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PERSONAL BANKRUPTCY: IS IT RIGHT FOR YOU?



CITY BAR JUSTICE CENTER

AND

**COMMITTEE ON BANKRUPTCY &
CORPORATE REORGANIZATION**

AND

**COMMITTEE ON CONSUMER AFFAIRS
OF THE NEW YORK CITY BAR**

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Personal Bankruptcy: Is It Right For You?

INTRODUCTION

The prospect of filing for bankruptcy is not something people want to consider; however, sometimes a person's financial situation takes a turn for the worse, usually due to circumstances beyond their control, such as illness, unemployment or divorce. At such a time, filing for an individual bankruptcy to eliminate a crushing load of debt may be the most appropriate course of action. It is a legal and proper step to take when the circumstances warrant it.

The purpose of this pamphlet is to briefly explain to individuals who are in debt and considering filing for personal bankruptcy, what the process is and the advantages and disadvantages of taking such action. This is not a step-by-step guide on every aspect of the bankruptcy process; however, it will provide the general knowledge needed to help make an informed decision as to whether a personal bankruptcy may be right for you.

While it is possible to file for bankruptcy *pro se* ("on your own") it is not a step that should be taken without serious consideration. Properly filing for bankruptcy takes careful preparation and knowledge of the law. The bankruptcy laws were recently changed and made more complex under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Individuals who fail to comply with the requirements of the new law or do not file all required paperwork and supporting documents risk dismissal of their cases. If a debtor files for the wrong type of bankruptcy under his or her circumstances, the debtor could lose valuable property. It is always better for an individual to speak with and retain an attorney familiar with bankruptcy law who can guide them through the process.

The information contained in this pamphlet applies only to people living in New York State. Residents of any other state should consult with legal advisors familiar with the laws of that state, since certain applicable local laws vary from state to state.

Generally, voluntary bankruptcy is a legal process established under Federal law to allow people who cannot pay debts to eliminate ("discharge") the legal obligation to pay most, or all, of certain types of consumer and business debts, and to obtain a financial "fresh start." Not all debts are dischargeable, but most common consumer debts are. There is no minimum amount of debt necessary in order to file for bankruptcy; however, the amount should be high enough that it is beyond the debtor's ability to repay it in the foreseeable future, or the debtor is about to suffer the loss of essential income or property to a creditor due to the collection of an outstanding debt.

Filing a bankruptcy case with the U.S. Bankruptcy Court will immediately stop ("stay") most of the creditors from taking collection action, at least until the debts are sorted out

under the law. As a result, the filing will end collection calls, letters, lawsuits, garnishments and other collection practices until there is a final ruling by the court. If a discharge in bankruptcy is granted, and there has been no ruling by the Court denying the dischargeability of any particular debt, the affected creditors will be prohibited from taking any further action against the individual (the “debtor”) who filed for bankruptcy to collect the debts listed in the debtor’s schedules.

TYPES OF INDIVIDUAL BANKRUPTCY

Most individual debtors file under one of the consumer bankruptcy proceedings known as Chapter 7 and Chapter 13 bankruptcies, both of which will be discussed in more detail later. In a Chapter 7 case (also known as a “straight bankruptcy” or a “liquidation”), the debtor is asking the Bankruptcy Court to “discharge” (release) him or her from personal liability from specific debts and to prohibit creditors from ever taking any action against the debtor personally to collect those debts. If the debtor owns certain types of valuable property, he or she may be required to surrender it, so it can be sold and the proceeds will be used to pay the creditors. However items such as basic household furnishings, clothing, pension plans and retirement accounts are “exempt” (protected) to a certain extent and debtors are allowed to keep them.

Debtors considering filing for Chapter 7 bankruptcy must pass an eligibility standard known as the “means test” to determine whether they qualify to file for such relief. This test is done by calculating the “current monthly income,” which is the average income of the debtor and the members of the debtor’s household, for the past 6 months. If this income exceeds a certain level established by the Internal Revenue Service, the debtor may not be eligible to file for Chapter 7 relief and may have to consider filing a Chapter 13 case. The “means test” is explained in more detail later in this pamphlet (see page 8).

A Chapter 13 bankruptcy is a reorganization case (also known as a “debt adjustment” or “wage earner plan”), where debtors may keep all of their property, including things such as real estate subject to certain conditions, in return for filing a “plan” to repay part or all of the debt out of their disposable income over a period of up to 5 years.

