# Guide to Filing BANKRUPTCY in Southwest Florida

## *From the Debtor's Perspective*

**2014 Edition**


- **What Can I Expect?**
- **What is the Process?**
- **Which Chapter Should I Choose?**
- **What is the Best Strategy?**
- **Life After Bankruptcy**

**by**

**Christopher D. Smith**

**Attorney at Law**

SMITHLAW ATTORNEYS

1561 Lakefront Dr 204

Sarasota, FL 34240

www.chrissmith.com

# Introduction

**Bankruptcy is not the end, but a fresh beginning**! I have had the pleasure of working on thousands of bankruptcy cases over the previous two decades, and not a single person ever looked forward to filing bankruptcy. But the good news is that in nearly every case, the bankruptcy helped them achieve a fresh start and a new outlook on life. Face it -- debt is a burden, and the reality of life is that sometimes we get overburdened and need a helping hand, and there is probably no more powerful tool than bankruptcy to give you the help you need.

If you find yourself overwhelmed with debt and unable to pay, facing collection calls or lawsuits, it may be time to ask yourself -- **Is bankruptcy right for me?** Filing for bankruptcy can be one of the hardest decisions you will ever make. However, bankruptcy often will be your best option for dealing with your debts, offering you an inexpensive, quick, and legal method of obtaining a fresh start from the burden of your creditors.

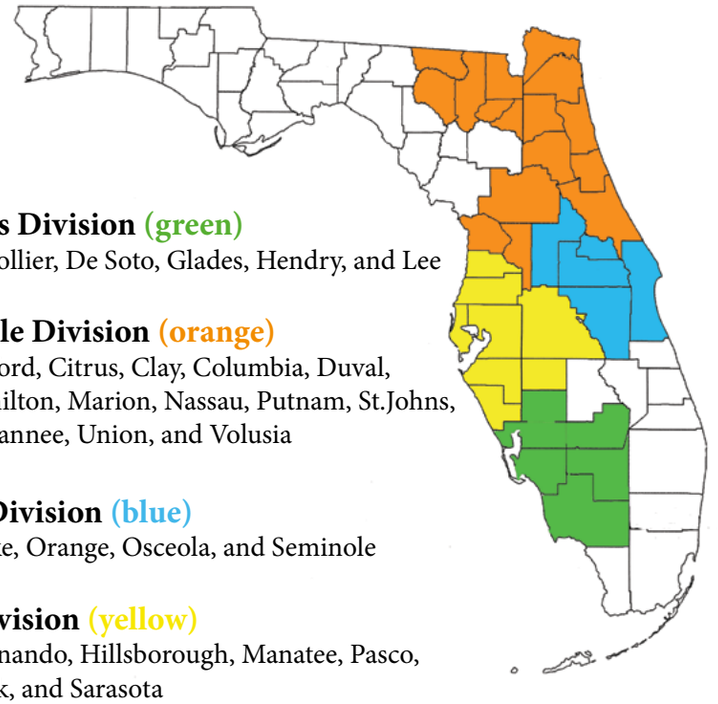
I have prepared this guide to help consumers navigate the bankruptcy process from start to finish. I wrote this from the perspective of someone who practices law in Southwest Florida, so the information contained in this guide is generally only appropriate for the Tampa and Ft. Myers Bankruptcy Courts. This guide is not intended for business debtors, and is not a substitute for the competent face-to-face advice of a licensed, experienced bankruptcy attorney. You should always consult an attorney before filing for bankruptcy protection, and please note that no attorney-client relationship is created by this guide.



**Contact attorney Christopher D. Smith at smith@ChrisSmith.com or 941-907-4774 if you are in need of bankruptcy services. Sign up for our newsletter at www.ChrisSmith.com.**



## Map of the Middle District of Florida Bankruptcy Court Divisions



**Fort Myers Division (green)**
Charlotte, Collier, De Soto, Glades, Hendry, and Lee

**Jacksonville Division (orange)**
Baker, Bradford, Citrus, Clay, Columbia, Duval, Flagler, Hamilton, Marion, Nassau, Putnam, St.Johns, Sumter, Suwannee, Union, and Volusia

**Orlando Division (blue)**
Brevard, Lake, Orange, Osceola, and Seminole

**Tampa Division (yellow)**
Hardee, Hernando, Hillsborough, Manatee, Pasco, Pinellas, Polk, and Sarasota

Recreated from the Middle District of Florida Bankruptcy Court website

This guide relates to the bankruptcy practice in the Tampa and Ft. Myers Divisions, noted in yellow and green above. The Middle District of Florida is the largest and busiest of Florida's three districts, and usually is the second busiest district in the nation.

# Contents

# STEP 1: Determination of need. Should I file?

Only you can answer this question, but I normally recommend that my clients give bankruptcy serious consideration if they are facing any of the following situations:

- Facing litigation from creditors, or intense collection activity in the form of daily calls and frequent letters.
- Have wages that are subject to a garnishment order.
- Have unsecured debts (credit cards, medical bills, unpaid expenses and deficiency claims) that exceed 30% of your annual income.
- Own real property that you no longer need that is subject to an underwater mortgage.
- Have judgments against you.
- Are contemplating or facing a divorce.
- Are facing foreclosure.
- Can no longer pay your bills while providing for your family.
- Facing a business failure.

Bankruptcy will usually eliminate most, if not all, of your unsecured debt, such as credit cards, medical bills, deficiency claims, personal loans (signature loans), past-due utilities, past-due condo association or homeowner association dues, repo debts, and unpaid bills (but not student loans and recent tax liability). Bankruptcy can also help in some cases with your secured debts (mortgages and car loans). However, even if any of these situations applies to you, bankruptcy may not be a viable option if you own a substantial amount of non-exempt property, have significant cash in the bank, or make above-average income. Further, if you have recently transferred valuable property out of your name, have previously filed bankruptcy in the preceding 8 years, or if the majority of your debts arise from child support obligations, taxes, student loans or alimony, then bankruptcy may still not be a viable option for you.

## The Fresh Start

The U.S. Supreme Court observed long ago that "One of the primary purposes of the bankruptcy act is to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start fresh free from the obligations and responsibilities consequent upon business misfortunes." Williams v. U.S. Fidelity & G. Co., 236 U.S. 549, 554-55 (1915). This concept of providing a fresh start to the honest debtor permeates the bankruptcy laws, and serves our society with a measure of forgiveness for the downtrodden, less fortunate and the unlucky (and even the misguided). We should be proud that our nation allows a second chance to its citizens and gives them a beacon of hope through the fog of despair caused by overwhelming debt.

## Exemption Planning

Determining whether to file will require a detailed examination of your assets and the available exemptions that you can apply to those assets. Exemption planning is probably the single-most valuable benefit of consulting with competent counsel before filing. For example, you should not withdraw funds from your retirement account (IRA or 401k) to pay off your car loan before filing bankruptcy – since this will probably result in you paying for your car twice. You should not acquire a significant amount of new household property before filing, and you should consider filing after you have received your tax refund. If you have substantial equity in your house, then you should wait to file until the unlimited homestead exemption attaches (at 1,215 days). If you have lived in Florida fewer than two years, then you need to consider the exemptions from your prior State or the federal exemptions, if available. There are dozens of other considerations that should be addressed in a typical case before choosing to file. Failing to consider exemption planning can cost you an enormous amount of money – far more than the typical cost of hiring a bankruptcy attorney.

## Understanding and Classifying your Debts

The bankruptcy process is replete with classifications and categories, so it is important that you understand some of the basic terminology so you can properly evaluate and plan for your case. The three main categories of classifications are debt type, dischargeability, and timing.



### Debt Type

- ***Secured Debts.*** These debts are those for which the creditor has a security interest in your property. Among others, these include mortgages, car loans, and certain store credit cards. Secured creditors have the right to take back secured property (called "collateral") through repossession or foreclosure if you do not pay the debt. In bankruptcy, you often can elect to keep your property that is subject to a security interest if you continue to pay your lender, but many different rules apply depending on your chapter and whether the property has equity.

- ***Unsecured Debts.*** These debts are those for which the creditor has no security interest in your property. These include personal loans, credit cards issued by banks, deficiency claims and medical bills, among others. Unsecured creditors do not have the right to collect against particular property owned by you, but can sue you to obtain a judgment, and a judgment can be used to garnish or levy against your property.

- ***Priority Debts.*** These are unsecured debts that are considered to be of greater public importance, and are paid before general unsecured debts. There are many types of priority debts, but the most common are child support, alimony and taxes. In a Chapter 13 bankruptcy, these must be paid in full, and in a Chapter 7, they are paid before any other creditors.

### Dischargeability

- ***Dischargeable debts*** are those that are extinguished by your bankruptcy and forever go away when the Court enters your order of discharge. As long as you schedule the debt in your petition and unless the debt is a non-dischargeable debt or unless you reaffirm the debt, the debt will be discharged and wiped out.

- ***Non-dischargeable debts*** are those that survive your bankruptcy. You will still be obligated to pay these debts after your bankruptcy. The most common example is a student loan debt, which is a non-dischargeable, non-priority unsecured debt. Click here for a list of common non-dischargeable debts.

### Timing

- ***Pre-petition debts*** are those that existed or accrued before the date of filing of your case.

- ***Post-petition debts*** are accrued after the filing of your case.

In a Chapter 7 case, only pre-petition debts are subject to a discharge. In a Chapter 13, generally only pre-petition debts are subject to your plan and discharge, with the exception of some taxes (and other rare debts not discussed here).

