

Using Bankruptcy to Help Older Consumers Overwhelmed by Debt

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Providing Legal Support to the
Aging Advocacy Network

- http://nlrc.acl.gov/index.aspx#service_dev
- Collaboration developed by the Administration for Community Living/Administration on Aging between the National Consumer Law Center, Justice in Aging, American Bar Association Commission on Law and Aging, Center for Elder Rights Advocacy, and the Center for Social Gerontology
- See upcoming trainings, conferences, and webinars
- Request a training
- Request consulting
- Request technical assistance
- Access articles and resources





Presenter – Sarah Bolling Mancini

- Sarah is Of Counsel for NCLC half-time, focusing on foreclosures and mortgage lending, and works half-time as an attorney in the Home Defense Program of Atlanta Legal Aid.
- She has experience representing homeowners in bankruptcy cases and litigating in state, federal district, and bankruptcy courts.
- Sarah is a member of the Georgia Bar. She received her B.A. in public policy from Princeton University and her J.D. from Harvard Law School.

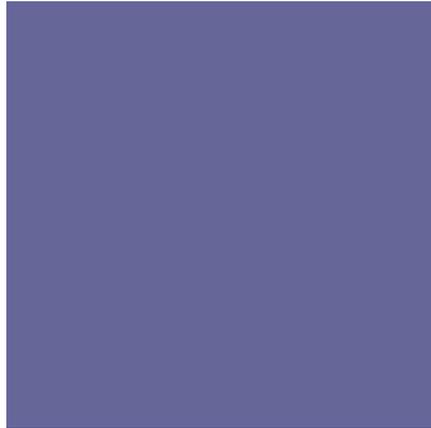
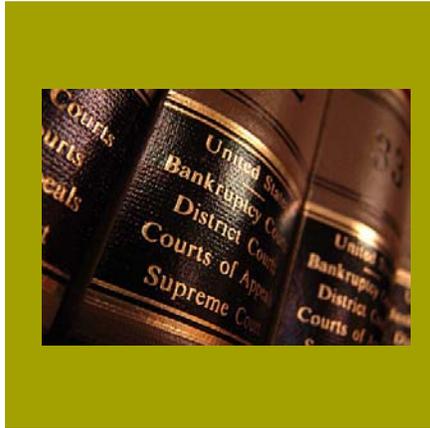
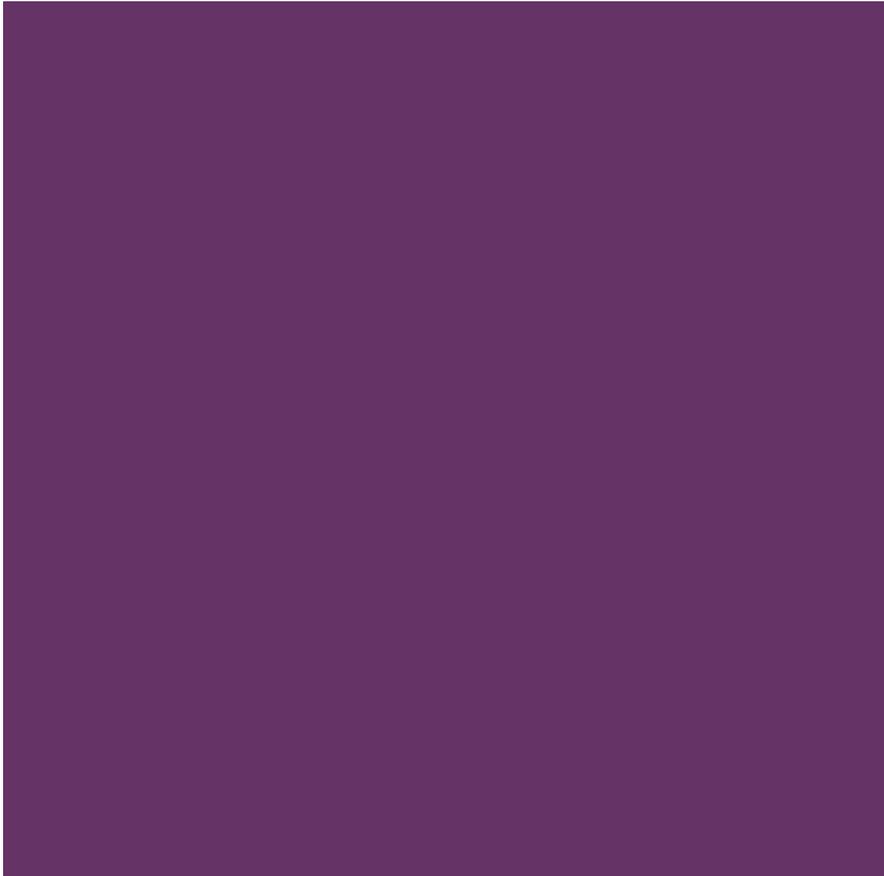




Moderator – Jerry Battle

- Jerry is a staff attorney, author of NCLC's Credit Discrimination and a contributor to several NCLC treatises.
- Previously, he was a staff attorney with Northeast New Jersey Legal Services where he focused on predatory mortgage lending and public benefits cases, and managing attorney with New Jersey Protection and Advocacy, Inc., (now Disability Rights New Jersey) where he concentrated on disability rights issues.
- He earned a B.A. with high honors from Rutgers University and a J.D. from Rutgers School of Law – Newark.





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Sources of Bankruptcy Law:

Bankruptcy Code

Federal Rules of Bankruptcy
Procedure

Official Forms

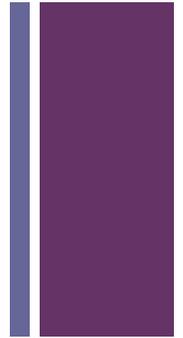
Local Rules and Standing Orders

2 Key Bankruptcy Concepts:

- * Fresh Start for Debtors

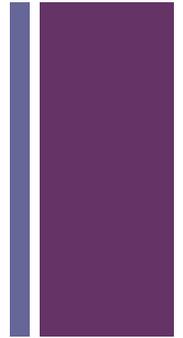
- * Fair and Equitable
Distribution of Non-Exempt
Assets to Creditors

The Various Chapters



- Chapter 7: liquidation
- Chapter 13: consumer reorganization (payment plan)
- Chapter 11: reorganization mostly used by businesses (consumer may elect)
- Chapter 12: family farmers and fishermen
- Chapter 9: municipalities
- Chapter 15: cross-border cases involving debtors and assets in more than one country

