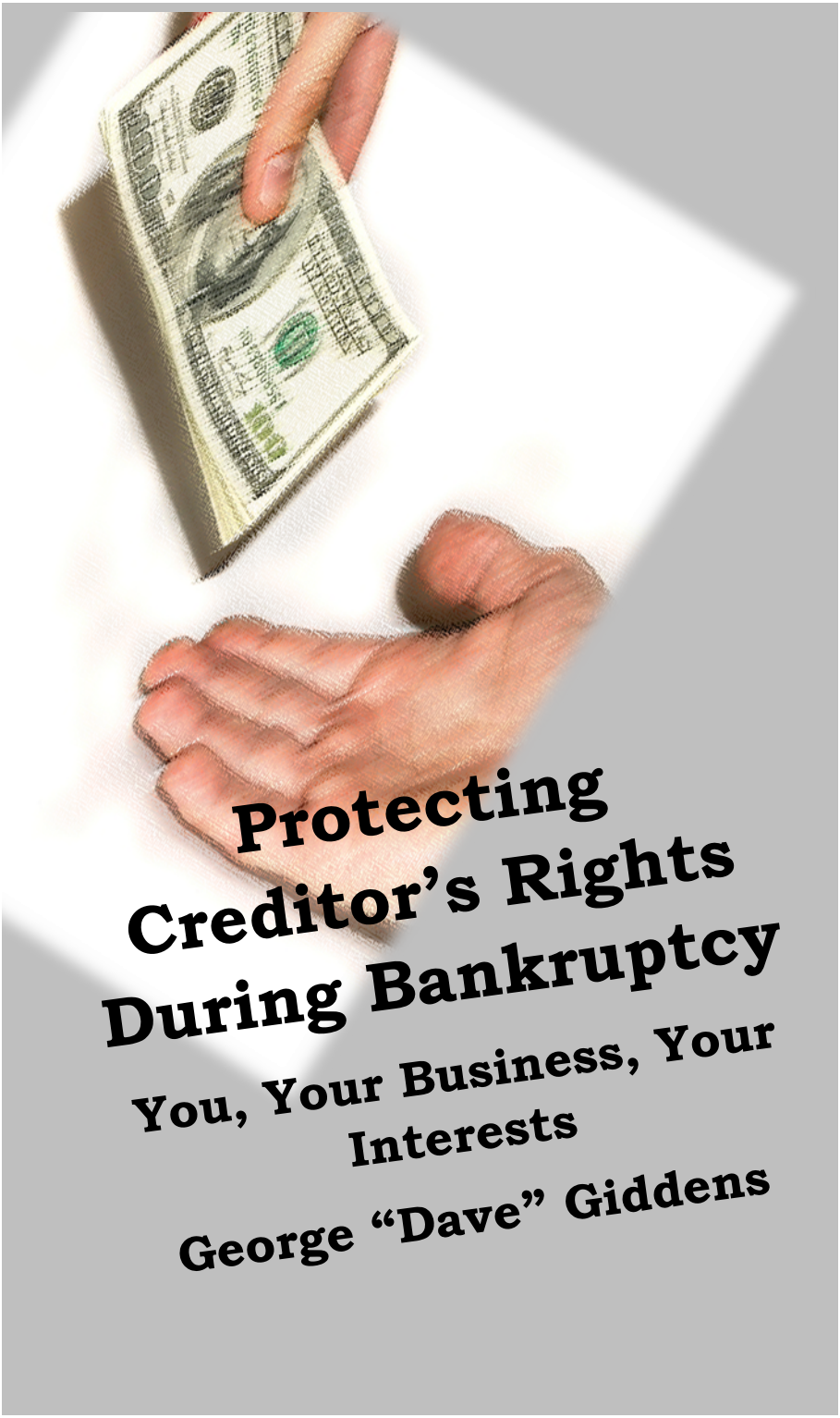

Protecting Creditor's Rights During Bankruptcy

You, Your Business, Your Interests

George "Dave" Giddens

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About the Author

George "Dave" Giddens

Dave Giddens has spent more than 30 years in Bankruptcy law.

