

## **11.0 PERSONAL BANKRUPTCY ISSUES**

### **11.1 Overview**

The damages and dislocation caused by a disaster are expected to make some individuals think about filing bankruptcy. Below is a summary of certain applicable sections of the Bankruptcy Code and answers to common questions asked about bankruptcy. This outline is meant to only be a bankruptcy primer.

The current Bankruptcy Code was enacted in 1978 and has been amended a number of times since then. The most significant amendments to the Bankruptcy Code were implemented in 2005 by the Bankruptcy Abuse Prevention and Consumer Protection Act (the "BAPCPA"). The outline below is intended to highlight certain relevant provisions of the Bankruptcy Code and some of BAPCPA's changes to it; however, it is advisable for any storm victim considering bankruptcy to consult a qualified bankruptcy attorney. To the extent that state law is relevant, the emphasis is on Texas law.

### **11.2 Most Common Issues/Questions**

- The bankruptcy process and decision to file
- Prerequisites or other requirements for filing
- The federal district for filing
- Types of debts discharged in bankruptcy
- Types of property exempt in bankruptcy
- How marriage, divorce, and child support affect bankruptcy
- The automatic stay

### **11.3 Summary of the Law**

There are four different chapters of the Bankruptcy Code affecting individuals: Chapter 7, Chapter 11, Chapter 12, and Chapter 13. Of these, Chapters 7 and 13 are generally most relevant to individuals. Subchapter V of Chapter 11 is the most relevant to individuals who own small businesses.

#### ***Chapter 7***

A Chapter 7 case is sometimes called "liquidation." In any individual bankruptcy case, certain types of property are exempt from creditors and are kept by the debtor. In a Chapter 7 case, all of the debtor's assets for which the debtor does not, or cannot, claim an exemption are subject to being liquidated by the Chapter 7 trustee, with the net proceeds distributed in order to pay creditors' claims. Still, in most individual filings, due to the exemptions, the debtor will keep most or all of his or her property, and once

the case is completed, most (and sometimes all) of the debtor's debts that existed prior to filing the petition (see the first paragraph of the answer to [Q. 11-1](#) below) are "discharged" (legally eliminated).

As explained below, eligibility for Chapter 7 is subject to a "means test," which requires debtors making an income above certain levels to instead file a Chapter 13 case. This section of these materials contemplates debtors who file voluntary bankruptcy petitions. However, Chapter 7 cases may also be involuntarily instituted by a debtor's creditors. There are no limits on the amount of debt that an individual may have and still file a Chapter 7.

### ***Chapter 13***

A Chapter 13 case is sometimes called "reorganization." In Chapter 13, a debtor who has regular income is required to follow a "plan" that obligates the debtor to pay some or all of his or her debts over a 3-5 year period. Chapter 13 is available only to an individual with regular income whose unsecured debts are less than \$ 419,275 and whose secured debts (e.g., mortgage or auto loan) are less than \$ 1,257,850. [11 U.S.C. § 109](#). (Under [11 U.S.C. § 104](#), the foregoing dollar figures are adjusted periodically; the figures provided throughout this section will be current until April 1, 2022.) A Chapter 13 case must be voluntary.

As noted above, debtors with income above a certain threshold (but below the debt thresholds listed in the previous paragraph) cannot file Chapter 7 cases and instead must file under Chapter 13. This requirement was implemented as part of the BAPCPA; the rationale was a belief among many of the BAPCPA's supporters that too many debtors who could afford to repay some or all of their debts were abusing Chapter 7.

Even though a Chapter 13 case requires a repayment plan that lasts several years, Chapter 13 does offer certain benefits compared with Chapter 7. For example, some homeowners who would lose their home in a Chapter 7 case might be able to keep it in a Chapter 13 case. (With respect to Chapter 7 filings and home ownership, the "homestead" exemption is discussed in the answer to [Q. 11-19](#) below.) In addition, when the debtor is facing foreclosure of a mortgage, a mortgage lender generally cannot foreclose on a home during the automatic stay that goes into effect after the filing of a petition (the automatic stay is discussed below), and in a Chapter 13 case, missed payments can be cured over the term of the plan, thereby reinstating the mortgage.

Under both Chapters 7 and 13, certain debts cannot be discharged (these include alimony and child support, student loans under most circumstances, or debts relating to death or injury due to the debtor's drunk driving), but Chapter 13 contains a "super discharge" that allows for discharge of some debts, upon completion of the plan, that would not be dischargeable in a Chapter 7 case (explained below). The Chapter 13 super discharge was much more extensive prior to 2005, when it was narrowed substantially by the BAPCPA, but it still covers certain debts that cannot be discharged under Chapter 7. Chapter 13 also allows the debtor to retain possession of his or her property, even non-exempt property, while making payments under a repayment plan. However, Chapter 13 requires that creditors be paid at least as much as they would receive under Chapter 7, which means that the amount repaid under the plan must equal or exceed the value of the retained non-exempt property.

