

I. THE DIFFERENT CHAPTERS OF BANKRUPTCY
(U.S. BANKRUPTCY CODE, TITLE 11, U.S.C.)

A. CHAPTER 7: LIQUIDATION

1. Available to individuals (unless previous discharge within 8 years and corporations)
2. Trustee appointed in all cases to verify accuracy of disclosures, conduct creditors meeting, bring actions as necessary to set aside fraudulent transfers/fraudulent conversions/ preferential payments, and/or liquidate non-exempt assets and distribute funds pro-rata to creditors.
3. Trustees appointed by U.S. Trustee
4. Compensation: 25% of first \$5,000
10% between \$5,000-\$50,000
5% between \$50,000-\$1,000,000
3% in excess of \$1,000,000
5. Only individuals receive discharge, which is essentially court-ordered, non-taxable, release and liberation from unsecured debts except the following (sect. 523(a):
 - taxes, unless older than 3 years from date return was due, plus extensions, or 240 days from date of assessment, or for which a return was filed fraudulently filed or for which a debtor willfully attempted to evade the tax(1);
 - debts incurred through fraud or misrepresentation, including false representations regarding financial condition upon which creditor reasonably relied and made with intent to deceive;
(presumption of fraud arises for consumer debts incurred within 90 in excess of \$550 for luxury goods or services, or cash advances for greater than \$825 incurred within 70 days(2);
 - unlisted creditors known at time of filing unless notice or actual knowledge of proceedings (3)
 - debts incurred through fraud in fiduciary capacity, embezzlement or larceny (4);
 - debts incurred through willful and malicious injury to another or property of another (6);
 - government fines or penalties(7);

-student loans unless discharge would impose undue hardship on debtor and debtor's dependents(8); (case law applies following test: debtor's ability to maintain minimal standard of living if forced to repay, likelihood that present inability to pay will persist, and good faith effort to maintain employment and minimize expenses, In re Holmes, 205 B.R. 336 (Bank. M.D. Fla. 1997)

-domestic support obligations (DSO) (5), defined as follows:

A debt incurred before, on or after the filing date, including interest, owed to a spouse, former spouse or child, or child's parent or legal guardian, or to a governmental unit, in the nature of alimony, maintenance or support, without regard to whether such debt is so expressly designated, and established by reason of the provisions of a property settlement agreement, final judgment, or order, or a determination by a governmental unit, and not assigned to a non-governmental unless voluntarily assigned by such spouse, former spouse, etc. (11 U.S.C. 101 (14A).

-debts to a spouse, former spouse, or child and not of the kind specified under paragraph 5 , but due in the course of divorce or separation, or under a separation agreement, divorce decree or other court of record (i.e., joint debt assumptions/hold harmless agreements; asset purchase obligations. (15)

B. CHAPTER 13- WAGE EARNER REORGANIZATION

1. Available only to individuals with regular income whose liquidated, unsecured debts are less than \$336,900 and secured debts are less than \$1,010,650 (11 U.S.C. 109(e).
2. Payment made to creditors through chapter 13 plan proposed by debtor in good faith and approved by court with payments to trustee whose role is to receive payments and distribute per terms of plan.
3. Trustee entitled to 10% of total of proposed payments as compensation.
4. Priority creditors must be paid in full(i.e. IRS/Child support).

5. Typical plan period is 3 years, but cannot exceed 5 years, unless fail to qualify for chapter 7 under means testing, which then requires 5 year plan.
6. Cannot strip down purchase money auto loans if incurred within 910 days (2 years, 5 months) of filing.
7. Discharge broader because includes all debts to former spouse, spouse or child that is not a domestic support obligation, i.e., joint debt assumptions/hold harmless agreements; asset purchase obligations).
8. Case can be dismissed or discharge denied if debtor fails to keep post-filing DSOs current during plan period or fails to provide for full payment to pre-filing DSOs(which are entitled to priority status), unless recipient agrees to lesser amount, or benefits have been assigned to governmental unit and debtor has committed all disposable income to 5-year plan.
9. Mortgages: Currently, with respect to principal residence, can only strip-off 2nd mortgage if value of home is equal to, or less than balance due on first mortgage.

With respect to rental property or commercial property, can modify mortgage by reducing interest or re-amortizing balance over new term, or stripping off debt over value of property.

C. CHAPTER 11-REORGANIZATION

1. Available to corporations and individuals, usually those whose debts exceed what is allowed in chapter 13.
2. Debtor is trustee and oversees own affairs.
3. Plan approved by votes of creditors.
4. Discharge entered after all payments under plan completed and after notice and hearing.

II. THE AUTOMATIC STAY (11 U.S.C. 362)

1. Arises immediately and “automatically” upon filing of petition.
2. Prevents and stays the commencement, continuation or other action that was or could have been instituted against a debtor
3. Excludes the following:
 - establishment of paternity;
 - an action concerning child custody or visitation;
 - domestic violence matters;
 - collection of domestic support obligations from property that is not property of the estate, i.e., exempt assets;

- enforcement or continuation of an Income Deduction Order pursuant to judicial order or statute;
- collection/enforcement procedures used by child support enforcement division under Florida law or Social Security Act such as suspension of driver's license or interception of tax refunds;
- an action for dissolution of marriage, except to extent that such proceeding seeks to determine division of property that is property of estate.

III. MISCELLANEOUS

A. Exemptions:

1. Florida has opted out of Federal exemptions and therefore Florida's exemptions apply:
 - \$1,000 vehicle
 - \$1,000 personal property
 - IRA, 401k, annuities, and most retirement accounts,
 - cash surrender value of life insurance
 - pre-paid college plans
 - homestead, but in bankruptcy, limited to \$125,000 in equity per debtor, if acquired within 1,215 days (3 years, 3 months) from filing, excluding amounts transferred from previous principal residence within same state (sect. 522(p)).
 - If no homestead, extra \$4,000 catch-all exemption

B. Means testing:

1. If gross income from all sources (except social security/disability) exceeds median income for number of persons in household, a presumption of abuse arises, precluding a chapter 7 and therefore requiring a chapter 13 with 5-year plan committing disposable income to pay creditors.
2. Income is based on average of last 6 months prior to filing multiplied by 12.
3. Income includes wages of non-filing spouse, payments from roommates, partner, or parents.
4. Deduct from household income IRS guideline expenses for same household number plus few other specific household expenses.

5. If net income figure is between \$109.58 and \$182.50 per month, then if that amount multiplied by 60 would pay 25% to unsecured creditors, then must file chapter 13.
6. If less than \$109.58 per month, then can file chapter 7.
7. If more than \$182.50 per month, must file chapter 13.

Current median household income for Florida: 1 person-\$42,468;
2 person-\$53,939; 3 person-\$60,162, then \$6,900 per person

C. Priorities:

1. Domestic support obligations are now first priority, unsecured claim, second only to administrative claim of trustee. (prior code placed in 7th priority position).
2. IRS claims, typically those arising in last 3 years, also have priority status.
3. In chapter 7 liquidation, funds raised by trustee are first applied to priority claims before general, unsecured.
4. In chapter 13, priority claims must be paid in full. Remember also that post-petition DSOs must be kept current to be successful.
5. Past due support obligations ordered by court can no longer be modified by chapter 13
6. Under BAPCPA, debts for personal injury arising from unlawful use of alcohol or drugs while operating vehicle or vessel also have priority status.

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