

# I Cannot Afford to File for Bankruptcy

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While the above statement may seem absurd, it is often true. Bankruptcy can cost an individual their home and all their savings, and while it is usually the final option for a small business owner, it is important to understand how it works especially in regards to the global crisis in which the world finds itself today. The COVID-19 pandemic has caused major economic and social unrest across the globe including the disruption of imports and exports in the United States which has strained the freight market and hurt the bottom line of many truckers.

According to the National Bureau of Economic Research (NBER), the U.S. saw its largest ever decline in the number of business owners between February and April of 2020, as at least 3.3 million businesses closed their doors. “More permanent mass closures of small businesses in the United States are likely to have a dramatic effect on employee job losses, further income inequality, and contribute to a prolonged recession.<sup>1</sup>”

Independent owner-operators are small businesses whose customers frequently consist of other small business owners, especially for those owner-operators under their own authority. In fact, a large percentage of leased-on owner-operators choose to work for smaller carriers that recognize their value. This effectively means that owner-operators, whether under their own authority or leased-on, are highly vulnerable to market conditions and thereby experience higher risk of failure.

A survey conducted by the Owner-Operator Independent Drivers Association Foundation (OOFI), in collaboration with the American Trucking Research Institute (ATRI), on the effects of the Coronavirus pandemic on the trucking industry, verifies the findings of the NBER as most truckers indicated that they do not foresee much of an upturn in the freight market in the coming months. According to the Business Insider, trucking companies slashed 88,300 driver’s jobs in April which is the biggest single-month loss of trucking jobs on record dating back to January of 1990.<sup>2</sup> In fact, even the American Trucking Association has declared there is no shortage of drivers at this time.<sup>3</sup>

OOFI’s mission statement is to fight for the rights of all truckers through research and education from the driver’s perspective. OOFI has recognized the reality that many owner-operators and professional drivers

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<sup>1</sup> Robert W. Fairlie, *The Impact of COVID-19 on Small Business Owners: Evidence of Early-Stage Losses From the April 2020 Current Population Survey*, National Bureau of Economic Research (June 2020), pg. 10

<sup>2</sup> Rachel Premack, “88,300 truck drivers lost their jobs in April, and it’s the biggest trucking job loss on record,” Business Insider (accessed May 2020), <https://www.businessinsider.in/thelife/news/88300-truck-drivers-lost-their-jobs-in-april-and-its-the-biggest-trucking-job-loss-on-record/articleshow/75631690.cms>

<sup>3</sup> Dan Ronan, “Driver Shortage is Over Temporarily,” Transport Topics (accessed May 28, 2020), <https://www.ttnews.com/articles/driver-shortage-over-temporarily>

will be facing the possibility of losing their income and way of life. It is not a reality we like to face, or acknowledge, but the facts are, through no fault of their own, that many carriers, large and small together with owner-operators, will have to make a decision on whether to declare bankruptcy.

OOFI's staff is not composed of attorneys or financial experts but recognizes that some directions or education might help those looking at their future in order to make a sound financial decision based on facts. OOFI's challenge is to present general information regarding several options for those who have to make these difficult decisions. OOFI strongly advises anyone considering bankruptcy to see an attorney that is well versed in transportation and specializes in bankruptcy. We repeat, seek out bankruptcy attorneys who are familiar with trucking and or transportation before making this decision.

If your situation has become one where you do not see any other way out but to close up shop and that you want to protect all you can, it would be advisable to consult with someone about how you can protect your assets before actually declaring bankruptcy. Barry Fowler, an Enrolled Agent, founder of Taxation Solutions, Inc., and member of OOIDA with years of experience in trucking, might be able to assist you in preparing for a bankruptcy filing by giving advice on how to legally retain as much of your assets as you can. OOFI believes that the cost of the consultation and the cost of an attorney is a good and intelligent investment.

The following is a brief summary of the most common forms of bankruptcy which an owner-operator or professional truck driver might qualify for. Unfortunately, as the title of this report stated, you might not have enough money to declare bankruptcy. While an individual may decide not to pay their creditors, they will be forced into court and will be hounded by debt collectors when better and simpler solutions may be available to them under bankruptcy protection. Tough decisions ahead.

## Chapter 7 Bankruptcy:

Chapter 7 is the most common form of bankruptcy and is referred to as a liquidation bankruptcy. This is for those carriers and owner-operators who are considered past the stage of reorganization and must sell off any non-exempt assets to pay creditors. This is an area where you need an attorney in determining what an exempt asset is. You do not get to select who gets paid, and in fact, your entire process will be guided by a Trustee who will be appointed to make sure that any assets that are secured are sold and that the proceeds are paid to the specific creditors.

Secured debts are those where a specific asset, like your truck where a bank loaned the money, will be sold by the Trustee and the proceeds will go to the bank. Whatever assets and residual cash remain after all secured creditors are paid will be pooled together to pay any outstanding creditors with unsecured loans. The Trustee handling your bankruptcy will also get paid from your liquidation. In some cases, the debtor will be allowed to keep their home equity or car, again this is where you need a transportation bankruptcy attorney. Under Chapter 7, you will be relieved of all debts but will have to reestablish your credit worthiness all over again.