Which type of bankruptcy is best for individuals depends on their own circumstances, including their income and the type and amount of property they own. A debtor considering filing for bankruptcy protection is strongly encouraged to consult an attorney knowledgeable in bankruptcy law.

CONSEQUENCES OF BANKRUPTCY

When thinking about bankruptcy a debtor must also consider the cost and consequences of filing, which will be set out in more detail below. There may be substantial filing fees, costs for taking required credit counseling courses, and possible surrender or loss of property depending on the debtor’s circumstances.

If a discharge is issued in a Chapter 7 case, a debtor cannot file for such relief again for 8 years. In addition, a report of a bankruptcy filing goes on a debtor's credit report for up to 10 years, which may affect the debtor's ability to get future credit.

The debtor must take great care to fully and accurately disclose all information required in the petition. Failure to do so may result in the denial of discharge, dismissal of the debtor's bankruptcy case, and/or criminal prosecution.

Bankruptcy cannot cure every financial problem, and it is not the right step for everyone who is in debt. Due to the requirements and the consequences, careful consideration must go into any decision to seek individual bankruptcy relief.

FREQUENTLY ASKED QUESTIONS ABOUT BEING IN DEBT AND FILING FOR BANKRUPTCY

Have changes in the bankruptcy law eliminated the right to file for personal bankruptcy?

No. Recent changes in federal bankruptcy laws did not eliminate either Chapter 7 or Chapter 13 bankruptcy as an option for most individuals. However, the changes in the law did make it more complicated and expensive to file for such relief. The new law complicated the filing process by adding an eligibility requirement known as the "means test," which determines whether a debtor's household income is high enough so that the filing of a Chapter 7 case would be considered an "abuse," which would result in the case being subject to dismissal or conversion to a Chapter 13 proceeding. This income level is based on a debtor's family size and state of residence, but in most cases is high enough that most debtors who need to file for Chapter 7 relief in New York will still be eligible to do so. Further details about these requirements can be found on the bankruptcy court website at:

<http://www.uscourts.gov/bankruptcycourts/resources.html>

The new law also added a mandatory two-part credit counseling and debtor education requirement that every debtor must comply with, at his or her own expense. As of early 2007, the approximate total cost for the two courses was \$100.

Additional documents are required to be filed, including the debtor's last 60 days' worth of pay stubs and a copy of their last federal income tax return filed, or a transcript of that return, if such return was required to be filed.

The court filing fees were also increased. However, in a Chapter 7 case only, if a debtor's income is below a certain level, he or she can apply for a waiver of the fee. Debtors may also request permission to pay the fee in installments for periods up to four months. As of January 2007, the filing fees for Chapter

7 and Chapter 13 cases were \$299.00 and \$284.00 respectively. These sums are always subject to change and should be checked with the clerk of the Bankruptcy Court.

Can debtors be arrested or put in jail for owing money to creditors?

No. Debtors are not arrested or put in jail for owing bills and debts to creditors unless they have committed a crime in connection with obtaining the debt. Creditors can legally seek to collect money on a debt only in certain ways, including suing a debtor in civil court and obtaining a “money judgment.” Once they have such a judgment, creditors can then seek to collect the money by placing a “garnishment” against a salary and taking no more than 10% of the debtor’s paycheck. A judgment creditor may also place a “Restraining Notice” on a bank account and “freeze” it before they obtain the funds in the account. Creditors can go after other types of property to collect what is owed, but they cannot put the debtor in jail.

Can creditors take away necessities such as basic household furnishings and clothing to satisfy what is owed to them?

No. The purpose of a bankruptcy is to give debtors a financial “fresh start” and not to remove all of their property. Therefore, the law allows every debtor to protect certain property from their creditors, even if the value of the assets is greater than his or her debts. The bankruptcy law specifies that various items of personal and real property belonging to a debtor cannot be taken by creditors in order to satisfy their claims. Such items are “exempt” (protected) property. New York State has laws specifying what property may be claimed as exempt when a debtor is filing for bankruptcy. These items include, but are not limited to:

- Clothing and household goods such as household furniture, a stove, refrigerator, radio, television, cookware, tableware, sewing machine, books and pets.
- Cash up to \$2,500 (this can include an income tax refund), unless an exemption for real property (real estate) is claimed.
- Alimony, maintenance or child support owed to the debtor.
- The right to receive certain awards and benefits such as Social Security, SSI, Unemployment Compensation, Public Assistance Veteran’s Benefits, Disability Benefits, Worker’s Compensation Benefits and Personal Injury Awards (up to \$7,500 not including pain and suffering and actual monetary loss).
- Pensions, Keogh, 401(K), 403(B) Plans, IRA and most annuities.
- A cemetery plot.