### ***Subchapter V***

Subchapter V is a subchapter of Chapter 11, and it is primarily used by small businesses that need to reorganize. In February 2020, the Small Business Reorganization Act was implemented to help small

businesses reorganize by making it easier and cheaper than a regular Chapter 11 business reorganization. Subchapter V, is available only to businesses that have debts less than \$7,500,000 and at least 50% of the debt must come from the commercial or business activities of the debtor. 11 U.S.C. § 1182(1)(A). (Under 11 U.S.C. § 104, the foregoing dollar figures are adjusted periodically. In March 2020, the limit was increased from \$2,725,625 to \$7,500,000 to accommodate for hardships brought on during the COVID-19 pandemic. This limit is set to expire March 22, 2022). Once a debtor files for subchapter V, the business will continue to operate under the same management, and the court will appoint a trustee to monitor its operations. 11 U.S.C. § 1183.

Subchapter V differs from a Chapter 11 reorganization in a number of ways. In a subchapter V, only a debtor may propose a plan of reorganization, and it must be filed within 90 days of the petition date. 11 U.S.C. § 1189. The debtor also does not need approval from the debtor's creditors to confirm the plan if the court finds the plan to be fair. 11 U.S.C. § 1191 (b). The debtor must pay all projected disposable income to its creditors for three to five years. 11 U.S.C. § 1191(c)(2). Debtors also do not need to file a disclosure statement describing how they will pay creditors. In sum, these changes make subchapter V a much more expeditious and cost effective process for small businesses.

### ***Chapter 11***

Chapter 11 is primarily used by businesses that need to reorganize in order to get out from under debt, although individuals may also file Chapter 11 if they otherwise do not qualify under the Chapter 13 debt limits. In Chapter 11, the debtor proposes a plan for paying some or all of his debts, and his creditors get a chance to vote on whether to accept or reject that plan. Chapter 11 may be the only recourse for a consumer debtor with an extremely large mortgage that causes the debtor's secured debt to exceed the limit for Chapter 13. Its procedures and requirements are significantly more expansive than in Chapter 13.

### ***Chapter 12***

Chapter 12 is for "family farmers" and "family fishermen." The Code defines this to be someone who earned more than 50% of their gross income from farming or fishing during the year immediately preceding the year of filing for bankruptcy. [11 U.S.C. § 101\(18\)\(A\), \(19A\)](#). There are special provisions for Chapter 12 debtors, and this will include filing a plan as well and devoting income in the future to pay creditors.

### ***Benefits & Concerns with Filing***

In general, a major benefit of bankruptcy is that an automatic stay is implemented which prevents further collection actions by creditors once the bankruptcy case is filed. [11 U.S.C. § 362](#). However, the BAPCPA added several new exceptions to the automatic stay. In addition, the BAPCPA imposed several new requirements on debtors, including (1) increased filing and disclosure requirements, (2) a requirement to complete credit counseling before filing for bankruptcy, and (3) a requirement to complete a personal financial management course before receiving a discharge of debts.

Filing bankruptcy will be reported on credit reports and may affect future credit applications. In addition, a bankruptcy filing could affect a debtor's eligibility to benefit from the protections of certain provisions under the Bankruptcy Code in the event of a future filing. Therefore, it is important to evaluate how this may affect an individual before proceeding.

Finally, a note about the dollar figures in this section. Every three years, on April 1st, certain dollar amounts in the Bankruptcy Code (such as figures used in the means test) are adjusted. 11 U.S.C. § 104(a). Therefore, if you are looking at the Bankruptcy Code in a printed source or even online, be careful to note that the dollar figures you see might not be up to date, even if the source otherwise contains the current law. This section reflects current dollar figures as of April 1, 2019, and will be valid until April 1, 2022. <https://www.federalregister.gov/documents/2019/02/12/2019-01903/revision-of-certain-dollar-amounts-in-the-bankruptcy-code-prescribed-under-section-104a-of-the-code>.

#### **11.4 Relevant Courts/Agencies**

Bankruptcy law is federal law, and the bankruptcy courts follow the same district (and division, if applicable) boundaries of the U.S. district courts. You can find the proper federal district for your client's case at: <https://www.uscourts.gov/federal-court-finder/search>. Consult the website of the U.S. bankruptcy court for your particular federal district for updates and information.

Southern District of Texas: <https://www.txs.uscourts.gov/page/bankruptcy-court>

Northern District of Texas: <https://www.txnb.uscourts.gov/>

Western District of Texas: <https://www.txwb.uscourts.gov/>

Eastern District of Texas: <http://www.txeb.uscourts.gov/>

There are a number of forms that debtors must file as part of the bankruptcy process. The forms can be found at <http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx>.

A particularly useful link can be found at <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics.aspx>, which provides a good summary of the bankruptcy process under the BAPCPA.

Again, although debtors have this information available to them, if at all possible, they should not file bankruptcy without an attorney. Bankruptcy is highly specialized, filled with traps and pitfalls for attorneys, let alone a pro se debtor. It may be difficult for a debtor to fix any mistakes he or she makes when filing for bankruptcy pro se, and it may be harder for an attorney to correct those mistakes if the case is dismissed.

