

Consumer Pamphlet: Consumer Bankruptcy in Florida

Note: This pamphlet is available online only.

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What is Bankruptcy?

Bankruptcy is a process by which consumers can eliminate or repay some, or all, of their debts under the protection of the federal bankruptcy court. Generally, bankruptcy takes one of two forms — liquidation or reorganization.

In the short term, bankruptcy prevents continued efforts by creditors to collect debts. In the long term, bankruptcy can eliminate repayment obligations or provide for a restructuring of the debtor's obligations, thus enabling the debtor to obtain a fresh start.

Alternatives to Bankruptcy

It is often said that bankruptcy should be a “last resort” for financially troubled consumers. This advice is oversimplified. In some cases, legal rights can be lost by delay. It is especially important to get early advice about bankruptcy if you are hoping to use the bankruptcy process to help save a home or a car. While bankruptcy can prevent a foreclosure or repossession, bankruptcy usually cannot help once the sale process has been completed and your property interest in the collateral has been terminated under Florida law.

In some situations, however, it may make sense to explore alternatives to bankruptcy. Such alternatives may include an out-of-court settlement with creditors, mortgage modifications or negotiating a reduction of payments to creditors. ▲

Collection Harassment

Consumers with debt problems often consider bankruptcy primarily to stop harassing telephone calls and letters from creditors. However, there may be other ways to stop collection activity. The Fair Debt Collection Practices Act (FDCPA) and the Florida Consumer Collection Practices Act (FCCPA) provide invaluable rights to consumers to prevent illegal and harassing debt collection activity.

What Bankruptcy Can and Cannot Do

Bankruptcy may make it possible for you to:

- Eliminate the legal obligation to pay most or all debts. This provision is called a “discharge,” which is designed to give the debtor a fresh financial start.
- Stop foreclosure on a home and allow you an opportunity to cure a default.
- Prevent repossession of an automobile or other personal property.
- Stop wage garnishment, debt collection harassment and other similar collection activities.
- Prevent termination of utility service or restore service if it has already been terminated.
- Lower monthly payments on some debts, including some secured debts such as mortgages or car loans.

Bankruptcy, however, cannot cure every financial problem. In bankruptcy, it usually is ***not possible*** to:

- Modify certain rights of secured creditors. Although you can force secured creditors to take payments over time in the bankruptcy process to cure a default, some secured creditors are afforded protection from other modifications of the loan terms.
- Discharge certain types of debts singled out by the Bankruptcy Code for special treatment, such as child support, alimony, most student loans, court restitution orders, criminal fines and most taxes.
- Protect all co-signers on their debts. When a relative or friend has co-signed a loan and the debtor discharges the loan in bankruptcy, the co-signor may still have an obligation to repay all or part of the loan.
- Discharge debts that are incurred after bankruptcy has been filed.

Types of Bankruptcy

There are six basic types of bankruptcy cases provided under the Bankruptcy Code. The cases are traditionally given the names of the chapters that describe them. Determining which type of bankruptcy to file is based upon analysis of numerous factors, including income, assets, debt, type of debt and the consumer’s goal in filing bankruptcy, among other factors. Most consumers, however, will file bankruptcy under either Chapter 7 or Chapter 13.



Chapter 7

OVERVIEW

A Chapter 7 bankruptcy, titled “Liquidation,” contemplates an orderly, court-supervised procedure by which a trustee (an individual who administers a bankruptcy estate, which is created by the filing of a bankruptcy) examines your assets to determine if any property is available to be sold or recovered for the benefit of creditors.

Certain property cannot be liquidated by the trustee because it is “exempt.” Florida law governs which property is exempt from attachment by your creditors. In most cases, most of your property, including personal property, will be exempt under Florida law. Because there is usually little, or no, nonexempt property in most Chapter 7 cases, there may not be an actual liquidation of your assets. These cases are called “no-asset cases.”

If you are filing as an individual, you receive a discharge that releases you from personal liability for dischargeable debts. You usually receive a discharge just a few months after filing bankruptcy.

One of the principal advantages of Chapter 7 is that you emerge from bankruptcy without any future obligations on your discharged debts, obtaining a “fresh start.”

HOW CHAPTER 7 WORKS

A Chapter 7 case begins with you, the debtor, filing a petition with the bankruptcy court serving the area where you live. In addition to the petition, you also must file with the court: (1) schedules of assets and liabilities; (2) a schedule of current monthly income and expenditures; (3) a statement of financial affairs; and (4) a schedule of executory contracts and unexpired leases. Individual debtors with primarily consumer debts must file a certificate of credit counseling.

A husband and wife may file a joint petition or individual petitions. Even if filing jointly, a husband and wife are subject to all the document filing requirements of individual debtors.

