

OCDA

BANKRUPTCY FOR DUMMIES

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The Child Support Version

# Bankruptcy for Child Support

OHIO CSEA DIRECTOR'S ASSOCIATION

# Bankruptcy for Child Support

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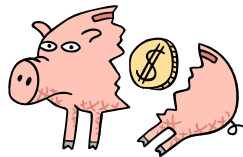
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# Bankruptcy for Dummies (Child Support)

## Bankruptcy Basics

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### Introduction

**This is the beginning Bankruptcy Child Support presentation. It is assumed that you have a working knowledge of child support and need instruction in the more complex issues that occur in bankruptcy practice.**



### What is bankruptcy?

Bankruptcy is a legal action that can be taken by individuals and businesses burdened by excessive debt. By filing for bankruptcy they can rid themselves of debt and get a fresh start. 11 U.S.C § 101 *et seq.*

The debtor is the obligor.

Bankruptcy law provides for the development of a plan that allows debtors, who are unable to pay their creditors, to resolve their debts through the division of their assets among their creditors. This court-supervised division allows the interests of all creditors to be treated with some measure of equality. Additionally, bankruptcy law allows certain debtors to free themselves (to be discharged) of the financial obligations they have accumulated, after their assets are distributed, even if their debts have not been paid in full.

### What is the legal basis for bankruptcy?

Federal statute. Title 11 of the United States Code which is known as the Bankruptcy Code.

### **What are the *types of bankruptcy*?**

Of the several different types of bankruptcy filings, the child support office may encounter:

- Chapter 7 Liquidation
- Chapter 9 Municipality
- Chapter 11 Business Reorganization
- Chapter 12 Family Farmer and Fisher
- Chapter 13 Individual Reorganization

Each of these Chapters has specific qualifications and consequences.

What are the steps in the bankruptcy process?

- With the help of an attorney, an individual completes a Voluntary Petition in bankruptcy.
- The Petition is filed in a federal court.
- A Trustee is appointed by the court to oversee
- Timeframes are established
- The debts are discharged (resolved)
- The individual is debt-free.

### **What is a Voluntary Petition?**

The Application or Pleading filed with the bankruptcy court requesting the protections of the bankruptcy court over assets and debts.

### **What is an Automatic Stay?**

Stay:  
Stop, defer,  
postpone, delay,  
or suppress  
certain action(s).

When a Petition for Protection is filed under the bankruptcy laws, a stay automatically takes effect under any of the chapter filings. This means that certain actions by creditors are immediately stopped, deferred, postponed, delayed, or suppressed. Section 362 of the Bankruptcy Code is called the “Automatic Stay.” This prevents creditors from harassing the debtor for payment. Specifically, creditors are prohibited from:

- Commencing or continuing any action or proceeding against the debtor to recover a claim or debt against the debtor, including the issuance or employment of process. This means a creditor may not commence a new law suit, or complete an existing law suit against a debtor in bankruptcy.
- Enforcing a debt or judgment against a debtor in bankruptcy. This means that a creditor must stop enforcement actions.

- Acting to obtain possession of property of the estate in bankruptcy. This means that repossessions are not allowed, or in the case of Chapter 11 or Chapter 13 filed prior to October 17, 2005, no wage assignments for arrears would be allowed. For Chapter 11, 12 and 13 cases filed after 10/17/2005, a Notice to Withhold (NTW) is allowed for child support. 11 U.S.C. § 362 (b)(2)(C).
- Pursuing any act to create or perfect a lien against property of the estate in bankruptcy. This means that once a petition is filed, you cannot file a real property lien.
- Pursuing any act to create or perfect a lien against property of the debtor in bankruptcy. This means that you cannot file an Abstract of Judgment or record a judgment while the debtor is in bankruptcy.
- Pursuing any act to collect, assess, or recover a debt against the debtor that arose prior to the filing of a petition in bankruptcy. This means that you cannot contact the debtor to find out about when the next payment will be made. You cannot negotiate a State Licensing Match System (SLMS) Stipulation, or inquire about payment on arrears for cases filed prior to 10/17/2005, but you can suspend a license for cases filed after that date. .

How does a stay impact a child support case?

Exceptions to the stay exist for child support debt. The filing of a petition does not operate as a stay against:

- The commencement or continuation of a criminal action against the debtor. However, some courts have ruled that a Civil Contempt proceeding to enforce the payment of a debt is a violation of the Automatic Stay and recent decisions have indicated that commencing a criminal action may be a violation of the Automatic Stay. Consult your unit attorney for clarification; and
- The commencement or continuation of an action to establish paternity, to establish or modify an order for child or spousal support, or the collection of spousal, child, and family support that is not property of the estate. That means in a Chapter 7 bankruptcy, you can continue to collect child and spousal support and arrears. In a Chapter 13 bankruptcy, current support may be collected by Wage Assignment, generally not arrears.

## **11 U.S.C. § 362**

### **Under the recent Bankruptcy law changes effective for petitions filed after 10/17/2005, the following is true:**

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub L 109-8, effective for petitions in bankruptcy filed 10-17-2005 or after:

- Creates a category of “domestic support obligation” which is a debt owed to a spouse, child, parent of a child or a governmental agency in the nature of maintenance, support (including public assistance) or alimony. 11 U.S.C. § 101(14A).
- Domestic Support obligations and interest on support obligations are non-dischargeable in bankruptcy. 11 U.S.C. § 523(a)(5). This change in the law makes it clear that previous decisions allowing discharge of assigned support or support arrears are no longer valid.
- A Notice to Withhold is valid, notwithstanding the filing of a bankruptcy, for both current support and arrears through income withholding. 11 U.S.C. § 362(b)(2)(C).
- Sending a Notice to Withhold, suspending or revoking licenses, or the denial of passport issuance does not violate the automatic stay. 11 U.S.C. § 362(b)(2)(C)
- Reporting overdue support obligations to a credit reporting agency is not a violation of the automatic stay. 11 U.S.C. § 362(b)(2)(E).
- It is not a violation of the automatic stay to intercept a tax refund for support. 11 U.S.C. § 362(b)(2)(F).
- The enforcement of medical support orders is not a violation of the automatic stay. 11 U.S.C. § 362(b)(2)(G).
- FTB full collection (and FIDM) are probably a violation of the Bankruptcy Stay. Currently the computer systems are programmed to remove an obligor when the bankruptcy screens are entered. FTB regulations remove an obligor from the collection program when they receive notice of the bankruptcy.
- Debtors will have to undergo a “means test” and many cases previously filed, as Chapter 7’s will now have to file under Chapter 13. 11 U.S.C. § 1322 (d).
- Child support claimants who file a bankruptcy petition will be given information on local child support agencies to assist in the collection of child support debt. Child support obligors will not be granted a discharge unless the debtor remains current with respect to current support that has accrued commencing with the filing of the bankruptcy or can show that their entire projected disposable income in paid into the Plan. 11 U.S.C. § 1322(a)(2), (4).

