo. = \$ 25/mo.
C. Unsecured debt \$60,000	x 10% = \$6,000 60 mo. = \$100/mo. (10% unwritten min. in MA)
Total	\$225/mo. divided by 90% for trustee fee = \$250/mo. + current mortgage payments

*5yr plan
Normal is three yrs
36 months*

~~If some unsecured creditors don't file claims then the unsecured payments will be distributed among those that do.~~

Burden is on debtor's counsel to provide accurate addresses for creditors. Debtor's atty's return address goes on the creditors notices, not the bankrcy's clerk's.

In Ch. 11, only the top 20 creditors are notified initially (creditor's committee). But all creditors' names and addresses go on matrix.

Client has continuing obligation to commit all surplus income during the term. (But MA has no followup, in fact.) If your client later can pay more than the amount set in the plan, 3 choices:

1. Amend the plan to increase the % to creditors, or
2. Shorten the term of the plan down to 3 yrs. minimum, or
3. A combination of the 2

Code only requires Ch 13 debtor to pay no less than the creditors would get under a 7. It doesn't require debtor to pay over a longer period just so that the creditors get a little more.

If income exceeds expenses, client should consider Ch. 13.

If expenses exceed income, client should be in a Ch. 7.

Reaffirmation

- . A secured creditor has 2 remedies: in personam + in rem. After bankruptcy is filed, only the in rem survives.
- . If client reaffirms a debt, he has an obligation as if he didn't file bankruptcy. Client now c/b used for deficiency.
- . If client doesn't reaffirm, redeem or surrender the property, the bankruptcy is a default and secured creditor may exercise their in rem remedies.
- . There's no reason client should reaffirm an unsecured debt.
- . You have to file a motion to reaffirm within 45 days of 341 meeting if you choose to reaffirm.

Melendez Decision:

- Set out a test for whether a client should reaffirm a debt. Burden is on atty to ensure debtor understands implications of signing a reaffirmation agreement.
- Amt. of the debt? Value of the collateral?
- Hardship?
- Will creditor truly repossess?

In a ch. 13 you can cure the arrearages on any secured debt, not just a mortgage.

1322(b)(2) Bifurcation of debt:

- can't do on a single family unless creditor accepts additional collateral
- value of the property becomes the secured portion
- remainder of the debt is deemed unsecured

There are no preference rules re secured debt, only unsecured.

Payments to Unsecured Creditors

In re Greer p. 359

F: Debtors' Ch. 13 plan was for 3 yrs. Secured creditors would be paid but unsecured would on receive nominal payment even tho total was \$18,000. Trustee objected to the amt the unsecureds would get and the 3 year plan- wanted it extended so unsecureds would get reasonable amount.

I: Is nominal payment to unsecureds enough reason to extend a plan?

H: No. There is ~~no Code minimum for unsecureds~~, but in MA there's an ~~unwritten 10%~~. ~~As long as the plan is in good faith, even if the unsecureds get nothing, that's not sufficient cause to extend the plan. Code only requires ch 13 debtor to pay no less than if under ch. 7.~~

~~Here, a very austere budget so court said nothing should go to the unsecureds.~~

DOR Visit 4/11

- tax liabilities are **priority claims**
- priority claims are not dischargeable in a ch. 7?
- dischargeability is statutory
- taxes within 2 yrs of petition are non dischargeable
- trustee taxes are non-dischargeable (withholding, sales)
- govt has 180 days to file a creditors claim, other creditors have just 90.
- DOR is subject to the automatic stay because it trumps state law.

Chapter 11:

- Corp. can create plan under any parameters; no limitations on amount or time.
- **But tax liabilities must be paid no later than 6 yrs from date of assessment.** Clock starts the day tax is assessed, not day of filing as with a chapt. 13. **(In a 13, 100% of the taxes within 3 yrs must be paid + interest + penalties; over 3 yrs old is treated as general unsecured.)**
- If tax is more than 6 yrs old, call DOR and do a workout
- Plan becomes a court sanctioned K.

In re Davies p. 366

F: Debtor's amended plan wasn't objected to by creditors but court looked at it and said looking at all factors together it should be denied.

I: What is a "good faith" plan under Ch. 13?

H: ~~Plan denied. Reasons: \$0 payments to unsecured creditors, misstatement of debts and assets on a loan application 6 months before filing, some budget items not reasonably necessary.~~

In re Kourtakis p. 376

F: Creditor objected to ch 13 plan as not in good faith where creditor had a criminal and civil assault & battery judgment against the debtor that would be discharged.

H: Not a good faith plan. Court said you ~~can't use a ch 13 to avoid a jury verdict, particularly for avoiding a criminal jury verdict for an intentional tort.~~

Chapt 13 Dischargeability

- debt from willful & malicious injury *is* dischargeable
- alimony *not* dischargeable
- student loans *not* dischargeable
- debt from death or personal injury caused by operating m. vehicle intoxicated *not* dischargeable
- can discharge taxes
- can't discharge criminal fines

Chapt 7 Dischargeability

- debt from willful & malicious injury *not* dischargeable
- alimony *not* dischargeable
- student loans *not* dischargeable
- debt from death or personal injury caused by operating m. vehicle while intoxicated *not* dischargeable
- can't discharge taxes
- can't discharge criminal fines

Classifying Unsecured Debts

Groves v. LaBarge p. 381

F: Debtors appeal court's refusal to confirm their ch 13 plan. Plan fully paid unsecured student loans as a separate class; other unsecured creditors got only partial repayment.

H: **Nondischargeability of a particular debt is not alone a good enough reason for separate classification.** You have to treat nondischargeable student loan debt the same as all other unsecureds.

What debt can you **separately classify**? Sec. 1322: **debt for which there is a guarantor or a co-maker** (but not debt for which you co-signed for someone else who got all the consideration). When you classify, you **can't unfairly discriminate**.

Serial filing: File ch 7 & get rid of all dischargeable debt, then a 13 to deal w/the remaining debt.