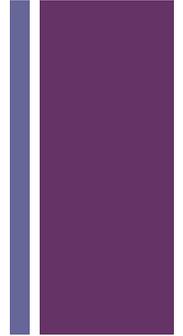
Chapter 7 Overview

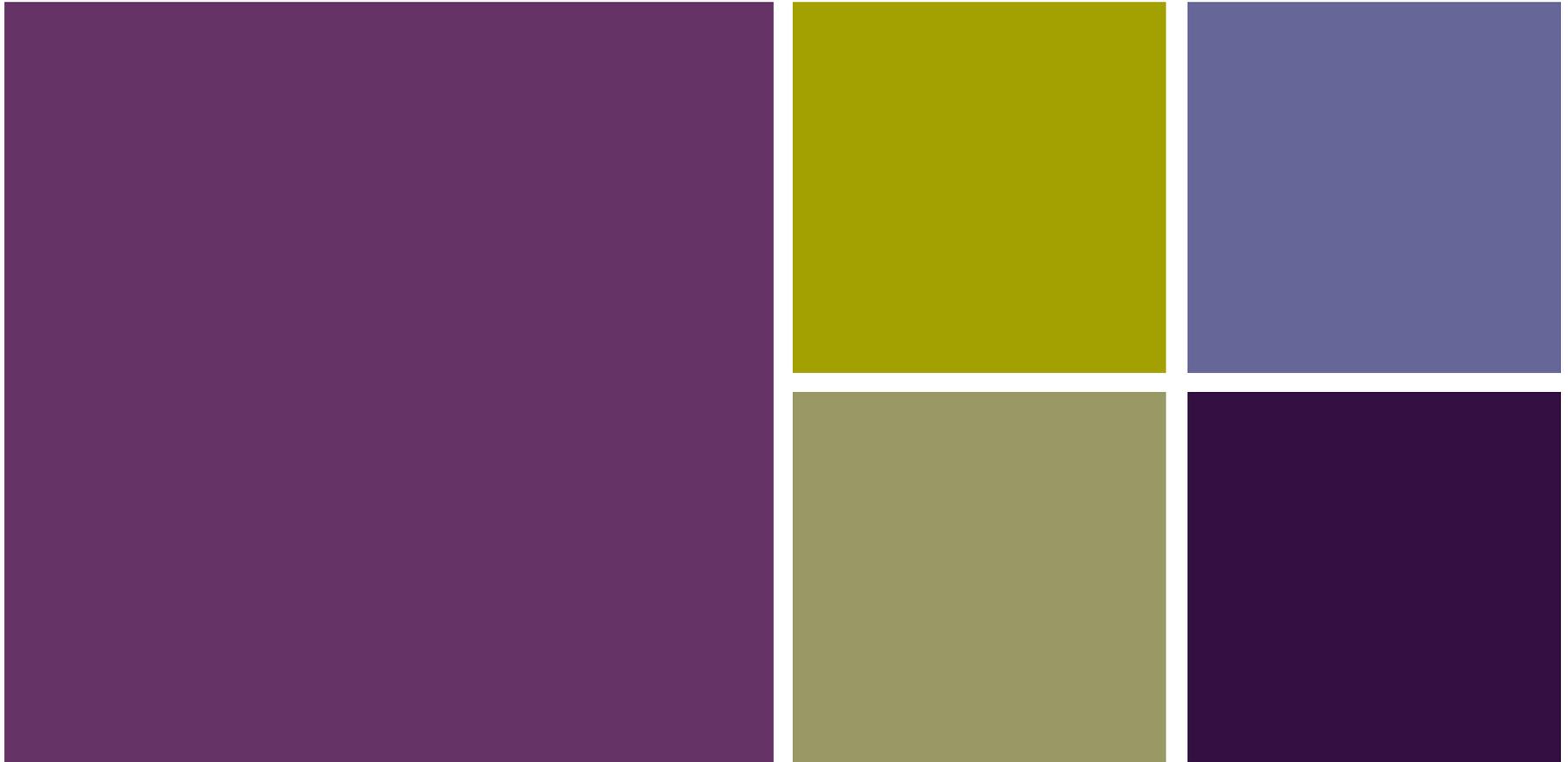


- Debtor files a petition for relief, automatic stay goes into effect;
- Debtor discloses all assets and debts on schedules filed with the court;
- Creditors are paid from proceeds of any nonexempt assets;
- Order is entered discharging debtor of debts, except for certain nondischargeable debts (such as domestic support obligations).

Chapter 13 Overview

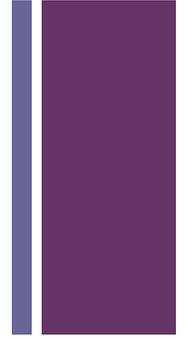
- Debtor files a petition for relief, automatic stay goes into effect;
- Debtor discloses all assets and debts on schedules, and files chapter 13 plan with the court;
- Creditors are paid generally from chapter 13 plan payments made by the debtor from future income and disbursed by trustee;
- Debtor has opportunity to cure arrearages on secured debts – to save a home or car;
- Discharge order is entered when the plan is completed.





Property of the Estate and Exemptions

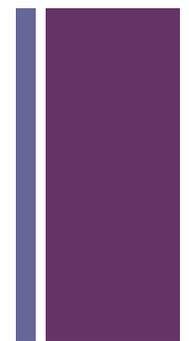
The Bankruptcy Estate



- Virtually all property debtor has interest in at time of filing goes into bankruptcy estate
 - includes intangible, contingent, and future property interests
 - examples include potential cause of action or anticipated tax refund
- Exempt property comes back out of estate
 - property the debtor gets to keep as part of the fresh start

