WHAT IF I FORGOT TO LIST A DEBT?

Generally, the idea in a bankruptcy case is to list ALL debts that you owe as of the date of filing. This includes ALL debts … even debts that you intend to keep paying (mortgages, auto loans) and even friends and relatives that you owe money to. Still, it is not unusual for people to forget some debts, especially smaller debts such as medical or magazines that claimed you ordered them. Generally, the failure to list a small debt won't cause you too much trouble, but if it is an important or large debt you may want to immediately contact your attorney and alert them of the unlisted debt.

CHAPTER 7 CASES:

As a rule, there is no need to worry if your case was a Chapter 7 case and it was a NO ASSET CASE (that is … no property was collected by the Trustee to sell and distribute to your creditors). Here, th general rule is no harm, no foul. Even if you had listed the debt, the creditor would have gotten nothing from your case. In these cases, the courts have routinely ruled that the debt has been discharged and that it IS A VIOLATION of the Discharge Order for that creditor to continue attempting to collect the debt ONCE THE CREDITOR KNOWS that the case was filed. REMEMBER that this only applies for debts that were owed prior to the date your case was actually filed.

In a no-asset case, you should simply send the creditor a copy of your Discharge Order that you finally received from the Bankruptcy Court. Although the unlisted creditor could still file a late claim with the U.S. Bankruptcy Court arguing that the debt was "incurred due to fraud" (highly unlikely), they would be violating a court order to continue attempting to collect the debt once they have this information.

But this changes if you had assets that were collected by the Trustee. The Trustee would have sold these assets and distributed them to the known creditors. Since the creditor that was not listed didn't know that it could have shared in that money (distribution from the Trustee), they have been harmed … even if they only would have gotten pennies. In this case, the DEBT IS NOT DISCHARGED and you still owe it. Generally, if the debt is a small one, they will also go away as soon as they receive a copy of your Discharge Order. But if it is a major debt (one that you really should have known about), your will likely be stuck with that debt.

If you discover the unlisted debt before the money is distributed and your case is closed by the Trustee (and there were assets collected in your case), it is important to have your attorney file an amended list of creditors. It is still possible to add that creditor and include them up to the time that your case is closed. However, it takes some work, the payment of some required fees and sending out a lot of notices. If you add the debt prior to receiving your Discharge Order, the debt can be added for $130.00. If you wait until after you receive your Discharge Order (but before the Trustee closes your case), the debt may be added for $250.00. So, if your Chapter 7 case has money or assets that are collected, let us know as soon as possible. Note that the quoted fee is required each time that an amendment is filed, regardless of whether that amendment adds 1 or 20 creditors. So, gather them all together at once so that only one amendment needs to be filed.

CHAPTER 13 CASES:

In a Chapter 13 case, it is necessary to list all creditors. Since your plan payments will be paying out money to your creditors (albeit a very small amount in some cases), if a creditor is not listed, they are not discharged and can still collect from you. Again, if the creditor is very small, it may be cheaper to simply pay it than to pay the fees necessary to add it. But if the amount is large (say over $150), it is likely best to have it added. In a Chapter 13 case, creditors can generally be added within the first year of making payments on your plan.

COLLECTION OF AN UNLISTED DEBT:

In general, Bankruptcy Courts have ruled that even if a debt has not been listed, the creditor (once they know that a bankruptcy has been filed) is still under an order to refrain from collecting on that debt during the pendency of the bankruptcy case due to the "Automatic Stay" Order that is issued by the Court on the date the case if filed. In addition, once you receive your Discharge Order from the Court, they are also prevented from taking any effort to collect upon the debt until they first request permission from the bankruptcy court. As a result, even if the debt was unlisted, provided that it was incurred before your case was filed, it may be more hassle for the creditor to apply for and get this permission than it would be simply to let the debt remain discharged. Below is a more legal description of your rights under the Court's Automatic Stay Order and the eventual Discharge Order.

A. ENTRY OF AUTOMATIC STAY IN BANKRUPTCY STOPS ALL PENDING COLLECTION EFFORTS.

When a bankruptcy case is filed, the Automatic Stay set forth in 11 U.S.C. §362 goes into effect, without notice, when the petition for relief is filed, not when the creditor learn that the petition has been filed. See Maritime Electric Co. v. United Jersey Bank, 959 F.2d 1194 (3d Cir. 1991); Smith v. First America Bank, 876 F.2d 524 (6th Cir. 1989); In re Scharff, 143 B.R. 867 (Bankr. E.D.Pa. 1988). The scope of the Automatic Stay is broad and prohibits the commencement or continuation of any proceeding (including the issuance of process) that could have been commenced before the bankruptcy case was filed. See 11 U.S.C. §362(a)(1).

