

# REPRESENTING CLIENTS POST- JUDGMENT

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**Supervising Attorney - Foreclosure**

**Legal Services of the Hudson valley**



Legal Services  
of the Hudson Valley

Protecting Rights  
Promoting Justice

## ABOUT LEGAL SERVICES OF THE HUDSON VALLEY (LSHV)

Legal Services of the Hudson Valley (LSHV) is a nonprofit law firm dedicated to Protecting Rights and Promoting Justice. We provide support, advocacy and high quality civil legal representation to poor and low-income families and individuals in Westchester, Putnam, Rockland, Dutchess, Orange, Sullivan and Ulster counties.



## WHAT WE WILL COVER:

- ❑ Types of Foreclosure
- ❑ Post Judgment Legal Strategies
- ❑ Bankruptcy
- ❑ Surplus Proceedings
- ❑ Systemic Foreclosure Issues



## TYPES OF FORECLOSURE

- Forward Mortgage Foreclosure (most common)
- Reverse Mortgage Foreclosure (senior citizens only)
- HOA/Condominium Board Foreclosure
- Tax Foreclosure
- Co-Op Board Foreclosure: this is a sale of shares, not real property

\* Legal options vary according to the type of foreclosure

WHAT LEGAL  
OPTIONS ARE  
AVAILABLE  
**AFTER AN  
ORDER OF  
REFERENCE** HAS  
BEEN ENTERED?

- Motion to Renew or Reargue\*
- Appeal\*
- Motion to Dismiss the Case
- Motion to Vacate an Order (within one year of the Notice of Entry)
- Loss Mitigation or Sale
- Bankruptcy
- Prepare for Surplus Funds Proceedings

*\*File within 30 days of the entry of the order.*

# MOTION TO DISMISS: NON-WAIVABLE DEFENSES

- ❑ **Civil Practice Law and Rules Sect. 1302-a Lack of Standing**
- ❑ **Civil Practice Law and Rules Sect. 3211**
  - 3211(a)(2) the court has no jurisdiction of the subject matter or the cause of action, or
  - 3211(a)(7) the pleading fails to state a cause of action upon which relief can be granted, or
  - 3211(a)(10) failure to state a necessary party)
- ❑ **90 Day Notice Defects**
  - ❑ *Kessler, et al.* (pending Court of Appeals Decision)

\*CPLR 3211(a)1, 3, 4, 5, and 6 are waivable if neither raised in the answer nor a pre-answer motion to dismiss, and must be continuously asserted in subsequent pleadings.

\*\* The order of reference is usually accompanied by an order granting Summary Judgment on default or on the merits.

MOTION TO  
DISMISS THE  
CASE **AFTER**  
**AN ORDER OF**  
**REFERENCE**  
HAS BEEN  
ENTERED

WHAT OPTIONS  
ARE AVAILABLE  
**POST**  
**JUDGMENT OF**  
**FORECLOSURE**  
**AND SALE?**

- Motion to Renew or Reargue within 30 days
- Appeal within 30 days
- Loss Mitigation or Private Sale
- Bankruptcy
- Prepare for Surplus Proceedings
- Motions to Vacate, Dismiss, or Stay Proceedings

# PROCEEDINGS POST JFS: **SIX WEEKS BEFORE THE AUCTION**

- ❑ Loss Mitigation
  - A requirement for many forward mortgages. Servicers will generally consider a loss-mit. application if submitted six weeks before the auction.
  - Redemption/Reinstatement
- ❑ Bankruptcy
- ❑ Motion to Vacate Judgment, Dismiss, or Stay Proceedings
- ❑ Emergency Order to Stay the Sale
- ❑ Prepare for Surplus Proceedings

\*Options vary according to the type of foreclosure



POST JFS:  
**THE PRECISE  
MOMENT  
BEFORE THE  
AUCTION  
REFEREE SELLS  
THE HOME**

- ❑ Bankruptcy
  - It is chaotic to file a petition within 24 hours of the auction. Try to file it with at least a day's notice.
  - Contact the referee's office and let them know that you have filed or plan to file before the sale
  - The stay order is generated by the bankruptcy court system automatically when the petition is filed
    - Forward proof of filing to all parties, and the referee
    - upload proof of filing to the foreclosure case docket.
- ❑ Obtain Emergency Order to Vacate Default Judgment
- ❑ Prepare for Surplus Proceedings