An attorney since 1983, Mr. Giddens has ample experience representing both creditors and debtors in bankruptcy cases. He and his firm possess the insight of knowing and understanding a debtor's vulnerabilities and needs, and how they and their legal counsel will negotiate to acquire the best outcome for them. However, as it is not generally the best outcome for you, the creditor, the Giddens legal team---possessing knowledge regarding both sides of the bankruptcy coin---can and will respectfully but assertively represent you to achieve the best possible outcome for *you.*

Honors and Recognitions

Mr. Giddens was rated 'Best of the Bar in Bankruptcy' in 2011 by *New Mexico Business Weekly.* Other recognitions include being named a Southwest Super Lawyer in 2009, 2012, 2013, 2014, and 2015; a Top Rated Lawyer for Corporate Restructuring and Bankruptcy in 2013; Best of the Bar/Bankruptcy in 2011; and Best Lawyers in America 2014 and 2015. Dave has also maintained his Martindale Hubbell AV Preeminent rating since 2004.

Table of Contents

Case Assessment And Creditor Rights

Creditor's rights are the laws to protect the entitlement of creditors/lenders to collect the money they are rightfully owed.

Before recommending a course of action, when a bankruptcy is filed, the creditor's lawyer will evaluate the specifics unique to the debtor's bankruptcy and their debt to you (as well as others). Pre-bankruptcy creditors have the right to one or all of the following:

- Put a lien on a debtor's property or effect a forced sale of the property and seize it.
- Effect a garnishment of the debtor's wages to recover the amount of the debt.
- Seize assets acquired by the debtor including filing lawsuits (against individuals and/or businesses).
- Foreclose homes or other real estate if the debtor defaults on payment
- Recover possession acquired through secured loans, such as vehicles, if the purchaser defaults on payment

The ultimate success or failure of collection efforts almost always depends on the quality of the written agreement between the creditor/lender and the debtor.

At the first hint of financial distress in your debtor/borrower you should have legal counsel review your documents to ensure that your interests are properly protected. After a bankruptcy is filed, it is usually too late to fix your documentation.

Important Considerations

Prior to engaging the service of counsel, creditors need to consider the particulars of the debt, such as how much is at stake and what kind of claim the creditor has. A secured claim is more likely collectable than an unsecured claim. In the event of a bankruptcy, subject to the automatic stay, a secured creditor can enforce its security interest against the assets of the debtor. Unsecured creditors are required to compete for a distribution on liquidation. In addition, the type of bankruptcy will define the creditor's rights and define the complexity of the bankruptcy

A measured review and comprehensive discussion with legal counsel will determine if the creditor should devote the time, effort, and financial resources trying to recover in a bankruptcy case.

Timing is Everything

When you receive a notice of bankruptcy relating to one of your customers, prompt action is critical as bankruptcy timelines are very brief and deadlines are strictly enforced.

The creditor's attorney will first determine all deadlines that are applicable to the case to ensure that all creditor's legal actions are undertaken by due dates. Deadlines will vary between the types of bankruptcy and will include a Proof of Claim deadline; plan exclusivity period expiration date, if applicable; deadlines for filing objections to discharge; deadlines to object to exemptions; and *many* more.

Bankruptcy cases are dynamic, not static

On a timely basis, the creditor's attorney will consult with the client regarding the current status of the case, as well as keep the client abreast of tactical opportunities and options as they become available.

For example, the bankruptcy may be dismissed due to the debtor's failure to comply with Code requirements, in which case creditors are free to pursue collection of their loan. A case may also change in classification, such as from a "no asset" case to an "asset" case if assets are uncovered from which a debt can be paid.

Once the creditor decides that there is enough at stake to pursue collection of the debt in the bankruptcy case, the key to success is in being proactive---there are plenty of tools available for the well-documented creditor to recover much of what is owed to them.

Chapter 1

The Four Main Types of Bankruptcy

Chapter 7 Bankruptcy

Chapter 7 is known as “straight” bankruptcy or “liquidation.” It is the most common option for individuals or consumers and a trustee is appointed to administer the estate which consists of all property owned by the Debtor at the time the bankruptcy is filed.