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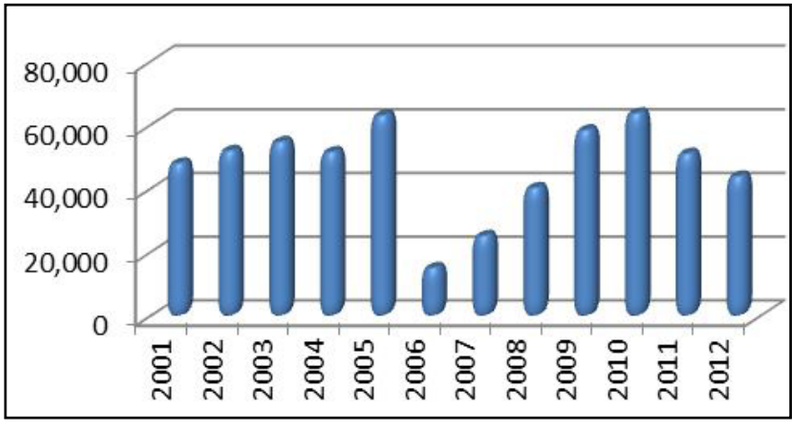
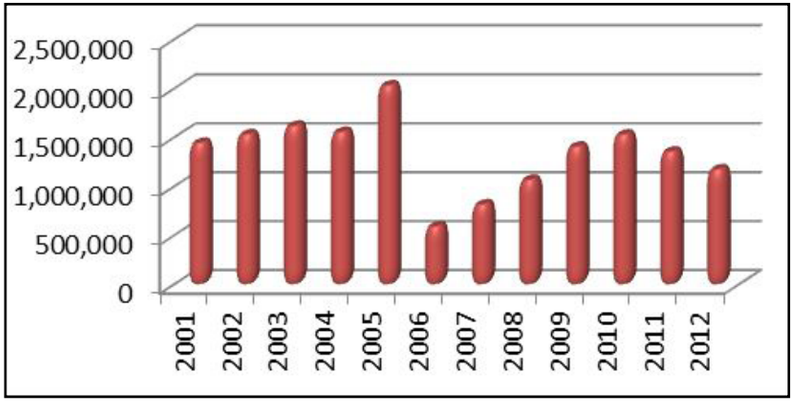
## You are not alone: Filing Statistics

Bankruptcy has been a life saver for millions of Americans over the last ten years, and there is no shame in asking for a little help. Here are two graphs showing the number of filings in the Middle District of Florida and nationwide (note the dramatic drop in 2006 that was due to an overhaul of the law):

### Middle District of Florida Consumer Filings (2001 -2012):




### Nationwide Consumer Filings (2001 – 2012):



## STEP 2: Chapter selection. I need to file, but which chapter do I choose?

There are three chapters that would normally apply to a consumer: Chapter 7, 11, and 13. Chapter 11 is a complex type of case that is normally used for business reorganizations and high-income individuals, and is not discussed here. Therefore, a typical debtor will have to choose between Chapter 7 or 13. There are pros and cons to each.

### Chapter 7

If your household income level is average or below-average, you may be able to qualify for a Chapter 7 bankruptcy, which is often referred to as a "liquidation case." A Chapter 7 bankruptcy can enable you to discharge your unsecured debts, usually in a matter of months, and to surrender without recourse your undesired property that is subject to secured debt. ("Without recourse" means the lender cannot pursue a deficiency claim against you after you turn over the collateral). It is the most effective method available to eliminate credit card debt, medical bills, and potential deficiency judgments from foreclosures and repossessions. The result of a Chapter 7 is a discharge that wipes out your dischargeable debts (click here for list of common non-dischargeable debts), but not recent taxes, child support or alimony. It is fast and fairly inexpensive, and is the most common type of bankruptcy.

#### Exemptions

The downside to a Chapter 7 is that you may have to surrender some of your property, depending on how much you have. You will be allowed to keep a certain amount of property, which is called your "exempt property," but everything that is not exempt must either be given to a court-appointed trustee or re-purchased. Property that is not exempt is "administered" by your trustee. In Florida, you may exempt $1,000 per filer in personal property, $1,000 of equity in a vehicle, and your homestead and retirement accounts. If you do not own a homestead or if you have one but wish to surrender it through a foreclosure, you get an additional $4,000 per filer in miscellaneous exemptions that can be






applied to personal property (not real estate). There are other, numerous exemptions that apply to special circumstances.

Florida has opted out of the federal bankruptcy exemptions, and does not permit those exemptions to be used. However, Florida does permit "tenancy-by-the-entirety" (TBE) titling of marital property, which can be a very valuable tool. TBE property is property acquired by a married couple, while married, with the intent that the property shall be marital property and not separate property. It is only available to married couples, and automatically extinguishes upon death or divorce. TBE property is exempt from the claims against one spouse, but not both. It can be helpful in a bankruptcy context when one spouse has all the debt, but can be overcome by your trustee if the married couple has any joint debt.

You must have lived in Florida for at least two years to claim Florida exemptions. You must have lived in your homestead for 1,215 days to claim the unlimited homestead exemption, but you may still claim the limited homestead exemption (presently $155,675) if you have lived in your home fewer than 1,215 days. Because of my victory in the Rasmussen decision in 2006, married couples may claim double this sum in Southwest Florida.

## Common Exemption Table

Table 1 – Common Florida Exemptions

| Common Florida Bankruptcy Exemptions (only most common shown) | | | | |
|---|---|---|---|---|
| | **Personal Property** | **Vehicle** | **Homestead** | **Other** |
| **Individual** | $1,000, plus $4,000 if you do not claim or benefit from homestead | $1,000 | Unlimited if you have owned your homestead for at least 1,215 days, otherwise limited to $155,675. | No limit on retirement accounts (IRAs, 401Ks, annuities, life insurance, social security). 75% exemption on wages and bank accounts funded from wages. |
| **Married Couple filing jointly** | $2,000, plus $8,000 if neither spouse claims or benefits from homestead | $2,000, provided both spouses are on title, or $1000 per car if owned separately. | Unlimited if you have owned your homestead for at least 1,215 days, otherwise limited to $311,350. | No limit on retirement accounts (IRAs, 401Ks, annuities, life insurance, social security). 75% exemption on wages and bank accounts tied to wages. |
| **Business** | None | None | None | None |



### Repurchase Agreements

If you have non-exempt property that is administered by your trustee, you will be given the option of repurchasing this property first, before it is taken by your trustee. This is called a "Repurchase" or "Buy Back." Most debtors elect to keep their property using a Repurchase, and most trustees are reasonable and will allow the debtor to buy back the property by making monthly payments over six months to a year. You only have to buy back the amount of your property that is not exempt. This property may also include your tax refund, so it is important to discuss this with your counsel before filing.

### Factors to Consider

Chapter 7 is the preferred case if:

- You have average or below-average income.
- You have a minimal amount of property (such as furniture, jewelry, and art), minimal equity in your car(s), and very little non-retirement savings.
- You have substantial medical or credit card debts beyond your ability to pay, or are facing foreclosure for a house that you no longer desire to keep.

***Note:*** You can keep your homestead in a Chapter 7 if you can remain current with your mortgage payments, because your homestead is exempt. (Special rules apply to homesteads acquired within the previous 1,215 days with equity in excess of $155,675). You can also keep your car if it has minimal equity, provided you can keep your car payments current with your lender.

If you do not have non-exempt property to administer, your case will typically discharge and close in four to six months. Cases with administered property usually take one to three years to close, but your discharge arrives in about 4 months.

There are other restrictions to consider, such as prior bankruptcy filings, state of residency, and choice of law. Generally, you cannot file a Chapter 7 if you have previously filed a Chapter 7 in the last eight years.

You must reside in Florida for at least 3 months before you can file here, and you must have resided in Florida for two years before you can claim Florida exemptions for your property.

Bankruptcy is probably not a good option for you due to messy complications that will likely arise in your case if any of the following situations apply to you:

- If you have recently transferred property out of your name to a friend or family member.
- If you have gifted large sums of money in the previous two years.
- If you have recently run up all of your credit cards in expectation of bankruptcy.
- If you are expecting a large inheritance in the near future.
- If nearly all of your debt is from student loans, child support, unpaid taxes, or alimony.

### *What is the "Means Test" and who can qualify for a Chapter 7 bankruptcy?*

The bankruptcy courts (and the Department of Justice) will use a formula called the "means test" to determine if you qualify for a Chapter 7 bankruptcy. The purpose of this test is to limit the use and availability of Chapter 7 bankruptcies to those who do not have the "means" (income) to pay back their creditors. The means test formula considers measures of income and allowable expenses. You may not be eligible for a Chapter 7 bankruptcy if, according to the results of the test, it is shown that you have sufficient net monthly income to repay a meaningful amount of your debts. If you do not qualify for a Chapter 7 based on the results of this test, you may still be eligible for bankruptcy relief in a Chapter 11 or 13.



## More About The Means Test

The means test is embodied in a form called a B-22A. Click here for a copy. This is a very complex form, and there are many judicial decisions that interpret what numbers can go into this form and what deductions a debtor can claim. Further, if you pass the means test, the Department of Justice may still object to your Chapter 7 if it feels you still have substantial income to pay back your creditors through a Chapter 11 or 13. If you attempt to file your case without counsel, the means test is the single-most challenging aspect of your case, and the one form you will most likely prepare incorrectly.

You will almost always pass the means test if your income is below the median income for Florida. Income is measured as the average, annualized household income over the prior six months. In practice, this means that your income for the last six months is doubled to determine your means test income. Thankfully, Social Security income is not counted toward this calculation, but nearly all other sources of income are counted, including gifts from friends and family (which we call "contributions to household income.") If you exceed the median income, you can still pass the means test in some cases if your allowable expenses reduce your disposable income to a very low amount. However, the more you exceed the median income, the more likely the U.S. Trustee will push to have you convert to a Chapter 11 or 13.

## Smart Means Test Practices

You should be smart with your claimed expenses and avoid fluff. The U.S. Trustee's office is staffed by highly capable attorneys, accountants and examiners who have seen tens of thousands of cases and are highly aware of all the tricks that some unscrupulous debtors might try to use to pass the means test, and are always on the lookout for fluffy numbers. Some smart practices for the Chapter 7 means test (Form B22A, as revised 04/13) include the following:

- Unless you have solid documentation to back it up and a long history of donations, you should avoid claiming significant charitable contributions on line 40. These are not looked upon favorably.

- Avoid claiming the extra 5% food deduction on line 39, since those are viewed with skepticism.

- Out-of-pocket medical expenses (line 31) exceeding the average allowance ($60/m for non-seniors, $144/m for seniors) must be supported by credible documentation, or they may be challenged.

- Lines 23 and 24 are a hot topic for Chapter 7s. If you have a lien on your car(s) or lease your car(s), then claiming the ownership expense is always acceptable. However, if you do not have a lien (i.e., car payment) or lease, then there is the possibility that these expenses could be challenged. You can never claim these expenses in a Chapter 13 unless you have a lien or lease.

- Avoid claiming anything on line 32 for health-related telecommunication charges.

- Lines 30 and 38 can be very helpful for above-median income families with children, but have credible documentation to support your deductions, and note the limit on line 38. There is no cap on childcare, but there is a cap on educational expenses for minor children. Also note that there is no deduction for college tuition expenses for your adult children.

- Line 25 for taxes is very difficult. Taxes change every year, and your effective tax rate changes depending on your IRS deductions, exemptions, allowances, etc. If your income is steady, then I recommend using your prior year's effective tax rate plus the FICA rate (7.65% for most people) multiplied by your monthly income for this calculation. The uncertainly in the tax calculation makes this line the single most "fluffy" deduction, so it may be helpful to get an opinion from your accountant as to your expected effective tax rate for the current year to use for this calculation. The U.S. Trustee will likely respect the written opinion of a credible CPA, within reasonable limits.

- Line 35 regarding care and support of elderly or ill family members is a potentially valuable offset, but requires extensive documentation and a payment history to support the deduction.



- I have never once seen line 36 claimed, and is almost never applicable.

- Line 56 for special circumstances is obviously going to be looked at closely and with heavy skepticism. I would avoid using this line if possible.