- A motor vehicle, up to \$2,400 in market value over any financed amount owed on the vehicle.

Expensive cars (see below), jewelry, real estate or investments (except retirement accounts) might have to be surrendered as a result of filing a Chapter 7 case, but a debtor may retain such property if he or she files a Chapter 13 case with an approved repayment plan.

Can debtors who file for personal bankruptcy lose their home or car?

Sometimes. While it is possible to lose such property in a bankruptcy, in most cases debtors will not lose their home or car. However, due to the potential risk, it is important to determine whether such a risk exists before the bankruptcy case is filed, since a Chapter 7 case cannot be withdrawn without the permission of the court after it has been filed. Depending on a debtor's circumstances, the debtor may have to file a Chapter 13 case in order to save the property.

Creditors or others can have a "secured" interest in a home or automobile that is being purchased over time with periodic payments. The creditor holding such an interest is known as a "secured creditor" since it has a "security interest" in the property, which is collateral for the debt. Such property may be taken and sold if the required payments are not made. Bankruptcy does not make these security interests go away. If the debtor intends to keep the property, he or she may have to "redeem" it by purchasing the property for the market value or "reaffirm" the debt and continue making the required payments to the secured creditor.

When a debtor files for Chapter 7 bankruptcy all of his or her property becomes the property of the "bankruptcy estate;" however, certain items qualify for exemption (protection) and cannot be taken for the benefit of the creditors. In New York State there is a "Homestead Exemption" of up to \$50,000 per debtor in the "equity" (the current market value of the property less the monies owed on all mortgages and liens) of the principal residence located in New York State. This includes a house, land, a condominium, a cooperative apartment or motor home. If the equity exceeds \$50,000, then the trustee in the case could take the property and sell it for the benefit of unsecured creditors after paying off the mortgage and giving the debtor his or her homestead exemption in cash. In such a case it might not be in the debtor's best interest to file a Chapter 7 because the debtor could lose his or her home. A debtor may then be better off filing a Chapter 13 proceeding, which would allow him or her to keep the property, provided all the regular mortgage payments plus the plan payments are made to the trustee.

As mentioned above, a debtor in New York is also entitled to an exemption of up to \$2,400 against the replacement value of their automobile over and above

the remaining balance due on any outstanding loan or note. As long as the debtor can reaffirm the debt and continue to make the required payments to the creditor and the equity in the car does not exceed the \$2,400, the debtor should be able to keep the vehicle.

If a debtor owns such property he or she must be very careful in determining what may happen to it if they file for bankruptcy. It would be advisable for a debtor owning any valuable property to consult with an attorney.

Does an individual who files for bankruptcy lose future income and property?

No. Many people believe that they cannot own anything for a long time after filing for bankruptcy. This is not true. A debtor can keep exempt property and anything obtained after filing. The major exception is if the debtor becomes entitled to receive an inheritance, a property settlement, or life insurance benefits within 180 days (6 months) after filing a bankruptcy. That money or property may have to be turned over to the trustee for payment to the creditors. In addition, to the extent that a debtor has a legal claim for damages that occurred on or before the filing date, that claim becomes the property of the bankruptcy estate, unless the trustee abandons the claim. Any award on a personal injury or medical malpractice claim in excess of \$7,500 becomes the property of the bankruptcy estate and will have to be turned over to the trustee to the extent necessary to cover the outstanding debts. If there is balance left over after the debts and expenses are paid it will be returned to the debtor.

All income earned by debtors after a Chapter 7 bankruptcy is theirs to keep and to use as they see fit.

Income earned by a debtor who files a Chapter 13 case is subject to the requirements of the Chapter 13 plan. Any “disposable income” (income in excess of the debtor’s living expenses) of the debtor must be allocated to the payments required by the plan. The life of the plan is between three and five years.

THE ADVANTAGES OF FILING FOR BANKRUPTCY PROTECTION

The Automatic Stay: Filing for Chapter 7 or 13 relief triggers an “automatic stay” against the collection of pre-filing debts, which will delay and may stop foreclosures, repossessions, garnishments, utility shut-off’s and debt collection activities.