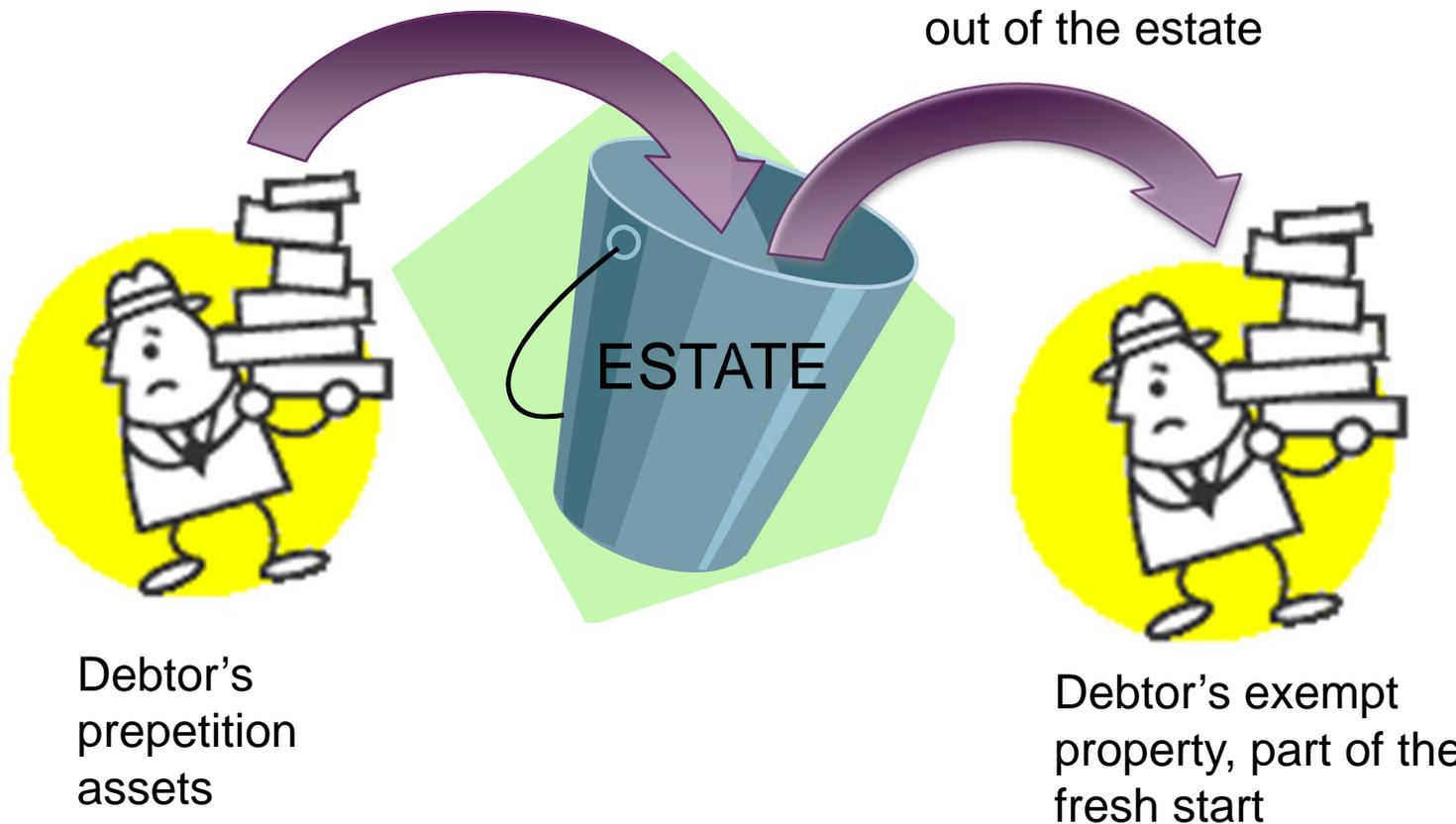
11 U.S.C. § 541

The Bankruptcy Estate



1. Debtor's assets go into the estate upon filing

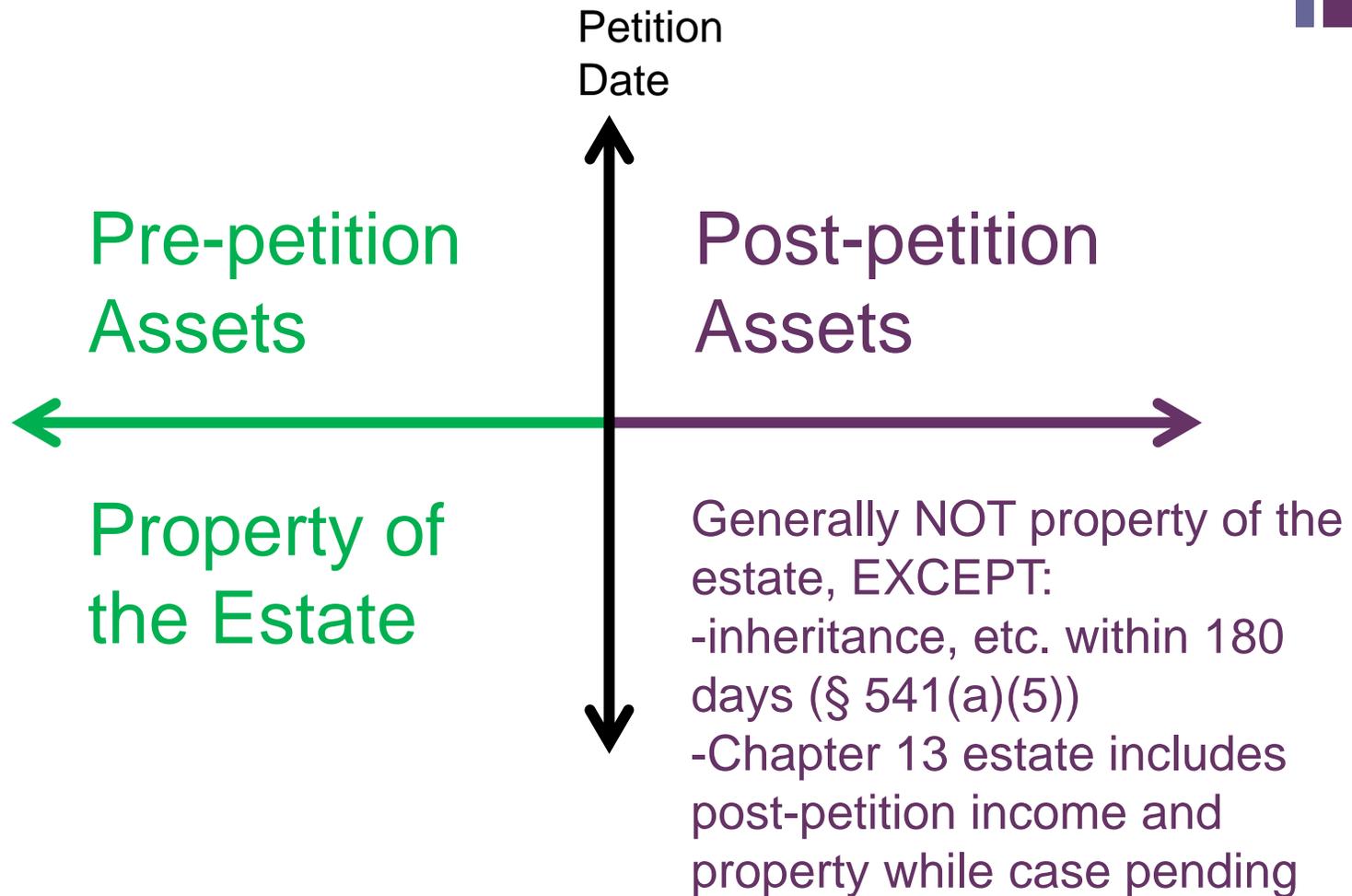
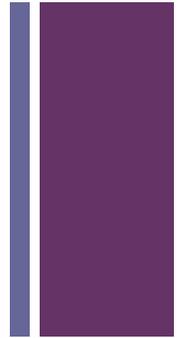
2. Property claimed as exempt comes out of the estate



Debtor's prepetition assets

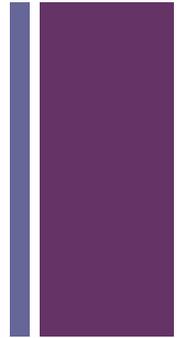
Debtor's exempt property, part of the fresh start

The Bankruptcy Estate

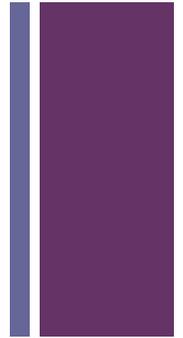


Commonly missed assets

- Tax refunds (when?)
- Alimony or support arrearages
- Security deposits
- Deposits in dormant savings accounts
- Pledged goods at pawnbrokers
- Personal injury or other legal claims (judicial estoppel)
- Cash value in whole life insurance policies
- Pension plans
- Burial plots
- Inherited real estate/heir property
- Cars being driven by someone else
- Voidable preferences (payments to creditors in past 90 days)



Exemption Choice



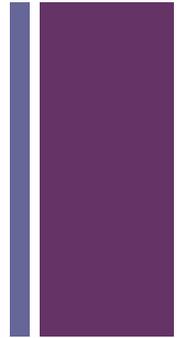
Generally, one of two schemes will apply:

- Exemptions available under § 522(d)

OR

- Exemptions available under state law
- If the state has “opted out,” then debtor must use state law exemptions
- If the state has not “opted out,” then debtor may choose exemptions under either § 522(d) or state law
 - In a joint case, both spouses must choose same exemption scheme

Which Exemptions Apply?



