



MOUNTAIN POST LEGAL BRIEF

A Preventive Law Service of The Office of the Staff Judge Advocate

Headquarters, Fort Carson

Keeping You Informed On Personal Legal Affairs

BANKRUPTCY MATTERS

Consider these questions and answers to determine whether filing for bankruptcy is in your long-term best interest.

Q: WHAT IS THE MAIN PURPOSE OF FEDERAL BANKRUPTCY LAW?

A: Bankruptcy has a wide variety of purposes, one of which is to relieve an honest debtor of certain debts, thereby providing an opportunity for a *fresh start*. Filing for bankruptcy is not necessarily a “free ride” to dispose of debt—there are long term consequences which are discussed below. Bankruptcy also benefits creditors by allowing them an opportunity to possibly collect a portion of the debtor’s debt once bankruptcy is filed.

Q: WHAT ARE THE DIFFERENT TYPES OF BANKRUPTCIES?

A: The two types of bankruptcies that individual debtors are eligible for are a Chapter 7 bankruptcy and a Chapter 13 bankruptcy under the Bankruptcy Code.

Q: WHAT IS A CHAPTER 7 BANKRUPTCY?

A: A Chapter 7 bankruptcy is often referred to as a “liquidation” bankruptcy. In a Chapter 7 case, the Bankruptcy Court appoints a trustee, and the trustee is required to collect all non-exempt property from the debtor’s estate, reduce it to cash, and pay the debtor’s creditors in a prescribed manner. After this process is complete, the debtor will receive a discharge from the Court, resulting in the debtor being “debt-free.” Thus, the term “liquidation” refers to the process of reducing a debtor’s estate to cash and distributing the proceeds to the creditors in order to satisfy any existing debt. Not all of a debtor’s property is available for liquidation, as some of the property will be exempt. Exempt property will be discussed in more detail below.

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Q: WHAT IS A CHAPTER 13 BANKRUPTCY?

A: A Chapter 13 bankruptcy, referred to as “reorganization” bankruptcy, is designed for a debtor who has a regular source of income, and who desires to repay all or a percentage of his or her debts pursuant to a plan that the debtor proposes to the Bankruptcy Court. Chapter 13 is different than a Chapter 7, inasmuch as the Chapter 13 debtor usually remains in possession of the property of the estate and makes payments to creditors, through the Chapter 13 trustee, based on anticipated income over the life of the Chapter 13 plan.

Q: WHO IS ELIGIBLE TO FILE A CHAPTER 7 AND CHAPTER 13 BANKRUPTCY?

A: The bankruptcy code applies to individuals, partnerships, and corporations that reside or have domicile, a place of business, or property in the United States. The bankruptcy code was modified in 2005 and changed who may file for Chapter 7 or Chapter 13 and when. The procedures must be followed in order for the debtor to be eligible for either Chapter 7 or 13. First, the debtor must take an approved financial counseling course 6 months prior to filing. Second, the debtor must compare his/her monthly income with the median income of the state in which he/she lives. Generally, if the debtor’s monthly income is below or slightly above the median, the debtor is eligible to file for Chapter 7 bankruptcy. If the debtor’s monthly income is above the median, the debtor must file for Chapter 13. Finally, the debtor must take an approved financial management course in order to receive a discharge.

Q: WHAT IS “PROPERTY OF THE BANKRUPTCY ESTATE?”

A: The creation of the bankruptcy estate occurs automatically upon the filing of a bankruptcy petition. The bankruptcy estate, often referred to as section 541 property, includes all the debtor’s property, real or personal, tangible or intangible, at the time the petition is filed. This property is the subject matter of the estate and may be available for disposition to creditors. Remember, however, that certain property may be excluded from the bankruptcy estate, and, therefore, it is important to consult an attorney regarding these issues.

Q: WHAT IS AN “AUTOMATIC STAY” AS IT RELATES TO BANKRUPTCY?

A: The automatic stay is a device that protects the debtor, the property of the estate and the property of the debtor from certain actions by creditors after *a bankruptcy petition is filed*. In essence, the automatic stay halts most actions against the debtor so as to give the debtor “breathing room” in order to properly administer the case. Once the bankruptcy petition has been filed, the automatic stay prohibits the following acts:

- a. Any lawsuit against the debtor to recover any debt or claim that occurred before the bankruptcy petition was filed.
- b. The enforcement of a pre-petition judgment against the debtor or against property of the estate.
- c. Any act to obtain possession of estate property or property in the estate’s possession, regardless of whether the underlying claim arose before or after the filing of the bankruptcy petition.
- d. Any act designed to create, perfect or enforce a lien against estate property or the debtor’s property, such as a mortgage foreclosure.
- e. Creditor’s may not bother, intimidate or harass the debtor about repayment of pre-petition obligations. The classic example is when a creditor constantly calls or writes a debtor for the purpose of collecting a debts.
- f. The commencement or continuation of a case in the United States Tax Court is specifically stayed.