The Discharge of Unsecured Debts: Both Chapter 7 and 13 eliminate (discharge) most unsecured debts, such as credit card debt, personal loans and medical bills.

You May Be Able to Keep Your Property By Filing Under Chapter 13: Filing for Chapter 13 allows debtors to keep property, such as a mortgaged house or car. In order to file Chapter 13 you must have regular income and be financially able to make monthly payments to a trustee on an approved plan over a three to five year period.

Fresh Start: The discharge of most unsecured debt will result in an economic fresh start, which will enable a debtor to start the process of rebuilding credit.

THE DISADVANTAGES OF FILING FOR BANKRUPTCY PROTECTION

Long Term Negative Impact on Credit Report/Credit Score: The details of a bankruptcy case will remain on a debtor's credit report for up to ten years and can impact the debtor's ability to obtain credit, a job; insurance or even rent an apartment.

In Chapter 7 -- The Sale of Assets That Are Not Exempt: When a debtor files for Chapter 7, the assets that are not exempt may be sold or turned over to his or her creditors to pay debts. Chapter 7 usually does not allow debtors to keep property where their creditors have an unpaid mortgage or security lien.

Time Period During Which a Debtor May File For Bankruptcy Again: A debtor who files for Chapter 7 must wait eight years after receiving a discharge in Chapter 7 before he or she can file again under that Chapter. Chapter 13 also involves a waiting period of at least two years. Any new debts incurred after filing for bankruptcy are not subject to discharge and will have to be paid.

Not All Debts May Be Discharged: Personal bankruptcy does not erase debts such as child support, alimony, fines, student loans and most tax obligations.

Co-Signers May Continue To Be Liable: Any co-signer on a debt will continue to be liable even if the debtor has filed for a Chapter 7 bankruptcy, unless the co-signer also files for similar protection. If the debtor filing a Chapter 13 petition agrees to pay in full a debt with a

co-signer, the co-signer cannot be pursued for the debt as long as the debtor remains in Chapter 13 and continues to make payments.

DOCUMENT REQUIREMENTS FOR FILING AND MAINTAINING A PERSONAL BANKRUPTCY

There are a number of documents that debtors must be prepared to provide, in order to determine their eligibility to file for bankruptcy, and to complete the requirements of the process. These items include:

Evidence of any prior bankruptcy filings within the last eight years.

Certificate of Counseling from an approved credit counseling program within six months prior to filing for bankruptcy.

Proof of income and support for the proceeding 6 months (and that of a spouse, if filing jointly), including, for example, copies of pay stubs from employers, unemployment income, pension, child or spousal support. At the time of filing the debtor must submit copies of “pay advices” (pay stubs, statements from employers, or affidavits) for the period 60 days prior to the filing date. If no such advices are available then an explanation must be provided.

Federal Income Tax Returns or Transcripts for the previous 2 years. At the time of filing a copy of the debtor’s last filed Federal Income Tax Return, or a Transcript, must be submitted to the case trustee. If none is available an explanation must be provided.

Bank statements for the previous 6 months.

Copies of all creditor notices, including credit card statements and collection letters, for the last 3 months.

Failure to provide required documents to the court or a trustee could lead to the dismissal of the bankruptcy case.

THE “MEANS TEST”

The “Means Test “ was added to the Bankruptcy Code to create a standard for determining whether individuals who wish to file Chapter 7 bankruptcy are eligible. If a debtor does not meet requirements of the means test, then his or her Chapter 7 case might be dismissed or the debtor may have to file for Chapter 13 relief. (Chapter 13 bankruptcy is explained later in this pamphlet). While the requirements of the means test are complicated, the reality is that the income of many debtors does not trigger the means test and even where it does apply most debtors will be eligible to file for Chapter 7 relief.

