Forgotten and Overlooked Issues in Chapter 7

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11 U.S.C. §365(p) Lease Assumption Agreements

I. In 2005, Section 365 was amended to reflect the economic realities of the evolution that occurred in consumer credit and provides that an individual may assume a lease in a Chapter 7 case by notifying a creditor in writing of the debtor's intent to assume the lease. Not later than thirty days after notification, the debtor must assume the lease and the liability becomes the liability of the debtor and not the estate. Creditors may condition their consent to the assumption upon the cure of all pre-petition defaults. Any liability flowing from the lease assumption is the responsibility of the debtor and not the bankruptcy estate.

II. Two lines of cases have developed with respect to how a Chapter 7 Debtor's assumes a lease (i.e. is a §524 Reaffirmation Agreement required) and what impact the discharge has on an assumed lease.

III. The only reported appellate court decision to grapple with this issue was released on July 1, 2011.

- In *Thompson v. Credit Union Financial Group (In re: Thompson)*, 453 B.R. 823 (U.S. Dist. Ct. W.D. Michigan 2011), the lessor and the Debtor signed a lease assumption agreement. Prior to the expiration of the lease and the entry of the discharge, the Debtor surrendered the vehicle. After the entry of the discharge, the lessor filed a lawsuit in the State Court to collect the debt and the lessor obtained a Default Judgment against the Debtor. The Debtor reopened the bankruptcy case and filed a Motion for Contempt asserting the lessor violated the discharge injunction by collecting on the lease debt that was not reaffirmed according to §524(c). The Bankruptcy Court denied the Debtor's motion and ruled that a §524 reaffirmation agreement was not required to assume a lease pursuant to §365(p) and that the assumed lease became a post-petition liability that was not subject to discharge. The Debtor then appealed the ruling to the United States District Court for the Western District of Michigan.

  The District Court reversed the decision of the Bankruptcy Court. The court noted "[a]uthority is limited, but multiple courts have held … that a debt assumed under 365(p) falls within the scope of the discharge injunction unless there has been a court approval of the assumption, under 524(c) or otherwise." The District Court cited the following cases:

  - *See In re Eader*, 426 B.R. 164, 166 (Bankr. D. Md. March 22, 2010) (concluding that "although [s]ection 365(p)(2) permits an individual debtor in a Chapter 7 case to assume a lease of personal property and that such assumption does not require any approval by the bankruptcy court, the personal obligation of the debtor under the assumed agreement is subject to the

discharge provided by [s]ection 524(a) unless the debtor reaffirms the indebtedness under the lease in compliance with [s]ection 524(c) *et seq.*");

- *In re Creighton*, 427 B.R. 24, 28 (Bankr. D. Mass. Feb. 16, 2007) ("It would thus appear that an assumption agreement negotiated and entered into under § 365(p)(2), when not otherwise excepted from discharge by § 523(a), is an agreement to which § 524(c) pertains; it is a species of reaffirmation agreement.").

The District Court did not specifically require a §524 reaffirmation agreement, but it does require more than the filing of a lease assumption agreement. The court stated, "if the parties desire to enter into a 365(p) assumption post-discharge, when a reaffirmation under 524(c) is ordinarily not possible, the parties could petition for entry of a nunc pro tunc order, could move for judicial approval under 365(a)...or could seek to have the matter reopened in a way that would permit appropriate relief. Section 524(c) need not be an exclusive rout to a discharge avoiding assumption of liability under 365(p)."

- Other courts have suggested that some sort of judicial approval of a §365(p) lease assumption is required.
  - ***In re Finch***, No. 06-14016-SBB, 2006 WL 3900111, *1 (Bankr. D. Colo. October 2, 2006) ("The language of section 365(p) does not appear to necessarily lead to waiver of or exception to the discharge of a debt by way of assumption.");
  - ***In re Rogers***, 359 B.R. 591, 593 (Bankr. D. S.C. Jan. 30, 2007) (noting that a lease assumption under 365(p) "may not necessarily lead to an exception from discharge of the liability since § 524 has not been amended to make reference to new § 365(p)(2) . . . . 'Personal liability on the lease will ordinarily be discharged if the chapter 7 discharge is entered, presumably even if the lease is assumed.'") (quoting 1-15 *Collier Consumer Bankruptcy Practice Guide* ¶ 15.04[8]));
  - ***In re Gaylor***, 379 B.R. 413, 414 (Bankr. D. Conn. Nov. 29, 2007) (denying motion for court approval of a 365(p)(2) assumption because such an assumption "does not require court approval or other court action," but noting explicitly that the denial of the motion "is not an adjudication of (1) the effect (if any) the Debtor's impending discharge may have in respect of the purportedly assumed Lease Agreement or (2) the enforceability of the Debtor's purported 'waive[r]' of such

discharge . . . because neither [issue] is properly before the court.");

- ***In re Walker***, No. 06-11514C-7G, 2007 WL 1297112, *1 (Bankr. M.D.N.C., April 27, 2007) (declining to pass judgment on lease assumption under 365(p) and noting that "[r]eaffirmation and waiver of discharge are dealt with in section 524(c), which has not been invoked.").

- Other Courts have ruled that the debt associated with an assumed lease pursuant to §365(p) is not subject to the discharge if a reaffirmation agreement is not used.

  - *See In re Mortenson*, 444 B.R. 225 (Bankr. E.D.N.Y. January 19, 2011), the court noted that the Creighton and Eader decisions fail to recognize that the assumption of the lease pursuant to section 365(p) binds the debtor to the terms of the lease and the discharge has no impact on that obligation.
  - ***In re Farley***, No.10-76018, 2011 WL 1304458 (Bankr. E.D.N.Y. April 6, 2011), and
  - ***In re Ebbrecht***, No. 10-79371, 2011 WL 1793272 (Bankr. E.D.N.Y. May 11, 2011).

- Several courts in the Eastern District of Michigan, however, have ruled that the reaffirmation requirements of §524(c) do not apply to leases assumed in Chapter 7 cases pursuant to § 365(p).

  - The bankruptcy court in ***In re Starline Jackson***, Case No. 06-44335 (Bankr. E.D. Mich. 2006, J. Shefferly), found that a lease assumed under §365(p) does not require a reaffirmation agreement. The *Starline Jackson* court noted that §365(p) does not specifically mention any of the rights and disclosures required for a §524 reaffirmation agreement. The court also reviewed other provisions of the Bankruptcy Code to determine whether §365(p) incorporated §524. Specifically, the court noted that §362(h)(1)(A), addressing the effect of the failure of a Chapter 7 debtor to timely file a statement of intention, clearly differentiates the act of reaffirming a debt under §524(c) and assuming an unexpired lease under §365(p). Therefore, the court reasoned, reaffirming a pre-petition debt is a wholly separate act from assuming a lease.

