



## Bankruptcy Part Two: Honesty is the Only Policy

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In this challenging financial market, in this space (urgent care medicine), should bankruptcy be something with which you are overly concerned?

The answer is an unequivocal, “yes!”

Urgent care ownership is not for the faint of heart or the short of capital. As a friend of mine said, “This business has a lot of moving parts and misfiring on any one of them can cause your business to be upside down very quickly.” I have known a number of operators who have gone “tango uniform” by simply not being diligent with health plan contracting and collections. One individual I know was upside down by \$1.6 million within 18 months!

Should business be this unforgiving, where a few simple mistakes can lead to financial ruin? Of course it should. After all, Darwinism exists on more levels than simply evolution. It is man’s nature to want to improve their lot in life by placing their effort and capital at risk.

Adam Smith realized this back in the 18<sup>th</sup> century: “It is not by augmenting the capital of the country, but by rendering a greater part of that capital active and productive than would otherwise be so, that the most judicious operations of banking can increase the industry of the country.”

When you place capital at risk, one of the potential outcomes is loss of that capital. Let’s face it, but for capitalism, bankruptcy laws would probably not exist. As Frank Borman, the ex-CEO of now defunct Eastern Airlines said, “Capitalism without bankruptcy is like Christianity without hell.”

So, now that we agree that bankruptcy equals hell, let’s figure out how to get out of it with the least amount of burnt flesh!

First and foremost, hire competent council. Bankruptcy

law is an extremely complex area of knowledge containing an intertwined body of both substantive law and procedural rules. Just as you would not want me performing brain surgery on you, the debtor does not want a “generalist” attorney representing you in a bankruptcy proceeding. Debtors should not settle for a “discount bankruptcy” attorney or the bankruptcy forms sold at the office supply store.

If a debtor is contemplating bankruptcy, they cannot transfer assets or assume additional debt. Both of these actions can result in suit by the trustee and, more importantly, the transfer of additional debt being denied discharged (i.e., you are stuck with it) during the proceedings.

Nor can the debtor pay off insiders (friends and family) preferentially. Any payments to insiders within 12 months of filing can be set aside as a preferential transfer. A “preferential transfer” (paying off friends and family first) occurs when the debtor moves funds to a creditor before filing, which results in that creditor receiving more than they would have in the liquidation proceeding.

Once hired, competent counsel’s advice should be heeded. For example, the Bankruptcy Code allows a debtor to exempt from their monthly income certain expenses that are necessary and reasonable.

Vacations, vacation funds, IRA payments, etc. are *not* considered reasonable. Although what is allowed varies from case to case, the expense, in the eyes of the court, must be reasonable and necessary. Unfortunately, the debtor can simply no longer spend money as they wish and be argumentative with their attorney or the court will not expedite the process.

Now this will sound hard to believe, but some people actually try to pay their attorney with credit cards believing that they will ultimately not have to pay this debt. But some categories of debt cannot be discharged if they are made within a certain period before declaring bankruptcy. If the debtor charges something believing it will never be paid off, it is considered fraud and in some cases can lead to other, more serious charges.



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## HEALTH LAW

### Guiding Principles

Two words to be guided by when going through a bankruptcy: Timely and Honest.

The decision to file for a bankruptcy should not be taken lightly. However, once commenced, the debtor must act expeditiously to gather all possible information. The simple fact that they have retained counsel does not relieve them from this duty. Ultimately, how quickly the debtor works to gather the information determines how quickly they will move through the process.

Bankruptcy law is not like criminal law, where the client should only tell the attorney what the attorney needs to know so they do not incriminate themselves. In bankruptcy law, honesty counts. The debtor cannot say they have a few thousand hidden away when they have a few *hundred* thousand. Nor can they even “hide money away.” By the time they are in bankruptcy court, the phrase “open kimono” should be very well known to the honest debtor.

This area of the law is like medicine. Much like a doctor who needs to hear everything to make an accurate diagnosis, a bankruptcy attorney needs to understand the entire financial picture to effectively represent the client. At the end of the day, the debtor has to sign the petition for bankruptcy, under the penalty of perjury. They cannot retrospectively claim that, “my attorney was supposed to do that.” Courts have denied a discharge to debtors who signed an inaccurate or incomplete petition.

Simply stated, if an individual files for bankruptcy, they are living beyond their means. How they got to this point is actually important. There are many reasons bankruptcy can occur: lost job, illness, lawsuit, divorce, substance abuse, gambling, etc. However, once at this point, counsel needs to have an understanding of how this happened in order to prepare their client for the proceedings. The debtor should not withhold information from their attorney fearing that their counsel will think less of them.

Finally, the debtor should not wait to file until the very last moment. Some debtors, like compulsive gamblers, are waiting for the one big hit to occur which will save them from filing. Ultimately, this never occurs and the debtor becomes further distressed. If the debtor waits too long to file, they may not receive the maximum benefit that filing offers. The time to consider filing is when the debtor first realizes that the debt load is too onerous to handle on their own. At this juncture, the “ostrich approach” will not make the debt go away.

Bankruptcy is a very difficult, time consuming and expensive process which, even at its best, is extremely angst provoking. Competent counsel, timely and honest disclosures, and a proactive approach are the best ways to mitigate the disaster. ■



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