THE BANKRUPTCY DECISION

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LEGAL NOTICE

This Book Is Not Legal Advice

This is an information resource for you in helping you to learn more about the bankruptcy process. Please don't interpret it as legal advice for your particular situation. Also, please note that by downloading this book and reading this book you are not hiring our firm to give you legal advice. We would love to be of service to you. But to be able to give you the advice you need, you need to hire us by signing a retainer agreement in our office. We can easily do that once you have come into our office for your No Charge Fresh Start Planning Session. So enjoy the book, learn a little something and then pick up the phone to schedule your consultation to obtain the advice you need to improve your financial life.

THIS IS AN ADVERTISEMENT

THE BANKRUPTCY DECISION

BY: JULIE O'BRYAN

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FOREWORD

My name is Julie O'Bryan, founder and President of O'Bryan Law Offices. My firm was started in 1995 with one office and one employee. Currently we have five offices spread throughout the "Kentuckiana" area with six attorneys and over 20 support team members. Our focus at O'Bryan Law Offices is to help individuals and couples file for bankruptcy relief. Our experience is vast having represented over 10,000 individuals and couples file for bankruptcy relief over the last 15 years. Currently we file over 1,000 bankruptcy cases annually, which makes us the area's largest bankruptcy firm.

Personally, I am only one of six attorneys in the state of Kentucky Board Certified in Consumer Bankruptcy by the American Board of Certification. I am also a member of the National Association of Consumer Bankruptcy Attorneys. Prior to starting my private bankruptcy practice, I served as a staff attorney for the Honorable J. Wendell Roberts, Bankruptcy Judge for the Western District of Kentucky for six years. This experience provided me with a unique insight into the court system and the perspective judges have when they are hearing cases from the bench.

I am very proud of O'Bryan Law Offices and its family of employees. We strive daily to help relieve the stress our clients face from overwhelming debt. It is very satisfying and rewarding to receive the thanks our clients offer at the end of each bankruptcy case. Bankruptcy is one of the few areas of the law where an attorney can help make a real improvement to a person's life – a fresh start with a new and better financial future.

Don't misunderstand me. The choice to file bankruptcy is a serious matter and should be selected only after examining the situation thoroughly and considering the alternatives. That is why I wrote this book, The Bankruptcy Decision, to help individuals struggling with debt understand their options to deal with overwhelming debt, as well as to provide an overview of the bankruptcy process.

If you are struggling financially, read the information contained in this book and schedule a consultation with my office. The consultation is no charge to you and will give you the tools to evaluate whether bankruptcy is the right decision for you and your family. Call us at 866-410-2004 and schedule your free Fresh Start Planning session. Your own financial fresh start is waiting, so call today!

Introduction

Let's face it: the decision to file bankruptcy is gut-wrenching. Clients attending the first meeting with a bankruptcy lawyer cry, get angry, are embarrassed, ashamed. . . that first meeting can be tough! It seems like you have hit the end of the road and the bottom of the barrel.

When you are at the end of your rope, bankruptcy is your legal safety net.

The primary purposes of the federal bankruptcy laws are to: (1) give an honest debtor a "fresh start" in life by relieving the debtor of most debts; and (2) repay creditors in an orderly manner to the extent that the debtor has property available for payment. Congress enacted the bankruptcy laws to give the honest, but unfortunate person a fresh start, a second chance at being productive and a contributing member of society, instead of being weighed down by the burdens of debt.

A recent Associated Press-AOL Health Poll found that the stresses and worry associated with debt contribute significantly to health problems including ulcers or digestive tract problems; migraines or other headaches; severe anxiety; severe depression; heart attacks; muscle tension; and trouble concentrating and sleeping. The impact of overwhelming debt can overwhelm every aspect of your life.

Bankruptcy is not the only option for people struggling with debt. The aim of this short book is to help you identify your debt problem, discuss possible solutions, and give a good introduction to the bankruptcy process. Every situation is unique and different and the solution to your debt problem should not come from a "one size fits all" firm. Read this book, consult with experienced and knowledgeable financial professionals, and make the best decision for yourself and your family.

This book should be in no way interpreted, inferred, read, or taken as offering legal advice. While the author has worked to ensure the accuracy of the information as of the time of this writing, the state and federal laws are constantly changing and may alter the assertions made in this book. Therefore, *caveat lector* (let the reader beware)! This book is meant as a general guide and not as specific advice pertaining to your individual situation or circumstances. Enjoy the book and don't hesitate to contact O'Bryan Law Offices if you need specific legal advice.

CHAPTER ONE: HOW BAD IS IT?

It is surprising, but many people that find their way into an attorney's office for bankruptcy advice have no idea how bad their situation really is. Some can't even say with certainty who they owe. Others bring in boxes or trash bags full of bills they have been unable to pay. For some, these unpaid bills can go back for years.

Determining your financial situation is the first step in the process to financial recovery. A good way to get a complete financial picture is to make a list of your household's:

- Assets – everything you own and the liquidation value of each item;
- Debts – all of your secured debts (house, car, etc.) and unsecured debts (credit cards, medical bills, etc.);
- Income – your household's monthly income; and
- Expenses – your household monthly expenses.

Once you have listed all of your family's assets, debts, income and expenses, you will have a good idea of your household finances. If you decide to file bankruptcy, you will be required to provide the same financial information to the bankruptcy court regarding your assets, debts, income and expenses.

Assets

A bankruptcy debtor is required to list all of his or her assets, and to give an estimated value of the property. This is an easy task when the asset has a determined cash value, like a stock, owed wages, or cash money. Household and personal items, vehicles, and even real estate can be more challenging.

Most bankruptcy attorneys and trustees advise debtors in bankruptcy to value household and personal items at a "quick sale" or "yard sale" prices. The reason for this is that if the asset was sold through the bankruptcy process, it would be sold at a liquidation price, usually at auction. A yard sale is familiar to most people, while guessing at what an item would bring at auction is less familiar (and less certain).

Many people *over-value* the value of their household and personal items. For instance, many used household items have little or no value, like bedding or bath towels. Other people *under-value* expensive items like guns and antiques. If you are unsure of how to value an item, the internet is a terrific resource. Sites like Ebay and Craigslist can be good examples of what your property is worth to the general public.

A good resource to obtain vehicle pricing information is to visit Kelly Blue Book on-line at http://www.kbb.com, or the NADA motor vehicle price guide on-line at http://www.nada.com. There resources are accepted price guides and are a good starting point in valuing your vehicle.

Real estate can be more difficult to determine. Most home and land owners have a good understanding of what their property is worth. If the value of the real property is an issue in the bankruptcy case, it will likely be in the debtor's best interest to have the property appraised by a professional real estate appraiser.

Debts

While identifying what you owe is important to your family's financial planning, identifying *who* you owe is even more important in the bankruptcy process. By identifying a creditor on a bankruptcy petition, the bankruptcy discharge will prevent that creditor from collecting on any pre-bankruptcy debt, regardless of the amount or account. However, the debtor is still required to provide accurate and fair information about who and how much is owed on the bankruptcy schedules.

There are excellent resources for determining many creditors and their addresses. The first resource is the US Mail. Original creditors and collection agencies are very good at sending mail to those that owe them money. *Lots and lots of mail*. Simply collect your mail for a month and you will have a good start in determining your debts.

A second resource is the credit reporting agencies. There are three main consumer credit reporting agencies:

Equifax
http://www.equifax.com/
800-685-1111
P.O. Box 740241
Atlanta, GA 30374-0241

Experian
http://www.experian.com/
888-397-3742
P.O. Box 2104
Allen, TX 75013

Trans Union
http://www.tuc.com/
800-916-8800
P.O. Box 2000
Chester, PA 19022

These consumer credit reporting agencies are required by federal law to provide one free credit report to you every 12 months. You can obtain an absolutely-free-no-strings-attached credit report from Equifax, Trans Union, and/or Experian by visiting the following website: https://www.annualcreditreport.com/cra/index.jsp

Do not rely exclusively on the information contained in the credit reports. Some creditors, like hospitals and payday loan companies, do not report to the credit reporting agencies. Other information may be inaccurate, outdated, or incomplete. However,

obtaining a copy of your credit report is a very good step in making a good-faith effort to identify all of your creditors.

Income

For many people with steady paychecks, determining income is the easiest aspect of their financial accounting. Income from all sources should be listed including salary, hourly pay, tips, bonuses, retirement income, social security, disability pay, unemployment checks, etc. The bankruptcy laws require that you provide all income information for the past six months. Many employees can obtain basic pay information from their human resources or payroll office at work.

Expenses

Estimating your monthly expenses is another area that people experience difficulty. For instance, the monthly utility bills for many people can vary depending on the time of year. For reoccurring bills that fluctuate, it may be wise to calculate a monthly average over three to six months. It may also be beneficial to contact the creditor (electric company, gas company, etc.) and obtain a billing history, or a yearly average.