- Child Support is a first priority debt and will be paid before other priority creditors (but after the payment of secured creditors and the payment of trustee's fees). Child support will be paid before taxes or customs, wages or attorney's fees. 11 U.S.C. § 507(a)(1)(A).



Only property of the estate is subject to the Automatic Stay.

### **What is meant by Property of the Estate?**

The filing of a Petition for Protection in bankruptcy creates what is called the Property of the Estate (11 U.S.C. §541). Upon the filing of a petition, all of the debtor's assets and debts become property of the estate, as well as potentially all earnings, lottery proceeds, tax refunds, and other sources of income the debtor may receive during the bankruptcy. Property of the estate does not include property that the debtor has exempted out of the estate pursuant to exemption law (11 U.S.C. §522) and filed in the bankruptcy schedules as exempt property.

### **Are there exemptions to the Property of the Estate?**

State and federal law exempts certain property from execution and these exemptions may be used by the debtor in bankruptcy to exclude the property from consideration in the estate. Upon filing a petition with the court, essentially all of the debtor's property becomes property of the estate, then the debtor exempts certain property which can be kept free from attachment and out of the hands of the bankruptcy trustee.

### **When is a Proof of Claim used?**

In bankruptcy, child support obligations are priority, non-secured claims. A proof of claim must be filled out and a support calculation attached with a copy of the judgment(s) supporting the claim. The original and two copies must be sent to the U.S. Trustee in bankruptcy and either the debtor or debtor's attorney. The addresses will be on the bankruptcy notice.

### **Are criminal actions affected by filing for bankruptcy?**

- Criminal actions, such as filing of a contempt or a criminal action for failure to support a child, or a violation of probation, may be affected by the filing of a bankruptcy. Consult with your attorney. Generally criminal actions are not impacted by a Bankruptcy filing, certain civil enforcement proceedings may be affected by a Bankruptcy filing.

- A Civil Contempt, however, can be viewed as a violation of the automatic stay as it seeks payment instead of punishment. If a debtor stops paying child support ordered in the terms and conditions of the debtor's probation, a violation of probation will not be stayed by the bankruptcy. The debtor must arrange to make the payments or is subject to incarceration.

### **What impact does filing for bankruptcy have on Tax Intercept/Lottery Proceeds?**

Generally, tax intercepts or lottery proceeds are either not property of the estate, or your certification of your arrears pre-dated the filing of the bankruptcy, so you are a secured creditor with respect to this property and need not release your lien. The general rule is, do not release tax intercept to the debtor. The recent changes in Bankruptcy law make it clear that intercepts, license revocation and passport denial are not violations of the automatic stay.

### **Where does the Establishment or Modification of Support or Paternity fit in with bankruptcy?**

Under no circumstances is the establishment of paternity, support, or health insurance orders stayed by bankruptcy. An action to modify support is not affected by the filing of a bankruptcy either.

### **What does it mean to have a bankruptcy discharged? Dismissed?**

#### **Discharge in Bankruptcy**

In bankruptcy cases, the debtor (or obligor) is entitled to "discharge" (release) certain kinds of debt. Most debts will be discharged. There are exceptions, and child support is one of the exceptions. So long as the debt is for child support or spousal support, even if it is assigned to the child support office to collect, the debt is non-dischargeable. That means that child support is a debt that survives bankruptcy. The interest on the support order also survives the bankruptcy.

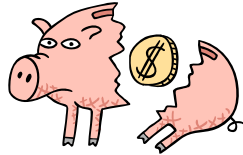
Once the discharge is entered, the Child support agency will be able to resume normal enforcement of the case including sending out the Notice to Withhold.

### **Dismissal of the Bankruptcy**

In certain cases the bankruptcy will be dismissed. The reason is usually that the debtor (our non-custodial parent) will have failed to comply with bankruptcy regulations (either did not present the required paperwork or did not make the bankruptcy payments). If the petition in bankruptcy is dismissed, it is as if the case never happened and all enforcement activities may resume.

## Chapter 7 Bankruptcy: Liquidation

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### What is Chapter 7 bankruptcy?

The type of bankruptcy filing most frequently encountered by child support officers is the Chapter 7 or liquidation bankruptcy. In this type of bankruptcy filing, the debtor (obligor in child support) files a Voluntary Petition with the bankruptcy court. Through the petition, the court is asked to liquidate the debtor's assets and debts. Ordinarily, the court exempts the debtor's assets from liquidation and discharges the debts. In other words, assets are retained by the debtor while debts are eliminated.

Child support attorneys will encounter two (2) types of Chapter 7 filings:

#### The "No-Asset Chapter 7"

- This is the most common.
- The debtor has no assets to be distributed to creditors.
- There is no need to file a Proof of Claim.
- The debtor will receive the discharge in approximately four months after the initial filing.

#### The Asset Chapter 7

- There are additional assets available to the creditors for disbursement.
- These assets are beyond those exempted by the debtor.
- You will need to file a Proof of Claim that will be attached to the Chapter 7 filing notice.

### What is the impact of a Chapter 7 bankruptcy on child support?

- You cannot file an Abstract of Judgment or record a judgment while the debtor is in bankruptcy.
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- You cannot contact the debtor to find out when the next payment will be made.
- You cannot negotiate a SLMS [Statewide Licensing Match System-SLMS--California designation] Stipulation, or inquire about payment on arrears.
- You can continue to collect child and spousal support and arrears.
- Do not release property liens or recorded Abstracts of Judgment that were filed or recorded prior to the debtor's filing for bankruptcy. (Exception: When the lien or Abstract was filed or recorded after the bankruptcy was filed.)
- If a debtor requests a lien be lifted, refer the debtor to the bankruptcy court to petition to remove the lien when it impairs an exemption.
- Licenses/SLMS [Statewide Licensing Match System]  
Under no circumstances should you release a license just because a bankruptcy has been filed. A license is not property or property of the estate. A license is a privilege under state law. Further, the revocation of a license is an operation of the state police, and the state may assert sovereign immunity to revoke the license without violating the automatic stay.

