

## The New Bankruptcy Law – (effective October 17, 2005)

### Filing Chapter 7 Bankruptcy in Florida

A permanent resident of Florida can file bankruptcy in a Florida bankruptcy court. Florida has three bankruptcy districts (Southern District, Middle District, and Northern District), and each of Florida's counties is assigned to one of the three bankruptcy districts. You must file bankruptcy in the district where you reside.

An important concept in both Chapter 7 and Chapter 13 bankruptcy is "exemptions" or "exempt property." When you file a Chapter 7 bankruptcy, the Trustee takes all of your "non-exempt" property and sells it for the benefit of your unsecured creditors. The Trustee cannot take your exempt property and you may keep all of your exempt property regardless of its value and amount. What property is "exempt" and what property is "non-exempt" depends on the exemption laws of the applicable state. Each state has its own and different laws about what assets are exempt and non-exempt for bankruptcy purposes. Therefore, before you file bankruptcy you and your bankruptcy attorney must ascertain which state laws will determine your exempt assets.

Florida has liberal bankruptcy exemptions for some assets, including an unlimited homestead exemption in most cases, and limited exemptions for other assets. Only Florida residents are eligible for Florida exemptions. Just because you are a Florida resident when you file for bankruptcy does not mean you are entitled to Florida exemptions in bankruptcy.

Under the new bankruptcy law the state exemption law applicable to your bankruptcy is determined by the state in which you have been domiciled for the 730 days (two years) immediately preceding your filing date. If you have not been a permanent resident of Florida for the two-year period immediately preceding your bankruptcy, then your bankruptcy exemptions will be those allowed by the state in which you were domiciled for 180 days immediately preceding the two year period, or the state in which you were domiciled for the longer portion of such 180-day period.

Otherwise stated, a person filing bankruptcy in Florida today is eligible for the property exemptions he could have claimed if he had filed two years ago. If this person was a Florida resident two years ago he claims Florida exemptions today; if two years ago he was a resident of a different state then he is entitled to the exemptions of the state of his prior residence.

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### Exempt and Non-Exempt Property in Florida

If Florida exemption law applies to your bankruptcy, the following are the principle bankruptcy exemptions under Florida law.

#### Exempt Property

1. Homestead. Your homestead is exempt property under Article X, Section 4 of the Florida Constitution. This protection is afforded homestead properties situated on one-half acre or less within a municipality and properties up to 160 acres outside a municipality. There is no dollar limitation. The homestead exemption applies to all Florida residents. The new bankruptcy law does not affect homestead protection for Florida residents in state court proceedings.

The new bankruptcy law does change the homestead exemption for Florida residents who file bankruptcy. Under the new law you can protect unlimited equity in your homestead provided you purchased the residence 40 months or more prior to filing bankruptcy. If you purchased your home within 40 months the new law exempts up to \$137,000 of equity. The exemption amount is increased (effective April, 2007) from the original \$125,000 to approximately \$137,000 per person. Additionally, if you injected cash in your home

within the 40 months, such as by paying down the mortgage or building a home addition, the amount of investment made within the 40 months will not be exempt even if you purchased the home 40 months prior to filing. The \$137,000 homestead exemption limit applies only in bankruptcy cases. Several courts have held that a married couple filing jointly can claim two homestead exemptions for a total homestead protection of \$274,000.

2. Statutory Exemptions Chapter 222 of the Florida Statutes includes several categories of exempt property, including: pensions, 401K plans, tax deferred retirement plans, Social Security income, disability income, IRAs, annuities, cash value of life insurance, college investment plans (including 529 Plans), health savings accounts, and hurricane savings accounts.

3. Automobile Exemption: You are allowed to exempt \$1,000 of equity in an automobile. Spouses who jointly own a car may exempt \$2,000 of value in that car. Most bankruptcy trustees use the average retail/wholesale value from the yellow NADA book, adjusted for the condition of your car. If the balance of your car loan is greater than the car value ("upside down") then you have no car equity and your car is protected in bankruptcy so long as you keep your car payments current.

4. Miscellaneous personal property exemption. Each bankruptcy debtor is allowed to exempt \$1,000 (\$2,000 for joint filings) of all other personal property including furniture, cloths, tools, and estimated cash on hand. For bankruptcy purposes the value of your personal property is its current fair market value at a public market such as a garage sale or flea market sale. A new Florida statute effective July 1, 2007, provides a \$4,000 "wildcard" personal property exemption to bankruptcy debtors who do not claim a homestead exemption. You must not own a home or intend to surrender the home you do own to the mortgage lender in order to qualify for the wildcard exemption. Joint debtors can claim a \$8,000 wildcard exemption.

