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Strategies to Survive Tough Times

BANKRUPTCY:
When to File, When Not To File, When to Wait

1. **COMMON TYPES OF BANKRUPTCY**
    a. **Chapter 7 - Complete liquidation**
        i. **If an individual** –
            1. You only keep exempt property
            2. Trustee may take other property to sell to pay unsecured creditors
        ii. **If a corporation** –
            1. It goes out of business
            2. All assets are sold to pay creditors
        iii. Means test - Income Thresholds to qualify to file
    b. **Chapter 11**
        i. Business reorganization plan
        ii. Very expensive to do
        iii. Individuals with more than $336,900 unsecured debts and more than $1,010,650 secured debts must file a Chapter 11
    c. **Chapter 13**
        i. Individual debtor reorganization plan
        ii. Three Year Plan: Pay back as much as you can over 3 years, then the rest of the debts are discharged.
        iii. Five Year Plan: If you are over the median income or your debts are too high, you may have to pay back over a 5 year plan.

2. **CONSIDERATIONS BEFORE FILING BANKRUPTCY** - It may be of benefit to consider the following before filing bankruptcy:
    a. **Do you owe non-dischargeable debts?** Some examples:
        i. **Liabilities or prior judgments that are non-dischargeable** (certain taxes, certain consumer goods over $500, luxury goods, cash advances over $750, fraud or defalcation while acting as a fiduciary, embezzlement, larceny, domestic support obligations, willful and malicious torts, such as some personal injuries for which you are at fault, certain fines and penalties to government units, debts that are not listed on the bankruptcy schedules, death or personal injury caused by your vehicle or vessel while you are drunk, restitution for crimes, etc.).

ii. **Certain debts owed pursuant to a divorce proceeding are non-dischargeable, such as child support and maintenance.** Certain obligations to pay debts, if not in the nature of support, may be dischargeable, but only in a Chapter 13.
iii. **Do you owe Income Taxes?** In some instances after you have filed your tax return, you may be able to file for bankruptcy protection on certain income taxes. The general rule is that the taxes must have been due at least three years before filing and you have filed your tax return at least two years ago.
iv. **Do you owe employee withholding (941) taxes?** If you or your company were responsible to pay taxes withheld for employees, but these taxes were not paid to the IRS, this debt is non-dischargeable. You may be on the hook even if you do not own the company but are simply a signer on the payroll account.
v. **Do you have Student Loans?** It is very difficult to get out of but not impossible if you can show undue hardship. The standard to show hardship, however, is very high. Is there anything anticipated in your life that that may create a showing of hardship? It may be a bad idea to file a bankruptcy to try to get out of student loans.
vi. **Do you owe homeowner's association fees?** These are generally non-dischargeable after filing until you no longer have a legal or equitable interest in the house. A general rule is to stop paying them before you file bankruptcy but start paying them after you file bankruptcy.

b. **Do you anticipate any substantial new debts anytime soon?** New debts may arise that you can throw in the bankruptcy pot. If you file too soon, you may not be able to get out of the new debt (for example medical bills).
c. **Can you refinance your way out of trouble?** You may be able to refinance <u>before</u> your credit is trashed from a bankruptcy. An example may be to sell a problem asset for a loss and then put the deficiency from this asset against another asset. You may be able to get rid of your motor home by selling it at a loss and then buy putting the deficiency against your house via a refinance of the house. Caveat: beware of transferring unsecured, dischargeable debt to your house and then not being able to pay the debt on the house.
d. **Do you need to get a loan?** It is now very difficult to get a loan after a bankruptcy – subprime lenders are gone. If you are going to need a loan, you may want to try to get the loan before filing for bankruptcy or never file at all. Bankruptcy remains on your credit report for ten years. However, if you play the game right, most people can have excellent credit again within two years. Be careful of the credit repair people – most are not worth it. Easiest way to begin rebuilding credit is to get secured credit card and put $500 in the bank and use this credit card.
e. **Can you do a Short Sale for your house?** It is possible that you could negotiate your way out of a problem house by doing a short sale. Find an experienced, reputable real estate agent who can assist you in doing this. You may still be liable for the deficiency when the house sells for less than the amount you owed and you may be able to discharge this later in a bankruptcy if it comes to that.