The situation is analogous to when an individual has to take a test to be granted a license. If the debtor does not pass the test, the debtor cannot then file for bankruptcy and request the license be issued because it would deprive the debtor of income.

Even if a license was considered "property" in which the debtor has an interest, your submission to SLMS prior to the filing of the bankruptcy makes you a "secured creditor" with respect to the license and the debtor would have no equity in the "property." It would then be the debtor's burden to petition the bankruptcy court to have your 'lien' removed (something that the debtor would most likely be unable to do), or file a judicial request for license review in the family law court.

If, however, other criteria for releasing a license were present (you are receiving payment by Wage Assignment or the debtor has provided a significant lump sum payment), you may release the license. You may not, however, issue

SLMS because the debtor filed bankruptcy, or retaliate with an SLMS issuance due to the bankruptcy.

- **SLMS Requests by Debtor pending Bankruptcy**  
If the debtor (the non-custodial parent) requests SLMS review while a bankruptcy is pending or after having been filed, do not negotiate with the debtor for a lump sum or payment plan. Refer the debtor to family law or bankruptcy court. If, however, you are receiving wage assignment payments or other SLMS release criteria are present, you may release the license, although you are under no obligation to do so and should not release a license solely because a bankruptcy has been filed.

### **How is a wage assignment affected?**

- There is no need to modify the wage assignment. Some employers will not honor the wage assignment once notified of a Chapter 7. In those instances, wait until the bankruptcy is discharged and then resend the wage assignment with the notice that child support is not dischargeable in bankruptcy.

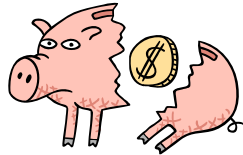
### **Is credit reporting allowed?**

Credit reporting is allowable in bankruptcy. These debts are non-dischargeable and the accurate reporting of the balances due is not a violation of bankruptcy laws. You do not report to enforce the amount due, so there is no violation of the stay.

## Chapter 3

# Chapter 9 Bankruptcy: Municipality

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### **What is a Chapter 9 bankruptcy?**

Prior to the County of Orange, California filing for Chapter 9 bankruptcy in the early 1990s, child support officers almost never saw a Chapter 9 filing. That is because municipalities, governmental entities, and utilities file for protection under Chapter 9. The Petition can either be to request a liquidation (mostly used by railroads) or reorganization (as in the case of Orange County).

### **What is the impact of a Chapter 9 bankruptcy on child support?**

- You will usually only become aware of a municipality's Chapter 9 bankruptcy filing when, in response to a wage assignment, you are unable to cash the municipality's check. (In this case the municipality is the debtor.) Since you did not actually receive any money, the obligor (non-custodial parent) cannot be given credit for the check you received. In this instance, you are not the creditor of the municipality; the obligor is. As a result, the Proof of Claim should be directed to the obligor to file with the court. It was the obligor's income which was garnished and the obligor's money which was not received. (*County of Shata v. Twig Smith* (1995) 38 Cal.App.4<sup>th</sup> 329)
  - You cannot file an Abstract of Judgment or record a judgment while the debtor is in bankruptcy.
  - You cannot contact the debtor to find out when the next payment will be made.
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- Do not release property liens or recorded Abstracts of Judgment that were filed or recorded prior to the debtor's filing for bankruptcy. (Exception: When it was filed or recorded after the bankruptcy was filed.)
- If a debtor requests a lien be lifted, refer the debtor to the bankruptcy court to petition to remove the lien when it impairs an exemption.
- Licenses/SLMS  
Under no circumstances should you release a license just because a bankruptcy has been filed. A license is not property or property of the estate. A license is a privilege under California law. Further, the revocation of a license is an operation of the state police, and the state may assert sovereign immunity to revoke the license without violating the automatic stay.

The situation is analogous to when an individual has to take a test to be granted a license. If the debtor does not pass the test, the debtor cannot then file for bankruptcy and request the license be issued because it would deprive the debtor of income.

Even if a license was considered "property" in which the debtor has an interest, your submission to SLMS prior to the filing of the bankruptcy makes you a "secured creditor" with respect to the license and the debtor would have no equity in the "property." It would then be the debtor's burden to petition the bankruptcy court to have your 'lien' removed (something that the debtor would most likely be unable to do), or file a judicial request for license review in the family law court.

If, however, other criteria for releasing a license were present (you are receiving payment by Wage Assignment or the debtor has provided a significant lump sum payment), you may release the license. You may not, however, issue SLMS because the debtor filed bankruptcy, or retaliate with an SLMS issuance due to the bankruptcy.

- SLMS Requests by Debtor pending Bankruptcy  
If the debtor (the non-custodial parent) requests SLMS review while a bankruptcy is pending or after having been filed, do not negotiate with the debtor for a lump sum or payment plan. Refer the debtor to family law or bankruptcy court. If, however, you are receiving wage assignment

payments or other SLMS release criteria are present, you may release the license, although you are under no obligation to do so and should not release a license solely because a bankruptcy has been filed.

- Obligor's ability to obtain a loan to satisfy any remaining arrears

### **How is a wage assignment affected?**

A Notice to Withhold (NTW) does not violate the automatic stay.

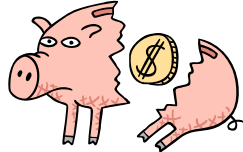
### **Is credit reporting allowed?**

Credit reporting is allowable in this type of bankruptcy. These debts are non-dischargeable and the accurate reporting of the balances due is not a violation of bankruptcy laws. You do not report to enforce the amount due, so there is no violation of the stay.

## Chapter 4

# Chapter 11 Bankruptcy: Business Reorganization

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### What is Chapter 11 bankruptcy?