## **Non-Exempt Property**

Any property which is not exempt under Florida law is included in the bankruptcy estate. The Chapter 7 Trustee may take and sell all non-exempt property and distribute the proceeds to the unsecured creditors. (You will have the opportunity to keep your non-exempt property by entering into a "buy-back" agreement with the Trustee. If you execute a buy-back agreement with the Trustee, you will make either a lump sum payment to the Trustee or make monthly installment payments over a period of several months.)

## **Credit Counseling**

The new bankruptcy law requires that anyone who files bankruptcy must receive credit counseling and financial education by approved providers as a condition for filing bankruptcy and discharging debts. No one can file bankruptcy unless they complete accredited credit counseling within 180 days of their bankruptcy filings. The credit counseling can be provided in person, by telephone conference, or over the internet. You have to pay for credit counseling, but the costs will be regulated by the United States Bankruptcy Trustee office. You will be required to file a certificate from the credit counseling agency verifying the course completion with your bankruptcy petition. If credit counseling resulted in a debt repayment plan, you must file a copy of the plan. Your bankruptcy attorney can tell you where to find approved credit counseling providers.

In addition, during the course of your bankruptcy you must also complete an instruction course concerning personal financial management in order to have your debts legally discharged. As is the case with credit counseling, financial management courses may be provided by phone or on line. You are responsible for the course fees. Your bankruptcy attorney can tell you where to find approved financial management providers.

## **Eligibility For Chapter 7 Bankruptcy**

Under the old bankruptcy law almost any resident of the United States could file Chapter 7 bankruptcy. The new bankruptcy law includes a two part test of Chapter 7 eligibility. The first test applicable in every Chapter 7 filing is the "means test." The means test is a mathematical formula to determine who may (and who may not) be eligible to file Chapter 7 bankruptcy. The means test applies only to people whose debts are primarily consumer debts. Consumer debtors include credit card debts, car debt, or mortgages for the primary residence. Many people are forced into bankruptcy because of non-consumer debt such as debts

from a failed business, large business related judgment or delinquent mortgages on investment real estate. Those people whose debts are primarily business or investment debts, or debtors who owe primarily other non-consumer debts such as taxes or student loans, are exempt from the means test; these people may file Chapter 7 bankruptcy regardless of their income and expenses. Most importantly, if your family income is less than the median income for similarly sized Florida households you too are exempt from the means test. As of October, 2008, the Florida median income for a two-person household is approximately \$52,000. The median income for a single person is approximately \$41,000.

The means test formula is designed to evaluate whether the debtor has the financial means to pay back a substantial part of his debts in a repayment plan through Chapter 13 bankruptcy. The means test formula considers measures of income and allowable expenses. If, according to results of the formula, you do not have sufficient net monthly income to repay debts you are eligible to file Chapter 7; if the formula says you can repay your debts you are not eligible for Chapter 7 bankruptcy unless you prove "special circumstances" of hardship such as a recent job loss or medical problem. You may be eligible for relief in Chapter 13 bankruptcy.

The *means test formula* is very complex and several of its important terms are counter-intuitive. The formula incorporates a variety of government statistics from several sources as well as information about each debtor's financial situation. Calculations under the formula are difficult to do without a professional computer program designed for bankruptcy attorneys to prepare bankruptcy petitions.

You may not obtain a discharge in a Chapter 7 bankruptcy within 8 years of the filing date of a previous bankruptcy in which you received a Chapter 7 discharge- the prohibition is 8 years from the prior filing date rather than the prior discharge. There is a 6 year wait after a prior Chapter 13 discharge. Thus, a debtor may obtain a discharge in a new Chapter 7 cases as long as 6 years have passed since the filing of a prior Chapter 13 case in which a discharge had been granted. In addition, there is no time restriction on obtaining a discharge in a new chapter 7 case after a prior Chapter 13 case in which a discharge was granted if 100% of the allowed unsecured claims were paid, or in which the actual payments under the previous Chapter 13 plan comprised at least 70% of the allowed unsecured claims in that case.

A summary of the means test and its most important terms and definitions is provided in the bankruptcy section elsewhere on this website.

## Basic Bankruptcy Information

**Secured or Unsecured Debts.** The bankruptcy petition asks you to list secured debts separately from unsecured debts.

*Unsecured debts* include personal loans and credit cards issued by banks, such as Visa, MasterCard, American Express, or Discover, and other credit cards used to purchase consumable items. Vehicle leases are unsecured debts. Medical bills and personal loans are also unsecured debts.

*Secured debts* include those debts where the creditor has a security interest in your property to guarantee payment. Examples of secured debts include mortgages, car loan, loans from finance companies (usually secured by household items), furniture, computers or electronics. If you purchased store goods using a store credit card, such as a card from Circuit City, Rooms to Go, Best Buy, Rhodes, etc., the store probably has a security interest in certain items purchased, which makes the store a secured creditor.