f. **Recent Credit Card Use?** If you have used credit cards recently, the charges you made may not be dischargeable. Three months may be a safe time frame for small amounts. For large charges or unusual charges (dream vacations), the credit card company may claim fraud further back than three months. Rule of thumb: stop using your credit cards and let the debts age before you file for bankruptcy.

g. Have you made any Preferential Transfers?

i. 90 day look-back for most creditors. It is possible that certain payments you made for bills or debts within 90 days prior to bankruptcy, which were not in the normal course of business, may be taken back by the bankruptcy trustee.

ii. 1 year look-back for insiders. If you paid a family member or other "insider", the trustee can look back for a year.

h. Have you previously filed a bankruptcy?

i. Chapter 13 to Chapter 13 – 2 years wait.
ii. Chapter 13 to Chapter 7 – 6 years wait.
iii. Chapter 7 to Chapter 13 – 4 years wait.
iv. Chapter 7 to Chapter 7 – 8 years wait.

i. **Have you moved recently?** If you came from another state to Colorado within the last two years, you may have to use the other state's exempt property statute. Not all states' exempt property statutes are the same. Look at the differences before you file.

j. **Have you made any dishonest credit applications?** If so, this may be a reason to talk to a lawyer.

k. **Have you transferred assets with the appearance of moving them beyond the reach of creditors?** If so, talk to a lawyer about this.

l. **Do you have too many non-exempt assets?** If your assets are sufficient, you may want to try to settle with creditors instead of filing bankruptcy.

3. EXEMPT PROPERTY

a. **Do you own exempt property?** It may be a good strategy to legally build your exempt property assets before you file for bankruptcy. Be careful that you do not do this fraudulently. Talk to a lawyer if you are going to do this. Rule of Thumb: Pigs get fat, Hogs get slaughtered.

b. **Exempt Property Statute List** – for Colorado is attached.

4. WHEN IT MAY BE A GOOD TIME TO FILE BANKRUPTCY

a. **Is your paycheck being, or about to be, garnished?** If you cannot meet living needs because of debts, it may be time to file bankruptcy.

b. Is your House at risk?

i. **Are you in foreclosure?** Foreclosure of your house may be stopped (at least temporarily) by filing bankruptcy. If you can then catch up the payments or work something out with the lender, you may be able to keep the house. In a Chapter 7, you will need to work directly with the creditor to come current; by law they don't have to let you. In a Chapter 13, however, you are legally entitled to come current over the course of either a three or five year plan.

ii. **Do you need to get out of a second mortgage?** If your second, third or fourth mortgages are wholly insecure, it is possible that the bankruptcy court could "strip them off" and get those creditors off

c. **Is there a judgment against you or are you in a lawsuit in which a judgment is imminent?** Certain judgments are dischargeable and it may be time to file.
d. **Are there collection agencies who are hounding you to the point you cannot handle it?** It may be time to file to get peace of mind. Once a bankruptcy case is filed and a case number is obtained, creditors are legally prohibited from contacting you to collect a debt during the bankruptcy. This is known as the Automatic Stay.
e. **If you are retired or wanting to retire and you have too much debt.** You may be able to enjoy your golden years without too much debt.
f. If you are in a divorce or thinking of filing for divorce, it may be a good time to bankruptcy advice.

5. RULES OF THUMB:

a. Chapter 7 is usually better than a Chapter 13 but there may be reasons you either have to do a Chapter 13 or you want to do one.
b. Always honestly and thoroughly list all your debts and assets on the bankruptcy schedules.
c. You cannot pick and choose which debts to list in the bankruptcy. You must list all debts.
d. Get legal advice before you begin to voluntarily pay back someone after a bankruptcy.
e. It is almost always a bad idea reaffirm any debts that are discharged in bankruptcy.
f. It may be a good idea to file your tax return on time even if you do not have the money to pay the taxes (get tax and bankruptcy advice first).
g. Be careful of paying back family members before filing bankruptcy.
h. You can usually keep your house even if you file bankruptcy – you just have to keep up the payments.