A. LACK OF ACTUAL NOTICE DOES NOT STOP THE EFFECT OF AN AUTOMATIC STAY IN BANKRUPTCY

Actions taken in violation of the Automatic Stay are void and without effect. See Easley v. Pettibone Michigan Corp., 990 F.2d 905 (6th Cir. 1993); In re Raymark Industries, Inc., 973 F.2d 1125 (3rd Cir. 1992) and In re Schwartz, 954 F.2d 569 (9th Cir. 1992). If a creditor's conduct violates the Automatic Stay, lack of notice of the debtor's bankruptcy is not a defense. See Fidelity Mortgage Investors v. Camelia Builders, Inc., 550 F.2d 47 (2nd Cir. 1976). However, lack of notice would be an obvious consideration should sanctions be requested against a creditor for proceeding on a collection matter. This would impact a finding of whether or not a creditor's continuing collection efforts were "willful." See In re Dungey, 99 B.R. 814 (Bankr. S.D. Ohio 1989)

Despite the above, a creditor who has initiated collection action in violation of the Automatic Stay, but without actual knowledge of the bankruptcy petition, still has an affirmative duty to restore the status quo without the debtor having to seek relief from the bankruptcy court or the state courts. See In re Knaus, 889 F.2d 773 (8th Cir. 1989); In re Abrams, 127 B.R. 239 (Bankr. 9th Cir. 1991) and In re

Dungey, supra. However, any failure by the creditor to affirmatively restore the status quo, and certainly any efforts to continue on with actual notice of the bankruptcy filing would fall under the definition of a willful violation of either the Automatic Stay, or later, the Discharge Order. A "willful violation" does not require a specific intent to violate the Automatic Stay. 11 U.S.C. §362(h) provides for damages upon a finding that the creditor i) knew of the stay and ii) continued his collection activities. However, knowledge of the law and intentional continuation would be a reason for increased sanctions and punitive damages. Whether or not the creditor believed in good faith that it had a right to property or to continue its activities is not relevant. See In re Bloom, 875 F.2d 224 (9th Cir. 1989) and In re Inslaw, Inc., 83 B.R. 89 (Bankr. D.D.C. 1998).

B. AUTOMATIC STAY HAS NOW MERGED INTO A DISCHARGE ORDER

Upon the granting of a Discharge Order, the Automatic Stay ceases to exist and merges into the Discharge Order. That Discharge Order operates as a permanent Injunction that a) voids any judgment to the extent it pertains to a pre-petition debt [11 U.S.C. §524(a)(1)] and b) prohibits the commencement or continuation of any action to collect, recover or offset any from the debtor any discharged debt [11 U.S.C. §524(a)(2)]. In addition, the discharge injunction prohibits the use of criminal actions as well to collect upon a discharged debt. See In re Brown, 39 B.R. 820 (Bankr. M.D. Tenn. 1984). The Bankruptcy Court has the power to impose sanctions for violation of the Discharge Order. See In re Barbour, 77 B.R. 530 (Bankr. E.D. N.C. 1987).

C. FAILURE TO PROPERLY LIST A CREDITOR DOES NOT PERMIT COLLECTION EFFORTS TO GO FORWARD, BUT DOES GIVE CREDITOR CERTAIN RIGHTS.

The above has shown that the failure to provide notice to a creditor does not vitiate the effect of either the Automatic Stay or the Discharge Order. Nor does the failure to provide notice permit the creditor to continue with the collection efforts once it receives actual notice. However, this does not

leave the creditor without rights. In general, a creditor that did not receive appropriate notice has the same continuing rights that it would have had if it did receive notice. The creditor has a) the right to file a Proof of Claim and share in the property distributed from the bankruptcy estate and b) the right to have the Bankruptcy Court determine whether or not the debt was dischargeable under 11 U.S.C. §523.

11 U.S.C. §523(a)(3)(A) provides that certain debts are not discharged if the debt is not scheduled in sufficient time to permit the creditor to file a timely proof of claim. However, in a no-asset Chapter 7 case, there is no bar date set for the filing of proof of claims and the creditor has not been prevented from filing a timely proof of claim. If a Chapter 7 Trustee later discovers assets to be collected and distributed, a proof of claim bar date would be set at that time. Thus, in a no-asset Chapter 7 case, creditors who are not even listed (as well as those who were listed, but at an inadequate address to provide notice) are discharged, subject to sharing in the distribution of later discovered assets. See Judd v. Wolfe, 78 F.3d 110 (3rd Cir. 1996); In re Maroney, 195 B.R. 452 (Bankr. D. Ariz. 1996); In re Pulley, 196 B.R. 498 (W.D. Ark. 1995); In re Anderson, 196 B.R. 839 (W.D. Mo. 1996); and In re Parker, Case No. 86 B 7917 E, Judge Charles Matheson (Bankr. D. Colo. 1987).

In addition, 11 U.S.C. §523(a)(3)(B) provides that a creditor who is not listed may have a non-discharged debt if the debt is not scheduled in time to permit the creditor to file a timely complaint to determine the dischargeability of the debt under 11 U.S.C. §523(a)(2); (a)(4); or (a)(6). In such cases, the deadline date for filing such a non-dischargeability claim will be extended upon request of the creditor. Thus, if the Plaintiff in this case believes it has a basis for holding the debt non-dischargeable under 11 U.S.C. §523(a)(2) (fraud); (a)(4) (larceny, embezzlement); or (a)(6) (willful and malicious injury), Plaintiff will have the right to file a non-dischargeability action with the Bankruptcy Court within a reasonable time of discovering the bankruptcy filing.