Major monthly bills are fairly easy, like a mortgage payment, food, cell phone bill, etc. Non-reoccurring bills are tougher, like out of pocket medical or dental expenses, or seasonal clothing expense (e.g. back to school clothes for kids). Also, don't overlook hidden expenses! For instance, a dollar a day for coffee or soda can add up to an extra twenty dollars or more during the month. Gifts, postage stamps, lawn care, and entertainment expenses are categories that many people overlook when calculating their monthly budgets. And don't fool yourself by saying, "I don't spend anything on entertainment." Do you take your kids to the movies? Do you rent an occasional DVD movie for yourself? Do you buy a newspaper? Do you have a hobby? Do you get the idea?

Adding It Up

Once you have listed your assets, debts, income and expenses, you can start comparing these categories to answer the question: ***"How bad is it?"*** There are many technical terms when a person is "poor," like "insolvent," "bankrupt," or "broke." In simple terms, if your monthly expenses exceed your monthly income, you are "cash poor." If your debts exceed your assets, you are "asset poor." If you are both asset poor and cash poor, it may be time to speak with a bankruptcy attorney.

Divorce

Divorce is a horrible legal process. Honest family lawyers will tell you that most divorces only make things worse for all involved. One of the biggest impacts is on the finances of the individuals and is directly responsible for many bankruptcy filings each year. Serious legal processes, like divorce and bankruptcy, demand very serious consideration.

If you are going through a divorce, and you are either "cash poor" or "asset poor," you should consult with a bankruptcy attorney to determine the financial relationships and consequences of the divorce. One serious issue is the effects of a joint obligation to pay a debt. Many people are surprised to learn after a divorce that even though the judge orders your spouse to pay a joint obligation, your divorce decree will not protect your credit rating if your spouse fails to pay the obligation. The family court's order *did nothing* to change your obligation on the debt. Basically, it is because the contract between you, your ex, and the creditor was not altered, as the creditor was not a party to your divorce.

In many cases it is better to file a bankruptcy before a divorce is final. In certain circumstances, property that is owed by a husband and wife receives better protection from creditors than it receives if owned by a single person. Additionally, certain debts that are ordered by a family court cannot be discharged by the bankruptcy court, so it is better to discharge those debts prior to a family court order.

A divorce can create very complicated legal problems. If you are considering divorce, and have significant debt, speak with a bankruptcy attorney before the divorce is final to avoid any unnecessary complications.

CHAPTER TWO: Non-Bankruptcy Options

After you have answered the first question, ***"How bad is it?"***, the next question you face is, ***"What can I do about it?"*** You need a plan of action. In plain terms there are only three options to deal with debt, with the same three options available for anyone that can't afford to pay the debt: **(1) do nothing; (2) negotiation: and (3) bankruptcy**. In this chapter I will discuss the first two non-bankruptcy options.

Do Nothing

The first option for a person unable to pay a bill is by far the most popular: I call it the "Do Nothing" option. This is a natural flight response to an overwhelming problem that can't be immediately solved. Often the debtor will try to rationalize the choice to do nothing with a future promise to deal with the situation in the future, like "I will catch up my bills with my bonus/tax refund/next paycheck."

The "Do Nothing" option is the worst option to choose because the debt problem only gets worse. The best example of this is to look at the effects of three missed payments on a typical credit card account. In our example, Mary has a $1,000 balance on her Visa credit card and an interest rate of 19%. Mary is cash-poor, but she scrapes together the minimum 4% payment each month, or $40.00. The chart below shows Mary's Visa card terms before she missed any payment:

Original Balance	Interest Rate	Minimum Monthly Payment	Months to Pay Off
$1,000	19%	$40.00	88

Unfortunately, Mary is laid off for work and is unable to make the minimum credit card payments. After missing payments the credit card company suspended her charging privileges and raises her interest rate to 36%, the default interest rate. The credit card company also charges Mary late fees of $35 each month. At the end of three months Mary's new credit card balance has increased to $1,200.91! The chart below indicates Mary's new Visa card terms after her missed payments:

Original Balance	Interest Rate	Minimum Monthly Payment	Months to Pay Off
$1,200.91	36%	$50.00	169

Mary's missed payments will also significantly impact her credit score. A 90 day late record will affect Mary's credit score for up to seven years. The credit scoring models treat 90 day late records as a serious indication that Mary is likely to pay 90 days late or later in the future. While a 30 or even 60 day late record may temporarily harm a credit score, a 90 day or later record can impact the credit score for years.

To add insult to injury, while Mary is job hunting and unable to pay her credit card bill, the credit card company has launched a systematic attack to harass and intimidate her into paying. The first wave is from the company's in-house collectors, who repeatedly call her home and cell phone in an effort to obtain information about Mary's financial situation. Mary also receives regular notices from the card company, sometimes in embarrassing pink envelopes indicating late payment or default.

After 90 to 120 days the credit card company has closed her account and transferred the debt to an outside collection agency. These collectors call Mary's family members and neighbors. One nasty debt collector calls Mary's elderly next door neighbor and asks her to walk to Mary's house in the snow to relay an "urgent message" to call the collector. These tactics are meant to shame Mary into paying and are very effective.

After a year, Mary's debt is sold to a debt company for pennies on the dollar. The debt company specializes in default debt and renews a campaign of harassment. The debt company discovers that Mary is employed and begins calling her at work, sometimes speaking to co-workers and Mary's boss.

Finally, after two years, Mary is sued by an attorney. The attorney sends her documents in the mail labeled "Plaintiff's First Request for Production," and Mary ignores these records. The judge grants default judgment against Mary in the amount of $3,237.72 (for principle and interest owed on the account) with continuing interest of 36% and costs and attorney fees in the amount of $500. Two months later Mary discovers that the attorney is garnishing from her paycheck and has seized all the money from her bank account.

Mary's horrific story is not usual, it is the norm! Bankruptcy attorneys see this situation daily. Do not ignore your debts.

Negotiation

The second option is "Negotiation." This option goes by many different names (e..g. credit counseling, debt settlement, debt mediation, etc.), but the process is the same: the debtor asks the creditor for more favorable terms in exchange for payment.

The benefits of Negotiation can be considerable and the results can depend on the stage of the debt and the parties involved. In our example above, there are five stages

Mary's Visa card debt passed through: **(1) late payment; (2) default; (3) collection; (4) bad debt; and (5) litigation.**

Negotiating during the **late payment stage** can be very easy. By contacting the credit card company early, before any missed payments, Mary (in our example above) may have been able to defer payments and avoid defaulting on the card. If the credit card company will agree to wait three months until Mary can resume payments, Mary can avoid defaulting and perhaps avoid costly fees and a default interest rate.

The credit card company is less willing to negotiate after the **default stage** has occurred. The company has already increased Mary's interest rate and charged penalty fees. After default, the credit card company may "re-age" the account and restore the original terms, but usually only after a substantial payment and proof of hardship. In some extreme cases they may cancel fees. This re-aging generally does not repair the damage to a credit report, but it does bring the account current. Generally, in the default stage the credit card company will try to set up a monthly payment arrangement to bring the account current and restore charging privileges.

By the **collection stage** the credit card company has washed its hands of the debt. The credit card company and the collection agency is interested in collecting as much as it can, as fast as it can. The whole debt is now due and accelerated. The collection company wants either monthly payments (which continue to incur interest at the default rate) that will pay the debt in 18 months or less, or satisfaction of the debt with one or more lump sum payments. If Mary is able to pay all at once, the collection agency may reduce the debt by 80-90% of the current amount. In some cases a credit counseling program may be able to negotiate monthly payments at more favorable terms.

A word of caution regarding credit counseling programs: these programs may claim to be not-for-profit, but most of them are funded and subsidized directly by the credit card industry. When a debtor participates in a monthly payment program, the debtor pays a small fee to the credit counseling program and the credit card company gives a "kick back" to the program. It makes you wonder just who the credit counselors are serving! Additionally, some credit counseling programs will establish a program to re-age the accounts after a certain time, others will not. Re-aging the account brings the account current so your payments are credited as timely (which helps you rebuild your credit report and score). Otherwise the collection agency will continue to record negative items on your credit report each month. Finally, be aware that if you are unable to complete the credit counseling program, all of the "forgiven" interest and penalties will be reinstated to the accounts.

When the credit card company sells the debt in the **bad debt phase**, it has declared the debt uncollectible and will take a tax credit for the loss. The debt is sold (and perhaps re-sold many times) to a debt company for pennies on the dollar.

Unfortunately, even though the debt company only has a few hundred dollars invested in Mary's account, Mary is legally obligated to the debt company for the entire debt.

Mary can still turn to a credit counselor to set up monthly payments on more favorable terms, but she now has a new option: the debt settlement company. These companies are notorious for defrauding consumers. The basic premise of the debt settlement company is to negotiate a lump-sum payment. Often this is accomplished through monthly payments to the debt settlement company "on account" until there are sufficient funds to negotiate a settlement amount (generally between 30-50% of the present amount owed). Licensed attorneys will sometimes negotiate settlements at better terms (20-40%), but the fee is greater.

Debt settlement is a tricky business and can take many months. The basic tactic is to wear down the debt company until they figure "something is better than nothing" and accept a pennies-on-the-dollar settlement from the debtor. Of course, if the original debt was $1,000, and the current debt is $2,000, when the debt settlement company finally agrees to $1,000 you are really paying 100% of the debt (minus fees and interest). During the settlement negotiation you may still receive harassing calls (unless you are represented by a licensed attorney) and you may be sued. Also, after the debt settles, you will receive an IRS Form 1099 to pay taxes on the "forgiven" debt. In the end the results of a debt settlement process are a paid debt in exchange for headaches, ruined credit, and a tax debt.