There are also exceptions to the automatic stay. Thus, the filing of a bankruptcy petition **does not** operate as a stay of the following actions:

- a) Criminal proceedings
- b) Alimony and/or child support
- c) Modification orders to spousal or child support and/or paternity suits
- d) Enforcement of judgments by governmental units
- e) Mortgage foreclosures where the mortgage is secured by the Housing and Urban Development (HUD) agency
- f) Transfer of real property with out consent from the secured creditor or the court
- g) Eviction proceedings between a landlord and tenant if the eviction proceeding occurred prior to filing the bankruptcy petition, or if there is endangerment to the property or illegal use of a controlled substance on the property within 30 days prior to filing the petition for bankruptcy
- h) There are others that are rare and do not usually concern service member, retirees and their families.

Q: WHAT PROPERTY EXEMPTIONS MAY I CLAIM WHEN I FILE FOR BANKRUPTCY?

A: In most circumstances, an individual debtor does not lose all assets as a result of bankruptcy. A debtor is entitled to certain exemptions which allow the debtor to keep property of the estate. These exemptions will vary depending on the state in which the debtor lives. In general, under the Bankruptcy Code, the maximum exemptions of a debtor's interest in property are as follows:

- a. **Homestead:** The debtor may exempt up to \$20,200.00 in real or personal property of the debtor or dependant that is used as a residence. This exemption is applied to the equity in the residence. Thus, the exemption may only cover the difference between the amount of the loan or mortgage and the value of the home.
- b. **Motor Vehicle:** There is a maximum exemption of \$3,000.00 allowed for one motor vehicle. This exemption works like the homestead exemption, where the exemption is only applied toward the equity in the vehicle. Thus, if there is a loan on the vehicle, the debtor must continue to make payments if he or she wishes to keep the vehicle.
- c. **Household Goods:** There is an exemption of up to \$525.00 in any particular item, or \$10,775.00 in aggregate value of household goods.
- d. **Jewelry:** There is generally a \$1,000.00 exemption in jewelry for the debtor or dependant.
- e. **Wildcard Exemption:** There is an exemption of up to \$1,075.00, plus up to \$10,125.00 of any unused portion of the homestead exemption, *in any property*. This exemption is designed primarily for the benefit of non-homeowners. There is no wildcard exemption in Colorado.
- f. **Tools of the trade:** The debtor may exempt \$2,025.00 in professional books or tools of a trade.
- g. **Life insurance:** Any unmaturred life insurance contract owned by the debtor may be exempted.
- h. **Loan value or accrued interest of life insurance:** Up to \$10,775.00
- i. **Health aids:** Such as wheelchairs, hearing aides, kidney machines, etc.
- j. **Government benefits:** There is an exemption for the debtor's right to receive social security benefits, veteran's benefits, local public assistance, unemployment benefits or compensation, or disability or illness benefits.
- k. **Alimony, support or maintenance received from another**
- l. **Pension benefits**
- m. **Crime victim awards**
- n. **Wrongful death awards**

- o. **Personal injury awards:** Up to a maximum of \$20,200.00.

Q: WHAT IS A DISCHARGE?

A: A discharge is when the debtor's debts are expunged at the conclusion of the bankruptcy case. In a Chapter 7 case, this usually occurs after 2-3 months. In a Chapter 13 case, a discharge does not occur until the end of the plan. Thus, a discharge permanently prevents creditors from attempting to collect or recover any debts that were included in the bankruptcy petition. As a general rule, all debts created prior to filing are discharged. However, there are exceptions, which are discussed below.

Q: ARE ANY DEBTS NON-DISCHARGEABLE?

A: Yes. Certain debts of an individual debtor are non-dischargeable and, therefore, survive the bankruptcy. There are numerous debts that may be non-dischargeable, but some of the most prevalent are: certain types of taxes, debts obtained by fraud, punitive damage awards, **alimony**, maintenance, and **child support**, certain fines and penalties and certain state court judgments, among others. For further assistance regarding non-dischargeable debts please contact a legal assistance attorney.

Q: ARE STUDENT LOANS DISCHARGEABLE?

