

CREDITORS' RIGHTS AND COLLECTION OF MONEY DUE

By Craig I. Kelley, Esq.



If an individual or business

owes you money and is delinquent on payments owed to you, then you have many options which depend upon the nature of the debt. All of these options involve the filing of some form of a lawsuit or a claim in a bankruptcy. If the debt is unsecured, you may file a lawsuit to collect upon the debt. If the debt is secured by property, then you can foreclose on your secured interest in the collateral, with the proceeds being applied to the debt. If the debt ultimately proves to be undersecured, meaning you are owed more than the value of the collateral, then you can seek a judgment for the deficiency balance.

Once you receive a judgment in your favor, you may need to take additional action in order to collect upon the judgment, such as a garnishment, levy and execution by the sheriff, and/or possibly discovery in aid of execution.

If the individual or business that owes you money files for bankruptcy, the remedies available to you are governed by the Bankruptcy Code. As soon as the debtor files for bankruptcy protection, an automatic stay goes into effect, which mandates that you must cease all collection activity outside of the bankruptcy court. The automatic stay protects the debtor and his property during the pendency of the bankruptcy from most forms of collection activity. In bankruptcy, your rights as a creditor are dependent upon a priority scheme contained within the Bankruptcy Code.

delinquent at the time of filing for bankruptcy, you have the right to seek relief from the automatic stay to pursue actions such as repossession and/or foreclosure outside bankruptcy if the debtor does not provide adequate protection payments (usually at least interest payments).

If the debtor files for Chapter 7 bankruptcy, your rights as a creditor depend upon whether the case is a "no-asset" Chapter 7 case or an "asset" Chapter 7 case. A Chapter 7 bankruptcy is sometimes called a "liquidation" bankruptcy because the bankruptcy trustee will liquidate (sell) the debtor's non-exempt assets and distribute the proceeds to creditors. In order to receive a pro-rata distribution, you must file a proof of claim by the deadline imposed by the bankruptcy court. In a "no-asset" case, there are no non-exempt assets that can be liquidated for the benefit of creditors.

In a Chapter 11 or 13, the debtor proposes a plan of repayment to creditors. If the debtor's plan improperly treats your claim, you have various objections available to you that must be raised in writing. In addition, in order to preserve your rights, you must file a proof of claim within the deadline imposed by the court.

If the debtor has engaged in any type of fraudulent, criminal, or intentionally malicious activity, then you may have the right to seek to have your claim determined to be non-dischargeable, which means that the obligation would survive the bankrupt-

cy proceeding. In addition, you may seek to have the debtor enter into a reaffirmation agreement, which is a court approved contract through which a debtor agrees that an obligation will survive the bankruptcy proceeding.

These issues are complex in nature and require review and assessment by experienced collections and/or bankruptcy attorneys who can help you understand the remedies available to you. ^{stb}

Craig I. Kelley, Esq. and Kelley & Fulton, P.A., represent individual and businesses debtors and creditors in Chapter 7, 13 and 11 proceedings and in state court. Mr. Kelley is A.V. rated by Martindale-Hubbell directory, which is the highest honor voted on by his peers in the legal profession. He is an Adjunct Professor of Bankruptcy Law and lectures nationally on the subject. With offices in West Palm Beach, he can be reached at 561-491-1200 or craig@kelleylawoffice.com.



CRAIG I. KELLEY, ESQ.

