

## CONSUMER BANKRUPTCY FILINGS UNDER THE NEW BANKRUPTCY LAW

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Law Office of Victoria M. Stevens, P.L.C. is a "debt relief agency" as defined under the Bankruptcy Reform Act.

The following is basic information focusing on consumer bankruptcy and the course of events you may experience in an Arizona bankruptcy case in the District of Arizona. If you cannot find the answer to your question in the information below you should direct your individual question to a bankruptcy attorney.

### Introduction

The new bankruptcy law (effective October 17, 2005) makes filing bankruptcy much more complicated. The new law includes impediments to filing bankruptcy, new bankruptcy court rules, new forms, and additional work for debtors and their attorneys. Additionally, there are many parts of the new law which are ambiguous and subject to multiple interpretations. Because of this, there is some risk and uncertainty about how the new law may impact your assets.

Debtors and attorneys have always been held to a very high standard in Bankruptcy Courts. A client, who does not reveal all assets and liabilities to the attorney or the Office of the United States Trustee, the Panel Trustee assigned to your case or the Bankruptcy Court is risking not only dismissal of the case but civil fines AND jail time.

### Who Can File Bankruptcy in Arizona

There are three chapters of bankruptcy that relate to consumers and businesses. Consumer bankruptcies are generally a Chapter 7 or a Chapter 13 proceeding. A Chapter 7 or 11 can be used by consumers with high assets or debts or businesses.

Chapter 7 is often referred to as a "liquidation" bankruptcy. It can be filed by individuals as well as businesses. Normally, businesses who are no longer in operation file for Chapter 7. One of the new requirements under the new Bankruptcy Law for consumers is a Means Test, which requires the Debtor to set forth their income. Under the means test, a Chapter 7 filing is presumed to be abusive if the debtor's monthly income, reduced by numerous allowances and living expenses, and multiplied by 60 (that is, over a five-year period), is greater than \$10,000. If income adjusted is less than \$6,000, there is no presumption of abuse, and the debtor is free to choose Chapter 7. If adjusted income is between \$6,000 and \$10,000, abuse is presumed only if income exceeds 25% of nonpriority, unsecured debt in the case. An abusive Chapter 7 filing is subject to dismissal or conversion.

Chapter 13 is a consumer reorganization or debt repayment plan most often used by wage earners who need debt relief, but have special problems such as non-dischargeable debts, mortgage arrears, or non-exempt assets. Reorganizations are often used by individuals who have tax problems, or a pending mortgage foreclosure. A Chapter 13 filing will give the individual time to catch up. Both forms of bankruptcy filings are useful to stop wage garnishments, lawsuits, home foreclosure, car repossession, creditor harassment and debt collection efforts.

For individuals with significant assets, a Chapter 11 reorganization may be the only alternative. Quite often, an individual Chapter 11 bankruptcy is filed by a professional that makes a healthy income as a physician, stock broker, financial analyst, actor, CEO or other business executive. The problem frequently lies in the individual's lack of attention to tax matters or a variety of judgments that are impeding his or her ability to continue doing business. Filing a Chapter 11 bankruptcy is a way to buy time and provide some breathing space to pay what is owed, while protecting assets and continuing to operate in your chosen profession.

A Chapter 11 bankruptcy for an individual is a significant undertaking, and those who consider it should be aware of the considerations and likely outcomes of filing an Individual Chapter 11

reorganization bankruptcy.

- If an individual has a significant amount of debt, but does not qualify for a chapter 13, and cannot file a Chapter 7 liquidation because of his or her assets, then a Chapter 11 may be the preferable way to go.
- A Chapter 11 bankruptcy for an individual remains a Debtor-in-Possession, and maintains control over the funds that he or she receives after the bankruptcy is filed. A panel trustee is not required, and the Debtor is free to create a plan of reorganization that can be submitted to the Court and to creditors for approval.
- It is critical to carefully analyze all of the assets and debts carefully. If you have a million dollar condo, you may be forced to file Chapter 11 because of the monetary limits of a Chapter 13 bankruptcy.
- Chapter 11 bankruptcy filing can typically take more than one year to complete, and on occasion will take several years. Debtor in possession accounts must be created, all existing bank accounts must be closed, and the United States Trustee must be included on insurance policies. A monthly operating report must be filed with the Court so that the funds that the Debtor is spending can be analyzed by the Office of the United States Trustee, as well as all the creditors.

### NONDISCHARGEABLE DEBTS

For individuals, there are certain debts that cannot be eliminated, called non-dischargeable debts. These debts include embezzlement claims, child support, back taxes, student loans, criminal restitution or fraud claims. When creditors bring adversary proceedings to have certain debts determined to be non-dischargeable, special litigation skills may be required. Ms. Stevens is a litigator and has handled numerous cases such as these in Bankruptcy Court.

### EXEMPTIONS

An important concept in Chapter 7 and Chapter 13 bankruptcy and a Chapter 11 consumer bankruptcy is "exemptions" or "exempt property." When you file a Chapter 7 or Chapter 13 bankruptcy, the Trustee takes all of your "non-exempt" property and sells it for the benefit of your unsecured creditors. The Trustee cannot take your exempt property and you may keep all of your exempt property if its values are at or under the specific exemption amount. What property is "exempt" and what property is "non-exempt" depends on the laws of the applicable state. Each state has its unique laws about what assets are exempt and non-exempt for bankruptcy purposes. Therefore, before you file bankruptcy you and your bankruptcy attorney must ascertain which state laws will determine your exempt assets.