#### **11.5 FAQs**

##### ***Q. 11-1 What is involved in the bankruptcy process?***

A bankruptcy case begins with the filing of a petition. The debtor's petition must ultimately be supported by schedules (forms in which the debtor lists all property, secured claims, unsecured claims, income, expenses, claimed exemptions, and other information), and a statement of financial affairs (which provides personal background information). In a Chapter 7 case, the debtor must also file a statement of intention with respect to any secured property indicating which such property he or she will surrender, reaffirm, or redeem. If the Chapter 7 debtor fails to carry out ("perform") the statement of intention within the appropriate time, the automatic stay (explained below) may be lifted with respect to this property. 11 U.S.C. §§ 521(a)(2), 362(h).

The BAPCPA imposed a number of new filing requirements on debtors. Debtors must file copies of all payments received from an employer within 60 days before filing, an itemized statement of monthly net income, a statement disclosing anticipated increases in income or expenditures within the next 12 months, evidence of attendance from a credit counseling agency (discussed below), and a “record” of any interest in an education IRA or tuition savings program. [11 U.S.C. § 521\(a\)–\(c\)](#). The debtor must also file a certificate proving that the debtor received certain required notices. [11 U.S.C. § 521\(a\)](#). The BAPCPA also requires the debtor to provide certain tax returns to the trustee and any creditor that requests copies. [11 U.S.C. § 521\(e\)](#), (f). Failure to comply with filing requirements will likely result in dismissal. [11 U.S.C. § 521\(i\)](#).

In a Chapter 7 (liquidation) case, the court will appoint a trustee to represent the interests of the creditors. About a month after filing, the debtor must attend the “Section 341 meeting” of creditors conducted by the trustee to answer questions under oath regarding the debtor’s assets and schedules. Creditors are invited, though in routine bankruptcy cases they do not usually appear and ask questions. The Section 341 meeting is usually pretty quick, although a debtor’s lack of compliance with requirements, incomplete information, or responses to questions may result in the hearing lasting longer than usual or being continued. After the Section 341 meeting, the trustee will often file a “no-asset report,” informing the debtor(s) and creditors that the trustee will not liquidate (“administer”) any assets, and that the debtor(s) can keep all their property. Sometimes, the trustee will file a report announcing that he or she does intend to gather and attempt to sell certain nonexempt property. The debtor can sometimes purchase the nonexempt property from the trustee. The trustee may also file lawsuits to recover funds of the bankruptcy estate that are considered to be “preferences” and/or fraudulent transfers or to pursue other claims that a debtor may have. (“Preference” is a term referring to a debtor’s payment or transfer of assets to a creditor shortly before the bankruptcy.) The proceeds from all sales and lawsuits are eventually distributed to the creditors once all such property is administered. As a general matter, the debtor will receive a discharge of creditor claims a few months after the Section 341 meeting. If the trustee filed a no-asset report, the case will be closed very soon after the discharge order is entered. If the trustee filed a report indicating that he or she plans to liquidate some nonexempt asset(s), the case will remain open until all assets are administered and the proceeds distributed.

In all consumer bankruptcy cases, the debtor must attend a credit counseling class before filing the case and a financial management class before a discharge will be granted. [11 U.S.C. § 109\(h\)\(1\)](#), [727\(a\)11](#) & [1328\(g\)](#). These classes are usually conducted online or by phone and must be done by an approved provider. See this website for a list: <https://www.justice.gov/ust/list-credit-counseling-agencies-approved-pursuant-11-usc-111>.

The federal government does have the authority to waive this counseling requirement for a district if it determines that “the approved nonprofit budget and credit counseling agencies for such district are not reasonably able to provide adequate services to the additional individuals who would otherwise seek credit counseling.” [11 U.S.C. § 109\(h\)\(2\)\(A\)](#). The Justice Department exercised this authority in Louisiana and in the Southern District of Mississippi after Hurricane Katrina, but there is no guarantee that any such waiver authority will be exercised in the future.

A Chapter 13 (wage earner) case begins by filing similar papers as under a Chapter 7. Unlike Chapter 7, where all assets that are not exempt are subject to being sold by a trustee, in Chapter 13 the debtor will file a repayment plan. The debtor makes payments under this plan from future income each month directly to the Chapter 13 trustee, who is an administrator for the benefit of the creditors. It is extremely important that you check your local rules for any special procedures regarding mortgage payments. Once

the plan is approved (“confirmed”) by the court, the trustee pays creditors according to the terms of the plan. The plan typically has between a three- to five-year term. The CARES Act permits a debtor to modify a confirmed plan if the debtor is experiencing a material financial hardship due to COVID-19. 11 U.S.C. § 1329(d)(1). The CARES Act also allows the plan to be modified to extend the term up to seven years after the first payment under the original confirmed plan was due. 11 U.S.C. § 1329(d)(2). The plan may provide for cure of a home mortgage, property taxes, automobile loan arrearages, and in certain instances might permit a write down of the debt to the value of the automobile as well as a reduction in interest rate, if the vehicle has been owned long enough by the debtor. The plan may also strip off a wholly unsecured second lien on a debtor’s homestead. When the debtor has repaid creditors according to the plan, the debtor will be discharged of all dischargeable debts (some debts are non-dischargeable, see [Q. 11-5](#) below), even if the plan did not pay them in full. The percentage paid to unsecured creditors will be dependent on the disposable income a debtor has, the amount of nonexempt property, and an amount calculated by the means test. The amount of personal expenses will be potentially subject to adjustment by the court if excessive, in order to permit disposable income to be allocated to creditors under the plan. The requirements for the plan can be found at [11 U.S.C. § 1321](#) *et seq.*