## Chapter 13 Bankruptcy:

Chapter 13 Bankruptcy is often called a wage earners plan. Once again we recommend that you have an attorney because this plan requires that the debtor create a comprehensive plan showing how they can utilize their income to pay off their creditors if allowed to restructure their obligations to repay their debts over time. Originally, an individual filing for Chapter 13 Bankruptcy was required to show a regular income over the years. However, later changes allowed for individuals, such as those who are self-employed and those operating an unincorporated business, to file under Chapter 13. The following list contains important factors an individual must consider before filing for Chapter 13 Bankruptcy:

- You must have unsecured debts less than \$394,725 and secured debts less than \$1,184,200.
- The debtor must also show they have received credit counseling from an approved credit counseling agency at least **180 days prior to filing**.
- The filer must first make a list of each creditor and the amount owed.
- The filer must compile a list of property owned, submit information about their income, such as how much they make and where the income comes from with detailed information on monthly expenses.
- Under Chapter 13 you are stating and trying to prove that you can reorganize your debts and pay them off with a rescheduling of secured debts. This must be a plan that is presented to the court and again the services of an attorney are invaluable.
- Chapter 13 allows the filer to retain their primary home by restructuring that debt while paying off the delinquent payments over a 3- to 5-year time period.
- A Trustee is assigned to collect the installment payment and forward the payments to a creditor for a specified time period (very similar to a debt consolidation plan).
- Trustees will have to be paid for their services.

One of the biggest advantages of Chapter 13 over Chapter 7 is that under Chapter 13, the debtor is allowed to keep their primary residence.

Since most owner-operators only qualify for declaring Chapter 7 or Chapter 13, it is important to know that the Small Business Reorganization Act (SBRA), which was passed in 2019 and incorporated in the CARES Act, opened Chapter 7 and Chapter 13 bankruptcy to a larger number of small businesses. **This change however went into effect in March 2020 and will revert back on March 27, 2021.** Under the Act:

- Any payments received from the federal government will be excluded from the analysis.
- Similarly, coronavirus-related payments are not considered in determining a debtor's disposable income for Chapter 13 reorganization.
- Allows Chapter 13 debtors who already have a confirmed plan, to modify the plan based on a material financial hardship caused by the pandemic, including extending their payments for seven years after their initial plan payment was due.

## Chapter 11 Bankruptcy:

Chapter 11 allows the debtor to reorganize its debts. A Trustee is appointed and will supervise the assets of the debtor allowing the business to continue. The business is still responsible for the debts but terms

and loan values may be amended. This form of bankruptcy allows for a reorganization with the agreement of its debtors allowing it to continue in a new corporate structure. It is important here to understand that while a one truck owner-operator or a small fleet of trucks (1-6) rarely qualifies for Chapter 11 bankruptcy, the Small Business Administration (SBA) considers you a small business if your annual revenue is \$30,000,000 or less. You must convince the courts that you can reorganize your business (importance of having an attorney). Small carriers are usually not eligible for Chapter 11 because while you may have debts of less than \$2,725,625, you may not have the capital to pay all the expenses under Chapter 11 Bankruptcy.

Under Chapter 11 filings, a creditors' committee is formed to represent the debtors' unsecured creditors. That committee will then hire advisers and lawyers which will incur costs. All costs are billed to the debtor. You must also post a "disclosure statement" which requires a significant amount of data. There is something called the "absolute priority rule" where creditors start getting paid with the secured creditors first and so forth. However, if the creditor above does not get paid then none of the others do. This is all done through a Trustee who also must be paid. The most vital part of the filing is a **detailed plan** as to how the debtor plans to pay their creditors, and how their restructuring plan will not only fix the balance sheet but also provide revenue for the future (again, attorney needed).

While Chapter 11 is probably beyond the scope of most owner-operators, the owner-operators who are leased to a carrier may be able to take advantage of Chapter 11 filings. This is especially true now as the CARES ACT modified the bankruptcy code making it easier for small businesses to reorganize rather than liquidate. The CARES ACT, under the SBRA, temporarily increases the debt limit for a small business to qualify for Chapter 11 Reorganization to \$7,500,000. Remember this is temporary, it is only in effect for one year. The modifications made were:

- A creditor's committee is not formed saving a large sum of money.
- The U.S. Trustee will appoint a small business trustee to oversee each small business case.
- Absent expansion of the Trustee's role, management of the small business remains with the debtor.
- Elimination of a debtor posting of a "disclosure statement".
- The bankruptcy court can approve a plan confirmation without the acceptance of an impaired class of creditors as long as the plan is fair and equitable. To be fair and equitable, it must provide that all of the debtor's projected disposable income to be received during the plan will be used to make payment for a period of 3-5 years.
- Debtor may pay administrative claims over the life of the plan rather than in cash on the effective date of bankruptcy.

Remember the new part of the CARES ACT reverts back **March 27, 2021**