



## **BANKRUPTCY MATTERS**



The information provided in this document is meant for the sole use of Active Duty service members, retirees, their families, and those individuals eligible for legal assistance. The information is general in nature and meant only to provide a brief overview of various legal matters. Rights and responsibilities vary widely according to the particular set of circumstances in each case. Laws can vary across states, services, and civilian jurisdictions and laws are changed from time to time. Do not rely upon the general restatements of background information presented here without discussing your specific situation with a legal professional.

**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 most 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.

### **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



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debtor's monthly income is above the median, the debtor must file under Chapter 13. Finally, the debtor must take an approved financial management course in order to receive 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. Also, in a Chapter 13 bankruptcy, the debtor usually remains in possession of the estate.

### **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 without 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 members, retirees and their families.



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### **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 files. Talk to an attorney about which exemptions will apply in your case.

### **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 2-3 months after filing. In a Chapter 13 case, a discharge does not occur until the end of the plan, up to five years after filing. 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 during 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 tries filing bankruptcy over and over again, creditors might allege that it was a pattern that showed a preconceived plan to defraud creditors.

### **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. There may be other court appearances necessary during the course of the case.

### **Q: HOW WILL FILING FOR BANKRUPTCY AFFECT MY CREDIT?**

A: A bankruptcy filing appears on the debtor's credit report for a period of up to 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. Local consumer credit or consolidation agencies can contact creditors on your behalf 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 these 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 any of the debts are also in the spouse's name, the spouse must file for that debt to qualify for a discharge. Otherwise, the spouse will remain obligated on the debt. 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: \$335.00 for a Chapter 7 and \$310.00 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: WILL FILING FOR BANKRUPTCY AFFECT MY SECURITY CLEARANCE?**

A: Yes. Filing for bankruptcy 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.