

**HOW TO AVOID A FEW COMMON MISTAKES OF PRO-SE BANKRUPTCY  
FILERS:  
VALUATION OF THE BANKRUPTCY ESTATE AND DISCHARGEABILITY OF  
DEBTS**

Over the years, more and more folks are attempting to file bankruptcy cases pro se – without an attorney. Statistics from the American Bankruptcy Institute indicate that over half of the chapter 7 cases, and almost 80% of the chapter 13 cases are dismissed. I’ve been asked to chair pro se bankruptcy filing classes for the U.S. Bankruptcy Court, and have spend years watching and listening to pro se debtors in creditors’ meetings. That has led me to provide a simple premier for simple bankruptcy cases. This is not intended to be legal advice, as advice can only be given on an individual basis after understanding the relevant facts of that case. Rather, the following are just a few of my thoughts on the topic, and it is my hope that it gives some guidance.

**PROPERTY VALUATION  
USE A COMMON SENSE APPROACH**

It is the responsibility of the Debtor to provide a “fair market value” of the estate. Fair market value is, “the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.” *In re Gagnon*, 2005 WL 1331142 (2005), citing *U.S. v. Cartwright*, 411 U.S. 546, 551, 93 S.Ct. 1713, 1716, 36 L.Ed.2d 528 (1973). Bankruptcy Code Section 11 U.S.C. § 522(a)(2) states that the valuation should be done as of the petition date.

Use common sense to determine the best methods to valuate property. For example, What is the debtor’s intent for the property? If it’s being surrendered or reaffirmed, a real estate broker’s

opinion is generally acceptable. Zillow is generally NOT accepted, and town value assessments are almost NEVER acceptable. In a chapter 13, is a second lien is being stripped offer, or if it's possible to bifurcate the first lien, then an appraisal can save the day!

**Zillow is just not acceptable.** Just don't use it because it's misleading in many cases and can lead to BIG issues if you rely on it for selecting state or federal exemptions, lien avoidance or just about anything else. Further, Zillow is susceptible to manipulation in some cases.

When a broker's opinion is good enough, make sure there's a Comparative Market Analysis (CMA), rather than just a memo of cost with no backup. Like I stated above, I think a CMA is good when a general idea of value is required:

- a. Chapter 7 to determine if there equity in the property.
- b. Chapter 13 when client has a single mortgage and no lien avoidance is proposed or possible.
- c. I like CMAs to get a good idea of property value. It's generally good enough for surrenders or reaffirmations.
- d. Certified Appraisal
  - i. Costs \$300 and up for single family. Is "mandatory" in my opinion for lien strip-offs and bifurcations.
- e. DO NOT tell a realtor or appraiser to make the value higher or lower because it's a bankruptcy. First, it's just wrong on so many levels. Second, if the valuation is contested, and Court will hear testimony that you attempted to sway the broker or assessor, and you're credibility will be shot, not to say that the U.S. Trustee may investigate.

Personal property value is dependant on the age and condition of the item. Check on-line auctions such as e-bay, ubid, craigslist. For cars, motorcycles and boats, NADA and Edmunds is

good. I personally like Edmunds better as I feel it gives a more accurate of the true value, where as NADA seems to be more directed to lenders. Note that some Trustees required NADA.

Electronics may devalue quickly to almost nothing, while home appliances may lose value quickly during the first few years, but then level off.

Remember to consider any extraordinary items within the household such as china, silver, artwork and antiques, for example.

Get jewelry appraised. Jewelry stores can usually provide an appraisal for around \$25. This is really critical is the jewelry is approaching the exemption limit. In Massachusetts, there was a recent case where the debtor was wearing an expensive watch that was not listed in the bankruptcy petition. The Trustee demanded that the debtor hand it over for the bankruptcy estate.

Time Shares are very difficult to value, as the price from the selling broker is generally significantly higher than the fair market value as traded between an owner and a potential buyer. There are a couple of web-sites that match buyers to sellers, and those can be helpful to determine the real value. For about a \$25 fee or so, some will actually provide the valuation for you. Also, check e-bay and Craig's list, and the registry of deeds for recent re-sales.

### **DISCHARGEABILITY OF DEBTS – KNOW WHAT YOU'RE GOING TO OWE AFTER THE BANKRUPTCY**

Many folks come to my office not understanding what is, what is not, and what "could" be dischargeable. Obviously, it is your goal in filing a bankruptcy to get debts discharged, as once discharged you no longer have any legal responsibility to re-pay those debts. But not all debts are dischargeable, and some debts required extra steps to be discharged.

Code Section 532 governs dischargeability of debts –

Non-Dischargeable Debts

- a. §523(a) covers debts that are not dischargeability, falling mostly (but not exclusively) in four areas: (i) Government debts (taxes, student loans, etc.), (ii) those incurred through fault of the debtor (fraud, etc.), (iii) domestic support obligations like alimony and child support, and (iv) those for administration of the bankruptcy and public interest (non-listed debts you forget or don't otherwise list in the bankruptcy filing, debts from a prior bankruptcy that were not discharged, and some others)

- i. Governmental liabilities. Income Taxes are most common, non-dischargeable debt, BUT there are exceptions. To be dischargeable:

1. You must have filed a legitimate, non-fraudulent tax return for the tax year(s) seeking to be discharged.
2. The liability is for a tax return actually filed by you at least 2 years prior to filing bankruptcy. If the IRS filed a tax return on your behalf, that return is deemed to be NOT filed by you.
3. The tax return was due at least three years before debtor filed for bankruptcy. and
4. IRS has not assessed the liability within 240 days before filing for bankruptcy.
5. Student Loans, except where hardship is shown. Very difficult burden – must show hardship that is persistent and on-going in to the foreseeable future (generally for life). Further, in a chapter 13, student loans are paid the same dividend as other unsecured debt, but in the end, it is not discharged! Student loans may often be handled better through the government programs reducing the monthly payments and forgiving a portion of the balance, because

the Bankruptcy Court does not have authority to do either of those things with student loans.

