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## Bankruptcy

The information provided herein is being provided to you for the dissemination of general information of the law only. There are many variables and exceptions to some of the written sections within this document, which could result in a different finding than the norm. Further, the information being provided here is a small percentage of the total statutes involved in various legal actions. Even if some of the provided information seems to apply, your given facts may apply the law differently. Legal counsel should be considered by anyone who would venture into the area of legal actions.

### What is a Bankruptcy?

#### Introduction to Bankruptcy

The United States Code has established a procedure that enables debtors to manage debt by seeking relief in the federal court system. The Federal Bankruptcy Act contemplates several different ways to manage this debt and in some cases to pay some or all of your creditors. Because the federal statutes and procedures change with each new Congress, this discussion is intended only to serve as a source of background information leaving it to each Plan Member to consult with a Bankruptcy attorney in the event bankruptcy seems to be an option.

For consumers there are at least two different statutory bodies of law by which to obtain relief from one's creditors: Chapter 7 Bankruptcy and Chapter 13 Bankruptcy. These are named for the Sections in which they appear in the Federal Bankruptcy Act. [There is also a Chapter 11 procedural scheme that allows businesses to reorganize.]

Chapter 7 is the traditional means of declaring bankruptcy, and enables one to clear one's debt, with some exceptions, and to begin one's financial slate anew. Chapter 13 is the alternative that is often encouraged by attorneys and judges and provides that one can obtain relief from their debts, but not to wipe the slate completely clean. Chapter 13 is designed to help creditors obtain some payment on the obligations, but 100 percent payment is not required. Chapter 13 is also a useful tool for Debtors who want to catch up home mortgages and car payments.

**The Bankruptcy Abuse Prevention and Consumer Protection Act** passed by Congress in 2005, and which became effective on October 17, 2005, has added educational and disclosure obligations to the existing burden Debtors bear in filing bankruptcy. The law was advocated by the banking industry and was designed to force bankruptcy debtors to repay at least a portion of through Chapter 13. Of note is the requirement that Debtors receive a certificate from an approved source that they have received pre-bankruptcy credit counseling before they can even file for bankruptcy relief. Prior to receiving the Court's discharge from their debts, Debtors must complete a financial management course, also from an approved vendor.

### Chapter 7

#### Discharge of your Debts

Chapter 7 is a complete discharge of all of the debt you may have at the time, with certain statutory exceptions.

## How Does It Work?

Here, when you file a Petition in Chapter 7, you turn over all of your assets to the Court, except those exempt by the current law. Typically, the following assets may be exempt, but only up to certain amounts provided for under the Bankruptcy Code, or under State Law, where the State has "opted out" of the Federal exemption scheme. Florida is one such "opt-out" state.

- Your home
- Your personal property
- Your car
- Your household possessions
- Your jewelry
- Cash Value of any insurance policy
- Items related to health care

It is important to remember that not all of these assets will be exempt, and then only up to the amounts set forth by statute. Additionally, most traditional forms of income are exempt. Samples of income that are exempt include:

- Wages of a head of household
- Social Security benefits
- Disability benefits
- Unemployment benefits
- Pension fund payments
- Profit-sharing plan payments
- Alimony
- Support maintenance payments
- Veteran's benefits

All future income is considered by the Court and often found to be exempt.

## State Law Exceptions

It is important to emphasize that many states, including Florida, have set their own lists of exemptions, which may be applicable if you are a resident of the state and you file for Chapter 7. It is important to realize that your state laws may apply to limit one or more of the above-referenced exemptions, and as such, it is critical to have legal assistance in this filing.

## Filing for Chapter 7

Chapter 7 starts with the filing of a Petition, in which all of the assets of the party are listed, along with all of the debts and obligations owed. You must also list your present income and your interpretation of all of the exemptions to which you may believe you are entitled. Once you file your Petition, the following protections are afforded:

- Your creditors cannot contact your employers in any way;
- Late charges, service charges, and often interest charges are halted;
- Any legal action brought against you will be halted, so long as it relates to your debts;
- Any new legal action related to your debts being brought is prohibited;
- All collection action, including phone calls, letters, and any other attempts to collect must be stopped;
- Your wages cannot be garnished, and any garnishments in effect must be terminated;
- Any repossessions in progress must be stopped; and
- All action to collect against co-signers, guarantors or co-debtors must be stopped, although your bankruptcy may not wipe out the debt as to them.