The final stage is the **litigation stage**. It is extremely difficult to negotiate any payment terms at this stage since a lawsuit has already been filed. Once a judgment has been rendered against Mary, the attorney can seize property, bank accounts, and garnish wages. To avoid a judgment on her credit report, Mary may need to spend thousands on an attorney to negotiate a lump-sum settlement. Without an attorney, the creditor attorney will simply put Mary on the stand and prove the debt.

Now let's look at what the Bankruptcy Decision can do for you.

CHAPTER THREE: Bankruptcy Overview

Bankruptcy is a federal legal process for declaring an inability of an individual or organization to pay its creditors. The United States Constitution authorizes the bankruptcy laws and federal laws govern all bankruptcy cases.

For each bankruptcy case a federal bankruptcy court judge is appointed. However, much of the bankruptcy process is administrative and conducted outside of court. A debtor's involvement with the bankruptcy judge is generally very limited and most chapter 7 debtors never go to court or see the judge. For nearly all bankruptcy cases a bankruptcy trustee is appointed to oversee the administrative process (see the section below entitled Who is the bankruptcy trustee?).

Usually, the only formal proceeding at which a debtor must appear is a meeting of creditors, sometimes called a "341 meeting" because section 341 of the Bankruptcy Code requires that the debtor attend a meeting where creditors can question the debtor about debts and property. More on this later.

One stated purpose of the federal bankruptcy laws is to give the debtor a financial "fresh start." At the end of most cases the bankruptcy judge will discharge certain debts and release the debtor from personal liability.

There are six basic types of bankruptcy cases: Chapter 7, an erase-your-debts-start-fresh bankruptcy; Chapter 13, a repayment plan for an individual; Chapter 11, a reorganization plan generally used by businesses; Chapter 12, a repayment plan specially designed for family farmers and fishermen; Chapter 9, a reorganization plan for cities and other local government entities; and Chapter 15, a bankruptcy chapter for cross-boarder (international) cases. This Ebook will only discuss the two most popular options for individuals: Chapter 7 and Chapter 13.

Chapter 7

A Chapter 7 case is also called a "liquidation bankruptcy." Chapter 7 is the most basic and simplest form of bankruptcy. The concept of Chapter 7 is that all of a debtor's property is sold, creditors are paid from the proceeds, and whatever debt is left is no longer enforceable.

Obviously taking all of a person's property is not very practical in today's world, so the Chapter 7 bankruptcy laws allow a debtor to keep certain modest property like clothing, household furniture, retirement accounts, and, in most cases, basic transportation and a home. These assets are protected by legal "exemptions" which protects a person's property, leaving no assets for creditors. Bankruptcy cases where the debtor's legal exemptions protect all property from creditors are called "no asset cases."

A typical no asset Chapter 7 bankruptcy case will take less than six months, start to finish, and the debtor will not lose any property. At the end of the case the bankruptcy judge will sign an order discharging many or all of the debtor's financial obligations, and the case closes.

Chapter 13

A chapter 13 bankruptcy is also called a "reorganization plan" or a "wage earner's plan." The debtor who files a chapter 13 bankruptcy is stating an intent to repay all or part of her debts in installments to creditors over three to five years. The individual's repayment plan term cannot exceed five years.

Chapter 13 is often selected over Chapter 7 because it is not a liquidation process. Debtors in Chapter 13 do not lose property during the bankruptcy (unless the property is voluntarily returned or surrendered). Instead, the debtor proposes a plan to repay creditors, based on the debtor's projected income, which is approved by the bankruptcy court. At the end of the repayment plan, many creditors who are not paid in full are discharged by the bankruptcy court.

Means Test

The choice of Chapter 7 or Chapter 13 is a decision many debtors voluntarily make. However, in some cases the choice is made for the debtor by the bankruptcy Means Test. This test is designed to identify debtors that can afford to pay some of their unsecured debts (for instance, credit card debt) and encourage repayment of these debts through a Chapter 13 repayment plan. Debtors that "fail" the Means Test are disqualified from filing Chapter 7 bankruptcy.

The Means Test is actually two tests. The first part determines whether your current monthly income is less than your state's median income for a household of your size. The current state median income figures can be found at the U.S. Trustee's website: http://www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm

If your family's income is less than your state's median income for a family of your size, you **PASS** the Means Test. There is no other testing and you can proceed with a Chapter 7 bankruptcy.

If your family's income is more than your state's median income, you must complete the Means Test worksheet to calculate if you have (or should have) money to repay unsecured creditors. In the end if you are able to pay a significant portion of your unsecured debt, you will **FAIL** the Means Test and cannot file a Chapter 7 bankruptcy.

The truth is that very few debtors fail the Means Test. Many debtors earn significant incomes and still qualify for Chapter 7 bankruptcy. Debtors with large monthly secured debt payments (e.g. house, car) often pass the Means Test as there is no extra money at the end of the month to pay unsecured creditors.

CHAPTER FOUR: Before Filing

Choosing an Attorney

Selecting an attorney is the most important step in the bankruptcy process. The right attorney can eliminate debt, safeguard your property, and help you make decisions that will affect your financial well-being for years to come. Select the wrong attorney and you may lose property, or end up in a worse financial position than before the bankruptcy. In some cases inexperienced attorneys have caused their clients to file multiple bankruptcies.

Choosing a bankruptcy attorney comes down to a few important issues:

1. Experience
2. Time
3. Fees
4. Personality

In the bankruptcy world there is no substitute for experience. Bankruptcy law is a complex mixture of federal law, state law, prior court cases, and the common practices of the bankruptcy court and the trustee. It is often important to be familiar with local creditor practices and their attorneys. It is easy for an inexperienced attorney to make an easy bankruptcy case difficult, and a complicated case a complete disaster.

Bankruptcy law deals with a person's finances and sometimes requires the attorney to be knowledgeable about various aspects of family law, business, law, criminal law, estates and trusts, real estate law, sales and leases, etc. Often it is not simply knowing the answer, but knowing the right questions to ask and identifying potential issues. That comes from experience.

An experienced bankruptcy attorney has also spent time and money on additional training and education, like advanced degrees or specialty certifications (Max Gardner's Bankruptcy Boot Camp, American Board of Certification, state certified specialist, etc.). Another hallmark of an experienced attorney is membership in the American Bankruptcy Institute and the National Association of Consumer Bankruptcy Attorneys. An attorney that practices bankruptcy "part-time" will likely not take the time for advanced training or participate in these associations.

In order to prevent problems in your bankruptcy, your attorney must spend time with you. You are required to list all of your property, all of your debts, all of your income, and all of your expenses on the bankruptcy schedules. Skilled and experienced paralegals are an important part of this information gathering process, but they cannot substitute for your attorney's judgment or experience. So how much time will your attorney give to you and your case?

In most personal bankruptcy cases, an attorney should meet with you a minimum of three times: at the initial appointment, at the signing, and at the bankruptcy 341 meeting of creditors. Your attorney should be available to you either by appointment, by telephone, or by email. Remember, you are employing an attorney to work for you. Not the other way around. At the very least your attorney should return your phone call or email.

Fortunately for bankruptcy debtors, most bankruptcy attorneys charge a competitive rate. Call around before making an initial appointment. Bankruptcy attorneys are accustomed to receiving the "how much do you charge" phone call and are happy to clearly explain all of the fees involved in the bankruptcy case, including attorney fees. The qualified and experienced attorney will charge a fair and competitive price. You may also ask if there is a fee for the initial consultation.

Finally, are you personally comfortable with the attorney? You will work with your attorney throughout your bankruptcy case. It is also important that you have faith in the person you hire. A good bankruptcy attorney asks the right questions, listens to the answers, and provides honest advice. If you have doubts or reservations, walk away.

Representing Yourself

You CAN represent your self during a bankruptcy, but SHOULD you? The federal law guarantees you the right to represent yourself in a bankruptcy proceeding. In many areas of the law, proceeding pro se (Latin meaning "for himself") can be effective, sometimes even beneficial. In the bankruptcy world it is often a disaster.

Consider that the typical experienced bankruptcy attorney attends three years of law school, and has practiced in bankruptcy law at least five years to gain proficiency (the American Board of Certification will not consider an attorney for certification who has not practiced five years). Do *you* have this experience and training?

There are many reasons to hire an experienced attorney to represent you in a bankruptcy case. Typically people that are considering a pro se filing think they know the reasons. Here are a few that are generally unknown:

(1) The bankruptcy trustee will examine your case more closely since you are not represented by counsel. Since there is no assurance of honesty and accountability

without a licensed attorney representing you, the trustee will likely put you at the end of the 341 meeting docket to have extra time to scrutinize your bankruptcy case. In other words, with an attorney the trustee will presume you are telling the truth. Without an attorney the presumption is that you are lying and hiding assets.

(2) If your case goes south, many skilled bankruptcy attorneys will refuse to get involved because you have already created a legal mess and annoyed the bankruptcy trustee. It is difficult and not profitable for an attorney to jump into the middle of a pro se case.

