

NON-BANKRUPTCY REPAYMENT AGREEMENTS

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In this age of ever-increasing bankruptcy filings both consumers and businesses may want to consider non-bankruptcy resolutions to their payment difficulties. This article briefly discusses some of those non-bankruptcy resolutions.

A. COMPOSITION PLANS

A composition is an agreement between an insolvent debtor and two or more of his creditors in which the creditors agree among themselves and with the debtor to accept less than full payment of the amount due in full settlement of each of their claims. A composition is contractual in origin and is enforceable under the law of contracts when all of the elements of a contract are present. Not all creditors need to participate in the agreement, and participating creditors may be divided into classes.

B. EXTENSION PLAN

An extension is an agreement among a debtor and two or more creditors for full payment of the amounts due but over a time period beyond the original due dates.

C. ACCORD AND SATISFACTION

Accord and satisfaction is an agreement between a debtor and a single creditor for the discharge of a debt by the substitution of an agreement between the parties in satisfaction of the original claim by full performance of the agreement. Minnesota recognizes the validity of an accord and satisfaction even though no actual dispute may exist if the claim is liquidated (i.e., specifically determined), payment has been made and accepted, and the clear intention of the parties was that the substituted obligation would fully satisfy the original obligation.

D. DEBT SUBORDINATION BY A THIRD-PARTY

Under debt subordination by a third-party, a creditor agrees “not to accept” and a debtor agrees “not to make” any payment on account balance due until the debtor’s obligation to another creditor has been fully paid. In addition, the first creditor assigns to the second creditor (usually a lender) any collateral security (e.g., personal property, financial certificates, etc.) that have been pledged by the debtor to the first creditor. The net effect of this informal agreement is, essentially, to create an express subordination agreement.

E. CREDIT EXTENSION AGREEMENT

A temporary waiver by the creditor of the statutory right to file a lien (for instance a mechanic’s lien for work the creditor has done to improve real property) and of the right to foreclose the lien is an example of a credit extension agreement. Except for such a purely temporary waiver, the creditor preserves all of its statutory rights.

F. ASSIGNMENTS

1. Common Law (Non-Statutory) Assignments

A common law assignment is a voluntary conveyance by a debtor of substantially all of his property to a party in trust. The “trustee” then collects amounts owed to the debtor by others, sells the property received, and distributes the proceeds to creditors of the debtor.

This assignment is non-contractual in nature and non-consensual. It compels creditors to comply or to force the debtor into bankruptcy.

The benefit of such an assignment is the relative quickness of the process. However, it may not be less costly than a bankruptcy filing.

A common law assignment must be absolute and complete, i.e., the debtor retains no control over the property surrendered to the trustee or the money owed to the debtor and collected by the trustee.

Additionally, there can be no "side" agreements between the debtor and any creditor to reconvey property or funds to the debtor after the assignment has been completed.

The trustee takes legal title to all of the debtor's property in a common law assignment. His only obligation is to creditors. He must be guided by the terms of the assignment and must administer the assignment quickly because failure to do so may be deemed a fraudulent conveyance, resulting in the assignment being vacated by a court.

2. Statutory Assignments

Minn. Stat. §577.01, *et seq.*, provides for assignments for the benefit of creditors.

Although the statute seems to read as though it preempts common law assignments, Minnesota courts have held that common law assignments are valid.

Statutory assignments are rarely used because of the ease of handling common law assignments and, more recently, because of the relative inexpense and administrative efficiency of bankruptcy filings.