**Secured Property.** After filing a Chapter 7 bankruptcy, you will have to choose to either reaffirm secured debts or surrender the secured items to the creditor. You are entitled to keep any secured property as long as you continue to pay the loan for that property. If, however, you elect to surrender secured property, the secured creditor may not thereafter recover any money from you personally on account of that debt. Some mortgage companies recently have required borrowers to sign cross-collateralization agreements by which the mortgage borrowers pledge bank accounts and other financial instruments to secure their mortgage. A cross-collateralization clause allows the mortgage lender to get money in your financial accounts to pay delinquent mortgage payments. If you are unsure whether you pledged financial accounts to your mortgage lender you should review the papers you signed when you got your mortgage.

**Reaffirmation Agreements.** The law requires you to execute a reaffirmation agreement for secured personal property you want to keep. You do not have to reaffirm mortgages on land. For personal property, you must sign a reaffirmation agreement within 45 days of the first meeting with the trustee (the meeting of creditors or 341 meeting). If you do not sign the reaffirmation agreement or redeem the property within 45 days, the automatic stay is lifted as to that property and the creditor is permitted to take all legal action allowable under the law to repossess the property (if payments are not current). Signing a reaffirmation agreement means that you will be personally liable to pay the debts after your bankruptcy is over

**Redemption.** Bankruptcy also gives you the option to “redeem” secured personal property such as furniture, computers, automobiles, or other property purchased on credit and subject to a lien in favor of the lender. Redemption means purchasing the property from the secured lender at its current retail market value considering its age and condition. When the current retail value is less than the amount due under the loan, redemption can be financially beneficial.

**Student Loans.** Student loans are not dischargeable unless you can show that your loan payments impose “undue hardship.” In order to eliminate your student loans under the “undue hardship exception” you must file a separate motion with the bankruptcy court, and you must appear before the bankruptcy judge with proof of your hardship. As a practical matter, it is very difficult to demonstrate undue hardship unless you are physically unable to work.

## Procedure Before Filing

**Unfair Debt Collection.** The Federal Fair Debt Collection Practices Act (the “Act”) prohibits unfair collection of consumer debts. If you can prove that your creditors intentionally and repeatedly violated the Act before or after you retained your bankruptcy attorney, you may be able to recover damages. The following is a summary of a few prohibited debt collection practices:

1. Calling you before 8 a.m. or after 9 p.m. local time.
2. Contacting you directly after you told the creditor you retained me to represent you.
3. Telling your employer or co-worker that you owe money to the creditor.
4. Calling you at work after you have told them not to.
5. Intentional and continuous harassment or abuse in connection with a debt.
6. A creditor’s representative falsely representing that he is an attorney when in fact he is not licensed to practice law.
7. Threatening you with arrest or imprisonment for failing to pay a debt.
8. Communicating with anyone other than you or your spouse about your debt.

**Use of Credit Cards.** Do not use any credit cards after our initial consultation with your bankruptcy attorney or once you have decided to file bankruptcy. If you have charges or cash advances in the months preceding filing bankruptcy, the creditor may file an adversary complaint alleging that you incurred recent charges with fraudulent intent and without the intent and/or ability to repay these debts.

**Get a Credit Report.** You must obtain a credit report and furnish a copy to our office prior to filing bankruptcy. If you have recently been denied credit, you are entitled to a free credit report from the reporting agency. Instructions for obtaining this report should be on the letter you received denying credit. Also, a recent federal law gives you the right to obtain a free credit report once a year. You can obtain a free credit report from one or all of the primary credit reporting agencies at <http://www.annualcreditreport.com>.

**The Automatic Stay.** The automatic stay acts like a shield between you and your creditors by prohibiting the commencement or continuation of creditors’ judicial proceedings against you as well as all collection efforts. The automatic stay does not begin when you hire a bankruptcy attorney, but begins only after you file your bankruptcy petition.

## Trustee Meeting After Filing the Petition

**Notice of Meeting of Creditors.** When the petition is filed, a combined Order Scheduling a Meeting of Creditors and Fixing Filing Dates for Claims, Complaints Objecting to Discharge, and Complaints Seeking Exception to Discharge will be sent by the Court to all creditors and to you. This is commonly referred to as the "341 Notice" or the "Creditor Meeting Notice." You should receive this Notice from the bankruptcy court approximately ten (10) days after your petition is filed.

**What is a Trustee and What Does He/She Do?** The "Bankrupt Estate" consists of all legal and equitable interests you have in property as of the date the case is filed. In Chapter 7 one primary job of the Trustee is to gather all of your non-exempt assets, sell those assets, and distribute the proceeds among all your unsecured creditors. A Trustee is randomly appointed by the Court immediately upon the filing of a Chapter 7 petition. The Trustee is usually a private attorney and is compensated primarily by a percentage of the non-exempt assets he or she is able to collect and distribute to your creditors.