\*Options vary according to the type of debts

- ❑ Bankruptcy Chapters - explain all of them to client
  - Chapter 13
  - Chapter 11
  - Chapter 12 (for those of us with Farmers as clients)
  - And in very rare circumstances, Chapter 7
- ❑ BK Intake: questionnaire and required documents
- ❑ Pre-Bankruptcy Course REQUIRED before filing
- ❑ File the Necessary Documents through PACER
- ❑ Adversary Proceedings
- ❑ Motion to Confirm the Payment Plan
- ❑ Discharge and Mortgage Account reconciliation

# BANKRUPTCY: OVERVIEW

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## **Ensure that client's goals for assets and liabilities align with Bankruptcy outcomes**

- Explain all chapters to the client - the BK Trustee will ask the client if you explained all eligible chapters. Chapter 7 may only be filed once every 8 years; Chapter 13 may be filed multiple times, but stay order not guaranteed.
  - Intake Questionnaire and list of required client documents
  - Pre-Bankruptcy Class is REQUIRED before filing
  - Run the numbers manually or with software like BestCase to confirm that one or more Chapters could meet client's needs.
  - Discuss with client.
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# **BANKRUPTCY CLIENT INTAKE**

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## Filing the Bankruptcy, Obtaining the Stay

- ❑ Skeleton Filing - enough to obtain Stay Order
    - Petition
    - Credit counseling certificate
    - Statement about Social Security Numbers
    - Creditor List and Creditor Matrix
  - ❑ Chapter 13 Statement of Current Monthly Income and Calculation of Disposable Income
  - ❑ Loss Mitigation Request (client affidavit)
  - ❑ Chapter 11 or 13 Plan - payments through the plan and outside of the plan
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# BANKRUPTCY - OBTAINING THE STAY ORDER

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## Filing the Bankruptcy, Keeping the Stay

- ❑ Schedules (list all assets, income and liabilities, located anywhere in the universe).
  - ❑ CLAIM THE EXEMPTIONS when you first file
    - ❑ New York CPLR Exemption scheme is best to protect home equity. CPLR §5205 and §5206
    - ❑ Federal exemption scheme is best for protecting cash. 11 USC § 522
    - ❑ You may only choose one scheme - do not mix and match NY and Federal exemptions
    - ❑ Claim 100% of the value up to the legal limit of the exemption
  - ❑ SOFA - statement of financial affairs
- \*Bankruptcy case will be dismissed, and the stay order lifted, if client fails to make monthly payments, OR you fail to file documents timely.

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# BANKRUPTCY: KEEPING THE STAY ORDER

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## Adversary Proceeding (a.k.a. AP)

- ❑ This is a lawsuit in the bankruptcy court with its own index number. It is tracked with the bankruptcy case.  
**Great for *in rem* tax foreclosure cases!**
- ❑ If you have legal reasons to claw-back sale proceeds or want to underpay/not pay a creditor, (e.g., SOL), then an A.P. is the right tool.
- ❑ The debt should be listed as “disputed” in the Petition Schedules.
- ❑ Object to claims filed by the creditor. If creditor fails to file a claim, then file one for them stating the amount you think is really owed (\$0).
- ❑ Then file the complaint with evidence to support it. Court will charge fee for new index number.
- ❑ Consider working on contingency with co-counsel to earn legal fees. Log your time in 30-minute increments or less.

\*Bankruptcy case will be dismissed, and the stay order lifted, if client fails to make monthly payments.

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# LITIGATING IN BANKRUPTCY COURT

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## Motion Practice

- ❑ Motion to Confirm the Plan
- ❑ Motion to Object to the Plan or Dismiss the Case
  - ❑ The Trustee or a Creditor may object if your proposed payment plan seems unjust to them.
  - ❑ A trustee or a creditor or the bankruptcy judge may dismiss a case
  - ❑ Motions may also be brought to object to the plan
  - ❑ Motions may be brought to lift the stay order completely, or for a limited purpose like auctioning a home.
- ❑ Once plan is confirmed, client must make payments as agreed to receive a discharge of unsecured, non-priority debts.

\*Bankruptcy case will be dismissed, and the stay order lifted, if client fails to make monthly payments.

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# BANKRUPTCY: THE PLAN YEARS

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## Discharge and Account Reconciliation

- ❑ If your client pays the bankruptcy trustee as agreed within the designated plan time (3 years or 5 years) then the trustee will distribute the funds to creditors, and herself.
  - ❑ The mortgage company should have been receiving payments outside of the plan for the duration of the bankruptcy case.
  - ❑ Before the bankruptcy case is closed, confirm with the mortgage servicer that the account is CURRENT, that the default has been cured, that your client is in good standing. Also ask for a list of fees/charges that will be generated as a result of the case closing. Creditor must work to reconcile the account or risk being sued for violating a discharge order and/or Reg X
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# BANKRUPTCY SUCCESS!

