

This is the twenty-first in my series of newsletters. Due to your great interest, I plan to continue this quarterly report for my clients.

## **THE 20 MOST ASKED QUESTIONS REGARDING BANKRUPTCY**

### 1. Q: WILL I GET BACK MY LICENSE IF I FILE BANKRUPTCY?

A: Under the current state of the law, if your license is solely suspended for failure to pay surcharges then you get back your license if you file Chapter 13. Once you show the bankruptcy petition to the Division of Motor Vehicles and pay your restoration fee, your license will be reinstated if it is not suspended for any other reason.

Based on the current status of the law regarding sovereign immunity, there may be issues regarding whether the debt is ultimately discharged.

### 2. Q: WILL I LOSE MY HOUSE IF I FILE BANKRUPTCY?

A: If you file the correct bankruptcy and remain up to date on your mortgage, you will not lose your home. Contrary to a lot of myths, you will not lose your home if you file Chapter 7 if you are up to date on your mortgage and you have equity under \$16,150 (married people are allowed equity of \$32,300). If you are behind on your mortgage, Chapter 7 will only temporarily stop foreclosure. However, the mortgage company will either move to lift the Stay to continue foreclosure or proceed with foreclosure after discharge.

Chapter 13 allows you to pay arrears over a 3-5 year period to stop foreclosure. It is always advisable to file as soon as possible since the longer you wait, the more the arrears sky rocket due to foreclosure fees, interest on the arrears and attorney fees.

Also, in Chapter 13 you will not lose any property since you pay creditors what they would be entitled to receive in a Chapter 7 case, if you have non-exempt equity.

### 3. Q: WILL I LOSE MY CAR IF I FILE BANKRUPTCY?

A: If you chose the correct chapter, you will not lose your vehicle. If you are up to date on your car payment and have no equity in your vehicle you should file a Chapter 7 bankruptcy and not have to worry about losing your vehicle. However, if you have substantial equity, a Chapter 7 trustee could sell your car; therefore, you would file a Chapter 13 so your vehicle is not sold.

If you are behind on your car payment or it has been repossessed, you must file Chapter 13 or else you will lose the vehicle.

Currently, under Chapter 13 (unless the law is changed which is anticipated), you have 3 alternatives:

- A). You can pay the replacement value of the vehicle plus contract rate of interest over the life of the Chapter 13 Plan;
- B). You can pay the balance due and owing on the vehicle plus contract rate of interest over the life of the Chapter 13 Plan; or
- C). You can cure the arrears over the life of the Plan plus resume car payments outside the Plan the month after the petition is filed.

Please note whenever you have a financed vehicle you must provide to the finance company that the vehicle is adequately insured.

Finally, if you have a leased vehicle you can only put arrears in the Plan. Also, if the leased vehicle is repossessed before you file, the bankruptcy won't get back the vehicle. Normally, if you finance a car and it is repossessed you can get back the vehicle even after it is repossessed as long as it has not been sold.

Thus, you must know the circumstances in determining what type of bankruptcy will save your vehicle.

4. Q: MY SHERIFF SALE IS SCHEDULED TOMORROW, DO I STILL HAVE ENOUGH TIME TO SAVE MY HOME?

A: Under the 1994 Bankruptcy Reform Act, you may file a Chapter 13 bankruptcy and cure a default with respect to a debtor's principal residence "until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law" 11USC § 322(c)(1).

There is currently a split in the law when a foreclosure sale takes place under New Jersey law.

At present in our vicinage, Judge Wizmur, Judge Ferguson and Judge Gindin allow you to cure arrears until the actual deed is transferred: However, Judge Stripp and Judge Burns hold that the actual date of the Sheriff Sale is when the foreclosure sale takes place.

Unless you enjoy playing roulette, the safe thing is to make sure the Chapter 13 petition is filed before the actual physical occurrence of the foreclosure sale to make sure that you can save your home.

In addition, I would strongly advise you to file as soon as you are behind since the longer you wait, the greater the fees for the mortgage company since they are entitled to foreclosure fees and cost plus interest on arrears if the mortgage was incurred prior to October 23, 1994.

Yes, you may file a Chapter 13 petition before the actual physical sheriff sale but my advice is to file it as soon as you are in arrears.