In order to demonstrate eligibility to file for Chapter 7 relief all individual consumer debtors must file a form entitled **Chapter 7 Statement of Current Monthly Income and Means-Test Calculation**. In this form debtors must calculate their “current monthly income.” This is the debtor’s total gross income for the past 6 months divided by 6 (income from any type of Social Security benefits does not have to be counted for this purpose). The form also calls for the income of the spouse of the debtor (provided they are living together) and any other household member who contributes to the support of the household. The current monthly income equals the average of the last 6 months of household income from all sources. If a debtor’s current monthly income falls below the state’s median family income established for the State of New York, then the means test does not apply and the debtor will be eligible to file for Chapter 7 bankruptcy relief. The Median Family Income for New York State can be located at:

http://www.usdoj.gov/ust/eo/bapcpa/20070201/bci_data/median_income_table.htm

In 2007, if a family with three people in the household made less than \$62,815 annually based on the current monthly income the debtor would be eligible to file for Chapter 7 relief. If the income was above that level, the “means test” criteria must be applied to determine whether the debtor is still eligible to file or if a “presumption of abuse” exists which could make the debtor ineligible to file for Chapter 7 relief.

The purpose of the means test is to determine whether the debtor has “disposable income”, that is, income over certain allowable living expenses that could be used to make payments of debts to creditors. The process for calculating the income is complex but usually if the disposable income works out to be less than \$100 per month, then the debtor will have passed the means test and can continue to file for Chapter 7 relief. If the total disposable income exceeds \$166 per month, then the debtor would not pass the means test and would not be allowed to continue with a Chapter 7 bankruptcy unless he or she could prove the existence of certain “special circumstances” (such as continuing serious medical expenses). If the remaining disposable income is between \$100 and \$166 per month, the debtor must determine if the amount is sufficient to pay more than 25% of his or her general unsecured debt (such as credit card bills, medical bills, and loans) over a 5 year period; if it is, then the debtor would not be eligible to file a Chapter 7 case. The debtor might then have to file for Chapter 13 relief.

MANDATORY CREDIT COUNSELING AND DEBTOR EDUCATION

Anyone who wishes to file for bankruptcy under Chapter 7 or Chapter 13 must have completed a pre-filing credit counseling program and received a “**Certificate of Counseling**” from an approved non-profit agency within 180 days prior to filing for bankruptcy. In addition, after filing for bankruptcy, debtors must complete a personal financial management course with an approved non-profit agency and submit another “**Certificate of Debtor Education**” to the court within 45 days of the First Meeting of Creditors or they will not receive a discharge. The agency may charge a fee for the course

(usually up to \$50 per course), which the debtor must pay unless the fee is waived. In order to comply with these credit counseling and debtor education requirements, filers must work with non-profit agencies that have been approved by the Office of the United States Trustee (a branch of the U.S. Department of Justice that is responsible for overseeing bankruptcy cases). Links to information on credit counseling and debtor education and lists of agencies that have been approved by the U.S. Trustee may be found at <http://www.usdoj.gov/ust/eo/bapepa/ccde/index.htm>.

FILING FOR BANKRUPTCY UNDER CHAPTER 7

Every consumer bankruptcy case requires the filing of a significant number of complex forms and documents. In particular, a Chapter 7 filing contains three major parts: the Voluntary Petition, Schedules A through J, and a Statement of Financial Affairs. There are also additional forms, which various bankruptcy courts require. Information about these forms can be obtained from the Clerk's Office in the Bankruptcy Court. Although these three parts are commonly referred to as a "petition," the petition is really only one of several of the documents required in a bankruptcy filing. For the sake of clarity, the term "petition" here will be used to refer to the entire body of documents initially required for a bankruptcy filing. Also, throughout the petition, the individual who is filing for bankruptcy is referred to as the "debtor."

The Voluntary Petition

The first part of a Voluntary Petition serves as a cover and signature page and is made up of three pages that list basic information about the debtor such as the debtor's name, address, and the last four digits of the debtor's social security number. (A separate form must be filed indicating the debtor's full social security number.) The cover page also states under which chapter the debtor is filing for bankruptcy.

Along with the Petition the debtor must submit **Exhibit D**, which is a form signed by the debtor acknowledging compliance with credit counseling requirements. Unless the debtor meets one of the exceptions, he or she must meet all the credit counseling requirements or the case may be dismissed or no discharge will be issued.

The Schedules

The second part of the filing consists of the debtor's schedules. The schedules, labeled from A to J, each list a particular type of information relating to the debtor's income, assets and liabilities.

Schedule A. The debtor lists any real property, such as a house, co-op unit or condominium, in which the debtor has an ownership interest. The schedule must also state the fair market value of the property and any outstanding loan or mortgage.

Schedule B. The debtor must list all personal property he or she owns as well as the current market value of that property. Personal property includes items such as cash,

bank accounts, furniture and clothing. It also includes intangible property and property in which the debtor holds a contingent interest, such as a pending legal claim. For example, a debtor who has commenced, or anticipates commencing, a lawsuit must list the lawsuit on Schedule B as personal property. Taken together, Schedules A and B list all of the debtor's property and assets.