## Current Median Income in Florida by Household Size (periodically adjusted)

Table 2 – Current Median Income in Florida (updated 11/15/13)

| | Household Size | | | | |
|---|---|---|---|---|---|
| **Family Size:** | *1 person* | *2 persons* | *3 persons* | *4 persons* | *Additional persons* |
| **Florida:** | $41,334 | $51,839 | $53,952 | $63,196 | Add $8,100 per person |

The Department of Justice updates these figures, on average, about twice per year. You can access this information directly on their website (click here).

### *Business Exception to the Means Test (the "loop hole")*

There is one exception to the means test – if the majority of your debts are not consumer-related, you do not have to pass the means test to qualify for a Chapter 7. This generally means that if the majority of your debts are business debts, then you can file a Chapter 7 even if you have above-median income. Keep in mind, however, your mortgage is almost always counted as a consumer debt. Also note that the use of this "loop hole" will be closely examined by the U.S. Trustee.

## Chapter 13

If you have average to above-average income, or own a substantial amount of property, a Chapter 13 might be better for you. This type of bankruptcy is a "repayment case," where you repay some or all of your debts over a three- to five-year period. While you are in repayment, your creditors are prohibited from suing you or attempting to collect or enforce a debt against you. Normally, you can keep your personal property in a Chapter 13, even if you do not have sufficient exemption to cover the property.

### Lien Strip

A Chapter 13 can also be used to "strip off" junior mortgages, which can be an amazing tool to achieve equity in your home. This is available if your house is worth less than the balance on your first mortgage.

### Factors to Consider

Chapter 13 is the preferred case if:

- You have average or above-average income and/or significant personal property, and cannot pass the means test.
- You have a house you want to keep but are behind on the mortgage payments, or have two mortgages and are substantially underwater (although, for now, lien strips are available in Chapters 7s in Florida).
- Have significant non-dischargeable debts (child support and alimony) or tax liabilities, along with significant dischargeable debts like credit cards and medical bills.

These cases typically run three to five years, but can be shorter in certain special circumstances. You receive your discharge upon the successful conclusion of your plan. You may have the option of converting to a Chapter 7 while in your Chapter 13 if you suffer a significant disruption to your income and otherwise qualify for a Chapter 7.

A Chapter 13 will cost about twice as much as a Chapter 7, but you can finance the attorney's fees through your plan payment.



You fund a Chapter 13 by making a monthly payment to a court-appointed trustee, called a Standing Trustee. There are presently only two Standing Trustees in the Tampa and Ft. Myers Districts, and each trustee has a sizable support staff and attorneys to handle each case. These trustees are powerful and carry great influence with the judges, and it is important to comply with their requests in order to make your case successful. Arguing with a Chapter 13 trustee or refusing to cooperate in most circumstances is not a productive task.

### Your Plan

The amount of your monthly plan payment is usually the single biggest issue in a Chapter 13 case, and the calculation is complicated. First, your plan payment must be large enough to ensure that your creditors receive at least as much as they would have received in a Chapter 7 liquidation case. Second, your plan payment must be equal to all of your disposable income over a 3 to 5 year period (3 years if your income is below-median, five years if above-median). The calculation of your "disposable income" is based on a combination of government formulas (embodied in B22-C form, which is very similar to the Chapter 7 means test B22-A form) and a good faith determination of your reasonably certain income and expenses going forward. The government formulas consider certain average expenses such as food, vehicle maintenance, and rent, but also consider certain actual expenses such as taxes, mortgage payments, and medical expenses. Determining disposable income is a complicated process, and is usually the product of educated "estimation" and averaging. As you can imagine, determining your future disposable income is a difficult task given all the unknowns about the future, and is especially tricky for people who have fluctuating income, such as the self-employed, or people on the verge of retirement.

Sound legal counsel involves maximizing your available deductions to minimize your disposable income (and ultimately your plan payment) in a manner that will be acceptable to your trustee and the judge. Your determination of your disposable income is not always the same as your trustee's determination, and not all expenses are considered reasonable or deductible. For instance, if you incur expenses to support your child in college, these are not usually factored into your calculation. If you

pay a large mortgage payment (more than $3,000 per month, for example), or have a substantial life insurance premium (above $400 per month), the trustee might reject those payments as a luxury and not allow part of the deduction. Some trustees are more lenient than others on these issues.

### Loan Modification

One additional side-benefit to a Chapter 13 is that you can now use your bankruptcy to seek a simultaneous loan modification of your mortgage loan. Around 2012, the Court began allowing Debtors to file for mediation to force lenders to consider loan modification options, and the statistics show a very high rate of success versus non-bankruptcy loan modifications. Therefore, if you want to keep your house, pursuing a loan modification through your Chapter 13 case should be seriously considered. There is an additional cost of approximately $1,800 for this service, but that fee is added to your plan and not paid by you upfront. SmithLaw offers this service to its clients as an optional add-on service.

### Debt Limits: What are the debt limits in a Chapter 13?

Eligibility for a Chapter 13 is limited based on the amount of debt owed by the debtor per Section §109(e) of the Bankruptcy Code. Individuals with debts exceeding those limits are not eligible to file a Chapter 13. The debt limits periodically change, and currently are $383,175 for unsecured debt and $1,149,525 for secured debt.

If your debts exceed these allowable levels, and if your income is too high to qualify for a Chapter 7 case, your only other bankruptcy option is a Chapter 11. However, you may be able to reduce your secured debt levels for qualification purposes by waiting for your foreclosure to complete before filing, but there are risks associated with this strategy for high earners.



### Tax Returns and Refunds

In the vast majority of Chapter 13 cases, you will have to provide your trustee with your tax return every year, and also your refund. You must file your return every year while in the plan. Do not spend your refund, and do not plan on keeping your refund until your case is closed. You may want to adjust your tax withholding allowances to minimize your potential refund in the future.

# STEP 3: Retain counsel. I know which chapter to file, so what's next?

Call us, or call another experienced bankruptcy attorney for a consultation. SmithLaw does not charge for consumer bankruptcy consultations and we will answer all of the questions you may have. We will also give you a list of documents to assemble so we can prepare your case paperwork.

We will evaluate your case to determine if you are eligible to file a Chapter 7 or 13, and help you decide which case is in your best interest, after evaluating your income, assets, and debts. If you do not retain the services of SmithLaw, make sure the lawyer you choose gives you this same level of treatment.

At SmithLaw, we usually process our consumer cases using a two-step progression. The first step is to meet with the attorney and discuss in detail your situation so you can select your chapter after advice of counsel. Then, the second step is to conduct a comprehensive intake with a paralegal to enter all of the salient information into your petition. The attorney then reviews the information and prepares it for filing, and files upon client approval and signature.

## Credit Counseling Class

Before you can file a bankruptcy in the United States, you must first complete a credit counseling class with an approved agency. The U.S. Department of Justice approves these agencies, and you can find a current list of approved agencies at this website:

- Click Here for List of Agencies

The class is typically one to two hours long, and most agencies will allow you to complete the class on the internet. They do charge a nominal fee that usually ranges between $15 and $35. If a husband and wife are filing together, both spouses will have to take the class. Be sure to inform the agency of the name of your attorney, so they can issue a certificate of completion for the class. These certificates are valid for 180 days, and must be filed with your case. Your case will be dismissed if you do not take this class before filing.



## Debtor Education Class

After you file and before you obtain a discharge, you must take a second class, called a Debtor Education Class. You can use the same agency as the credit counseling class, and the process is very similar. There is an additional charge comparable to the cost of the first class. You will not earn a discharge unless you take the second class.

## Fees

For a Chapter 7 case, you must pay your fee in advance of filing. The typical fee in the Tampa and Ft. Myers Districts is about $1,500 to $2,000. The filing fee is $306. For a Chapter 13, you can finance part of your fee through the plan, depending on the preference of your attorney. Presently, the Court allows a fee up to $4,100 for a typical five-year Chapter 13 case, and the filing fee is $281.

Table 3 – Typical Fees and Expenses

| | Chapter 7 | Chapter 13 |
|---|---|---|
| **Attorney Fee** | $1,900 (basic consumer case) to $10,000 (complex business case) | $3,000 to $4,100 (you can add an a la carte loan modification to this for an additional $1,800) |
| **Filing Fee** | $306 | $281 |
| **Expenses** | $100 | included in fee |
| **Financing Options** | No, the fee must be paid in advance | Yes, part of the fee can be financed through the plan |
| **Optional Extras** | Lien Stripping: $300-$500 per lien | Lien Stripping: $300-$400 per lien |

Some attorneys will charge extra for reaffirmation agreements in a Chapter 7 case, but we do not at SmithLaw. Most attorneys will charge extra if you miss your creditor's meeting, which requires the attorney to drive to Tampa or Ft. Myers a second time.

## STEP 4: Spousal consideration. Does my spouse have to file jointly with me?

If all or a majority of your debts are only in your name, your spouse may not need to file with you. In most cases, creditors are not permitted to pursue a spouse who is not contractually obligated to that loan or debt. A person may be contractually obligated if they signed the loan application when the credit was taken out, or if they added their name to an account of a spouse as an authorized user. The bankruptcy will not appear on the non-filing spouse's credit report.

Many married Debtors elect to file only in the name of one spouse to protect the credit rating of the non-filing spouse. This strategy may be wise when the non-filing spouse has insignificant debts. Keep in mind, however, if only one spouse files and if there was marital debt, the creditor can still pursue the non-filing spouse for the entire balance owed.

For purposes of eligibility for a Chapter 7, household income is used to measure income for the means test. Therefore, if only one spouse is filing, the income of both spouses will still be considered for eligibility. The only exception is if the married couple is separated and living in different residences. It also means that if only one spouse is filing, the non-filing spouse will still need to cooperate in the bankruptcy by providing information about his or her income.

### Civil Unions and Same-Gender Couples

Bankruptcy law looks to the law of the State in which the Court sits to determine marital status, and the Bankruptcy Code does not recognize non-marital civil unions for purposes of eligibility to file a joint petition. Since Florida does not recognize marriage between same-gender individuals, these couples are not eligible to file a joint petition. If same-gender couples wish to file bankruptcy, we recommend that both partners file simultaneous separate cases to increase the likelihood of being assigned the same trustee. This can make the administration of the two cases smoother.



## STEP 5: Preparation. What documents do I need to assemble before filing?

The following documents are needed for preparation of your case:

- Complete copy of all bank statements covering the previous 3 months. If you are self-employed, you need bank statements for the previous 6 months. (NOTE: this is for all bank accounts)
- Copy of all pay stubs for the previous 6 months.
- Complete copy of individual federal income tax returns, including all W-2 forms, for the previous two years. If you are a stockholder or partner in a privately held corporation or partnership, also include a complete copy of all corporate and partnership federal income tax returns for the previous two years.
- Written payoff statements reflecting the balance owed for all vehicles, boats, trailers or other real or personal property. The payoff must be in writing and prepared by the creditor.
- Copies of titles and/or registrations for all vehicles, motorcycles, boats, trailers or other personal property that is titled in your name(s).
- Copy of most recent statement for all retirement and non-retirement accounts, including 401(k) plans, IRAs, mutual funds, etc.
- Copies of deeds to all parcels of real estate owned by you, or in which you have any kind of interest. In Sarasota and Manatee counties, these deeds can be obtained over the internet from the clerk of court.
- Copies of closing statements (HUD-1s) and deeds for all real estate sold or transferred within the prior two years.
- If you are a plaintiff in an injury lawsuit or have the intention of filing a lawsuit, provide all details including date of injury. If an attorney has been retained, provide the name, address and phone number of the attorney.

