

BANKRUPTCY IN GENERAL

A bankruptcy is a federal court case which helps a person get rid of debt and resolve financial problems.

A person who files for bankruptcy is called a “debtor.”

A “creditor” is another person or company that the debtor owes money to. A “trustee” is a person appointed to help administer the case. This paper explains how bankruptcy works for consumer debtors and for creditors.

If you have financial problems, think before you file bankruptcy. A bankruptcy stays on your credit report for ten years, and might make getting credit more expensive and harder to get. Contact your lender(s) if you are behind on your home mortgage(s) or your car loans. You might be able to avoid bankruptcy by making a deal with your home mortgage lenders or your other creditors to repay some or all of your debt over time. A lawyer or a consumer credit agency might be able to help you make a deal. If not, a bankruptcy might be very helpful.

If you are thinking about filing for bankruptcy, talk to a lawyer if at all possible. Many debtor’s lawyers offer a free initial consultation. A bankruptcy petition preparer is not a lawyer and cannot give you advice.

Debtors usually file a chapter 7 or chapter 13 bankruptcy case. These two types of cases, described below, are alike in many ways. Both cases require a debtor to file lists of ALL debts (even those the debtor intends to keep paying) and ALL property of any kind that the debtor owns. They both require the debtor to attend a meeting early in the case to answer questions under oath asked by the trustee and by creditors. In a chapter 7 case the trustee sells whatever property the debtor does not keep (see **What the Debtor Can Keep** below), distributes the sale proceeds to creditors, and then closes the case. In a chapter 13 the trustee does not usually sell any property; instead, the debtor proposes a plan to use her or his wages or other income to repay some or all the debts over a three- to five-year period. During the case, the debtor pays her or his basic day-to-day living expenses as if the debtor were not in bankruptcy.

WHAT THE DEBTOR CAN KEEP

The Debtor usually keeps **all** of her or his property. The debtor can keep certain property for herself or himself, called “exemptions.” These are the things that the debtor and the debtor’s family need in order to keep living; such as some money, clothes, household goods and furnishings, retirement funds, vehicles, a residence, and pets. (Note: This is not a complete list of everything a debtor can exempt.) Creditors may not take exempt property except for taxes, child support or alimony. The debtor also usually gets to keep her or his house and vehicle, as long as the debtor can keep making the monthly payments on the house and vehicle.

THE AUTOMATIC STAY AND DISCHARGE

When a debtor files a bankruptcy petition, the “automatic stay” kicks in “automatically.” The stay continues in effect until the end of the case, unless the judge grants a creditor’s request to end the stay early. The stay immediately stops (“stays”) debt collection actions, including phone calls and letters to the debtor, lawsuits, and wage garnishments. (**Collection actions for child support or alimony are not stayed.**) The stay also stops, at least for a while, foreclosure of a home and repossession of a vehicle.

At the end of the case, the debtor receives a “discharge,” which is a court order which says the debtor does not have to pay her or his listed debts. (This does not apply to “non-dischargeable” debts, described below.) The debtor may voluntarily repay a debt, but a creditor may never ask for or force repayment of a discharged debt. However, if the debtor owes a secured debt, such as a mortgage on the home or the title to a vehicle, the debtor must keep making payments on the house or vehicle to the creditor or else the creditor can take the home or the vehicle back. The discharge provides the debtor a financial “fresh start” in life.

Sometimes a creditor or the trustee will object to the debtor getting any of her or his debts discharged. That happens when the creditor or trustee claims that the debtor has lied on the schedules, hidden or given away property before or after the case starts, destroyed or failed to keep records, etc. In particular, failure to fully disclose assets is a reason for denying a discharge. Debtors who have something to hide **should not file bankruptcy.**

NON-DISCHARGEABLE DEBTS

A debtor cannot get a discharge of certain kinds of debts. These “nondischargeable” debts include certain taxes, debts due to fraud, debts from deliberately harming someone, DWI debts, student loans, and unlisted debts. Child support and alimony are not discharged at all. **A debtor must continue paying child support and alimony during the bankruptcy case.** For the other types of nondischargeable debts, the debtor must be prepared to pay those after the discharge is granted.