Modification/Dismissal of Chapt 13 Plans

In ch 7 you can only deal with already acquired assets.

In ch 13, you project future income, expenses. **If projections don't come about, plan may be modified or dismissed.**

In re Paaland p. 386

F: 1/2 way thru ch 13 plan, debtor missed 2 payments. Trustee & creditors moved to convert him to a ch 7 or dismiss as a material default under the plan.

I: Was missing 2 payments a **material default**?

H: For debtor. **Before dismissing or converting, court will look beyond the fact of default to the cause.** Here, factors **beyond debtor's control** - unseasonable weather in a seasonal occupation.

If client goes to ch 13 and 1) case is dismissed because debtor wilfully failed to abide by court orders to appear, or 2) debtor got dismissal of the case following the filing of a request for

relief from auto stay, then debtor can't refile for 6 mo's - dismissed w/prejudice. 109(g)

In re Bond p. 387

F: Hardship petition by the trustee. Ch 13 debtor died partway thru plan, 2 minor children.

H: Hardship discharge allowed to protect probate estate for minor children. **Hardship**

discharge is appropriate where:

- 1) debtor has been **making payments faithfully**, and
- 2) now can't because of reasons **beyond debtor's control**, and
- 3) creditors **won't get less than under ch 7**, and
- 4) **modification isn't a feasible** alternative

Threshold Eligibility for Chapt 13

In re McMonagle p. 393

F: Debtors, the M's, filed a ch 7, reporting no assets. Their family corporation also filed a ch 7 and was discharged. Bank filed complaint for nondischargeability against the M's personally & got judgment of nondischargeability. The M's then converted to ch 13.

I: Is the debtor eligible for a ch 13?

H: Yes. Meets **threshold eligibility requirements under ch 13:**

- **an individual**

- **regular income**

- **noncontingent, unliquidated unsecured debt is less than the statutory limit**

(Current maximum is \$807,000).

Contingent = claims the debtor may have to pay eventually.

Unliquidated = liability admitted but amount is in dispute

In re Walton p. 410

F: Debtor filed ch 7 with monthly income surplus of \$500 & unsecured debt of \$26,000.

H: This is **substantial abuse under sec. 707(b)**. Debtor could propose a plan and pay off more than 2/3 to creditors in 3 years.

Substantial abuse under sec 707(b) calls for **dismissal**, not conversion to a 13, where **debtor has ability to pay something**. Only the debtor can voluntarily convert.

Chapt 13 Incentives

1. Property Incentives

- opportunity to **keep property** subject to a security interest, by payment of present value, sometimes w/lower monthly payments over longer time.
- **keep home**, even where foreclosure proceedings have begun, by paying off arrears.
- **chapt 7 limits** the amount of prop debtor can keep as exempt.

2. Discharge Incentives

- broader discharge under 13

3. Access to Chapt 7 is Limited

- can only file once/7yrs
- court can deny if filing is a "substantial abuse"

In re San Miguel p. 417

F: Debtor proposed a 16 mo. plan under a chapt 13 whereby unsecured creditors each received only \$1 (minimal payment). The only reason for filing a 13 instead of a 7 is because the attorneys wanted fees up front under a 7, but he could pay the fee over time w/a 13.

I: Is debtor's 13 plan a lack of good faith?

H: Confirmation denied. **Minimum plan is 36 mo.** These debtors could pay over 36 mo. to allow more to the unsecureds - or - file a 7 for a clean start.

In re Saylor p. 423

F: Couple filed a ch 7, got discharge. Then filed a 13 to deal w/the mortgage arrears. Bank objected to the successive filings (a "20") as not in good faith.

H: A "20" is permissible. Even tho the filing of the 13 prevented the secured creditor from foreclosing, it was in good faith.

Risks of filing a "20" (a 7 first, then a 13):

- If you have ability to do a 13, you'll be denied a 7 discharge.
- If client is close to foreclosure, bank may hold sale before you get the 7 discharge to allow you to file a 13.

Rule 109(g): Dismissed w/prejudice. You can't file again for 180 days.

A debt *excepted* from discharge is one you have to pay.

An asset *exempted* is one the debtor can keep.

Business Bankruptcy

- . ch 7 liquidation or ch 11 reorganization
- . a business that files a 7 intends to go out of business, unlike an individual
- . Exemptions are not available to a business as w/an individual.
- . Discharge isn't granted to a corp., only to an individual.

Involuntary Bankruptcy ⇒ Ch. 11

- . Can be filed against a debtor who is unable to pay debts as they mature.
- . If **at least \$10,000 is owed and fewer than 12 creditors**, then **one creditor can file**.
- . If **more than 12 creditors, 3 must file together**.
- . If debtor doesn't answer, order for relief will enter.
- . Purpose = to recover 90 day preference \$'s.

In re Gibraltar p. 453

F: Involuntary bankruptcy petition filed.

I: Whether 2 corps w/a close relationship can count as 2 separate creditors for purpose of filing involuntary bankruptcy petition against debtor.

H: In this case, yes.

REVIEW

2 goals in bankruptcy:

- get discharge of as much debt as possible
- retain as much of your property as possible

Exempt property = the property of the estate you are permitted to keep from the trustee (put on Schedule C).

2 possible exemption scenarios & you must choose one:

- **fed bankruptcy code**
- **non-code** (state, other fed laws such as fed rr. Act) 522(b)

2 Tests of a Plan:

1. **Best Efforts**

- income
- reasonable expenses
- = what should go to creditors

2. **Best Interests**

- You must pay creditors no less than what they'd get under ch 7 (i.e., more over time than what they'd get now, taking into consideration the time value of \$).

Secured v. NonSecured

- Ch 7: Even tho the secured debt is discharged, the underlying lien is not & creditor can evoke remedies against the collateral. Creditor is only secured to the value of the collateral tho.
- Ch 13: Same rule. If you're current, keep paying. If not, the auto stay lets you take time to pay arrears as you keep current going forward. If you have a note, you can only cure arrears over period left on the note.