- If you are self-employed, prepare a profit and loss statement for the previous 12 months for every business you own.

You should make copies of all of these documents and deliver them to your attorney. Your attorney will be required to share most, if not all, of these documents with your trustee after your case is filed.

## STEP 6: Post-Petition Proceedings. I just filed a bankruptcy… what should I expect now?

### NO MORE CREDITOR CALLS!

First and foremost, you should expect to be able to breathe from the constant harassment from creditors that may have occurred prior to your filing. Federal law prohibits creditors from contacting you in any way in an effort to collect previous debts, so long as you have scheduled those debts on your bankruptcy petition. This prohibition is called the "Automatic Stay," and is very powerful.

It usually takes about one week for the Court to mail notice of your case to all of your scheduled creditors, at the address you provided on your petition. Scheduling a proper address for your creditors is important to ensure that they receive the notice in a timely manner. Sophisticated creditors, such as credit card companies and mortgage lenders, know the rules and usually comply by ceasing all communication. However, some lenders, especially vendors and small personal lenders (such as friends, family, and neighbors) may need to be reminded of the rules by your attorney.

In a Chapter 7, if you have a car or house that you are keeping, then you may not receive monthly statements from these creditors, but you should still send in your normal payment. Your vehicle lender will eventually prepare a Reaffirmation Agreement which will be sent to your attorney for review before you sign it. In a Chapter 13, if you have a car or house that you are keeping and are NOT paying through your plan, you should make arrangements to continue to pay those creditors even if you do not receive monthly statements.



The Automatic Stay does NOT stop collection of child support obligations through existing wage garnishments, and it does NOT stop criminal proceedings. You may still receive notices from your mortgage lender about the availability of loan modification options, but this is not a violation of the Automatic Stay. A pending divorce proceeding is technically not subject to the Automatic Stay, but the determination of a property settlement is, so the practical effect is that the filing of bankruptcy can impact the progress of a divorce for several months if there is an anticipated property division.

### The Creditors' Meeting

About a month after the filing of the case, you can expect to attend a short meeting called the "341 Meeting of Creditors." This meeting is held so that creditors and the trustee (the person who will preside over the meeting) can ask questions about your financial situation. Creditors will rarely attend this meeting, but they have the right to attend and ask you questions.

A typical meeting lasts about ten minutes, and you MUST REMEMBER to bring your driver's license (or other state-issued identification) and social security card. If you fail to bring these, you will probably have to drive back a second time. Your attorney will sit next to you at this meeting, but you will have to answer the questions. Although many debtors stress about this meeting, you should just relax and answer the questions truthfully and concisely. Normally, your trustee will already have a good understanding of your finances, but has to ask you questions to verify information and to fill in gaps. Sometimes your trustee will ask you to provide supplemental information.

This meeting is public, and is tape recorded. You will have at least 3 weeks' advance notice of the 341 meeting, and you must attend. We recommend you show up 20 minutes early and watch the hearings that precede yours to get an understanding of what to expect. As a general rule, the more assets that you have, the longer your meeting and the more questions you will face. If you have income that is close to the median, the U.S. Trustee may send a representative to the meeting, who will sit next to your trustee and ask you additional questions, which will usually focus on your income or asset transfers.

We recommend that you remain polite and respectful at all times with the trustee and the U.S. Trustee's representative. Answer their questions truthfully, but do not add unnecessary or irrelevant banter to the discussion, or attempt to joke with them. Your trustee probably has a room full of cases and is pressed for time, and will want to proceed as efficiently as possible. They are not there to be your friend or confidant, but they are human, so if you are polite and respectful and answer truthfully without being vague, you will likely receive polite and respectful treatment in return. If you appear evasive, you will invite greater scrutiny and further questioning. Your trustee can take a more thorough deposition of you at a later date if there are unanswered questions or unresolved issues that remain from your meeting. Remember, it is a serious crime to lie to your trustee.

### Preparation for Meeting

If you hire SmithLaw, we will provide you with a list of the questions that the Trustee will probably ask at the 341 meeting, so that you can prepare. The Chapter 7 hearings are slightly more antagonistic than the Chapter 13 hearings, on average, although most hearings are smooth and uneventful. You should review your petition in detail before attending the hearing, so that your assets, liabilities and income are fresh in your mind. Also, arrive early to your scheduled meeting and listen to the types of questions your trustee is asking other debtors. Chances are those questions will be fairly consistent with the questions you will be asked. Remember to bring your social security card and driver's license! Your attorney will meet you at the hearing location.

### Location – Where Do I Go?

Tampa hearings are held on the first floor of the Timberlake Annex located at 501 East Polk St. in downtown Tampa. Click here for map. This is a federal building, and security is tight. You will have to pass through security to enter the building. Do not bring a camera into the building. Remember to turn off your cell phone before entering the building. There is ample public parking available nearby for a fee.

Ft. Myers hearings are held on the second floor of the United States Courthouse at 2110 First Street in downtown Ft. Myers. Click here for map. This is a federal courthouse, and security is very tight. You **may not** bring any cell phones or computers into the building, and the security personnel in Ft. Myers tend to be extra-cautious (they usually make you remove belts and coats). There is ample public parking available nearby for a fee.

## The Chapter 7 Trustee

The bankruptcy trustee is the person you will meet at your 341 Creditors' Meeting. This person will question you about your finances. The job of the trustee is to represent the interests of your creditors and to administer a bankruptcy estate for their benefit, which consists of all of your non-exempt property owned on the date of filing of your case (with a few rare exceptions, such as inheritance). Bankruptcy trustees are compensated based on the amount of property they recover from you, so they are incentivized to recover as much property from you as legally permissible. We find the trustees to be reasonable and rational, and nearly every trustee will work out repayment options with you if you have property that is not exempt.

Chapter 7 trustees are very powerful and can invoke the powers of the Court to take possession of your property, sell your property, and even recover property from persons who previously received your property. They can investigate your finances to determine if you have previously transferred property with fraudulent intent (to conceal it or to keep it out of the hands of the trustee), and can have professional appraisers examine your property if they believe you have undervalued it. There are approximately 20 trustees in the Tampa District and 3 in the Ft. Myers District. They are not government employees, but they work closely with the U.S. Department of Justice and are closely monitored by the federal government.

If your trustee should recover property or money from you, they will make a detailed accounting of that property, and ultimately will distribute that money to your creditors on a pro rata basis. Certain creditors, such as taxing authorities (IRS) and beneficiaries of child support or alimony orders get paid before your general unsecured creditors (credit cards, medical debts, deficiency judgment holders). You will not be closely involved in this process, but you will receive notice of the ac-

counting and payments. The trustee may occasionally file interim accountings before making a final accounting.

## The Chapter 13 Trustee

The Chapter 13 trustee has many of the same responsibilities as the Chapter 7 trustee, but because of the different "flavor" of this type of case, this trustee has a different role. The Chapter 13 trustee is more concerned with your income than your assets (as long as you do not have a significant amount of non-exempt assets). This trustee is unlikely to send an appraiser to your house or investigate the value of your assets (although he still technically could), but he will be very interested in determining the precise amount of your income and determining what it will likely be in the future. He will also be very interested in how you spend your money and about your expenses.

### Payment Administration

The Chapter 13 trustee will collect a monthly payment from you that he will distribute to your creditors *pro rata,* and will determine what the appropriate amount of your plan payment should be to make a recommendation to the judge. The trustee will evaluate your income and deductions and examine your future income and future anticipated deductions to determine your disposable income in accordance with government formulas and the law. Once he is comfortable with his calculation of your disposable income, the Chapter 13 trustee will recommend that your plan be confirmed by your judge at your "confirmation hearing." In reality, the judge will almost always defer to the recommendation of the Chapter 13 trustee on the issue of confirmation and plan payment, unless your attorney raises an objection. It is usually not productive to argue with the trustee (unless there is an obvious mistake of fact), and we find the trustees to be very knowledgeable and well-versed in bankruptcy law, plus they are generally well respected by the judges. In short, it is almost always better to negotiate informally with the Chapter 13 trustee before the confirmation to iron out any remaining issues than to fight them in front of the judge.



### Confirmation

Your confirmation hearing is the formal hearing where the judge will approve or reject your plan. Your creditors could object to the plan, and if so, the judge will hear those objections and render a ruling. In reality, this is rare, since by the time of confirmation almost all of the issues regarding the plan have already been negotiated and confirmation then becomes a ministerial act. In fact, it is highly unlikely that you will have to attend your confirmation hearing, and most of the time your attorney will not even be present. In almost every Chapter 13 case, the initial confirmation hearing is rescheduled, so that the trustee can first see all the claims filed by creditors before determining a plan payment amount. This delay is welcomed by debtor's counsel because it gives debtors more time to file motions to value property and motions to strip junior liens.

### Failure to Pay and Payment Adjustments

If you do not make all of your plan payments in a timely manner, your Chapter 13 trustee will have your case dismissed. If you miss one of your first few payments, your case can be dismissed very quickly. If you are further into your case and have a good payment history with the trustee, your counsel can usually work out an arrangement to get you caught up with payments if you missed one, as long as you stay in communication with your attorney and the trustee. The current practice is that your trustee will automatically establish a 3 month "catch up" window for you in the event you fall behind. This could result in additional attorney's fees being owed, however, so it is better to stay current with your payment. Also, your plan payments will probably change as the case progresses. The initial plan payment proposed by your attorney is rarely the same payment that is determined by the trustee and judge at confirmation, so be prepared to adjust your payment amount. You may be able to pay by direct debit from your bank account by filling out one of the trustee's authorization forms, which can be obtained from your trustee's website. In some cases, you may be able to pay off your plan early, but this is not common.

## The U.S. Trustee

The U.S. Trustee is very different from your case trustee (who is often called a panel trustee or interim trustee in a Chapter 7 case, or a standing trustee in a Chapter 13 case). The U.S. Trustee's Office is a division of the United States Department of Justice and is in charge of overseeing all bankruptcy cases from an administrative standpoint. A member of this agency may attend your 341 Creditors' Meeting and may ask you some questions towards the end of your meeting. They typically attend the "borderline" Chapter 7 cases that may involve businesses or higher-than-average incomes. If it is found that your case could be an "abuse" (i.e., your income is too high for a Chapter 7) then they may move to dismiss your case, or in most cases, push you to convert the case to a Chapter 13. It is very rare that the U.S. Trustee would intervene in a Chapter 13 case, but they do monitor Chapter 7 cases very closely. Although beyond the scope of this book, the U.S. Trustee is very closely involved in Chapter 11 cases.