This type of bankruptcy is used by businesses to reorganize their debts and by individuals who are ineligible to file under Chapter 13 because their unsecured debts exceed \$307,675 (and is adjusted annually) or their secured debts exceed \$922,975. Essentially, if a debtor owes more than \$1,000,000.00 s/he will have to file a Chapter 11 rather than a Chapter 13. 11 U.S.C. § 109 (e).

Under Chapter 11 bankruptcy, the debtor files with the court a Petition of Relief in which the debtor's assets and liabilities are explained. The debtor returns to court to file a Plan of Reorganization in which the plan to pay creditors is presented. Creditors will be paid either in full or at a pro-rata share over a specified time, usually 3 – 5 years.

What is the impact of Chapter 11 bankruptcy on child support?

- You will generally run into this type of bankruptcy when you send a business a wage assignment and the returned check does not clear the bank. (In this case, the business is the debtor.) You did not actually receive any money, therefore, the obligor (non-custodial parent) cannot be given credit for the check you received. In this instance, you are not the creditor of the business; the obligor is. As a result, the Proof of Claim should be directed to the obligor to file with the court. It was the obligor's income which was garnished and the obligor's money which was not received. (*County of Shasta v. Twig Smith* (1995) 38 Cal.App.4<sup>th</sup> 329)
- You cannot file an Abstract of Judgment or record a judgment while the debtor is in bankruptcy.

Property of the estate includes earnings and income received by the debtor during a Chapter 11 bankruptcy as these are necessary to conduct the wage earner plans

- You cannot contact the debtor to find out about when the next payment will be made.
- Do not release property liens or recorded Abstracts of Judgment that were filed or recorded prior to the debtor's filing for bankruptcy. (Exception: When the lien or recorded abstract of judgment was filed or recorded after the bankruptcy was filed.)
- If a debtor requests a lien be lifted, refer the debtor to the bankruptcy court to petition to remove the lien when it impairs an exemption.
- Licenses/SLMS  
Under no circumstances should you release a license just because a bankruptcy has been filed. A license is not property or property of the estate. A license is a privilege under California law. Further, the revocation of a license is an operation of the state police, and the state may assert sovereign immunity to revoke the license without violating the automatic stay.

The situation is analogous to when an individual has to take a test to be granted a license. If the debtor does not pass the test, the debtor cannot then file for bankruptcy and request the license be issued because it would deprive the debtor of income.

Even if a license was considered "property" in which the debtor has an interest, your submission to SLMS prior to the filing of the bankruptcy makes you a "secured creditor" with respect to the license and the debtor would have no equity in the "property." It would then be the debtor's burden to petition the bankruptcy court to have your 'lien' removed (something that the debtor would most likely be unable to do), or file a judicial request for license review in the family law court.

If, however, other criteria for releasing a license were present (you are receiving payment by Wage Assignment or the debtor has provided a significant lump sum payment), you may release the license. You may not, however, issue SLMS because the debtor filed bankruptcy, or retaliate with an SLMS issuance due to the bankruptcy.

- SLMS Requests by Debtor pending Bankruptcy  
If the debtor (the non-custodial parent) requests SLMS review while a bankruptcy is pending or after having been

filed, do not negotiate with the debtor for a lump sum or payment plan. Refer the debtor to family law or bankruptcy court. If, however, you are receiving wage assignment payments or other SLMS release criteria are present, you may release the license, although you are under no obligation to do so and should not release a license solely because a bankruptcy has been filed.

### **How is a wage assignment affected?**

A Notice to Withhold is allowed under Bankruptcy law.

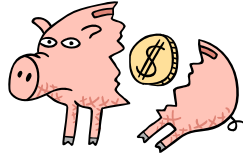
### **Is credit reporting allowed?**

Credit reporting is allowable in this type of bankruptcy. These debts are non-dischargeable and the accurate reporting of the balances due is not a violation of bankruptcy laws. You do not report to enforce the amount due, so there is no violation of the stay.

*Chapter 5*

## Chapter 12 Bankruptcy: Family Farmer

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### **What is a Chapter 12 bankruptcy?**

A family farmer or fisher with regular income would use this type of bankruptcy.

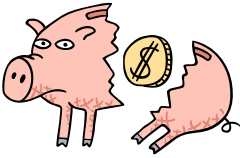
### **What is the impact of Chapter 12 bankruptcy on child support?**

For child support purposes, you should treat this type of bankruptcy in the same manner as a Chapter 13 bankruptcy, which is discussed in the next chapter.

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# Chapter 13 Bankruptcy: Individual Reorganization

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## What is a Chapter 13 bankruptcy?

This type of bankruptcy filing is available only to individual debtors or married individuals with regular income and unsecured debts of less than \$307,675 (and adjusted annually) and secured debts of less than \$922,975 (and adjusted annually). In this type of bankruptcy, the debtor files with the court a Petition of Relief in which the debtor's assets and liabilities are explained. Within 30 days, the debtor files with the court a Plan of Reorganization in which the plan to pay creditors is presented. The repayment plan usually lasts three to five years and provides for periodic payments to the bankruptcy trustee, who then distributes the payment to the creditors based upon the formula presented in the Plan of Reorganization. The debtor must attend debt counseling (consumer credit counseling) classes. Most times these are conducted on-line and can be completed in about 45 minutes.

## What is the impact of Chapter 13 bankruptcy on child support?

This type of bankruptcy filing is commonly seen in child support cases and demands the most attention for child support enforcement agencies. You will need to attach a Proof of Claim to the Notice of Bankruptcy filing and file with the court and trustee.

- You cannot file an Abstract of Judgment or record a judgment while the debtor is in bankruptcy.
- You cannot contact the debtor to find out when the next payment will be made.



Property of the estate includes earnings and income received by the debtor during a Chapter 13 bankruptcy as these are necessary to conduct the wage earner plans

- You cannot negotiate a SLMS Stipulation, or inquire about payment on arrears.
- Current support may be collected by Wage Assignment, generally not arrears.
- Do not release property liens or recorded Abstracts of Judgment that were filed or recorded prior to the debtor's filing for bankruptcy. (Exception: When it was filed or recorded after the bankruptcy was filed.)
- If a debtor requests a lien be lifted, refer the debtor to the bankruptcy court to petition to remove the lien when it impairs an exemption.
- Licenses/SLMS  
Under no circumstances should you release a license just because a bankruptcy has been filed. A license is not property or property of the estate. A license is a privilege under California law. Further, the revocation of a license is an operation of the state police, and the state may assert sovereign immunity to revoke the license without violating the automatic stay.