Auto Stay

- Designed to create a level playing ^{field} filed among creditors as of date of filing.
- Must provide adequate protection to secured creditor so he doesn't suffer any further loss from deterioration of prop.
- Auto stay stops both secured and unsecured collections

1322(b)(2): You can cram down or bifurcate a mortgage but **not if it's a principal residence** (unless there's some additional collateral).

A creditor can file **motion for relief from auto stay** in order to foreclose before debtor attempts cram down, but if debtor is making regular pmts its not worth it.
Once crammed down, debtor must pay full amount of amount crammed down over term of plan.

Co-debtor stay: Co-debtor on a secured debt is protected during term of plan in a 13, not a 7, and only if the debtor is going to pay 100% is co-debtor off the hook.

3 Categories of Debt

1. **Secured**
prop^{property} you pledged as collateral for the debt.
Ch 13 plan must **guarantee payment equal to balance of loan or value of collateral.**
2. **Priority**
100% payment required.
Income taxes, past child support, legal costs, administrative costs.
3. **Unsecured**
Medical bills, credit cards, etc.
Only get what's left, on a pro rata basis.
Can separately classify co-debtor debt (can have 100% payment on these; if plan doesn't include 100% payment of these, creditor can go after co-debtor for difference.)

Qualifying for a Ch 13: Max is \$807,000 secured + \$269,000 in unsecured.

Dismissal of your case:

You may dismiss voluntarily at any time. Trustee may dismiss if you do not keep up your plan payments. Consequences: secured can foreclose, unsecured can sue for judgment, co-signers lose protection.

Discharge

Under a 13, all debts listed are discharged upon completion. But *not*:

- home mortgage
- alimony
- death caused by your drunk driving
- student loans

IRS

- All tax returns must be filed or you won't be discharged.
- if you have a refund coming, IRS may send to trustee or offset a prior tax obligation.

MASSACHUSETTS SCHOOL OF LAW

Spring 1993

Bankruptcy

Final Examination

Social Security Number

For each of the following essay questions, your answers are to be written in the blue book(s); be sure to put your social security number in the blue book as well as this examination sheet. Please do not repeat the facts, unless such repetition is necessary to your analysis and explanation. Do not attempt to "answer" the question and justify your response, rather dissect the various issues presented and discuss completely as you progress through the fact pattern. You should concentrate on analysis and explanation as you apply the law to the presented facts.

1. Robert and Mary Smith are married and have two children, ages 5 and 9. They own as joint tenants and reside in a single family home in Andover, MA, which they purchased in 1979 for \$130,000.00. They have refinanced their mortgage a number of times since they acquired their residence and used the refinancing proceeds to fund other investments. The balance due on their first mortgage is now \$210,000.00 and they are now four months in arrears to the mortgagee at \$2,000.00 per month. They estimate that their house is worth about \$180,000.00 today.

Mr. Smith has accumulated various credit card obligations such as Visa, Mastercard, American Express and a number of retail charge accounts in the total sum of approximately \$30,000.00. Mrs. Smith has also developed charge balances in the sum of about \$10,000.00 in her own name. In addition, they are both together obligated to the American Bank for a personal loan in the sum of \$6,500.00, which Mr. Smith's father co-signed. Robert Smith has not yet told his father that the personal loan is in default. The various banks and credit card companies have recently begun a vigorous and irritating a campaign to attempt collection and the Smiths find the almost constant telephone calls to be exceedingly difficult to handle. Bob and Mary have now gotten used to paying for what they need as they go along, since they no longer have any charge or credit privileges.

Bob Smith has a good stable job as the manager of a successful health club and fitness facility and Mary Smith works part-time in a retail clothing store. Bob earns \$52,000.00 per year and Mary earns about \$20,000.00 per year but was just informed that her hours will probably be reduced over the next month. She figures she will probably earn about \$8,000.00 for the rest of 1993, but hopes to find alternative employment as soon as possible. Mary used to be a teacher for the City of Boston and still maintains her teacher's retirement plan, from which she cannot withdraw any funds. She is on an extended "leave of absence" and has not retired. The plan has a present value of \$36,000.00

In 1989, Bob and Mary purchased 4 condominium units in the City of Lawrence, for investment purposes, and borrowed against the equity they had at the time in their home to come up with the down payments. Each of the 4 condo units is worth about \$20,000.00 but the mortgage balances are about \$30,000.00 each. Bob and Mary are two months in arrears on each of the four separate mortgage loans, which are with four separate banks. The management of the units has become a nightmare and Bob and Mary would be happy to get out of the condo and real estate business altogether. Each of the four banks is beginning to threaten to foreclose, if the mortgage is not brought up to date. The Smith's income does not permit them to do so and maintain their regular living expenses.

Bob owns a 1987 Chevrolet sedan free and clear, which is worth about \$2,000.00 - Mary is still paying \$427.50 per month on her 1990 Mercedes Benz 190. The car loan has a balance of \$19,000.00 and is current but the car has minor problems and some body damage and is worth about \$15,000.00. Bob prides himself as an amateur photographer and has accumulated camera equipment worth about \$4,000.00 and wants to keep it, almost as much as Mary wants to keep her car. Bob earns about \$5,000.00 per year in freelance photographic work, using this equipment. At your office conference, Bob just informed you (and Mary) that over the past three years, he has "borrowed" approximately \$15,000.00 from the cash box at the health club, to fund various expenses. He has been confronted by the owner of the club who is willing to defer any criminal action so long as Bob pays back all of the money, and the owner is willing to keep Bob employed at his regular salary. Bob is thankful and remorseful but is certain that as soon as he pays back all the money (at the rate of \$100.00 per week), he will be asked to leave the health club.

Bob and Mary seek your advice. They know a little about bankruptcy and have heard about Chapter 13. They would like to keep their home. How will you inform them about the various alternatives available so that they can make an informed decision about their future? What advice would you give and why?