**Q. 11-2     *Should I file for bankruptcy?***

Filing bankruptcy is a strictly personal decision. The ratio of a debtor’s assets to liabilities is an important factor. The type of debt a debtor has is another factor. A debtor cannot discharge all debts. So, it is very important to determine before any filing whether certain types of your debts may be “nondischargeable” in a bankruptcy proceeding (see [Q. 11-5](#) below). The effect bankruptcy might have on your credit rating, ability to borrow in the future, or reputation may be important. The impact bankruptcy might have on prior transfers of money or property may be a factor. The need to cure mortgage debt arrearages might be important. The desire to retain nonexempt property in the future might also be a factor. The decision as to whether and when to file a bankruptcy petition should be based upon the facts of each debtor’s individual case.

**Q. 11-3     *Are there any prerequisites to filing for bankruptcy?***

Before an individual debtor can file a bankruptcy petition, he or she (or if filing as spouses, both) must complete an approved credit counseling course within 180 days before filing. [11 U.S.C. § 109\(h\)\(1\)](#). Such a course must outline opportunities for credit counseling and provide budget analysis assistance. These courses can be taken online. The debtor must file a certificate of compliance. [11 U.S.C. § 521\(b\)\(1\)](#). However, the law provides for a **temporary** waiver (thirty days) of this requirement if a debtor can show “exigent circumstances” and that he or she requested credit counseling but was unable to receive it within seven days of the request. [11 U.S.C. § 109\(h\)\(3\)\(A\)\(i\), \(ii\)](#). This is rarely allowed. Case law has consistently held that a pending foreclosure IS NOT an exigent circumstance. The law also provides an exemption if such services are not available in the area where the debtor resides or if the debtor is incapacitated, disabled, or on active military duty. [11 U.S.C. § 109\(h\)\(2\), \(4\)](#). This would only be applicable in very rare circumstances, particularly given the access to online courses. As mentioned above, the Justice Department temporarily exercised authority to suspend the counseling requirement in Louisiana and in the Southern District of Mississippi after Hurricane Katrina, but there is no guarantee that any such waiver authority will be exercised in the future.

**Q. 11-4 How does the “means test” work?**

The BAPCPA introduced a new “means test” for Chapter 7 bankruptcies. [11 U.S.C. § 707\(b\)\(2\)\(A\)](#). The purpose of the test is to prevent abuse of Chapter 7. If a debtor has primarily consumer debt (as opposed to business debt) and does not meet the “means test,” a presumption of abuse arises and a Chapter 7 case may be dismissed or converted to a Chapter 13 case. Debtors must file Official Bankruptcy Form B 122A-2, which contains the “means test” calculation. The form is available at <http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx>.

The formula for the means test is quite complex, but in short, it works as follows:

First, the debtor’s “current monthly income” must be determined. “Current monthly income” is defined as the average of the last six months income received by the debtor excluding benefits received under the Social Security Act, payments to victims of war crimes, payments to victims of international or domestic terrorism, benefits received due to disability or combat related injury/death, and payments made by the federal government in response to COVID-19. [11 U.S.C. § 101\(10A\)](#). The debtor’s “current monthly income” (on an annualized basis—i.e., multiplied by twelve) must then be compared to the “median family income” for his state. The median incomes for each state can be found at <http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm>. As of May 15, 2021, median incomes for Texas based on household size are: \$52,953 (one person); \$71,287 (two people); \$77,110 (three people); \$89,196 (four people); [https://www.justice.gov/ust/eo/bapcpa/20210515/bci\\_data/median\\_income\\_table.htm](https://www.justice.gov/ust/eo/bapcpa/20210515/bci_data/median_income_table.htm). If the debtor’s current monthly income is lower than the state median, no presumption of abuse arises, and the debtor is allowed to file a Chapter 7 case. [11 U.S.C. § 707\(b\)](#).

If, however, the debtor’s current monthly income exceeds the state median, the “means test” applies and the debtor must calculate certain expense amounts based on IRS standards in order to determine if the debtor is eligible for a Chapter 7 bankruptcy. These allowed expenses are deducted from the current monthly income and then multiplied by sixty (in other words, the total amount over five years) to arrive at “disposable income.” Disposable income excludes benefits received under the CARES Act, child support payments, foster care payments, and disability payments for a dependent child. If disposable income is greater than (1) 25 percent of the debtor’s nonpriority unsecured debt or \$8,175, whichever is greater, or (2) \$13,650, a presumption of abuse arises. [11 U.S.C. § 707\(b\)\(2\)\(A\)](#). (Nonpriority unsecured claims include obligations such as credit card and medical-related debts.) Unless this presumption is rebutted, the case may be dismissed or converted to a Chapter 13 case.

It is worth noting that the concept of “current monthly income” also impacts certain calculations for Chapter 13 repayment plans. [11 U.S.C. § 1325\(b\)](#). For debtors whose annualized “current monthly income” is less than the applicable state median but who nevertheless file a Chapter 13 bankruptcy, the repayment plan must be no longer than three years (unless there is court approval for cause for a period of up to five years or material hardship due to COVID-19 for a period up to seven years). [11 U.S.C. § 1322\(d\)\(2\)](#), [§ 1329\(d\)\(2\)](#). If the debtor’s “current monthly income” is equal to or greater than the applicable state median, the plan generally must be for no longer than five years. [11 U.S.C. § 1322\(d\)\(1\)](#).