To obtain a judge’s ruling that a debt is nondischargeable or that the debtor will not get a discharge at all, the trustee or the creditor must file a lawsuit in the bankruptcy court. A lawsuit in bankruptcy court is called an “adversary proceeding.” Discharge and/or dischargeability adversary proceedings are usually complicated lawsuits and require a lawyer. The debtor’s lawyer will charge additional fees for defending the debtor in a discharge or dischargeability lawsuit. Such a lawsuit may delay or prevent the entry of the discharge. Except for nondischargeable debts, creditors may not try to collect any remaining unpaid debts.

MORE PROCEDURES IN CHAPTER 7 AND 13 CASES

A debtor must complete and file in the bankruptcy court certain required forms which include the “Petition,” which starts the case, and the “Schedules” and the “Statement of Financial Affairs” which list and describe all of the debtor’s property (assets), debts, creditors, income and expenses, and financial history. The debtor signs these documents to show, under penalty of perjury, that they are true and complete. Intentionally leaving out or misstating information can result in a federal criminal prosecution for bankruptcy fraud; or the debtor can be denied a discharge but still have her or his nonexempt property taken by the trustee. When these documents are filed with the bankruptcy court, they become public records.

About 45 days after the petition is filed, the debtor will have to attend a meeting with the trustee and creditors. **At that meeting the debtor will have to show the trustee a photo ID and evidence of a Social Security number (if any).** The trustee will also ask the debtor about the information she or he has filed. Creditors also may ask the debtor questions about debts, property, etc. The debtor must answer all questions accurately and under oath. In a chapter 13 case the trustee will also ask about the debtor’s proposed repayment plan and explain the procedures used by the trustee’s office to handle plan payments.

MORE ABOUT CHAPTER 7 BANKRUPTCY CASES

In a chapter 7 case, whatever nonexempt property the debtor owns when she or he starts the case is sold to pay what the debtor owes when the case starts. Whatever of those debts are unpaid when the case ends get discharged (go away without being paid) except for nondischargeable debts (see above). With some exceptions, the debtor can keep any income or other property the debtor receives after the case starts. Likewise, the debtor does not get a discharge for any debts incurred after the case starts.

If a debtor has more than the median New Mexico income (the 2008 median income for a family of four is \$53,516) the bankruptcy judge may give the debtor a choice of dismissing (getting out of) her or his bankruptcy case or changing the case over to one under chapter 13 (discussed below).

Most chapter 7 cases last about four or five months. The debtor usually gets her or his discharge within two or three months after the meeting with the trustee and creditors. This is true even in cases that stay open longer to allow the trustee to sell property to pay creditors. Note: A debtor can receive a discharge in chapter 7 only once every eight years.

MORE ABOUT CHAPTER 13 BANKRUPTCY CASES

In a chapter 13 case, the debtor uses her or his income after the case starts to pay the debts he or she incurred before the case started. To be eligible to file a chapter 13 case, the debtor must have regular income and must have no more

than \$336,900 of unsecured debt (such as credit cards, unpaid utility bills, etc.) and \$1,010,650 of secured debt (a house mortgage or a title loan on a vehicle are examples of secured debt). Congress encourages debtors to use chapter 13 to repay at least some of their debts. Additionally, a debtor might change to a chapter 13 case if the bankruptcy judge threatens to dismiss a chapter 7 case when the debtor has enough income to pay some portion of her or his debts.

There are other reasons a debtor might file a chapter 13 case, including to have more time (up to five years) to get caught up on the payments to keep a home or a vehicle or to pay off tax debt over time without additional penalties or interest. Usually the debtor can hire and pay for a lawyer over time as part of the plan payments instead of having to pay all the lawyer fees up front.

A chapter 13 case is based on a chapter 13 plan which the debtor prepares and which the judge must approve ("confirm"). The plan must be filed at the time the bankruptcy case is started or within 15 days after that. The plan explains to everyone how the debtor will use her or his income to pay monthly living expenses (including making monthly house and vehicle payments) and also make a monthly payment to the chapter 13 trustee to pay back some or all of the debt incurred before the case started. The debtor must begin making the monthly payments to the chapter 13 trustee within 30 days after the chapter 13 case starts, and the payments must be made in certified funds. The chapter 13 trustee accepts the money, takes out a percentage to run her operation (up to 10 percent), and distributes the remaining funds each month. The law says how the plan must handle different types of debts. The plan must pay unsecured creditors at least what they would get if the case were a chapter 7 case. Unless the debtor has property that would not be exempt in a chapter 7 case, the debtor's ability to pay controls the amount paid to creditors. Other than these limits, there is no specific minimum amount that the debtor must pay creditors.