  - See also ***In re Gundy***, Case No. 07-57777 (Bankr. E.D. Mich. 2008, J. Tucker) (the court ruled that a §524

Reaffirmation Agreement was not required and that a lease assumption agreement does not need to be filed with the court); ***In re Murray***, Case No. 08-67847 (Bankr. E.D. Mich. 2009, J. Shapero).

Rule 2004 - Examination

I. Federal Rule of Bankruptcy Procedure 2004:

(a) EXAMINATION ON MOTION. On motion of any party in interest, the court may order the examination of any entity.

(b) SCOPE OF EXAMINATION. The examination of an entity under this rule or of the debtor under §343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In a family farmer's debt adjustment case under chapter 12, an individual's debt adjustment case under chapter 13, or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan.

(c) COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTS. The attendance of an entity for examination and for the production of documents, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in Rule 9016 for the attendance of a witness at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court for the district in which the examination is to be held if the attorney is admitted to practice in that court or in the court in which the case is pending.

(d) TIME AND PLACE OF EXAMINATION OF DEBTOR. The court may for cause shown and on terms as it may impose order the debtor to be examined under this rule at any time or place it designates, whether within or without the district wherein the case is pending.

(e) MILEAGE. An entity other than a debtor shall not be required to attend as a witness unless lawful mileage and witness fee for one day's attendance shall be first tendered. If the debtor resides more than 100 miles from the place of examination when required to appear for an examination under this rule, the mileage allowed by law to a witness shall be tendered for any distance more than 100 miles from the debtor's residence at the date of the filing of the first petition commencing a case under the Code or the residence at the time the debtor is required to appear for the examination, whichever is the lesser.

II. The Scope of Rule 2004

Bankruptcy Rule 2004 is primary discovery tool used in bankruptcy cases. This Rule permits the examination of *any* entity after a motion under Rule 2004 is filed with the court. 11 U.S.C. § 101(15) defines "entity" to include a "person, estate, trust, governmental unit, and United States trustee."

The Interplay Between Rule 2004, Contested Matters and Adversary Proceedings

Examinations under Rule 2004 are independent of contested matters and adversary proceedings. Contested matters are governed by Bankruptcy Rule 9014 and adversary proceedings are governed by Part VII of the Bankruptcy Rules, Fed. R. Bankr. P. 7001, et seq. Where an adversary proceeding has been filed, the discovery rules found in Bankruptcy Rules 7026-7037 apply (adopting discovery provisions of the Federal Rules of Civil Procedure).

Where an adversary proceeding (Rule 7001) or a contested matter (Rule 9014) is pending, one line of cases holds that Rule 2004 may not be used. These cases hold that the parties are limited to the discovery tools found in Bankruptcy Rules 7026-7037. *See* In re Silverman, 10 C.B.C.2d 1219, 36 B.R. 254 (Bankr. S.D.N.Y. 1984). Courts have also prohibited the use of Rule 2004 where an action is pending in another forum. See In re Enron Corp., 281 B.R. 836, 844 (Bankr. S.D. N.Y. 2002) (securities litigation); In re Duratech Indus. Inc., 241 B.R. 283 (E.D.N.Y. 1999) (Pending litigation in district court).

Another line of cases allows the use of Rule 2004 despite a pending Adversary Proceeding or Contested Matter so long as the court finds that use of Rule 2004 is otherwise proper, notwithstanding the fact that information obtained through the use of Rule 2004 may be later used in pending litigation. *See* In re Sun Medical Management, Inc., 104 B.R. 522, 524 (Bankr. M.D. Ga. 1989) (Rule 2004 examination allowed despite adversary proceeding having been filed); *see also* In re International Fibercom, Inc., 283 B.R. 290, 292 (Bankr. D. Ariz. 2002) (court has discretion to allow the use of Rule 2004 where litigation is pending).

Courts permitting Rule 2004 examination where litigation has already commenced often limit the rule's scope so as to prevent an examination from delving into matters related to the litigation. Rule 2004 is appropriate where a party is attempting to obtain discovery regarding matters not related to the litigation. *See* In re Washington Mutual, Inc., 408 B.R. 45, 51 (Bankr. D. Del. 2009).

III. Obtaining Rule 2004 Discovery

A Rule 2004 examination is generally obtained by filing a motion. However, some courts permit examination simply by notice. When a motion is filed, the motion and order must set forth the scope and nature of the exam.[1]

[1] *See* Fed. R. Bankr. P. 9013; *see also* In re Analytical Sys., Inc., 71 B.R. 408, 412 (Bankr. N.D. Ga. 1987).

Parties in interest only may seek discovery under Rule 2004. These parties include generally the trustee, creditors, the debtor and entities related to the debtor. Parties in interest also include those obligated to a debtor. The United States Trustee is also a party in interest and may conduct Rule 2004 examinations

2004 Examination of a Debtor

It is not uncommon for a debtor's examination to be taken pursuant to Rule 2004. Rule 2005 can be used to compel a debtor to appear for an examination if he or she does not do so voluntarily. In these situations, sanctions may be imposed. *See* United States v. Martin-Trigona, 759 F.2d 1017, 1019-20, 1026 (2d Cir. 1985). A debtor's case may also be subject to conversion or dismissal if he or she fails to attend a Rule 2004 exam. *See* In re Sanders, 417 B.R. 596, 601 (D. Ariz. 2009).

2004 Examination of a Non Debtor

Non Debtor entities may be examined under Rule 2004. The examination of non-debtors must be obtained through a motion filed by any party in interest. See Rule 2004(a). Rule 2004(c) addresses compelling the attendance of third parties for examination and production of documents and provides that Rule 9016 governs any action to compel compliance with Rule 2004. It is important to note that the examination testimony of a third party may not be admissible later in an adversary proceeding, where a motion for summary judgment has been filed. *See* In re Oliver, 414 B.R. 361, 371 (Bankr. E.D. Tenn. 2009).

IV. The Scope of Rule 2004

Rule 2004(b) is extremely broad. Courts discussing the scope of Rule 2004 have stated that the rule's scope is "unfettered and broad" and that Rule 2004 is "peculiar to bankruptcy law and procedure because it affords few of the procedural safeguards that an examination under Rule 26 of the Federal Rules of Civil Procedure does." *See* In re GHR Energy Corp., 33 B.R. 451, 453-54 (Bankr. D. Mass. 1983); In re GHR Companies, Inc., 41 B.R. 655, 660 (Bankr. D. Mass. 1984).

Rule 2004 examinations are designed to discover assets and uncover fraud; they have been likened to "fishing expeditions." In re GHR Energy Corp., 33 B.R. 451, 453 (Bankr. D. Mass. 1983) (*citing* In re Foerst, 93 F. 190, 191 (S.D.N.Y. 11899)).

