

KREKELER LAW REPORT



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CONSTITUTION DAY AND CITIZENSHIP DAY

Constitution Day on September 17 marks the 233rd anniversary of the signing of the U.S Constitution. Citizenship Day, observed on the same date, celebrates all American citizens, whether native born or naturalized. Since 2004, these two holidays have been observed on the same day, as one celebration called Constitution Day and Citizenship Day. This holiday is meant not just to commemorate the signing of the constitution but to “recognize all who, by coming of age or by naturalization, have become citizens.”

This year, Constitution Day and Citizenship Day is being celebrated virtually—as the Judiciary has moved many of its in-person, year-round civics programs online. The message and meaning of the day remain the same, though: honoring American heritage, recognizing the foresight and wisdom of the signers of the Constitution, and appreciating all American citizens.

After the Founding Fathers declared independence from Great Britain, they spent a great deal of debate in ratifying the Constitution. In Article I, they gave Congress the power to make laws about bankruptcy. These discussions about the Constitution were published in 85 essays known as The Federalist Papers. Both Courts and historians look to The Federalist Papers when trying to determine what the drafters of our Constitution intended.

The primary reference to bankruptcy comes in Essay #42, written by James Madison, and includes the following sentence: “The power of establishing uniform laws of bankruptcy, is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.”

Madison’s comments made two main points. The first is that bankruptcy is so connected to interstate commerce that the federal government must have the power to create a uniform set of bankruptcy laws. The second point is that a uniform national bankruptcy law would prevent fraud by not permitting debtors to hide themselves or their assets in other states.

Madison and the other Founding Fathers have many times over been proven to be correct in their assessment of bankruptcy and the benefits it provides our society. The foresight of James Madison and others eliminated societies filled with debtors’ prisons and lives of indentured servitude, allowing citizens who were suffering from money problems to legally move on from crippling debt.



Fun Fact: Louisville, Ohio was the first city in the United States to celebrate Citizenship Day on September 17, 1952.

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SINGLE WOMEN AND FINANCIAL PROTECTION

Today I was asked to give advice about how single women can protect themselves from financial downturns and unexpected problems. These problems might arise from an illness or injury, from a loss of a job or income, from being sued and having a judgment placed, or even from having an auto accident without sufficient insurance. The measures to be taken will vary with the circumstances, of course, but there are some underlying principles.

First, if you have debt already, we should deal with that first. How that debt is dealt with will depend upon the type and amount of the debt. It also varies depending upon the age, health and income, both now and in the future, of the single woman.

If the unsecured debt can be paid fairly quickly, say in a year or two, installment payments might be the best approach. It is often possible to negotiate discounts, particularly of interest rates.

High interest rate unsecured debt can be paid with zero percent interest over three years under a Wisconsin Chapter 128 wage amortization. You can pick and choose what creditors to use this procedure for, and that can be very helpful.

If the unsecured debt cannot be paid in three years, it is time to consider other options, including the various forms of bankruptcy which may be available. You can still pay your creditors in full, if you wish, but you may be able to pay them much less, and perhaps not at all. Eliminating debt and the corresponding payments allows you to begin saving for other needs, whether a replacement vehicle, a child's education, or retirement. All of these things can provide financial stability for a single woman.

Secured debts are somewhat more complex. The analysis hinges upon the type and value of the collateral, and whether or not you want to retain that asset. It is often possible to force creditors to reduce interest rates and extend loan terms, which in turn lowers monthly payments.

Single women without substantial debt problems can safeguard against future problems arising by making sure that their assets, or at least a substantial portion of those assets, are held in a form which cannot be taken by creditors.

Single women, and single men for that matter, do not have another income to fall back upon in the event of a calamity. This makes it all the more important to have assets which cannot be attached by creditors.

OPTIONS

Yesterday an attorney who does not do much debtor creditor work asked if his client could collect a judgment by foreclosing upon property that was already subject to two mortgage liens. The answer is yes and that is what I told him.

But just because a legal remedy may be available does not mean it should be used. In this instance the sale of the judgment debtor's property would take a significant amount of time, likely about 18 months, and would incur both filing fees and attorney fees.

Without knowing the value of the property and the amounts owed on the two mortgages, we cannot determine the likelihood of recovering any money for the client through this process. We believe that options should always be considered with a cost / benefit analysis. The client should be provided not only with the available options, but with our best estimate of the risks and costs for each option. Without that evaluation how can we make a proper recommendation? And isn't that recommendation what clients really want?



QUESTION OF THE MONTH

Question: I've heard that only the debtor can be discharged of debt in bankruptcy, but I have also heard that third parties can be released from debts as well. Which is true?

Answer: Both, depending on the circumstances. The bankruptcy discharge only applies to the debtor. Someone who has co-signed a loan or guaranteed payments under a lease, or is in any way liable with the debtor, normally would not get the benefits of that discharge.