5. Q: MY EX-BOYFRIEND AND I PURCHASED OUR HOME 10 YEARS AGO BUT THE MORTGAGE IS IN MY EX-BOYFRIEND'S NAME, AND THE DEED IS IN HIS NAME. HE TOOK OFF SIX MONTHS AGO AND I'M LEFT WITH THIS HOUSE THAT IS GOING TO SHERIFF SALE NEXT WEEK. CAN YOU HELP ME?

A: Even though the house is not in your name and the mortgage is in your ex-boyfriend's name, my argument would be that since you live in the home your children, you have a possessory interest in the home and would be eligible to file a Chapter 13 and cure the arrears on the mortgage and stop the sheriff sale even though you don't own the home.

6. Q: MY GRANDMOTHER COSIGNED MY CAR PAYMENT AND I AM 2 PAYMENTS BEHIND AND THE BANK IS THREATENING TO REPOSSESS IT ANY DAY. I ALSO HAVE SUBSTANTIAL CREDIT CARD DEBT AND MY WAGES ARE GOING TO BE GARNISHED ANY DAY. WHAT CAN I DO TO SAVE THE CAR AND STOP THE GARNISHMENT?

A: Fortunately, there is a codebtor Stay which means that as long as you pay the payoff on the car in full or the arrears in full and resume payments, you will save the vehicle and prevent the bank from pursuing your grandmother as long as the car loan was a consumer debt. The codebtor Stay only applies to Chapter 13.

Also, the moment the petition is filed, the creditor must immediately stop any wage garnishment. If your wages are garnished subsequent to a bankruptcy filing, they must be returned or the creditor is in willful violation of the bankruptcy Stay and you can get counsel fees, and other monetary sanctions against the creditor for a willful violation of the Stay.

7. Q: I'VE BEEN OUT OF WORK AND FELL BEHIND ON MY RENT. I MISSED THE COURT DATE SINCE I HAD TO BE OUT OF TOWN FOR FUNERAL. NOW I HAVE A 3-DAY NOTICE ON MY DOOR. CAN YOU

HELP?

A: Under Chapter 13, you are allowed to assume a lease and cure the back rent, so long as it is done promptly.

As soon as the petition is filed, my office would immediately fax the petition to the landlord's attorney and the landlord tenant court.

Under the law, this plan would stop eviction and allow you to resume ordinary rent payments and pay a trustee the money you are behind on the back rent.

This issue under the law is divided by the Judges if a judgement of possession has been entered. However, most landlords' attorneys just wish to have the landlord get paid and won't raise this legal issue if the debtor resumes post petition rent payments.

My best advice is to file the Chapter 13 petition BEFORE the date of Court to guarantee no judgement has been entered: However, I have helped numerous clients who have filed before the actual physical lock out. If you file after the locks are changed, Chapter 13 will not help.

Also, don't get lulled into a false sense of security if you have a payment plan with the landlord AFTER the judgement of possession is entered.

Once the judgement is entered, the landlord is in control and can issue a warrant of removal if you don't comply with his terms.

If you cannot come up with the total amount of rent arrears prior to the Superior Court eviction proceeding, the bankruptcy will allow you to save your apartment under much more favorable terms.

8. Q: THE OTHER DAY WHEN I RECEIVED MY CHECK I WAS IN A STATE EXTREME ANXIETY SINCE I LEARNED THE INTERNAL REVENUE SERVICE GARNISHED MOST OF MY CHECK. THIS WILL SET ME BEHIND ON ALL MY BILLS. WHAT CAN I DO?

A: With the IRS, I usually advise clients to file Chapter 13. This will immediately stop the wage garnishment. If you have real estate and the IRS has a lien, then the IRS is secured and you must pay back the value of the collateral. Also, if the tax is less than three years old, It is a priority tax and must be paid back over the life of the Plan.

Only the 1040 taxes over 3 years old, or not assessed within 180 days of filing, would be treated as unsecured. The correct procedure is to file a Motion to Reclassify the Internal Revenue Service's Claim.

In contrast under Chapter 7, income taxes over 3 years old aren't automatically discharged. The best way to handle that issue is to file an adversary proceeding to decide which taxes are dischargeable.

Under certain circumstances if you bring a Chapter 7 discharge to the IRS office, they may accept this and admit the debt is discharged. However, the safer procedure is filing the adversary proceeding under the Chapter 7 route.