**Meeting with Trustee.** In the Southern District of Florida, the meeting with your Chapter 7 trustee (the "creditors meeting" or "341 meeting") is held in a conference room, not the courtroom, and the federal bankruptcy judge is prohibited by law from being there. Typically this meeting will last about ten minutes. The trustee will ask you questions about your bankruptcy petition.

**Who attends?** You are required to attend the creditors meeting with the bankruptcy trustee (if filing jointly, both husband and wife must attend). Your bankruptcy attorney (if you wish to hire one) will accompany you to the meeting. As a practical matter very few, if any, unsecured creditors attend. The trustee's job is to represent all creditors whether or not a creditor attends the meeting of creditors.

**What Happens at the Creditors Meeting?** The Chapter 7 Bankruptcy Trustee will ask you questions, but (s)he will not interrogate you, cross-examine you, or threaten you. The trustee may ask you why you filed bankruptcy. The trustee often asks questions about your assets and your sources of income.

**Tax Returns.** The new bankruptcy law gives the Chapter 7 Trustee (or the Judge) the right to verify information about your income by reviewing copies of your income tax returns. Upon request of the court, the Chapter 7 Trustee (or the US Trustee) may request that you file a copy of your federal tax return (or a tax transcript) for the tax year ending during the time the case is pending and/or for the three years prior to the filing of the petition. As a practical matter, you should file with your bankruptcy petition a copy of your last two federal tax returns filed with the IRS. Income tax refunds are property of the bankruptcy estate and will be paid to the Chapter 7 trustee.

## The Bankruptcy Discharge

**60-Day Waiting Period.** After the Creditors Meeting, there is a 60-day period during which time creditors can file claims if they believe you have non-exempt assets and during which creditors may object to being discharged provided they have legal grounds. Grounds for objection to discharge include the fraud, student loans, alimony and support obligations etc.

**Discharge Order.** A minimum of 60 days (usually more) following the creditors meeting you should receive a copy of a court order that discharges your debts. The discharge order wipes out your debts and liability to creditors in your bankruptcy. Do not expect to receive your discharge immediately after 60 days. You can call the Bankruptcy Voice Case Information System at (866) 879-1286 for an update on your case.

**Discharged Debts.** The entry of a discharge order does not affect a secured creditor's rights in property which you pledged to repay the secured creditor. The secured creditor can always repossess the secured property if you do not pay according to your loan agreement. In addition, the discharge order only discharges debts that "are dischargeable." Therefore, the order does not eliminate non-dischargeable debts, such as student loans, ineligible tax liability, or loans procured by fraud or by abuse of the bankruptcy system. The Order of Discharge does not give you a list of specific debts that were discharged; it simply states that dischargeable debts are discharged.

**Debts Not Discharged.** The Bankruptcy Code has a list of debts which cannot be discharged in Chapter 7 bankruptcy. These non-dischargeable debts include:

- Debts incurred through fraud or embezzlement;
- Recent income tax liability;
- Education loans / student loans;
- Fines and penalties payable to the government;
- Child support, alimony, and property settlement obligations;
- Debts incurred for the purchase of luxury goods.

There is a presumption of non-dischargeability for cash advances of over \$750 taken within seventy (70) days of filing and for purchase of more than \$500 within ninety (90) days of filing.

## **CLOSING YOUR CASE**

Approximately 30 to 45 days after the Discharge, you will receive another notice stating that your case is closed. This means that your bankruptcy case is over.

## **LIFE AFTER BANKRUPTCY**

**Bankruptcy and Your Credit Rating.** Bankruptcy will appear on your credit report for several years. This does not mean you cannot get credit after filing bankruptcy. Most lenders will extend credit within two or three years after filing a bankruptcy case. Many creditors consider you a better credit risk after you filed bankruptcy because you have few other debts, if any, and you are unable to file bankruptcy again for seven years.

Generally, the effect of bankruptcy on your credit is not a bankruptcy issue; it is a banking or credit issue. Most questions concerning reestablishment of credit are best answered by people at banks, credit agencies, or consumer credit services. Most banks and mortgage companies state that a debtor can establish normal credit two years after filing Chapter 7 bankruptcy.

Many debtors report that after filing bankruptcy and receiving their discharge notice that their credit reports still show certain debts as "written off" or "discharged." It may take the credit reporting agencies several months to update your file. Regardless of what is on your credit report, no creditor listed in your bankruptcy can collect money from you. If your credit report incorrectly reports certain debts you must resolve errors directly with the credit bureau because no bankruptcy law issues are involved in the incorrect reporting of your credit history. If you have contested the error directly with the credit reporting agency and the creditor, and the incorrect information is not corrected, you may want to contact an attorney to discuss your legal rights under the Fair Credit Reporting Act.

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