## How Does This Proceeding Work Once I File?

The court procedures are a bit different from Chapter 13, in that there are some creditors who can put up a bit of a "fight" to ask the Court to keep their debt from being discharged. One of the ways they can do so is to attempt to allege, and bring proof to Court, of a case of fraud on the part of the debtor. Thus, there are procedural hearings in this process that require the debtor be prepared to explain his financial woes and to demonstrate, if necessary, that all of the debt was

obtained without any intention to defraud any creditor. A hearing takes place and then a Judge renders a decision as to the discharge of the debt.

Debtors should know that the Bankruptcy proceedings, like many other legal proceedings, have serious time limitations and requirements, and that the failure to comply with these may result in penalties from the Court, including, in some instances, dismissal of the Petition without discharge of debts.

During the legal process, the trustee has the right to collect all of your non-exempt assets and liquidate them. Here in the Northern District of Florida, as well as many other districts, as a practical matter, the Trustee usually allows the Debtors to “buy back” their nonexempt assets and accepts payments over a 12 month period without charging interest. The trustee also collects any non-exempt cash and then creates a plan for the distribution of the money to your creditors in some share that is determined to be fair.

Once this process is completed and the creditors have received something, or in some cases nothing, and the statutory time limits have passed, the discharge is filed by the Court. All of the debts listed on your Petition will then be considered to have been paid, and no attempts to collect these will be allowed by any creditor. You should note that debts that were not listed on your Petition or in a subsequent amendment with the Court and debts that you reaffirm (file an agreement with the Court saying that you promise to pay the debt as if you had never filed bankruptcy), are not be discharged, and creditors may still attempt to collect it.

**Concern Area:** A Bankruptcy is placed on your credit report and remains there for up to 10 years under the current statutory scheme. You should know that if you were to file for bankruptcy relief, you may be asked to explain your bankruptcy to new creditors, if you ever applied for credit. Some creditors may refuse to loan money or may want to charge you a higher interest rate. More often however, where the pre-bankruptcy credit record showed “slow-pays” and “no-pays” and “repossessions,” it is easier to obtain new credit after filing bankruptcy than it was prior to bankruptcy. Many creditors are inclined to offer credit with a Bankruptcy on your record, since there are legal limitations on when a debtor can file a second Bankruptcy and wipe out the new debt.

**Certain Debts Cannot Be Discharged:** Subject to any amendments to the Bankruptcy Code, the following is a list of debts which cannot be discharged under Chapter 7 [Note: This list is not complete and is not intended to be relied on at the time you file. You should consult with an attorney at the time of filing to obtain the most accurate list of non-dischargeable debts]:

- Taxes due in the past three years [there are some exceptions];
- Debts from false financial credit information;
- Alimony, child support and other maintenance obligations;
- Fines and penalties assessed by the government;
- Student loans [there are some exceptions];
- Other debts as ordered by the Court; and
- Debts affirmed by the debtor

## Chapter 13

Chapter 13 Bankruptcy has some limits that are subject to being changed by Congress, so one should always consult with an attorney at the time Bankruptcy may be sought as a remedy before reaching a decision to do so. Chapter 13 is available to wage earners, small business owners and professionals, but may not include everyone.

### What Happens When I File?

As soon as a person files a Petition for relief under Chapter 13 of the Bankruptcy Code, the following protections are afforded:

- Your creditors cannot contact your employers in any way;
- Late charges, service charges, and often interest charges are halted;
- Any legal action brought against you will be halted, so long as it relates to your debts;
- Any new legal action related to your debts being brought is prohibited;

- All collection action, including phone calls, letters, and any other attempts to collect must be stopped;
- Your wages cannot be garnished, and any garnishments in effect must be terminated;
- Any repossessions in progress must be stopped; and
- All action to collect against co-signers, guarantors or co-debtors must be stopped, although your bankruptcy may not wipe out the debt as to them.

### **How Does the Court Procedure Work After Filing?**

The court appoints a trustee to manage the debt process throughout the court proceeding. The trustee is an independent professional and his/her job is to collect payments from you over a three to five year period and distribute those payments according to a plan agreed on by the Trustee, you and your attorney that will enable you to repay your creditors as much as possible over that period.