Notwithstanding the broadness of Rule 2004, it is not without its limitations. Rule 2004 may not be used to abuse or harass; Rule 2004 discovery "cannot stray into matters which are not relevant to the basic inquiry." *See* In re Mittco, Inc., 44 B.R. 35, 36 (Bankr. E.D. Wis. 1984).

A Rule 2004 examination must be limited to matters regarding the debtor. Inquiries into matters unrelated to the debtor or the administration of his or her bankruptcy estate are improper.[2]

[2] *See* In re Coffee Cupboard, Inc., 128 B.R. 509, 514 (Bankr. E.D.N.Y. 1991).

As a few practice pointers:

(i) A 2004 examination should be allowed where there is a question about whether a witness was involved with the debtor;[3]
(ii) A 2004 examination should not be allowed if the matters to be discussed are barred by res judicata;[4]
(iii) State Law cannot limit Rule 2004.[5]

Objecting to Rule 2004 Discovery

A motion to quash is proper where a debtor or non-debtor believe that the Rule 2004 discovery sought is beyond the rule's scope. Any motion to quash is subject to the court's discretion and any orders resulting from a motion to quash are interlocutory.[6]

Typical grounds to quash include abuse, harassment and where the discovery requests involve matters unrelated to the debtor and his or her finances. See In re Mittco, Inc., 44 B.R. 35, (Bankr. E.D. Wisc. 1984).

It is not proper to grant a motion to quash a request for 2004 examination on the grounds that the party to be examined has no information to disclose.[7] Rule 2004 discovery should generally be allowed, unless the party from whom discovery is sought can demonstrate that it is oppressive and burdensome[8] or where Rule 2004 discovery interferes with other bankruptcy or non-bankruptcy policies.[9]

Expert Opinion

Rule 2004 can be used to obtain expert opinion concerning matters such as feasibility of business operation, financial affairs and the like.[10] However, Rule 2004 may not be used for discovery when the expert's work is not related to the matters described in Rule 2004(b).

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[3] *See* In re Table Talk, Inc., 51 B.R. 143, 146 (Bankr. S.D.N.Y. 1985).
[4] In re Wilche, 56 B.R. 428, 440 (Bankr. N.D. Ill. 1985).
[5] In re Kreiss, 46 B.R. 164, 166-67 (Bankr. E.D.N.Y. 1984).
[6] *See* Aetna Cas. & Surety Co. v. Glinka, 154 B.R. 862, 868 (D. Vt. 1993); Gache v. Balaber-Strauss, 198 B.R. 662, 664 (S.D.N.Y. 1996).
[7] In re Arkin-Medo, Inc., 44 B.R. 138 (Bankr. S.D.N.Y. 1984).
[8] In re Vantage Petroleum Corp., 34 B.R. 650, 652 (Bankr. E.D.N.Y. 1983).
[9] In re Eagle-Picher Indus., Inc., 169 B.R. 130 (Bankr. S.D. Ohio 1994) (the court denied discovery of mediation and plan drafts).
[10] *See In re* Financial Corp. of America, 119 B.R. 728, 738 (C.D. Cal. 1990) (discovery of attorney work product limited); *In re* Valley Forge Plaza Assocs., 116 B.R. 420, 422-23 (E.D. Pa. 1990); *see also In re* GHR Energy Corp., 9 C.B.C.2d 516, 33 B.R. 451 (Bankr. D. Mass. 1983) (debtor's discovery of creditor's expert denied on facts of case).

V. Rule 2004 and Privilege

Discovery under Rule 2004 is subject to applicable privileges.[11]

The privilege against self-incrimination under the Fifth Amendment applies in a Rule 2004 examination. The district court has the power to grant immunity if the Fifth Amendment privilege is properly asserted.[12] A party seeking immunity must request the United States Attorney to apply for a grant of immunity. If immunity is granted, contempt is available where a witness is uncooperative.[13]

See the case of In re Connelly, 59 B.R. 421, 449 (Bankr. N.D. Ill. 1986) for an in-depth discussion of the application of the Fifth Amendment privilege in bankruptcy.

Invoking a privilege does not necessarily place a debtor's discharge at risk, but the court is permitted to draw a negative inference from a debtor who takes the Fifth in an objection to discharge case. *See* In re Marrama, 445 F.23d 518, 522 (1st Cir. 2006). While rare, invoking the Fifth Amendment privilege can warrant the dismissal of a case where the debtor's refusal to testify makes it impossible to administer the bankruptcy estate.[14]

VI. Misc. Items Related to Rule 2004

(a) Courts have refused to extend the deadline to object to a debtor's discharge under Rule 4004(b) or to extend the deadline to object to dischargeability under Rule 4007(c) where no Rule 2004 discovery was conducted by the moving party.[15]

(b) Rule 2004 examinations may be taken subsequent to plan confirmation but are limited to matters which the court can still entertain.[16]

(c) A false statement during a Rule 2004 examination can result in criminal prosecution[17] and denial of discharge under 11 U.S.C. §727.[18]

(d) Rule 9018 provides for entry of protective orders to limit or otherwise prevent access to sensitive or proprietary information that can be discovered under Rule 2004.[19]

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[11] *See* In re North Plaza, LLC, 395 B.R. 113, 121-23 (Bankr. S.D. Cal. 2008) (Federal law governs privileges available in the Rule 2004 examination context).
[12] 11 U.S.C. § 344.
[13] *See* Matter of Younger, 986 F. 2d 1376 (11th Cir. 1993).
[14] *See* In re Blan 239, B.R. 385, 398 (Bankr. W.D. Ark. 1999).
[15] *See* In re Mendelsohn, 202 B.R. 831 (Bankr. S.D.N.Y. 1996).
[16] In re Daisytek, Inc., 323 B.R. 180, 186 (N.D. Tex. 2005); In re Sun Medical Management, Inc., 104 B.R. 522 (Bankr. M.D. Ga. 1989); In re Cindrella Clothing Indus., Inc., 93 B.R. 373, 377-79 (Bankr. E.D. Pa. 1988).
[17] *See* U.S. v. Snover, 900 F.2d 1207, 1210 (8th Cir. 1990).
[18] Williamson v. Fireman's Fund Ins. Co., 828 F.2d 249, 251-52 (4th Cir. 1987).
[19] *See, e.g., In re* Summit Corp., 891 F.2d 1, 5-6 (1st Cir. 1989) *In re* Jewelers Shipping Ass'n. 97 B.R. 149, 150 (Bankr. D.R.I. 1989); (Fed. R. Bankr. P. 2004 may not be used to obtain information subject to prior order protecting it as confidential). *In re* Continental Forge Co., 73 B.R. 1005, 1006 (Bankr. W.D. Pa. 1987) (Fed. R. Bankr. P. 2004 is not intended to be used as a vehicle for gathering confidential information).