The situation is analogous to when an individual has to take a test to be granted a license. If the debtor does not pass the test, the debtor cannot then file for bankruptcy and request the license be issued because it would deprive the debtor of income.

Even if a license was considered "property" in which the debtor has an interest, your submission to SLMS prior to the filing of the bankruptcy makes you a "secured creditor" with respect to the license and the debtor would have no equity in the "property." It would then be the debtor's burden to petition the bankruptcy court to have your 'lien' removed (something that the debtor would most likely be unable to do), or file a judicial request for license review in the family law court.

If, however, other criteria for releasing a license were present (you are receiving payments by Wage Assignment or the debtor has provided a significant lump sum payment), you may release the license. You may not, however, issue SLMS because the debtor filed bankruptcy, or retaliate with an SLMS issuance due to the bankruptcy.

- SLMS Requests by Debtor pending Bankruptcy  
If the debtor (the non-custodial parent) requests SLMS review while a bankruptcy is pending or after having been filed, do not negotiate with the debtor for a lump sum or payment plan. Refer the debtor to family law or bankruptcy court. If, however, you are receiving wage assignment

payments or other SLMS release criteria are present, you may release the license, although you are under no obligation to do so and should not release a license solely because a bankruptcy has been filed.

How is a wage assignment affected?

- NTW for current for arrears is allowed.
- The debtor's wages may be part of the estate. However, a NTW or child support is not in violation of the automatic stay. The NTW (wage assignment) may be modified to collect only current child support, as the arrears may be paid by the trustee pursuant to a properly filed Proof of Claim. The debtor will generally consent to a wage assignment for current child support and arrears because the trustee must be paid a percentage of the amount collected in addition to the amount collected. Also pursuant to bankruptcy law, the entire arrears must be paid under the terms of the Plan (unless treated for outside of the Plan) and you may not need the entire amount of the arrears paid during the 36-60 operation of the Plan. You may be able to negotiate with a debtor's attorney to allow current and some arrears to be paid outside of the bankruptcy. Debtors have incentive to remain current on their support obligations or their discharge can be denied. Some attorneys may request that you file a proof of claim for the entire arrears in order to demonstrate to the court that a Chapter 13 is not feasible, even if the debtor's meet the means test. That would in some instances allow the debtor to convert to a Chapter 7. Otherwise a Chapter 13 Plan can be drafted to pay a portion of the child support arrears while acknowledging that the balance will remain non-dischargeable. A possible scenario would be where the support is arrears only, the debtor is behind in his/her mortgage and you do not need to collect the full amount of the arrears in the 3 to 5 years that the Plan will last. You may file a proof of claim for a portion of the debt, and allow the balance to survive the bankruptcy for collection later. This may allow a debtor to save their house (and your lien against it) while making some payments towards a case with arrears. At the end of the bankruptcy, if the debtor successfully save their home, your lien will still attach and the debtor should be grateful that we did not stand in the way of their successful completion of their bankruptcy. A true win-win situation.

### **Is credit reporting allowed?**

Credit reporting is allowable in this type of bankruptcy. These debts are non-dischargeable and the accurate reporting of the balances due is not a violation of bankruptcy laws. You do not report to enforce the amount due, so there is no violation of the stay.

## Chapter 7

# Complex Proof of Claim:

## Adding Interest to Support Arrears

### What is a Proof of Claim in bankruptcy?

A claim is a right to payment. 11 U.S.C. § 101 (5).

(5) 'claim' means -

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

A claim in bankruptcy could be the right to collect unliquidated, but accrued, unreimbursed medical expenses or educational expenses or reimbursement of child care costs not yet reduced to a judgment.

Child support is defined as a specific domestic support obligation. 11 U.S.C. § 101 (14A):

'domestic support obligation' means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable non-bankruptcy law...that is;

(A) owed to or recoverable by-

(i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian or responsible relative, or

(ii) a governmental unit.

11 U.S.C. § 523 (a)(5):

Domestic Support Obligations are not dischargeable in bankruptcy.

Child support debt for the purposes of a Proof of Claim includes all amounts owed as of the date of the filing of the Petition in Bankruptcy, for support, maintenance, educational expenses, travel expenses, child care expenses, etc., as defined by state law and as ordered in an order or judgment, whether reduced to a liquidated amount or not.

The amount your agency is collecting should be the amount listed on the Proof of Claim, but the obligee can also file a Proof of Claim for the amounts that remain owed, but are

not yet liquidated to a sum certain. An example would be when there is a 50/50 reimbursement of unreimbursed medical expenses. If the obligee has those figures, s/he can submit a proof of claim in the bankruptcy court attaching the documentation, including the order allowing for the reimbursement, and the receipts in support of the amount claimed and the payment records.

Bankruptcy case on interest on child support:

***In re Donald Clifford Foster (9<sup>th</sup> Cir. 2003) 319 F.3d 495***

In a case pursued by the Ventura County DCSS, the ninth circuit held that interest on child support is nondischargeable. The Bankruptcy Code provides that child support is nondischargeable, and like tax debt, interest that accrues on child support, even post-confirmation interest, is nondischargeable. In this case Foster paid pre-petition child support debt and interest through the Plan, which was confirmed. The Plan was not opposed by Ventura County and Ventura County did not request post-petition interest. Upon discharge, the Ventura County DCSS (then the D.A.) sent a wage assignment to Foster's employer to collect the interest that had accrued during the 5 years under the Plan. Foster filed a motion in the Bankruptcy Court to enforce the provisions of the discharge injunction which prohibits creditors from enforcing debt which has been discharged. The Bankruptcy Court granted Ventura County's summary judgment motion and Foster appealed. The ninth circuit found that "interest on nondischargeable child support obligations, like interest on nondischargeable tax debt, continues to accrue after a Chapter 13 petition is filed and is not dischargeable." The County could, therefore, collect against Foster after the underlying debt was discharged.

Bankruptcy Trustees are aware of the interest on child support, but may not be aware of the interest allowed under state law on child support judgments. The Trustees, who administer the bankruptcy payments from a Chapter 11 or 13, have programs designed to attribute interest (even variable interest) to debt on proofs of claim. You must provide the Trustee with the state law providing for the interest and how the interest has been calculated to date and a request that interest accrue on the principal throughout the distribution under the Plan of Reorganization.