State law as to opt-out applies as follows:

- In most cases, controlling state law will be where debtor was domiciled for 730 days before filing
- If the debtor moved to a different state any time during the 730 days, look **instead** at where the debtor was domiciled for longest portion of the 180 days preceding the 730-day period
- Federal exemptions under § 522(d) apply if debtor ineligible for any state's exemptions

11 U.S.C. § 522(b)(3)(A)

Federal Bankruptcy Exemptions

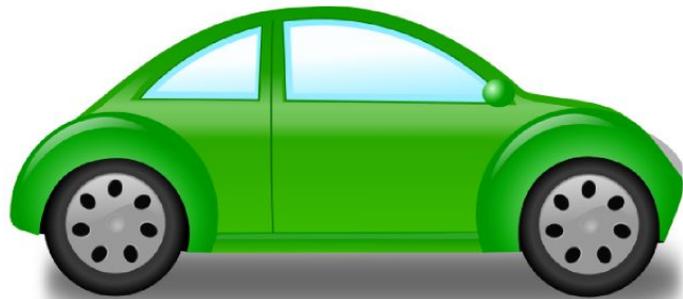
Examples of exemptions under § 522(d):

- Up to \$22,975 in real or personal property the Debtor uses as a residence;
 - Up to \$3,675 in value in one motor vehicle;
 - Up to \$12,250 in aggregate value, but no more than \$575 in any particular item, of household furnishings, goods, clothing, appliances, etc;
 - Wild card exemption: \$1,225 plus any unused amount of the homestead exemption, up to \$11,500.
-
- Amounts are doubled if married couple filing jointly

Calculating Exemptions

Exemptions only apply to **equity** in the property

Car loan balance: \$4,000
Equity: \$2,000



Car worth: \$6,000

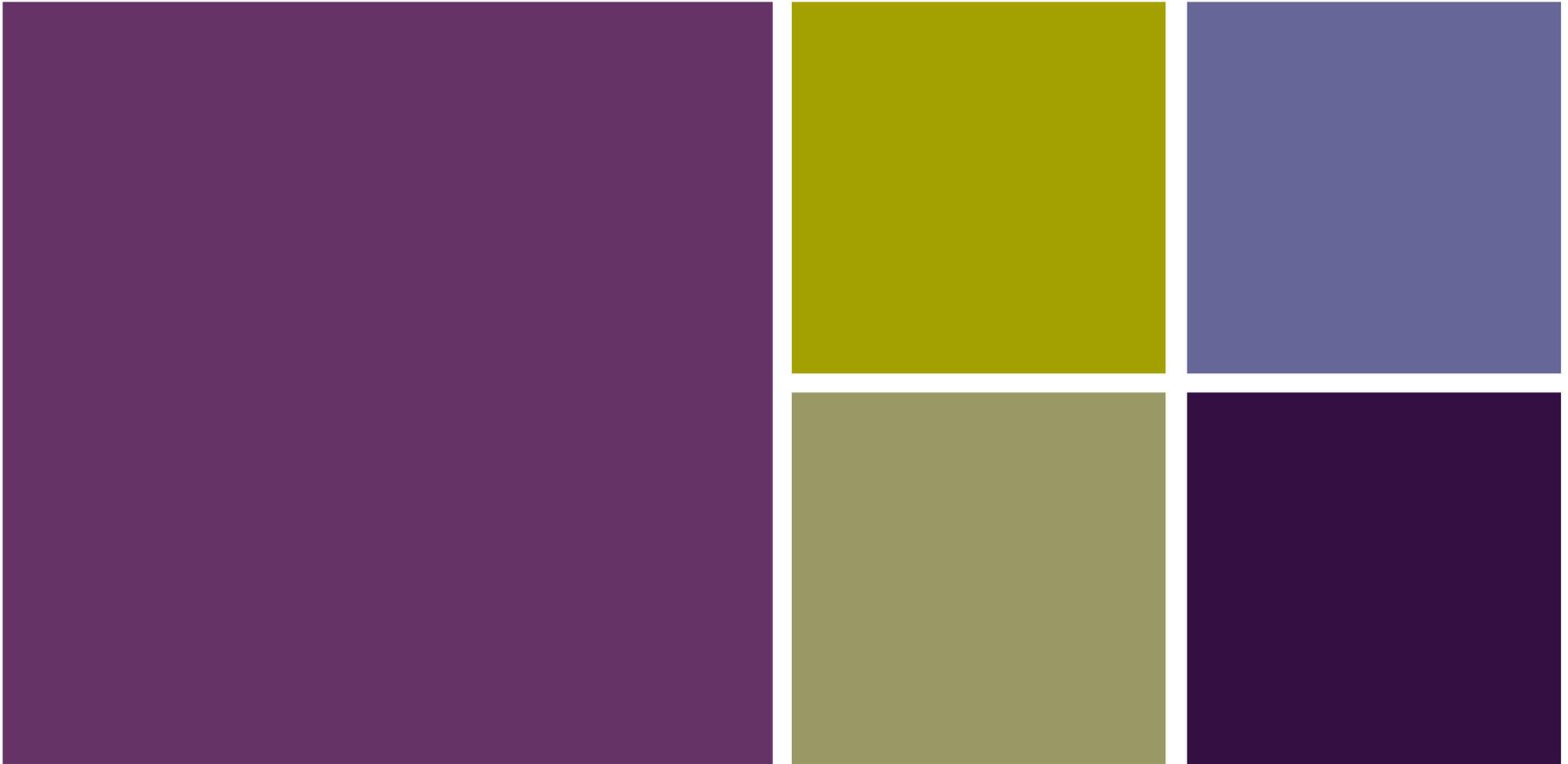


House worth: \$100,000

Equity: \$20,000

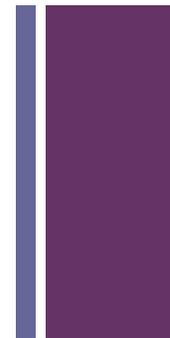
Mortgage balance: \$80,000

- A \$2,000 vehicle exemption and a \$20,000 real estate exemption would fully exempt this car and house.



The Automatic Stay

The Automatic Stay



Scope of the Stay

The Automatic Stay prohibits:

- Attempts to collect pre-petition debts
- Commencement or continuation of judicial or other proceedings to collect pre-petition debts (e.g., foreclosure, garnishment)
- Efforts to create, perfect or enforce liens on property of the estate or of the debtor, if relating to a pre-petition claim
- Efforts to take possession of or assume control of property of the estate (e.g., repossession of a car)
- Enforcement against the debtor or property of the estate of a pre-petition judgment
- Setoff of pre-petition debts

11 U.S.C. § 362(a)

Exceptions to Automatic Stay

Section 362(b) contains 27 exceptions to the stay, including:

- Criminal actions or proceedings
- Enforcement of domestic support obligations
- Enforcement of policy or regulatory powers
- Petition filed in violation of § 109(g) or prior court order
- *In Rem* Order in a prior case related to real property
- Residential tenant eviction if judgment for possession was entered prepetition (or based on endangerment of prop.)
- Repeat bankruptcy filings (within prior year)

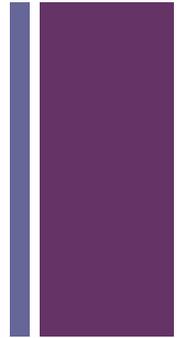
Motion for Relief from Stay

**COURT MAY TERMINATE, ANNUL, MODIFY, OR
CONDITION THE STAY**

- For cause, including lack of adequate protection
- Lack of equity and property not necessary for effective reorganization
- Burden of proof
 - Equity – burden is on party requesting relief
 - All other issues – burden is on party opposing relief