VII. Compelling Testimony and Document Production

Under Rule 2004(c) any entity may be compelled to attend an examination or produce documents as set forth in Rule 9016 for the attendance of witnesses at a hearing or trial. See Fed. R. Bankr. P. 2004(c). Bankruptcy Rule 9016 incorporates Rule 45 of the Federal Rules of Civil Procedure. This, in turn, allows issuance of a subpoena for witness or document production. Where Rule 2004(d) is applied to call the debtor to provide testimony or documents, a subpoena is unnecessary and Federal Rule of Civil Procedure 45 and Rule 9016 are inapplicable. All that is required is an order from the court. See Fed. R. Bankr. P. 2004(d).

See materials regarding Rule 9016 for Debtor and Non-Debtor Subpoenas.

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Rule 9016 - Subpoena

Rule 45 Fed. R. Civ. P. applies in cases under the Bankruptcy Code.

Federal Rule of Bankruptcy Procedure 9016:

Rule 45 Subpoena

(a) IN GENERAL.

(1) *Form and Contents.*

(A) *Requirements—In General.* Every subpoena must:

(i) State the court from which it issued;
(ii) State the title of the action and its civil-action number;
(iii) Command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and
(iv) Set out the text of Rule 45(d) and (3).

(B) *Command to Attend a Deposition—Notice of the Recording Method.* A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) *Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.* A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) *Command to Produce, Included Obligations.* A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of the materials.

(2) *Issuing Court.* A subpoena must issue from the court where the action is pending.

(3) *Issued by Whom.* The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sig a subpoena if the attorney is authorized to practice in the issuing court.

(4) *Notice to Other Parties Before Service.* If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party.

(b) SERVICE.

(1) *By Whom and How; Tendering Fees.* Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

(2) *Service in the United States.* A subpoena may be served at any place within the United States.

(3) *Service in a Foreign Country.* 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) *Proof of Service.* Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) PLACE OF COMPLIANCE.

(1) *For a Trial, Hearing, or Deposition.* A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) Within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) Within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) Is a party or a party's officer; or
(ii) Is commanded to attend a trial and would not incur substantial expense.

(2) *For Other Discovery.* A subpoena may command:

(A) Production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) Inspection of premises at the premises to be inspected.

(d) PROTECTING A PERSON SUBJECT TO A SUBPOENA; ENFORCEMENT.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspection, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) Fails to allow a reasonable time to comply;
(ii) Requires a person to comply beyond the geographical limits specified in Rule 45(c);
(iii) Requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
(iv) Subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) Shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) Ensures that the subpoenaed person will be reasonably compensated.

(c) DUTIES IN RESPONDING TO A SUBPOENA.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced In Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows

good cause, considering the limitations of Rule 26(b)(2)(c). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) Expressly make the claim; and
(ii) Describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(f) TRANSFERRING A SUBPOENA-RELATED MOTION. When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances. Then, if the attorney for a person subject to a subpoena is authorized to practice in the court where the motion was made, the attorney may file papers and appear on the motion as an officer of the issuing court. To enforce its order, the issuing court may transfer the order to the court where the motion was made.

(g) CONTEMPT. The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

Rule 9016 Overview

Rule 45 of the Federal Rules of Civil Procedure ("FRCP") regarding Subpoenas is made applicable in cases under the Bankruptcy Code through Federal Rule of Bankruptcy Procedure 9016 ("FRBP 9016"). FRBP 9016 applies in adversary proceedings, Bankruptcy Rule 2004 examinations and any matters in a bankruptcy case where testimony may be required.

Generally speaking, FRCP 45 applies to subpoenas which command an individual or business entity to appear and give testimony and also applies to those commanding an individual or business entity to produce books, records, documents or other objects.[1] A Rule 45 subpoena requiring testimony and/or materials may be issued for depositions, trials and even hearings.

Rule 45 permits subpoenas to be issued in order to compel production by nonparties outside the setting of a deposition. See FRCP 45(a)(1). It also allows the issuance of a subpoena to mandate the inspection of premises held by a nonparty. FRCP 45(a)(1)(C). Rule 45(e) authorizes subpoenas requesting production of electronically stored information and further deals with claims of privilege or protection as trial-preparation material.

Bankruptcy Rule 2004 Examinations:

Debtors are not required to be formally served with a subpoena for a Rule 2004 examination. Instead, an order is appropriate.[2] However, non-debtors require a subpoena in order to compel the attendance at a 2004 examination.

Issuing a Subpoena:

Under Rule 45(a)(2), subpoenas must issue from the court in which the action is pending. It must be issued by the clerk, signed, but otherwise in blank, to be completed by the party requesting it prior to service.[3]

Requirements:

The subpoena must:

(i) specify the name of the issuing court; and
(ii) contain the case name, number, and the time and place for attendance.

The subpoena does not need to be under seal. It also must include the text of subdivisions (d) and (e) of Rule 45. This text contains a statement of the rights and duties of witnesses.[4]
A subpoena may be served by any non-party who is at least 18 years of age.[5]

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[1] For a complete discussion of Fed. R. Civ. P. 45, *see* 9 Moore's Federal Practice, Ch. 45 (Matthew Bender 3d ed.).
[2] 11 U.S.C. § 343; Fed. R. Bankr. P. 2004, 2005.
[3] Subdivision (a)(3) of Fed. R. Civ. P. 45 provides that an attorney as an officer of the court may issue and sign a subpoena on behalf of a court if the attorney is authorized to practice in the issuing court.
[4] Fed. R. Civ. P. 45(a)(1)(A)(iv), (d), (e).

A subpoena may be served at any place within the United States.[6]

Compliance:

The failure to obey a subpoena is punishable a contempt of court.[7] Sanctions can also be imposed under Rule 45(d)(1).

A sanction of attorney fees cannot be imposed on a non-party for noncompliance with a subpoena under Rule 37. See In re Pham, B.A.P. No. CC-14-1342-KiBrD (B.A.P. 9th Cir. Sept. 2, 2015).

Rule 45 provided the only basis for enforcing sanctions for a non-party's failure to comply with a subpoena. Rule 34(c) also provides that Rule 45 governs non-party compliance.

Rule 45 requires that the non-party first be subject to an order compelling discovery and subsequently fail to comply with the discovery order before the court can evoke its contempt powers and impose a sanction of attorney fees.

In order to receive the procedural protections of Rule 45, a non-party must timely object to a subpoena by either filing a motion to quash or serving written objections. When the objection is made, the party seeking the discovery must then obtain an order requiring the discovery.

Rule 30(d)(2), provides that the court may impose a sanction of reasonable attorney's fees incurred by any party on a "person" who impedes, delays or frustrates the fair examination of a deponent. Rule 30(d)(3)(C) provides that any such sanction is governed by Rule 37(a)(5).

Objections:

Objections to a subpoena are made by way of a motion to quash and must be filed in the time specified under Rule 45(d)(3). The party seeking to quash a subpoena must have standing.