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POST JFS:  
**AFTER THE  
AUCTION**

Motion to Vacate Default Judgment

Surplus Proceedings

\* Options vary according to the type of foreclosure

- ❑ Motion to Vacate Default Judgment
    - serve this motion within one year of entry of the default judgment
    - You may have to file this before the auction, depending on when judgment was entered
  - ❑ Surplus Proceedings
- \*Options vary according to the type of foreclosure

## POST JFS: **AFTER THE AUCTION**

- ❑ Motion to Vacate Default Judgment
- ❑ Surplus Proceedings
  - Who may file: Any person claiming the surplus moneys arising upon the sale of mortgaged premises - either in his/her own name or by an attorney
  - Governing Law
    - 1354 Distribution of Proceeds of Sale
    - 1355 Report of Sale; Confirmation
    - 1361 Application for Surplus
    - 1362 Payment to Surplus out of Court

\*Options vary according to the type of foreclosure

## POST JFS: **AFTER THE AUCTION**

## □ Surplus Proceedings

- File a Notice of Claim
- Motion to Confirm Referee's Report of Sale
- Hearing to Ascertain and Report the Amount Due to Claimants
- Motion to Confirm Referee's Report and Direct Distribution (if a hearing is ordered by the court)
- Obtain Certified Copy of the Order of Distribution
- Application for Distribution to the Department of Finance

# SURPLUS PROCEEDINGS

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## **R.P.A.P.L. §1354 DISTRIBUTION OF PROCEEDS OF SALE**

- File a Notice of Claim
  - Motion to Confirm Referee's Report of Sale
  - Hearing to Ascertain and Report the Amount Due to Claimants
  - Motion to Confirm Referee's Report and Direct Distribution (if a hearing is ordered by the court)
  - Obtain Certified Copy of the Order of Distribution
  - Application for Distribution to the Department of Finance
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# **SURPLUS PROCEEDINGS**

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## **R.P.A.P.L. §1354 DISTRIBUTION OF PROCEEDS OF SALE**

- ❑ Out of the Proceeds of the Sale, the officer (referee) shall pay:
    - The expenses of the sale;
    - The amount of the debt, interest, and costs owed to plaintiff;
    - all taxes, assessments, and water rates which are liens upon
    - the property;
    - from the then remaining proceeds and if the judgment of sale has directed, any amount due to the holder of any subordinate mortgage; and
    - All surplus moneys arising from the sale shall be paid into court by the officer conducting the sale within five days
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# **SURPLUS PROCEEDINGS**

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- Homeowner may file a “Notice of Claim to Surplus Money” stating the nature and extent of his claim and the address of himself or his attorney, at any time before the confirmation of the report of sale.
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# SURPLUS PROCEEDINGS

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## **R.P.A.P.L. §1355 REPORT OF SALE; CONFIRMATION**

- ❑ Within thirty (30) days after completing the sale and conveyance to the purchaser, the referee must file with the clerk his report of the disposition of the proceeds of the sale
  - ❑ A motion to confirm the report of sale shall not be made within three months after the filing of the report, but not later than four months after the filing of such report
  - ❑ Failure to move within this time period may be disregarded if no prejudice is demonstrated. C.P.L.R. §2001; Fidelity Bond & Mortgage Co. v. Lucas, 135 A.D.2d 778, 523 N.Y.S.2d 125 (2d Dept. 1987).
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# **SURPLUS PROCEEDINGS**

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## **R.P.A.P.L. §1361 APPLICATION FOR SURPLUS; REFERENCE**

- ❑ Motion for confirmation of the referee's report of sale must be on notice to all parties who have appeared in the action or filed claims
  - ❑ The court, by reference or otherwise, shall ascertain and report the amount due to the claimant or any other person who has a lien on the surplus money, the priority of the liens and order distribution of surplus money
  - ❑ Claimant may file a motion to confirm and dispense with reference and direct distribution, but the court can order a hearing before funds are distributed R.P.A.P.L. § 1361(3).
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# **SURPLUS PROCEEDINGS**

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## REXHIBITS FOR MOTIONS AND HEARINGS (IF REQUIRED)

Must include:

- Filed Notice of claim
  - Claimant/Homeowner's Deed
  - Judgment of foreclosure and sale
  - Referee's report of sale
  - Receipt of deposit of surplus funds from County Clerk
  - Certificate of deposit from Department of Finance
    - (must submit application to DOF prior to making motion)
  - Certification of Appearances from County Clerk
    - (may be a fee and may require a waiting period)
  - Notice of No Exceptions from County Clerk
    - (may be a fee and may require a waiting period)
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# SURPLUS PROCEEDINGS