2. Allied Enterprises, ("Allied") is a Massachusetts Corporation, which operates various retail stores in four (4) New England states, selling consumer goods, such as toys, electronics, jewelry and furniture. For years, Allied enjoyed a good reputation for value and service, but Allied is now having financial difficulty. Allied locations are generally in desirable suburban malls and retail centers. Most of Allied retail stores leases were entered into in the late 1980's and call for rental payments which are extremely high. However, three of the retail locations have leases which were entered in the mid-1970's and call for substantially below market rental rates, even in these difficult economic times. A number of retail operators have expressed interest in "purchasing" the balance of Allied's leases on those three locations, which leases terminate in 1999. Therefore, three of the locations have leases which represent significant value.

Since October, 1992, Allied has been faced with "new retail challenges" and is finding it impossible to pay its debts as they mature. The United Bank, which has a mortgage (security interest) on all of Allied assets (inventory, furniture, fixtures, machinery, equipment, etc.) has made a demand upon Allied to cure its payment arrears, which is currently quite substantial (three months arrears at approximately \$25,000.00 per month). In addition, at least six of Allied's largest trade creditors have threatened to institute suit because of overdue invoices. Besides the tough business climate, the reason for Allied's difficulty is that it has had to pay an out of Court settlement with the Massachusetts Attorney General's Office for alleged violations and has used almost all of its cash flow available to satisfy this obligation. The Attorney General has threatened criminal prosecution against the company and its principals if any payment is missed and to further complicate matters, Allied's employees are considering a discrimination suit and allege that Allied is also in violation the a National Labor Relations Act, for interfering with the employee's attempts to unionize.

John and Tom Allied, the principals of the corporation, consult you and inform you that they feel they may lose the various battles facing Allied and they feel that they need to consider liquidation. In their opinion, the assets of Allied (inventory, furniture, etc.) are worth approximately four million dollars "at liquidation", but would probably be worth six to seven million dollars if sold in the ordinary course of Allied's business operations. In addition, John and Tom feel that an appropriate liquidation would also create substantial value for the balance of the term of the leases which are "under market". The United Bank is presently owed approximately 1.9 million dollars and trade vendors are owed an additional 1.7 million dollars.

John and Tom further inform you that they themselves can probably find excellent top management positions with other companies or in other areas, but feel that they need to do "the right thing". As a result of your probing questions, John and Tom also inform you that the corporation presently owes approximately \$250,000.00 in back vacation pay, \$100,000.00 in federal corporate taxes and they have been asked to now personally guarantee the bank loan balance, which Tom and John absolutely refuse to do. They are not willing to subject their "modest" personal wealth to the claims of any party as a result of the operation of the business, although they do remember that they did personally guarantee one trade vendor, whose balance is presently \$37,500.00.

Tom and John feel that the only way Allied can survive the present economic turmoil would be for a cash infusion of approximately one million dollars. Though they have these monies personally, they are unwilling to make the further investment or loan to the corporation and feel that since they are nearing retirement age, they would rather close the business, pay all the corporate obligations and consult for others.

Over the last six years, the corporation has paid both Tom and John approximately \$400,000.00 per year and those salaries have continued at that level, despite falling sales and increased expenses over the last three years. Finally, the men inform that they have not reported all sales from certain consignments, the consignors are threatening legal action (including the possibility of criminal prosecution) and Tom and John now seek your advice.

They would like you to inform them regarding all of the aspects of Chapter 7 Liquidation for this Corporation. You must also advise them with respect to the procedure, substantive law and the likely result of a Chapter 7. They are good listeners, but need to know how each of the facts they have presented impact on a liquidation and any potential personal responsibilities they may have. They are also very interested in the matter in which funds will be distributed as a result of a Bankruptcy liquidation, including how the various consumer deposit creditors (who put deposits on consumer goods, which were never delivered) will be treated.

3. Andy and Susan are in the process of a not so amicable divorce. Andy and Susan were married in 1985, when both graduated college. Andy was born and raised in Boston and started his married life with little money, but great hopes for the future. Susan, on the other hand, comes from a wealthy family and has received payments from a substantial trust fund ever since she was eighteen. Both Andy and Susan are now thirty years old.

For the last four years, Andy has worked for a small computer software company, which has done quite well and his income has increased from \$25,000.00 (to start) to the \$65,000.00 that he is presently earning. His prospects are quite good. Susan has worked part time during the marriage and has had no lack of material things, because of the substantial trust fund income that she has enjoyed. Because of Susan's income, the couple have enjoyed a lifestyle which was significantly greater than Andy's income would otherwise provide. Andy will miss this lifestyle, but feels that he can do just fine on his income, alone.

In 1988, at the height of the real estate market, Andy and Susan bought a penthouse condominium in Boston's fashionable Beacon Hill neighborhood. They paid \$450,000.00 for the two bedroom duplex and borrowed \$300,000.00 from a local bank. Susan paid the balance of the purchase price from part of her annual trust income. Today, the condominium is worth \$290,000.00 and the mortgage balance has been paid down to \$275,000.00. However, the mortgage interest rate is still 10% and the payments are substantially more than Andy can afford on his own. The couple separated approximately four months ago and Andy has not been able to make any payments on the mortgage since that time. The bank has been calling Andy and has already begun foreclosure proceedings against Andy and Susan. During

their brief marriage, both Andy and Susan became spendthrifts, of a sort and incurred substantial consumer credit card debt, to the extent of \$35,000.00 on a joint basis. They are both responsible for the credit card obligations. Andy is seeking your advice about the possibility of a bankruptcy of some other form other of reorganization and it is clear that you cannot represent both Andy and Susan, since their interests and goals obviously conflict.

Andy informs you that his divorce attorney is attempting to get a substantial cash settlement from Susan, considering her substantial annual trust fund income, but Andy informs you that the Trustee of Susan's trust has the right to determine, in the Trustee's discretion, how much is to be paid to Susan on a regular basis. The Trustee has threatened to hold further disbursements to Susan until she "gets her life in order" and, until then, will only pay for the necessities. Andy still feels that he can get a reasonable property settlement from Susan, but would like to consider a bankruptcy before that happens, so that he can keep the money he gets from Susan after he has received a discharge in bankruptcy with respect to his debts. Andy also informs you that his wealthy Uncle Harry has just taken a turn for the worse and is not expected to live more than six months. Andy feels that Uncle Harry has always intended to take care of his favorite nephew (Andy) and Andy feels that his prospective inheritance, along with a nice negotiated property settlement from Susan will give him a great opportunity to start life fresh, to say the least.