As discussed above, median incomes and expense deductions used to calculate the “means test” (as well as other dollar amounts under the Bankruptcy Code) are adjusted periodically. [11 U.S.C. § 104\(a\)](#).

**Q. 11-5 Which debts are not discharged in bankruptcy?**

Certain debts are not dischargeable in bankruptcy, meaning bankruptcy does not affect them. Chapter 13 historically allowed for the discharge of more debts than Chapter 7, but the BAPCPA largely eliminated the scope of what debts can be discharged only under Chapter 13.

In a Chapter 7, 11, 12, or 13 case, you cannot as a general matter obtain a discharge for, among other things: (1) domestic support obligations, including alimony, child support, and certain property settlements, (2) student loans, absent extreme hardship (if you are going to pursue this option, make sure you do extensive case review; in the Fifth Circuit, which covers Texas, this standard is virtually impossible to meet), (3) damages resulting from driving under the influence, (4) court-ordered restitution or a criminal fine included in the sentence for conviction of a crime, (5) taxes that are generally less than three years old or, if older, arising under late or fraudulent tax returns, (6) damages for willful and malicious injury awarded for personal injury or death of another person, (7) debts incurred by fraud, (8) damages for willful and malicious injury to someone else's person or property, (9) certain taxes and tax penalties, or debts incurred to pay non-dischargeable taxes, (10) debts that were or could have been listed in a prior case in which you waived or were denied a discharge, (11) property settlements in a divorce, (12) condominium or cooperative housing fees and assessments (i.e., HOA dues), (13) court filing fees, or (14) damages resulting from securities fraud. [11 U.S.C. §§ 523, 1328](#). Note, however, that in Chapter 13 you can restructure the payments under the plan and provide some relief to immediate payment demands for these types of debts.

Notably, the BAPCPA also expanded the nondischargeability for "luxury goods or services" and cash advances. Consumer debts to a single creditor for luxury goods or services greater than \$725 incurred within ninety days before filing are presumed non-dischargeable. [11 U.S.C. § 523\(a\)\(2\)\(C\)\(i\)\(I\)](#). Likewise, cash advances greater than \$1,000 obtained within seventy days before filing are also presumed non-dischargeable. [11 U.S.C. § 523\(a\)\(2\)\(C\)\(i\)\(II\)](#). These dollar amounts are valid until April 1, 2022.

**Q. 11-6 What happens if I leave out a debt on my petition?**

Generally, if the debt is not listed on your schedules, then you may not get the benefit of the discharge and will have to repay that debt. [11 U.S.C. § 523\(a\)\(3\)](#). However, there is some case law to suggest that the debtor may still be able to get the discharge in a no-asset Chapter 7 case, absent any fraud or intent to hinder a creditor. But if you fail to list the debt with the intent to conceal and defraud, then you may lose your discharge in its entirety.

For more information about listing debts on a bankruptcy petition, visit <http://www.nolo.com/legal-encyclopedia/leave-creditor-off-bankruptcy-mailing-matrix.html> (note that this is a private, third-party resource and its content has not been reviewed for accuracy in preparing these materials).

**Q. 11-7 Does a bankruptcy filing stop a wage attachment?**

Yes. This is a result of the automatic stay that occurs when you file a bankruptcy petition. However, the stay only applies to debts incurred before you filed the bankruptcy petition. The automatic stay also does not apply to payments for child support or alimony.



**Q. 11-8 What is a discharge in bankruptcy?**

A “discharge” in bankruptcy means that the debtor is legally free and clear of any obligation to repay certain debts. The creditor no longer has any right to demand or collect that debt. The debtor no longer has any obligation to repay it. [11 U.S.C. § 727](#).

For more information on discharge in bankruptcy see <http://www.nolo.com/legal-encyclopedia/what-is-the-bankruptcy-discharge.html>. (note that this is a private, third-party resource and its content has not been reviewed for accuracy in preparing these materials).

**Q. 11-9 How can I escape from my student loan debt?**

Student loans are dischargeable only on a showing of “undue hardship.” [11 U.S.C. § 523\(a\)\(8\)](#). The undue hardship standard is very hard to meet. Unlike practically every other legal liability, student loans never go away—there is currently no statute of limitations for student loan debt. In fact, the BAPCPA expanded the definition of student loans to encompass all types of lenders, including nongovernmental lenders. [11 U.S.C. § 523\(a\)\(8\)](#).

**Q. 11-10 Can I repay a creditor if I want to, even after bankruptcy?**

Voluntarily repaying a debt even if it would be (or already was) discharged by your bankruptcy is not prohibited (see [11 U.S.C. §524\(f\)](#)), but you should be very careful if you consider pursuing this option. Once a discharge is obtained, the discharge will operate as an injunction against efforts to collect the discharged debt, and creditors cannot force a debtor to pay any amounts that are discharged. In a Chapter 7 case, if you choose to do this, you must use exempt assets (assets you listed on your schedules as being exempt) or post-petition earnings (money you earned after you filed the petition), so it may be wise to wait until the bankruptcy case is closed before making such voluntary payments. See <http://www.nolo.com/legal-encyclopedia/what-debts-must-i-continue-pay-during-my-chapter-7-bankruptcy.html> (note that this is a private, third-party resource and its content has not been reviewed for accuracy in preparing these materials).