You must always make sure you are current in filing all your tax returns whether you are in Chapter 7 or 13.

9. Q: I USED TO BE A SHAREHOLDER IN A CORPORATION WHERE I WAS PARTNER WITH 2 BUDDIES OF MINE. THE CORPORATION WENT UNDER AND OWED \$1500 IN TAXES. NOW 3 YEARS LATER, THE IRS IS ATTEMPTING TO LEVY ON MY BANK ACCOUNT BUT HASN'T TOUCHED MY BUDDIES? IS THIS RIGHT?

A: Unfortunately, when you are a partner the IRS can choose who they want to pursue since you are all jointly and severally liable.

To stop the levy, you would file a Chapter 13 and then file a Motion against the IRS to determine whether you were a "RESPONSIBLE PARTY"? The responsible party is fully obligated to pay these taxes and they would have to be paid in full over life of the plan.

10. Q: I HAVE AN ASTHMATIC CHILD WHO NEEDS THE AIR CONDITIONER TO BREATHE DUE TO SUBSTANTIAL MEDICAL EXPENSES, I GOT BEHIND ON MY ELECTIRC BILL AND THEY ARE READY TO SHUT ME OFF. WHAT CAN I DO?

A: Under section 366 of the bankruptcy code, the utility cannot cut you off as long as you provide adequate assurance. Thus, if you file Chapter 7 or 13, you will immediately stop shut off. However, within twenty (20) days of filing you have to give the utility a deposit, which constitutes adequate assurance, or they will shut you off.

- 11, Q: WILL A BANKRUPTCY ALLOW ME TO SAVE MY HOME IF IT IS SCHEDULED FOR A TAX SALE?

A: Chapter 13 will give you the opportunity to payoff the arrears on back

taxes over the life of the plan. This will also deal with back water or sewer charges.

However, if you file Chapter 13, you must resume your normal quarterly taxes post petition or the taxing authority will move to lift the bankruptcy Stay and foreclose on your home.

12. Q: I OWE \$30,000 IN STUDENT LOANS THAT WERE INCURRED IN 1982. NOW THEIR LAWYERS ARE SUING ME AND TRYING TO GARNISH MY WAGES. I ALSO HAVE SUBSTANTIAL CREDIT CARD DEBT TOTALLING \$30,000. WHAT CHAPTER CAN I FILE?

A: On October 7, 1999, President Clinton passed a new law, which prevents student loans from being discharged, in bankruptcy regardless of how old they are. This alters the old law that student loans over 7 years old were dischargeable.

The only way to discharge a student loan is to establish "undue hardship" which is a difficult burden to establish under the law of our circuit.

Therefore, I would advise you to initially file Chapter 7. This will stop the wage garnishment while the Stay is in effect and discharge all the other debts. However, since the student loans cannot be discharged in Chapter 7 or 13, the student loan creditor will be free to pursue you after you are discharged in Chapter 7.

Assuming the law does not change (which may limit refiling bankruptcy) at the time of this publication, you are allowed to file Chapter 13 to payoff the student loan over the life of the plan and stop the garnishment. Please note interest still accumulates and you will owe interest when the plan is completed.

13. Q: I PREVIOUSLY FILED CHAPTER 13 IN 1995 AND 1997 BUT DUE TO MEDICAL PROBLEMS, BOTH CASES FAILED. NOW MY HOUSE IS SCHEDULED FOR SHERIFF SALE NEXT WEEK. AM I LIMITED TO THE NUMBER OF CHAPTER 13 FILINGS?

A: Presently until the law changes there is no specific number of bankruptcy filings. However, the normal rule of thumb is 3 filings. Most mortgage company's will argue that there is bad faith after the third filing and will ask for prospective relief. This means that if one files another bankruptcy after prospective relief is entered the automatic Stay will not stop the sheriff sale but it will be your burden to reimpose the Stay establishing changed circumstance.

However, if things have improved and you have 2 prior dismissals, currently under the PRESENT law, there is no reason to prevent you from refiling Chapter 13.

14. Q: I AM PRESENTLY IN CHAPTER 13 BUT THERE IS A SHERIFF SALE SCHEDULED NEXT MONTH. THE TRUSTEE IS GETTING PAID SINCE THE TRUSTEE IS GETTING PAID OUT OF MY WAGES.

