

Don't Wait Until You Are Too Broke To File Bankruptcy

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A popular misconception about filing bankruptcy is that people think they should be broke before consulting an attorney to discuss the possibility of a bankruptcy. This is often a tragic mistake, as **they may be literally too broke to file bankruptcy**. In these troubling times, it is best to obtain professional advice sooner rather than later to get the best result.

One should not consider bankruptcy lightly; it is a life altering event. However, we live in troubling times and for those people who find themselves financially upside down, bankruptcy can be a powerful tool to get a fresh start. Unemployment in California is over 12%, and real property prices continue to fall. Ordinary people who never contemplated the possibility of bankruptcy find themselves having to consider it. In order to survive in these financially challenging times, it is important to understand the basics of bankruptcy and to be prepared to act proactively if one's situation demands it. By researching options, you may be able to save more property and have a smoother glide path towards economic recovery or retirement.

In order to understand bankruptcy, think of it as a living probate. In a probate, someone dies and their property creates an estate. Their property is then administered and distributed through the laws of probate. From the decedent's estate property will first be distributed to pay debts and administrative claims, then to the beneficiaries or heirs as determined either by a will, trust or priorities created under the law.

Bankruptcy, like probate, deals with the distribution of a person's property when he is *insolvent*. "Insolvent" is defined as "[t]he condition of a person who is unable to pay his debts". *Black's Law Dictionary*, Revised Fourth Edition. However unlike probate, bankruptcy does not involve a physical death, but merely a financial one, and unlike a deceased person, a successful bankruptcy allows a person a fresh start, either not encumbered by [most of] the pre-bankruptcy debts or alternatively to pay them off through a plan of reorganization, usually at a discount. Upon the filing of a bankruptcy petition, a bankruptcy estate is created which consists of all of the debtor's assets at the time of the filing of the bankruptcy petition. From the bankruptcy estate, the Debtor is allowed to exempt certain items of property so that he or she is not left without the basic necessities of life. Understanding the allowable exemptions is the key to obtaining the most benefit of a Bankruptcy and *by failing to seek advice of competent bankruptcy attorney too late, one might lose the ability to maximize those exemptions or to lose them entirely*.

In California, there are two different exemptions schedules, one being the state exemptions and one that is based on the Federal exemptions (CCP§ 703.140(b)). You can only use one of these two schedules and each has a different emphasis. Under the California exemptions, anyone can exempt up to \$75,000.00 or more of equity in their residence and for people over 65 or with physical or mental disabilities, you can exempt up to \$175,000.00 of equity. This means that if you could afford to keep your mortgage current, and had less equity

than the homestead and the costs of sale, you might easily keep your residence if you file bankruptcy, as long as you continued to make the mortgage payments and taxes. Therefore, anyone who is saddled with crippling credit card debt, but has some equity in the house, should consider filing bankruptcy or at least get bankruptcy counseling, to determine if they might keep their house while eliminating their unsecured debt. It is better to make that decision sooner rather than later, before equity is eaten up or property foreclosed because one could not afford to pay their mortgage payments and credit card debt.

The Federal type exemptions are more flexible as to the type of property you can keep, but has a very small real estate exemption (\$22,075.00) § 703.140(b)(1) compared to the California exemptions. However, for those people who don't own real property or have no equity the federal exemptions can protect any other property. Under California Code of Civil Procedure § 703.140(b) (5), you can exempt out \$1175.00, plus any amount of the homestead exemption § 703.140(b)(1) not used, for a total of \$23,250.00. Therefore, a renter with a savings account of \$21,000.00 you could theoretically file bankruptcy, discharge all of their credit card and other dischargeable unsecured debt and still keep their savings account. This is a tremendous opportunity to get a fresh start that would be lost if one waited too long to consult a bankruptcy attorney.

This is a simplification of the bankruptcy system, as requirements for filing and actual filing are complex, and some people simply make too much money to filing bankruptcy. However, the determination of income is called the "means test." It is usually based on your last six months of income, and if you are retired or out of work, you may easily qualify. The important message is that to file bankruptcy intelligently, one must plan and one is best served by having a qualified and experienced attorney guide you through the system. It is better to see that attorney too soon, rather than too late, as filing bankruptcy is never easy or pleasant, as sometimes it is the most intelligent thing to do in difficult times. If you wait too long you may make mistakes or miss opportunities to get your best fresh start. (Note: This writer is a licensed attorney who like many qualified bankruptcy counsel provides an initial free bankruptcy consultation of up to 45 minutes, if you are having difficult financial times, please do not hesitate to seek such counsel.)

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