Any non-exempt property can be sold by the trustee to pay off the debtor’s creditors. Chapter 7 is designed for debtors in financial difficulty who cannot repay their debts.

If you want to keep property like a home or a car and are behind on payments, a Chapter 7 case may not be the right choice for you.

Why? This type of bankruptcy does not eliminate the right of mortgage holders or car loan creditors to take your property to cover your debt.

Most Chapter 7 cases take about four to five months to complete. The debtor usually gets his or her discharge within two to three months after the meeting with the trustee and creditors.

Chapter 13 Bankruptcy

Chapter 13 is a type of "reorganization" used by individuals to pay all or a portion of their debts over a period of years using their current income.

As the debtor, you can usually keep your property, but must continue to earn wages or have a source of regular income.

If your income is above the median family income in the state of New Mexico, you may be required to file under Chapter 13.

Higher income consumers have to fill out a "means test" form requiring detailed information about their income and expenses.

If that form indicates, based on standards in the law, that you have a certain amount left over that could be paid to unsecured creditors, the bankruptcy court may decide that you can't file under Chapter 7, unless there are special circumstances.

The most important thing about a Chapter 13 case is it will allow you to keep valuable property, in particular your home and car, if you can make the payments which the bankruptcy court requires you make to your creditors.

In most cases, these payments will be at least as much as your regular monthly payments on your mortgage or car with some extra payments for the amount you are in arrears.

You should consider filing for Chapter 13 if you:

- Own your home and are in danger of losing it
- Are behind on debt payments – but can catch up if given some time
- Have valuable property which is not exempt, but you can afford to pay creditors from your income over time

Chapter 11 Bankruptcy

Chapter 11, known as "reorganization," is used by corporations and partnerships and a few individuals whose debts are very large.

Debtors are required to file various documents pertaining to their income, assets, liabilities and a debtor's plan for reorganizing their finances.

Upon filing a petition for relief under Chapter 11, the debtor automatically assumes an identity as the "debtor in possession" and is able to keep possession and control of their assets.

Chapter 12 Bankruptcy

Chapter 12 is similar to Chapter 13 – except it is for family farmers and fisherman with a regular annual income

Chapter 2

What To Do When Your Customer Files Bankruptcy

The bankruptcy process is full of rules that the debtor and creditor must follow. Chapters 11, 12 and 13, and to a lesser extent, Chapter 7, when you are a secured creditor, are often a lot like "Let's Make a Deal." You can negotiate a resolution, hopefully one that is in your favor, in cases where the debtor is trying to save the business (or their home and car) and pay back creditors.

With a Chapter 11, 12 or Chapter 13 filing, reorganization is the goal. Debtors are required to pay debts according to a repayment plan the Debtor proposes and the court, with creditor input, approves. Chapter 7 bankruptcy filing is quite different; the business is shutting its doors permanently and individuals are given a "fresh start" by liquidating non-exempt assets and discharging debts.

Of course, the problem is that the vast majority of the filings are Chapter 7. For an unsecured creditor, in most cases, the likelihood of recovery is small.

The extent of your customer or client's financial situation is more clearly revealed in the bankruptcy

filings (Schedules and Statement of Financial Affairs) and the notice of the Section 341 meeting of creditors you receive. The Section 341 Notice will spell out:

- The type of bankruptcy filed
- The date the case was filed
- The court in which the case is being heard
- The deadline to file a proof of claim
- The time, date, and place for the first meeting of creditors
- The rules for collecting what's owed to you.

Before you call the Debtor and ask them what they were thinking, or how could they do this to you, or, alternatively, write off the debt, you should do some or all of these eight things:

Step 1: Stop Contact Completely

Once a person or business files for bankruptcy, you have to stop any and all collection activity. If you make contact to try to get your money back, you will violate the automatic stay and you can actually be sued. Even if you had already filed a lawsuit against the client, it gets stayed until the bankruptcy is completed. You can, however, contact the attorney or court appointed trustee to work out an arrangement on how your debt is handled in the bankruptcy. If for some reason you are not listed in the bankruptcy petition as a creditor who is owed money, then you might have the right to keep collecting on the debt even after the bankruptcy is over, but if you know about the bankruptcy, you

should confer with counsel before undertaking collection even if you aren't listed as a creditor. Do a Cost-Benefit Analysis