Without moralizing, discuss with Andy the various legal issues presented and inform Andy regarding his various alternatives. In the last moments of your initial conference, Andy also adds that he has moved out of the Beacon Hill condominium into a small apartment with a new girlfriend and has rented the condominium to a notorious drug dealer who is conducting business directly from the duplex penthouse. You are hardly aware of the forfeiture laws of the United States as relates to drug dealing and real estate and Andy now adds that he is receiving a 10% commission on all of his tenants' drug deals, in addition to the monthly rent, which Andy is pocketing. Andy is not paying the mortgage, would like to forestall any foreclosure as long as possible, so that he can maximize on the commissions and intends not to tell anyone about the cash that he is "socking away". Andy feels that, compared to his soon to be ex-wife Susan, he has been dealt a difficult hand in life and feels that he has every right to protect himself financially.

The Massachusetts School of Law

Bankruptcy, Fall 1993
Kitaeff Final Exam

Please answer each of the following three essay questions in the accompanying blue-book. Each question has equal value.

1. In 1988, Sam and Joe Smith (brothers) formed a Massachusetts corporation called ABC, Inc. Since that time, the corporation has been operating a retail store called "STEREO, PLUS", in Wilmington, Mass. and the enterprise has been only marginally successful. The corporation presently employs the two principals, two administrative staff and six (full time and part-time) salespersons. For the past six months business has been especially difficult and Sam and Joe are facing the reality that they cannot continue to do business in the same manner, considering new competition that has adversely affected their profitability. In fact, for the last two weeks they have not been able to pay payroll and they are seriously behind in their payments to vendors. Most vendors have refused to ship except for cash, in advance.

The corporation owes BayBank, their primary lending source a total of \$145,000 which debt is secured by a lien on all of the corporation's assets which are worth approximately \$60,000 at cost. The corporation has not made its December loan payment to the Bank and the Bank has threatened to call the note fully due and payable. In addition, 9 retail customers have tendered deposits ranging from \$300 to \$1500 for specially ordered merchandise (each deposit is equal to 50% of the selling price) and none of the products are available to be delivered - the deposit monies have been used for general overhead. The corporation owes \$37,000 to its general unsecured creditors and the landlord has threatened legal action and eviction if the rent (now overdue for Nov and Dec, 1993) is not paid within 4 days.

Sam and Joe have just made a deal with a super-discounter to purchase brand-name but year-old merchandise at significant savings (off the cost price) and they feel that this could change their profitability for the future in a very positive manner. However, they don't know if the business can last that long.

Advise your clients as to the various alternatives available. They are concerned about the rights of various parties in any proceedings, but they know that they must do something quickly.

2. Bill and Sally (not married) own a house in Andover, Massachusetts that has a fair market value of \$150,000. Their mortgage to Andover Bank has a principal balance of \$150,000, but is three months in arrears (the monthly payment is \$1245 principal and interest). Bill and Sally pay their real estate taxes on their own and are currently two years in arrears, for a total real estate tax delinquency of \$4,000. The Internal Revenue Service and the Mass Department of Revenue are owed \$6,000 and \$1,800 respectively for 1990 income taxes based on returns that were filed on time. Between Bill and Sally, they owe their general unsecured creditors, for credit card and medical debt, approximately \$24,000. At your meeting with them

Essay Question No. 2

Mr. and Mrs. Wilson have asked you to analyze their financial situation and make recommendations to them. They come to your office and state "We need to file Bankruptcy". During the interview with your clients, you find the following:

Your clients own a duplex home in Peabody, Massachusetts, with a present fair market value of \$225,000.00. The home is subject to a first mortgage in favor of ABC Bank, with a principal balance of \$145,000.00, however, they have not made mortgage payments for 5 months, in the monthly amount of \$1600.00 and are therefore substantially in arrears. The Bank has begun foreclosure proceedings and the sale is scheduled for June 7, 1990. Mr. Wilson informs you that he is presently employed as the manager of a small machine shop, in which he has no ownership interest, and it is rumored that the machine shop may be having financial difficulty itself. Mrs. Wilson provides day care in her home (the duplex in Peabody) even though she understands that there is a continuing risk for violation of the local zoning ordinance (no business use of any kind is permitted). Mr. and Mrs. Wilsons' combined income for 1989 was approximately \$50,000.00. They have 2 small children living at home, both under 10 years old.

Over the past 2 years, the Wilsons have enjoyed the use of their credit cards and have borrowed money from various banks and they presently have a combined unsecured debt obligation, to various creditors, in an amount of approximately \$25,000.00. One credit card creditor has instituted a suit against Mr. Wilson and has attached the family residence 76 days ago. A judgment has not yet been obtained in that particular collection action.

Mr. and Mrs. Wilson have resigned themselves to the fact that they might not be able to keep their duplex home. However, they would like your advise on how to protect the equity in the house for their personal benefit, if possible. In addition, they indicate to you that they are about to lease the other apartment in the duplex for \$700.00 per month, however, they are reluctant to do so if they are about to loose the house. The prospective tenant is a personal friend and they have disclosed nothing to him.

The Wilsons, in addition, have a tax liability to the I.R.S. and the Massachusetts Department of Revenue for 1988 and 1989 in the combined sum of approximately \$18,000.00. They have just received a notice of intent to levy and they advise that their bank accounts have approximately \$2,000.00 total on deposit.