Schedule C. The debtor lists appropriate "exemptions." Put simply, exemptions protect certain property of the debtor and limit the extent to which the debtor's assets may be used to pay off his or her debts. In New York, a debtor's allowable exemptions are determined under New York State law. For example, an individual debtor is entitled to claim an exemption of \$50,000 of equity in his or her primary residence in New York. A married couple filing jointly may claim up to \$100,000 as a "homestead exemption." For examples of other "exempt" property see the discussion on page 4 above.

Schedules D, E, F. The debtor must list any debts he or she owes on these schedules. Debts owed to creditors are referred to on the petition as "claims." Schedule D is reserved for "secured claims." Secured claims are those debts where the creditor holds an interest in one of the debtor's assets. This allows the creditor to use that asset as backing for the loan. The most common example is a lender holding a lien in a debtor's house under a mortgage. Thus, if the house is sold, the creditor may use the proceeds of that sale to satisfy the lien.

Schedules E and F list "unsecured claims." Unsecured claims are debts owed by the debtor that are not secured by assets of the debtor. Unsecured claims are further divided between priority claims and general unsecured claims. A common example of a priority claim is tax debt owed to the government. The most common example of a general unsecured claim is credit card debt. On these schedules the debtor must list each creditor's name, address, account number, and the amount owed. The practical consequences of classifying claims as priority or general unsecured debt is more fully explained below.

Schedule G. The debtor lists any contracts or leases that are ongoing. For example, a debtor with a lease on an apartment or automobile must list the details of the contract.

Schedule H. The debtor must list any "co-debtors" or those people that are equally liable for one or more of the debts along with the debtor. The most common example of a co-debtor is a person who co-signed an obligation such as an automobile loan along with the debtor. Someone who is an "authorized user" on a credit card may not be a co-debtor.

Schedules I and J. The debtor must set forth his or her monthly income (I) and expenses (J). In particular, on Schedule I, the debtor lists all monthly income received from any source.

On schedule J, the debtor must list all monthly expenses, such as rent, utilities and other expenditures.

Taken together, the two schedules show how much a debtor earns and spends, and what, if anything, is left over at the end of the month that might be available to pay to the creditors (“disposable income”).

Statement of Financial Affairs

The third part of the bankruptcy petition is the debtor’s Statement of Financial Affairs. The Statement of Financial Affairs requires the debtor to list additional information not necessarily reflected in Schedules A through J. For example, while Schedule I lists a debtor’s current income, the Statement of Financial Affairs requires the debtor to list all past employment for a period of three years along with the amount of income received from this employment during that period.

The debtor must take great care to fully and accurately disclose all information required in the petition and schedules.

What Happens After Filing?

Let’s assume that the debtor has completed his or her Petition including all the required schedules and the Statement of Financial Affairs and all the other required documents, and has filed the Petition with the bankruptcy court along with the required non-refundable filing fee. What happens next? The answer to that question will vary widely from case to case. However, there are a few general observations that can be made.

Once the bankruptcy court receives a Petition, the case is assigned to a Bankruptcy Judge and the Office of the United States Trustee assigns the case to a Panel Trustee. The duties of the trustee are wide ranging but he or she can be best thought of as a case administrator. At the First Meeting of Creditors (“Section 341 Meeting”) the trustee asks questions of the debtor, reviews the Petition and Schedules, determines what assets the debtor owns, and whether there is any income or assets available for the benefit of the creditors.

The First Meeting of Creditors (which each debtor is required to attend) is normally about one month after a petition is filed. Prior to the meeting the debtor must submit to the court, or trustee, copies of their last 8 weeks of “pay advices” and a copy of their last filed Federal Income Tax Return or a Transcript. At the First Meeting of Creditors, the trustee asks the debtor about the information listed in the debtor’s Petition. Also, any creditor of the debtor may attend and be heard. Based on the examination, the trustee may ask the debtor to supply further information in order to give the trustee a more accurate picture of the debtor’s financial affairs.

If the trustee is satisfied with the information provided by the debtor and that there are no assets available for the benefit of the creditors, the trustee will usually indicate that the meeting is “Closed”. However, the case is not officially over until the period of time that a creditor has to file an “objection to discharge” is complete (approximately two months). After that time passes, and no objections have been filed, the clerk of the Court will issue the Discharge and the record will reflect that the case is closed.