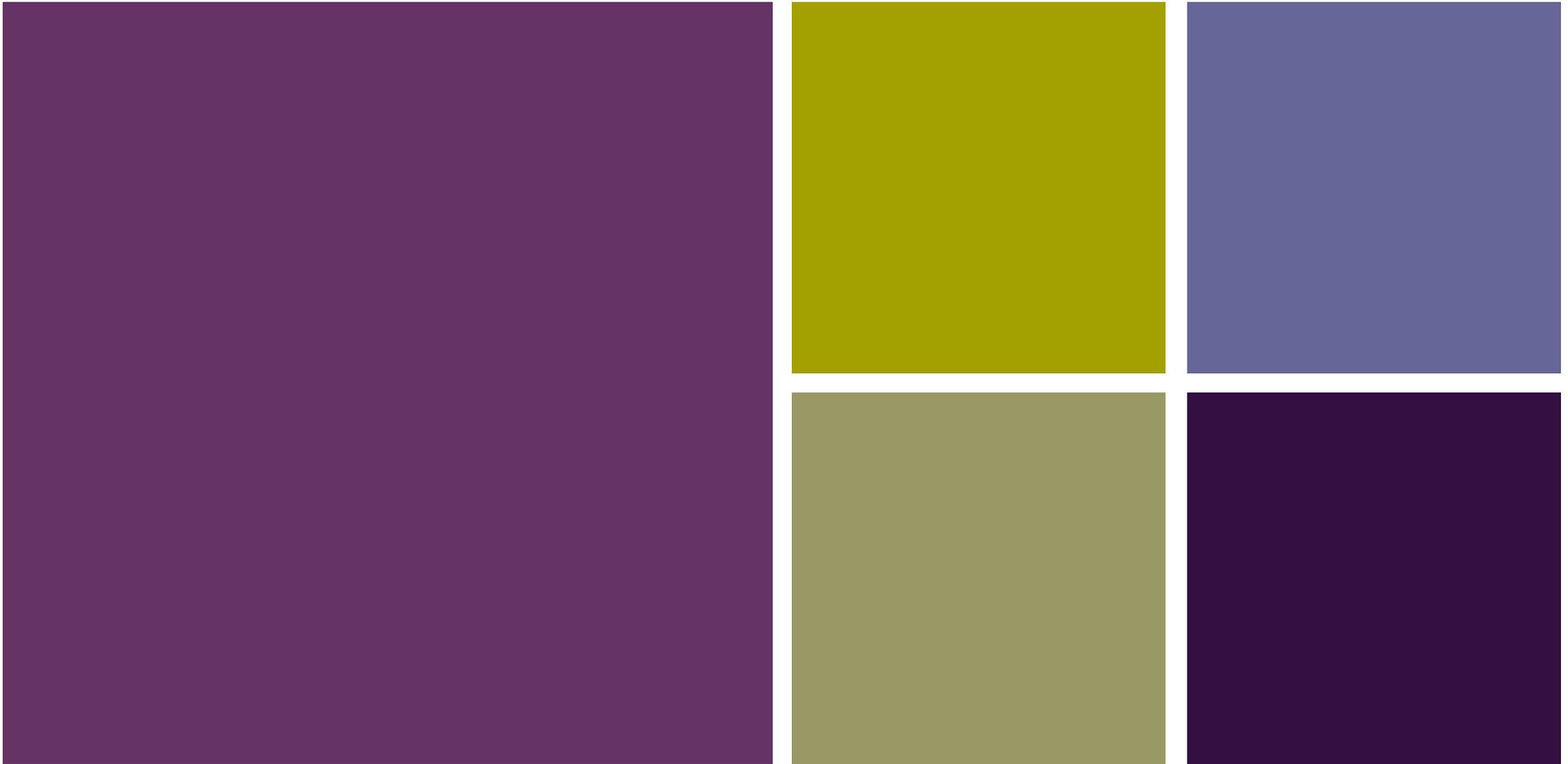
11 U.S.C. 362(d)

Benefits of the Stay: Utility Service



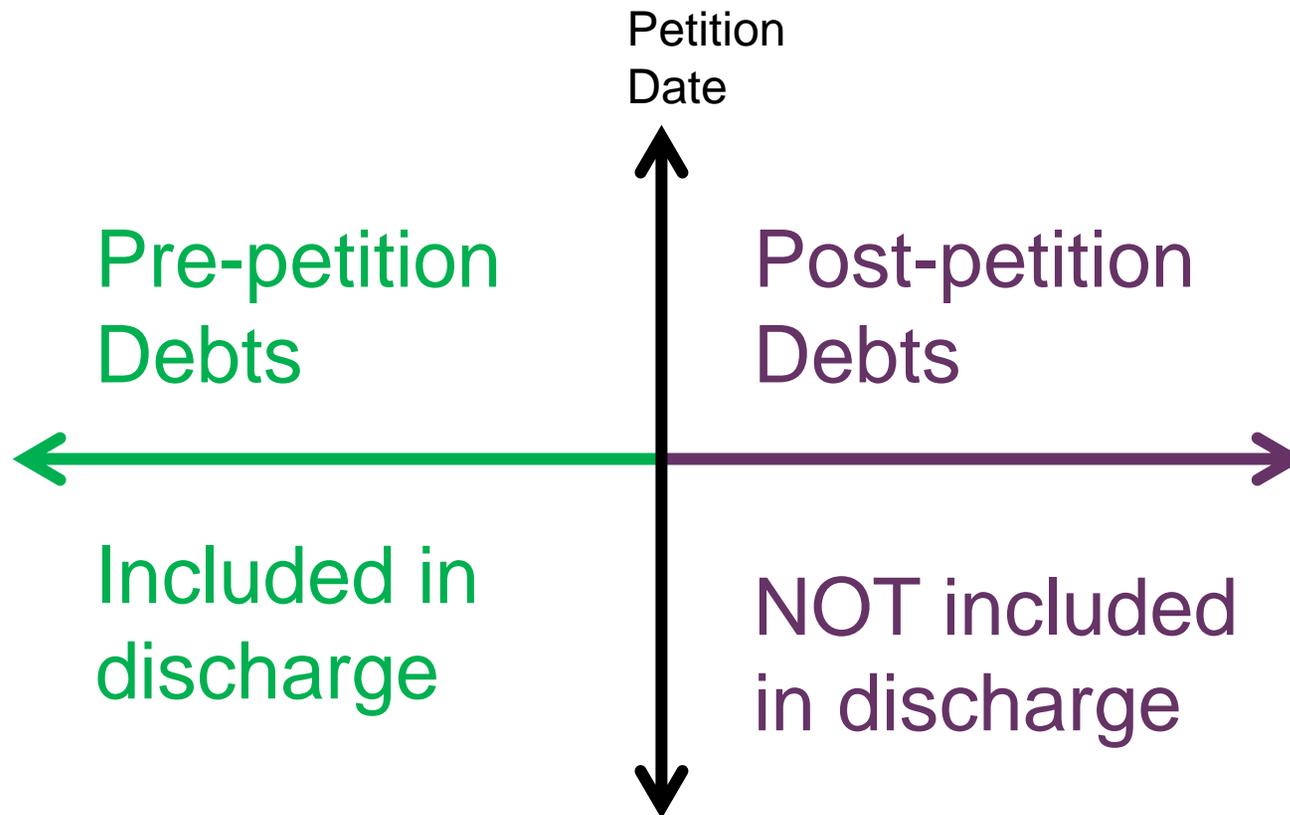
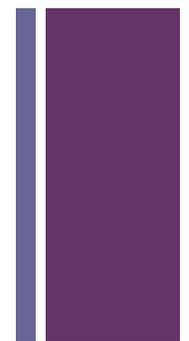
- Utility service may not be shut off
- If terminated prepetition, service should be restored
- Prepetition arrearage is dischargeable debt and utility may not refuse future service because of discharge of prepetition arrearage
- Utility may condition continued service on receipt within 20 days after the petition date of “adequate assurance” deposit
- Post-bankruptcy deposit is typically similar to deposit required for new customers (2x average monthly bill)

11 U.S.C. § 366



**Discharge and
Dischargeability**

The Fresh Start



Discharge of Debts

- Court enters a Discharge Order
 - In chapter 7, any time after 60 days after date first set for the meeting of creditors;
 - In chapter 13, upon plan completion.
- Operates as an injunction preventing creditors from attempting to collect discharged debts in the future as personal liability of debtor
- Violations of the discharge injunction may be punished by contempt

11 U.S.C. § 524(a)

Exceptions to the Discharge

Debts that are *not* dischargeable:

- Most taxes;
- Debts the debtor failed to list in the schedules (maybe);
- Domestic support obligations (child support and alimony);
- Most fines and penalties owed to government agencies;
- Student loans, unless the debtor can prove to the court that repaying them will be an “undue hardship;”
- Debts incurred by driving while intoxicated;
- Debts the debtor has formally agreed to repay by entering into a reaffirmation agreement.