(3) You may be audited by a CPA firm selected by the Department of Justice. An experienced bankruptcy attorney knows how to handle this situation. Do you?

(4) If you are reaffirming a debt, you must appear in open court and answer the bankruptcy judge's questions. Debtors represented by counsel do not need to do this.

The upside of representing yourself is saving a few dollars. The downside is a considerable risk to your property, your future finances, and, in extreme cases, your liberty. Don't risk your families' well-being! Let an experience bankruptcy attorney guide you through your bankruptcy case.

Bankruptcy Fees

There are three categories of fees in a bankruptcy case: (1) attorney fees; (2) bankruptcy court fees; and (3) credit counseling fees. The attorney fees are negotiated between yourself and your attorney. Attorney fees are generally paid up-front in Chapter 7 cases. In Chapter 13 cases, your attorney require a partial fee before filing and accept monthly payments of the remaining fees through the Chapter 13 plan.

The bankruptcy court fees are the same across the country and vary by chapter. For a Chapter 7, the filing fee is $299. For a Chapter 13, the filing fee is $274. Typically the filing fee is paid at the time of filing, although there are exceptions to this rule.

Within 180 days of filing your bankruptcy, a bankruptcy debtor must receive credit counseling from a nonprofit budget and credit counseling agency approved by the United States Trustee. That counseling fee is generally $50.00 per household. The credit counseling is available in-person, by telephone, or over the internet.

After filing bankruptcy the debtor must also complete an "instructional course concerning personal financial management." This class is also available in-person, by telephone, or over the internet for a fee around $35.00 per filer.

Your Initial Bankruptcy Appointment

Your bankruptcy attorney will have many questions for you during your initial meeting. The most important goals of this meeting are learning about your situation, and helping you determine whether bankruptcy is the right option for you and your family. In order to achieve these goals you will want to come prepared to answer your attorney's questions. While every case is different and may require additional documents from the client, below is a list of the most common documents and records your attorney needs:

1. Photo ID and social security card;
2. The last six months of pay check stubs. Sometimes this information can be obtained from your employer;
3. Last two years of income tax returns;
4. Real estate deeds and mortgage paperwork;
5. Vehicle titles along with lease or purchase agreements;
6. All loan paperwork;
7. Any child support or maintenance (alimony) court order;
8. Any recent credit report (you can obtain a free credit report at https://www.annualcreditreport.com/cra/index.jsp);
9. Information regarding your debts;
10. Any important documents that impacts your income, assets, debts, or expenses. For instance: a foreclosure notice, or a notice of an upcoming bonus;
11. Investment records;
12. Last six months of bank statements;
13. Any tax bill showing assessed value;
14. Proof of insurance on all property secured by a lien; and
15. Any documents pertaining to a legal claim or pending lawsuit (e.g. a personal injury or worker's compensation claim).

While this is not an exhaustive list, it is a start to help your attorney understand your circumstances and advise you on how to improve your financial situation.

Pre-Bankruptcy Credit Counseling

A debtor filing a Chapter 7 or Chapter 13 bankruptcy is required to complete a pre-bankruptcy counseling session with an approved credit counseling organization. The counseling session must be completed within 180 days of the bankruptcy filing. Be aware that the bankruptcy court will only accept credit counseling certificates from those agencies that have been approved by the United States Trustee.

The charge for a credit counseling session is typically $50 per household, although the federal law also requires counseling organizations to provide the counseling free of charge for those consumers who cannot afford to pay. The typical counseling session lasts about 60 to 90 minutes and can take place in-person, over the telephone, or online. The session will include an evaluation of your personal financial situation, a discussion of alternatives to bankruptcy, and a personal budget plan. Once you complete the counseling session, you will receive a certificate as proof of completion which must be filed by your attorney at the time of your bankruptcy filing.

Keeping Property

One of the biggest questions for an individual considering bankruptcy is, "What will I lose?" As discussed previously, in a Chapter 13 the debtor does not lose any property. In a Chapter 7 case the debtor can potentially lose property that is non-exempt (see discussion of <u>Exemptions</u>, below).

The United States Trustee program reports that nationwide only around four percent of all Chapter 7 bankruptcy cases have assets that are turned over to the bankruptcy trustee. That means one case in twenty-five may have non-exempt property that is taken, sold, and the proceeds distributed to creditors. Over 70% of all asset cases involve less than $10,000 in disbursements.

The key to keeping property is to accurately identify and value the property *before* a bankruptcy case is filed. Every bankruptcy attorney has a horror story about the client that reveals an asset for the first time at the meeting with the bankruptcy trustee: "I didn't tell my lawyer this, but I have 10 acres of beachfront property in Florida that I own with my brother. My name is on the deed, but it's really his property." This funny anecdote is usually a tragic story for the client. There are many ways to protect property, and you and your attorney should discuss all of your property and all of options prior to filing your bankruptcy case.

Valuing Property in Bankruptcy

During bankruptcy a debtor is required to list all property and provide an estimated value. Valuing property is one of the most important tasks a debtor has during the case. It is important to understand that one of the chief functions of the bankruptcy trustee is to uncover assets for the benefit of creditors. Federal and state laws allow the debtor to keep certain modest items of household property that are considered "necessary," like clothing and household items, but only up to a certain dollar amount. That amount is called an "exemption," and that property is considered "exempt" and protected from a creditor's collection remedies. Any property that is worth more than the allowed exemption amount is subject to be liquidated, usually at auction.

As owner of your property, you are entitled to give an opinion regarding its value. It is important not to under-value or over-value your household property, but instead give a fair and reasonable estimate. So the debtor should value property **at yard sale prices**.

Exemptions

After the value of your property has been determined, the next step is for your attorney to apportion the legal exemptions you are entitled to for protecting and keeping property. The Bankruptcy Code allows an individual debtor to protect some property from the claims of creditors because it is exempt under federal bankruptcy law or under the laws of the debtor's home state. Many states have adopted their own exemption laws in place of the federal exemptions. In other jurisdictions, the individual debtor has the option of choosing between a federal package of exemptions or the exemptions available under state law. The debtor should consult an attorney to determine the exemptions available in the state where the debtor lives.

Retirement Accounts

Many debtors have retirement accounts. Fortunately, Congress has provided substantial protections in the bankruptcy laws that safeguard retirement accounts during bankruptcy. Congress has declared that certain retirement funds are exempt from creditors during a Chapter 7 bankruptcy case. These funds include retirement accounts classified under sections 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code. These sections cover most retirement plans and include pension plans, profit sharing plans, stock bonus plans, employee annuities, IRAs, Roth IRAs, government deferred compensation plans, plans of tax exempt organizations, and certain trusts. The laws exempt these funds to over a million dollars for each debtor.

The bankruptcy laws further protect retirement accounts by providing that retirement funds not otherwise exempt are protected if they are necessary for the support of the debtor and the debtor's dependents. The bankruptcy laws also protect certain retirement accounts subject to title 1 of ERISA, 457 deferred compensation plans, 403(b) tax deferred annuities, and health insurance plans regulated by state law.

The federal bankruptcy laws provide many ways to protect your retirement accounts during bankruptcy. The key is to identify the type of account and the corresponding protection prior to filing the bankruptcy case. As always, consult with an experienced bankruptcy attorney prior to taking any action to either move retirement funds, make contributions, or take withdrawals as these actions may impair your attorney's ability to protect your retirement account.

Reaffirmation Agreements

During a Chapter 7 bankruptcy a debtor is required to either pay a secured creditor or return property in satisfaction of the debt. Secured creditors retain an interest in property to guarantee payment on a loan. Generally, even though the secured debt is discharged during bankruptcy, a secured creditor's right in the property will survive the bankruptcy discharge. In simple terms, the bankruptcy discharges the debt, but the secured creditor can still take the property securing payment of the debt.

If a debtor wishes to keep certain secured property (such as an automobile), he or she may decide to "reaffirm" the debt. A reaffirmation agreement is a contract between the debtor and the creditor in which the debtor will remain liable and promises to continue paying on the secured debt. The creditor promises that it will not repossess the property so long as the debtor continues to pay the debt.

If the debtor decides to reaffirm a debt, he or she must do so before the bankruptcy court enters its discharge order (generally at the end of the case). The debtor and creditor execute a written reaffirmation agreement and it is filed with the court. The Bankruptcy Code requires that the debtor disclose current income and expenses, which demonstrates that there are sufficient monthly funds to pay the reaffirmed obligation. If there is not enough in the monthly budget to pay the reaffirmed debt, there is a presumption of undue hardship to the debtor, and the court may not approve the reaffirmation agreement.

Once the reaffirmation is filed and approved, the debtor's personal liability for that debt will not be discharged in the bankruptcy. That means that the debtor can be sued for any breach of the agreement and the property can be repossessed. Reaffirmation agreements can be very useful to the debtor. The agreement can re-write the terms of the loan including reducing principle, interest, or lengthening payment terms.

Redemption

Redemption is a process in a Chapter 7 case where the debtor pays a secured creditor *only* the value of the secured property, not the total debt that is owed. For example, if the debtor owes $3,000, and the property securing the debt is only worth $2,000, the debtor may redeem the property for $2,000. The entire $2,000 must be paid in one lump sum to the secured creditor in satisfaction of the secured debt. The remaining unsecured portion of this debt is discharged along with all other unsecured debt at the end of the bankruptcy case.