**Q. 11-11 What is the automatic stay?**

The “automatic stay” prevents a creditor from continuing to enforce a claim against a debtor during the pendency of the bankruptcy case. Some examples of actions by a creditor that would violate the stay are these: (1) filing a new lawsuit or continuing to press a lawsuit that had already been filed, (2) sending collection letters, (3) filing a “financing statement” to perfect a security interest, (4) refusing to issue a transcript of school records, or (5) seeking to foreclose on property.

There are a number of exceptions to the automatic stay, however. The automatic stay does not apply to certain proceedings involving certain domestic matters (i.e., paternity, domestic violence, and dissolution of marriage matters), the withholding of income to pay domestic support obligations (i.e., child support, alimony), the restriction or suspension of a driver’s license, and certain pre-existing eviction actions. [11 U.S.C. § 362\(b\)](#). In addition, the stay now automatically terminates after thirty days if the case is filed by a debtor within one year after he or she had another bankruptcy case dismissed, unless the court finds that the new filing is in good faith. [11 U.S.C. § 362\(c\)\(3\)](#). If the debtor files a third bankruptcy within one year after two previous bankruptcy cases were dismissed, the automatic stay does not go into effect when

the third case is filed, and the debtor must ask the court to impose a stay. [11 U.S.C. § 362\(c\)\(4\)](#). The automatic stay also automatically terminates with regard to secured debt if a statement of intention is not filed timely (within thirty days after the filing of the petition or by the date of the Section 341 meeting, whichever is earlier). [11 U.S.C. § 521\(a\)\(2\)](#).

**Q. 11-12 *I'm married. Can I file by myself?***

Yes, but your spouse will still be liable for any joint debts, and all community property will be included in the debtor's bankruptcy estate. If you file together, you will be able to double your exemptions. In some cases where only one spouse has debts, or one spouse has debts that are not dischargeable, then it might be advisable to have only one spouse file. If the spouses have joint debts, the fact that one spouse discharged the debt may show on the other spouse's credit report.

For more information, refer to <http://www.nolo.com/legal-encyclopedia/filing-bankruptcy-without-spouse-property-debt.html> (note that this is a private, third-party resource and its content has not been reviewed for accuracy in preparing these materials).

**Q. 11-13 *Where do I file if I haven't lived in the same state or district for the last six months?***

Under [28 U.S.C § 1408](#), the case should be filed where the debtor has lived "for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period." See also [11 U.S.C. § 522\(b\)\(3\)\(A\)](#). This means that the case should be filed in the bankruptcy district in which the debtor has lived for the greatest portion of the last six months. Typically, your case will be handled within the district in the closest division, and the bankruptcy judges regularly conduct hearings at each of the divisions' courts.

In order to receive certain state exemptions in the bankruptcy, such as a homestead exemption, the debtor must have lived in Texas longer (see [Q. 11-19](#) for more details).

**Q. 11-14 *How will my ex-spouse's filing bankruptcy affect our divorce decree or settlement?***

Alimony, maintenance, and/or support are protected from discharge. The exceptions to discharge broadly include "domestic support obligations" as well as property settlements not otherwise covered as "domestic support obligations," including attorney's fees. [11 U.S.C. § 523\(a\)\(5\)](#), (15). In addition, domestic support obligations are now given the first priority for payment of unsecured debt. [11 U.S.C. § 507\(a\)\(1\)\(A\)](#). And if the debtor is filing a Chapter 13 case, the debtor cannot receive confirmation of a repayment plan or discharge under Chapter 13 unless the debtor has paid all domestic support obligations coming due after the bankruptcy filing. [11 U.S.C. § 1325\(a\)\(8\)](#).

**Q. 11-15 *Will my retirement plan or IRA be protected?***

Generally speaking yes, if the funds are in a qualified account. Retirement plans that are ERISA-qualified are protected under current laws in all jurisdictions and are not included as property of the bankruptcy estate.

However, the exempted assets in an individual retirement account (IRA), except for a simple employee pension or a simple retirement account, may not exceed \$1,362,800 in a case filed by a debtor who is an

individual, except that such amount may be increased if the interest of justice so requires. [11 U.S.C. § 522\(n\)](#).

**Q. 11-16 *What effect does bankruptcy have on child support?***

Filing bankruptcy does not allow your ex-spouse to discharge past due child support obligations. Any back payments owed for child support cannot be discharged in a bankruptcy proceeding. As noted above, the automatic stay no longer applies to proceedings to establish or modify domestic support obligations or to withholding of income for payment of domestic support. [11 U.S.C. § 523\(a\)\(5\)](#), (15).

**Q. 11-17 *What about co-signers on loans?***

If someone has co-signed a loan with you and you file for bankruptcy, the co-signer may have to pay your debt. Chapter 13 extends the automatic stay to co-debtors for consumer debt in most cases pending confirmation of a plan. [11 U.S.C. § 1301](#). Nevertheless, if the co-signed debt is not fully repaid by a debtor, the co-signer is still liable for the balance.