Attach a letter/request to the proof of claim with the statute authorizing interest and the rate that interest accrues. File only one proof of claim per debtor if possible. Do not file separate claims for child support, medical arrears, interest, child care, alimony or spousal support. You can attach separate accountings evidencing the different accounts, but add them up onto one proof of claim and attach all supporting documents.

## Chapter 8

# Objections to Claim

## Challenges and Responses

Once a Proof of Claim is filed with the bankruptcy court, it is allowed by operation of law unless an objection is filed. 11 U.S.C. § 502(a). The debtor or the trustee would usually object, although other creditors have the ability to object as well. An objection is a motion proceeding where an individual (usually the debtor—your obligor) would object to the amount or status of your claim. The usual objections are to the amount, primarily the addition of interest, but other objections could include the priority of claim or the nondischargeability of the child support obligation.

Once an objection to claim is filed, the court will set a date for the objection. Bankruptcy Rule 3007. At the hearing on the Motion Objecting to Claim, the child support agency has the burden of proving validity of claim (Federal Rules of Evidence Rule 902 (1) a certified copy of an order is self-authenticating) and have an accounting with a declaration in support of the public agency's records (Federal Rules of Evidence Rule 803 (8) documenting charges and payments and the accumulation of interest). Once you have submitted these documents, you have made your *prima facie* case and the burden shifts to the obligor to show why his/her objection should be heard and the claim reduced or disallowed. If your proof of claim was properly filed and included the above documentation, you would have met your burden prior to the Motion for an Objection.

This is a simple prove up case. The court will know the law. Motions in bankruptcy court are by declaration, and the court will usually not allow testimony. Make sure you have submitted your response and declarations and evidence in advance of the hearing within the time frames required by your court.

Identify areas of state law to which the obligor/debtor objects. For example, supply the court with your statute on income, the law regarding the assignment of collection and authorization of your representation.

## Chapter 9

# Employer Files Bankruptcy

## Honoring the Notice to Withhold

You have a Notice to Withhold that is paying with Acme Electric. Acme pays pursuant to the money deducted from the child support obligor's check from September through December. Acme deducts child support in January, but does not forward it to your office and files bankruptcy in February and sends no more payments. The child support obligor's check has deductions from your Notice to Withhold (or garnishment) and requests that you credit his/her child support accounts for the amounts you caused to be deducted, but never received. What do you do?

It is easier to tell you what not to do.

Do not file a contempt against the employer Acme. Acme has filed bankruptcy. The amounts owed by Acme is not child support (Acme is not a parent), but are wages. Once the bankruptcy is filed, the automatic stay prohibits you from moving to collect on the debt. The child support agency is not out any money. The obligor is. Acme does not owe you the money, but was a trustee for the obligor.

Do not credit the child support obligor for money not received. In a California case, the court ruled that the child support agency had no obligation to credit the child support obligor for money deducted from his/her check, but that was never received. *County of Shasta v. Twig Smith* (1995) 38 Cal. App. 4<sup>th</sup> 329.

Do not file a proof of claim on behalf of the child support agency. The money is not owed by Acme to the child support agency. It is owed to the employee who had money deducted from his/her check, but not forwarded. It is wages accrued, but not paid. This type of claim is entitled to priority under the Bankruptcy Code and the obligor has every right to file a Proof of Claim for the wages not received. If the child support obligor complains for not receiving credit, provide him/her with a proof of claim form (the instructions are attached) so s/he can file a priority claim for wages.

## *Chapter 10*

# Objection to Chapter 13 Plan as not Providing for Child Support Payments

When the debtor (your obligor) proposes a Plan that does not include payment of child support arrears and does not provide for payment of on-going support, you can object to the Plan. Copies of the Objection and Declaration in Support are supplied with these materials. The format is simple and familiar; the procedure varies from court to court.

The first step is to get all your documents in order. Generally, you need certified copies of the orders you are submitting to the court. You will also need certified pay ledgers and an accounting. Then file your Proof of Claim with the court. Next step is to review the Plan and talk to the debtor's attorney about amending the Plan to provide for payment of arrears and on-going support to be paid outside of the Plan, preferably by Notice to Withhold. At this point, you can negotiate. For example, the debtor thinks his child support arrears are \$10,000 and you submit a proof of claim for \$25,000. The debtor's attorney indicates that they filed the Chapter 13 to keep the house from being foreclosed or the car from being repossessed and that payment of the additional \$15,000 in the Plan would jeopardize the ability of the debtor to save the house. Remember most Plans provide for complete repayment in three to five years. Often you can agree to payment plans that exceed three years. If your balance is so high that the debtor could not pay off the complete amount in the Plan, propose that you voluntarily reduce your claim, having the debtor acknowledge in writing that the debt is non-dischargeable and will survive the discharge in bankruptcy.

If you believe the debtor is trying to eliminate debt and not providing for child support, object to the Confirmation.

## Chapter 11

# Complex Proceedings in Bankruptcy:

## Motions to Avoid Liens

A judicial lien on the debtor's primary residence or homestead is avoidable (removable or releasable in bankruptcy) if it impairs a homestead exemption. The normal homestead exemptions are in the nature of \$50,000 to \$200,000 depending on the state, with Texas and Florida providing for unlimited exemptions on primary residences. What this means that if the debtor's voluntary encumbrances, such as mortgage and lines of equity combined with the exemption, exceed the value of the home, then all judicial liens are avoidable in bankruptcy. A child support recording or lien is a judicial lien and may therefore be avoidable.

A simple procedure is available. See the attached example to file an Objection to a Motion to Avoid a Lien.

11 U.S.C. § 522 (f)(1) provides the legal basis to object.

"(f)(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is -

- (A) a judicial lien, other than a judicial lien that secures a debt -
  - (i) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement; and
  - (ii) to the extent that such debt -
    - (I) is not assigned to another entity, voluntarily, by operation of law, or otherwise; and
    - (II) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support."