A: Unfortunately, if you are presently in bankruptcy, the reason for the Sheriff Sale is that the mortgage company got relief from the Stay and can now continue foreclosure.

If you dismiss your case voluntarily, you will be prohibited from refiling Chapter 13 for 180 days, which will not give you enough time to refile.

However, if you are married or the mortgage is in another person's name, they could always file Chapter 13 and save your home.

Even if your spouse is not on the deed or mortgage, your spouse would have an equitable interest, which would allow he/she to save the home under a Chapter 13 reorganization.

15. Q: I JUST GOT DIVORCED AND I WAS ORDERED TO PAY MY EX \$50,000 IN EQUITABLE DISTRIBUTION. CAN I FILE CHAPTER 7?

A: I would not advise you to file under chapter 7 because under the 1994 Bankruptcy Reform Act, your ex-spouse could challenge the dischargeability of equitable distribution under 11 USC 523 (a)(15). Since this could involve substantial bitter litigation, it is always better to go into Chapter 13 since equitable distribution can be discharged in Chapter 13.

Please remember that there is a debt limitation in Chapter 13. If you have over \$807,500 in secured debts or \$269,500 in unsecured debts, you will be over the debt limits and not qualify for Chapter 13.

16. Q: WILL I LOSE ANY PROPERTY IF I FILE BANKRUPCTY?

A: To answer this question, you must understand that Congress provides exemptions for all types of property. Only if you are way over the allowed exemptions and file Chapter 7 would you lose property. If you have too much equity in your home or car and have substantial personal property, Chapter 13 will protect all your property.

The exemptions are as follows:

Real Estate	\$16,150
Jewelry	\$ 1,075
Automobile	\$ 2,575
Personal Injury Claim	\$16,150
Household Goods, Supplies, & Furnishings	\$ 8,625
Wild Card Exemptions	\$ 8,075

For example if you bought a house in 1950 for \$10,000 and its worth is \$60,000 today, free and clear, you do not want to file Chapter 7 Bankruptcy since you would lose the home.

The following is a Chapter 7 Trustee's liquidation analysis which creditors would have to receive in Chapter 13: Fair Market Value \$60,000-\$6,000 cost of Sale-\$16,150 exemptions=\$37,850.

17. Q: I OWE \$5,000 CHILD SUPPORT AND THERE IS A BENCH WARRANT FOR MY ARREST. WHAT CAN I DO?

A: A Chapter 13 will not guarantee that you won't be incarcerated but it will help you if you go before the child support officer or Judge and show that you filed Chapter 13 and are complying with your repayment of child support arrears.

The Chapter 13 only deals with back support. If you don't stay current on your support you will go to jail.

18. Q: I HAVE A REAL SERIOUS GAMBLING PROBLEM AND HAVE BORROWED FROM MY CREDIT CARDS TO MAINTAIN THIS PROBLEM. CAN I DISCHARGE ALL THESE DEBTS IN CHAPTER 7?

A: No, you do not want to file Chapter 7 since there is a presumption that if you ran up case advances within sixty (60) days of filing that there was fraud.

The way to get around this serious dilemma is to file Chapter 13 where fraud is currently dischargeable. However, the court is going to look at the issue of "good faith" and the reasons for running up this credit.

Also, under the proposed legislation pending before Congress, fraud will not be dischargeable in Chapter 13 if and when the new law passes.

19.Q: I JUST RECEIVED AN ORDER FOR MY ARREST SINCE I NEVER

ANSWERED THE CREDITORS INFORMATION SUPEONA AFTER A JUDGEMENT WAS ENTERED AGAINST ME. WILL CHAPTER 7 HELP ME?

A: There is no guarantee that you won't go to jail, but my office would immediately fax a bankruptcy petition to the creditor and usually, this will resolve the situation, however there is NO GUARANTEE. You should not wait until the last minute to file. The quicker you file, the quicker you will stop the threat of arrest or wage garnishment.

20. Q: AM I ALLOWED TO HAVE A BANK ACCOUNT IF I FILE BANKRUPTCY?

A: The moment you file Bankruptcy there is an automatic Stay that goes into effect. This prevents creditors from seizing any assets. There is certainly no reason you cannot have a bank account once the petition has been filed.