**Q. 11-18 *Will my filing bankruptcy stop a foreclosure?***

Yes and no. Filing bankruptcy temporarily stalls your lender's right to foreclose (the automatic stay, discussed above), until it gets permission to go forward with the foreclosure proceedings. However, a bankruptcy filing won't stop a foreclosure forever. Eventually, a debtor in bankruptcy will still have to provide "adequate protection" to a secured creditor by making payments on the debt (and/or satisfying certain other criteria), or the automatic stay can be lifted. See [11 U.S.C. §§ 361, 362](#). Moreover, in order to keep the secured asset, the debtor will have to become current on the mortgage in a Chapter 7 case or cure the arrears in a Chapter 13 case. Note that the Chapter 13 plan cannot modify the mortgage on a loan secured by the debtor's principal residence. [11 U.S.C. § 1322\(b\)\(2\)](#).

**Q. 11-19 *What property is exempt from the trustee in a Chapter 7 case?***

In a Chapter 7 filing, certain property is exempt from the debtor's estate, meaning that the trustee and the debtor's creditors cannot liquidate the property in order to recover on the debtor's assets. In Texas, a debtor can elect either federal or state property exemptions, [11 U.S.C. § 522\(b\)](#), assuming the debtor can meet the residency provisions discussed below for relying on state law (see also [Q. 11-13](#)). The federal exemptions are listed at [11 U.S.C. § 522\(d\)](#). However, because Texas generally has more generous homestead property exemptions than are provided under federal law, most debtors will elect to take state law exemptions.

In order to claim a state's exemptions, the debtor must have lived in the state for at least 730 days (two years). Otherwise, the debtor can only claim the exemptions of the state in which he or she resided for the largest portion of the 180-day period preceding the last two years. [11 U.S.C. § 522\(b\)\(3\)\(A\)](#). This is intended to prevent a debtor from moving to the state to take advantage of its more generous homestead laws and then immediately filing bankruptcy.

Certain Southern and Western states, including Texas, historically have had generous exemptions for debtor's personal residences, known as the "homestead exemption." The BAPCPA imposes a \$170,350 cap on filers for any equity interest in a homestead purchased during the approximately forty months (1,215 days) prior to the bankruptcy filing. [11 U.S.C. § 522\(p\)\(1\)](#). Clearly, this has a significant impact on

residents who recently moved to Texas. There is no cap on the homestead exemption for property owned for more than 1,215 days. The cap also does not apply to equity rolled over from a prior residence located in the same state if the prior residence was acquired before the 1,215-day period. [11 U.S.C. § 522\(p\)\(2\)](#).

The following exemptions are allowed under Texas state law (again, these are available to individuals who meets the residency requirements):

<b>ASSET</b>	<b>EXEMPTION</b>	<b>PROVISION</b>
<b>Homestead</b>	<p>Urban: ten acres of land on one or more contiguous lots, along with improvements, used by a single adult or head of a family for purposes of a home or as both a home and a place of business.</p> <p>Rural: 200 acres for a family; 100 acres for a single adult.</p> <p><u>Note:</u> A person cannot have both a rural and an urban homestead</p>	<a href="#">Tex. Prop. Code § 41.002</a>
<b>Personal Property Exemption (overall)</b>	<p>Overall limit:            Single Adult: \$50,000            Family: \$100,000</p> <p>The following are specifically exempt, which means they are not included as part of the overall limit above:</p> <p>(1) current wages for personal services, except for the enforcement of court-ordered child support payments;</p> <p>(2) professionally prescribed health aids of a debtor or a dependent of a debtor;</p> <p>(3) alimony, support, or separate maintenance received or to be received by the debtor for the support of the debtor or a dependent of the debtor; and</p> <p>(4) a religious Bible or other book containing sacred writings of a religion that is seized by a</p>	<a href="#">Tex. Prop. Code § 42.001</a>

	<p>creditor other than a lessor of real property who is exercising the lessor’s contractual or statutory right to seize personal property after a tenant breaches a lease agreement for or abandons the real property.</p>	
<p><b>Personal Property Exemption (specific items)</b></p>	<p>The overall exemption above may include the following (within the aggregate limits above):</p> <ul style="list-style-type: none"> <li>(1) home furnishings, including family heirlooms;</li> <li>(2) provisions for consumption;</li> <li>(3) farming or ranching vehicles and implements;</li> <li>(4) tools, equipment, books, and apparatus, including boats and motor vehicles used in a trade or profession;</li> <li>(5) wearing apparel;</li> <li>(6) jewelry not to exceed 25 percent of the overall limits above;</li> <li>(7) two firearms;</li> <li>(8) athletic and sporting equipment, including bicycles;</li> <li>(9) a two-wheeled, three-wheeled or four-wheeled motor vehicle for each member of a family or single adult who holds a driver’s license or who does not hold a driver’s license but who relies on another person to operate the vehicle for the benefit of the non-licensed person;</li> </ul>	<p><a href="#">Tex. Prop. Code § 42.002</a></p>