## *Chapter 12*

# Complex Proceedings in Bankruptcy:

## Violations of the Automatic Stay;

### What to Do, What to Avoid

Sanctions is what worries most child support attorneys about Bankruptcy. Fear not, so long as you have a written procedure and you follow it. Chapter 7's are easy. You need not modify any part of collections, just hold off until the discharge (approximately four months post-filing) for most collection activities.

Chapter 13 is more troublesome. Some do's and don'ts.

Do not release validly filed liens that precede the filing of the bankruptcy.

Do not file a new lien post filing.

Do not issue a Notice to Withhold (NTW) post filing without the permission of the debtor's attorney or the debtor. Do not include arrears in the NTW. File a proof of claim for the arrears.

Do not release a license. Generally, licenses are a privilege, not property. The state has the authority to revoke a license notwithstanding the filing of a bankruptcy.

Do not request a debtor's exam.

Probably do not file a Contempt action, but criminal proceedings are not prohibited.

Do communicate with the debtor's attorney. Promptly inform the debtor's attorneys of any mistakes and your action to rectify the mistake.

Credit reporting is allowed, in fact, it is required by federal law for child support cases.

You are allowed to establish or modify a child support order notwithstanding the filing of a Chapter 13 without permission of the court.

When in doubt, request Relief from Stay.

If a Motion for Sanctions is filed, always argue Sovereign Immunity.

## *Chapter 13*

# Adversary Proceedings

The debtor or a creditor can file a lawsuit against another entity in the bankruptcy court. Such an action is called an Adversary proceeding. It is essentially a lawsuit filed in the bankruptcy proceeding. Certain core proceedings must be filed in the bankruptcy proceeding. A complaint to determine dischargability is an adversary proceeding and must be filed in the bankruptcy court. An action to declare a debtor's business their alter ego is an adversary proceeding. Federal Civil Procedure applies (with some Bankruptcy Rules thrown in).

*Chapter 14*

## Chapter 11 and Chapter 13 Issues

11 U.S.C. § 109 defines the differences in Chapters.

*Chapter 15*

# Bankruptcy Procedure

Pub.L 103-394, Title IV, § 304(g), 108 Stat. 4134

“Child Support creditors or their representatives shall be permitted to appear and intervene without charge, and without meeting any special local court rule requirement for attorney appearances, in any bankruptcy case or proceeding in any bankruptcy court or district court of the United States if such creditors or representatives file a form in such court that contains information detailing the child support debt, its status, and other characteristics.”

Telephonic Appearance

Declarations

Electronic Filings

## Chapter 15

# Important Cases

***In re Garrett* (E.D. Tex 2005) 315 B.R. 431** 1981 Dissolution support order from California was sent to Texas for enforcement pursuant to UIFSA. Texas entered an order for arrears that did not include the California interest. When debtor paid all the amounts under the Texas judgment, he claimed that he no longer owed any child support debt. Obligee filed a proof of claim in the Texas Bankruptcy proceeding and debtor objected claiming that he had satisfied the amount the Texas courts had requested. The Texas order did not include accumulated interest.

**HELD:** UIFSA and FFCCSOA require that only one order be maintained and Texas did not have the authority to modify the terms of the initial California order, and the Texas order was erroneous and the California balance remains a priority debt under bankruptcy law, notwithstanding that Texas had erroneously issued a satisfaction. The debtor was required to pay the remaining balance under the California order and all accumulated interest even though he had satisfied the Texas judgment for the same obligation. The bankruptcy court found that the Texas judgment was erroneous under UIFSA.

**Practice Pointer:** There is very good language about interstate cooperation and the reason and basis for UIFSA and FFCCSOA in this opinion.

***In re Lyle* (N.D. CA 2005) 324 B.R. 128**

Child support obligor (debtor) filed for Chapter 13 bankruptcy. Debtor owed public assistance assigned arrears to the County. Santa Clara County DCSS intercepted debtor's tax refund and filed a motion for turnover and a proceeding for sanctions for violation of automatic stay against DCSS.

**HELD:** Debtor's interest in tax refunds does not attach until there is a determination of a tax overpayment. Pursuant to tax regulations, and Internal Revenue Code (26 U.S.C. § 6402), the IRS must determine if there is an overpayment after applying previous tax delinquencies to any overpayment and reducing any amounts owed the debtor/taxpayer by any amounts of child support arrears which have accrued. Therefore, DCSS is entitled to keep the tax intercept, notwithstanding the filing of a Chapter 13 bankruptcy there is no violation of the automatic stay when tax intercepts are applied in child support cases.

**Practice Pointer:** The Bankruptcy Code was amended in 2005 and it is clear that there is no violation of the automatic stay when intercepting tax refunds. 11 U.S.C. § 362 (b)(2)(f).

***In re Charnock* (9<sup>th</sup> Cir. BAP 2004) 318 B.R. 720**

Debtors owed money to creditor. Creditor filed an Abstract of Judgment which attached to debtor's primary residence. Subsequent to the filing of the Abstract which created the judicial lien, the debtors refinanced the property with Washington Mutual but did not pay off the lien. The debtors then filed bankruptcy and filed a motion to avoid the lien on the grounds that the judicial lien impaired the debtor's homestead. Creditor asserted that the consensual lien (the mortgage by Washington Mutual) was junior to his recorded abstract and therefore should not be avoided.

**HELD:** 11 U.S.C. § 522(f) allows the avoidance of a judicial lien (Abstract of Judgment, including Abstract of Support Judgment) if it impairs a debtor's homestead allowance in their primary residence. The judicial lien can be avoided (wiped out) even if it is senior to the later filed consensual mortgage.

**Practice Pointer:** The action to file a Motion to Avoid a Lien is an adversary proceeding and if filed against a governmental agency, the governmental agency can argue governmental immunity to request dismissal of the adversary proceeding.

***In re Cervantes* (9<sup>th</sup> Cir. 2000) 219 F.3d 955**

County received a judgment ordering Cervantes to pay monthly child support and to reimburse the County for AFDC payments made to the custodial parent prior to the child support order. Cervantes filed a Chapter 13 bankruptcy and sought to discharge the AFDC debt to the County. The court ruled that 42 U.S.C. § 656 (b) was applicable in this case, therefore Cervantes could not discharge his support debt to the County.