After the petition is filed, usually no more than 40 days afterward, the trustee will hold a “meeting of creditors.” During this meeting, the trustee puts you under oath, and both the trustee and your creditors may ask questions (usually about why you are filing bankruptcy, your current financial situation, etc.). If a husband and wife have filed a joint petition, they both must attend the creditors’ meeting and answer questions. Although referred to as a “meeting of creditors,” it is quite rare for a debtor’s creditors to attend. For most consumers, this will be the only meeting or court appearance that they will need to make during their bankruptcy.

The Federal Rules of Bankruptcy Procedure provide for the clerk of the bankruptcy court to mail a copy of the order of discharge to all creditors, to you and to your attorney, if you have one. The notice informs your creditors generally that the debts owed to the creditors have been ▲ discharged and that any further collection activity is prohibited.

CHAPTER 7 ELIGIBILITY

One of the primary purposes of bankruptcy is to discharge certain debts to give you “fresh start.” Although an individual Chapter 7 case usually results in a discharge of debts, the right to a discharge is not absolute.

The 2005 amendments to the Bankruptcy Code included a “means test” intended to make it more difficult for wealthy consumers to file Chapter 7 bankruptcy. If your income is below the median family income for your household size, you need not worry about the “means test.”

If your income *exceeds* Florida’s median family income for your household size, you will need to fill out **Official Forms 122A-1 and 122A-2** Statement of Current Monthly Income and Means Test Calculation.

If your current monthly income (CMI) exceeds Florida’s median income, then the “means test” applies a more complicated expense formula to arrive at your eligibility for a Chapter 7 bankruptcy. The formula starts with your CMI and then deducts several categories of allowed expenses to calculate your “net monthly income,” which is presumed to be available to pay general unsecured creditors. Eligibility for a Chapter 7 bankruptcy may require a detailed analysis of your income and expenses. If you “fail” the means test, you might not be eligible for a Chapter 7 bankruptcy. Being precluded from filing a Chapter 7, however, does not necessarily mean that you will be prohibited from filing a different type of bankruptcy.

Chapter 13

A Chapter 13, titled “Adjustments of Debts of an Individual with Regular Income,” is often referred to as “reorganization.” A Chapter 13 is regularly filed by individuals who want to catch up on a past-due mortgage or car loan, modify their mortgage payment through bankruptcy or otherwise attempt to keep their assets.

In a Chapter 13 case, you submit a plan to repay creditors all or part of the money owed to them over a three- to five-year period, usually funded from future income. If the plan meets the requirements set out in the Bankruptcy Code and is confirmed by the bankruptcy court, your payments under the plan are distributed to creditors by the Chapter 13 trustee.

Unlike in Chapter 7, you do not receive an immediate discharge of debts. You must complete the payments required under the plan before the discharge is received. You are protected from lawsuits, garnishments and other creditor actions while the plan is in effect. The discharge in a Chapter 13 is also somewhat broader (i.e., more debts are eliminated) than the discharge under Chapter 7.

HOW CHAPTER 13 WORKS



Similar to a Chapter 7 case, a Chapter 13 case begins with the filing of a petition, schedules, statement of financial affairs and counseling certificate. Rather than file a Statement of Current Monthly Income and Means Test Calculation, a Chapter 13 debtor files a statement of current monthly income and calculation of commitment period and dispensable income (**Official Forms 122C-1 and 122C-2**). A Chapter 13 plan must be filed with the schedules. The Chapter 13 plan is your proposal detailing when and how each creditor will be paid.

As in a Chapter 7 case, the trustee in a Chapter 13 case will schedule a meeting of creditors. You must attend the meeting and answer questions regarding your financial affairs and the proposed terms of the plan.

In a Chapter 13, you must submit a plan for court approval that provides for payments of fixed amounts to the trustee on a regular basis, typically monthly. The trustee then distributes the funds to creditors according to the terms of the plan, which may offer creditors less than full payment on their claims.

In a Chapter 13 case, to participate in distributions from the bankruptcy estate, unsecured creditors must file their claims with the bankruptcy court within 90 days after the first date set for the meeting of creditors.

If you want to keep the collateral securing a particular claim, the plan must provide that the holder of the secured claim receives at least the value of the collateral. If the obligation underlying the secured claim was used to buy the collateral (e.g. a car loan), and the debt was incurred within certain time frames before the bankruptcy filing, the plan must provide for full payment of the debt, not just the value of the collateral. The plan need not pay unsecured claims in full as long as it provides that you will pay all projected “disposable income” over an “applicable commitment period,” and as long as unsecured creditors receive at least as much under the plan as they would receive if your assets were liquidated under Chapter 7.

After the meeting of creditors, the court will hold a plan confirmation hearing to determine whether the plan is feasible. If the court confirms the plan, the Chapter 13 trustee will distribute funds received under the plan. If the court declines to confirm the plan, you may file a modified plan or convert the case to a liquidation under Chapter 7.