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

Otherwise stated, a person filing bankruptcy in Arizona today is eligible for the property exemptions he could have claimed if he had filed bankruptcy two years ago. A Debtor is eligible for the following exemptions and execution of a judgment, or in a bankruptcy proceeding.

- Any person the age of eighteen or over, married or single, who resides within the state of Arizona, may hold as a homestead exempt from attachment, execution and forced sale, not exceeding one hundred fifty thousand dollars in value (\$150,000), his interest in his dwelling which may include real property, a condominium or cooperative, or a mobile home. Only one homestead exemption may be held by a married couple or a single person under the provisions of Arizona law. (ARS 33-1101, et seq.)
- Effective as of October 17, 2005, the amount of the homestead may be limited to \$125,000.00 if it was purchased by the Debtor within 1,215 days before the bankruptcy filing.

The following exemptions are designated per person, if the couple filing is married:

- Personal property exemption may include household furniture, furnishings and appliances, the total value of which does not exceed \$4,000.00;

- food, fuel and provisions for the debtor's individual or family use for six months;
- personal items up to specific values prescribed by law;
- life insurance proceeds - Cash Surrender Value \$25,000 and Life Insurance proceeds of \$20,000,
- Motor Vehicle \$5,000 or \$10,000 if disabled,
- Pets, horses, cows, poultry \$500.
- retirement funds (no limit),
- Wearing apparel \$500,
- One watch \$100,
- Musical instrument \$250,
- Money in one bank account \$150,
- Books and personal documents \$250,
- Personal tools, firearms and a burial plot \$500,
- Farm machinery, feed, grain, seed and animals \$2,500,
- Engagement and wedding rings \$1,000,
- and tools and equipment used in a commercial activity, and trade, business or profession \$2,500.
- Any person the age of eighteen years or over, married or single, who resides within this state and who does not exercise the homestead exemption may claim as a personal property homestead exempt from all process prepaid rent, including security deposits as provided in ARS 33-1321, subsection A, for the claimant's residence, not exceeding the lesser of one thousand dollars or one and one-half months' rent. (ARS 33-1126.)

#### COMPLETE DISCLOSURE

There are certain issues that anyone who files for bankruptcy must resolve before filing, so that there will be no surprises during the bankruptcy process. Complete disclosure is the key to an error-free bankruptcy filing. Be aware that the failure to disclose assets to the Bankruptcy Court and the Office of the United States Trustee and the Trustee assigned to your case can result in civil AND criminal penalties. And because of the numerous changes to the United States Bankruptcy Code, filing for bankruptcy has more legal hurdles than it did before October 2005, when the laws changed.

If you are prepared and are aware of the issues before filing, a bankruptcy can provide relief to people overburdened by unsecured debt. However, a bankruptcy is not going to provide relief unless and until a debtor makes a conscious decision to create a budget and remain true to that budget in the future.

Serial filers (people who file multiple bankruptcies to avoid paying debts) are rare. However, those serial filers and the heavy lobbying efforts from credit card companies have created an environment ripe for Congress to take drastic measures to quell what Congress believed was an abuse of the system. Fortunately, most people who file do so with a considerable amount of thought beforehand.

Before you even consider filing, you must reside in the state where you intend to file for at least 120 days prior to filing. In other words, you cannot move from one state to another and immediately file. Next, you must sit down and gather all information on your debts and assets. All of your tax returns must be filed, and if they are not, it will delay the closing of your bankruptcy case and may even result in dismissal. You will need copies of all of your debts, any judgments against you, any pending actions (including criminal actions because they may result in restitution) – and do not leave any debts out. Those debts include money that you owe to friends and family.

Some people try to do what they can to retain certain assets without informing the Bankruptcy Court or the creditors. Here are some examples: Debtors will try to transfer a piece of property in another state to a friend or a family member before filing, thinking that no one will ever know. Do not try this trick! It is called a fraudulent conveyance. If you have one angry creditor who knows a little bit about you then expect that creditor to let the Trustee know about your assets.

Additionally, do not try to pay off your friends and family for debts that you owe them before filing for bankruptcy. It is easily traceable. And the Trustee can go back *at least* one (1) year to check large transfers of your assets or monies to friends and family. How do they do this? It is quite simple to trace a person's assets, and the Trustees take the time and the effort to investigate such activities. An attorney has a duty to the Court to thoroughly investigate your financial activities as well. If you file without the assistance of an attorney, this will not excuse you from answering all questions truthfully.

Filing for bankruptcy is an important decision. And if you are not prepared to change your lifestyle, it is a wasted exercise. As the Bankruptcy Code becomes more difficult for consumers to understand, I find a greater number of individuals coming to me after they have filed to fix errors that they have made initially. If

a consumer goes to a bankruptcy preparer, that preparer is forbidden from giving legal advice. An ill-prepared filing could cause the consumer thousands of dollars and much discomfort. And the Office of the United States Trustee and the Panel Trustees are extremely thorough in reviewing a consumer's financial position. And often, once a bankruptcy is filed, it cannot simply be dismissed by the Debtor.

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