

# **Wis. Stat. §128.21 Debtor Actions**

## **~ A Wisconsin Bankruptcy Alternative ~**

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### **IN A NUTSHELL, HOW CHAPTER 128 HELPS THOSE WHO ARE IN DEBT.**

Wis. Stat. §128.21 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). At the end of three years, a debtor is perfectly free to file another one right away (only one case per debtor can be open at any one time, though). 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 also stops interest from accruing on credit cards and similar debts. Upon the filing of one of these petitions, the statute provides that any creditors named by the debtor who are amenable to our 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 after filing then provides that none of a debtor’s listed creditors may otherwise try to collect 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. Because of the broad and powerful protections afforded by Wis. Stat. §128.21 actions, they are often mistaken as bankruptcy filings. It’s a nice option we have in this state!

### **HOW IT ALL WORKS – GENERAL PROCEDURE.**

#### **IT’S EASY ON THE DEBTOR AND THE ATTORNEY!**

The process is much less complex, far less expensive and far less *invasive* than filing for bankruptcy relief, especially after the changes in the Bankruptcy Code that took effect late in 2005; the debtor does not have to submit any schedules of property or personal finances, and there is no mandatory counseling, filing tax returns or any sort of “means

test” or exemptions calculations involved. It is started by filing a simple petition to amortize debts, along with other paperwork, such as the debtor’s affidavit of debts, with the circuit court in the county where the debtor resides. A husband and wife may file together jointly. As of July 1, 2009, the filing fee is only \$31.50 (\$35.00 in Milwaukee County). Electronic filing of the court documents by attorneys is now mandatory in many counties and imposes an electronic filing fee of \$20 in addition to the regular court-filing fee. Usually, neither the debtor, nor the attorney must go to court, not even to file the paperwork – it can all be done through regular mail and/or electronically on line.

#### SIMILAR PROTECTIONS AS FILING FOR BANKRUPTCY

This is similar to filing a bankruptcy in that the debtor enjoys many of the exact same protections from his or her creditors. 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. An interim order signed by the judge then prohibits creditors from otherwise trying to collect on any debt which arose prior to the filing that is included in the petition. Wis. Stat. §128.21(2). Should any creditor violate these provisions, a motion can and should be filed with the court to show cause why the creditor should not be held in contempt if they persist after speaking with them. 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. See *Stellwagen v. Clum*, 245 U.S. 605, 38 S.Ct. 215 (1918). 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.

#### NOT EVERY DEBT MUST BE INCLUDED, BUT MANY CAN BE . . .

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 Chapter-128 debtor action – the debtors may include and exclude any qualified debts they wish. Also, the Bankruptcy Code makes the attorney and debtor 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 such pseudo-court appearance required for a Chapter-128 debtor action. In fact, in the years that I have been filing these, no client of mine has ever had to step foot in the trustee’s office or a court room. That isn’t to say that I’ve never wound up in a court hearing for a client, but it really only happens if there is some irreconcilable disagreement between a debtor and a creditor as to the amount of a debt (where the parties have to go in and have an evidentiary hearing on the proofs). It could also be necessary if a creditor has to be brought before the judge on a motion to show cause why

they should not be held in contempt for not heeding the automatic stay or subsequent court order.

Nearly any kind of unsecured debt can be handled with one of these. Late rent, department store charge cards, fines, judgments of any sort, deficiencies, medical, dental and veterinarian bills, speeding tickets and nearly everything like them can be included. Though the statute's language doesn't *expressly* stop interest on things like credit cards from accruing, interest must stop accruing during the course of the plan in order for the law to operate as it was intended by the legislature – repayment of debts through one of these plans means that the debts must all be for fixed, invariable amounts. 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 their secured debts to be included, secured creditors are not required to go along with it. In my experience, once they find out that it is a way that they will be getting some steady payments going again, they usually acquiesce (so it never hurts to ask).

### IMPACT ON CREDIT

If your credit score is between 500 and 600, a Ch. 128 debtor action should not have a severe impact on it. In fact, if your credit score is down in the low 400s, filing and completing a §128.21 action can actually *improve* your credit score (this typically happens when one's debt-to-income ratio decreases by shedding debt). A bankruptcy stays on one's credit report for ten years, but these go away after seven years and the reports should indicate that repayment was made in full after the plan is successfully completed. During a §128.21 receivership, the debtor's credit reports will normally classify the repayment of included debts with an "I-7" or "R-7" rating which is a 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, I tell all my clients to pull their credit reports from the three main credit bureaus after they're about six to nine months into their plans to make sure that there is no language on them that even remotely resembles *bankruptcy, Ch. 7* or *Ch. 13*. Too many times, creditors inadvertently mistake a Ch-128 debt amortization for a bankruptcy and report them as such. My research indicates that Wisconsin is the only state that provides this type of statutory relief for debtors (though Michigan and Ohio both have similar types of laws on their books, their laws are weak and ineffective compared to Wisconsin's §128.21). So that is probably why some creditors confuse these for bankruptcy filings. The debtors' credit reports should reflect language indicating something along the lines of "in repayment status." Sometimes they'll indicate that payments for included debts are "x number days late," and this is also an unacceptable description of the account status. Should a debtor's credit report contain any sort of adverse references to *bankruptcy* or "x number days late," the debtor should fill out and send in the forms provided with the reports to dispute the erroneous information. The credit bureaus will then have 30 days

to verify if the information is correct, or they will have to remove the information as a matter of law.

