



Bankruptcy and Real Property

Montana Land Title Association
Spring Education Seminar – May, 2024

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Agenda

1. Introduction to Bankruptcy.
 - History & Purpose
 - Chapters.
2. The Stay & the Bankruptcy Estate.
3. Sellers in Bankruptcy - Requirements.
4. Post-bankruptcy issues - Lien Clearance.



History of U.S. Bankruptcy Law

- **English Common Law** – Debtors unable to pay their debts had their property confiscated and assigned to creditors.
 - And/or...imprisonment
- **U.S. Constitution (1787):** Article I, Section 8 - Congress to enact “Uniform Laws on the subject of Bankruptcies”
 - Series of short-lived bankruptcy laws over the following century.
- **Bankruptcy Act of 1800:**
 - District Judges appoint non-judicial commissioners to oversee cases
 - Only “merchant” debtors; creditor-initiated proceedings.



History of U.S. Bankruptcy Law

- **Bankruptcy Act of 1898**, amended 1938 – modern concepts, including bankruptcies for entities.
 - First long-term act, survived 80 years.
 - Perceived as *pro-debtor*, narrow exceptions to discharge.
 - Establishes office of the Trustee.
- **Bankruptcy Reform Act of 1978** –The “Bankruptcy Code”
 - Bankruptcy Courts and Judges.
 - Chapters 11 and 13, making reorganizing easier for corporations and individuals.



History of U.S. Bankruptcy Law

- **Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 – “BAPCPA”**
 - Made Chapter 7 more difficult
 - Income limits and means test for individuals
 - Encourage Chapter 13 (Repayment Plan) over Chapter 7
 - Student Loan Debt made non-dischargeable.
 - IRA’s and Roth IRA’s given protection.
 - Formerly 401k’s and traditional retirement plans.

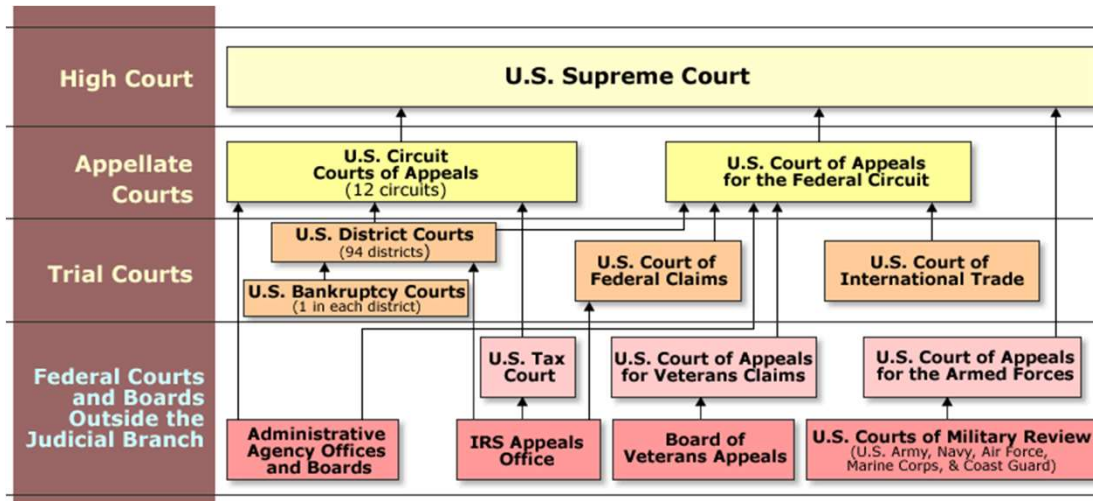


The Bankruptcy Courts

- One in each District (94 Districts).
 - Operate as adjuncts to the federal court system, but independently.
 - Separate “Article 1” Judges, appointed for 14-year terms.
- Subject matter jurisdiction over all proceedings “arising under or related to” Title 11.
 - Includes “adversary” proceedings.
- Bankruptcy Appellate Panels (“BAP’s”) – first line of appeal, to a panel made up of three bankruptcy judges within the Circuit but outside the District.



The Federal Court System



Bankruptcy Basics – Purpose

1. Provide debtors a “Fresh Start.”
 - a) Balances the interests of debtors and creditors, giving creditors as much as they could receive without bankruptcy.