FILING FOR BANKRUPTCY UNDER CHAPTER 13

A Chapter 13 filing is formally known as an “Adjustment of Debts for an Individual with Regular Income.” It is more commonly called a “wage earners plan” because the debtor must be an individual with a regular income. This income may consist of wages, commissions, rents, public benefits, social security, unemployment compensation, alimony, child support, pension or other types of regular income.

Typical Chapter 13 debtors file because they are behind (“in arrears”) on mortgage payments, car loan or other secured debts or because they have some other substantial debt which cannot be discharged in a Chapter 7 case, or they have a substantial asset which they want to keep, but which cannot be claimed as exempt (such as a house with equity that exceeds the homestead exemption). Under the new bankruptcy law, some debtors may now have to consider filing for Chapter 13 relief because they have an income that is high enough to prevent them from passing the means test and are not eligible for Chapter 7 relief.

Under a Chapter 13 case the debtor prepares a “plan” in which he or she proposes to partially or fully repay the debts out of future earnings over the life of the plan, which can be three to five years. The plan payments are made to a person known as a Chapter 13 Trustee, who is appointed by the Bankruptcy Court to oversee the case. The trustee distributes the payments to the creditors.

Chapter 13 is more lengthy and complex than a Chapter 7 case. To succeed in a Chapter 13 filing, a debtor must be able to come up with a feasible plan to repay his or her debts. If the total debt burden is too high or the debtor’s income is too low or irregular, a debtor may not be able to propose a workable plan. Once a plan is accepted, or “confirmed,” by the court, the burden is on the debtor to make it work. This requires discipline and effort because for the entire length of the plan (3 to 5 years) the debtor has to live on a strict budget. If the debtor fails to make the required payments to the trustee each month, the trustee will ask the court to dismiss the case or the debtor may have to convert it to a Chapter 7 case. Statistics show that many debtors are not able to successfully complete their plans and their cases are dismissed before a discharge can be issued. If a debtor believes that a Chapter 13 case is best under the particular circumstances, it is strongly recommended that the debtor use the services of an attorney who specializes in the field so as to maximize the chances of a successful outcome.

A Chapter 13 bankruptcy can offer individuals certain advantages over a Chapter 7 proceeding. Most significantly, it allows individuals an opportunity to save their homes from foreclosure and allows time to cure delinquent mortgage payments. It can also stop debt collection by creditors and allow the debtor to reschedule and repay both secured and unsecured debts over a fixed period of time.

A Chapter 13 bankruptcy case starts in the same manner as a Chapter 7 case. A Voluntary Petition must be filed in the clerk’s office of the U.S. Bankruptcy Court in the district of the debtor’s residence for the majority of the last six months. The debtor must also have completed a pre-filing credit counseling course within 180 days of filing the

case and submit a certificate of completion. The filing fee must be paid or a request made to pay it in installments. At the same time or within 15 days of filing, the debtor must submit various schedules (A through J as previously discussed) including, but not limited to, assets, debts, income and living expenses. Other documents that must be provided include pay stubs for the last two months and a copy of the tax return or transcript for the most recent tax year. The debtor will also have to provide the trustee with copies of his or her returns each year the case is ongoing and provide copies of returns or transcripts for any prior year that had not been filed when the case began. Married individuals who are not filing a “joint” petition will have to include their spouse’s income information unless they are legally separated.

In addition to these forms, the debtor must file a proposed repayment “plan” within 15 days of the filing and must be prepared to start making payments under the plan within 30 days of filing the plan with the court. The plan is reviewed by the trustee and submitted to the court for confirmation; it must provide for the payment of a fixed amount to the Chapter 13 Trustee, usually on a monthly basis. Generally the plan must provide that certain debts such as secured claims (mortgages, auto loans) and priority claims (alimony, maintenance and child support, taxes) must be paid in full. Unsecured claims (such as credit card debt) generally do not have to be paid in full as long as the debtor agrees to pay all “disposable income” over an “applicable commitment period” (generally 3 to 5 years) and as long as the creditor will receive as much as it would have received if the debtor’s assets were sold under a Chapter 7 case. Whether the plan is 3 or 5 years in length depends on a number of circumstances, but in no instance may it go beyond 5 years.