If the objection is not timely, it is waived.[8]

Objections can include lack of proper service, inability to appear or to produce the requested documents, failure to identify the documents requested and the burden and cost of compliance, including advancement of costs.[9] Grounds for an objection also include situations where requests are made for disclosure of privileged or other protected matter, if there is no applicable exception or waiver. Fed. R. Civ. P. 45(c)(3).

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[5] Fed. R. Civ. P. 45(b)(1).
[6] Fed. R. Civ. P. 45(b)(2).
[7] Fed. R. Civ. P. 45(g).
[8] BAC Home Loans Servicing, LP v. McDermott (*In re* Robinson), 2011 Bankr. LEXIS 1667 (Bankr. W.D. Tenn. Apr. 6, 20111).
[9] 9 Moore's Federal Practice, § 45.04[3] (Matthew Bender 3d ed.).

Witnesses:

When a witness who is before the court at the time a request for examination is made, no subpoena is required. The court may immediately order the witness to testify.

If the witness is not present, a subpoena is required to compel attendance. Whether a party or not, a witness' compliance with the subpoena, absent a successful motion to quash, is mandatory.

Subpoenaed party and non-party witnesses who fail to attend a deposition are subject to an award of expenses, including attorney fees incurred in filing a motion to compel attendance pursuant to Rule 37(a)(5).

Fees and Mileage:

Witnesses are entitled to tender of lawful mileage and one day's witness fees at the time of service of the subpoena. If the proper amount is not tendered, the service of the subpoena is improper and can lead to it being quashed.[10]

28 U.S.C. § 1821 provides:

> (a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.
>
> (b) A witness shall be paid an attendance fee of $40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.
>
> (c)(1) A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route in going to and returning from the place of attendance. Such a witness shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished.
>
> (2) A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of the Federal Government shall be paid to each witness who travels by privately owned vehicle. Computation of mileage under this paragraph shall be made on the basis of a uniform table of distances adopted by the Administrator of General Services.

[10] Id.

(3) Toll charges for toll roads, bridges, tunnels, and ferries, taxicab fares between places of lodging and carrier terminals, and parking fees (upon presentation of a valid parking receipt), shall be paid in full to a witness incurring such expenses.

(4) All normal travel expenses within and outside the judicial district shall be taxable as costs pursuant to section 1920 of this title.

(d)(1) A subsistence allowance for a witness shall be paid in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to section 5702(a) of title 5, for official travel in the area of attendance by employees of the Federal Government.

(3) A subsistence allowance for a witness attending an area designated by the Administrator of General Services as a high-cost area shall be paid in an amount not to exceed the maximum actual subsistence allowance prescribed by the Administrator, pursuant to section 4702(c)(B) of title 5, for official travel in such area by employees of the Federal Government.

(4) When a witness is detained pursuant to section 3144 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.

Under Bankruptcy Rule 2004(c) an entity other than a debtor cannot be compelled to attend as a witness if "lawful mileage and witness fee for one day's attendance" is not tendered.

Fed. R. Civ. P. 45(c)(3)(A)(ii) requires that the court, on a timely motion, quash or modify a subpoena if it requires a person who is not party of an officer of a party to travel more than 100 miles from the person's residence, place of employment or regular business.

An exception is found in Rule 45(c)(3)(B)(iii), whereby a person may be commanded to attend a trial by traveling from any such place within the state where the trial is held.

Bankruptcy Rule 2004(c) provides that a debtor is entitled to the mileage allowed by law to a witness for any distance in excess of 100 miles from the debtor's residence. However, a debtor is not protected by the 100 mile geographical limits of Rule 45. A debtor may be compelled to attend from any place, subject to the mileage rules.

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FORGOTTON AND OVERLOOKED ISSUES IN CHAPTER 7

2015 Detroit Consumer Bankruptcy Conference

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U.S. Bankruptcy Court, W.D. of Michigan

Case Reopening in Chapter 7

A. What are the consequences of closing a case in the first place?

1. The court must close the case upon it being fully administered. 11 U.S.C. § 350(a); Fed. R. Bankr. P. 5009.
2. The court does not close the case until the trustee has been discharged; accordingly, upon closure, there is no trustee. 11 U.S.C. § 350(a).
3. Property that was scheduled and is not otherwise administered is deemed abandoned at the time of closing. 11 U.S.C. § 554(c).
4. Property of the estate that was not scheduled and is not administered retains its status as "property of the estate" after closing. 11 U.S.C. § 554(d).
5. The automatic stay terminates upon closing except with respect to property that retains its status as "property of the estate." 11 U.S.C. § 362(c).
6. If the applicable limitation periods have not already run, closing terminates many of the trustee's avoidance and recovery powers. See 11 U.S.C. § 546(a)(2), § 549(d)(2), and § 550(f)(2).
7. Closing may terminate the ability to request revocation of discharge under § 727(d)(2) and (d)(3). See 11 U.S.C. § 727(e)(2).
8. The purpose of an open "case" is to provide for bankruptcy administration. "If there is no bankruptcy administration that is associated with a particular civil proceeding being considered by the court, there is no reason in principle for the 'case' to be open." In re Menk, 241 B.R. 896, 910 (9th Cir. B.A.P. 1999) (citing 3 Collier ¶ 350.03[4]). "In these situations, which do not concern administration of the case, a motion to reopen may not be necessary for the court to render a decision; these issues clearly are within the court's jurisdiction under section 1334 of title 28. However, many courts require that a motion to . . . reopen be filed, if only to provide a mechanism to instruct the clerk to retrieve a case filed from storage. If a motion to reopen is required in such circumstances, it should be granted as a matter of course." Id. (quoting 3 Collier ¶ 350.03[4]).
9. 28 U.S.C. § 1334(b) "arising under" jurisdiction survives the closing of the bankruptcy case in various circumstances, such as: (a) § 362(k) damage issues; (b) issues of dischargeabilty of particular debts; (c) issues of compensation and sanctions; (d) equitable subordination; (e) interpretation of prior court orders; (f) contempt proceedings, etc. These are two party

disputes that do not involve administration of the estate. However, in most courts, it is common practice to reopen the case for adjudication of these issues, even if reopening is not technically necessary.

