

Chapter 13 can save you from Foreclosure, short of a discharge

In today's poor economy, where home foreclosures seem to be commonplace, and where debtors have few options to stop a foreclosure, when the bank does not want to negotiate with the debtor, a chapter 13 filing may be the only way out. The bankruptcy code has set a time frame which a debtor can not file and obtain a discharge in a chapter 13 case, if they have already filed another chapter. When a debtor is forced to file a chapter 13, in order to protect their home, many trustees will simply file a motion to dismiss the case without taking into consideration the strict language of the code. The code does not in fact prohibit a debtor from filing a chapter 13, even if they are still in another 13 or 7, but rather, prohibits a discharge. As such, many trustees do not consider that a debtor may be seeking the protection of certain chapter 13 benefits outside of a discharge.<p>

There is some, although limited case law on point, which would protected the homeowner seeking to save their home, by using the automatic stay, at least for a period of five years. In a 2008 case, the trustee contended that, because debtors were ineligible for discharges under 11 U.S.C.S. § 1328(f), they should not be allowed to file a Chapter 13 petition. The court held that a debtor was not precluded from filing in good faith a new Chapter 13 bankruptcy case even though he was ineligible for a discharge under § 1328(f). ... Whether an individual may be a debtor under Chapter 13 is established under 11 U.S.C.S. § 109(e) 11 U.S.C.S. § 1328(f) never mentions the word "filing," speaks only of "discharge," and does not purport to limit the eligibility provisions of 11 U.S.C.S. § 109(e). Therefore, the plain language of 11 U.S.C.S. § 1328(f) does not prohibit a debtor who is ineligible for a discharge from filing a Chapter 13 petition. Branigan v. Bateman (In re Bateman), 515 F.3d 272 (2008). The Bateman decision further held, 11 U.S.C.S. § 1328(f) does not prevent a debtor from filing a Chapter 13 bankruptcy case even though he is ineligible for a discharge. <p>

In Branigan v. Khan (In re Khan), Bankr. L. Rep. (CCH) P80,820 (2006), the court held a Chapter 13 debtor may not always be motivated by the availability of a discharge, so courts would be wrong to impute bad faith to a Chapter 13 petitioner simply because discharge was unavailable. Although the availability of a discharge is undoubtedly the main reason Chapter 7 cases are filed and Chapter 7 debtors view the bankruptcy discharge as "the holy grail," a Chapter 13 debtor ineligible for a discharge may file a Chapter 13 case and utilize the tools in Chapter 13 to cure a mortgage, deal with other secured debts, or simply pay debts under a plan with the protection of the automatic stay. Thus, in many Chapter 13 cases, it is the ability to reorganize one's financial life and pay off debts, not the ability to receive a discharge that is the debtor's "holy grail.". The court further held, Congress has expressly prohibited various forms of serial filings in 11 U.S.C.S. § 109(g) (no filings within 180 days of dismissal), 11 U.S.C.S. § 727(a)(8) (no Chapter 7 filing within six years of a Chapter 7 or Chapter 11 filing), and 11 U.S.C.S. § 727(a)(9) (limitation on Chapter 7 filing within six years of Chapter 12 or Chapter 13 filing). The absence of a like prohibition on serial filings of Chapter 7 and Chapter 13 petitions, combined with the evident care with which Congress fashioned these express prohibitions, convinces the Supreme Court of the United States that Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who

previously has filed for Chapter 7 relief. ... The language of 11 U.S.C.S. § 1328(f) is clear and unambiguous. It prohibits only the grant of a discharge under Chapter 13, and does not address the circumstances, set out in 11 U.S.C.S. § 109, under which a Chapter 13 bankruptcy petition may be filed.

The forgoing article was drafted by Attorney Michael Goldstein for the [Massachusetts Bankruptcy Blog](#)