

## **PRO BONO CHAPTER 7 BANKRUPTCY FOR SENIORS AND THE DISABLED**

Materials by:  
Michael Fuller, Esq.

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### **PANELISTS**

**Michael Fuller, Esq.**  
OlsenDaines  
Portland, Oregon

**Shatorree Bates, Esq.**  
Bates Law Firm, LLC  
Atlanta, Georgia

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# PRESENTATION OUTLINE

## Introduction

### I. Non-Bankruptcy Options

- A. Tax Consequences of Settlement Offers
- B. Debt Management Companies
- C. “Represented” Debtors and the Fair Debt Collection Practices Act
- D. Reverse Mortgages
- E. IRS Offers in Compromise

### II. Obtaining a Chapter 7 Filing Fee Waiver

- A. Relevant Law
- B. Household Income Limit

### III. Obtaining a Credit Counseling Class Waiver

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### V. Bankruptcy Petition Basics for Seniors and the Disabled

- A. Form 1. Voluntary Petition
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- C. Schedules
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- E. Form 22A. Means Test

### Appendix: Sample Forms and Letters

- A. Sample Representation Letter
- B. Relevant IRS forms
- C. Form B 3B
- D. DHHS Poverty Guidelines Table 2010
- E. Sample Motion to Appoint Next Friend

## ABOUT THE PANELISTS

**Michael Fuller** practices consumer rights litigation and bankruptcy law at OlsenDaines in Portland, Oregon. He joined the Oregon State Bar in 2009 and regularly files pro bono chapter 7 bankruptcies.

**Shatorree Bates** practices bankruptcy, business and family law at Bates Law Firm, LLC in Atlanta, Georgia and was admitted to the State Bar of Georgia in 2008. Her bankruptcy clients include consumer and small business debtors, creditors and trustees.

## **PROGRAM MATERIALS**

### **I. Non-Bankruptcy Options**

The first step in providing advice to most seniors and disabled clients is determining whether chapter 7 bankruptcy will benefit them. Many of these clients are judgment-proof and do not need to file.

#### **A. Tax Consequences of Settlement Offers**

Settling debts may be appropriate for debtors with non-exempt assets and a small amount of creditors or debt. However, adverse tax consequences should also be considered when negotiating settlements.

##### **1. IRC §108 and Form 982 – Forgiveness or Cancellation of Debt Income**

The IRS generally counts forgiven debt as taxable income. Creditors will often provide debtors with a Form 1099-C as part of a settlement offer where less than the full amount owed is accepted.

###### **i. Foreclosure Exception**

An exception exists for forgiveness of debt resulting from foreclosure of a qualified principal residence. The foreclosure must occur before Dec. 31, 2013, and the debt must be less than \$1,000,000 (\$2,000,000 if married).

###### **ii. Insolvency Exception**

Insolvent debtors whose total debts are larger than the value of all their assets also qualify for the exception. Note that exempt assets count in the calculation of solvency, including retirement accounts.

###### **iii. Bankruptcy Exception**

Debt forgiven or canceled due to a bankruptcy filing is also exempt from taxable income.

#### **B. Debt Management Companies**

Debt management companies provide little or no benefit to most debtors. Occasionally a debtor with only one or two creditors may benefit by hiring outside professionals to negotiate settlements. However, debtors may negotiate the settlements themselves and avoid potential up-front fees and fly-by-night con artists posing as legitimate companies.

#### **C. “Represented” Debtors and the Fair Debt Collection Practices Act (“FDCPA”)**

The FDCPA (codified at 15 USC §1692) provides protection to debtors represented by counsel. Many seniors and disabled debtors who do not want to file bankruptcy or are not good candidates for bankruptcy at a given point in time may still benefit by forming an attorney-client relationship.

After a debtor tells a debt collector they are represented by an attorney, the debt collector can no longer contact the debtor or third parties. (15 USC §1692b(6); §1692c(a)(2))

During the period of representation, debtor's counsel must respond to the debt collector within a reasonable amount of time. *See* Appendix A: Sample Representation Letter.

#### **D. Reverse Mortgages**

A debtor who is judgment-proof but-for non-exempt equity in their home may seek to obtain a reverse mortgage and avoid bankruptcy.