Finally, Mr. Wilson advises you that he was in a car accident 2 years ago and that a suit is pending against the other driver and Mr. Wilson expects to receive settlement in the next few months that could amount to approximately \$30,000.00, net to him. The Bank has been informed but has decided not to wait and intends to proceed against the house.

yesterday, Bill has admitted that in the last 60 days he took cash advances on his MasterCard totalling an additional \$3,000 and has reached the credit limit. He used the money to purchase the HI-fi system of his dreams, thinking that the boost to his emotional well-being would give him the ability to handle his financial affairs in a more productive manner.

Bill's car, a 1989 Chevrolet, is worth about \$6,000 and has no lien and is free and clear. Sally leases her 1991 Toyota and is current on the payments. Both Bill and Sally have defaulted on the final payment on their auto insurance and a notice has just been sent to the car leasing company that the insurance policy has already been cancelled; the car leasing company considers this a technical default in the lease contract. Yesterday, Bill had a minor auto accident, but the person whose car he hit is ~~alleging~~ injury.

Sally works as a nurse at a Municipal hospital and has accumulated \$32,000 in a municipal pension plan. Bill has \$25,000 (fully vested) in his employers ERISA qualified pension plan, and he has \$2,000 in an IRA that he started about a year ago. Bill and Sally's household goods and wearing apparel, etc., are normal and ordinary and nothing unusual in value.

Finally, Sally has disclosed to you that she had borrowed \$10,000 from her brother and over the last 3 - 8 months has repaid all but \$3,000 of the total.

Bill and Sally would like to keep their home and all of their assets and seek your advice. Analyze their situation and provide them with alternatives.

3. Mary is a single woman and a resident of Boston, Massachusetts. She purchased her condominium residence in 1978 and paid \$31,000 at the time. As the value of the condo rose over the course of time, she refinanced the unit at least three times and presently owes \$96,000 to Shawmut Bank secured by a first mortgage. Interestingly, her condo unit is in a beautiful building in Boston's Back Bay area and has a fair market value of about \$110,000. Because of recent difficulties in her employment situation (she was "laid off" in what she believes was a serious violation of the anti-discrimination laws - because she is of mixed ethnic background), she has had no income for a while and is 4 months in arrears on her mortgage and 6 months in arrears on her condo fees. The Bank is about to start foreclosure proceedings. Mary is about to go on her third interview for a job prospect and feels very positive about becoming employed almost immediately.

Over the years, Mary has amassed substantial personal property such as furniture and jewelry - all paid for and of significant value. During the real estate heydays of the 1980's, Mary purchased two investment condos. Each is now worth \$40,000 but each has a mortgage balance of \$75,000. The mortgages are current but the tenants intend to leave over the next 90 days. Two years ago she filed a tax return but did not pay all the tax called for and is now paying \$300 per month on the \$4,000 balance. She has become despondent and has recently "maxed out" her credit cards to maintain her lifestyle and she now owes about \$14,000 to MasterCard, American Express, etc. Mary's father, who is very ill, just himself inherited \$100,000 and intends to leave it all to Mary - he knows nothing about her situation. Advise Mary.

Advise your clients as to the various alternatives available and the effect each may have upon their lifestyle, their ability to reorganize their personal financial life and their ability to maintain their residence.

MASSACHUSETTS SCHOOL OF LAW
ANDOVER, MASSACHUSETTS

BANKRUPTCY LAW
SPRING 1990

May 21, 1990

Jeffrey A. Kitaeff, Esq.

Instructions:

For each of the following 20 multiple choice questions, choose the best answer by circle either a, b, c or d. Mark your choice clearly.

1. A Chapter 7 debtor can claim exemptions available
 - a. under Section 522(d) of the Bankruptcy Code
 - b. pursuant to any non-code exemption statutes
 - c. either (a) or (b) on an elective basis
 - d. from any exemptions available

2. A Chapter 7 Interim Trustee in Bankruptcy is
 - a. initially selected by the office of the U.S. Trustee
 - b. can be elected by unsecured creditors at a 341 (first meeting of creditors) meeting.
 - c. both (a) and (b)
 - d. chosen by Counsel for the debtor

3. Pursuant to Section 365 of the Code
 - a. an executory contract, if not assumed within 60 days, will be deemed rejected
 - b. an executory contract must be "cured" of default, if sought to be assumed.
 - c. a Chapter 11 debtor has essentially the same rights as a Trustee
 - d. all of the above

4. The filing of a Voluntary Petition in Bankruptcy
 - a. imposes an automatic stay with no further pleading necessary
 - b. requires a motion, to be relieved of an automatic stay, under Section 362
 - c. permits the continuation of action against a debtor only if such action has already been started
 - d. both (a) and (b)

5. A debtor's or Trustee's intended sale of property
 - a. must be noticed out to all parties in interest, unless specifically ordered by the Court
 - b. requires no notice to creditors, but due diligence and good faith by the seller
 - c. will only be allowed to proceed if the appraised value exceeds the secured debt (if any) by at least 25%
 - d. will not be permitted to proceed unless approval is obtained from a majority of unsecured creditors in both number and amount

6. A Chapter 13 debtor in Massachusetts
 - a. may file a Plan when it accompanies the initial Petition
 - b. may file a Plan within 15 days of filing the Petition
 - c. must file a Plan along with the Petition
 - d. either (a) or (b)

7. A Chapter 11 debtor's Plan and Disclosure Statement
 - a. must be filed within 120 days of the date of the Petition
 - b. must first be approved by the Court prior to notice to creditors and the solicitation of votes
 - c. may classify and categorize creditors into various classes and treat creditors differently
 - d. both (b) and (c)

8. A Chapter 7 debtor may
 - a. claim for his benefit all exemptions available under the statutory system elected
 - b. accumulate unclaimed exemptions in any property whatsoever, to maximize the exempt ability of of selected assets
 - c. select both Code or non-code exemptions on an asset by asset basis
 - d. exempt a personal residence to the extent of any equity, so long as minor children reside in that residence

9. A "preference", under the Bankruptcy Code sought to be recovered by a Chapter 11 debtor or a Trustee
 - a. can generally be recovered, if it can be shown if the payment was made within 90 days of the Petition date, on account of antecedent debt
 - b. cannot be recovered if the payment was made for simultaneous consideration given by the creditor
 - c. includes payments made to "insiders", however, the period is extended to 1 year prior to filing
 - d. all of the above