Step 2: Assess Your Situation
Assess whether it is even worth your time or should you simply take the loss. Meaning, "in a practical sense can you really get any money back from this consumer or client?" For instance, say the business grosses over $500,000 but it has over $1 million in debts and a long string of 15 creditors or more. There is very little chance you are going to receive any money back. In most cases, small companies or consumers filing bankruptcy aren't going to have tangible assets that the trustee can sell and then distribute to any and all creditors. At a minimum you should review the Schedules and Statement of Financial Affairs to determine if the Debtor has income that exceeds expenses or if there are assets that have equity. If it is a Chapter 11 or 12, you might get some recovery even if you are unsecured.

Step 3: Pay Attention to the Type of Bankruptcy
Chapter 7 is available to both individuals and businesses. Its purpose is to achieve a fair distribution to creditors of the debtor's available non-exempt property. If secured debts outweigh the value of the assets, the secured creditors will get their collateral, and everyone else will be out of luck. If there are non-exempt assets that are free and clear they will be liquidated and whatever is liquidated gets split up among unsecured creditors. Chapter 13 is for individuals or sole proprietors. It is designed for

someone with regular income whose debts do not exceed certain amounts. It is used to budget some of the debtor's future earnings under a plan through which creditors are paid in full or in part. Chapter 11 is primarily used by corporations. Chapter 12 is for family farmers and fisherman. The purpose of Chapters 11, 12 and 13 is to give the debtor a breather from creditors while the individual or company attempts to reorganize and come up with a better, more profitable way of doing business. The average case takes four to seven months to submit and approve a repayment plan.

Step 4: File a Proof of Claim

Check the bankruptcy filing notice to see what the deadline is to file a claim with the bankruptcy court detailing what you are owed and why. Failure to file a claim definitely will eliminate any chance you have of getting paid, unless you have collateral for your loan. If there is any money left after the bankruptcy proceeding, the trustee appointed by the court will be charged with paying various creditors what's leftover. Although the Proof of Claim is a one-page form that you can fill out yourself; you may want to check with bankruptcy counsel before filing one because doing so can submit you to the jurisdiction of the Bankruptcy Court for certain purposes.

Step 5: Get in Line and Wait

The Bankruptcy Code has a definite priority scheme for distribution of funds to creditors. Where you fall in the order will determine how likely you are to get any of what you are owed. Secured claims, which include

mortgage holders, are outside this scheme; you will get your collateral or the equivalent of its value (not necessarily the amount of your debt. From the funds available after the secured creditors get their collateral, then administrative claims, the costs of administering the case are paid. After these are the "priority" claims, such as pre-bankruptcy wages, customer deposits and taxes. If there is anything left after those are paid, then the general unsecured creditors share in what is left. Schedules A and B show the assets of the Debtor. Schedule D shows the secured debts, Schedule E shows the priority claims, and Schedule F shows the unsecured debts. If the debt is secured go get your collateral (with the permission of the Bankruptcy Court, or negotiate to get paid for it. If you are unsecured, you will normally have to wait and see.

Step 6: Attend the "341" Creditors Meeting
This is a meeting with the court-appointed trustee, the debtor, and creditors. At this meeting, the debtor explains how things got so bad and what's going to be done about it. Here is where as a creditor you get to ask questions of the debtor. You can also pass information to the trustee (for example, if you know the Debtor owns a Rembrandt and didn't list it on their schedules. Attendance is optional.

Step 7: Review Any Proposed Repayment Plan
In Chapters 11, 12 and 13, the debtor has the right to come up with a reorganization plan. It will be sent out to all the creditors for review. In a Chapter 11, for the plan to be approved, the debtor needs to have the consent from more than 50 percent of the total

number of creditors and for more than two-thirds of the debt owed. The confirmation process in Chapters 12 and 13 is different, but you will receive notices from the Court that tell you when you have to take actions to approve of or object to the plan.

Step 8: Follow PACER (Public Access Court Electronic Records)

This allows users to obtain case and docket information from bankruptcy courts online. You can create a user name and password to look up what is essentially public information. You can see for yourself what is going on with a bankruptcy filing, bypassing the need for an attorney. Whether doing it yourself is wise goes back to the cost-benefit analysis.

