

BANKRUPTCY ISSUES FOR DENTAL CLIENTS

In 2005, more than 2.04 million individuals filed for protection from their creditors under federal bankruptcy law—28,100 of them were in Oregon. The increasing numbers of bankruptcies led Congress to adopt the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the “Reform Act”) which changed Title 11 of United States Code (the “Bankruptcy Code”). The Reform Act went into effect on October 17, 2005, and made a number of significant changes to the rights of debtors and creditors, which raises issues for dental professionals.

1. Basics of Bankruptcy. The Reform Act continues the two types of bankruptcies that your patients are most likely to file—either a *Chapter 7* (a liquidating bankruptcy) or a *Chapter 13* (a wage earner’s plan).

1.1. Chapter 7. In a Chapter 7, the Court appoints a bankruptcy trustee (the “Trustee”) who is required to liquidate all of the debtor’s non-exempt assets and turn them into cash. The majority of consumer Chapter 7 cases are “no asset cases”—that is there are no non-exempt assets of sufficient value for the Trustee to administer. No distribution is made in a “no asset case.” In an asset case, after payment of administrative expenses and trustee’s fees, the Trustee distributes all remaining funds to creditors in the in each class’s order of priority set by statute. Claims with the highest priority are those for unpaid child and spousal support, followed by “priority claims” for unpaid wages, taxes, and the like. If there are insufficient funds to pay an entire class in full, the creditors in that class are paid pro rata. Because unsecured creditors have the lowest priority, it is rare that an unsecured creditor will receive much more than a small percentage of its claim. This was one of the reasons that Congress passed the Reform Act—to require more debtors to file Chapter 13—in hopes that creditors will be paid more.

1.2. Chapter 13. In a Chapter 13, the debtor is permitted to keep certain assets, but must pay creditors pursuant to a payment Plan that can last up to 60 months. The amount of the debtor’s monthly payment to the Chapter 13 Trustee depends on the value of the debtor’s non-exempt assets and the debtor’s net disposable monthly income. In order to confirm a Plan, the debtor must satisfy specific requirements. Often by objecting to confirmation, it is possible to improve a creditor’s relative treatment under the Plan resulting in a larger distribution. Payments to creditors by the Chapter 13 Trustee follow the same priority scheme as in Chapter 7. Unlike Chapter 7, the debtor doesn’t receive a discharge until the Plan has been fully performed. There are also debt limits for Chapter 13—the debtor cannot have more than **\$307,675** in “non-contingent liquidated unsecured debt” and more than **\$922,975** in “non-contingent liquidated secured debt.” If debts exceed either of these limits, the debtor is disqualified from Chapter 13.

1.3. The Automatic Stay. As soon as a debtor files a bankruptcy petition, the Bankruptcy Code imposes an “automatic stay” on all collection efforts, including sending bills to the patient, whether you know about the bankruptcy or not. Willful violation of the automatic stay could subject you to damages and attorney fees. However, the automatic stay does not bar the patient from making voluntary payments to you.

1.4. Discharge. The goal of both Chapter 7 and 13 is for the debtor to discharge all or as much debt as possible. Except for certain specified hardships, in a Chapter 13 bankruptcy, the debtor doesn't receive a discharge until the debtor makes all of the payments required by a confirmed Plan. In a Chapter 7, the Court usually grants a discharge 60 days after the "first meeting of creditors." Certain types of debt are non-dischargeable. Unfortunately debt owing for most dental services is dischargeable. Under certain circumstances—for example where the debtor makes false statements concerning the bankruptcy, or fraudulently transfers assets—the debtor's discharge can be denied. In order to obtain this relief an "adversary proceeding" must be filed in the debtor's bankruptcy case. We have had some success in bringing these types of proceedings or persuading the bankruptcy Trustee to bring them in appropriate cases. While a debtor is required to list all of their debts in their bankruptcy papers and give creditors notice of the bankruptcy in order to obtain a discharge, in some circumstances even the claim of a creditor who wasn't listed and didn't receive notice of the bankruptcy can be discharged. One thing to keep in mind is that a discharge does not bar you from receiving voluntary payments from your patients; you just can't ask them or encourage them to make payments, and you can't send them a billing statement as a reminder—even if they request that you do so.

1.5. Effect of Discharge on Future Services. Depending upon the terms of the agreement that you have with your patient, a discharge could also bar you from payment for services that you provide the patient *after* the patient's bankruptcy is filed. While a debtor may sign a "reaffirmation agreement," the requirements for reaffirmation are technical. The agreement must be in writing and must be approved by the Court.

1.6. Preferences. The Bankruptcy Code gives the power to the Trustee to recover payments made to you within 90 days prior to the date of your patient's bankruptcy. One of the positive changes that Congress made in the Reform Act was to provide some protection to creditors from preference claims. A new section provides that a Trustee cannot recover a preference if the aggregate value of the transfer within the 90 days prior to bankruptcy was less than \$5,000. The elements of a preference claim and defenses to such claims are technical. If you receive a demand from a Trustee, it is a good idea to contact us for assistance.