Bankruptcy – The Chapters

	Chapter 7 Asset Liquidation	Chapter 11 Reorganization	Chapter 13 Repayment Plan
Who may file?	Individuals & Businesses	Individuals & Businesses	Individuals Only
Liquidation or Payment Plan?	Liquidation	Both	Repayment Plan
Time on Credit Report	10 years	10 years	7 years

Chapter 9 – Adjustment of Debts of Municipality

Chapter 12 – Adjustment of Debts of Family Farmer (or Fisherman) with Regular Income

Chapter 15 – International Cases



The Chapters – Basic Process

Chapter 7 – Liquidation

- Trustee sells all non-exempt assets and distributes proceeds to creditors.

Chapter 11 – Reorganization

- Debtor (“Debtor-in-Possession”) continues operating business.
- Trustee supervises performance of Plan.
- Plan either approved by Creditors or, if contested, by Court.

Chapter 13 – Adjustment of An Individual with Regular Income

- Debtor makes plan payments to Trustee for distribution to creditors.
- In practice, similar to loan consolidation.



Qualifications for Certain Chapters

Chapter 7:

1. Average monthly income over the prior six months must be lower than the median income for same-sized household in your state; OR
 - Means Test: comparison of disposable income and payment obligations to unsecured creditors
2. No prior Chapter 7 in previous 8 years.
3. No prior Chapter 13 in previous 6 years.
4. Complete Credit Counseling Course.

Chapter 13 (aka "the Wage Earner Plan"):

1. Sufficient income to make the monthly payment outlined in your repayment plan.
2. Total debt limits:
 1. Unsecured debts (credit cards, medical bills) less than \$465,000*
 2. Secured debts (mortgages and car payments) less than \$1,400,000*

*These limits suspended under COVID-era laws until June 21, 2024.
3. Complete Credit Counseling Course.



Bankruptcy Filings – Facts & Figures

Filings by Year:

Year	Business	Non-Business	Total
2023	18,926	434,064	452,990
2022	13,481	374,240	387,721
2021	14,347	399,269	413,606
2020	21,655	522,808	544,463
2019	22,780	752,160	774,940

Filings by Chapter:

Year	7	11	12	13
2023	261,277	7,456	139	183,956
2022	225,455	4,918	169	157,087
2021	288,327	4,836	276	120,002
2020	378,953	8,333	560	156,377
2019	480,206	7,020	599	286,979



source: www.uscourts.gov/news

More Facts and Figures - Montana

Montana Bankruptcy Filings, by Year

12 months ended:	Filed	Terminated	Pending
3/31/2024	683 (+15.6%)	698 (-7.7%)	861 (-1.6%)
3/31/2023	591	756	875



source: www.uscourts.gov/news

Bankruptcy Basics – The Automatic Stay

- Under all Chapters, Proceeding initiated by a Petition.
- The Stay (11 USC § 362) prohibits the continuation or commencement of actions against the Debtor to collect debts.
 - Term: Petition → Closure of Case.
 - Non-violation: Filing lien claim (for pre-bankruptcy work).
 - Show Judgments recorded during bankruptcy, despite violation of stay.
- Stay Relief Motions: Court will suspend the Stay for a secured creditor.
 - Foreclosures;
 - Short Sales;
 - Evictions.



The Bankruptcy Estate

- Upon filing Petition, all property of the Debtor becomes part of a fictitious entity known as the “bankruptcy estate.” (11 U.S.C. § 541.)
 - Effectively “vests” the debtor’s property in the Trustee for the benefit of creditors.
- **The Debtor No Longer has Title. The Trustee can avoid post-petition transactions.**



The Bankruptcy Estate – Termination

- Chapter 7 – Discharge (all property liquidated or abandoned back to Debtor).
- Chapter 11 – Plan Confirmation (presumptively) vests property in Debtor.
- Chapter 13 - Plan Confirmation (presumptively) vests property in Debtor.

- In Chapters 11 & 13, must review Plan & Confirmation Orders.



The Bankruptcy Estate – Exempt Property

- Certain “essential” property is exempt from the estate, under federal and state laws.
- Rule 4003 governs claims of exemption. Property exempt if:
 1. Claimed as Fully Exempt (not just equity) in Schedules;
 2. Notice of Meeting of Creditors was properly noticed;
 3. No objection to Claim of Exemption within 30 days after Meeting of Creditors; and
 4. Debtor has little or no surplus equity.
- Reliance on Exemption subject to underwriting approval.