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## Hearing

- Notice required
    - Serve a summons to attend to all appearing parties, claimants and other parties the ordered by the court (see sample)
  - Reporter optional (but recommended)
  - Provide Referee with exhibits in advance
  - Enter party appearances and motion exhibits into the record.
    - Include Original Affidavit of Service showing the parties served with “Summons to Attend Before Referee”
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# SURPLUS PROCEEDINGS

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## Post-Hearing

- Referee's report and recommendation in surplus proceeding (sample included in materials);
    - Serve all parties who appeared and file with county clerk
  - Move to confirm report and direct distribution (sample included)
    - Essentially same as prior motion with exhibits from hearing
    - Include referee's report
    - Include proposed order for distribution (sample included)
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# SURPLUS PROCEEDINGS

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## APPLICATION TO DOF FOR DISTRIBUTION

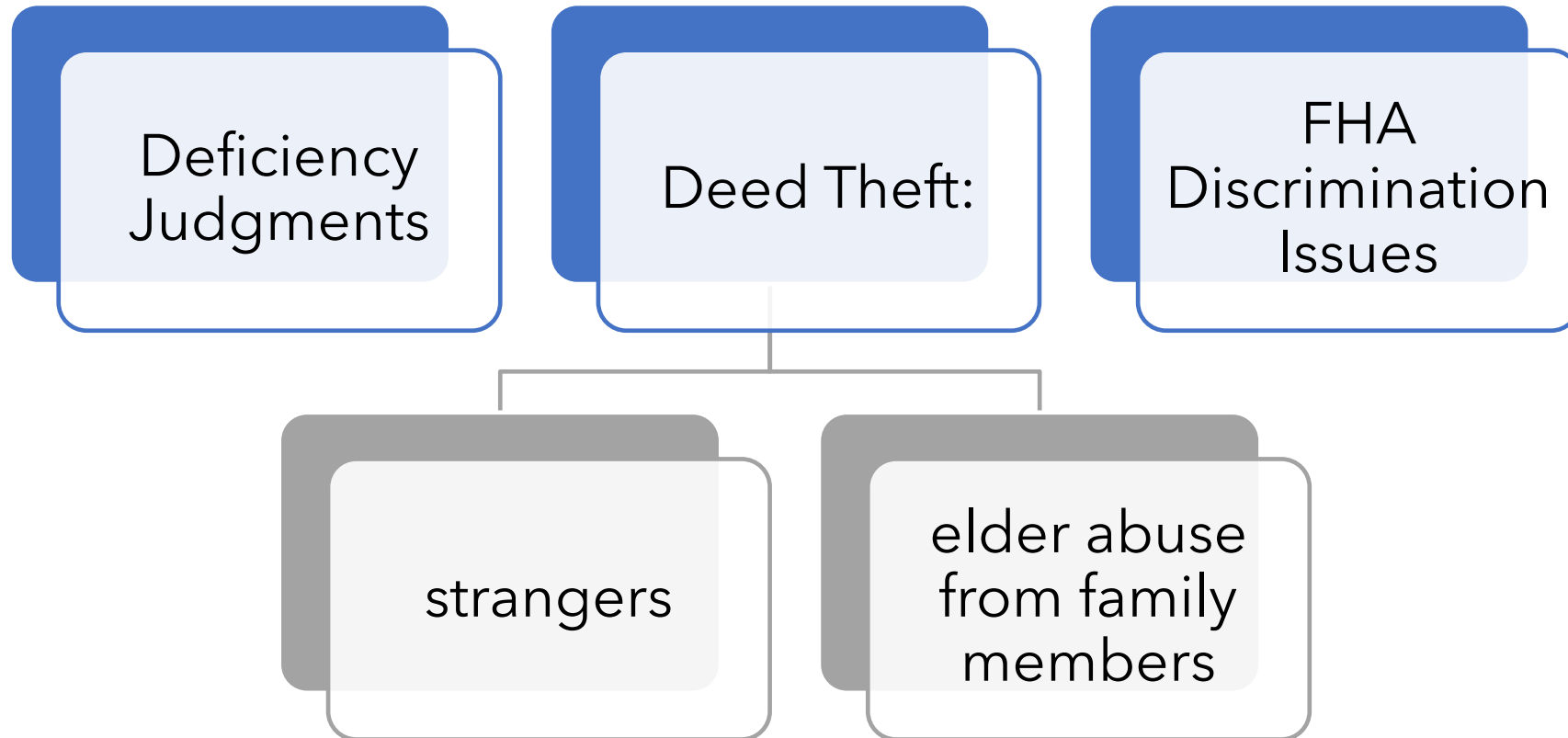
- Application for Certificate of Deposit (completed prior to notice of claim and motion to confirm report of sale)
  - Administrative Fee Deduction Form
  - W-9
  - Certificate of Deposit (obtained prior to motion to confirm)
  - Certified Copy of Order For Distribution
  - DOF will notify you when the check is available for pick up
  - Deliver in person or by mail
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# SURPLUS PROCEEDINGS