Also, talk to your attorney or accountant about taking a deduction for the bad debt on your taxes. If you manage to recoup any portion of the money owed, then you can claim it as income later on.

Chapter 3

Worthy of Consideration

Because creditors are not the party "in the wrong" during a bankruptcy, they can understandably adopt an attitude of dominance and bellicosity. However, to do so is usually a mistake. A combative bankruptcy atmosphere adds time and expense to a case without necessarily contributing to a positive end result—for either party. Yes, the creditor is rightly disgruntled, but it's important for the creditor to think "approach," "strategy," and "recovering or limiting losses" in knowing and protecting their rights.

Most debtors find themselves in bankruptcy because of bad circumstances (loss of job, divorce, illness) rather than because of bad acts. The Bankruptcy Code does provide tools to punish bad acts, such as denial of discharge, but normally these should be considered remedies of last resort, to be used only if they will improve the chances of collecting the debt.

Consider alternatives to bankruptcy that benefit you as a creditor.

Bankruptcy may not be the only solution to a debtor's financial problems and as a creditor there may be solutions that will prevent a bankruptcy filing and put more dollars into your pocket. A good creditor's lawyer can help you explore these options.

It is important for lenders and creditors to be open to negotiating and developing a debt-settlement plan that voids bankruptcy for the debtor and recovers the debt (in part or fully) for the creditor.

Each debtor has a unique situation which requires an assortment of unique solutions. Creditors can benefit when they are part of the solution whenever possible and practical.

Lenders are advised to look for an attorney who is adept at considering all specifics from the debtor's perspective in protecting the creditors' rights.

Bankruptcy as a solution for the debtor is okay, perfectly legal, and within their rights. If the creditor broadens his/her approach to include a win-win resolution, it could ultimately be to the creditor's benefit.

Chapter 4

Frequently Asked Questions About Creditor Rights

Courtesy of The Law Office of Mark J. Markus, Los Angeles, CA

Q: What is the automatic stay?

A: This is an injunction that goes into effect automatically upon the filing of a bankruptcy. It strictly prohibits the commencement or continuation of any acts to collect on a debt that arose prior to filing the bankruptcy. This includes enforcement of judgments, creating or perfecting liens, and many other actions. (It does not apply to collecting alimony maintenance and support).

Q: You're owed money by a debtor and they file a bankruptcy. Next, you get a letter from the bankruptcy trustee demanding that you return money the debtor paid to you prior to the bankruptcy case being filed. How can this possibly be legal and what can I do?

A: You have been bitten by the preference bug. In order to maintain some semblance of equality, the bankruptcy code does not allow a debtor to prefer one creditor rather than another by

repaying some creditors before the bankruptcy is filed but not others. Thus, any payments made on a prior debt within 90 days before a bankruptcy filing (or within one year if you are a relative or insider of the debtor) is recoverable by the bankruptcy Trustee UNLESS you have one of the many defenses available. You should check with an attorney if this should arise. You may also wish to take preventive steps if you are accepting payments from a client who you think may be going bankrupt soon.

Q: Can I still try to collect on a judgment after the debtor files bankruptcy?

A: No. However, you may have rights to pursue in the bankruptcy depending on what chapter was filed and whether you are secured by any of the debtor's property.

Q: I hold a trust deed on the debtor's house and I am in the process of foreclosing when a bankruptcy is filed. What should I do?

A: First of all, you cannot proceed with the foreclosure. What you do next depends on what chapter the bankruptcy case was filed under and what the debtor's intentions are with respect to the property. If the property is the debtor's principal residence and the case filed is a Chapter 13, he will be required to stay current with your payments from that point forward and propose a plan to repay the past due amounts. You should either obtain a copy of the debtor's

statement of intentions or contact the debtor's attorney to find out what his plans are with respect to your collateral. If the debtor filed a Chapter 7 case, you can obtain permission from the court (via a Motion for Relief from the Automatic Stay) to allow you to proceed with your foreclosure.