Redemption is widely used to eliminate unsecured vehicle debt. The common situation involves a late model vehicle that has depreciated faster than the debtor has paid on the loan. During a redemption the value of the vehicle is determined (either by agreement between the debtor and secured creditor or by the bankruptcy judge after a

hearing) and a court order is issued directing the secured creditor to accept a sum from the debtor in exchange for a release of its lien. In plain terms the lender is paid a lump sum and the lien on the vehicle is released. For example, a debtor that owes $15,000 on an auto that is worth $10,000 will redeem the vehicle for $10,000.

The requirement of a lump sum payment is a significant draw-back to the redemption process. Fortunately, there are finance companies that make redemption loans for debtors in bankruptcy. Just like any lender, these finance companies require a loan application and certain assurances of repayment. The interest rate can be high for a redemption loan; however the resulting monthly payment is often lower than the original monthly payment. It is important to carefully consider all of the advantages and disadvantages before making a decision to redeem a vehicle.

Cram-Down

While redemption is only available in a Chapter 7 case, a cram-down is a feature available in Chapter 13. The same principles apply: the debtor pays a secured creditor *only* the value of the secured property, not the total debt that is owed. However, in a Chapter 13 cram-down the debtor is permitted to pay the secured value of the property over the life of the Chapter 13 repayment plan at a reasonable court-directed interest rate. Any remaining debt is treated in the same class as all unsecured creditors (usually paid pennies on the dollar, if anything).

Cram-down is often used during a Chapter 13 plan to reduce the principle, interest, or monthly payment amounts of a secured loan. Cram-down is not available to reduce a home mortgage amount; to reduce the security interest in a personal motor vehicle purchased within 910 days (about 2.5 years) of the bankruptcy filing date; or to reduce loans for any other property purchased within 1 year of the filing date.

Real Estate Issues

As stated previously, cram-down cannot be used to lien-strip a home mortgage. In fact, under current bankruptcy law there is no mechanism to modify a *first* mortgage secured by a debtor's home. However, Chapter 13 does allow a bankruptcy judge to strip away an entirely unsecured *second* mortgage lien. Lien stripping is useful for an individual who has multiple mortgages, and the value of the property is less than the amount owed on the first mortgage.

For example, let's say you purchased your home three years ago for $400,000, made a cash down-payment, and obtained two mortgage loans. You have made your monthly mortgage payments, and today you owe $305,000 on the first mortgage and $70,000 on the second. Unfortunately, property in your area has depreciated and your home is only worth $300,000. During a Chapter 13 bankruptcy case a bankruptcy court can strip away the second mortgage lien on your home because it is entirely unsecured by

your home (i.e. the value of your home is not more than the first mortgage debt). The stripped second mortgage is discharged along with other unsecured debt at the end of the bankruptcy case.

The above example is not possible if the second mortgage is secured *at all* by the value of the home. If the home is merely under-secured, lien stripping is not authorized. For instance, if the value of the home in our example is $305,001, then the loan is partially secured (by one dollar) and its second mortgage lien cannot be stripped. Consequently, the success of any lien stripping case boils down to the value of the property. An early appraisal of the property prior to litigation is very important. Lien stripping is especially useful to homeowners who have Home Equity Lines of Credit secured by a second mortgage on their primary residence, or homeowners that purchased a home using 80/20 loan financing.

Surrendering Property

Sometimes it doesn't make financial sense to keep a secured loan. In those cases, the debtor may surrender the property back to the secured creditor. Surrendering property is usually as simple as coordinating a time between your attorney and the creditor, and then delivering the property. Once the debtor surrenders the property, the debt is unsecured and is either discharged with the Chapter 7 bankruptcy, or, in a Chapter 13, paid according to the debtors ability to pay, then discharged at the end of the case.

While surrender can be a no-brainer when the debtor cannot afford to pay the debt, the threat of surrendering property can be a powerful negotiating tool with secured creditors when negotiating the terms of reaffirmation, redemption, or cram-down.

Discharging Debt

Before filing a bankruptcy case, it is important to know what debts will be discharged. The bankruptcy code generally classifies debt into three major categories: (1) secured (2) unsecured, and (3) priority. Generally, secured debts must be paid for or returned; unsecured debts get paid pennies on the dollar (if anything) and are discharged; priority debts are non-dischargeable.

Secured debts include mortgage loans, vehicle loans, purchase money security interests (like in house financing to buy a plasma TV), and non-purchase money security interests. Secured debts must generally be paid or the property must be returned. Keeping secured property during a bankruptcy case usually involves a reaffirmation agreement, redemption, or cram-down. Non-purchase money loans are typically used by finance companies to secure personal loans with personal property. These loans may be "avoided" in a Chapter 7 case by asking the bankruptcy court to strip the lien on the property. The finance company debt is discharged in the bankruptcy and you keep the property.

Unsecured debts include credit cards, hospital bills, utility bills, and unsecured personal loans. These debts are discharged in a Chapter 7 case and are paid in a Chapter 13 case according the debtor's financial ability.

Priority Debts

Congress has identified debts in the Bankruptcy Code that it considers "priority debts" deserving of special treatment. Section 507 sets forth categories of unsecured claims which Congress has, for public policy reasons, given priority of distribution over other unsecured claims. "Priority" refers to the order in which unsecured claims in a bankruptcy case are paid from the money available in the bankruptcy estate. The higher the priority, the sooner the claim is paid from money in the estate. When the money runs out, the remaining lower priority claims are paid nothing from the bankruptcy estate.

Non-Dischargeable Debt

The bankruptcy laws are meant to give the honest debtor a *fresh start*, but not a *head start*. Therefore, Congress has identified certain debts that cannot be discharged in a bankruptcy. Many debts that would ordinarily qualify for discharge may be determined as non-dischargeable if a debtor has committed a crime or fraud in acquiring the debt.

Generally, the following are non-dischargeable debts:

1. Back child support or alimony obligations, and debts considered in the nature of support;
2. student loans, unless repayment would cause you undue hardship;
3. criminal fines or restitution;
4. debts listed in a prior bankruptcy where debtor was denied a discharge;
5. recent income taxes less than three years past due; and
6. auto accident claims involving intoxication.

Additionally, there are circumstances which may make a debt non-dischargeable:

1. debts incurred on the basis of fraud;
2. debts from willful or malicious injury to another or another's property;
3. recent purchases with credit cards;
4. debts from larceny (theft), breach of trust or embezzlement; and
5. most federal, state and local taxes and any money borrowed on a credit card to pay those taxes.

There are exceptions to these rules and each situation has its own rules and challenges. Be sure to discuss your unique situation with a qualified bankruptcy attorney and learn your options.

Contested Matters

Occasionally there is a creditor who contests the debtor's bankruptcy case. There are many scenarios when this may occur. For instance, in a case where the creditor claims that the debtor procured a loan as a result of fraud, the creditor must contest the discharge of this debt within a certain time, or the debt will be discharged. In other circumstances, like student loans and child support, the creditor does not have to file anything and the debt is not discharged.

Creditors who file contested actions often utilize the bankruptcy code's provision for adversary actions. A creditor who claims that a debtor owes a debt on account of fraud or dishonesty, or a creditor who claims a non support obligation which arose during a divorce must file an adversary action within 60 days of the first meeting of creditors and then prove to the court that the debt should not be discharged. An adversary case may also be initiated by the bankruptcy trustee, or by the debtor against a creditor, to determine the dischargeability of a debt or to sanction the creditor for a violation of the automatic stay.

Other Concerns
Income Tax Refunds

Every year many pro se debtors and inexperienced attorneys fail to protect income tax refunds from turn-over to the bankruptcy trustee. This is an unfortunate and usually preventable situation. Fortunately, most debtors receive only a modest income tax refund that is too small for the trustee to administer, or is protected by the debtor's bankruptcy exemptions. In other cases, the debtor may miscalculate the refund amount and receive more than expected.

The best advice to anyone expecting a refund is to have your taxes prepared by a professional in advance of the bankruptcy filing. Fore-knowledge is the key to protecting your income tax refund.

Inheritances

An inheritance usually involves a bittersweet transfer of wealth from a departed loved one. Bitter because of the loss, but sweet because of the love that the departed has shown. Bankruptcy can make this difficult time more bitter.

The bankruptcy law provides that if a debtor receives an inheritance within 180 days of filing for bankruptcy, that inheritance becomes the property of the bankruptcy estate. Even if the bankruptcy court has already entered an order of discharge and closed the bankruptcy case! The bankruptcy law calculates the 180 days from the date of death. For example, if your grandfather left you $10,000, but you did not actually receive it until two years after he died, your inheritance could still become the property of the

bankruptcy estate as long as your grandfather died within 180 days after you filed for bankruptcy.

The treatment of an inheritance depends on the bankruptcy chapter. If the debtor filed a Chapter 7, the entire inheritance must be paid over to the bankruptcy trustee, without any exemptions, and will be used to repay creditors. In a Chapter 13, an inheritance is used to calculate how much you should pay creditors.

