

Bankruptcy

This handout discusses bankruptcy issues military members and their dependents may face. Discussion can only be in general terms since this is a complex area and the law changes often. Although military attorneys do not practice bankruptcy law, the following discussion should provide some insight into the process. After reading this handout, an individual will be better prepared to discuss this issue with a private attorney specializing in bankruptcy law, should the individual decide bankruptcy is a viable alternative.

WHAT IS BANKRUPTCY?

- a. Bankruptcy is a legal proceeding where a debtor goes to court to have his or her obligations modified or forgiven when the debtor cannot meet his or her obligations after the debtor has honestly made a diligent effort to pay the obligations. The goals of bankruptcy are to (1) convert the assets of the debtor into cash and distribute it among creditors fairly and (2) give the debtor a fresh start, with such exemptions (property the debtor can keep) and rights as the bankruptcy laws permit.
- b. The United States Constitution gives Congress the power to make one set of bankruptcy rules for the entire country. Thus, when a debtor files for bankruptcy, the debtor is receiving federal protection from his or her creditors. Consequently, a bankruptcy proceeding must be filed in specially created federal bankruptcy courts.

NONBANKRUPTCY ALTERNATIVES:

Before filing for bankruptcy, you should consider other means of solving your financial problems. For example, you should consider making an appointment with the base Financial Counselor. The services are free. Aside from helping you establish a monthly budget, the Counselor can discuss money-saving techniques.

TYPES OF BANKRUPTCY AVAILABLE:

Chapter 7: This is also referred to as "straight bankruptcy" or "liquidating bankruptcy" because the court takes most of the debtor's property, sells it, divides the proceeds among the creditors, and discharges the remaining debts.

Chapter 13: This is also referred to as the "wage earner's plan" because the court approves a realistic plan where the debtor can retain much of his or her property in exchange for paying back the debts over a period of time, ranging from three to five years. The debtor must have regular income to be able to complete the plan. This type of bankruptcy can only be used by individual debtors, and only if the total debts owed are less than certain limits.

BASIC STEPS FOR FILING FOR CHAPTER 7 OR CHAPTER 13 BANKRUPTCY:

You must file a bankruptcy petition in the appropriate federal court. Nebraska has two federal district courts, located in Omaha and Lincoln. Although you are not legally required to have an attorney to file, it may be extremely helpful to have one since this is an extraordinarily complex area of the law.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 requires filers to get credit counseling from a government approved organization before they file, and debtor education after completion of the bankruptcy

proceedings (with limited exceptions). After filing, the bankruptcy court will have control over the proceedings regardless of where the member's property or creditors are physically located. A trustee will be assigned to your case and manage the pre-court proceeding before a deferral bankruptcy judge decides your case.

Once a bankruptcy petition is filed, an automatic "stay" takes effect and protects the debtor and his property from certain creditors' actions. This means that with regard to all debts covered by the bankruptcy, creditors may not take any action to collect payment nor repossess any property which is collateral for a debt.

MILITARY CONSIDERATIONS:

Section 525 of the Bankruptcy Code provides that no governmental unit may discriminate with respect to employment because an individual has filed for bankruptcy. While a service member has a right to file for bankruptcy, a member can be discharged or prosecuted under Article 134 of the Uniform Code of Military Justice for "dishonorable failure to pay just debts." However, action will likely be taken only if it is determined the member is not acting in good faith. Additionally, a commander has discretion to restrict or withdraw access to classified information whenever a military member's financial situation makes the member vulnerable to bribes or blackmail. Loss of access is by no means automatic.

SERVICEMEMBERS' CIVIL RELIEF ACT (SCRA):

The Servicemembers' Civil Relief Act (SCRA) is found at 50 U.S.C. app. §§501 et seq. The primary purposes of SCRA are to (1) provide service members protection against default judgments; (2) implement a stay of proceedings where proceedings against the service member have been initiated; and (3) stay or vacate execution of judgments, garnishments, or attachments. A service member may invoke the protections of SCRA in any bankruptcy presented before the bankruptcy court, including any default judgments levied therefrom. One condition for invoking SCRA protection is that the bankruptcy court clerk's office must be made aware of the member's military status prior to the default judgment against the defendant military member.

LEGAL ASSISTANCE FOR FILING:

The debtor will likely need the help of an experienced attorney in the area of bankruptcy law. As military attorneys, we are prohibited by regulation from representing individuals before courts or drafting such documents.

RESOURCES:

- 11 U.S.C. §101, et seq.
- Pub. L. No. 109-8, 119 STAT. 23, BAPCPA
- AFI 36-2906, *Personal Financial Responsibility*, dated 1 January 1998.
- <http://www.consumer.ftc.gov/articles/0224-filing-bankruptcy-what-know>
- <https://www.neb.uscourts.gov/>
- <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics.aspx>

The information provided here is very general. You should consult with an expert in the field of bankruptcy to make a final determination whether to file and how to proceed. The material in this handout represents general legal advice. Since the law is continually changing, some provisions in this pamphlet may be out of date. It is always best to consult an attorney about your legal rights and responsibilities regarding your particular case.