Q: Can the debtor lien strip (reduce the value of) or remove my lien against his/her real property?

A: If the real property is the debtor's principal residence, only under the following circumstances:

- The debtor filed a Chapter 13.
- Your lien is a junior, non-purchase money debt.
- The value of the real property is LESS than the sum of all senior liens.

If the real property is not the debtor's principal residence the lien can be partially or fully avoided depending on the value of the property. (Again, only in Ch. 13).

If you have a judgment lien (rather than a consensual trust deed based on a loan) against the debtor that has attached to her property prior to the filing of the bankruptcy case, the debtor may be able to avoid your lien even in a Chapter 7 if it impairs the debtor's homestead exemption as that term is defined in the bankruptcy code, based on the value

of the property and amount of senior liens and encumbrances on the date the bankruptcy case is filed.

Obviously this is a tricky area of law and you should consult with an attorney if you are faced with any of these scenarios.

Q: I'm an unsecured creditor. How do I make sure the debtor is paying everything he should or that he has included all his assets?

A: This depends on what chapter is filed and how much you want to spend investigating everything. The bankruptcy papers that are filed may be obtained from the clerk of the court. You can review these papers to see if anything seems inaccurate to you. You may also obtain court approval to take the debtor's deposition if you wish to inquire in more detail as to the debtor's assets and debts.

Q: What types of debts can be prevented from being discharged in a Chapter 7 case?

A: Most taxes, unless they are more than 3 years old. However, this can be a complicated issue. If you have tax debts, you will need to discuss them with your lawyer

- Child support. The debtor must continue to pay child support during a bankruptcy case
- Alimony
- Most student loans. But you can ask the court to discharge the loans if you can prove that

paying them is an "undue hardship." There are options for reducing your monthly payments on student loans, even if you can't discharge them.

- Money borrowed by fraud or false pretenses.
- Court fines and criminal restitution. This exception includes even minor fines, including traffic tickets.
- Personal injury caused by drunk driving or under the influence of drugs.

These are among the most common types of non-dischargeable debts. There are actually 19 types of non-dischargeable debts. Consult with experienced bankruptcy counsel if you think the debt owed to you might be non-dischargeable.

Q: What types of debts can be prevented from being discharged in a Chapter 13 case?

A: Mostly the same as listed above for Chapter 7, but there are some exceptions.

Q: What are the criteria for objecting to the debtor's discharge in total?

A: The debtor is not an individual

- The debtor attempts to conceal assets
- The debtor knowingly lies or presents a false claim
- The debtor refuses to obey the court

- The debtor received a Chapter 7 or 11 discharge in the past 8 years
- The debtor received a Chapter 12 or 13 discharge in the past 6 years
- The debtor fails to complete mandatory credit counseling courses
- The debtor is liable for a non-dischargeable debt

Q: I am in the middle of a lawsuit when the defendant files bankruptcy. What happens now?

A: The lawsuit must not proceed unless and until you obtain permission from the bankruptcy court. There may or may not be reasons for doing this (such as to determine, i.e. liquidate, the amount that is owed to you).

Q: How do I get the debtor to reaffirm my debt?

A: Debtors may choose to reaffirm certain pre-bankruptcy obligations. This reaffirmation turns the debt into a post-bankruptcy obligation. This is desirable for creditors, but almost never for debtors. Extreme care must be exercised in seeking a debtor's reaffirmation as there are increasing court and other legal requirements for doing so.

Q: How do I determine the deadline for filing a Proof of Claim?

A: Shortly after the bankruptcy filing, the court sends out a notice of bankruptcy that includes information regarding the date, time and place of the first meeting of creditors, the deadline for filing proofs of claim, and deadline for filing objections to discharge.

Q: May a debtor add additional creditors after the case has been filed?

A: Yes. This may be done at any time. A debtor may also amend to correct or add any other information contained in the papers.

Q: If I was not listed in the bankruptcy and didn't receive notice, can my debt still be discharged?

A: Generally, a debt that is not listed or scheduled on a bankruptcy petition will not be discharged unless the creditor has notice or actual knowledge of the case in order to timely file a proof of claim. HOWEVER, if it is a no asset bankruptcy (meaning, no distribution would be made), most courts hold that the debt will be discharged even if it was not listed since there would be no distribution in any event. If you have grounds for objecting to the debtor's discharge, that time period may be extended if you received no notice of the bankruptcy.