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# OTHER FORECLOSURE CONCERNS





Legal Services  
of the Hudson Valley

Protecting Rights  
Promoting Justice

**[www.lshv.org](http://www.lshv.org)**

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## BANKRUPTCY RESOURCES

Apply for Federal Bar Admission here:

- NY Southern District  
<https://www.nysd.uscourts.gov/attorney/admission>
- NY Eastern District <https://www.nyed.uscourts.gov/attorney-admissions>
- NY Western District <https://www.nywd.uscourts.gov/attorney-admissions>
- NY Northern District <https://www.nynd.uscourts.gov/attorney-admissions>







# BANKRUPTCY RESOURCES

Register for a Federal Court Electronic Records account at <https://pacer.uscourts.gov/> (accounts allow you to search cases or file documents)

An official website of the United States government. Here's how you know

Public Access to Court Electronic Records MENU

## What can we help you accomplish?

 <b>Search for a Case</b> Learn options to find case information.	 <b>Filing Electronically</b> Find court specific information to help you file a case electronically and developer resources.
 <b>Manage Your Account</b> Create a PACER account or log in to manage your account and pay a bill.	 <b>Move to NextGen CM/ECF</b> Is your court migrating to NextGen CM/ECF? Follow these steps to prepare in advance.

### ? Frequently Asked Questions

- What is PACER?
- What if I cannot find the case I am looking for?
- How much does it cost to access documents using PACER?

[View all questions](#)


### Announcements

January 6, 2023  
[PACER Quarterly Announcements | January 2023](#)

October 11, 2022  
[PACER Quarterly Announcements | October 2022](#)

July 10, 2022  
[PACER Quarterly Announcements | July 2022](#)

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# **BANKRUPTCY RESOURCES**

## **COURSES YOUR CLIENT MUST TAKE**

Approved providers for the Credit Counseling Course that must be taken before Bankruptcy is filed.

- <https://www.justice.gov/ust/list-credit-counseling-agencies-approved-pursuant-11-usc-111>

Approved providers for the Debtor Education Course that must be taken before debts are discharged and the case closed. Best practice is to have client take it as soon as the Bankruptcy has been filed.

- <https://www.justice.gov/ust/list-approved-providers-personal-financial-management-instructional-courses-debtor-education>

# BANKRUPTCY RESOURCES

## DOCUMENTS NEEDED FOR A BANKRUPTCY ANALYSIS AND/OR FILING

1. Social Security card;
  2. Government Issued Picture ID;
  3. Deed to home;
  4. Most recent Mortgage statements;
  5. If any valuation for the home exists, please send; (tax statement may have a tentative value thereon);
  6. Bank account information and six months of statements (all accounts in your name)
  7. 3 months of Paystubs and/or award letters;
  8. Credit Report from TransUnion, Equifax and Experian (find your free reports here [www.AnnualCreditReport.com](http://www.AnnualCreditReport.com)). We do not need your credit score.
  9. Pension info and /or statements;
  10. Will need current balance in bank accts the day Bankruptcy is to be filed;
  11. Titles to all motor vehicles (ATV, boat, cars);
  12. Most recent Loan statements for vehicles;
  13. Most recent Loan statements for any personal loans;
  14. Most recent Credit card statements;
  15. Credit counseling certificate- approved list of providers found here <https://www.justice.gov/ust/list-credit-counseling-agencies-approved-pursuant-11-usc-111> ;
  16. Child support or Domestic Support Order obligations information/statements
  17. Complete the Bankruptcy questionnaire
- \* You will live with this budget you are listing on the questionnaire for three to five years. Be as truthful as possible in setting up your expenses. Remember however, that a chapter 13 requires disposable income, enough to cover the past due balances on assets you want to keep (arrear balance).
- Protect these assets by claiming exemptions using citations. Good list of citations for exemptions listed here <https://www.thebankruptcysite.org/exemptions/newyork.html>



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