##### **1. HUD Home Equity Conversion Mortgages**

HUD's reverse mortgage program generally requires a homeowner be 62 or older and live in a single

family residence or up to four unit home (condos and manufactured homes sometimes qualify). Repayment of the loan is required upon homeowner's death, sale of the home, or if the homeowner fails to occupy the home for more than 12 months. HECM Counselors are available at (800) 569-4287.

### **E. IRS Offers in Compromise (“OIC”)**

Clients whose primary debts are federal income taxes may seek to avoid bankruptcy and resolve their tax debt through an OIC. The OIC form requires debtors to select their reason for applying, either because there is doubt as to the collectability of the taxes, or to serve the interests of effective tax administration. A lump sum offer of 20% of the total offer must be attached to the OIC. The debtor may elect to pay the remaining payments in five installments. *See* Appendix B: IRS Form 656.

## **II. Obtaining a Chapter 7 Filing Fee Waiver**

### **A. Relevant Law**

28 USC §1930(f)(1-3) governs the waiver of bankruptcy filing fees. The debtor must attach Official Form 3B to their petition upon filing. *See* Appendix C: Form B 3B.

### **B. Household Income Limit**

The debtor's household income on Schedule I Line 16 must be less than 150% of the income official poverty line. *See* Appendix D: DHHS Poverty Guidelines Table 2010.

For the purposes of determining household income for the fee waiver, debtors should exclude non-cash govt assistance (ie, food stamps, housing subsidies, etc.). The 2010 poverty guideline for a household of two is \$14,570, or, multiplied by 150% and divided by 12, \$1,821/mo.

To qualify for the full fee waiver, the debtor must be unable to pay the fee in installments. This may be shown by providing a negative net monthly income on Schedules I and J. Courts may use a totality of the circumstances standard to determine whether a debtor may waive other filing fees imposed under 28 USC § 1930(b) and (c).

## **III. Obtaining a Credit Counseling Class Waiver**

Generally, a debtor must complete a briefing from an approved credit counseling agency within the 180 days prior to filing, pursuant to 11 USC §109(h). The class may now be completed on the day the petition is filed, pursuant to the Bankruptcy Technical Corrections Act of 2010.

Seniors or disabled debtors should contact an approved agency and request a fee waiver. A debtor may provide prepared Schedules I and J to show financial hardship. Agencies are required to provide the class regardless of ability to pay the fee, pursuant to 11 USC §111(d)(1)(E).

If a debtor is unable to obtain the class certificate free of charge, consider submitting a certification to the Court in lieu of the class certificate. The certification should describe exigent circumstances that merit waiver of the class requirement, and state that the debtor requested the class from an approved agency and was unable to obtain the certificate within seven days, pursuant to 11 USC §109(h)(3)(A).

For debtors with mental or physical impairments that do not allow them to complete the class, consider a waiver under 11 USC §109(h)(4).

#### **IV. Motion for Appointment of Next Friend**

Seniors and disabled debtors unable to attend the meeting of creditors due to mental incapacity may appoint a “next friend” under Federal Rule of Bankruptcy Procedure 1004.1. *See* Appendix E: Sample Motion to Appoint Next Friend.

#### **V. Bankruptcy Petition Basics for Seniors and the Disabled**

##### **A. Form 1. Voluntary Petition**

###### **1. Consumer vs. Business Debts and the Means Test**

Debtors with primarily business debts are not subject to the means test or dismissal under 11 USC §707(b). Seniors or disabled debtors who own rental properties are most likely to have primarily business debts. In States with anti-deficiency statutes prohibiting collection of certain mortgages foreclosed by trust deed, counsel should note whether filing before foreclosure would affect the consumer debt versus business debt ratio.

###### **2. Prior Bankruptcies and Discharge**

Pursuant to 11 USC §727(a)(8) and (9), debtors cannot receive a discharge of their debts in chapter 7 bankruptcy if they received a discharge in chapter 7 within the past eight years, or a discharge in a chapter 13 within the past six years.

11 USC §727(a)(9)(A) provides an exception to debtors who received a chapter 13 discharge within the past six years if the debtors paid 100% of their unsecured creditors, or if debtors paid 70% of unsecured creditors, and proposed their plan in good faith and made their best efforts to repay creditors.

###### **3. Venue State**

Pursuant to 28 USC §1408, a petition should be filed in the District Court for the District in which the debtor resided (or maintained domicile or principle place of business) for the majority of the 180 day period prior to filing.