Spending Sprees

Sometimes a person will go on a credit card spending spree after realizing that a bankruptcy is unavoidable. A credit card spending spree with the intent on discharging the debt may be fraud, and it may also be a *criminal act*. Debts incurred as a result of fraud or criminal acts may be found non-dischargeable by the bankruptcy court.

The Bankruptcy Code provides that "luxury goods or services" purchased with a credit card totaling more than $550.00 within 90 days prior to filing a bankruptcy case are presumed non-dischargeable debts and will survive the bankruptcy discharge. The Bankruptcy Code states that "luxury goods or services does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor."

Additionally, the Bankruptcy Code provides that if you take a cash advance from a credit card (or use a credit card check), within 70 days prior to filing your bankruptcy case, there is a presumption that the debt on those funds are non-dischargeable.

Preference Payments and Hiding Assets

Property transfers can create serious problems for the bankruptcy practitioner. Usually the transfer is entirely innocent, however, the Bankruptcy Code does not consider the debtor's intent or mental state during the transfer.

Sometimes a property transfer is a payment made to a friend or family member just before filing. For example: Mary borrows $3,000 from her mother to help pay bills. In March, Mary receives her income tax refund and repays her mother the $3,000. Mary files bankruptcy in May. This situation is called a "preference payment." A preference payment occurs when there is a transfer of money by a debtor, on account of a pre-existing debt, that is made while the debtor is insolvent, and gives the creditor more than it would receive from the liquidation of the debtor's assets during a Chapter 7.

The idea behind a preference payment is that the debtor chose to pay the friend or family member instead of other creditors – the debtor "preferred" this creditor. Preference payments are unfair to the debtor's other creditors, and, if the transaction took place within 90 days, the bankruptcy trustee can compel the recipient to turn over this

preference payment to the bankruptcy estate for equal distribution to all creditors. Also, if the payment is made to an "insider," then the avoidance period is one year. An "insider" is a generally a relative, business partner, etc. who has a special relationship with the debtor.

Another situation is a property transfer just prior to filing bankruptcy. The bankruptcy trustee will be highly suspicious of any large transfer immediately preceding the bankruptcy filing. The assumption will be that the transfer was an attempt to hide an asset and protect it from the bankruptcy estate. Take, for instance, adding your mother to your car title just prior to the bankruptcy filing. The bankruptcy trustee may bring an action in the bankruptcy court to avoid this transfer of title, strip your mother's ownership in the vehicle, and seize and sell the vehicle.

There are many ways to protect property in bankruptcy. Discuss your issues with an experienced bankruptcy attorney as self-help solutions rarely work.

Monthly Payments

The internet is full of well-intended advice concerning bankruptcy. *Most* of this advice is good legal advice for *most* situations. However, every situation is different and what is good legal advice for one person may be horrible legal advice for another.

Here is one piece of common internet advice: "If you are sure you are going to file bankruptcy, stop paying your monthly credit card bill." The theory behind this is that the credit card debt will be included into the bankruptcy and discharged, so spend your money on something else (like your bankruptcy lawyer!).

This advice may be terrific for 99% of debtors entering bankruptcy. There are situations in which the debtor makes things *worse* by skipping these payments. Let's say that Mary loses her job in November. She is broke, has no savings, and cannot afford to pay her credit card payments. However, she has about $5,000 in available credit and uses her credit cards to pay for modest Christmas gifts for her family, groceries, and utilities. She makes no payments after the purchases and decides to file bankruptcy in April.

In the above example Mary may have opened the door for an adversary proceeding for fraud. Because she made charges and purchases during a time when she was insolvent, the credit card company could claim that she obtained money from the credit card company under false pretenses. The credit card company's case is strengthened by the fact that Mary did not make any attempt at monthly payments after the charges were incurred.

If you are in Mary's shoes discuss your situation with an experienced bankruptcy attorney and do not take legal advice from internet bankruptcy discussion boards. What works well for others may not work for you.

Bad Checks and Other Criminal Charges

The bankruptcy automatic stay does not stop the criminal prosecution of the debtor for writing a bad check. Most states now agree that while the bankruptcy can discharge the underlying debt, it does not discharge a criminal act or the ability of the state to order restitution for the criminal act. What that boils down to is that even though the bankruptcy discharges the obligation between you and the creditor, if you have written a bad check, the prosecutor may still prosecute you, and you may still be convicted. In the end, the judge may still order you to pay criminal restitution to the creditor/victim.

The Bankruptcy Code states that criminal restitution is non-dischargeable. That generally includes fines like municipal traffic tickets, or victim restitution for serious offenses. If you have a serious problem criminal restitution problem, it is likely affecting your personal finances. An experienced bankruptcy attorney can discuss your options with you.

Payday Loans

Payday loan companies offer a short-term loan of a few hundred dollars that will be repaid on the borrower's next payday. To obtain the loan the borrower usually writes a post-dated check to the lender. Often the payday loan lender will require a statement that the borrower is not considering bankruptcy, and, sometimes, that the borrower will not file bankruptcy in the future.

Many individuals worry that they will face a criminal bad check charge when they are unable to pay the post-dated check. With a few narrow exceptions, being unable to pay the payday loan check is not a criminal act. It is important to note that the post-dated check may still be presented for payment even after the bankruptcy has been filed, resulting in significant bank fees. In some areas of the country (notably in the 6th and 8th Circuit Court of Appeals) courts have stated that the presentment of the post-dated check *does not* violate the automatic stay provisions of the bankruptcy code. However, these courts have said that the funds collected by the payday loan company may be an "avoidable transfer," meaning that the debtor may get that money back.

While an agreement to not file bankruptcy is generally considered void because it violates public policy, a representation to the payday loan lender that the borrower is not contemplating bankruptcy is a serious matter. A borrower that takes a payday loan with the intention of discharging it through bankruptcy, and with no intention on repaying the loan, may have committed fraud and even a criminal act!

Utility Disconnects

The Bankruptcy Code protects debtors from the disconnection of necessary utilities like water, electricity or gas services. Specifically, a utility company may not alter, refuse, or discontinue service to an existing customer solely because either (1) the customer filed for bankruptcy protection; or (2) the customer failed to pay a pre-petition debt to the utility.

This protection is limited and within 20 days after the bankruptcy filing the debtor must give the utility company "adequate assurance of future payment," which usually means a *new* security deposit. The law allows the utility company to keep any previous security deposit and apply that deposit to your prior bill. If the debtor does not provide "adequate assurance of future payment" within the 20 day time period, the utility provider may discontinue services.

Bankruptcy Myths

- **There is a minimum amount of debt required to file bankruptcy.**
  There is no debt threshold you must meet in order to file bankruptcy.

- **You can't keep your home or car if you file bankruptcy.**
  Many individuals file for bankruptcy protection in order to save their homes from foreclosure or their vehicles from repossession.

- **Taxes cannot be discharged in bankruptcy**
  Taxes are difficult to discharge in bankruptcy, but it is possible to discharge tax debt under certain circumstances.

- **Medical bills can't be discharged in bankruptcy**
  Medical bills are generally among the easiest type of debt to discharge in bankruptcy.

- **All of your debts are erased in bankruptcy**
  Not all debts are discharged in bankruptcy. See the section on Non-Dischargeable Debts in this book for more information.

- **You can't get credit after a bankruptcy**
  Most people rebuild their credit after bankruptcy and buy homes, automobiles and save for retirement.

- **You can choose who you file bankruptcy against**
  You must list all of your creditors on the bankruptcy schedules. Non-disclosure of a debt may prevent a discharge of your other debts and could land you in criminal trouble for bankruptcy fraud! There are several different ways that a debt may survive the bankruptcy (e.g. a non-dischargeable debt, or the debtor executing a reaffirmation agreement). Speak with your attorney if you want a debt to survive the bankruptcy.

- **You can only file bankruptcy once.**
  An individual debtor can file a chapter 7 bankruptcy every eight years. An individual who has received a chapter 7 discharge may also file a chapter 13 after four years. A person who files a chapter 13 can file another chapter 13 after two years, and a chapter 7 after six years.

CHAPTER FIVE: After Filing

Publicity

Your bankruptcy is a matter of public record. It is available to anyone who contacts the U.S. Bankruptcy Court, and all proceedings, including the meeting of creditors, is open to the public. The bankruptcy filing may also stay on your credit report up to 10 years.

But that's about as public as it gets.

As a general rule, if you don't tell people about your bankruptcy, they won't know. Newspapers do not generally report bankruptcies because it is not practical due to the large numbers of bankruptcy filings. It is simply not news, unless your name is Donald Trump or Burt Reynolds.

Once your bankruptcy case is filed, a notice is sent to all of your creditors. If you owe someone locally, they will receive notice of your bankruptcy. If you do not owe money to a person or institution, they do not receive notice. That includes your family members, employer, and bank.

Automatic Stay

The automatic stay is the bankruptcy law's most powerful protection and immediately stops nearly all creditor actions against a debtor. The automatic stay is invoked upon filing the case – no hearing is necessary and no judge's signature is required. This powerful injunction is even effective against creditors that have no actual knowledge of the bankruptcy!