B. When, and under what circumstances, may a case be reopened?

1. "A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause". 11 U.S.C. § 350(b). Section 350(b) confers upon the bankruptcy court's broad discretion in determining whether to reopen a case and its decision to grant or deny a motion to reopen is binding absent a clear abuse of discretion. Mead v. Helm, 865 F.2d 1268 (6th Cir. Jan. 4, 1989) (unpublished table opinion) (citing In re Rosinski, 759 F.2d 539, 540-41 (6th Cir. 1985)).

   a. A case may be reopened to administer assets:

      i. Unscheduled assets. But what if they were scheduled? Where assets were scheduled and not administered, they were abandoned under 11 U.S.C. § 554(c). The abandonment was not a technical abandonment and the reopening of the case did not undo the abandonment. However, the trustee could seek to set aside the abandonment under Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60(b). Olson v. Aegis Mortgage Corp. (In re Bloxsom), 389 B.R. 52 (Bankr. W.D. Mich. 2008).
      ii. Newly discovered assets.
      iii. Concealed assets.

   b. A case may be reopened for cause.

      i. Cause existed to reopen case to determine scope of the debtor's discharge. Although the state court had concurrent jurisdiction, the bankruptcy court allowed reopening to make the bankruptcy court's jurisdiction available to the creditor. In re Steward, 509 B.R. 123 (Bankr. W.D. Mich. 2014).

   c. A case may be reopened to determine a § 523(a) dischargeability question, as a complaint to determine dischargeability other than under § 523(c) may be filed at any time.

      i. Case reopened to allow omitted creditor to file an adversary proceeding to address the dischargeabilty of a debt. In re Wilson, 511 B.R. 103 (Bankr. E.D. Mich. 2014).

ii. But, reopening to add "an omitted creditor in a no asset case where dischargeability is not challenged 'is for all practical purposes a useless gesture.'" In re Delicruz, 300 B.R. 669, 678 (Bankr. E.D. Mich. 2003) (quoting Zirnhelt v. Madaj (In re Madaj), 149 F.3d 467, 468, 471 n.4 (6th Cir. 1998)).
iii. Bankruptcy courts and state courts have concurrent jurisdiction over nondischargeabiilty determinations, other than those brought under § 523(a)(2), (4), and (6). 11 U.S.C. § 523(c); In re Steward, 509 B.R. 123, 126 (Bankr. W.D. Mich. 2014).

d. A case may be reopened to accord relief to the debtor.

i. A lien avoidance claim under § 522(f) may be sufficient to accord such relief.
ii. To add an omitted creditor; but it is unnecessary in a no asset case unless the omitted debt is of the kind specified in § 523(a)(2), (4), or (6). In re Wilson, 511 B.R. 103, 105-06 (Bankr. E.D. Mich. 2014) (citing Zirnhelt v. Madaj (In re Madaj), 149 F.3d 467, 468, 472 (6th Cir. 1998)).

e. A motion to reopen may be made by the debtor or any party in interest.

i. There is a split of authority as to whether a former trustee may move to reopen the case.

a) In re Caswell, 2014 WL 1364835 (Bankr. W.D. Mich. Apr. 4, 2014) (denying trustee's request to set aside the final decree).
b) In the Western District of Michigan, motions to reopen are brought by the U.S. Trustee, which is then given the authority to appoint a trustee if necessary. Fed. R. Bankr. P. 5010.
c) Other courts hold that the former trustee is a party in interest and may seek reopening. In re Winebrenner, 170 B.R. 878 (Bankr. E.D. Va. 1994).

f. The fee to file a motion to reopen is $260. 28 U.S.C. § 1930.

i. This fee must be charged when a case has been closed without a discharge being granted.
ii. The court may waive or defer this fee, or require that fee be paid from additional assets.

iii. This fee must not be charged if: (1) the reopening is to permit the filing of a complaint to determine dischargeability under Rule 4007(b); (2) the debtor filed the motion based upon alleged violation of discharge injunction; or (3) the reopening is to correct an administrative error.

Discharge Issues in Chapter 7

A. What is the effect of a discharge? Section 524(a) provides that a discharge:

1. "[V]oids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged . . . whether or not the discharge of such debt is waived;" 11 U.S.C. § 524(a)(1).

2. "[O]perates as an injunction against the commencement or continuation of an action, the employment of process, or an act to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived;" 11 U.S.C. § 524(a)(2).

B. When must the discharge be granted?

1. Under Rule 4004(c)(1), "on expiration of the times fixed for objecting to discharge and for filing a motion to dismiss the case under Rule 1017(e), the court shall **forthwith** grant the discharge" unless:
    a. The debtor is not an individual;
    b. An objection to discharge under § 727(a)(8) or (a)(9) has been filed and not decided in debtor's favor;
    c. The debtor has filed a waiver under § 727(a)(10);
    d. A § 707 motion to dismiss is pending;
    e. A motion to extend the time to object to discharge is pending;
    f. A motion to extend the time for filing a motion to dismiss the case under Rule 1017(e)(1) is pending;
    g. The debtor has not paid the filing fee;
    h. The debtor has not filed statement concerning completion of personal financial management course.
    i. A motion to delay discharge under § 727(a)(12) is pending;
    j. A motion to enlarge time to file a reaffirmation agreement under Rule 4008(a) is pending;
    k. A presumption is in effect under § 524(m) that a reaffirmation agreement is an undue hardship and a hearing on the presumption has not been concluded; or
    l. A motion to delay discharge is pending, because the debtor has not filed all tax documents required under § 521(f).

2. Under Rule 4004(c)(2), "on motion of the debtor, the court may defer the entry of an order granting a discharge for 30 days and, on motion within that, the court may defer entry of the order to a date certain."

C. The entry of the discharge order has practical consequences, such as:

1. A reaffirmation agreement must be entered into before the granting of the discharge. 11 U.S.C. § 524(c)(1). [Note that Rule 4008 imposes a deadline for filing reaffirmation agreements, but it may be extended by the court. Fed. R. Bankr. P. 4008(a) & 9006(b)(3).]

2. Upon conversion of a chapter 7 case to chapter 13, a discharge shall not be entered in the chapter 13 case if the debtor received a discharge in a chapter 7 case during the 4 year period preceding the order for relief. 11 U.S.C. § 1328(f).

3. Terminates the automatic stay under 11 U.S.C. § 362(c)(2)(c).

D. Can the debtor waive his or her own chapter 7 discharge? Yes. 11 U.S.C. § 727(a)(10) provides that no discharge will be granted "if the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter." But, a debtor may not waive his or her discharge after it has been entered. In re Williams, 2014 WL 6774252 (Bankr. W.D. Mich. Nov. 26, 2014).

E. If a reaffirmation agreement was "entered into" after the discharge was issued, can relief be granted? Sometimes. Bankruptcy Rule 9024, incorporating Fed. R. Civ. P. 60, applies. If the debtor (or creditor) can meet the requirements of Rule 60, then relief may be granted. See In re Smith, 467 B.R. 122 (Bankr. W.D. Mich. 2012).

F. Can the Debtor execute a waiver of one debt pursuant to 11 U.S.C. § 727(a)(10)? Yes. "Section 727(a)(10) contains no textual limitation on partial waivers of dischargeability, nor is there any textual indication that such a limitation is intended . . . . Accordingly, we decline to require valid waivers of discharge to waive all debts under § 727(a)(10) . . . ." Lichtenstein v. Barbanel, 161 F. App'x 461, 465 (6th Cir. Dec. 20, 2005) (unpublished opinion).

