

2011 Divorce and Bankruptcy Update

by

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Bankruptcy Basics

Chapter 7

- Liquidation of debts and assets.
 - Joint Debtors not protected.
- Exemptions in Florida
 - Homestead: Unlimited.
 - Personal Property: \$1000/4000 (Wild Card)
 - Auto: \$1000
 - Retirement Accounts: Unlimited
 - TBE Property: Unlimited
- Trustee
- Non Dischargeable Debts.
 - Support Obligations
 - Certain Taxes
 - Student Loans

Chapter 13

- Reorganization of debt.
- Ch 13 Payment Plan
 - Based on Income and Expenses.
 - Secured Creditors
 - Pay or Surrender
 - Arrearages paid in the Plan
 - Unsecured Creditors
 - Get leftovers.
- Lien Stripping

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA")

Debt and Marriage

Individual vs. Joint Debts

- All debt is "individual"
- You don't marry someone's debts or assets.
- Authorized User.

Bankruptcy as Pre-Divorce Planning

Conflicts of Interest

- Deal or No Deal
- Complete Disclosure

Timing the Cases

- BKC must be filed while couple still married.

Marital and Individual Assets

- Problem Assets: Real Estate

Marital and Individual Debts

- Discharge both to enable payment of non-dischargeable debts.

Post-Divorce Filing.

- If One Files and the Other does not.
 - Reduces Debt to increase Disposable Income
 - Protect non-filing spouse in DOM Settlement Agreement.

Spouse vs. Spouse (X vs. X)

Marital Assets

- may become property of the bankruptcy estate.
 - Investment property
 - paid off autos

Marital Debts

- normally discharged.
- joint debtor still on the hook.

Steps to Protecting Non-filing Spouses Rights

Proof of Claim

- establishes existence of a debt in asset cases
- entitles "creditor" to payment under Ch. 13 Plan.

Adversarial Action

- Pre October 2005
 - was required to force payment of marital debt.
- After October 2005
 - no longer required.

Objection to Exemptions

- New law allows all assets to be attacked by former spouse.

Bankruptcy Basics

Chapter 7 Liquidation of Debt and Assets

In Chapter 7, all debts are discharged, meaning erased, except those that the person wishes to keep. If they want to keep their car, they have to keep their car payment. Likewise, if they want to keep their home, they have to keep their house payment. If a person is only a few months behind on their mortgage, chapter 7 can be used in a "work-out" situation. A chapter 7 can leave a person with only their basic living expenses. Other debts like credit cards, doctor bills, and even some taxes no longer need to be paid freeing up money to catch up with the mortgage payments. It is sometimes possible to enter into a "reaffirmation agreement" that modifies the terms of the mortgage and makes it more affordable. One thing a chapter 7 cannot do is force creditors into a repayment plan. So, if the mortgage payments are too far behind, and the lender doesn't want to deal, a chapter 13 would be a better option.

People file a 7 if they are up to date on their house and wish to keep it or if they want to discharge the debt.

Automatic Stay: Filing date to discharge

Motion for Relief from Stay: Request that the creditor be released from the bankruptcy so they can foreclose their lien rights. In Florida, due to the nature of the homestead exemption, motions for relief from stay are routinely granted.

Chapter 13 Reorganization of Debt

Chapter 13 is a reorganization of debt. Creditors are divided into groups including "secured" and "unsecured." A secured debt has collateral or security. On a car loan, the car is the security. If you don't make the payments the loan company can come and repossess the car. In the case of a mortgage, the house is the collateral. If you don't make the house payments, they can file foreclosure. Unsecured creditors include credit cards and doctor bills and have no collateral or security. In a chapter 13 case, regular payments must be made through the court to secured creditors if the person wants to keep the collateral, meaning the house or the car. If the person is behind in their payments, the amount they are behind is put into a payment plan and spread out up to 60 months. For example, if a family's regular mortgage payment is \$2000, and they are five months behind, the arrearage is \$10,000. In chapter 13, they would pay their regular payment of

\$2000 plus \$167 per month (10,000 divided by 60 = 167). As long as they make the payments in the chapter 13 payment plan, the lender cannot foreclose.

File a 13 to force the mortgage company into a payment plan to get caught up.

Lien Stripping. It is also possible to eliminate the second mortgage if it has no equity. If the first mortgage is greater than the value, subsequent liens can be stripped because they no longer secured by equity.

§ 523. Exceptions to discharge

(a) A discharge under section [727](#), [1141](#), [1228 \(a\)](#), [1228 \(b\)](#), or [1328 \(b\)](#) of this title does not discharge an individual debtor from any debt—

(5) for a domestic support obligation;

(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit;

§ 507. Priorities

(a) The following expenses and claims have priority in the following order:

(1) First:

(A) Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.

(B) Subject to claims under subparagraph (A), allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition, are assigned by a spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative to a governmental unit (unless such obligation is assigned voluntarily by the spouse, former spouse, child, parent, legal guardian, or responsible relative of the child for the purpose of collecting the debt) or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the

petition be applied and distributed in accordance with applicable nonbankruptcy law.

(C) If a trustee is appointed or elected under section [701](#), [702](#), [703](#), [1104](#), [1202](#), or [1302](#), the administrative expenses of the trustee allowed under paragraphs (1)(A), (2), and (6) of section [503 \(b\)](#) shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims.

§ 522. Exemptions

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section [502](#) of this title as if such debt had arisen, before the commencement of the case, except—

(1) a debt of a kind specified in paragraph (1) or (5) of section [523 \(a\)](#) (in which case, notwithstanding any provision of applicable nonbankruptcy law to the contrary, such property shall be liable for a debt of a kind specified in section [523 \(a\)\(5\)](#));

Recent Cases

Chapter 7

In Re: Paul Christopher Ginzel, Case No. 6:09-bk-15478 ABB Adversary No. 6:10-ap-00015-ABB. Orlando. Judge Briskman

Almost nothing Dischargeable.

In Re: Dennis & Jennifer Duggan: Case 6:06-bk-02512-KSJ. Orlando. Judge Jennemann.

Trustee can not void exemptions.

In Re: Robert N. Gentilini Case No. 05-44584-BKC-RAM. Maimi. Judge Mark.

Chapter 13

In Re: Louis R. Reimer, Case No. 6:09-bk-06090-KSJ, Adversary No. 6:09-ap-840. Orlando. Judge Jennemann.

“Non Domestic Support” Property Awards Dischargeable.