

Wis. Stat. §128.21 Debtor Actions

~ A Wisconsin Bankruptcy Alternative ~

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THIS OUTLINE IS INTENDED TO ASSIST THOSE IN THE COLLECTIONS INDUSTRY TO BETTER UNDERSTAND §128.21 DEBTOR ACTIONS - IT SHOULD NOT BE CONSIDERED TO BE ALL-INCLUSIVE OR BE CONSTRUED AS LEGAL ADVICE.

IN A NUTSHELL, WHAT IS A “CHAPTER 128”?

First, let's understand what it is *not*. Wis. Stat. §128.21 is not bankruptcy. Though it has come to be commonly referred to by debtors, attorneys and those in business as a “Chapter 128,” it is a state law in Wisconsin and not a chapter of the federal bankruptcy code. Though it really isn't proper to refer to these debtor actions as a “Chapter 128” (because these actions deal with one, specific section - section # 21 - of Chapter 128 of the Wisconsin Statutes), it has ended up with a bankruptcy-sounding label that we all widely use now. However, though it is not bankruptcy, it still provides virtually the same protections from creditor collections actions as does a federal bankruptcy. In short, this law provides the legal framework for establishing a *personal receivership* wherein someone may amortize certain debts through a monthly payment “plan” that can last for up to three years (the plans can be formulated to run for shorter periods of time, if feasible for the debtor). So, though it is also not debt consolidation as we know and understand debt consolidation to be, it results in a debtor paying one monthly payment towards one or more debts, as in traditional debt consolidation. If a debtor sticks to it, a successful §128.21 plan will also result in his or her listed creditors being paid *in full*, with the exception of accrued interest and penalties. The statute empowers a circuit court to appoint a trustee to administer the debtor's “estate” and to issue a protective order forcing most types of creditors to accept payment of debts owed to them little by little this way, despite the fact that they may have a contract with the debtor whose terms would normally dictate otherwise (the statute trumps private contracts between parties amenable to Wisconsin state-court jurisdiction). By its operation, the law stops interest from accruing on credit cards and similar debts. Upon the filing of a Chapter-128 petition, the statute provides that any creditors named by the debtor who are amenable to our state's jurisdiction, no matter where they are situated or their offices located, are automatically prohibited from attempting or continuing to attach the debtor's property or garnish his or her wages. An interim order then prohibits creditors from otherwise collecting on their debts. However, creditors are not prohibited from obtaining or litigating judgments on included debts (but they are not able to collect on them pending the debtor's 128.21 proceedings). All of the debtor's property is exempt from attachment.

SIMILAR TO, BUT VERY DIFFERENT FROM FEDERAL BANKRUPTCY

Like a bankruptcy, an “automatic stay” goes into effect upon the filing of the petition which prohibits creditors from executing any attachments upon the debtor’s property or garnishing the debtor’s wages. The judge then normally signs an interim order prohibiting creditors from otherwise trying to collect on any debt which arose prior to the filing that is included in the petition. Unlike in bankruptcy, however, the debtor must repay all debts included in the plan – no debt may be discharged through a §128.21 plan because issuing discharges of debt lies strictly with the federal bankruptcy courts. Again, filing under Ch. 128 does stop interest from accruing on debts upon filing, but it does not work to eliminate interest which had accrued prior to filing. Most creditors seem to appreciate this statute because they do get paid in full, even though they must usually wait over the course of three years to get paid.

HOW IS THE TRUSTEE SELECTED AND WHAT IS THE TRUSTEE’S ROLE?

The trustee is appointed by the court to serve as a neutral, third-party caretaker of the collection and distribution of payments to named creditors. The trustee determines, based on the amount of debts owed, how much a debtor will need to send in to the trustee’s office each month. The trustee is responsible for sending out appropriate notices to all of a debtor’s listed creditors so that each has a fair chance to have input in the matter, and for submitting to the court various reports concerning the formulation of a repayment plan and amounts owed to the creditors, including written consents and objections, if any, of the creditors, and an analysis, with the trustee’s recommendations regarding the disposition, of any claim whose amount is in dispute or appears to be uncertain. In a sense, the trustee is there to serve the needs of both debtor and creditor alike, and is equally available to a creditor and/or a creditor’s attorney as to a debtor or his/her attorney.