	<p>(10) the following animals and forage on hand for their consumption:</p> <p>(A) two horses, mules, or donkeys and a saddle, blanket, and bridle for each;</p> <p>(B) twelve head of cattle;</p> <p>(C) sixty head of other types of livestock; and</p> <p>(D) 120 fowl; and</p> <p>(11) household pets.</p>	
<b>Insurance</b>	Any policy proceeds or cash values under an insurance policy issued by a life, health, or accident insurance company or an annuity plan used by an employer.	<a href="#">Tex. Ins. Code § 1108.051</a>
<b>Retirement Accounts</b>	<p>Right to assets or payments, whether vested or not, in stock bonus, pension, annuity, IRAs, and other plans if qualified under Internal Revenue Code of 1986.</p> <p><u>Note:</u> IRA or annuity contributions, except to Roth IRAs, in excess of the amounts deductible for tax purposes are not exempt.</p>	<a href="#">Tex. Prop. Code § 42.0021</a>
<b>College Savings Plans</b>	"a qualified tuition program of any state that meets the requirements of" IRS Code §529.	<a href="#">Tex. Prop. Code § 42.0022<sup>1</sup></a>
<b>Worker's Compensation</b>	Worker's compensation and death benefits.	<a href="#">Tex. Lab. Code § 408.201</a>
<b>Unemployment Benefits</b>	Benefits received are exempt if not mingled; right to future benefits is exempt	<a href="#">Tex. Lab. Code § 207.075(b), (c)</a>

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<sup>1</sup> This section of the property code appears to be repealed as part of the Acts 2019, Texas Acts of the 86th Leg.-Regular Session, ch. 320, Sec. 4.

**Q. 11-20    *What if I cannot afford to hire a lawyer to file a bankruptcy case?***

Bankruptcy is a complex process and there are many legal and factual matters to consider in deciding whether a bankruptcy case should be filed. While a person can file an individual case pro se, the procedural rules and requirements and the substantive legal issues make any such case extremely hard to complete and to permit a discharge to be obtained. If you cannot afford to hire an attorney, you may be able to obtain assistance in certain circumstances, if you qualify, by contacting one of the entities listed below. For a convenient tool to find which legal aid provider serves your county or zip code, try: <https://www.lsc.gov/what-legal-aid/find-legal-aid>.

**Houston area:**

Houston Volunteer Lawyers

(Primarily Harris County)

1111 Bagby, Suite FLB300

Houston, TX 77002

(713) 228-0732

<https://www.makejusticehappen.org/>

Lone Star Legal Aid

(Houston and Greater Southeast Texas)

500 Jefferson Street, 17th Fl.

Houston, TX 77002

(800) 733-8394

<https://lonestarlegal.blog/>

**Dallas/Fort Worth**

Dallas Volunteer Attorney Program

1515 Main St.

Dallas, TX 75201

(214) 243-2236

<http://www.dallasvolunteerattorneyprogram.org>

Legal Aid of Northwest Texas

(Dallas and Greater Northwest Texas)

1515 Main St.

Dallas, TX 75201

(888) 529-5277

<https://internet.lanwt.org>

**Austin/San Antonio**

Texas RioGrande Legal Aid

(Austin/San Antonio and Greater West Texas)

1111 N. Main Ave.

San Antonio, TX 78212

(888) 988-9996

<http://www.trla.org/>

The person should reference the “Bankruptcy Assistance” program when he/she calls.

**Q. 11-21    *What about obtaining payment from my company or someone I did business with before the disaster who is now out of business?***

If you have a claim for payment you might contact a lawyer for assistance in collecting the debt or seek relief in a justice of the peace small claims court for debts less than \$10,000. If you decide to file a bankruptcy and have not collected on this payment, you will need to list this as an asset.

**Q. 11-22    *Virtually all my property and my apartment were destroyed in the disaster. Should I file bankruptcy?***

If you only have property that is exempt from creditors then there would appear to be no immediate need as a general matter to file a bankruptcy case. As a general matter, exempt property cannot be taken from debtors except by creditors that have obtained a lien on the property when it was bought, or for unpaid taxes. However, the decision whether to file is something an individual debtor should evaluate, looking at all the facts and circumstances of his or her situation and future. If a creditor obtains a judgment against a debtor, the creditor may later garnish or get a turnover order for the debtor's bank account.

**Q. 11-23    *My business was affected by the disaster. Can it file bankruptcy?***

Businesses can file bankruptcy cases. Many businesses can file Chapter 7, Subchapter V, and Chapter 11 cases, but only individuals can file Chapter 13 cases. If your business is unincorporated and a "dba," then any bankruptcy by the business will place you into bankruptcy as well. To avoid being personally liable for business debts for unincorporated businesses, many business owners file both a business bankruptcy and a personal bankruptcy, because the business bankruptcy does not protect the owners from personal liability for the business debts. These matters should be reviewed with an attorney.

The CARES Act added numerous provisions to help small business owners seek relief under the bankruptcy code. Until March 27, 2022, small business may file for bankruptcy under subchapter V if the business has less than \$ 7,500,000 in debt where at least 50% of the debt is from the commercial or business activities of the debtor. 11 U.S.C. § 1182(1)(A). After March 27, 2022, the limit is set to return to the pre-COVID limit (\$ 2,725,625 to be adjusted for inflation in 2022 per 11 U.S.C. § 104).