# STEP 7: Case Administration and Issues

## Chapter 7 Cases

### Lien Stripping in Chapter 7

In a very exciting yet unexpected decision from the 11th Circuit in In re McNeal, Case No. 11-11352 (11th Cir., May 11, 2012), the Court ruled that a Debtor in a Chapter 7 case can strip off wholly-unsecured junior mortgages. Previously, this was only possible in a Chapter 13 case. The effect of this decision is limited to Florida, Georgia and Alabama, and it is not presently being applied uniformly across the districts in these three States.

The permanency of this decision is still uncertain at the time of this publication. The decision could be overturned by the U.S. Supreme Court on appeal, but as of the date of this publication, this is still good law.



A lien strip in a Chapter 7 case is an incredible tool for a Debtor with more than one mortgage on an underwater house. This means that if your house is worth less than what you owe on the FIRST mortgage, you can remove and "strip off" the SECOND mortgage entirely. This does not mean you just discharge the liability on the second mortgage, but rather, you actually remove the lien from the title. That means that a Debtor can someday sell his or her house without having to pay anything towards the second mortgage. This is a fantastic opportunity for Debtors seeking a long term solution for their underwater houses.

To obtain a lien strip, your attorney must file a motion with the Court and offer an assessment of value. The second lienholder has 30 days to challenge the motion, otherwise the Court will usually grant the order. The stripping order is effective upon entry of discharge, and must be recorded (with the discharge order) in the official county records where the property sits, in order to effectuate the removal of the lien from title.

There is typically an add-on charge for lien strips, in the range of $300 to $500 per lien for uncontested motions. There is no impact on the first mortgage.

### Common Questions in a Chapter 7:

#### *Question: I did not have any non-exempt assets. What's next?*

If you do not have any assets to be liquidated or repurchased from your trustee, your debts should be discharged and your case should close about 3 months after your Creditors' Meeting. However, this time period may be extended should there be an adversary action filed.

Generally, if your trustee files a Report of No Distribution in the days following your Creditors' Meeting, this is a good sign that your trustee does not expect to administer an estate. However, those reports can be withdrawn if assets are later discovered.

#### *Question: I have non-exempt assets. What's next?*

Usually, your trustee will be in contact with your attorney to stipulate to the repurchase of your non-exempt assets. Many times this will include cars, boats or timeshares that are owned outright. The trustee has

the legal authority to order an appraisal of your personal belongings to determine the value. This is likely if you live in an above-average size house or scheduled substantial personal belongings in your petition. However, your trustee will never just take your items without telling you or without first trying to arrange for you to "buy back" the property. Most buy-backs result in a repayment plan between 6 to 12 months. Most trustees now charge a monthly administrative fee of about $25 for buy-back plans. If you do not elect to do a buy-back, you will have to surrender your non-exempt property to your trustee's auctioneer.

Remember, your tax refund for the next year is an asset, and you **should not spend** that refund until your attorney or trustee tells you it is okay, or until your case closes. Many debtors are alarmed to learn that they will have to surrender all or part of their refund to their trustee after they already spent the money.

Your case cannot close until after you have completed your repurchase. Plus, once you have paid the full amount, there will still be an accounting period of about six to twelve months where the Trustee produces an accounting for approval by the U.S. Trustee and the Court. You are not involved in this process, but you will receive notice in the mail.

Your trustee has broad discretion to pursue your non-exempt assets. If your trustee should determine months into your case that you neglected to list a valuable non-exempt asset, your trustee can still take that asset. Even if your case closes, in most circumstances a trustee can re-open a case to administer a concealed asset, so the authority of your trustee should not be underestimated.

Even if your case has assets that you repurchase, you can still face an adversary action that could impact your discharge. Further, if your income is high enough to fund a reasonable Chapter 13 plan, the U.S. Trustee can file to dismiss or convert your case.

## *Question: Someone filed an adversary action. What does this mean?*

For our purposes here, an adversary action is when your trustee, the U.S. Trustee, or a creditor files a new case to deny your discharge or a motion



to dismiss your case. Dischargeability actions arise because an interested party believes either (a) that you have misstated information on your petition or (b) that the nature of your debt is such that discharge should not apply to that debt. Motions to dismiss are filed because the U.S. Trustee wants to convert you to a Chapter 13 case, or because of some other legal flaw in your petition. These situations involve litigation and are very serious, and will almost always cost you additional attorney's fees.

The most common adversary actions are those in which a creditor seeks to have its debt "excepted" from discharge, which would allow the creditor to pursue the debt even after your case is discharged and closed. These often arise if the creditor feels it can prove that you incurred debt to the creditor in a fraudulent manner or from a willful and malicious injury. There are numerous exceptions to discharge, but fraud is the most common. Certain debts, such as student loans, child support and alimony, are automatically excepted from discharge and no adversary proceeding is necessary for those debts to survive. Each adversary proceeding has a separate case number from your bankruptcy case number.

Motions to dismiss usually arise when your income is high enough to fund a meaningful Chapter 13 plan. These can be filed against you even if you pass the means test, and are subject to the broad discretion of the U.S. Trustee and the Court. In a nutshell and in very general terms, if the U.S. Trustee determines, after looking at all of your income and examining your potential for future income, that you can pay back at least 25% of your unsecured debts, it will likely seek to convert you a Chapter 13 case. This is especially true if your income is above-median and you have shown the ability to make a good living in prior years. In my experience, the U.S. Trustee is successful the majority of the time when a Motion to Dismiss or Convert is filed, and litigating against the government is never an attractive option when a client's budget is already tight.

## *Question: My Trustee filed an Objection to my Exemptions… is this bad?*

Not usually. When the trustee files an objection to your exemptions, in most cases your trustee is merely objecting to the valuations that you have assigned to your property, and thus reserving the right to later appraise and sell that property (usually back to you). Although there are

exceptions, these objections are usually ministerial and are very common in Tampa and Ft. Myers, so much so that our judges sustain the objection automatically and without a hearing. If your trustee files an objection to something other than valuation, then you should take it more seriously.

## *Question: What about appraising my personal property?*

A common misconception people have is that when they file for a Chapter 7 bankruptcy all of their household items are taken from them. This is not the case, except in very rare, extreme cases. Typically, about a week after your 341 Meeting, the trustee may have a personal property appraiser set up a time and date to be let into your home to conduct an appraisal of your personal belongings. You must cooperate with the appraiser or face the ire of the judge and trustee. A week or so after the appraisal has been completed, the appraiser will supply your trustee with a copy of this appraisal. These appraisal figures are usually the basis for determining the amount of non-exempt property that you have, for purposes of setting a buy back sum from your trustee.

To avoid uncertainty, we advise our clients to hire their own personal property appraisal prior to filing their case, and then to attach that appraisal to their petition. You can hire the same appraisal companies that the trustees usually hire, and there are only a handful in Southwest Florida that specialize in that type of work. Your trustee is very likely to accept your appraisal at face value if it comes from a trusted source.

## *Question: What is the deadline for my creditors, Trustee or U.S. Trustee to object to the discharge of my debts?*

Interested parties have 60 days after the meeting of creditors to file a complaint objecting to the discharge of debts. However, on or before that deadline, a party may request an extension of the deadline, which will be freely granted. It is the practice of the Tampa and Ft. Myers Divisions to grant one extension automatically without a hearing. Subsequent attempts to extend the deadline will meet with more resistance and the party seeking the extension will usually have to show good cause for the extension or have the consent of the debtor.



### Reaffirmation Agreements

A Reaffirmation Agreement is an agreement between you and a particular creditor that prevents a particular debt from being discharged. This is common with vehicle loans. Most vehicle lenders will require that you sign a reaffirmation agreement as a condition for letting you keep a car after bankruptcy. When considering whether or not to sign a reaffirmation agreement, it is important to determine if you can afford the payments in the future on that loan. Once your case is closed, if you fail to make the payments on a reaffirmed loan, the creditor can repossess and hold you personally liable for any deficiency (the difference between what it sells the collateral for and what you currently owe on the loan). Reaffirmations are disfavored by the Court unless the debtor is realizing a significant benefit from the debt, since these agreements work against the central purpose of bankruptcy by saddling the debtor with debt after the case.

If you have counsel, you can execute a reaffirmation agreement and have it become automatically effective upon filing if your attorney also approves and signs your agreement. At SmithLaw, we only approve reaffirmation agreements if the benefit from retaining the collateral outweighs the cost of the debt. In practical terms, this means the following with respect to a car:

- You really need that car for work and no cheaper replacement is easily obtainable;
- The car is not significantly underwater;
- The loan terms are not unreasonable; and
- You have sufficient income to pay the debt.

If your counsel does not approve the reaffirmation (or if you do not have an attorney), you must present your reaffirmation agreement to your judge at a hearing, who will weigh the costs and benefits of the agreement and make a decision about whether to allow it to become effective. Our judges in Southwest Florida take these agreements seriously, and you should not expect the Court to automatically approve a reaffirmation agreement, especially if the car is severely underwater, is overly luxurious, or if you are not presently employed. If the agree-

ment is not approved, then you will have to surrender the car to your lender unless you can get a private loan to pay off the vehicle (usually from friends and family, or from a draw from your retirement account) or refinance the vehicle debt (very difficult to do while in bankruptcy).

In certain circumstances, a mortgage lender may seek to have you reaffirm a debt on your home. We would almost NEVER approve this reaffirmation, unless the property has substantial equity and is your exempt homestead that you intend to keep long term. We see these attempted reaffirmations by junior mortgages as over-reaching and unnecessary in most circumstances.

## Chapter 13 Cases

### *Question: Why did I receive an unfavorable recommendation?*

After your 341 Creditors' Meeting, your Chapter 13 trustee will issue either a favorable or unfavorable recommendation. Don't be alarmed, but most of the time they issue an unfavorable recommendation, and it is not usually a major problem so do not panic. In the majority of cases, the unfavorable recommendation simply means that your trustee may want something amended in your petition or plan, or that he needs more information or documents regarding your case. It does not mean your case was rejected or that it was not approved… it just means some follow-up is needed. If you get a favorable recommendation, that is obviously good news. It is very rare to get favorable recommendations in the Ft. Myers Division, but more common in the Tampa Division.

### *Question: What does it mean to have my Plan confirmed?*

After your Creditors' Meeting, you will have a confirmation hearing before your judge. In almost every case, the Debtor does not need to attend this hearing. Further, in almost every case, the initial confirmation hearing is continued to a later date, between 2 and 8 months later. The second confirmation hearing is called the "continued confirmation hearing," and this is an important hearing where the judge either dismisses your case or confirms your plan. Very rarely would you ever



have to attend the continued confirmation hearing. Most of the time, your attorney will not even attend this hearing unless there are unresolved issues in your case or pending creditor objections.