The Bankruptcy Estate – Unscheduled Property

- Property vests in the estate, and is subject to the bankruptcy proceedings, regardless of whether it is disclosed in the Schedules.
 - After closure of a case, unscheduled property not administrated by the Court remains subject to the bankruptcy proceeding. (They have to re-open the case.)
 - After dismissal of a case, all property - scheduled and unscheduled - re-vests in the Debtor.



The Bankruptcy Estate – “Clawback” Provisions

Trustee or creditors may bring action to avoid pre-petition transfers:

1. **Preferential Transfers.** (11 U.S.C § 547.) Transfers made for the benefit of a creditor, while the debtor was insolvent
 - Lookback period: 90 days prior to petition, or 1 year for transfers to insiders.
2. **Fraudulent Transfers.** (11 U.S.C. § 548.) Four varieties:
 1. Actual intent to hinder or delay creditors;
 2. Transfers for less than reasonably equivalent value;
 3. Transfers by partnership to general partner; and
 4. Transfers by debtors to self-settled trust.
 - Lookback period: Transfers made within 2 years prior to petition.



Sellers in Bankruptcy

Avenues to insurable sales of property of the bankruptcy estate:

1. Sale under Order Approving Sale (7, 11, 12 or 13)
2. Sale Authorized under Confirmed Plan (11, 12 or 13);
3. Property is Abandoned by Trustee; or
4. Case is dismissed or closed.



Documents Needed to Determine Insurability

Your underwriter may need one or more of the following:

1. The Bankruptcy Petition;
2. The Schedules;
3. The Docket;
4. Orders Approving Sale and/or Avoiding Liens; and
 1. Motions and Certificate of Mailing
5. The Plan and Confirmation Order (in a Chapter 11, 12 or 13);
6. Discharge or Dismissal.



Sale by Trustee under Order of Sale

- Order of Sale. Trustee may sell under Order of Sale after notice and right to hearing. (11 U.S.C. 363.) Twenty-one day notice (Rule 2002).
- Motion for Approval must identify:
 1. Sales price and terms;
 2. purchaser;
 3. Legal description;
 4. Time period for objections.
- Review Certificate of Mailing for timeliness and inclusion of all creditors.
 - Hearing – only if Objection(s) filed. Otherwise, sale may proceed.



Sale by Trustee under Order of Sale

Default Rules (unless changed by Order of Sale):

- 14-day Stay - Order of Sale stayed for 14 days, unless waived under Rule 6004(h).
- 10-day appeal period. Order may state longer period.
- Liens and Encumbrances – Not extinguished unless specified in Order.
- Deed –by “[Trustee], as Trustee of the Bankruptcy Estate of [Debtor].”



Sample – Motion for Order Approving Sale

11. Pursuant to F.R.B.P. 6004(h), Debtor also requests that the Order authorizing the sale of the property be effective immediately and not stayed for fourteen (14) days.

WHEREFORE, Debtor respectfully requests the Court approve the subject sale, free and clear of liens and Order monies be paid as set forth above.

DATED this 8th day of November, 2023.

NOTICE OF OPPORTUNITY TO RESPOND AND REQUEST A HEARING

Pursuant to the Bankruptcy Court's Order dated November 3, 2023, filed at ECF No. 146, if you object to the motion, you must file a written responsive pleading and request a hearing by **November 20, 2023**. The responding party shall schedule the hearing on the motion for **November 27, 2023, at 9:00 a.m. in Great Falls, Montana** and shall include in the caption of the responsive pleading in bold and conspicuous print the date, time and location of the hearing by inserting in the caption the following:

NOTICE OF HEARING

Date: November 27, 2023
Time: 9:00 a.m.
Location: Chief Mountain Courtroom
Third Floor
Missouri River Courthouse
125 Central Avenue West
Great Falls, Montana

If no objections are timely filed, the Court may grant the relief requested as a failure to respond by any entity shall be deemed an admission that the relief requested should be granted.

DATED this 8th day of November, 2023.

Notes:

- Request for waiver of 14-day stay.
- Request for “free and clear of liens.”
- Hearing Notice – review docket for objections within permitted time.
- Look for corresponding language in Order.