11 U.S.C. § 523(a)

Exceptions to the Discharge

Debts *potentially* non-dischargeable if a timely adversary proceeding is filed:

- Debts incurred by fraud – 523(a)(2)
Presumption of fraud:
Luxury goods - \$650 within 90 days pre-petition
Cash advances - \$925 within 70 days pre-petition
- Fraud as fiduciary, embezzlement, larceny – 523(a)(4)
- Willful and malicious injury to person or property (applicable only in chapter 7 cases) - 523(a)(6)

11 U.S.C. § 523(c)(1); Bankruptcy Rule 4007(c)

Grounds for Denial of Discharge: ^{A12}

A party may object to the discharge within 60 days after the first scheduled meeting of creditors. Court can deny the discharge if Debtor has done any of the following (or other conduct in § 727):

- Transferred or concealed property with intent to hinder, delay, or defraud a creditor or trustee;
- Destroyed or concealed financial records;
- Made a false oath or account, presented or used a false claim, or withheld books and records from the trustee;
- Failed to explain satisfactorily the loss or deficiency of assets;
- Received a prior discharge in the too-recent past;
- Failed to complete an approved financial education course after filing the petition.

11 U.S.C. § 727(a).

Slide 27

A12

This is a new slide. I didn't want to list every single basis for denial of discharge, so I deleted and paraphrased a few.
Administrator, 11/13/2014

Questions?



Overview of Chapter 7

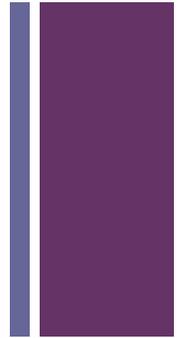
Eligibility to File Chapter 7



- Any individual who lives in the United States or has property or a business in the United States
- Debtor must obtain briefing from an approved credit counseling agency within 180 days before filing
- Under § 109(g), Debtor must not within the 180-day period prior to filing:
 - have had a prior case dismissed by the court for willful violation of court order or failure to prosecute prior case; or
 - have voluntarily dismissed a prior case after the filing of a motion for relief from the automatic stay.

11 U.S.C. § 109

Eligibility for Chapter 7 Discharge



- A debtor is disqualified from receiving a chapter 7 discharge if the debtor got a prior discharge:
 - under chapter 7 in a case filed within 8 years before the filing of this case; or
 - under chapter 13 in a case filed within 6 years before the filing of this case, unless:
 - unsecured claims were paid in full in the ch. 13
 - payments under the ch. 13 plan totaled at least 70% of allowed secured claims, court finds best effort and good faith.

11 U.S.C. § 727

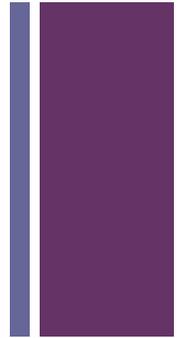
The Means Test

- Bankruptcy judge can dismiss chapter 7 case if filing is an abuse of bankruptcy system
- “Means test” creates a presumption that the filing was abusive if the debtor fails the means test
- Most debtors represented by pro bono attorneys pass the means test
 - consumers with household income below state **median family income** are protected by a “safe harbor” and not subject to the means test

11 U.S.C. § 707

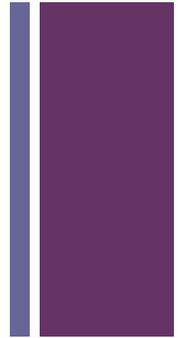
Chapter 7 Trustee

- After the case is filed, a chapter 7 trustee is appointed as the representative of the debtor's bankruptcy estate
- Selected from a panel of private trustees established by the U.S. Trustee
- Duties include:
 - examining debtor at meeting of creditors;
 - collecting any nonexempt property that can be sold;
 - distributing proceeds from sale of nonexempt property to creditors with valid claims; and
 - making a final accounting to the court.



Meeting of Creditors

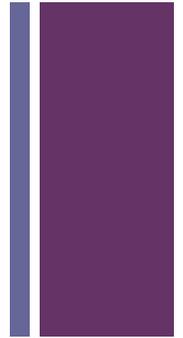
- Also known as the “section 341” meeting, as it is required by 11 U.S.C. § 341
- Scheduled about 30 days after the case is filed
- Chapter 7 trustee and creditors have the opportunity to examine the debtor under oath
- Creditors rarely attend the meeting
- Debtor must provide a copy of last year’s federal income tax return to the chapter 7 trustee no later than 7 days before the meeting



General Rule: Secured Creditors Stay Secured

- Unless a court orders otherwise, the lien (or security interest) survives the bankruptcy
- Thus, secured creditors will still be able to foreclose on a home or seize other property if consumer is in default
 - They may file a motion for relief from stay or wait for the discharge to be entered
- Personal liability on secured debts is wiped out (no deficiency after foreclosure, for example)

Avoiding Liens That Impair The Debtor's Exemptions



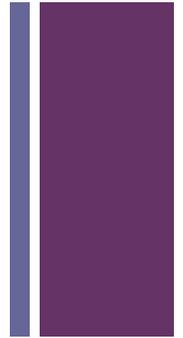
- Debtor may avoid a judgment lien that impairs the debtor's exemptions
- If a creditor has obtained a judgment lien prior to the bankruptcy filing, the debtor may file a motion to avoid (or remove) the lien to the extent the lien is attaching to value that would otherwise be exempt.
- Debtor may also avoid nonpossessory, nonpurchase-money security interests in certain exempt personal property listed in § 522(f) (such as household goods or furnishings)

11 USC § 522(f)

Redemption

- “An individual debtor may redeem tangible personal property intended for personal, family, or household use, from a lien. . . by paying the holder of such lien the amount of the allowed secured claim. . . .”
- Available only in chapter 7 cases
- Debtor may file a motion to redeem the asset, pay the creditor an amount equal to the value of the asset, and get rid of the lien.

11 USC § 722



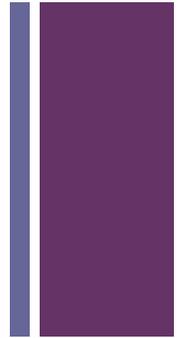
Reaffirmation

- As if bankruptcy never happened for this debt – the debt will not be discharged
- Debtor must decide whether to reaffirm
 - Car loans?
 - Mortgage loans? (usually not)
- Request reaffirmation agreement from creditor
- If attorney does not certify that the reaffirmation will not impose undue hardship, court will hold a hearing on that question.

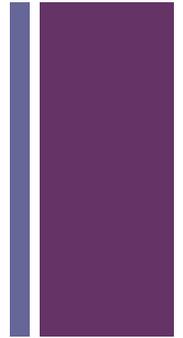
11 USC § 524(c)

Discharge

- Can be entered any time after 60 days after the first date scheduled for meeting of creditors
- Time from filing until entry of discharge is usually 3-4 months
- Debtor must certify that she has completed a financial management course by an approved provider after the petition is filed in order to receive discharge
- Discharge may be delayed if a court review of a reaffirmation agreement is pending



In Summary: When is Chapter 7 a Good Option?