The intent of the automatic stay is to give the debtor a "breathing spell" from the pressures and harassment from creditors while the bankruptcy process proceeds. The automatic stay prohibits a creditor from taking many actions, including:

- contacting the debtor to request payment (stops collection calls)
- initiating or continuing a lawsuit against the debtor (stops lawsuits)
- enforcing a judgment against the debtor (stops wage garnishments)
- repossessing personal property or foreclosing on real estate (stops repossessions and foreclosure)

Creditor violation of the automatic stay is a serious offense. The debtor may file a complaint against the violating creditor and the bankruptcy court may sanction the creditor. The automatic stay is a temporary injunction ordered by the bankruptcy court

which can be lifted by the bankruptcy court after notice and a hearing. There are a few exceptions to the automatic stay, for instance: the automatic stay does not prevent criminal prosecutions. Likewise the automatic stay does not stop lawsuits to establish or modify alimony, maintenance, or support.

Co-Debtor Stay

A unique feature of a Chapter 13 case is the "Co-Debtor Stay." It is only available in a Chapter 13 case and is designed to protect the debtor from indirect pressures that a creditor may exert through friends or relatives. The Co-Debtor Stay stops all collection action against any individual who is obligated on a consumer debt owed by the debtor. The Co-Debtor Stay continues until the Chapter 13 case has concluded.

It is important to understand that the Co-Debtor Stay is a protection intended for the bankruptcy debtor. The debtor's Chapter 13 Bankruptcy will not discharge the co-debtor's responsibilities to the creditor. However, the Co-Debtor Stay will prevent collection action by the creditor against the co-debtor during the pendency of the Chapter 13 case.

The Co-Debtor Stay is effective immediately upon the filing of the debtor's Chapter 13 petition and continues until the case is closed, dismissed, or converted to Chapter 7 or 11. Like the Automatic Stay, this temporary injunction can be modified or terminated by the bankruptcy court. Termination of the Co-Debtor Stay may be successful if the co-debtor received "consideration" for the debt. One instance would be if you cosigned a car loan for your brother, who actually owns the car. The Co-Debtor Stay may also be terminated if your Chapter 13 plan proposes to not pay a debt, or if the creditor's interests would be irreparably harmed by continuation of the Co-Debtor Stay.

Similar to the Automatic Stay, a knowing violation of the Co-Debtor Stay may also be contempt of court and punishable by damages, including attorney's fees. Additionally, any collection action taken by a creditor in violation of the co-debtor stay is void.

Personal Financial Management Course

After your bankruptcy case is filed you must complete an "instructional course concerning personal financial management." Notice of completion of this course must be filed within 45 days of the 341 meeting of creditors for a Chapter 7 case, or no later than the last payment required by the plan in a Chapter 13 case. To avoid these deadlines it is prudent to complete the class before or soon after the 341 meeting.

The Personal Financial Management Course is also available in-person, by telephone, or over the internet for a fee around $35.00 per filer. The United States Trustee, who oversees the organizations offering this class, has directed that the Personal

Financial Management Course should average two hours in length and include written information and instruction on four major topics:

(1) budget development;
(2) money management skills;
(3) wise use of credit; and
(4) consumer information.

Most debtors appreciate the Personal Financial Management Course and state that it is a worthwhile experience. It is a good way to start new habits and maximize your fresh start opportunity.

Who is the Bankruptcy Trustee?

Quite a bit of mystery surrounds the bankruptcy trustee. Generally, the person identified as the bankruptcy trustee in a Chapter 7 case is a "panel trustee," also called an "interim trustee." The Panel Trustee is appointed by the United States Trustee Program (a component of the U.S. Department of Justice) as a local agent to review the debtor's bankruptcy petition and schedules, and to determine if the debtor has any non-exempt assets available for distribution to creditors. While the Panel Trustee is required to be independent and disinterested in the debtor's case, the Panel Trustee works primarily for the benefit of the debtor's unsecured creditors. Panel Trustees are usually attorneys or accountants with extensive bankruptcy law and auditing experience. The bankruptcy trustee is forbidden from offering legal advice to debtors in bankruptcy.

Panel Trustees are paid a flat fee of $60 per case. In addition, Panel Trustees receive an incentive commission on each dollar they collect from the debtor. The commission rate works on a sliding scale from 25% for the first $5,000 to 3% of anything over $1,000,000. In other words, if you have a non-exempt curio cabinet worth $200, the trustee's potential commission from taking this item is $50. At $50 it is generally not worth the trustee's time or effort to pursue the asset, coordinate the collection, execute the sale, and file the required paperwork to be paid $50. Perhaps this example helps the reader understand how the U.S. Trustee reports only about four of all Chapter 7 bankruptcies are asset cases.

In a Chapter 13 case the same trustee is appointed to every case: the Chapter 13 Trustee. The responsibilities of the Chapter 13 Trustee include the evaluation of the debtor's proposed Chapter 13 Plan and the distribution of payments from the debtor to creditors. The Chapter 13 Trustee, or an assistant trustee, also oversees the 341 meeting of creditors, and files objections to the plan as required by the bankruptcy code.

Meeting of Creditors

Regardless of the chapter you file, between 20 and 40 days after your bankruptcy filing you must appear at a "meeting of creditors," also called the "341 meeting" (after section 341 of the bankruptcy code which requires the meeting). This meeting is an opportunity for your creditors to appear and ask you questions under oath. While all of your creditors will be mailed an invitation to attend the meeting, generally no creditors appear at this meeting in the typical bankruptcy case. Your attorney will be present with you at this meeting.

The Panel Trustee is almost always the individual that presides over the debtor's Section 341 Meeting of Creditors in a Chapter 7 case. The Chapter 13 Trustee, or one of the assistant Chapter 13 trustees, may conduct the Chapter 13 meeting of creditors. The trustee is required to investigate the debtor's financial affairs, examine the debtor under oath, and submit reports to the bankruptcy court and Office of the U.S. Trustee. At the 341 Meeting the trustee is required to ask the debtor specific questions outlined in the U.S. Bankruptcy Code. These questions include:

Did you read the schedules before signing?
Did you list all of your assets?
Did you list all of your debts?
Are the schedules accurate?
Do you want to make any corrections to the schedules?
Do you have a domestic support obligation?

The trustee may have specific questions regarding assets, income, expenses, debts, or transactions. The trustee may require certain information or documents to be presented to the trustee either before or at the meeting including bank statements, pay stubs, tax returns, vehicle titles, and land ownership and debt documents. Most of this information should already be in your attorney's possession. You are also required to provide proof of identity including social security number and a government issued photo I.D.

Most 341 Meetings are quick and easy, and neither the Panel Trustee nor the Chapter 13 Trustee has the power to decide anything. It is simply a meeting to obtain information. However, what is discovered at this meeting can be used against you. After the trustee concludes questioning the debtor, any creditors may ask questions. Most trustees operate 341 Meetings on very limited time constraints, so creditor questioning is usually limited to a few minutes. If the creditor needs additional time for questioning the debtor it can ask the bankruptcy court for an order requiring the debtor to appear for a further examination between just the creditor and the debtor. This examination is conducted like a deposition with your counsel present and only occurs in the rarest cases.

Chapter 13 Plan

The debtor's Chapter 13 plan must be filed with the bankruptcy petition or within 14 days and a copy or summary of the plan is mailed to all creditors. The Chapter 13 Plan is largely guided by the outcome of the debtor's Means Test and may result in no payments to unsecured creditors and a three year plan, a five year plan with 100% payment to all creditors, or anything in between. The Chapter 13 Plan must provide payment of at least as much to unsecured creditors as they would have received had the debtor filed a Chapter 7 liquidation bankruptcy. The Chapter 13 Plan may also require the payment of unsecured creditors from the debtor's "disposable income" as calculated by the Means Test. Any priority claims must be paid in full and include a plan for paying secured debts during the plan term. Long term debts, like a mortgage payment or student loans, do not need to be paid off during the plan term, but the plan may provide for the cure of a defaulted note.

The Chapter 13 Plan acts like a consolidation loan and the debtor makes payments directly to the Chapter 13 Trustee, who distributes the payments to creditors. No more late fees! While the debtor's Chapter 13 Plan may not be confirmed bankruptcy court until later, the debtor's first payment is due 30 days after the case is filed. If no payment is made the Chapter 13 Trustee will file a motion to dismiss the case for failure to commence payments. It is recommended that the debtor execute a voluntary wage withholding to pay the Chapter 13 Trustee, although there is no requirement to do so.

No later than 45 days after the meeting of creditors, the bankruptcy judge holds a confirmation hearing to decide whether the plan is feasible and meets the standards for confirmation as described in the bankruptcy code. Creditors receive notice of the hearing and may object to confirmation. In order to receive payments from the Chapter 13 Trustee, the creditor (or debtor) must file a proof of claim with the court within 90 days after the first date set for the meeting of creditors. A governmental unit has 180 days from the date the case is filed file a proof of claim. Failure to file a Proof of Claim may result in the creditor not being paid. Once the Chapter 13 Plan is confirmed, it binds all the parties to the terms of the Plan. The Plan can be changed only by modification through the bankruptcy court.