G. Post-discharge, can a debtor be named as a nominal defendant in a state court action against the debtor's insurance company? Yes. The discharge does not extinguish the claim, but eliminates an action against the debtor to collect on the claim as a personal obligation of the debtor. In re Livensparger, 2015 WL 1803922 (Bankr. W.D. Mich. 2015). Also, note M.C.L. § 500.3006, which requires liability policies in Michigan to include "a provision that the insolvency or bankruptcy of the person insured shall not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of such policy."

Section 366– Utility service

Section 366(a) of the Bankruptcy Code protects debtors by providing that "a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case …"[1] In other words, utility companies must supply service to a debtor regardless of the debtor's pay history. However, § 366(b) mitigates the risk to the utility by allowing the utility to "alter, refuse, or discontinue service" 20 days after the petition if a debtor does not furnish adequate assurance of future payment.

The request for deposit is often made by the utility company, but the onus is on the debtor to timely provide the adequate assurance payment. If the adequate assurance requested by the utility is deemed too high, § 366(b) allows the debtor to request a reasonable modification of the amount.

[1] Specifically, § 366 states in part:

> (a) Except as provided in subsections (b) and (c) of this section, a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.
> (b) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. On request of a party in interest and after notice and a hearing, the court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.
> (c)(1)(A) For purposes of this subsection, the term "assurance of payment" means—
>
> (i) a cash deposit;
> (ii) a letter of credit;
> (iii) a certificate of deposit;
> (iv) a surety bond;
> (v) a prepayment of utility consumption; or
> (vi) another form of security that is mutually agreed on between the utility and the debtor or the trustee.
>
> (B) For purposes of this subsection an administrative expense priority shall not constitute an assurance of payment.

"In determining if a debtor has provided adequate assurance of payment to a utility, the Court is 'afforded significant discretion' and must look at the facts of the case." *In re As*tle, 338 B.R. 855, 861 (Bankr. D. Idaho 2006) (citing *Virginia Elec. & Power Co. v. Caldor, Inc*., 117 F.3d 646, 650 (2d Cir. 1997).

In *Virginia Elec. & Power Co. v. Cunha (In re Cunha)*, 1 B.R. 330 (Bankr. E.D. Va. 1979), the court found that adequate assurance in a consumer case is an amount which protects a debtor from discrimination while also providing a utility assurance of future payment. The court reasoned that "a stern policy of prompt payment for service or immediate curtailment may offer greater protection and be fairer, too, to the debtor who obviously is hard pressed to produce a cash deposit so soon after his financial collapse." *Cunha*, 1 B.R. at 333. Moreover, a deposit provided to a utility need not provide complete assurance of payment. *Cunha*, 1 B.R. at 333.

A deposit equal to two months of the debtor's average monthly usage for the previous year is a typical request. But, if a debtor seeks to modify the request, other facts may come into play, such as the time of year that the bankruptcy is filed (heating bills being less in the summer) and the ability of the debtor to pay the deposit.

With or without a deposit, under § 366, a utility may follow state law procedures to terminate service (after the 20 day period expires), if a debtor fails to pay a post-petition utility bill. *Robinson v. Mich. Consol. Gas Co. Inc*., 918 F.2d 579 (6th Cir. 1990). No permission is required for termination, because § 366 is an exception to the automatic stay of § 362. *See In re Speer*, 2015 Bankr. LEXIS 2063, *7 (Bankr. D. Conn. June 24, 2015) (quoting *In re Jones*, 369 B.R. 745, 749 (B.A.P. 1st Cir. 2007) ("a debtor's failure

to pay postpetition utility bills allows a utility to terminate a debtor's service 'without requesting permission from the bankruptcy court'").[2]

Loan Modifications

Because a motion to approve a loan modification does not amount to an actual dispute, bankruptcy courts have denied such motions for lack of jurisdiction. *See In re Wofford,* 449 B.R. 362 (Bankr. W.D. Wis. 2011) ("As a stand-alone motion, a request to approve a loan modification did not present the court with any case or controversy and essentially constituted a petition for an advisory opinion or comfort order."); In re Moore, 2015 Bankr. LEXIS 3155, *3-4 (Bankr. S.D. Ga. Sept. 18, 2015) (Finding that court approval of a loan modification would constitute an advisory opinion given in violation of the court's judicial authority); *In re Hammond, Sr.,* Case No. 09-77872 (Bankr. E.D. Mich. February 13, 2013) (noting lack of jurisdiction to either approve or disapprove a loan modification).

However, rare circumstances may exist that will permit a court to consider the appropriateness of a loan modification agreement. Most commonly, court approval of a loan modification may be applicable in the context of a plan confirmation, or as a

[2] A bill to amend § 366 was introduced in the U.S. House of Representatives on January 6, 2015, H.R. 98, 114th Cong., 1st Sess. (2015). If passed, the amendment would add the following to the end of § 366:

> (d) Notwitstanding any other provision of this section in a case in which the debtor is an individual, if the debtor pays in the 20–day period beginning on the date of the order for relief debts owed to a utility for service provided during such period and thereafter pays when due debts owed to such utility for service provided during the pendency of the case, then the debtor may not be required to furnish assurance of payment.

resolution of an actual dispute, such as a motion for relief from the stay. *In re Smith*, 409 B.R. 1, 4 (D. N.H. 2009).

Reaffirmation Agreements

Counsel for the debtor's role in the reaffirmation agreement process:

1. Verify loan documents and terms;

2. Verify lien perfections/recorded mortgage;

3. Budget and Presumption of Undue Hardship Issues;

4. Possible renegotiation of terms;

5. If not reaffirming, loss of potential mortgage modification and/or refinance options in the future;

6. Do not reaffirm, but continue to make payments;

The debtor's attorney must certify the following in a reaffirmation agreement:

1. The attorney represented the debtor during the course of negotiating this reaffirmation agreement;

2. The agreement represents a fully informed and voluntary agreement by the debtor and does not impose an undue hardship on the debtor or any dependent of the debtor;

3. The attorney has fully advised the debtor of the legal effect and consequences of the reaffirmation agreement including but not limited to a default under such agreement;

See 11 U.S.C. §§524(C)(3) and 524(k)(5)(A).

If a presumption of undue hardship (monthly income is less than monthly expenses) exists, the attorney must certify that in the attorney's opinion the debtor is able to make the payment. See 11 U.S.C. § 524(k)(5)(B). The presumption can be avoided if Schedules I and J and the debtor's Statement in Support of the Reaffirmation Agreement clearly displays the debtor's ability to make the payments required in the reaffirmation agreement.