A: No. Under the new bankruptcy laws [student loans are non-dischargeable](#). [However there are certain exceptions if repayment of the debt would cause "undue hardship" on the debtor.](#)

Q: HOW MANY TIMES MAY I FILE FOR BANKRUPTCY?

A: A debtor may file a Chapter 7 bankruptcy petition again no sooner than six years after he/she was discharged from a previous Chapter 7 filing. This rule applies to people who have been granted a discharge under Chapter 13 bankruptcy and wish to then file Chapter 7 bankruptcy. It must be noted that if an individual tried filing bankruptcy over and over again, creditors might allege that it was a pattern that showed a preconceived plan to defraud creditors, which, of course, is a violation of criminal law.

Q: WILL I NEED TO APPEAR IN COURT AFTER I FILE BANKRUPTCY?

A: Yes. A "meeting of creditors" is conducted at a reasonable time after the order of relief is issued by the Bankruptcy Court. The debtor must attend this meeting. Also known as the Section 341 meeting, its primary function is to allow creditors and the trustee an opportunity to examine the debtor under oath about issues related to the bankruptcy case. In short, creditors and the trustee use this meeting to question the debtor regarding information contained in the bankruptcy petition.

Q: HOW WILL FILING FOR BANKRUPTCY AFFECT MY CREDIT?

A: A bankruptcy filing appears on the debtor's credit report for a period of ten years. This can prevent the debtor from obtaining credit, such as certain personal loans, credit cards, and private student loans, just to name a few. For that reason, one must treat bankruptcy as an absolute last resort, because the consequences of bankruptcy last a long time.

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Q: ARE THERE ANY ALTERNATIVES TO BANKRUPTCY?

A: Yes. It is always a good idea to contact a local consumer credit or consolidation agency before filing for bankruptcy. Many times, these agencies can contact creditors and work out reduced interest rates or payment plans that fit within a debtor's budget. However, please note that a debtor will still be required to pay the debts in full. The agencies merely attempt to provide a means by which the burden on the debtor is eased while payments are still being made.

Q: DOES MY SPOUSE HAVE TO FILE, AND WHAT IS THE EFFECT IF HE/SHE DOES OR DOES NOT FILE?

A: A debtor's spouse does not have to file with the debtor if the debts are solely in the debtors name. If any of the debts are also in the spouse's name, the spouse must file for that debt to qualify for a discharge. Generally debts will only be in the spouses name if he/she personally signs the agreement or contract. In certain states, called "community property" states, either spouse can sign an agreement for a debt and both the debtor and the spouse are obligated to pay that debt. Of course, if the spouse does file, his or her credit will be affected in the same manner.

Q: WHAT ARE THE FILING FEES FOR A CHAPTER 7 AND CHAPTER 13?

A: \$299.00 for a Chapter 7 and \$274.00 for a Chapter 13.

Q: DO I NEED AN ATTORNEY OR CAN I REPRESENT MYSELF?

A: Technically, a debtor may represent him or herself, **but it is strongly discouraged.** The procedure for filing a bankruptcy case is complicated and very time sensitive. The consequences of a late filing could result in the case being dismissed and potentially barring a subsequent filing for six years, or causing you to pay in order to file the case again. Therefore, it is in the debtor's best interest to hire an experienced bankruptcy attorney to handle his or her case.

Q: HOW MUCH ARE ATTORNEY FEES?

A: Typically, attorneys charge a flat fee for most Chapter 7 and Chapter 13 cases and the payment is expected to be made "up-front" before the bankruptcy petition is filed. The debtor must contact the attorney regarding the amount of fees as they vary widely from attorney to attorney, but expect to pay anywhere from \$500.00 to \$1,500.00.

Q: WILL FILING FOR BANKRUPTCY AFFECT MY SECURITY CLEARANCE?

A: Yes. Filing for bankruptcy, under most circumstances, may prevent you from keeping or obtaining a security clearance. Pursuant to AR 380-67, the criteria for determining eligibility for a security clearance includes "excessive indebtedness, recurring financial difficulties, or unexplained affluence." Therefore, filing for bankruptcy is one factor that may be considered in deciding whether a security clearance will be issued. For more information regarding this issue, please contact a legal assistance attorney or the security manager.

Q: WHAT IF I HAVE OTHER QUESTIONS?

A: Please set up an appointment to see one of our legal assistance attorneys. They are here to help you. Also note that there are various bankruptcy reform bills currently pending in the Senate and the House of Representatives. As a result, bankruptcy law may substantially change in the near future, which is another reason to seek legal advice if contemplating bankruptcy.

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