With the sole exception of Milwaukee County, the trustee is normally nominated in the proposed order by the debtor’s attorney. I currently work with a couple of trustees – one based in Milwaukee and another located in central Wisconsin. Most courts throughout the state maintain a list of people eligible to serve as a §128.21 trustee (should the debtor’s attorney’s nomination fail), and not all of them are lawyers themselves. Once the judge approves the trustee and his or her proposed repayment plan for the debtor, the trustee then supervises the debtor’s payments and, if necessary, takes an active role in prompting a debtor to make timely payments each month to the trustee. Should a debtor fail to make a payment for more than 30 days, the trustee will report it to the court for possible dismissal of the debtor’s case, unless exceptional circumstances justify the tardiness of the debtor’s payment. The protections that the debtor enjoys would then be null and void, and his or her creditors would once again be free to resume collections efforts. The trustee may also take an active role in contacting any creditors who do not heed the automatic stay while a §128.21 is in effect, referring violations of the stay and/or order to a debtor’s attorney so that he or she may take appropriate, legal action against them.

By law, payments are made every three months on a *pro-rata* basis by the trustee to the listed creditors, unless there is not enough paid by the debtor to cover the costs of making a distribution – then the trustee is entitled to wait until a sufficient amount is available to distribute, and also cover the costs of the distribution. The trustee is compensated for his or her trouble with either 7% or 10% of a debtor’s total debt load (7% is what the trustee is entitled to if the debtor’s payments are made via employer wage-assignment, 10% is what the trustee gets if a debtor is what we call a “self-pay,” sending payments in directly to the trustee’s office himself or herself). The trustee’s fees are factored into the debtor’s regular, monthly-payment amount.

WHAT CONSEQUENCES ARE THERE FOR CREDITORS WHO DO NOT HEED THE AUTOMATIC STAY AND/OR THE COURT ORDER PROHIBITING COLLECTIONS ACTIVITIES?

As with a bankruptcy, there are potentially serious consequences for any creditor named in a debtor’s petition paperwork who attempts to contact the debtor about the debt, initiates or continues a garnishment of the debtor’s wages, or who otherwise attempts to collect on the debt after being duly notified that the debtor has included the debt in the debtor’s case. Of course, a named creditor is free to contact the debtor’s attorney or the assigned trustee about the debt. But effectuating communication with the debtor will bring into play the court’s statutory and inherent powers to find that the creditor’s actions justify holding the creditor company – or even an individual collections agent – in contempt of the court’s order.

A typical court order for a sec. 128.21 debtor action generally reads as follows:

UPON READING AND FILING the Petition of the debtor(s) named above,
IT IS HEREBY ORDERED that the Petitioner(s) be allowed to proceed with the amortization of [his/her/their] debts pursuant to the provisions of § 128.21, Wis. Stats., and that the Trustee hereinafter named is directed to notify creditors and submit a plan for such amortization.

IT IS FURTHER ORDERED that [trustee’s name & address] be appointed Trustee in this proceeding. Said Trustee is further directed to propose an equitable plan for the amortization of the debts of Petitioner(s) and submit the same to this Court for approval thereof.

IT IS FURTHER ORDERED that upon filing of this Order and until the dismissal of these proceedings, no execution, attachment, activation of wage assignment or garnishment or other collection actions may be levied or enforced by creditors of the above-named debtor(s), unless such creditor is not included in the plan.

IT IS FURTHER ORDERED that the employer of the above debtor(s), [name & address of employer], henceforth, until further order of the Court, deduct [\$_____] from his/her/their monthly payroll checks and mail said sum(s) directly to the Trustee named above, all pursuant to the assignment authorized by debtor(s) in the Petition filed herein.

Dated this _____ day of _____, 20____.

BY THE COURT

Circuit Court Judge

Note the italicized paragraph – that’s what is really important to a debtor’s named creditors, and that’s what can bring about stiff monetary fines and even *jail time* for creditors and/or their individual agents who intentionally violate it.