- The debtor has significant dischargeable unsecured debt
- The debtor does not have nonexempt assets that the debtor wants to keep
- The debtor is not behind on debts secured by collateral the debtor wants to keep;
- The debtor's debt load has peaked.



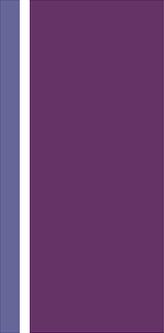
Overview of Chapter 13

How is Chapter 13 Different?



- Instead of getting paid from sale of non-exempt assets, creditors get paid from the debtor's future income – through the chapter 13 plan
- Debtor may keep nonexempt assets
- The chapter 13 plan gives the debtor an opportunity to cure arrearages on secured debts – to save a home or car
- Generally, no discharge until the plan is completed

Chapter 13 Eligibility



- Chapter 13 is available to “individuals with regular income” who live in the United States or have a place of business or property in the United States.
 - Regular income includes government benefits, child support
- Debt limits to file chapter 13:
 - \$383,175 in unsecured debts;
 - \$1,149,525 in secured debts (amounts are adjusted for inflation every three years)
- Debtor must obtain briefing from an approved credit counseling agency within 180 days before filing (same as chapter 7)
- No dismissals described in § 109(g) in past 180 days

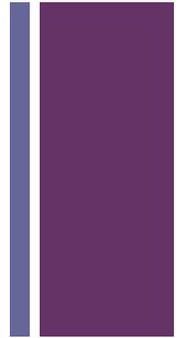
Eligibility for Ch. 13 Discharge



- A debtor is disqualified from receiving a chapter 13 discharge if the debtor got a prior discharge:
 - under chapter 7, 11, or 12 in a case filed within 4 years before the filing of this case; or
 - under chapter 13 in a case filed within 2 years before the filing of this case.
- Unlike chapter 7, there may still be a reason to file under chapter 13 even if not eligible for discharge... Debtor may use the plan to cure and reinstate secured claims.

11 USC § 1328(f)

Chapter 13 Trustee

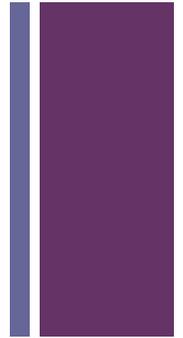


- Has more to do than a chapter 7 trustee
- Must review the debtor's chapter 13 plan to ensure that it is feasible and complies with the law, object to confirmation if it does not
- If the plan is confirmed, chapter 13 trustee collects payments from the debtor and distributes money to creditors who have filed claims
- Both debtor and chapter 13 trustee may object to claims

Chapter 13 Plan

- Plan sets out how much the debtor pays each month, how much each class of creditors will get, and the treatment of secured claims
- Plan must propose to pay priority claims in full, such as tax debts and domestic support obligations
- Plan will last at least 3 years, and up to 5 years
- Debtor must make first chapter 13 payment to the trustee within 30 days after filing

11 USC § 1325



Plan Confirmation Tests



- **Best Interest of Creditors:** Are unsecured creditors getting at least as much as they would get if the debtor filed chapter 7 (and the trustee liquidated any nonexempt assets)?
- **Good Faith:** Is the plan proposed in good faith?
- **Ability to Pay:** Is the debtor paying all disposable income into the plan (if unsecured creditors are getting paid less than 100%)?
 - Below median: consider reasonably necessary expenses
 - Above median: consider expenses provided by the means test
- **Feasibility:** Can the debtor afford the plan payment?

11 USC § 1325

Secured Claims

Treatment of secured claims:

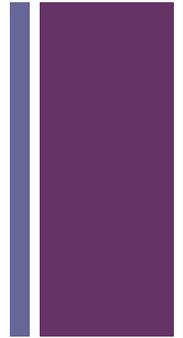
- If debtor **does not wish to keep** the collateral, plan may provide for its surrender;
- If debtor **wishes to keep** the collateral, the plan may be confirmed if:
 - Secured creditor accepts the plan, OR
 - Plan provides for the creditor to retain its lien and receive the present value of its allowed secured claim during the plan