10. In order to have his or her Chapter 13 Plan confirmed, debtor must show
 - a. that the Plan is in the best interests of creditors, is the debtor's best effort and is feasible
 - b. that the Plan calls for payment over the term of the Plan that would pay unsecured creditors something materially better (in percentage terms) than would result if the debtor's estate were liquidated under Chapter 7
 - c. that he (she) has a reasonably stable source of income from which to make payments to the Chapter 13 Trustee
 - d. all of the above

11. If a Chapter 13 debtor with a "confirmed" Plan cannot make payments to the Chapter 13 Trustee
 1. the debtor may amend the Plan with Court and creditor approval
 2. the Trustee may file a Motion to Dismiss the case
 3. the debtor may convert to a Chapter 7 proceeding
 4. the Trustee may convert the case to a Chapter 7 proceeding
 - a. 1, 2 & 4
 - b. 2, 3 & 4
 - c. 1, 3 & 4
 - d. 1, 2 & 3

12. An executory contract rejected under Section 365 of the Code,
 - a. gives rise to a claim for damages against the estate by the party whose contract was rejected.
 - b. must be rejected within 60 days of filing of the Petition
 - c. requires notice an opportunity for hearing prior to effective rejection
 - d. will create an entirely separate class of creditor whose claim must be paid in full

13. A secured creditor whose value in the collateral is less than the amount of his claim
 - a. will nonetheless be considered fully secured
 - b. may have the amount of the secured claim reduced to that value, and the balance deemed unsecured
 - c. can vote the full dollar amount of his claim regardless of what portion may be secured by collateral value, in a Chapter 11
 - d. will always have a priority claim to the extent of the under-secured balance

14. An unsecured creditor in a Chapter 7 liquidation case will not participate in distribution of funds unless
 - a. the creditor has been owed monies or has an allowed claim for at least 90 days prior to the filing of the Petition
 - b. the creditor has filed a Proof of Claim with appropriate documentations supporting it
 - c. the debtor has scheduled the creditor's claim as undisputed and non-contingent
 - d. the Court finds that non-payment of the claim would create irreparable injury to the holder of the claim

15. The office of the U. S. Trustee
 - a. appoints an Interim Trustee for the purpose of Chapter 7 case administration and liquidation
 - b. prosecutes non-dischargeability complaints on behalf of creditors
 - c. approves or objects to unsecured claims of creditors
 - d. values real estate for the purpose of determining secured status

16. A non-dischargeability complaint for fraud, misrepresentation, defalcation, etc.
 1. may be maintained by any creditor with respect to that creditor's particular claim
 2. may be maintained by a Trustee, as to all debt, if the Trustee can show fraudulent intent of the debtor
 3. compels the debtor to maintain the burden of proof as to the non-existence of facts material to the allegation
 4. may be maintained by any party in interest up to 5 years after the filing of the Petition
 - a. 1, 2 & 4
 - b. 2, 3 & 4
 - c. 1 & 2
 - d. 1 & 3

17. A debtor can prevail in a complaint to avoid a judicial lien
 - a. to the extent that the judicial lien impairs the debtor's exemption claim
 - b. to the extent that the lien is preferential
 - c. to the extent that the judicial lien adversely affects the debtor's ability to get a fresh start
 - d. both (a) and (b)

18. The automatic stay imposed by Section 362 of the Bankruptcy Code will
 - a. stop a foreclosure proceeding
 - b. prevent a creditor in possession of assets of the estate from disposing of same, in collection of debt
 - c. give a Chapter 11 debtor at least some critically needed time and "breathing space"
 - d. all of the above

19. A Chapter 11 debtor cannot
 - a. conduct its business without advance approval of the office of the U.S. Trustee
 - b. obtain post-petition credit
 - c. dispose of assets except in the ordinary course of the debtor's business
 - d. seek to assume an executory contract

20. The distribution of proceeds in a Chapter 7 case will be made in accordance with the Code
 - a. to all secured creditors first, regardless of collateral liquidation value, then to all other parties pro rata
 - b. to all creditors who file Proofs of Claim regardless of priority
 - c. in payment of secured, exemption and administrative claims and other claims in descending order of priority
 - d. to debtor in recognition of exemptions first, then to all creditors, secured or unsecured, administrative or otherwise, regardless of priority, on a pro rata basis

Essay Question No. 1

Main Street Pet Shoppe, Inc. ("Main Street") is a Massachusetts corporation doing business in Andover, MA and Boston, MA.

Two years ago, in 1988, Main Street borrowed \$100,000.00 from Bay Bank to purchase additional inventory, pay some of its trade debt and install a sophisticated computer system from "Miracle Joe, the Computer King". Miracle Joe arranged a lease of the system for both stores and arranged for a financing of the lease with XYZ Leasing Company. XYZ purchased the system and leased it to Main Street with lease terms calling for 36 equal payments of \$3,000.00 per month and a purchase option at the end of the term for \$1.00.

The principal officers of Main Street, Mr. Jones and Mr. Smith seek your advise. They tell you that their cash flow is awful, they cannot afford the computer system (which is not performing according to plans and specifications anyway) and they have accepted deposits from 27 consumers for various animals that will cost Main Street approximately \$250.00 more per animal than originally contemplated. In your research, you find that Bay Bank only recorded a U.C.C. Financing Statement with the Town Clerk in Andover and failed to record any U.C.C. Financing Statement with either the Secretary of State or the City Clerk for the City of Boston. This alleged security interest in all assets, in favor of Bay Bank, is therefore subject to attack, as to validity. Your clients now tell you that the landlord in Andover has alleged a default for non-payment with respect to their lease, the lease terms call for \$3.00 per square foot to be paid monthly in advance and the lease has approximately 5 years to go. The lease is greatly under market value and your clients also inform you that 80% of their business is accomplished in the Boston store.