But what will always be missing from the language of these orders is a prohibition against a creditor filing a law suit against the debtor outside the §128.21 proceeding, litigating that case and obtaining a judgment on the debt owed. The statute specifically and expressly allows that. However, once a judgment is obtained, the creditor may not proceed to collect on it or try to negotiate a settlement directly with the debtor, or the creditor will be violating the court order and/or the automatic stay. What the creditor can and should do with the judgment amount is report it with a “proof of claim” to the assigned trustee. The trustee will then adjust the amount of the debt listed by the debtor, accordingly. The judgment amount will then be paid out through the trustee’s office.

WHAT IF A CREDITOR DOES NOT AGREE WITH AN AMOUNT OF ANY PARTICULAR DEBT OR WITH THE PLAN AS FORMULATED BY THE TRUSTEE, OR TO THE TRUSTEE WHOM THE COURT APPOINTS?

The law provides that the court shall forthwith enter an order approving the plan recommended by the trustee and determining, for the purposes of the plan, the amounts of the claims, unless a creditor asks for a hearing by way of a written objection respecting the plan or the amount of the creditor's claim, or the person to be trustee, in which case the court must set a date for a hearing as soon as possible, with notice to the debtor, the trustee and creditors. At the hearing, the court must enter an order either approving the plan, if the judge is satisfied that it is feasible and equitable, and determining, for the purposes of the plan, the amounts of the claims, or dismissing the proceedings, or modifying and approving the plan as the judge considers just; and the court may appoint a different trustee if the one appointed is objected to.

NOT EVERY DEBT MUST BE INCLUDED . . .

Another thing that distinguishes these from the Bankruptcy Code is that not every debt that a debtor owes must be listed. The Bankruptcy Code requires a debtor to list every single penny that he or she owes to anyone in the world. There is no such requirement for filing a §128.21 debtor action – the debtors may include and exclude any qualified debts they wish. Also, the Bankruptcy Code makes the debtor and debtor’s attorney attend a meeting of creditors presided over by the bankruptcy trustee. Those are usually short, informal hearings where the trustee goes over the debtor’s bankruptcy petition with him or her and gives the debtor’s creditors an opportunity to show up and examine him or her under oath. There is no requirement that a §128.21 debtor attend such a meeting of creditors, though the trustee will notify creditors of a time when they may meet with the trustee regarding the §128.21 action. The meeting of creditors, however, is a formality that is rarely, if ever physically attended by any creditors – they may accomplish the same goals for which the meeting of creditors is intended by simply picking up the telephone and calling the trustee’s office and/or mailing in proofs of claims to the trustee.

WHAT TYPES OF DEBT MAY OR MAY NOT BE INCLUDED?

Nearly any kind of unsecured debt can be handled with one of these. Late rent, overdue utility bills, department store charge cards, Wisconsin fines, accounts already in collections, judgments of any sort, deficiencies, medical, dental and veterinarian bills, Wisconsin speeding tickets and nearly everything like them can be included. Secured debts, like those for house or car payments, generally cannot be included. Though the statute does confer secured creditors with the option of allowing secured debts to be included, secured creditors are not required to go along with it.

HOW ARE THESE REPORTED TO THE CREDIT BUREAUS?

I am finding that the impact a §128.21 debtor action has on a person's credit report is not severe. A bankruptcy stays on there for ten years, but these go away after seven years. During a §128.21 receivership, these are showing up on debtors' credit reports classified with an "I-7" or "R-7" rating, the mid-range score indicating that the debt is being repaid through a debt-consolidation or similar plan. Because there is no discharge of the debtor's debts and because the creditors get paid in full, the vast majority of creditors out there who have been subjected to these filings are happy to go along with them and to report them for what they are. However, there is still quite a bit of confusion as to the true nature of these filings, and some creditors – even in Wisconsin - are still mistakenly reporting these as bankruptcies. The simple credit-report dispute process normally clears up any such erroneous reports.

CONCLUSION

Having a debt included in a person's court-repayment plan filed under Wis. Stat. §128.21 is obviously greatly preferred to having it included – and potentially *discharged* - in a bankruptcy petition. With the exception of accruing interest and penalties, a creditor will receive payment in full within three years of the filing, provided the debtor sticks with the court plan. If the debtor fails to stick to his or her plan, then the creditor keeps what was paid through the plan and is again free to pursue repayment of the balance due. It is a great option we have in Wisconsin for both those in need of fast, effective debt relief and for those to whom they are indebted!