### **FOR EXAMPLE:**

Now I'm going to walk you through a hypothetical case scenario in order to illustrate how these work from start to finish (and this is going to be way more complicated than the vast majority of cases that get filed). Let's say that we have a debtor who's up to her eyeballs in credit card debt because she's been dipping into them to try to pay off some of the huge overdue amounts owed on her truck and back-rent. After determining from her whether there are any existing conflicts of interest, it must be ascertained whether she is qualified to file one of these.

### **STATUTORY & OTHER DEBTOR PREREQUISITES FOR FILING**

The qualifications are two-fold. The statutory requirements come first and foremost: Any adult Wisconsin resident whose principal source of income consists of wages or salary is eligible to file one of these. Wis. Stat. §128.21(1). Is she at least 18 years of age? Is she a resident of any county in this state? If not, does she plan on moving to this state? Is she working or self-employed? If not, does she have any steady source of income? At first glance, the statute seems to dictate that the debtor must have a job. But most courts will allow a debtor with any steady, reliable source of income to file for relief under this chapter. "Steady source of income" means any regularly-received income that a court approves of. I have successfully filed these for people whose only source of income have been monthly unemployment insurance payments, Social Security disability benefits or alimony. See *Central National Bank of Wausau v. Bettie Dustin*, 321 N.W.2d 321, 107, Wis. 2d 614 (Ct. App. 1982)("wages" can be equated with "earnings" which means compensation paid or payable to an individual, including periodic payments pursuant to a pension, retirement or disability program). If the prospective debtor is otherwise qualified for one of these, and it appears that this would be the best option for him or her, then the petition may be filed, even if the debtor's source of income is from something other than a proper line of work.

So, let's say she reveals that she's subleasing a girlfriend's apartment in Madison and that she's working for cash under the table for her dad while her divorce is pending. She does have to state under oath in her petition paperwork that she is a resident of the county where she lives, and she must also state the nature and general location of her employment or where and how she generates her regular, monthly income (but she does not necessarily have to reveal in detail her source of income, though it is the best practice to include it). So she fits all the statutory requirements, but now there is a new issue: She's *married*. That leads to the second prong of a potential debtor's suitability for filing one of these. The second level of qualification has nothing to do with legal requirements. Rather, it has to do with a particular person's suitability in a more practical sense. First off, she's already said that she has a secured debt (her truck) which seems to be the brunt of her debt load. Though Wis. Stat. §128.21(8) gives a secured creditor the option, one

cannot be forced to be included in a Chapter-128 debt amortization. So the truck debt can disqualify her for all intents and purposes for this type of debt relief if that creditor cannot be persuaded to go along with it. But all is not completely lost because, unlike proceedings under bankruptcy law, one does not have to include every debt one owes into a Chapter-128 plan. That means that debtors have the luxury under this state law of picking and choosing which debts they wish to include and which ones to exclude. So our hypothetical debtor may not be able to include her truck debt in a Chapter-128 plan, but she can certainly lighten the rest of her debt load by putting the credit cards and the past-due rent amounts into one! This would give her the opportunity to pay back the credit card and the landlord in small, monthly increments while diverting more of her income towards the overdue truck payments and getting caught up on them. It doesn't completely cure all of her debt headaches, but it sure makes her situation much, much more manageable!

But, oh wait – she's married. If she files singly and her husband does not join her, then any of the creditors would arguably not be precluded from continuing their collections efforts against her husband. And unlike the bankruptcy laws, Wis. Stat. §128.21 provides no special mechanism for protecting a non-filing spouse from attachment, garnishment or collections, though Wisconsin's unique marital-property laws do, at least in theory, provide "shadow" protection for a non-filing spouse, as long as the marriage does not end. But, in the case of a married debtor, it is usually always best to file a *joint petition*, naming both the debtor and his or her spouse as joint debtors. That way, they are both definitely protected (it costs only one filing fee and the attorney should charge the same fee to file a *joint petition*, incidentally). In this case, however, the debtor is in the middle of a divorce. The circumstances of her current relationship and attitude towards her spouse, and the terms of any marital settlement agreement being contemplated by the parties and/or their attorneys in the divorce proceeding would have to factor heavily into whether she is a good candidate for seeking debt relief by filing one of these.