Finally, the Commonwealth of Massachusetts has just levied the corporate bank account for failure to pay sales taxes in the sum of \$25,000.00

Mr. Jones and Mrs. Smith have personally guaranteed the note in favor of Bay Bank, which now has a balance in the sum of \$82,500.00 and the Bank has threatened to consider the note in default for non-payment.

Your clients would like to stay in business and keep the Boston store operating; they feel that there is a market for the balance of the term of the lease in Andover and they would like to renegotiate, if possible, the note to Bay Bank. Additionally, the computer system is of no real value and the Boston store can be operated with a cash register and a simple ledger system for all bookkeeping etc.

Advise your clients as to the various alternatives available, your recommendations as to course of action and the results of the various recommendations you may give them. Be sure to discuss the effect any particular action may have on third parties (creditors or others).

MASSACHUSETTS SCHOOL OF LAW
BANKRUPTCY

SPRING 1990-1991

SS# _____

ESSAY QUESTIONS

- I. In 1987, John Smith and Mary Jones, who were very friendly and long time tennis partners, decided to purchase a home in Andover, Massachusetts. The real estate market was at its peak and they purchased a lovely colonial home on a one acre lot for \$425,000.00. John Smith had his own business (with his partner, Sammy Sleaze) and came up with \$50,000.00 towards the down payment. \$25,000.00 came from John's own personal checking account and the other \$25,000.00 (unknown to his partner) came from the partnership checking account. Mary Jones put in \$10,000.00 from her own savings account towards the down payment and borrowed \$40,000.00 from her mother to make up her \$50,000.00 share of the total \$100,000.00 cash down payment. John and Mary then borrowed \$325,000.00 from the ABC Mortgage Company to close their purchase.

John and Mary, whose friendship is still solid but somewhat strained, come to see you in May 1991. They inform you that the bank that holds the first mortgage on their colonial home has elected to accelerate the mortgage debt and it appears that John and Mary are presently six months in arrears with respect to their mortgage payments of \$1,852.00 per month. They further inform you that they have no real intention of keeping the house, however, the house is no longer quite so "lovely", and it is now worth only about \$290,000.00, at best.

John's business appears to be in serious financial difficulty and the partnership presently owes approximately \$75,000.00 in vendor debt and John and his partner have seriously considered terminating the business. Mary, who most recently was working for a local bank, has been laid off and is otherwise unemployed. Just before she was laid off, Mary suffered a work related injury and is about to receive disability and worker's compensation benefits. She does not know exactly what they may amount to, in terms of dollars.

While John was watching his business (with his partner) flounder, he decided to "protect" the one thing he was most proud of: his thoroughbred horse named "Samantha". He informs you that about six months ago, he "sold" Samantha to his second cousin once removed, for the sum of \$500.00. In actuality, even though papers were passed between the seller and buyer (relating to the horse transaction) the second cousin once removed is actually "holding" the horse for John and the horse is really worth approximately \$25,000.00 on the open market. As a result of repeated questioning by you, Mary admits that she has approximately \$60,000.00 of accumulated pension and retirement funds which accumulated some years ago when she was working as a coach for the tennis association. Mary is forty-four years old. Mary's mother wants her money back.

Neither John nor Mary have any objection to the filing of a bankruptcy petition and seek your advice as to whether or not a reorganization or a "straight" bankruptcy would be in their best interest. Discuss the issues presented and advise John and Mary as to their choices so that they can make an informed decision.

- II. Amalgamated Products Corp. ("APC") is a Massachusetts Corporation whose share holders are "Happy Harry", "Sad Sam" and "Mediocre Mike". Each owns 33 1/3% of the outstanding stock of this closely held corporation. Harry is the president and treasurer, Sam is the clerk and Mike spends most of his time at Bobby's Bar N'Grill offering investment advice to any one who cares to listen. The corporation is in the business of manufacturing display systems for various types of businesses and these systems are used at trade shows throughout the country. The corporation has both a sales and administrative staff; the sales people are paid on commission only and the administrative staff is paid (barely) either fixed weekly salaries or wages.

About two years ago, Happy Harry was approached by the company's hottest sales person who was about to close one of their largest deals. However, the \$300,000.00 sale would require the company agreeing to be paid over a twelve month period. Needless to say, the entire display system was manufactured and shipped and \$295,000.00 is still being carried on the books as an account receivable due from the customer. 10% of the sale (\$30,000.00) is due to the sales person as a commission. Only \$500.00 of this has been paid, however, the principals of the company acknowledge that commissions are due upon acceptance by the company of the sale.

Since this one sale represented a possibility of getting into the "big leagues", Harry, Sam and Mike went to their

local bank and arranged for the corporation to borrow \$300,000.00 for working capital. They personally signed this loan, as guarantors. Unfortunately, it turns out that Happy Harry was actually "Happy" for a particular reason: he supported his alcohol and drug habit by "borrowing" funds from the corporation, as needed. Over the past year, Harry "borrowed" over \$100,000.00. As a result, the Internal Revenue Service and the Massachusetts Department of Revenue are presently owed approximately \$71,000.00 (total) and both taxing authorities have contacted Harry and Sam as to the possibility of payment and the potential for a 100% penalty assessment.

Harry, Sam and Mike come to your office and seek your advice. Harry has beaten his alcohol and drug problem but is now in the middle of a bitter divorce. Sad Sam could not be any sadder, and Mediocre Mike wishes he never got involved in this company. They also mention to you that the corporation owes approximately \$125,000.00 in regular vendor debt and their relationship with their vendors is excellent. They have informed you that if they could get some "breathing" space and not have to deal with their present problems, they could turn the business around very quickly and keep all of their current bills up to date. Further, they feel that the company could be very profitable in about six months and they could have smiles if they could restructure the corporation's debts.

How would you discuss their situation and what advice would you give Harry, Sam and Mike. Remember, the bank took a lien on all corporate collateral (the lien is perfectly valid) and the bank perceives the value of all that collateral to be significantly less than what the corporation owes.