Once the court confirms the plan, you must make the plan succeed. You must make regular payments to the trustee, which will require living on a fixed budget for a prolonged period. Further, while confirmation of the plan lets you retain property as long as payments are made, you may not incur new debt without consulting the trustee.

You are entitled to a discharge upon completion of all payments under the Chapter 13 plan. The discharge releases you from all debts provided for by the plan, with certain exceptions. Debts that are not discharged in Chapter 13 include debts for alimony or child support, certain taxes, ▲

debts arising from death or personal injury caused by driving while intoxicated or under the influence of drugs, and debts for restitution or a criminal fine included in a sentence on your conviction of a crime.

Creditors provided for in full or in part under the plan may no longer initiate or continue any legal or other action against you to collect the discharged obligations.

Student Loans

There are exceptions, but in most situations student loans will not be discharged in bankruptcy. The Bankruptcy Code provides that student loans can be discharged only if the debtor demonstrates that payment of the debt “will impose an undue hardship on the debtor and the debtor’s dependents.”

The questions of whether a student loan is discharged based on undue hardship is not automatically determined in the bankruptcy proceeding. You must affirmatively seek such a determination.

Despite the difficulties in obtaining a discharge of a student loan obligation through bankruptcy, there are many things a bankruptcy can do with regard to a student loan. Upon filing a bankruptcy, an automatic stay is created, which prohibits creditors from continuing collection actions. If your wages (or tax returns) are being garnished for unpaid student loans, a bankruptcy can stop that garnishment while the automatic stay is in effect.

Further, a Chapter 13 may allow you to pay a lower amount through a Chapter 13 plan than you would otherwise be required to pay.

Other Considerations

Under the Fair Credit Reporting Act, information about a bankruptcy filing can be reported on your credit report for a period of 10 years after the case is filed, rather than the normal seven years allowed for other credit information. Nevertheless, many consumers are able to obtain credit after filing bankruptcy.

You also may be concerned that you may be discriminated against for having filed bankruptcy. However, in most cases “governmental units” are not permitted to discriminate on this basis. Further, private employers may not terminate employment or discriminate with respect to employment based upon a bankruptcy filing or discharged debts.

For certain debtors, it may be advisable to wait before filing bankruptcy. If you are currently “judgment proof,” there may be little advantage to filing at a time when creditor action will not result in the loss of your property or income. Moreover, you may want to hold off on filing if substantial obligations will be incurred post-filing (such as a health care obligation). This is because you may not obtain another Chapter 7 discharge for a period of eight years after filing a ▲

Chapter 7 case in which a discharge was received (though the filing of a Chapter 13 case may be possible). If you are expecting a tax refund, it may be prudent to file after that tax return is received and spent, as it may become property of the bankruptcy estate.

If you are contemplating bankruptcy, you should make every effort to ensure that your filing is done in good faith. That is, avoid incurring new debts such as willfully overusing credit cards in contemplation of filing bankruptcy. Property should not be transferred or concealed to avoid its loss to creditors during the bankruptcy proceedings. Bankruptcy fraud is a criminal act that can result in your being denied a discharge of your debts and can even result in imprisonment.

Do I Need a Lawyer?

As in any court, individuals have a right to represent themselves before the Bankruptcy Court. However, bankruptcy is a complex area and involves many considerations, including whether to file, the election of the appropriate chapter, use of exemptions, understanding all protections of the Bankruptcy Code and using them to your advantage. The right decision for you depends on an evaluation of your family status, your assets, your obligations and other factors. It is a serious step that could affect you for the rest of your life. It is possible in a bankruptcy that you will lose all assets and still come out owing all of your debts. A lawyer can explain to you how the process works and can help you reach an intelligent decision.

PETITION PREPARERS

Beware of petition preparers who do not comply with all legal requirements. The role of nonattorney petition preparers is solely to type information on bankruptcy forms. Petition preparers are barred by law from providing legal advice. They cannot explain how to answer legal questions or assist in bankruptcy court.

HOW DO I FIND A LAWYER?

If you need a lawyer and don't know how to find one, call your local bar association and inquire if a referral service is available.

If there is no lawyer referral service in your city, the statewide **Florida Bar Lawyer Referral Service** can locate a lawyer for you. Call toll-free at (800) 342-8011. The statewide service, which operates only in cities where there is no local program, will refer you to an attorney for an initial one-half hour consultation for a reduced fee.

The material in this pamphlet represents general legal advice. Because the law is continually changing, some provisions in this pamphlet may be out of date. It is always best to consult an attorney about your legal rights and responsibilities regarding your particular case.

This pamphlet is produced as a public service for consumers by The Florida Bar.