##### **B. Form 8. Statement of Intention**

Pursuant to 11 USC §521(a)(2)(A), debtors must file a statement of intention, stating whether they intend to reaffirm, redeem, or surrender debts secured by property of the estate.

Prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), debtors in the Second, Third, Fourth, Ninth, and Tenth Circuits could retain secured collateral without entering reaffirmation agreements. After BAPCPA, debtors in all Circuits risk repossession under an ipso facto clause unless they state their intent to reaffirm and enter a reaffirmation agreement within 30 days after their meeting of creditors.

Debtors may also elect to redeem property by paying the secured creditor the value of the collateral.

The BAPCPA amendments do not require debtors to reaffirm real property, and there is little advantage to entering reaffirmation agreements on mortgages unless the lender offers significantly better loan terms.

## **C. Schedules**

### **1. Sch. C Exemptions**

To avoid forum shopping, the Code designates which States' exemptions a debtor may use on Schedule C. Some State exemption laws allow debtors to use the federal exemptions, which are found in the Code at 11 USC §522(d).

Pursuant to 11 USC §522(b)(3)(A), debtors shall use the exemptions of the State that has been their domicile for the two year period prior to filing. If debtors maintained domicile in more than one State in the two years prior to filing, they must use the exemptions for the State in which they maintained domicile for the majority of the 180 days prior to the two year period.

### **2. Sch. E Priority Debts**

Priority debts are enumerated at 11 USC §507(a), and should be listed on the petition at Schedule E. If there are non-exempt assets of the estate, the panel trustee shall pay priority debts in full before distributing any funds to general unsecured creditors.

Pursuant to 11 USC §507(a)(8), taxes are priority (and non-dischargeable pursuant to 11 USC §523(a)(1)(A)) unless they have been assessed and owed for at least three years, and returns were filed by the debtor at least years years prior to filing a bankruptcy petition.

The above-referenced time periods toll during OIC's and pending bankruptcies. An experienced bankruptcy attorney may be required to properly analyze a debtor's tax transcripts in complex cases.

## **D. Form 7. Statement of Financial Affairs**

The Statement of Financial Affairs ("SOFA") is a list of 25 questions debtors are required to answer. Most of the questions will not pertain to seniors and disabled debtors.

### **1. SOFA #2: List unemployment, disability, pension, social security, etc.**

SOFA #2 asks for income other than from employment or operation of a business. Depending on local practice in each District, debtors may want to include cash and non-cash benefits, including rent assistance, food stamps, unemployment, disability, pension, social security, and other government benefits.

### **2. SOFA #3: Watch for Preferences**

Unsophisticated debtors often believe paying off family and friends prior to filing bankruptcy will "keep them out of it." SOFA #3 requires debtors list all payments to creditors who are "insiders" made within the year prior to filing.

Payments listed on SOFA #3 may be reversed by the panel trustee. Waiting to file until payments to insiders are over a year old may benefit the "insider" creditor and make life easier on the debtor.

### **3. SOFA #9: Should be Blank**

A pro bono case should not list any payments on SOFA #9.

### **4. SOFA #10: Transfers and Fraudulent Conveyances**

All transfers outside the ordinary course of business of the debtor within two years prior to the filing date must be listed on SOFA #4. The panel trustee may reverse transfers within the two year period pursuant to 11 USC §547, if the debtor's intent was to defraud creditors, or if the debtor received less

than fair market value in exchange for the transfer.

11 USC §544(b) allows the panel trustee to avoid transfers that any unsecured creditor may avoid under State law. The Uniform Fraudulent Transfer Act (“UFTA”) generally imposes a four year statute of limitations on actions to reverse fraudulent transfers. Be sure to check your State's codification of the UFTA and ensure your client has not transferred property that may be reversed by the trustee under §544(b) or §547.

#### **E. Form 22A. Means Test**

11 USC §707 explains the requirements of the means test, which will not be covered, as most seniors and disabled chapter 7 debtors earn below their state's median average income.

For below-median debtors, average all household income for the six month period prior to the month the petition is filed and enter the numbers on Form 22A. The means test does not count social security benefits. Districts vary as to whether unemployment must be counted.

Debtors with primarily business debt need not complete the means test.