

PRIVATE CLIENT

Going bankrupt and debts which are excluded

5 frequently asked questions



1 What is a bankruptcy order?

A bankruptcy order is an order of court declaring that you are insolvent, which means that you are unable to pay the debt which the bankruptcy petition is based on. Insolvency is usually implied where your liabilities exceed your assets.

Once declared bankrupt, all of your personal assets and most of the debts that are claimed or may be claimed against you are consolidated into your “bankruptcy estate” which is then administered by an appointed officer of the court. Following the making of a bankruptcy order, you are referred to as bankrupt.

A bankruptcy order can be made upon your own request (commonly called a ‘petition’), which is often referred to as a debtor’s petition, or upon a similar petition being filed at court by one of your unpaid creditors, which is often referred to as a creditor’s petition.

Once you are declared bankrupt, your financial estate falls immediately within the authority of an officer of the court who is usually the official receiver and who acts as receiver and manager of your estate. If you own any assets of value (for example a residential home) then an independent accountant (often referred to as an Insolvency Practitioner) may be appointed by the Secretary of State, or creditors, and upon appointment s/he will be referred to as your trustee in bankruptcy (“the trustee”).

2 What is the effect of bankruptcy?

If you are declared bankrupt your entire financial estate will immediately come under the control of the official receiver and, subsequently, the trustee.

As a result, from the date of the bankruptcy order all of your assets – including money at bank, any money owed to you, any physical assets (such as your car), your home, any other property you own, any inheritance or trust income and any interest in business – will automatically vest in the trustee. The trustee will be responsible for selling all such assets with the final sum realised (once all assets have been sold) being used to pay the costs of the bankruptcy proceedings and then a payment to your creditors.

Similarly, upon being declared bankrupt, most of the debts you owe will no longer be enforceable against you. The creditors, rather than writing to you, will be contacted by the trustee who will deal with their claims against you.

You will normally have no further obligation to pay these creditors, although please see below for creditors who’s debts continue to be payable despite the making of a bankruptcy order.

3 What other effect does bankruptcy have on me?

In addition to the loss of control over your assets and the divorce from your debts, you will also be subject to a number of legal restrictions or requirements as a result of the onset of insolvency. For example, you may have to declare to any provider of credit (for example a credit card, store card or even credit offered in business) that you have been bankrupt. Your credit record will also reflect the bankruptcy and affect future borrowing.

You are prohibited from taking certain positions, for example you cannot act as a director, trustee and, if you are professionally qualified (for example as a solicitor, accountant etc.), then you may not be able to practice or may be required to practice under limited conditions.

In business, suppliers will be more cautious in supplying goods or services to someone who has been bankrupt and thus it may affect your ability to continue trading.

Following the making of the bankruptcy order, provided you have cooperated with the official receiver and the trustee, you may then be discharged from bankruptcy. This does not mean it ends, but that some of the above duties cease. Your assets and debts (subject to exempt debts described below) will continue to be collectable by the trustee and the record of your bankruptcy will remain, but otherwise at this point you have the opportunity to continue your life without the threat of such debts hanging over you.

4 Are all of my debts written off when a bankruptcy order is made?

Once a bankruptcy order has been made you can normally stop making payments to your creditors that pre-dated the date of the bankruptcy order, whilst still being able to keep your income for personal living expenses (although any surplus may have to be paid into the bankruptcy estate).

However, not all debts are included in a bankruptcy estate and neither are they written off when a bankruptcy order is made. This means that a person who is declared bankrupt may remain liable for the payment of certain debts even after they have been discharged from their bankruptcy.

5 What debts can continue to be claimed against me?

The debts that will not be written off on the making of a bankruptcy order are often referred to as "non-provable debts". Despite the making of a bankruptcy order these may still be claimed against you.

The list below contains some examples of non-provable debts that you will continue to be liable for, although we strongly recommend seeking advice in this respect:

STUDENT LOANS

At present, a student loan debt is not included in a bankruptcy estate. The student loan debt is not written off and you may still be liable to make payment of the student loan. There are exceptions documented where undue hardship can be proven, but these are exceptional cases and conventionally this debt will remain liable despite the making of a bankruptcy order against you.

COURT FINES AND COMPENSATION ORDERS

court fines and compensation orders imposed for the committing of an offence or arising in respect of a confiscation order are not written off and you, as a bankrupt individual, may still be responsible for paying off such debts.

PERSONAL INJURY CLAIMS

Debts arising from a personal injury claim against you, in which a sum of money by way of damages is payable, will not be written off following the bankruptcy order and you may still be liable for paying the debt.

FRAUD

Debts that arise as a result of fraud (usually where proceedings have previously commenced at court and lead to an order being made against you) may survive the bankruptcy and the creditor may be able to continue pursuing you for payment of the debt, despite your bankrupt status.

CHILD MAINTENANCE AND CHILD SUPPORT AGENCY PAYMENTS

Obligations to pay lump sum or costs orders in family proceedings, or under a maintenance assessment made by the Child Support Agency, are excluded from a bankruptcy estate. You as a bankrupt must still make these payments despite all other debts vesting in the bankruptcy estate.

However, at the same time there is normally a provision for reasonable living expenses allowable to you and the payment of these liabilities are subject to allowing you to receive such income to cover such reasonable living expenses.

BENEFIT AND TAX CREDIT OVERPAYMENTS

Where overpayments of benefit payments or tax credit are made to a bankrupt before the date of the bankruptcy order and recovery action is taken after the date of the bankruptcy order to recover the overpayments, the debt is not written off as a result of the bankruptcy and you as the bankrupt may remain personally liable for the payment.

If however the overpayment of benefit payments or tax credits was made before the bankruptcy order and recovery action is also taken before the date of the bankruptcy order, the debt falls within the bankruptcy estate and you would not have to pay the debt. The exception to this is if the overpayment was made as a result of fraud.

MORTGAGES AND SECURED LOANS

Mortgages and secured loans are secured debts. A 'secured debt' is where the creditor has a legal right to take action to repossess an asset if repayments are not made of the outstanding liability to that secured creditor. Examples of secured debt include a mortgage over a property or a hire purchase agreement in respect of a car.

When a bankruptcy order is made, the secured creditor has the option to rely on his security or claim in the bankruptcy. In the case of mortgagees, the bank will usually rely on its security.

As a bankrupt you are still responsible for paying secured debts after the making of the bankruptcy order, under the terms of the loan agreement/mortgage. If you do not continue to make payment of this debt to your secured creditor(s) after the bankruptcy order, the secured creditor can take steps to repossess the assets. An example of this is your mortgage, as the payment of the sums due to the mortgagee is equivalent to rent you would have to pay as an ordinary living expense and if you do not continue paying the mortgagee will repossess your home.

Obviously this does not apply to non-residential properties with mortgages (for example tenanted properties you may own). If you have any such properties then the rent payments from your tenants may be collected by the trustee and the property(s) repossessed as a result of non-payment.

Should you have any query with any of the above questions or desire to seek further advice in any of these matters please contact Francis Wilks & Jones at www.franciswilksandjones.co.uk

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