Once the plan is confirmed by the Court, your plan binds all the parties involved in your case. This means that the creditors must accept the payments provided and your payments over the life of the plan are fixed, unless you experience a change in circumstances that significantly increase or decrease your income (or your mortgage payment changes). The trustee will reserve the right to increase your plan payments if your income increases during the plan, but this is rare. Your trustee will see your income because he will be provided a copy of your tax return every year while in the plan, and sometimes (often) he will require you to turn over any income tax refund.

#### Loan Modifications

Since late-2011, the Tampa and Ft. Myers Districts have incorporated a new program to encourage and facilitate mortgage modifications through the Chapter 13 process. We are very excited about this program, since it allows Chapter 13 debtors to mediate with their mortgage lenders to seek a loan modification, and gives the debtors a six-month window of reduced loan payments during which time they will seek a loan modification. In practice, having a face-to-face meeting with a lender's agent is more likely to result in a successful modification than the alternative of mail-- or phone-based modification efforts. The early numbers show this program to be an impressive success when compared to State Court mediation programs. This program has the favor of the judges, and debtors will find the Court to be supportive of modification efforts.

If you are keeping your house and if your current mortgage payment is more than 31% of your income, then you should consider utilizing this program. There is usually an add-on charge of about $1,800 for additional attorney's fees, which will be paid through your plan, plus a mediator's fee in the range of $175 to $250.

When coupling this loan modification program with a lien strip of a junior mortgage, this strategy is the single-most effective tool available to a debtor who wishes to keep his or her home, and gives the best opportunity at having equity in the future. The only better option would

be a principal reduction, which presently is very difficult to obtain and should not be expected.

## STEP 8: The Discharge

A discharge is your main goal in a bankruptcy and the reason you filed. It is a court order signed by your judge which states that you are no longer obligated to pay your dischargeable debts, and it operates to permanently enjoin (prohibit) your creditors from attempting to collect the discharged debt from you. A discharged debt is no longer enforceable against you personally.

For a debt to be discharged, it must:

- be a dischargeable debt;
- be scheduled by the debtor in the petition (some exceptions apply to "no-asset" cases);
- not have been subject to an order denying discharge or a waiver of discharge; and
- not have been reaffirmed by the debtor.

### Timing

The timing of the discharge varies, depending on your particular circumstances. In a Chapter 7, the court usually grants the discharge about two to three months after the first date set for your Creditors' Meeting, unless an interested party should first file an adversary proceeding to deny your discharge or request an extension. In a Chapter 13, the discharge will arrive shortly after the final payment has been made to the trustee, in accordance with your confirmed plan.

### Secured Debts

It is very important for you to understand what happens to your secured debts when they are discharged in bankruptcy. A secured debt is a debt which is backed by collateral that can be repossessed or foreclosed on



by your lender if you default on your loan. The most common secured debts are car loans and mortgages, but other types of secured debts are judgment liens (special rules apply) and certain types of consumer-financed debt, such as furniture loans and appliance loans. If you did not reaffirm your secured debt in your Chapter 7, or make payment provisions in your Chapter 13, your secured creditor can, and usually will, repossess your collateral. This is particularly true for vehicle loans.

Your discharge eliminates your personal liability on that secured debt, so that you are not obligated to pay your lender. However, it does not eliminate your lender's right to repossess the collateral, so they are still permitted to take back your car or foreclose on your house, if you no longer pay them. The good news is that your discharge will prevent deficiency claims against you after repossession or foreclosure (which could have been huge debts), but the bad news is that you will lose the collateral. Therefore, when surrendering a house or car in bankruptcy, remember that your lender will someday come and retake that property, either through a foreclosure or repossession. Cars can be repossessed fairly quickly in a bankruptcy, but homes still must go through a foreclosure before you lose your interest (which is a long process in Florida, but one that is speeding up due to a 2013 law designed to quicken the foreclosure process).

One side note to this issue concerns first mortgages in Chapter 7 cases: Unless you have received a first mortgage from a credit union, it is highly unlikely that you will be asked to reaffirm your mortgage debt as a prerequisite to keeping your house. This is because the first mortgage lender is already in a superior legal position. That lender can always retake your house if you do not pay your debt, so there is little benefit in obtaining a reaffirmation from you. As for junior mortgages, we never suggest that you reaffirm those debts unless you have substantial equity in your house, since in the present real estate environment in Florida it is very unlikely that your junior mortgage will attempt to foreclose on your house after a bankruptcy. However, if home prices show significant improvement, the risk of foreclosure from second mortgages should increase.

Also, you must be advised that if you have multiple mortgages on your house and continue to pay your first mortgage holder after a bankruptcy, you probably will be able to keep your house for many, many years, if not indefinitely. However, unless you stripped your junior mortgage

from your property in a Chapter 13, the lien from the junior mortgage is still sitting on your title, even though the lender is probably idle. This means that if you have dreams of someday selling your house after a bankruptcy, that second mortgage will still need to be paid off at closing, even though you might not have been paying that mortgage for many years. This is why you should always seek to strip a junior mortgage if you intend on keeping your house, provided you otherwise qualify.

## Non-Dischargeable Debts

There are some debts that cannot be discharged due to public policy reasons. Non-discharged debts may still be pursued against you after bankruptcy. There are certain debts that can be discharged in a Chapter 13 case that cannot be discharged in a Chapter 7. Below is a list of common debts that will not be included in your bankruptcy discharge:

- Student loans (the definition is very broad and relates to any loan incurred for educational purposes).
- Most taxes, government fines and penalties (older taxes can sometimes be discharged).
- Child support.
- Spousal support (alimony).
- Property settlements from divorce (not dischargeable in Chapter 7, but dischargeable in a Chapter 13).
- Debts incurred from fraud, larceny, embezzlement, or damage from willful and malicious acts (non-dischargeable if a creditor should file a successful dischargeability action, otherwise these debts are dischargeable).
- Court fines and criminal restitution.
- Personal injury caused by drunk driving.
- Debts not listed on your bankruptcy papers (in no-asset Chapter 7 cases, most courts have determined that unlisted debts can still be treated as discharged).
- Debts accrued after you filed your case.



## *Question: What is the difference between a bankruptcy discharge and the closure of my case?*

You should not confuse your discharge with the closure of your case, since they can be very different events. In a Chapter 7 case, if there are no non-exempt assets to administer and if your trustee has filed a Report of No Distribution following your Creditors' Meeting, then your case will usually close at the same time as discharge. However, if your trustee has recovered assets from you and funded a bankruptcy estate, the trustee will notice your creditors and request that they file claims against the estate. While this is occurring the case will remain open, potentially for months or years, even after you have already received your discharge. Until closed, your case is still an active case and the trustee is still able to recover your non-exempt property notwithstanding the entry of discharge. In simple terms, your discharge relates to your debts, and the case closure relates to your assets.

## *Question: My case just closed. What does this mean?*

Congratulations, it means everything is done. Any assets that have not been administered by your trustee now revert back to you and you are free to dispose of those assets. Be careful, however, because if you failed to disclose your assets or committed perjury during your case, your trustee can reopen your case to revoke your discharge or administer those assets. This window to revoke a discharge is generally one year, but there is no window of time for a trustee to reopen your case to pursue your concealed assets.

If you fail to complete your debtor education class in a timely manner, your case could close without the entry of discharge. This would be devastating and defeat the very purpose of your bankruptcy. Therefore, we strongly encourage all Debtors to take their Debtor Education Class as soon as possible after the filing of the case.

# STEP 9: Life after Bankruptcy

## Impact on foreclosure

### Chapter 7

If you were already in an active foreclosure case when you filed your Chapter 7, your foreclosure will eventually continue unless you make arrangements to bring your mortgage current. Neither the Court nor your trustee will get involved in your negotiations with your mortgage lender if you seek to make arrangements to keep your house. Typically about a month into your case, if not sooner, your mortgage lender will file a "Motion for Relief from Stay" in your case, in which they are asking the Court for permission to continue the foreclosure. These motions are almost always granted after about 30 days. Therefore, filing a Chapter 7 will usually grant you a two month reprieve from your foreclosure, plus some possible additional time for your lender's attorney to reschedule the foreclosure hearing. If no motion is filed, your lender may also continue the foreclosure after the entry of discharge.

### Chapter 13

The answer depends on what you put in your plan. Unlike a Chapter 7, a Chapter 13 can stop a foreclosure completely, if you make provisions in your plan to bring the mortgage current over a five year period. This is typically accomplished by paying the normal first mortgage payment through your plan, plus 1/60th of your arrearage every month for five years. For example, if you are $6,000 behind on your mortgage and your normal monthly payment is $1,000, you could "catch up" on your mortgage and stop the foreclosure by paying $1,100 per month for 60 months.

In practice, however, this process is messy, because your lender will often add on to your arrearage a significant amount of late fees, interest, court costs, attorneys' fees and extras that massively inflate your arrearage balance. The Court has been pushing back on some of these charges in recent years, but many of them were included in your mortgage agreement and are valid (albeit unexpected). So what often happens, for example, is that Debtors believe they are only $6,000 behind on their mortgage but it turns out they are actually $12,000 behind according to their lender, and



this means they have to pay even more money to keep their house. We find, unfortunately, that most debtors are unable to pay even their regular mortgage payment by the time they file bankruptcy, so allowing them to "get current" over 60 months is usually unworkable. In this scenario, we would stress to our clients the availability of the loan modification program in Chapter 13 cases, and encourage their participation.

If you elect to surrender your house in your Chapter 13 or pay outside the plan (you have to be current on your mortgage to pay outside the plan, which just means you will pay your lender directly instead of paying your Trustee), you will not have protection against a foreclosure and you are on your own with your lender (much like with a Chapter 7). In this case, the lender will usually commence foreclosure proceedings if you are not current on your loan.

## Renting after bankruptcy. Getting a car.

Yes, of course you can rent. In 2010 alone, there were 1,593,081 bankruptcy filings. Over a million people are certainly not sleeping on the streets because they filed bankruptcy. Although there are no publicly available statistics on this issue, from our experience we find that clients have no problem obtaining housing after a bankruptcy/foreclosure. Although there will be a blemish on your credit, many landlords are eagerly seeking paying renters and are willing to overlook a bankruptcy filing. In some instances, you may have to offer your landlord an extra month's security deposit to ease their concerns. Remember, after a bankruptcy you are often debt free, which means you are potentially an attractive tenant to a smart landlord since you have fewer bills to pay. You may have to remind them of this fact if they have concerns about your prior filing.

As for cars, you usually can obtain new credit for a vehicle after a bankruptcy, but you should expect to put down a respectable down payment (in the range of 10%) and will probably pay a higher rate of interest than someone with perfect credit. If you are in an active Chapter 13, your trustee will have to approve a new vehicle purchase if you are financing the car, but our trustees usually grant these requests so long as the vehicle purchase is reasonable (nothing luxurious).

