



## **FORT SAM HOUSTON LEGAL ASSISTANCE OFFICE** **The New Bankruptcy Code**

Bankruptcy is a Federal court process designed to help consumers or businesses eliminate their debts or repay them under the protection of the bankruptcy court. On October 17, 2005, Congress signed into law a new Bankruptcy Code that will affect the types of bankruptcy consumers are now eligible to file under.

### **What is the difference between Chapter 7 and Chapter 13 bankruptcy?**

Chapter 7 and Chapter 13 are the most utilized bankruptcy filings for consumers. A Chapter 7 filing is generally characterized as a liquidation, while a Chapter 13 is more aptly described as a reorganization.

In Chapter 7 bankruptcy, you ask the bankruptcy court to discharge most of the debts you owe. In exchange for the discharge, the bankruptcy trustee can take any property you own which is not considered "exempt" under state laws, and sell it and distribute the proceeds to creditors. Although state exemption laws differ, you are usually allowed to keep equity in your home (called a "homestead exemption"), the cash value of insurance policies, retirement plans, and personal property including household goods, furniture, and clothing, up to certain set cash values. Most people of average income will find that a majority of their personal effects are exempt from sale by the trustee.

In Chapter 13 bankruptcy, you file a repayment plan with the bankruptcy court to repay your debts over a five year period. The amount you have to repay depends on how much you earn, the amount and types of debt you owe, and how much property you own. In a Chapter 13 bankruptcy, the trustee does not seize any of your property to sell, and this type of filing may be able to stop a foreclosure on your home. For example, if you are behind on your mortgage and want to keep your house, you may be able to include those arrearages in your repayment plan and repay them over time. Remember however, that in order to file under Chapter 13, you must demonstrate to the court that you have a reliable source of income now and for the foreseeable future. Thus, if you are currently unemployed with no reasonable expectation of earning adequate income in the near future, the bankruptcy court may not allow you to file under Chapter 13.

Under the old bankruptcy laws, the bankruptcy court had discretion in determining whether a filer should file under Chapter 7 or Chapter 13. Under the new bankruptcy laws, not all people are eligible to file for Chapter 7 bankruptcy. The new law imposes what is called "The Means Test" to determine whether a debtor is eligible to file for liquidation under Chapter 7. The first step is to determine if your current monthly income (which is actually an average of your income over the 6 months prior to filing, even if you are currently unemployed) is less than the median monthly income for a family of your size in your state. Current monthly income includes the filer's wages, plus the wages of a non-filing spouse, all regular gifts or assistance from family members, and the profits from wholly-owned businesses. If your current monthly income is less than the median income for your state, you may then file a Chapter 7. If your current monthly income is higher than the median income for your state, then you must pass The Means Test in order to qualify for Chapter 7 filing. A civilian attorney or a credit counseling agency approved by the U.S. Trustee's Office can help you make these calculations. More information on estimating these calculations yourself can be found at [www.irs.gov](http://www.irs.gov) or <http://public.findlaw.com/new-bankruptcy-law>. If you do not pass The Means Test, you will not be permitted to file under Chapter 7. You may, however, be permitted to file a Chapter 13 bankruptcy, where the court will impose a 5 year repayment plan in which you repay your secured and unsecured debts. At the end of the 5 year period, however, any remaining unpaid unsecured debt will be discharged. When a debt is discharged by the bankruptcy court, you are no longer responsible for paying it, and all of your obligations on it are dismissed.

For military families, the state in which you file can be either your home of record or the state in which you are currently stationed. However, military families will only be able to claim property exemptions from their home of record state. Likewise, for military families, current monthly income includes not only base pay, but all non-taxable income as well, including BAH, BAS, and all incentive and special pay. It is important to note that disabled veterans whose debt was incurred during active duty may not have to pass The Means Test at the discretion of the bankruptcy court.

### Will all of my debts be wiped out in bankruptcy?

Bankruptcy only eliminates unsecured debts, like credit cards. There are certain debts that cannot be discharged in either Chapter 7 or Chapter 13 bankruptcy, and will remain as if you had never filed. This includes child support, alimony, most tax debts, debts incurred because of criminal acts, and debts owed as a result of causing personal injury or incurred as a result of driving under the influence. In almost all cases, student loans *cannot* be discharged in bankruptcy. To have a student loan discharged, you must show the bankruptcy court that repaying the debt would cause extreme hardship. This means that not only can you not afford to repay the loan right now, but that there is no reasonable likelihood that you will ever be able to repay it in the future. This is a very difficult threshold to overcome.

### What are the steps to filing for bankruptcy?

First, seek the advice of a civilian attorney. Under the new bankruptcy laws, attorneys must personally vouch for the accuracy of all paperwork filed with the court. Thus, while Legal

Assistance attorneys can advise you on your options for filing for bankruptcy, you must seek the services of a civilian bankruptcy attorney to assist you with completing the paperwork.

The first step in filing for bankruptcy is to attend credit counseling within 6 months of filing your petition with an agency approved by the U.S. Trustee's Office. The agency will help you to determine whether filing for bankruptcy is the best choice, or if an informal repayment plan with you creditors would suffice. This counseling is mandatory, even if it is obvious that a repayment plan is unfeasible. The agency will make an initial assessment of whether you need to liquidate your debts, or whether you are eligible for a Chapter 13 repayment plan. You are not required to follow any repayment plans the agency comes up with. However, if they do formulate a plan, you are required to submit it to the bankruptcy court when filing your petition, along with a certificate of completion for the course.

Next, your attorney will prepare your Petition to file with the court. The Petition is a complex document which requires characterization of all your debts. You are highly encouraged to seek the services of an attorney in completing this step. Often times, preparing the Petition is the most difficult and time-consuming step in filing for bankruptcy.

After filing your petition, federal law imposes an "automatic stay," which prevents creditors from taking any action to collect debts against you, for the pendency of the bankruptcy. However, under the new laws, filing for bankruptcy will no longer delay or stop eviction actions, driver's license suspensions, legal actions for child support, or divorce proceedings.

Between four to six weeks after filing, you will have to attend a "Meeting of Creditors" chaired by the Bankruptcy Trustee assigned to your case. Unless there is something unusual about your case, this meeting is usually brief. The Trustee will ask you a few form questions, and will then ask if there are any creditors present. Usually there will not be, although some credit card providers attend many or most Meeting of Creditors. Your presence, however, is mandatory at the meeting. If you are an active duty servicemember, you can request that the meeting be postponed or that your absence be excused under the Servicemember's Civil Relief Act. Your Legal Assistance attorney can help you draft this request to the court.

If the Meeting of Creditors is uneventful, the process is probably over for you and your lawyer. If you are seeking a Chapter 7 petition, your Notice of Discharge will probably arrive within 6 weeks or so. If you have filed under Chapter 13, you will begin making payments and receive a Notice of Confirmation within about the same time.

The final step you must take before any debts will be discharged, is to attend a financial management course. Like your meeting with a credit counseling agency, this course must be given by an agency approved by the U.S. Trustee's Office, and a certificate of completion must be submitted to the court.

There is no hard and fast rule on how quickly bankruptcy proceedings will progress. It can take as little as three months and as long as nine months depending on what part of the country you file in. The most important thing in filing for bankruptcy is to seek out the advice of a qualified civilian bankruptcy attorney whom you feel comfortable with, and who will help you

through the process. Your Legal Assistance attorney can provide you with a referral list of local attorneys specializing in bankruptcy law.