However, in reorganization cases, like Chapters 11, 12, and 13, third parties who are liable with the debtor have sometimes been able to get releases as part of the reorganization plan confirmed by the court.

Within the past year courts in both New York and Delaware have ruled that such releases are constitutional. But these releases are not favored in the law and are not easy to get.

FUTURE INCOME SOMETIMES GOES TO CREDITORS

Chapter 7 cases generally last less than four months. The debtor files and quickly receives a discharge.

Chapter 13 cases, on the other hand, will last 3 to 5 years. Debtors with above-median income will be required to be in the case for 5 years.

A lot can happen to someone over 60 months. Jobs can be lost, and injuries or illnesses could strike. People get divorced, move, change jobs, and incur unexpected expenses. We always worry about these sorts of things for our clients. It is one of the reasons we generally prefer Chapter 7 for clients if it will otherwise solve their financial problems.

But sometimes good things happen to people while in their Chapter 13 case. Wage increases, promotions, and new jobs that may pay more all occasionally happen. Inheritances can be received, and even lottery tickets can be winners.

When any of these positive occurrences take place the bankruptcy Trustee or a creditor may seek to modify the debtor's plan to increase the payments.

Sometimes the debtor can legitimately oppose this effort. The new job, while providing more income, may also bring additional expenses as a result. For example, these may incur new wardrobe expenses, special tool costs, or higher commuting costs.

Sometimes the debtor will simply have to decide whether to pay the higher amount under a modified plan or dismiss the case.

In a recent case from California a debtor, Stephen Buckley, got a new job, a very good job. As a result he began receiving stock options from his employer.

Toward the end his Chapter 13 plan, Berkley's employer was being bought out and he was to be paid for his stock options...\$3.8 million. The Trustee in his case sought to modify the plan so that Mr. Berkley would make a lump sum payment of about \$200,000, which would pay all of his creditors in full.

For some reason, greed got in the way and Berkley opposed paying this approximately 5% of his windfall to satisfy his debts.

Not surprisingly, both the bankruptcy court and the appellate court found that the modification to capture this increase in Berkley's income was appropriate.

If one of my clients got a \$3.8 million windfall, we would simply dismiss the Chapter 13 case and pay all the creditors in full. If Berkley had done that, he would probably have saved about \$15,000 of Trustee fees and an awful lot of attorney fees. Greed sometimes gets in the way.

I HIRED THEM... WHAT NOW?

Have you ever hired someone you thought was a top performer, only to later find out that their performance was mediocre? Do some of your employees seem to have difficulty meeting your expectations?

If so, you are not alone. Many organizations struggle with the performance process. This can result in unacceptable productivity and low morale.

It does not have to be like that. There are four simple, methodical steps you can take to ensure your employees are productive and successful.

1. **Clarify Roles.** Whether management or front line, employees need an understanding of their roles in the organization. What are their responsibilities? What are their direct and indirect reporting relationships? Who do they need to consult with prior to making a decision? Who do they need to inform about decisions?
2. **Set Measurable Goals.** "What gets measured, gets done." Avoid any possible confusion about the direction employees should take. Employees should understand exactly what they are expected to accomplish. Ideally, goals will be measured by some combination of quantity, quality, and/or timeliness. Do not set vague goals such as "improve teamwork" or "better client service."
3. **Cultivate.** Employees must understand the company culture. What are the values that the firm lives by? What are the rules that will keep employees out of trouble and cause them to become productive more quickly?
4. **Feedback.** Prompt and honest feedback is critical. Give employees feedback early and often.

SPANISH FLU

“Despite poor or absent data from many countries, the virus is believed to have infected over half of the world’s population...Social and economic disruption were also prevalent, as absenteeism led to shutdowns of schools and businesses (many of which went bankrupt).”

No, this is not a recent news article regarding Covid-19. It is about the Spanish Flu and is taken from The Great Pandemic: The United States in 1918-1919.

While this may sound similar to our situation today, some things have changed. Among them has been the evolution of our bankruptcy laws. We are far better situated today to deal with struggling businesses. We have the tools to keep many businesses in business.



WHERE'S KREKELER?



David Krekeler attended a seminar on Measuring Profitability Goals for a strong business position. The presentation by SVA Certified Public Accountants reviewed the various key performance indicators and financial ratios which can often be of help in assessing the health of a business.

We use these numbers all the time in our efforts to keep businesses in business. Knowing your financial position, and being able to compare it to prior periods, can be extremely valuable, not only in assessing the current health of a business, but in convincing a court that a plan of reorganization will likely be successful.



Have a question? Idea for a future article?

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Speaking Engagements

If you would like more information on any of these topics, David would love to discuss them over coffee and a bagel-his treat (or Zoom). Contact him at jdkrek@ks-lawfirm.com

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