This case is distinguished from the earlier cases of *Ramirez* and *Visness*. Those cases held that an absent parent could discharge debts unless they fell within the scope of 42 U.S.C. § 602 (a) (26). The importance of *Cervantes* is that the Court acknowledged the independent effect of 42 U.S.C. § 656 (b).

**HELD:** The amended provisions of the Social Security Act, 42 U.S.C. § 656 (b) provide that child support arrears or AFDC reimbursement are not dischargeable debts under Bankruptcy law. After *Cervantes*, parties can no longer discharge debts that are "(1) owed under state law to a state or municipality, (2) 'in the nature of support' and (3) enforceable under part D of Title IV of the Social Security Act."

***In re Leibowitz* (9<sup>th</sup> Cir. 2000) 217 F.3d 799**

**HELD:** In a Chapter 7 case, AFDC arrears are in the nature of support and nondischargeable in bankruptcy proceedings.

***In re Coker* (C.D. CA. 1998) 232 B.R. 182**

County filed an action for child support and reimbursement of welfare arrears. The judgment ordered current child support of \$1,053 and child support arrears of \$7,371. The judgment was entered after the bankruptcy was filed. Coker moved

for a determination that the reimbursement of welfare amount of \$7,371 was dischargeable. The bankruptcy court agreed, the County appealed. The District Court stated that PRWORA 42 § USC 656(b) and 42 § USC 653(p) and the bankruptcy counterparts of 11 USC § 523(a)(5)(a) and 11 USC § 523(a)(18) made welfare reimbursement nondischargeable and hold that *Visness*, decided under prior law, no longer has an impact or effect.

***In re Pacana* (9th Cir. BAP 1991) 125 B.R. 19, 22.**

“Congress, by virtue of 362(b)(2) specifically excepted child support obligations from the effect of the bankruptcy stay while the case is pending and through 1382(a)(2) and 523(a)(5), it specifically excepted child support obligations from the effect of confirmation in the Chapter 13 bankruptcy case. These provisions, read together, are consistent and manifest a legislative intent that child support obligations be excepted from the broad reach of §§ 1322 and 1327, and therefore from the effects of a Chapter 13 plan, as well as the post-confirmation automatic stay.”

The Court noted that state courts have exclusive control over the nature of child support enforcement and collection. Thus, state courts do not have to wait for the confirmation of a Chapter 13 debtor’s plan to commence an action for child support, to modify a child support order or enforcement of support.

**NOTE:** The bankruptcy court will readily grant the relief from stay. The bankruptcy court guards its jurisdiction and may sanction certain enforcement activities taken without first having applied for relief from stay. The Bankruptcy Reform Act makes non-welfare arrears a priority and normally 100% of arrears will be paid under the Plan and it is usually not necessary to try to proceed outside the plan. The language of *Pacana* is quite broad and should be viewed with some caution.

***In re Donald Clifford Foster* (9<sup>th</sup> Cir. 2003) 319 F.3d 495**

In a case pursued by the Ventura County DCSS, the ninth circuit held that interest on child support is nondischargeable. The Bankruptcy Code provides that child support is nondischargeable, and like tax debt, interest that accrues on child support, even post-confirmation interest, is nondischargeable. In this case Foster paid pre-petition child support debt and interest through the Plan, which was confirmed. The Plan was not opposed by Ventura County and Ventura County did not request post-petition interest. Upon discharge, the Ventura County DCSS (then the D.A.) sent a wage assignment to Foster’s employer to collect the interest that had accrued during the 5 years under the Plan. Foster filed a motion in the Bankruptcy Court to enforce the provisions of the discharge injunction which prohibits creditors from enforcing debt which has been discharged. The Bankruptcy Court granted Ventura County’s summary judgment motion and Foster appealed. The ninth circuit found that “interest on nondischargeable child support obligations, like interest on nondischargeable tax debt, continues to accrue after a Chapter 13 petition is filed and is not dischargeable.” The County could, therefore, collect against Foster after the underlying debt was discharged.

***In re: Wayne K. Crawford* (7<sup>th</sup> Cir. 2003) 324 F.3d 539**

In a Chapter 13 case, Crawford proposed a plan to pay his nondischargeable child support creditor 2/3 of the amount owed, while the other non-priority, unsecured creditors would get nothing. While the Bankruptcy Code does provide for different classifications of creditors, the Plan proposed must be fair. The Bankruptcy refused to confirm this Plan as it unfairly discriminated against creditors other than the child support creditor and the district court affirmed. Crawford appealed. The Seventh Circuit affirmed.

The 7<sup>th</sup> circuit held that classification of creditors may be appropriate in some circumstances where the creditors as a whole would be worse off without such a classification. In this case classification of creditors was not appropriate. As Chapter 13 is for the protection of the creditors as well as the debtors, the court found that the district court did not abuse its discretion in rejecting as unfair discrimination against other creditors as the plan would shift 2/3 of the dischargeable debt to other creditors leaving them with nothing.

**A. Effect on Criminal Prosecution**

***Hucke v. Oregon* (1993) 992 F.2d 950 (9<sup>th</sup> Cir. 1993), cert. denied 510 U.S. 862 OVERRULED by *Gruntz***

Defendant, in a criminal proceeding, was given a suspended sentence and ordered to pay restitution. He promptly filed a Chapter 13 Bankruptcy petition that called for payment of about 20% of the restitution fine. The state court revoked probation for not meeting its terms and because the purposes of probation were not being served. The revocation order required defendant to serve the suspended sentence and made no provision for payment of the restitution fine. The record reflected that the trial judge had been reluctant to have defendant placed on probation in the first instance because of the nature of the crime (rape).

The Ninth Circuit held that under these circumstances, the revocation of probation was not a violation of the automatic stay. However, had the state court sought to collect the restitution fine, the stay would have been violated. It was also noted that such fines are dischargeable.

***In re Gruntz*, 202 F.3d 1074 (9<sup>th</sup> Cir. 2000)**

En Banc opinion held that the federal Bankruptcy Courts do not have authority to void state criminal proceedings, even proceedings based upon failure to pay child support orders. Criminal prosecutions are exempt from the automatic stay without regard to the motive of the prosecutor or the remedy sought. State courts, however, do not have the authority to modify the bankruptcy automatic stay provisions and the bankruptcy court does not have to give those determination full faith and credit however a criminal conviction is not a judgment that modifies or violates the automatic stay.

Thank you.

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