Incomplete or altered attorney certifications:

a. In re Perez, 2010 Bankr. LEXIS 2229 (Bankr. D. N.M 2010, July 12, 2010). The debtor filed an executed reaffirmation agreement; however, debtor's counsel unilaterally altered the required disclosures in Part C of the reaffirmation agreement pursuant to a local bankruptcy rule, which rendered the agreement unenforceable. The court determined that §52l(a)(2)(B) does not require that a debtor complete and sign an enforceable reaffirmation agreement and because the debtor, as opposed to the debtor's attorney, did everything in her power and control to timely reaffirm the debt, §362(h) did not operate to terminate the automatic stay.

b. In re Narro, Case No. 10-15859 (Bankr. N.M 2011). The debtors' Statement of Intention indicated their intent to retain their 2006 Lincoln Navigator. Based on the debtors' Statement of Intention, counsel for creditor prepared a standard form reaffirmation agreement and submitted the form to counsel for the debtors. The completed reaffirmation agreement did not contain the three required certifications in Part C. Debtors' counsel had stricken through the second certification which states:

> …(2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor;

Creditor's counsel notified debtors' counsel that the reaffirmation agreement did not comply with 11 U.S.C. § 524(c)(3) so it was being returned unfiled. Despite not having been signed and accepted by creditor, debtors' counsel proceeded to file the reaffirmation agreement. After the entry of the discharge, creditor repossessed the Navigator. The debtors then filed an Emergency Motion for Turnover of the Vehicle and an adversary complaint seeking sanctions for violation of the discharge injunction. The Court ultimately dismissed the debtor's adversary complaint and ruled that the reaffirmation agreement was not enforceable due to the alterations made to the Attorney Certification section. The Court held that Ford's repossession of the vehicle did not violate the discharge injunction.

c. In re Mendoza, 2006 Bankr. Lexis 1698 (Bankr. W.D. TX 2006). Debtor's counsel executed the declaration portion of the reaffirmation agreement; however, the attorney failed to check the box certifying that he had made the requisite disclosures to the client

(that the agreement does not represent an undue hardship, the agreement was voluntary on the part of the debtors or the box stating that even though the agreement is an undue hardship, the attorney is of the opinion that the debtor can make the monthly payments required under the agreement.) The court found that even though the attorney signed the reaffirmation agreement, the failure to properly certify that the required disclosures were made caused the reaffirmation agreement to be declared invalid;

d. In re Isom, 2007 Bankr. Lexis 2437 (Bankr. E.D. of VA). The debtor was represented by counsel during her chapter 7 bankruptcy case; however, debtor's counsel refused to execute an affidavit or declaration to accompany the reaffirmation agreement. The court held that without the attorney's certification the reaffirmation agreement was unenforceable.

e. In re Minardi, 399 B.R. 841 (Bankr. N.D. Okla. 2009). The court held that, if the debtor was represented by counsel during the course of the Chapter 7 case, the attorney must execute the reaffirmation agreement for the agreement to be valid. The court noted that it would not recognize efforts by the debtor's bar to exclude reaffirmation agreements from the services provided;

f. The United States Bankruptcy Court for the Eastern District of Michigan has issued an Administrative Order clarifying the responsibilities of debtor's counsel relating to reaffirmation agreements that states:

> As a matter of fulfilling the obligations of counsel for a debtor in a Chapter 7 Case:
>
> i. Counsel may not exclude from representation services relating to a reaffirmation agreement; and
>
> ii. Counsel shall appear and represent the debtor at any hearing on any reaffirmation agreement.

Timing of reaffirmation agreement:

For a reaffirmation agreement to be valid, it must be "made" before the granting of discharge. 11 U.S.C. §524 (c)(l). Courts have different views on whether "made" refers to entering into and signing the reaffirmation agreement or actually filing the reaffirmation agreement with the court.

1. In re Piontek, Case No. 09-70632 (Bankr. E.D.Mich. 2010). The debtor was provided a reaffirmation agreement approximately two months before the issuance of the discharge. The debtor failed to return the reaffirmation agreement to the creditor until after the court had issued the discharge. The court ruled that the reaffirmation agreement was not valid as it was not "made" prior to discharge because all parties had not yet signed the document when the discharge was entered.

2 Pickerel v. Household Realty Corp., 433 B.R. 679 (Bankr. N.D. Ohio 2010) - Reaffirmation agreement signed prior to entry of discharge but not filed with court until after discharge is binding and enforceable reaffirmation agreement. As long as the reaffirmation agreement is executed prior to entry of discharge, Code does not impose time limit to file and there is no prohibition against filing timely executed reaffirmation agreement after entry of discharge;

A majority of courts have ruled that the parties cannot enter into a reaffirmation agreement after the discharge has been issued and that the discharge cannot be set aside to allow for the filing of a reaffirmation agreement.

1. In re Smith, 467 B.R. 122 (Bankr. N.D. Ohio 2012). Rule 4008(a) requires reaffirmation agreements to be filed not later than 60 days after the first date set for the first meeting of creditors. Rule 4004 provides a vehicle for delaying entry of discharge at the request of the debtor. Debtor's Motion to Vacate Discharge for purposes of allowing belated reaffirmation agreement denied. Reaffirmation agreements

are not enforceable if not made before entry of discharge order.

2. In re Cottrill, 2007 Bankr. LEXIS 2009 (N.D. W.Va. 2007) When the debtors filed for bankruptcy relief, they stated their intention to reaffirm the debts on both vehicles. The creditor filed a motion to confirm termination of the automatic stay as to the collateral because of the debtors' failure to take timely action on their statement of intention. The creditor asserted that the debtors did not take action to reaffirm the debt within 30 days of the first creditors' meeting, as required by 11 U.S.C.S. § 362(h). After receiving their discharge, the debtors filed a reaffirmation agreement regarding each of their vehicles. The court rejected the debtors' argument that the time requirements of 11 U.S.C.S. § 524(c)(1) did not apply because the debtors were voluntarily consenting to the reaffirmation agreements. The timing requirement of 11 U.S.C.S. § 524(c)(1) was mandatory. The debtors had not established any basis for vacating the discharge order, allowing the reaffirmation agreements to be entered, and then re-entering the debtors' discharge order under Fed. R. Civ. P. 60(b)(6) or Fed. R. Bankr. P. 9024, particularly when the debtors did not provide any extraordinary circumstances.

3. In re Stewart, 2006 Bankr. LEXIS 2959 (Bankr. N.D. Ohio 2006). The court held that the discharge could not be set aside for the purpose of filing a reaffirmation agreement entered into after discharge.

4. In re Smith, 467 BR 122 (Bankr. W.D. Mich. 2012). Debtors' alleged uneasiness at not having reaffirmation agreement with residential mortgage lender and possible foreclosure if debtors' default in post-petition payments did not warrant setting aside discharge order. Section 105 does not provide basis to disregard or limit or expand express statutory provisions. Court must exercise equitable powers only within the confines of the Code and to carry out, but not countermand, provisions of Title 11.