11 USC § 1325(a)(5)

Modifying Secured Claims

Allowed Secured Claim
\$6,000

Allowed
Unsecured Claim
\$4,000

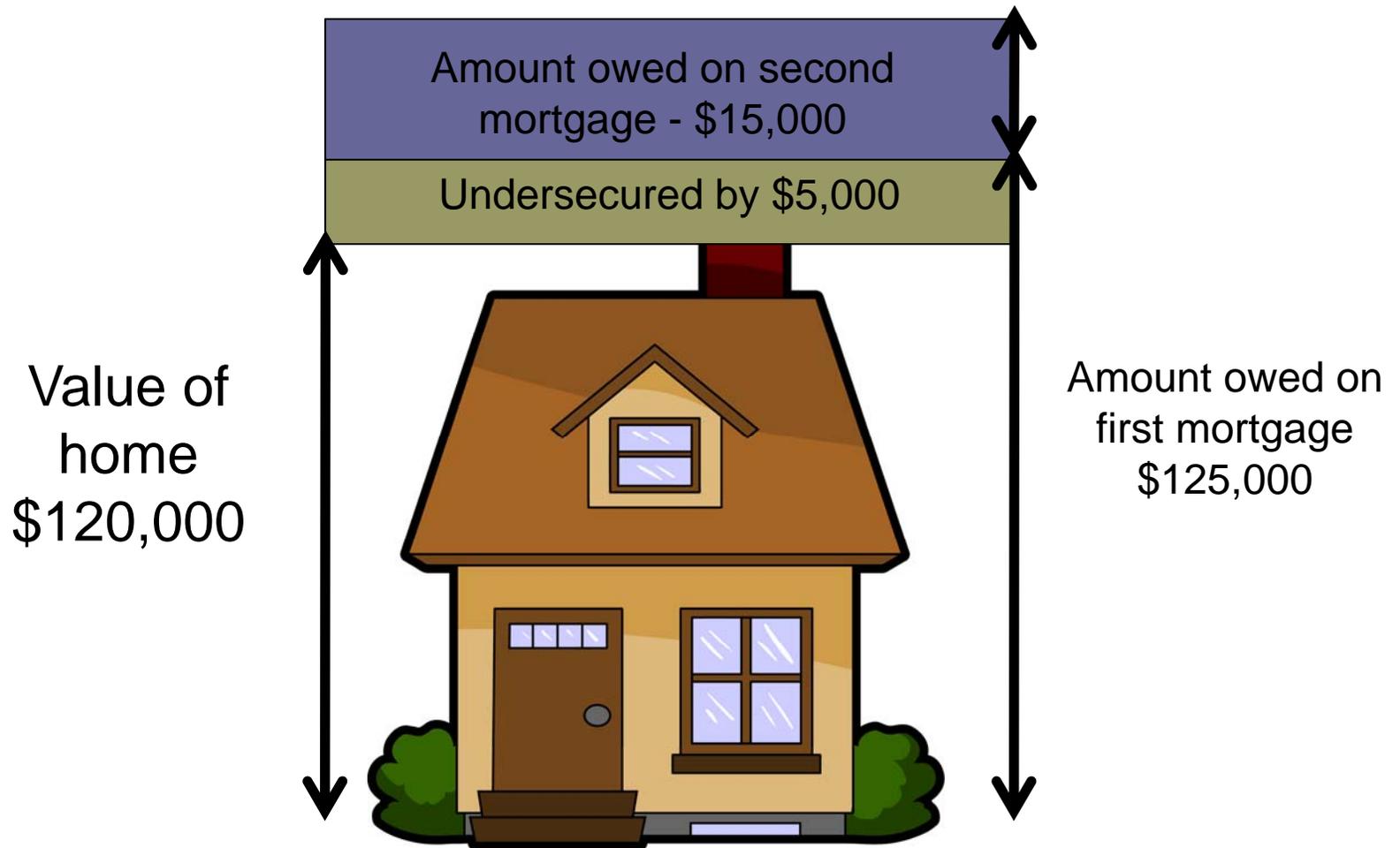


Mortgage Secured by Principal Residence: Cure and Maintain

- For most mortgages secured by the debtor's principal residence, modification will not be an option
 - Except: stripping off totally unsecured junior mortgages
- Still, chapter 13 provides great benefits:
 - Stop foreclosure (automatic stay, immediate upon filing)
 - Cure arrearage through the chapter 13 plan
 - Maintain ongoing payments
- **Important:** Debtor must be able to afford to make regular mortgage payments going forward, plus the chapter 13 plan payment!
 - (Alternative: Seek a loan modification while bankruptcy is pending)

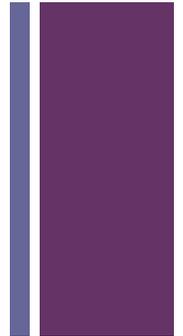
11 USC § 1322(b)(5)

Underwater Junior Mortgages



Chapter 13 Discharge

- Will be entered after plan payments are completed
- Debtor must complete a financial management course by an approved provider before final plan payment
- If debtor cannot complete the chapter 13 plan, consider:
 - Modification of the plan (by motion)
 - Hardship discharge
 - Conversion to chapter 7
 - Dismissal of the case (voluntary or by court) without discharge

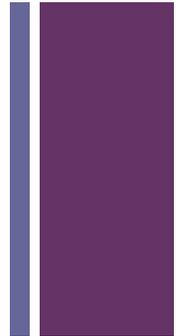


Counseling the Consumer Debtor

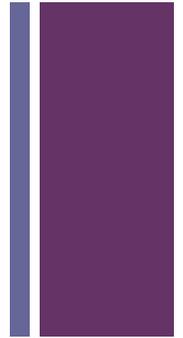
Why Bankruptcy?

What Bankruptcy Can Do

- Eliminate the legal obligation to pay most debts
- Stop foreclosure on a home and allow the debtor an opportunity to cure a default
- Prevent repossession of an automobile or other personal property
- Stop garnishment of wages or a bank account (and get back money taken in the 90 days before filing)
- Prevent termination of utility service or restore service after a shutoff
- Prevent government agencies from collecting Social Security overpayments, unless the overpayment was obtained by fraud
- Lower the monthly payments on some secured debts such as car loans

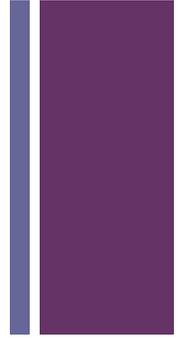


What Bankruptcy Cannot Do



- Force a modification of a mortgage secured by the debtor's principal residence. Although the debtor can cure a default in a chapter 13 plan, the debtor will have to make the regular post-petition payments on time.
- Discharge certain debts, such as:
 - child support and alimony
 - most student loans
 - court restitution orders and criminal fines
 - most taxes
- Discharge the liability of a cosigner who doesn't file bankruptcy
- Discharge debts that are incurred after bankruptcy has been filed

Counseling the Judgment-Proof Debtor



- Social security benefits are exempt from garnishment (other than for child support, alimony, tax debts, student loans, and public benefits overpayments)
 - If client's only income is social security, even if the creditor gets a judgment, will not be able to garnish the client's income
- Bankruptcy may provide peace of mind; or you could recommend sending the creditor a "stop contact" letter under the FDCPA, 15 U.S.C. § 1692c(c)
- If client is likely to have other (garnishable) income in the future, or may lose assets, bankruptcy may be worthwhile
 - If the debtor may incur more debt, waiting to file may be the better choice

Pros and Cons of Bankruptcy

❑ Advantages of Bankruptcy

- Fresh start
- Automatic stay
- Deal with secured debts
- Affordable repayment plan
- Raise claims and defenses against creditors

❑ Disadvantages of Bankruptcy

- Loss of certain property
- Impact on credit rating
- Moral obligation
- Discrimination

Alternatives to Bankruptcy

- **Credit Counseling**
- **Debt Management Plan**
 - Debtor sends monthly payment, distributed each month among creditors
 - Usually no cancellation of principal
 - Creditors may waive some fees
 - If plan is not affordable and debtor fails to complete it, all debts revert to original contract terms

Alternatives to Bankruptcy

- **Debt Settlement** (*beware!)
 - For-profit businesses
 - Collect money from the consumer, but do not send regular payments to the creditors; hold money until a debt can be settled
 - Often make false or unrealistic claims about their ability to settle debts
 - If debts are settled for less than the amount owed, consumer may owe taxes based on cancellation of debt income (not so if discharged in bankruptcy)

Alternatives to Bankruptcy

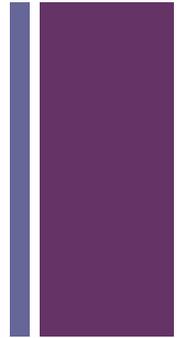
Debt Consolidation Loan

- Usually not a good idea to use a mortgage to pay off credit card and other unsecured debt

Reverse Mortgage

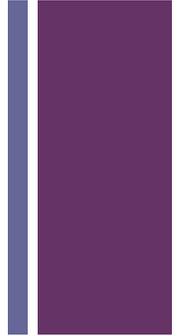
- Borrower must be at least 62 years old
- Loan proceeds taken as a lump sum, annuity, or line of credit
- No required monthly payment of principal or interest; loan balance increases over time
- High closing costs
- May help some homeowners with low income and substantial home equity

Alternatives – Saving a Home



- Does client qualify for:
 - **Repayment plan:** client can afford regular payment plus extra to catch up
 - **Forbearance agreement:** client has no permanent income (unemployed, medical hardship)
 - Homeowner makes a low payment or no payment for limited time (3-12 months) while looking for work
 - Full arrearage is due at the end (try for a mod)
 - **Loan modification:** client has permanent income at a reduced level – needs permanent reduction in payment
 - **Short sale or deed in lieu of foreclosure:** client sells the house for less than balance owed or transfers to creditor

Advice for Homeowners



- Work with a HUD-certified housing counselor
 - Their services are free
 - Knowledgeable about existing loan mod programs
 - Help the client gather docs and create an accurate budget
- Never pay a company to help you apply for a loan modification
 - Usually a scam; free help is available!
- New regulations govern the process, see 12 C.F.R. § 1024.41
- If foreclosure is scheduled, have a back up plan
 - Chapter 13 bankruptcy (file before the sale date)

Questions?

Using Bankruptcy to Help Older Consumers Overwhelmed by Debt

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Next Series of Webinars



- New in May! May 28th – Part II: Litigating on Behalf of Reverse Mortgage Surviving Spouses
- Email us your ideas for speakers and topics to trainings@nclc.org



Just a Reminder

- Please fill out the evaluation when you sign-out
- I will email you the PowerPoint and recording in a few days
- Thank you to our speakers!



Since 1969, the nonprofit **National Consumer Law Center® (NCLC®)** has worked for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training. www.nclc.org