Sample - Order Approving Sale

In their Conditional Consent, Creditors indicate they do not object to Debtor's Motion, so long as the sale is made in accordance with the terms and condition of the buy-sell agreements attached to Debtor's Motion as Exhibits A and B. Creditors further note that their consent to Debtor's Motion is also conditioned on:

the requirement that not only costs of sale and real estate taxes be paid from the gross sale proceeds, but also that all liens and encumbrances disclosed by the title commitments are ordered transferred from the real estate to the gross proceeds of sale, and that those liens and encumbrances are also satisfied from the gross sales proceeds prior to any distribution of net sales proceeds to either the Debtor or to the Trustee.

Accordingly, absent any opposition after notice,

IT IS ORDERED that the Motion is granted. Debtor is authorized to sell the property identified in the Motion free and clear of all liens and interest under 11 U.S.C. § 363(f), pursuant to the terms and conditions authorized by the buy-sell agreement attached to Debtor's Motion as Exhibits A and B and Creditor's Conditional Consent.

IT IS FURTHER ORDERED that the November 27, 2023, hearing on Debtor's Motion is vacated.



Sample - Order Approving Sale – page 1

Pursuant to 11 U.S.C. § 363(f), and for good cause appearing, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That the Debtor, is hereby authorized to sell to Eron and Tracia Sloan, for the total sum of \$569,900 the real property 1263 E Echelon Ridge Lane, Boise, ID, more particularly described as:

Lot 17 in Block 1 of Echelon Ridge Subdivision, according to the plat thereof, filed in Book 118 of Plats at Page(s) 18246 through 18249, Records of Ada County, Idaho.

2. The following lienholders shall not be paid at closing and shall retain their interests in the proceeds of the sale until further Court order.

- a. Ferguson Enterprises, LLC
- b. KW Construction, LLC
- c. Central Stone and Tile, LLC
- d. Bella Vive, LLC an Idaho Limited Liability Company d/b/a Bella Masonry



Sample - Order Approving Sale – page 2

3. The Debtor shall issue a Warranty Deed to the Buyer;
4. The sale shall be closed as soon as practicable after entry of this Order.
5. The Debtor is authorized to pay from the proceeds at closing all appropriate closing

costs, title insurance premiums, real and personal property taxes, and liens and encumbrances. The sale proceeds shall be distributed by the closing agent in the estimated amounts as follows:

Sale Price	\$569,900
Less Estimated Deductions:	
GIT SIT Solutions, LLC	\$438,239.10
Granite Excavation Inc.	\$11,000.00
Sunroc Corporation	\$17,838.81
Nampa Floors and Interiors Inc.	\$27,228.00
Estimated Real Property Taxes	\$5,690.00
6% Realtor Commission	\$34,194.00
Estimated Closing Costs	\$5,690.00
Net Proceeds to Estate	\$30,002.10

6. This sale shall be effective immediately and the fourteen-day stay imposed by Rule 6004(h) and other rules is hereby waived;

//end of text//



Sales by Debtor in Possession (Chapter 11, 12 or 13)

- Sale by Debtor-in-Possession. The docket should reveal that the Debtor has retained control of the estate as “debtor in possession,” and whether limits (such as right to sell real property) have been imposed upon such control.
- Plan Confirmation. A confirmed Plan must be reviewed to determine whether the Debtor must sell, or has the right to sell, the subject property. Conditions, such as approval of trustee and/or creditors may be present.
 1. Debtor has 120 days to file plan. After 120 days, creditors may file Plan.
 2. Creditors vote to accept or reject plan;
 3. If no Trustee appointed, debtor serves as trustee.
 4. Court must Confirm Plan, even if no objections.
- If no provision for sale, property re-vests in Debtor upon confirmation of Plan, subject to any limitations in the Confirmation Order.
- If no Confirmation Order, sale must be approved by Notice and Hearing.
- Subject to Liens and Encumbrances, unless Order indicates otherwise. If creditor is listed and fails to object to Plan, Creditor’s recovery is limited to payment under the Plan. However, if case is subsequently dismissed, lien is reinstated.
- Generally, require consent of Trustee.



Sales in Chapters 12 and 13

- Method of sale depends on case status and language of the Plan.
 - Prior to Plan Confirmation - Order Approving Sale (11 or 13).
 - After Plan Confirmation, may proceed with sale by debtor in possession, depending on Plan language.
 - Generally, require approval or consent of Trustee.