## Utilities

Public utilities cannot refuse service to a debtor who has filed for bankruptcy. They may however, require a deposit for future service.

## Employment Discrimination

A government agency may not discriminate against an individual for employment purposes simply because he or she has filed for bankruptcy protection, applicable both to hiring and retention decisions. A private employer may not terminate an employee because of a bankruptcy filing. This would defeat the very purpose of the bankruptcy system, which is to give the debtor a fresh start.

## Credit Reports and Scoring

One of the most common questions we see from debtors is "How will my credit score be affected?" This is also one of the hardest questions, because the answer is almost always "It depends."

Credit scores are a very complicated calculation based on many factors, including (but not limited to) payment history, debt-to-available-credit ratios, recent inquiries, overall debt levels, public records (judgments and bankruptcies), and number of open accounts. The precise algorithm applied to calculate a score is proprietary and a trade secret of the bureaus, but we know the overall purpose of the score is to determine the likelihood of future repayment as a gauge of risk to the lender. We also know that certain debts, such as mortgage debts and car loans, tend to impact your score more than revolving credit accounts.

In order to determine the impact on your score from a bankruptcy, it depends what type of debts you have, how many, and what your present score is at the time of filing. If you have only a few credit cards, a small vehicle loan, and no mortgage, and if your present score is very low (say 500), then your score after bankruptcy is not going much lower, and could even be higher after a few months. However, if you have a high score (say 780) going into bankruptcy and surrender your house and car and have a large number of credit cards, then your score will go down dramatically as a result of the filing.



From experience, I can tell you that most debtors suffer a score impact in the range of 50 to 100 points, but many of these debtors find that their scores are on the upswing just a year out of bankruptcy because they are largely debt free, and find paying the debts that remain to be a much easier task.

## Strategic Considerations

Bankruptcy is a fascinating mix of federal and state law, coupled with rules, guidelines and customary practice. Given the medley of judges, panel trustees, standing trustees, U.S. Trustees and creditor counsel, there is always the risk of the unknown in every bankruptcy case. There is nothing like it in any other area of law.

The best friend of any debtor going through bankruptcy is usually the legal professional who has been through hundreds or thousands of other bankruptcies, since experience and an acute sense of reality often are the most valuable tools in the consumer bankruptcy world. It is important to know the players, their tendencies, predilections and policies, so that a debtor can get through his or her case with the least amount of tension and stress.

Below, I have listed some general strategic considerations for filers in the Tampa and Ft. Myers Divisions.

### Avoid pre-petition transfers

Your trustee, especially your Chapter 7 Trustee, and certainly the U.S. Trustee, detests transfers of property that occur before a bankruptcy filing. These should be avoided as much as possible, as they often will get you in trouble. Selling your car to a friend or family member, deeding a house to a close neighbor, or having a massive garage sale in which you unload all of your household possessions before you file a bankruptcy is likely to be met with contempt, and a possible adversary action for fraudulent conveyance. If you absolutely must sell some of your property before filing, only do so as a matter of last resort (literally, to feed your family, keep the power on, or to pay rent) and only sell your property to a legitimate third party (not friends or family) and only at fair market value. Document everything, and be able to prove what you sold, who you sold it to, and what you did with the money.

## Appearances and attitude matter

Bankruptcy is a very human process, and appearances and attitude do matter to the people who govern the bankruptcy world. If you are disrespectful or vague with your Trustee, he or she will probably conclude you are hiding something, and could go to great efforts to investigate you and your assets. If you take a cruise or trip to Vegas two months before filing, that does not convey to the U.S. Trustee the appearance that you are in dire need of debt relief, and could earn you extra scrutiny and a motion to dismiss. If you take out a large loan and then default on the very first payment, that gives the impression to your creditor that you never had any legitimate intent to repay the loan, and could earn you an adversary suit to deny the debt's discharge. Be smart about your actions, and if you have done anything recently that will not present well to your Trustee or the U.S. Trustee, you should try to delay your filing until there is more time between your questionable conduct and your filing date. We recommend no less than six months, but a year if possible, because the passage of time plus honest disclosure can be the best ointment for questionable conduct.

## Equitable considerations

Bankruptcy is an equitable process, which generally means that our judges have a tremendous amount of discretion, and are vested with considerable power to exercise their own best judgment about a case in terms of what is reasonable and fair in the balance between debtors' and creditors' rights. Knowing this, the trustees also take into consideration certain equitable issues in every case, and ask the question "why" along with "what." For instance, if your debt burden was caused by a loss of job from a layoff or due to a legitimate injury or disability, this is certainly going to be met with greater flexibility than if your debt burden was caused by a recent increase in credit card debt or gambling losses. In the same sense, medical debts are perceived as less controversial than credit card debts. Debtors of advanced age, with low income, with infirmities, single parents, recently divorced, or crime victims will, on the whole, have an easier time than other debtors, when all other considerations are held constant.



## Tax Refunds

If you are expecting a sizable tax refund in the current year, you may wish to consider delaying your filing until after you receive and consume your refund, unless you are in an emergency situation where you have to file immediately. If you spend your refund, you must maintain a detailed accounting of how you spent the money, and should only spend the money on normal day-to-day living expenses (for example: insurance, mortgage, rent, utilities, food, car, daycare, etc.) and medical procedures. Do not spend your tax refund on the repayment of unsecured debt or on vacations, and do not gift it away.

## Student loans are not going away

It is nearly impossible to discharge student loan debt, which is unfortunate since the trend in the last decade has been that this type of debt is increasing at a staggering rate compared to other dischargeable debt. On the upside, the fact that student loans are not dischargeable does make them easier to obtain, but the downside is that these debts are often massive and never seem to go away. The law does allow these debts to be discharged if you can show "undue hardship," but the standard for undue hardship is nearly insurmountable. If you have any means of support or income, you are unlikely to meet this standard. The few people that do qualify for undue hardship tend to be permanently disabled without any valuable skill sets. Therefore, please do not expect to be able to discharge your student loan debt since this will lead to disappointment.

## Divorce and property distribution planning

If you are facing a divorce and are likely to receive a property distribution settlement from your former spouse, you should consider structuring the marital settlement agreement so that you are to receive alimony in lieu of a property distribution, to the fullest extent feasible. Alimony is never dischargeable, but property distribution debt can be discharged in a Chapter 13. On the flip side, if you are likely to be the payer in a divorce settlement, it may be favorable for you to structure the settlement with a larger property distribution amount and a smaller alimony amount, in order to preserve bankruptcy options down the road.

## Allowing priority debts to increase the value of your Chapter 13 versus non-bankruptcy settlement options

There are certain general truths about Chapter 13 cases and unsecured debt:

- The higher your income the more you will usually have to repay.
- The "value" of a Chapter 13 is often measured in terms of paying the least amount of your dischargeable debts back while still receiving a discharge.
- You usually have the option of settling your debts outside of bankruptcy by paying a discounted amount to a collection agency.

Given these assumptions, most people would assume that above-median earners would have a lower value Chapter 13 case, and that they would do better by settling their debts outside of bankruptcy. However, if you have a large amount of non-dischargeable debt (alimony, child support, and taxes) and dischargeable debt (credit cards and medical bills), there still could be a place for you in a Chapter 13 that would make the case highly valuable. This is because certain debts (priority debts) get paid back in full before other debts are paid at all (we call this the prioritization of debts).

The logic here is that you will have to pay these priority debts anyway since they are usually not dischargeable, and they get paid before your general unsecured creditors. Therefore, you can use your Chapter 13 to pay your priority debts and still potentially discharge your other debts without paying a substantial amount back, even if you have substantial income, thereby increasing the value of your case in comparison to a non-bankruptcy settlement. Let me demonstrate this with two examples:

***Example A (no priority debt).*** Let's assume you have $120,000 in debt and $1,000 per month in disposable income. Your debt consists entirely of credit card debt. You are considering either (Option A) settling your debts in exchange for a 40% reduction in the balance or (Option B) filing a Chapter 13 bankruptcy. In Option A, the settlement will cost you $72,000. In Option B, the Chapter 13 would require you to pay back $60,000 over five years. In this example, the savings from your Chapter 13 was $12,000 over the settlement costs.



***Example B (some priority debt):*** Now let's assume you again have $120,000 in debt and $1,000 per month in disposable income. Your debt consists of $80,000 in credit card debt, and $40,000 in past-due alimony (a priority debt). You are again considering either (Option A) settling your credit card debt in exchange for a 40% reduction in the balance or (Option B) filing a Chapter 13 bankruptcy. In Option A, the settlement will cost you $48,000, and you will still have to pay another $40,000 in past-due alimony, so the total cost is $88,000 to eliminate your debt. In Option B, the Chapter 13 would require you to pay back $60,000 over five years, with $40,000 going to your priority debt and $20,000 going to your credit card debt. So by filing bankruptcy, you eliminated your debt for $60,000 instead of the $88,000 it took in Option A, thereby saving you $28,000.

Table 4 – Example of maximizing value in a Chapter 13 with priority debts.

| | Debt | Option A - Settle at 60% of balance | Option B – Chapter 13 Bankruptcy | Savings achieved through Bankruptcy |
|---|---|---|---|---|
| **Example A:**<br><br>**$1,000/m disposable income** | $120,000:<br><br>all credit card debt | Cost $72,000 | Cost $60,000 | $12,000 |
| **Example B:**<br><br>**$1,000/m disposable income** | $120,000:<br><br>$80,000 credit card and $40,000 back alimony | Cost $88,000:<br><br>$48,000 to settle plus $40,000 in back alimony | Cost $60,000 | $28,000 |

## Remember to lien strip

Lien stripping is an amazingly valuable option in a Chapter 13, and usually is the decision maker for homeowners contemplating filing either a 7 or a 13. It is the single most effective tool at giving a homeowner the possibility of having equity in a home that they intend to keep. In order to use lien stripping in a Chapter 13, your home value must be less than the present balance owed on your first mortgage. Lien stripping only applies to junior mortgages and liens, such as HELOCs (lines of credit) and IRS tax liens, but does not impact the first mortgage.

To prove the value of your home, you can order an appraisal (as of your filing date) at a cost of about $350, or if the valuation is unlikely to be challenged by your lender, you can rely upon your tax assessor's valuation. Currently, it is very rare for junior mortgage lenders to challenge a lien stripping motion, and if they do, the issue of valuation will be the sole litigated issue (unless the balance on the first mortgage is in question, which is also rare). There is usually an additional attorney fee of $300-400 for each uncontested lien strip in a Chapter 13 case, which is added to the plan.