Your obligation would be to pay to the Trustee all of your “disposable net income” over and above your reasonable and necessary living expenses over the term of the plan. Once the trustee and the party and their attorney approve the plan, it is submitted to the judge who approves the plan. In making this determination, the judge analyzes your income to debt picture. Based on your expected income, the judge will approve the payments he believes will fulfill your obligations to the best of your ability. Usually such plans pay creditors only a portion of their claims. At the end of the plan the unpaid balance of debt is “discharged” and your creditors cannot ask you to pay more.

### **What Debts Can I Receive Help With?**

Most unsecured creditors, such as credit card companies, financing companies, department stores and similar creditors must accept the Bankruptcy Court’s determination, regardless of their personal feelings of whether it is enough money. If your house has been foreclosed upon, all back payments can be lumped together and spread out over a period of up to five years. You must also make your current house payments under the mortgage. If you do both, the house cannot be foreclosed upon.

If you owe back taxes, in Chapter 13 there are a number of solutions that your attorney can help you with including that with some taxes, the Court can grant relief from the obligation to pay them immediately.

### **What Happens After the Plan is Approved or “Confirmed” by the Court?**

The trustee requires you to make payments to his/her office every month. Our office recommends that we arrange for your plan payments to be payroll deducted and sent directly to the Trustee by your employer. The trustee then pays all of the creditors directly according to the terms of the Chapter 13 Plan that you and your lawyer worked out and proposed to the Court. This ensures that the trustee monitors your performance and that you keep up with your obligations.

### **What Happens If I Cannot Pay During the Repayment Period?**

The Federal Bankruptcy Code contemplates problems in repaying debt after a Plan has been approved and implemented. There are procedures in the law that allow you to amend the Plan, but there are strict statutory requirements with which you must comply in order to obtain relief. Also, there is a possibility that you may be able to apply for complete relief from your debts and discharge all of your obligations by converting your case to one under Chapter 7 Bankruptcy. If you need assistance after a Plan has been approved and implemented, or if you think you may need to apply for Chapter 7 relief, you should seriously discuss your options with your Bankruptcy attorney.

### **Transfers Before Filing Bankruptcy**

In order to hide assets from the bankruptcy court, transfers to other parties are often contemplated. If you understand the legal system mindset that often catches people unfamiliar with the proceedings off-guard, you will understand and avoid pitfalls of trouble. One of the most important concepts to understand is that whenever a court asks a lawyer or a party or a witness to say or do something on which the court will rely, it usually asks for the information under the penalty of perjury.

Likewise, when the Bankruptcy Court asks a party who files a Petition for Bankruptcy to submit a list of all assets, for example, this requirement will be under penalty of perjury. Making a transfer of one's property just before the Bankruptcy is filed may cause a party to be in danger of running afoul of this penalty of perjury provision. Needless to say, many Federal Court Judges become upset at the prospect of someone asking for help from the Court and not being truthful to the Court. There is a place on the bankruptcy petition where the Debtor must report all transfers and payments to creditors during the previous year. Debtors must sign their Bankruptcy Petition and Schedules under penalty of perjury. Failure to list assets or transfers on the schedules is a Federal Crime and can result, not only in a denial of discharge, but in criminal charges and even jail time!

This does not mean that one cannot transfer property and then declare bankruptcy. However, to avoid any problems, a person making such a transfer should consult with an attorney about the transfer to determine if it would be a proper transaction to undertake, and the transfer must be reported on the bankruptcy paperwork.

In Bankruptcy Court, there are several types of transfers that can raise problems. Two of these include a fraudulent conveyance, and a preferential payment(s) to creditors. If a Judge were to be apprised of either of these two transactions, they could be set aside and penalties might ensue. While a person may believe that it is unlikely the court could find out, it is often others close to the process that may intentionally or inadvertently demonstrate the problems.

For example, assume that a person paid off creditor A except for \$200. Creditors B and C are owed \$4,000 and \$5,000 respectively. In a Court Petition, all three Creditors are listed. A person's credit report pulled by Creditor B two months prior to the Petition being filed shows Creditor A was owed \$5,000 by the debtor. Creditor B could simply bring this to the Court's attention, possibly even inadvertently, and this would demonstrate that the debtor paid off Creditor A in a preferential transaction.

In short, transfers before the filing of a Petition in Bankruptcy are going to be subject to much scrutiny. One should exercise great care in this area, and do not hesitate to contact legal counsel for assistance.

There are many means of managing debt, of which bankruptcy is only one. If you decide to utilize the Bankruptcy Court, do so with great care and, if possible, in consultation with experienced legal counsel. Should you choose Bankruptcy, be sure to further consider your options before filing your Petition.