Sales Following Abandonment

- Order of Abandonment (11 U.S.C. § 554), requires:
 1. Notice of Intent to Abandon, including legal description and objection deadline;
 2. Notice Mailed to all Creditors; and
 3. Expiration of period for objections (typically 15 days).
- Notes on Abandonment.
 1. Abandoned property re-vested in the Debtor subject to all liens and encumbrances.
 2. Property scheduled, but not administered, is deemed abandoned on closure of case.
 3. Property not scheduled remains in bankruptcy estate even after closure of case.
- See Local Rule 6007-1: Special rules on abandonment process.



Discharge – Non-Dischargeable Debts

- The primary objective of bankruptcy is a Discharge. This is the “fresh start.”
 - The Discharge means you are no longer legally responsible for the *scheduled* debts.
- However, the following Debts are generally non-dischargeable:
 1. Child Support and Alimony
 2. Criminal Penalties and Restitution
 3. Certain Federal and State Tax Liens
 4. Student Loans, unless....



Discharge – Student Loans

- Evolution of Bankruptcy Code treatment of Student Loans
 - 1975 Higher Education Act.
 - allowed discharge of student loans only if they had been in repayment for 5 years.
 - 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”)
 - Student Loan non-dischargeable unless “undue hardship” is proven.
- Debtor must file an Adversary Proceeding to prove undue hardship.
- Factors:
 - 1) Can student repay loans and maintain minimal standard of living?
 - 2) Will hardship continue for significant portion of repayment period?
 - 3) Has debtor made good faith efforts to repay the loan before filing?



Lien Clearance - Generally

- General Rule: **A Discharge in Bankruptcy eliminates the Debtor's personal liability for the Debt, but does not eliminate a lien.**
 - Creditors retain right to recover against *the property*.
- Order Avoiding Lien – Debtor may seek clearance of liens by Order of Bankruptcy Court
 - Order should identify lien(s) by recording information.



Lien Clearance – Order of Discharge

Order of Discharge

12/15

IT IS ORDERED: A discharge under 11 U.S.C. § 1141(d)(5) is granted to:

Fernando Valdivia

Deborah Lee Valdivia

6/14/19

By order of the court: Barry K. Lander
Clerk of the Bankruptcy Court

Explanation of Bankruptcy Discharge in an Individual Chapter 11 Case

This order does not close or dismiss the case.

Creditors cannot collect discharged debts
This order means that no one may make any attempt to collect a discharged debt from the debtors personally. For example, creditors cannot sue, garnish wages, assert a deficiency, or otherwise try to collect from the debtors personally on discharged debts. Creditors cannot contact the debtors by mail, phone, or otherwise in any attempt to collect the debt personally. Creditors who violate this order can be required to pay debtors damages and attorney's fees.

However, a creditor with a lien may enforce a claim against the debtors' property subject to that lien unless the lien was avoided or eliminated. For example, a creditor may have the right to foreclose a home mortgage or repossess an automobile.

This order does not prevent debtors from paying any debt voluntarily. 11 U.S.C. § 524(f).

Most debts are discharged

Most debts are covered by the discharge, but not all. Generally, a discharge removes the debtors' personal liability for debts provided for by the chapter 11 plan.

In a case involving community property: Special rules protect certain community property owned by the debtor's spouse, even if that spouse did not file a bankruptcy case.

Some debts are not discharged

Examples of debts that are not discharged are:

- ♦ debts that are domestic support obligations;
- ♦ debts for most student loans;
- ♦ debts for most taxes;
- ♦ debts that the bankruptcy court has decided or will decide are not discharged in this bankruptcy case;

For more information, see page 2 >



Lien Clearance - Tolling of limitations periods

- Extension of Time Limitations (11 U.S.C. §108)

A statute of limitation for a civil action outside of bankruptcy expires at *the later of*:

1. The time allowed under non-bankruptcy (state) law; OR
2. 30 days after termination of bankruptcy stay.
 - MCA 27-2-406: limitations period does not run during the Stay.
 - Do not count Petition-to-Discharge or Dismissal



Lien Clearance – Post-petition Property

- Post-Petition Property.
 - Pre-petition liens securing debts which are discharged in bankruptcy do not attach to property acquired post-petition.
 - When was the judgment recorded?
 - When was the property required?
 - Was the Debt Scheduled?
 - Has Discharge been entered?