Q: Should I attend the first meeting of creditors (341a Meeting)?

A: Generally speaking there is no great benefit to attending. Although, this depends on what chapter was filed and what the circumstances of the particular debtor is. Due to time constraints, questioning by creditors at these meetings is very limited. If you wish to discover information about the debtor, your better course is to seek court approval to take the debtor's deposition (under Bankruptcy Rule 2004).

Q: If the debt is guaranteed by a third party, can I still pursue that party in collections during the debtor's bankruptcy?

A: Generally, yes. But, in a chapter 13 the automatic stay also protects co-obligors on consumer debts. Under such circumstances, you would need to seek court approval to proceed against the third party.

Chapter 5

3 Steps to Choosing a Creditor Attorney

Step 1: Proven track record
First, you should do some research about the attorneys you are considering, just as you would do if you were choosing an orthopedic surgeon or another professional with a specialty.

One of the best resources is a recommendation or peer-review from another lawyer or member of the judiciary who has worked with the attorney in question.

Martindale-Hubbell (www.martindale.com), this online peer-review resource, generates ratings of attorneys, who have been a member of the state bar for a minimum of three years, based on evaluations from other members of the bar and judiciary.

Martindale-Hubbell evaluates an attorney's legal knowledge, analytical capabilities, judgment, communication ability and legal experience and give the attorney a numeric score, which translates into one of three ratings.

AV Preeminent indicates the attorney's peers rank him or her at the highest level of both professional excellence and ethical standards.

BV Distinguished is an excellent rating for an attorney with some experience. It is a widely respected mark of achievement and differentiates an attorney from his or her competition.

Rated indicates that the attorney has met the very high criteria of General Ethical Standing.

Super Lawyers (www.superlawyers.com), is another good peer-review resource. It lists outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The company also solicits peer nominations and evaluations as well as independent research. You can search for an attorney in a specific practice area such as bankruptcy on superlawyers.com by entering the practice area and state in which you are looking for an attorney. You will then receive a number of names of highly rated attorneys in your area.

Step Two: Sufficient creditor bankruptcy experience

Bankruptcy is a specific and unique area of the law and requires an attorney with experience representing creditors in Chapters 7, 11, 12 and 13 bankruptcies,

Experienced bankruptcy attorneys not only understand the federal bankruptcy laws but the unique rules and regulations that pertain to the Bankruptcy court in their area, as well as the requirements of the bankruptcy trustees in their local area.

An attorney who practices in another area of law, or in multiple areas may be unfamiliar with local court requirements and procedures, which may cause delays and blunders in the bankruptcy case.

Creditors are encouraged to confirm that the attorney they are considering is a member of the *National Association of Consumer Bankruptcy Attorneys* (www.nacba.com), which is a well-respected membership association for attorneys practicing in this area.

Membership in this organization indicates that the firm or lawyer is "dedicated to the practice of bankruptcy, stays up to date on the latest developments and provides competent representation." You can also search for a member attorney by state.

The American Bankruptcy Institute (www.abiworld.org) also focuses on developing the highest standards of bankruptcy practice through research and education and is another excellent membership organization for attorneys and other professionals dealing with bankruptcy.

Step Three: Set up an appointment

It's difficult to choose bankruptcy legal representation without personally meeting the attorney. It will provide an opportunity for you to gauge their professionalism, communication style, enthusiasm for their profession, and their desire to assist you.

Ask why the attorney chooses to practice bankruptcy law and look for answers that indicate they find it interesting and rewarding to help people get back on

their feet. Ask the attorney to tell you what is most rewarding about their profession and listen for enthusiasm and passion in their response.

Finally, have an open and honest discussion with a proven attorney to evaluate when it's wise to fight to recover the monies you loaned in good faith, and when it's smarter to avoid litigation in cutting your losses. Having clearly defined goals and expectations will help your attorney achieve what you want for the amount you are willing to invest.

This Creditor's Rights Guide

Is Provided Courtesy of

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