Modifying the Chapter 13 Plan

Life happens. Sometimes changes occur in a debtor's finances that require a change in the Chapter 13 Plan. Fortunately, Congress recognized the benefits of allowing the bankruptcy court flexibility in a Chapter 13 case. Selling property, reducing (or increasing) plan payments, and lengthening or shortening the Plan term can be accomplished through a motion to the bankruptcy court. The proposed modification must meet the tests for plan confirmation.

CHAPTER SIX: Bankruptcy Discharge

The bankruptcy discharge imposes a permanent injunction against the further collection of certain debts against the debtor personally. It is easy to say, "It erases your debts," but that isn't really the case. The debt is still there, it is just not legally enforceable against the debtor. Creditors cannot pursue any collection action including legal actions in court, by telephone, in person, or by mail. Violation of the bankruptcy discharge injunction can result in a contempt of court complaint and the appropriate sanctions by the federal bankruptcy court against the creditor.

While the creditor cannot collect from the debtor *personally* after the bankruptcy discharge, a secured creditor may still execute against property where the creditor has a valid lien that was not avoided (i.e. made unenforceable) by the bankruptcy court. In other words, a secured debt that is not paid for or otherwise avoided may be repossessed by the creditor after the case.

The bankruptcy discharge is usually ordered after the time for filing a complaint objecting to discharge has expired. That is usually about three months after the date the debtor files the bankruptcy petition. In Chapter 13 cases, the bankruptcy court usually orders the discharge soon after the debtor completes all payments under the Chapter 13 Plan, or sometime after three to five years. Typically the discharge is ordered automatically by the bankruptcy court. Copies of the order are mailed to all creditors, the trustee, the debtor and the debtor's attorney. The notice tells creditors that all dischargeable debts have been ordered discharged and that they should not attempt any further collection on penalty of contempt.

The bankruptcy court may deny the debtor a bankruptcy discharge if the debtor has failed to provide requested tax documents; failed to complete a course on personal financial management; transferred or concealed property; destroyed or concealed books or records; committed perjury or other fraudulent acts during the case; failed to account for the loss of assets; or violated a bankruptcy court order. There is absolute no right to a discharge.

Can a Discharged Debt Be Repaid?

Yes! The discharge prevents actions to collect from the debtor, but the debtor may repay a discharged debt even though it can no longer be legally enforced. There is no prohibition against repayment of a debt, and commencement of voluntary payments does not affect the enforceability of the discharge injunction. In other words, you can make voluntary payments without fear of waiving your discharge or creating an enforceable debt.

The Effect of Bankruptcy on a Credit Report

The Fair Credit Reporting Act ("FCRA") directs credit reporting agencies to exclude bankruptcy case information from all consumer reports ten years after "the date of entry of the order for relief." The FCRA does not distinguish between chapter 7 or chapter 13. However, many credit counselors cite an "unofficial policy" of the three largest credit reporting bureaus (Experian, TransUnion, and Equifax) that removes a chapter 13 filing from your credit report after seven years.

Section 301 of the bankruptcy code states that the "order of relief" date is the filing date, so the ten year period is measured from the bankruptcy filing date, not the discharge date. Information about your bankruptcy must be removed from your credit report not later than ten years after the date you filed the case. If you file on January 1, 2010, the bankruptcy must be removed before January 1, 2020.

Many people ask at the initial meeting with their bankruptcy attorney, "Won't bankruptcy ruin my credit score?" Let me answer that question with a question: "Isn't your credit score already ruined?" If not, isn't the handwriting on the wall? How the bankruptcy affects your credit score will depend on your circumstances and is beyond the scope of this topic. As a general rule the bankruptcy filing will have an immediate adverse affect on the score, although in some cases there is no score change and in a few cases the score actually improves.

Rebuilding After Bankruptcy

For most people, rebuilding your credit history should start immediately after your case closes. While there are many ways to rebuild credit after a bankruptcy case, below briefly describes a typical process.

Step One: obtain a copy of your credit report from Experian, Equifax, and TransUnion. You can obtain an entirely free report from each of these agencies at: https://www.annualcreditreport.com

Step Two: review each report for errors and report inaccuracies to the credit bureau. Discharged debts should be described as "Discharged in Bankruptcy" with a "Zero Balance." There should be no activity since the date of your bankruptcy filing.

Step Three: after correcting your credit report, it is time to rebuild your credit score. Approximately 1/3 of your credit score is based on your payment history, so many individuals have found that they can quickly rebuild by making on-time payments to a secured credit card or small bank loan (that may require a co-signor). On-time payments to a secured debt, such as a home mortgage or auto loan, will also improve your score.

Slow and steady really does win the credit rebuilding race. Making wise credit choices and paying bills on time will dramatically improve your score.

Omitted Creditors

A forgotten and omitted creditor can sometimes occur when going through a bankruptcy. If you discover you have overlooked a creditor, inform your bankruptcy attorney immediately! If discovered during the bankruptcy, the debtor is required to file amended schedules and identify the creditor.

What happens to an overlooked creditor discovered after the bankruptcy case closes depends on the court and the circumstances. Sometimes it is important to ask the bankruptcy court to reopen the bankruptcy case and discharge the debt. In other cases the debt may be considered discharged as a matter of law, that the bankruptcy discharge took care of that debt even though it wasn't listed in the schedules. Finally, in some rare cases the debt cannot be discharged and the debtor is simply stuck with it.

Failing to list a creditor means that the creditor did not receive notice of the bankruptcy case and was not given an opportunity to protect its interests during the case. In no asset bankruptcy cases, omission of a creditor means very little and most courts will find that the debt was discharged with the bankruptcy. On the other hand, an omission in an asset case (creditors receive funds from the estate) means that the creditor was deprived the opportunity to be paid. In that case most courts will find that the debt was not discharged.

CHAPTER SEVEN: Why You Should Choose the O'Bryan Law Offices

At the O'Bryan Law Offices we offer a combination of Experience, Focus, Size and most importantly Compassion that makes us the area leader in bankruptcy law:

Experience

- Founder Julie O'Bryan has 25 years of legal experience and has worked as a staff attorney for the United States Bankruptcy Court for six years;
- Associate Attorneys Leeann Thornhill, Andrea Wasson, LaShea Bordon and Amy Elam-Krizan have collectively over 30 years experience in Bankruptcy; and Asssociate Attorney Christy Tobin can handle any type of family law issue that may arise
- O'Bryan Law Offices have been serving the Louisville, Kentucky, area since 1995;
- Julie O'Bryan is one of only five attorneys in Kentucky certified in Consumer Bankruptcy by the American Board of Certification.

Size

- As one of the areas largest bankruptcy law firms, O'Bryan Law Offices files over 1,000 bankruptcy cases each year;
- With six licensed attorneys and a large staff covering five office locations, we have the size and resources to handle the complex bankruptcy case without sacrificing individual attention to all of our clients.

Focus

- As a bankruptcy law firm, O'Bryan Law Offices have developed processes for handling cases that are efficient and effective. Unlike smaller firms, we do not have to "recreate the wheel" every time a bankruptcy client walks in the door;
- O'Bryan Law Offices recognize the special needs of bankruptcy clients and are able to quickly assist clients in all types of important bankruptcy-related issues like emergency bankruptcy filings to prevent foreclosure or repossession, or re-establishing disconnected utilities.

O'Bryan Law Offices combines a thorough understanding of bankruptcy law with compassionate and caring client service. We are honored to represent our clients honestly, diligently, and respectfully. It is what our clients deserve and what we have pledged as attorneys.

Testimonials

Why should you hire O'Bryan Law Offices to handle your bankruptcy? Other people have and they are glad they did! Here are some comments from a few of them:

"I was scared and heard so many terrible stories about the effects of bankruptcy and then one morning while watching TV, I heard an advertisement for O'Bryan Law Offices offering a seminar on the Basics of Bankruptcy. I signed up for the seminar and learned that many people file for bankruptcy every day and it didn't ruin their credit forever. I also found out that I could make payment arrangements with OBryan Law Offices in order to file for bankruptcy. After my initial Fresh Start Planning Session, I not only felt relieved, but confident that I had made the right choice in selecting an experienced law firm to help me through the process. I left the initial meeting, feeling like my life was NOT over and that I was ready for a New Beginning!" -M. Rose

"I would like to thank all the staff at OBryan Law Offices for the outstanding job they did for me. I have to say that when I first came to their office I was really confused and upset about my financial predicament after losing my business. From the minute I stepped into the office, I was greeted with a smiling face saying 'How may I help you?' This meant so *much to me! The staff told me over and over again that it would be okay. But I didn't believe it at first. But as promised ... everything did turn out okay! Through the whole process, all I got was support. The thing that impressed me the most was that if I had a question or concern, I would e-mail or call and the e-mails were responded to quickly and the phone calls were dealt with professionally. I will tell anyone in need of bankruptcy representation to call OBryan Law Offices as they take great care of their clients."* -J. Donhoff

Conclusion

Whether you are just now experiencing financial difficulties or are on the brink of financial disaster, you need to take action. By requesting this book, you have taken a first step toward resolving your problems and getting your life back on track. If you have any more questions or would like to schedule your Fresh Start Planning Session visit our website at www.obryanlawoffices.com or call us at 339-0222 or toll-free 866-410-2004.