- ii. Liabilities incurred through fault of the debtor if creditor objects
  1. Willful and Malicious injury to another, including court ordered restitution for damages in drunk driving cases, larcenies, etc.
  2. Fraud, misrepresentation to induce another to give or loan
  3. Luxury debts exceeding \$600 to any one creditor within 90-days of filing.
  4. Cash advances from any one creditor totaling more than \$875 within 70 days of filing.
- iii. Obligations arising from divorce or separation agreements (e.g., Domestic Support Orders “DSOs”)
  1. Child support,
  2. Alimony
- iv. Those debts determined to be non-dischargeable for administration purposes or public interest.
  1. Unlisted creditors – most of the time
    - a. If a no-asset Chapter 7, then might be dischargeable even if not listed
    - b. If a bar date for proof of claims, and creditor not listed then debt is probably non-dischargeable.
    - c. In Chapter 13 – can be a critical mistake!!
  2. Debts not discharged in a prior bankruptcy for reasons of preserving *res judicata* (something already decided usually can't be re-decided).

Because the dischargeability of debts can be complex, I've included a copy of Section 523 here.

## **CONCLUSION**

It should be noted that the above is only a small fraction of all of the things that need to be considered in filing a bankruptcy, but they are commonly not understood, or worse, misunderstood. That leads to dismissal or unrealistic expectations! It is important to understand the bankruptcy process – even in simple cases – to ensure that your case does not end up dismissed rather than discharged.

United States Code Annotated [Currentness](#)

Title 11. Bankruptcy ([Refs & Annos](#))

▣ [Chapter 5](#). Creditors, the Debtor, and the Estate ([Refs & Annos](#))

▣ [Subchapter II](#). Debtor's Duties and Benefits

▣ **§ 523. Exceptions to discharge**

(a) A discharge under [section 727](#), [1141](#), [1228\(a\)](#), [1228\(b\)](#), or [1328\(b\)](#) of this title does not discharge an individual debtor from any debt--

(1) for a tax or a customs duty--

(A) of the kind and for the periods specified in [section 507\(a\)\(3\)](#) or [507\(a\)\(8\)](#) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, or equivalent report or notice, if required--

(i) was not filed or given; or

(ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing--

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C)(i) for purposes of subparagraph (A)--

(I) consumer debts owed to a single creditor and aggregating more than \$600 [\[FN1\]](#) for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and

**(II)** cash advances aggregating more than \$875 [\[FN1\]](#) that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

**(ii)** for purposes of this subparagraph--

**(I)** the terms “consumer”, “credit”, and “open end credit plan” have the same meanings as in section 103 of the Truth in Lending Act; and

**(II)** the term “luxury goods or services” does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor.

**(3)** neither listed nor scheduled under [section 521](#)(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit--

**(A)** if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

**(B)** if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

**(4)** for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

**(5)** for a domestic support obligation;

**(6)** for willful and malicious injury by the debtor to another entity or to the property of another entity;

**(7)** to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty--

**(A)** relating to a tax of a kind not specified in paragraph (1) of this subsection; or

**(B)** imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

**(8)** unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for--

**(A)(i)** an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

**(ii)** an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

**(B)** any other educational loan that is a qualified education loan, as defined in [section 221\(d\)\(1\) of the Internal Revenue Code of 1986](#), incurred by a debtor who is an individual;

**(9)** for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

**(10)** that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under [section 727\(a\)\(2\)](#), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;

**(11)** provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;

**(12)** for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency;

**(13)** for any payment of an order of restitution issued under title 18, United States Code;

**(14)** incurred to pay a tax to the United States that would be nondischargeable pursuant to paragraph (1);

**(14A)** incurred to pay a tax to a governmental unit, other than the United States, that would be nondischargeable under paragraph (1);

**(14B)** incurred to pay fines or penalties imposed under Federal election law;

**(15)** to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit;

**(16)** for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;

**(17)** for a fee imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under [subsection \(b\)](#) or [\(f\)\(2\) of section 1915 of title 28](#) (or a

similar non-Federal law), or the debtor's status as a prisoner, as defined in [section 1915\(h\) of title 28](#) (or a similar non-Federal law);

**(18)** owed to a pension, profit-sharing, stock bonus, or other plan established under [section 401, 403, 408, 408A, 414, 457, or 501\(c\) of the Internal Revenue Code of 1986](#), under--

**(A)** a loan permitted under section 408(b)(1) of the Employee Retirement Income Security Act of 1974, or subject to [section 72\(p\) of the Internal Revenue Code](#) of 1986; or

**(B)** a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under [section 414\(d\)](#), or a contract or account under [section 403\(b\), of the Internal Revenue Code of 1986](#) constitutes a claim or a debt under this title; or

**(19)** that--

**(A)** is for--

**(i)** the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or

**(ii)** common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

**(B)** results, before, on, or after the date on which the petition was filed, from--

**(i)** any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;

**(ii)** any settlement agreement entered into by the debtor; or

**(iii)** any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

For purposes of this subsection, the term “return” means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to [section 6020\(a\) of the Internal Revenue Code](#) of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to [section 6020\(b\) of the Internal Revenue Code](#) of 1986, or a similar State or local law.

**(b)** Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act of 1965, or under section 733(g) of the Public Health Service Act in a prior case concerning the debtor under this title, or

under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

**(c)(1)** Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

**(2)** Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

**(d)** If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

**(e)** Any institution-affiliated party of an insured depository institution shall be considered to be acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).