## DOING THE MATH

Okay, so let's say our hypothetical debtor from above decides to file singly and we will not be including her spouse (he can hire his own lawyer to file one on his own!). The secured creditor won't go along with it, so she just includes the credit cards and the utility bills. So let's pretend that our hypothetical debtor's total amount of debt which she wishes to address through Ch. 128 equals **\$5,454.11**. A plan must be formulated factoring in the trustee's statutory fees and administrative costs into the total amount of debt for the case management. This depends on whether the debtor's payments will be made through a payroll wage assignment or if she is going to be a "self-pay" and send her money directly to the trustee herself. If she pays by wage assignment through her job, the trustee is entitled to 7% of the total debt amount for his or her trouble. If the debtor is going to be a self-pay, then the law says that the trustee gets 10% of her total debt amount. Wis. Stat. §128.21(4)(a). The law prefers that a debtor's monthly payments be made through his or her employer by wage assignment. But our fictitious debtor here works more in the capacity of an independent contractor for her father – she does not have a proper job

where she gets paid through her employer's payroll department. So we must treat our hypothetical debtor as a self-employed person who is going to send her monthly payments herself to the trustee. The trustee will therefore be entitled to 10%. So take your total debt number from above and add 10% to it:  $\$5,454.11 \times .10 = \$545.41$ .  $\$5,454.11 + \$545.41 = \$5,999.51$ . Take that product and divide it by the 36 months (three years) a plan goes for:  $\$5,999.51 \div 36 = \$166.65$ . Our hypothetical debtor's monthly payments to the trustee will only be \$166.65. If she had a regular job and got paid every two weeks, then you'd figure in only a 7% (.07) trustee fee and divide the monthly payment amount by two in order to see how much they'd be taking out of each of her bi-weekly paychecks for the next three years.

THE RULE OF THUMB IS: For every **\$10,000.00** of debt, the monthly payment amount will roughly be **\$300.00**. This rule of thumb applies for both the 7% and 10% trustee fee (because the 3% difference doesn't really amount to a whole hill of beans). *It's easy!*

#### PAYING A CHAPTER 128 OFF EARLY

If our pretend debtor above wanted to shorten up the amount of time her plan lasts (i.e., pay off her Chapter-128 plan sooner than three years), then she could always send in extra money each month, in addition to the required monthly payment amount of **\$166.65**. She could knock a year off her total plan length by sending in an extra \$166.65 every month to the trustee, in addition to the required monthly payment. She could even shorten her plan down to a single year by sending in a total of \$499.95 (**\$166.65 x 3**) each month. A person with a regular job whose monthly payments are coming out of his or her paychecks by wage assignment may accomplish the same thing by simply mailing in extra money every month on his or her own directly to the trustee. The trustee will credit the extra payments to the person's Ch. 128, and it will get paid off that much sooner!

#### SO, IT'S FILED . . . NOW WHAT?

Now the debtor waits for the judge to appoint a trustee, if the debtor does not nominate one, and for the judge's clerk to send back the executed order. The trustee then sends out a number of notices to the debtor and to his or her creditors (and copies of everything to the debtor's attorney, of course). Once any issues about the amounts of any debts are resolved, either by agreement or hearing, the trustee then files a proposed repayment plan with the court. Upon the court's approval of the plan, the debtor's employer's payroll department is notified by the trustee to start sending automatic withholdings to the trustee or, if the debtor is a self-pay, the debtor is notified to start sending in his or her payments directly to the trustee. The trustee will then make quarterly pro-rata disbursements to all of the creditors thereafter. When the three years is up, the trustee will then move to dismiss the case upon successful completion of the plan and file a report of trustee, provided the debtor has made all of his or her scheduled payments.

## **ARE THERE ANY PUBLISHED CASE LAW DECISIONS ABOUT §128.21?**

Scant case law is available. Again, see *Central National Bank of Wausau v. Bettie Dustin*, 321 N.W.2d 321, 107, Wis. 2d 614 (Ct. App. 1982), especially the footnotes. In a fairly recent decision in the Eastern District of Wisconsin, *In re Delta Group*, 300 BR 918, 921 (Bankr. E.D.Wis. 2003), the Court reiterated the decision in *In the Matter of Wisconsin Builders Supply Co.*, 239 F.2d 649 (7<sup>th</sup> Cir. 1956), wherein the 7<sup>th</sup> Circuit Court of Appeals ruled that all voluntary provisions of Chapter 128, such as §128.21, are not preempted by federal bankruptcy laws or jurisdiction.

## **CONCLUSION**

Filing for debt relief under Wis. Stat. §128.21 is easy, inexpensive and, often times, the most appropriate alternative to filing bankruptcy for Wisconsin residents. It should be the very first option explored by people living in this state who have more debts than they can handle and who are in need of legal/professional help to get them back on their feet.