2. How should you deal with a patient who declares bankruptcy? Your first notice that your patient has filed bankruptcy will likely come in the form of a "Notice" mailed to you by the Bankruptcy Court. This Notice includes important information and some important *deadlines*. How your office responds when you receive a Notice depends upon a number of factors. Here are some easy to follow guidelines for you and your office staff.

2.1. Useful Information in the Notice. Read the Notice as soon as it comes in to your office. It will provide you with some important and useful information. This includes: (a) the date of filing; (b) the case number; (c) the name of the debtor(s) and their contact information; (d) the name of the Trustee who has been appointed for the case and his/her contact information; (e) whether the debtor has filed Chapter 7 or Chapter 13; (f) the date and location of the first meeting of creditors; (g) the deadline for filing objections to the debtor's discharge; (g) the deadline for filing reaffirmation agreements; and (h) *whether it is an asset or no-asset case*, and (i) if it is an asset case, the deadline for filing a proof of claim. If the notice says not to file a proof of claim, it is a no-asset case.

2.2. Filing a Proof of Claim. If it is an asset case, it is almost always a good idea to file a proof of claim. On the backside of the Notice, the Court provides you with a form for the proof of claim. You or your staff person will need to provide the following information: (a) The amount of the debt owing on the date of bankruptcy; (b) A copy of your current billing statement; and (c) If you have a written agreement with the patient, a copy of the agreement. Claims are *deemed allowed* when they are filed. That means that the debtor or the Trustee will have to take some affirmative steps to object to your claim. If they do, you will receive another notice in the form of an “order” that gives you 20 days to request a hearing. Probably the most common mistake that leads to an objection is where the creditor lists the debt as a priority debt or a secured claim when it isn’t. It is likely that a claim for dental services will be a general unsecured claim.

2.3. Future Services. If one of your patients files bankruptcy, unless you have an agreement to provide future services which the debtor reaffirms, you have no contractual obligation to provide any future services, even if you are providing services pursuant to a long term care agreement (for example—orthodontic treatment). You may however have certain ethical responsibilities to complete the services or some part of them in order to avoid harm or injury to your patient. On the other hand, *most services that are provided after a bankruptcy is filed are not discharged, and you can charge for these new services.* However, you cannot condition delivery of new services on payment of pre-bankruptcy debt. Also, if there is dental insurance coverage, the bankruptcy does not affect your right to receive payment from the insurance carrier.

2.4. Assistance. While bankruptcy law and procedure is technical, we can help you and your staff address most simple issues without incurring significant attorney fees (since there is no reason to “throw good money after bad”). We can help you and your staff spot more difficult issues which require the assistance of counsel. We can provide you with a checklist for important deadlines, and forms and instructions which will enable you to handle most routine matters, including filing proofs of claim, and reaffirmation agreements. We are also available to answer simple and routine questions, usually without charge.

3. How can you protect your assets from creditors in the event of a catastrophe? Obviously, a major financial reversal in an investment or even in your dental practice could cause you and your family big problems. The number of professionals that find themselves in this predicament is surprisingly. What can you do to protect yourself and your family?

3.1. Bankruptcy Eligibility under the Reform Act. The Reform Act has tightened up the eligibility requirements for file a Chapter 7 bankruptcy. It’s not as easy as it once was to file bankruptcy and get a fresh start. Congress also imposed a means test based upon income using a complicated formula. If the debtor has income below amount determined using the formula, he or she is *eligible* to file Chapter 7. If the debtor has income greater than the amount determined using the formula, the debtor cannot file Chapter 7 and will need to consider a Chapter 13.

3.2. Asset Protection. There are steps that professionals can take in advance to protect their assets from creditors in the event of a major financial catastrophe. For example, except for certain types of claims—such particular IRS tax claims—your retirement plan is your safest asset, and completely exempt from the claims. So rule number one—don't raid your retirement plan to try to pay other creditors. It rarely if ever works to your advantage. There are other legitimate steps you can take. Just like a review of your estate plan, we can provide you with a review what will assist you in successful asset protection.

4. We Can Help You. Although many bankruptcy issues can be handled routinely by your staff, we can help with the tougher issues. When a patient files bankruptcy, we can help you: (a) Optimize your chances of making a recovery; (b) Minimize your cost of dealing with bankruptcy; and (c) Assist you with more challenging tasks.

Feel free to contact R. Scott Palmer at Watkinson Laird Rubenstein Baldwin & Burgess, P.C., at (541) 484-2277 in Eugene, (541) 673-5528 in Roseburg, (541) 923-8767 in Redmond, or (541) 757-1365 in Corvallis for further information.