The plan may allow a debtor to pay a reduced price, including a lower interest rate, to keep some property (but not home mortgages and certain vehicles). If the debtor is behind on a home mortgage or vehicle loan or other secured debt, the past due amounts may be paid through the plan so the home or vehicle or other property is not lost. However, particularly with homes, there may be additional fees and expenses that must be paid to the creditor as part of the cost of making up the past due payments. Certain debts must be paid under a plan. These include recent taxes, child support or alimony and, if the debtor can afford it, the interest on student loans, DWI debt, criminal restitution and fines, and civil restitution or damages from deliberately harming someone.

Creditors and the trustee can object to the proposed plan. If they do, there will be one or more court hearings. If the judge confirms the plan, either as proposed or as changed to resolve objections, the trustee distributes plan payments to creditors according to what the plan says. If the judge does not confirm the plan, the debtor may get

to try again with another plan, or the case may be dismissed or converted to a chapter 7 case (see above).

A debtor may not make credit purchases while in chapter 13 without the judge's permission. The judge can permit the debtor to obtain reasonable and necessary loans (including buying things over time), if the debtor can afford the loan.

If the debtor makes all the plan payments and meets certain other obligations (including being current on child support and alimony), and if the debtor has not received a discharge from a chapter 7 case filed within four years before the filing of the chapter 13 case, the debtor receives a discharge.

ADDITIONAL NOTES FOR CREDITORS

In most chapter 7 cases, after the debtor claims exemptions, there is nothing left to pay anything to unsecured creditors. There is usually but not always some payment to unsecured creditors in chapter 13 cases. To get paid anything in a case, a creditor must file a proof of claim. This is especially important in a chapter 13 case. A creditor should read all the notices that are sent by the trustee, the debtor or another creditor, because if someone asks the judge to do something and no one objects, the judge will often do what has been asked for. The function of the trustee is to help administer the case and to watch out for the interests of the unsecured creditors. So a typical creditor can rely on the trustee to do what is in all the creditors' best interests.

ADDITIONAL INFORMATION ABOUT BANKRUPTCY

This paper only provides a general summary of bankruptcy, and no decision to file should be based solely on the information contained here. There are many places to get additional information concerning bankruptcy. Apart from general publications that you may find at a library or bookstore, consider using the following resources:

- The State Bar of New Mexico conducts a free Consumer Debt Workshop on a monthly basis in Albuquerque, and less frequently in other areas of the state. A volunteer bankruptcy lawyer will present a general one-hour talk. You will have a brief opportunity to discuss your specific situation privately. The State Bar can also refer you to a qualified lawyer. If you meet certain low income guidelines, pro bono (free) services may be available. For more information, call the State Bar at (505) 797-6048.
- * The United States Bankruptcy Court for the District of New Mexico maintains an excellent website with general bankruptcy information and links to other resources about bankruptcy at www.nmcourt.fed.us/usbc.
- The New Mexico Legal Specialization Board offers programs that allow lawyers to ask to be recognized as specialists in Consumer Bankruptcy or Business Bankruptcy, or both. If you wish to contact a certified specialist, visit <https://www.nmlegalspecialization.org>.



FILING BANKRUPTCY IN NEW MEXICO

The decision to file bankruptcy is a serious one. Please consult a lawyer before filing a bankruptcy. Many lawyers who represent bankruptcy filers offer an initial free consultation.

Note: A bankruptcy petition preparer is not an attorney.

The only things that a petition preparer can do for you are to provide you with the bankruptcy forms and then type onto those forms whatever information you provide.

A bankruptcy petition preparer is not competent to provide legal advice to you, and it is against federal law for a bankruptcy petition preparer to provide legal advice.

The information in this paper is from the State Bar of New Mexico Bankruptcy Law Section and is published by the State Bar of New Mexico as a public service. Nothing in this paper is intended to provide specific legal advice for a personal financial situation.

Bankruptcy is a complicated legal procedure. Every case is unique, and specific questions about bankruptcy should be directed to a lawyer who knows bankruptcy law.

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