## Don't roll over for credit cards in dischargeability suits

We always counsel our clients to avoid using credit cards before a bankruptcy filing, especially in the 90 days leading up to the filing date. However, sometimes it still happens where a Debtor will use a credit card and incur or increase a balance. If the charge is large enough, the credit card company may elect to file an adversary proceeding to deny the discharge of that debt. The legal threshold to incur this wrath is $600 in charges in the 90 days pre-petition (slightly different for cash advances), but the practical threshold is actually a little higher, closer to $2,000 in the prior 180 days. The bad news is that a Debtor will almost never prevail on the merits against a credit card company, but the good news is that a credit card company almost never wants a trial on the merits. These cases can be settled for very favorable terms, and almost always are settled. So do not lose hope if you receive a complaint from a credit card company while in bankruptcy that attempts to deny your discharge for pre-petition credit card usage, but be prepared to work out a deal.



## Do not lie to your trustee or on your petition

The reality of the bankruptcy world is that it is largely an honor system, where trustees rely upon Debtors to accurately list their debts, assets, and income, under the promise that the Debtor is telling the truth, and under the penalty of perjury if not. Perjury is a crime, and perjury in bankruptcy can be a serious crime punishable by substantial fines and even prison time. Lying is not worth it! You might be tempted to conceal your diamond ring or your investment property from your trustee by not disclosing it, thinking it will save you some money. In some cases, you may be right, but if you are caught, I assure you the money you attempted to save will be a pittance compared to the legal troubles you will face. Trustees are smart, and know all the tricks and know where to look. The U.S. Trustee is also smart, and if they suspect that you are concealing assets, they have the benefit of using the FBI to investigate you, which is never an attractive outcome. So be honest … it might cost you some money or property, but in the long run your bankruptcy is probably eliminating far more debt than the property you could lose to your Trustee, so consider it the cost of getting a fresh start.

## Strategies for the means test

The means test is generally the scariest part of the Chapter 13 bankruptcy process, especially for lawyers, because it seems that there is a tremendous amount of fluff and "grey area" in the test, and many of the presumptions in the means test seem to disfavor the Debtor. For example, if a Debtor was unemployed for 3 of the last 6 months, the means test will show significantly lower income than the present income of the Debtor because it reflects an average over the prior six months, but the Trustee will base the plan payment not on the means test income but rather on the actual present income. On the flip side, if a Debtor loses his job immediately before filing bankruptcy (very common), the means test will reflect a much higher income than the present income, but the Debtor can expect his plan payment to be based on the average income and not the present income. It is a lose-lose situation and the Trustee seems to always come out on top.

However, there are a few "tricks" that can work in the Debtor's favor. These are legal methods of maximizing your deductions on the means test to give you the smallest potential payment plan:

- **It is better to have a car with a loan than one that is free-and-clear in a Chapter 13.** Also, if a joint filing, it is much better to have two cars, each with loans, than cars that are paid-off. The reason is that you get a much larger standard deduction for the ownership costs of a vehicle if there is a loan against that car, even if the loan is relatively small. Presently, the ownership deduction in Florida is $517 per month per car if the car has a loan. So, for example, if there is a $100/m loan payment on your car, you are getting an additional "bonus" deduction of $417/m for having a car payment, which over a 60 month plan could save you over $24,000.

- **Get health insurance!** You can deduct the actual cost of health insurance premiums against your disposable income. So if you are contemplating a Chapter 13 filing and do not presently have health insurance, it would usually make sense for you to obtain a policy before you file, since the entire cost of the policy will be deducted from your available income, thereby lowering your plan payment by the same amount as the cost of your insurance. This makes good sense if you presently have sufficient disposable income to afford the insurance and not an overwhelming amount of non-exempt assets.

- **Track and document your charitable contributions.** When the bankruptcy process was overhauled in 2005, Congress was careful not to discourage charitable giving by Debtors. This is somewhat counter-intuitive, of course, but you can actually deduct up to 15% of your income from cash donations, which could lower your plan payment in a Chapter 13. However, the Trustees despise these deductions and treat them with heavy suspicion (rightfully so), and if you intend on claiming charitable donations as a deduction, you must be able to prove the donations. So keep your receipts, returned checks, and bank statements showing your donations. Avoid giving cash if a check would work, since checks can be proven. And maintain a steady, consistent pattern of donations leading up to your filing, preferably for six months to a year, and continue the donations after you file.



### If your income is very high, file your Chapter 13 before your foreclosure is final

If you are in an active foreclosure and have high income, it could be helpful if you file before your foreclosure is final. If you wait until the foreclosure is final before filing, your lender may obtain a deficiency judgment against you, which is an unsecured money judgment. That judgment would have to be repaid in your Chapter 13 bankruptcy if you have substantial disposable income, and could make your plan untenable. However, if you file your case before the foreclosure is final, the bank will have a much harder time obtaining judgment or proving a deficiency claim against you before the claims bar date, which means you will not end up paying the deficiency through the plan.

There are different schools of thought on this advice, since the lender could attempt to argue that the deficiency claim did not arise until the conclusion of the foreclosure, thereby making it a post-petition debt not subject to discharge. I would not accept that argument, however. In practice, we are not seeing banks pursue deficeincy claims after bankruptcy, likely due to the severe ramifications and fines they could face if it turns out their attempt to collect the deficiency claim was a violation of the discharge injunction.

### Remember to consider pending inheritances

Inheritances have a special place in bankruptcy, since they are one of the few types of assets that can fall under the jurisdiction of your Chapter 7 Trustee even if they do not come into existence until AFTER your case is filed. If you inherit money within 6 months of your filing date, your Trustee can still reach that money and administer it with the estate. Therefore, if you expect soon to receive a large inheritance from a dying loved one, you should consider delaying or cancelling your filing if feasible.

### Don't Transfer Debts to Credit Cards and Don't Pay off Debts with Retirement Accounts

Moving your debts to your credit cards (through cash advances or balance transfers) prior to filing bankruptcy is only inviting trouble. These can been seen as fraudulent or preferential, and can cause more harm than good. For instance, you might pay off your taxes or student loans using a credit card thinking you can eliminate the debt in bankruptcy, but the credit card companies will sometimes see this and file an action to render that debt non-dischargeable. In that case, you would probably have to pay back the debt and incur additional attorney's fees in the process. If you made the unintentional mistake of taking cash advances to pay off your taxes or student loans, then at the very least you should wait six months to a year before filing to reduce the risk that you will face an adversary action.

Paying off debts with your retirement accounts is almost always foolish. The retirement accounts are almost always exempt, so you ultimately end up wasting your retirement savings to pay off a debt that could be dischargeable (or at least compromised to a smaller sum after bankruptcy).

### Consider smart bankruptcy alternatives, but be cautious of debt consolidation companies

You might find it surprising that a bankruptcy attorney would suggest that you consider alternatives to bankruptcy, but in reality there are instances where bankruptcy is not necessary. I would caution you, however, to be very leery of debt consolidation companies (sometimes called credit counseling companies or debt management companies), as in my experience they tend to put their own interests in front of clients, and charge a very hefty fee for services that often do not result in a successful outcome. I have a room full of cases that were filed for clients who came to me after an unsuccessful (and expensive) attempt to resolve their money issues by using a debt consolidation company. After the real estate collapse in 2007 and 2008, many mortgage brokers who formerly worked in the "mortgage mills" lost their jobs, and a significant number of these people (usually men in their early-20s) went to work in the debt consolidation world. Can a zebra change its stripes?



There are smart alternatives, however, depending on your circumstances. For example:

- If you have less than $10,000 in debt, bankruptcy is probably not a smart option, regardless of your income. You would do better to work out a payment option directly with your lender.

- If your debt is primarily for medical bills, most hospitals and medical offices will greatly discount these debts if your reach out to them and explain your hardship, especially after the debt ages past a year. You can probably avoid bankruptcy with a nominal payment.

- Diversify, remain private, and lease. If you are facing collection efforts and do not want to file for bankruptcy, spread your money around in different banks to limit the risk of a garnishment, and hold some money in cash in your residence. Do not tell a collection agent where you work, where you bank, and what you drive. And if you are in the market for a new car, you may wish to consider a leased vehicle for your next purchase.

- If you have minimal assets, below-median income, minor credit card debt and medical bills, but are facing a substantial litigation liability from a deficiency judgment or business failure, then you are in a good position to negotiate the debt to avoid bankruptcy. In bankruptcy, your creditor would probably get nothing, so by offering it a nominal sum (a few thousand dollars?), you give it the opportunity to walk away with something instead of nothing, allowing you to avoid bankruptcy. This often works, but you may need to provide your creditor with a financial affidavit to make your threat credible.

- Sometimes doing nothing is an option! If you have insignificant non-exempt assets and live on disability or social security, or are the sole wage earner and have dependents, your creditors probably cannot do much against you even if they do get a judgment and attempt collection. You may face creditor calls for a few months, but you can ignore them. At the end of the day, there is nothing for your creditor to take, so you can disregard their collection efforts. This is even true if you own a home,

since your Florida homestead is exempt from the claims of unsecured creditors (don't ignore your mortgage holder though, and pay your property taxes). Of course, if you plan on having significant assets in the future, then you do not want a judgment against you because that judgment is usually collectible for 20 years, and could come back to haunt you later.

- Marriage can offer a strong shelter. Florida is a tenancy by the entirety state, which is an amazingly powerful tool that could be used against creditors as a shield against their collection efforts. Generally, property owned in Florida that is legitimate marital property (called "tenancy by the entireties" property) is exempt from spouses' separate creditors, but not their joint creditors. For example, if a husband and wife own an investment property together, as husband and wife, that they acquired while married, and if the husband is facing a judgment from his failure to repay his credit card (not the wife's debt), that creditor cannot levy against the investment house since that property is exempt from his creditor. If the credit card was a joint debt, however, then the investment house is vulnerable. With smart planning, marital asset ownership can be an effective alternative to bankruptcy, but the rules for establishing marital ownership are precise and time-sensitive, and beyond the scope of this guide.

**Contact Christopher D. Smith at Smith@ChrisSmith.com or 941-907-4774 if you are in need of legal services. Sign up for our newsletter at www.ChrisSmith.com.**



## About the Author

Christopher D. Smith graduated magna cum laude from Harvard University (Cambridge, MA), then obtained his Juris Doctorate from Georgetown University (Washington, D.C.). A longtime resident of Florida, Mr. Smith also graduated from Pine View School in Sarasota. He is a member of the bars of Florida, Virginia, and Washington, D.C. Before becoming an attorney, Mr. Smith owned and operated a debt subrogation company in Washington, D.C. Mr. Smith started his legal career with the international law firm of Dechert LLP working as an associate in the securities law division. He joined the Florida Bar in 2002, and returned to Florida in 2005 to pursue a solo practice. His practice areas include bankruptcy, debt mitigation, litigation, real estate, corporations, estate planning, probate and guardianship. Outside of work, Mr. Smith is a football referee and father of three.

Please click here to visit his consumer law blog, covering a large variety of consumer topics for residents of Florida.




1561 Lakefront Dr 204
Sarasota, FL 34240

www.chrissmith.com

Phone: 941-202-2222
Email: smith@chrissmith.com

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