At the conclusion of the case the court will issue a Discharge which releases the debtor from all the remaining debts provided for in the plan. Most, but not all, Chapter 13 debts can be discharged. Some debts will not be discharged. These include, but are not limited to: certain long term obligations such as a mortgage; debts for domestic support obligations such as alimony and child support; certain tax arrears; most student loans, benefit overpayments; or debts arising from death or personal injury caused by driving while intoxicated or under the influence of drugs and criminal restitution or fines.

A Chapter 13 bankruptcy can be an extremely good way for someone who has debts, owns property, and has some form of regular income to reorganize his or her financial life and protect his or her property from creditors. However, it is a complex and lengthy procedure that requires planning and discipline to succeed. It is highly recommended that the advice and assistance of an experienced attorney be sought. Such guidance can increase the chances of a successful outcome and help avoid costly mistakes.

THE DISCHARGE

The objective of filing a bankruptcy petition is to obtain a discharge in bankruptcy. The discharge means that no creditor may, in the future, make any effort to collect the debts that have been discharged. If a creditor whose debt was discharged in bankruptcy, tries

to collect a debt that arose prior to the bankruptcy, and after the creditor has been notified of the discharge, the creditor may be held in contempt of court.

The issuance of the discharge is usually automatic but in certain cases the court may deny it for a number of reasons. The discharge may be denied if:

The filing fee has not been paid in full.

The debtor failed to complete both an approved credit counseling and personal financial management course.

The debtor failed to comply with directives of the trustee or orders of the bankruptcy judge.

The debtor failed to list all of his or her creditors (only debts listed on the schedules will be discharged).

The debtor concealed, destroyed or transferred property with the intent to hinder, delay or defraud before the bankruptcy petition was filed or after filing.

The debtor intentionally concealed or destroyed records of financial dealings unless he or she can show a good reason for doing so.

The debtor lied under oath at the First Meeting of Creditors or any other court hearing.

The discharge is the debtor's alone and it does not affect anyone else's obligations. If someone co-signed for one of the debts, the discharge will not eliminate the co-signer's liability. Unless the debtor has agreed to pay the debt in full, the creditor may pursue the co-signer.

If one spouse files for bankruptcy and the other does not, the spouse who did not file will still be liable for any joint debts.

NON-DISCHARGEABLE DEBTS

Except in rare cases, certain types of debts will not be discharged even though they may be listed on your bankruptcy petition. These debts will have to be paid despite the fact that the debtor has filed for bankruptcy and include:

Taxes and tax penalties for each of the last 3 years.

A debt obtained by fraud, false pretenses, a false representation or a false written statement regarding the debtor's financial condition.

Debts for luxury purchases of more than \$500 within 90 days before the petition is filed, or cash advances of more than \$750 within 70 days before the petition is filed.

A debt not listed in the petition, unless the creditor received actual notice that the debtor filed for bankruptcy.

Alimony, separate maintenance and child support due to a child or former spouse of the debtor (“domestic support obligations”).

Fines and penalties to a government agency, including parking tickets and moving violations.

Student loans, unless the debtor can prove they should be discharged due to “undue hardship.” This is a very difficult standard to meet and usually requires further litigation.

The foregoing should not be interpreted as a complete outline of the bankruptcy process. It is urged that any party wishing to file bankruptcy seek bankruptcy advice from an attorney knowledgeable in bankruptcy law before filing. Debtors who utilize a typing or “petition preparation” service to prepare the petition should not rely on any advice of such typist or preparer.

Appendix A: Where to Go for Help or Further Information

The Consumer Pro Se/Self Help pages were created to answer some of the most often asked questions by debtors filing for bankruptcy without legal representation. This guide is in no way intended to advise you of your legal rights or responsibilities under the bankruptcy laws, or to tell you what to file. Bankruptcy law is complicated and not easily described. If possible, you should seek the advice of an attorney. For information regarding choosing a lawyer and/or obtaining legal services at a reduced fee or free of charge, contact:

RI Bar Association (401) 421-7799 www.ribar.com

RI Legal Services (800) 662-5034 or (401)274-2652

Volunteer Lawyer Program (401) 421-7758

You are encouraged to visit the Court's website at www.rib.uscourts.gov for information regarding local rules and procedures, local and federal forms, and additional resources to help you navigate through the bankruptcy process. The Clerk's Office is prohibited by 28 USC Sec. 955 from giving legal advice or assisting with the preparation of forms.