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Bankruptcy review for non-bankruptcy lawyers

AN OVERVIEW TO HELP GUIDE YOUR CLIENT, WHETHER DEBTOR OR CREDITORS

Although state laws play a very important role, bankruptcy law is federal in nature, stemming from the enumerated power of Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States." (U.S. Const. Art. I, § 8, Cl. 4.) The U.S. Bankruptcy Code was codified at Title 11 United States Code section 101 et seq, beginning in 1978 with the Bankruptcy Reform Act, and is periodically updated (the most recent major revision occurring in 2005 with the "Bankruptcy Abuse Prevention and Consumer Protection Act" ("BAPCPA")), and the addition of Subchapter V (small business bankruptcy) in 2020.

The Purpose of Bankruptcy

"The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" (*Marrama v. Citizens Bank of Massachusetts* (2007) 549 U.S. 365 (quoting *Grogan v. Garner* (1991) 498 U.S. 279, 286-87.)

The honest debtor can file for bankruptcy protection under one of several chapters of the Bankruptcy Code, the most common being chapters 7, 11, and 13. Chapter 7 essentially provides for an organized liquidation of a debtor's assets, whereas chapters 11 and 13 allow for a reorganization of the debtor's assets, and typically a plan to pay back creditors over time.

Individuals can receive a discharge of debts in bankruptcy under either chapter 7, 11, or 13. While most attorneys do not think of individuals filing chapter 11 cases, they are a viable option despite the different filing requirements (and perhaps the only real option if the individual's income exceeds the limits set forth in chapter 13). Corporations are not entitled to a discharge in chapter 7 bankruptcy. Subchapter V of chapter 11 (small business chapter 11) is available for individuals and companies with under $7,500,000 in debt.

One distinct advantage to filing is freezing most, if not all creditor actions to collect or foreclose/repossess. Under the reorganization options, a debtor can organize its debts to pay off creditors and even discharge one's debts (subject to restrictions) in the case of individuals.

Bankruptcy courts

Bankruptcy cases are filed with federal courts known as U.S. bankruptcy courts, located in each federal district. Title 28 of the U.S. Code governs bankruptcy court jurisdiction. Cases are heard before bankruptcy judges, and federal procedural law applies.

PRACTICE TIP: In addition to the Bankruptcy Code, attorneys should familiarize themselves with the Federal Rules of Bankruptcy Procedure (FRBP), which provide guidance on applying the Bankruptcy Code as well as other rules such as the Federal Rules of Civil Procedure. In addition, each Bankruptcy Court publishes its own "Local Rules," and, in turn, each judge adopts particular filing procedures. Most (if not all) of these materials are now available online, and attorneys should be sure to check the rules and guidelines at each stage to ensure compliance. The Local Rules are particularly helpful for timelines, noticing requirements, and mandatory forms.

The client as the debtor

Bankruptcy may not be the right answer for everyone. If debts are not too extensive, the harm to an individual's credit rating – impairing one's ability to make substantial purchases like a home or automobile – may not be worth it. Moreover, it is very important to determine whether one has the kind of debt that can be discharged ("dischargeable debts") when deciding whether to file.

In addition, the filing requirements, expense, and emotional drain of bankruptcy mean that clients should always approach the question thoughtfully and purposefully. It's also important to note that a person can only get a discharge of debts once every eight years, so this privilege should be used carefully. Bankruptcy is an open and public process: Debtors need to file financial information detailing all their assets and liabilities, stated under penalty of perjury. Therefore, an attorney should explore negotiating with creditors, with the implicit threat of a looming bankruptcy often being sufficient to work out a settlement or payment plan.

Nevertheless, bankruptcy is often the only appropriate solution for a debtor. Attorneys should take care to follow a methodical and particular plan of action. Caselaw suggests that any attorney providing "bankruptcy assistance" (see, 11 U.S.C. 101(4A)) to an "assisted person" is considered a "debt relief agency" for purposes of the Bankruptcy Code, subject to certain disclosures and advertising conditions.

An "assisted person" is defined as "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000." (11 U.S.C. § 101(3).) If an attorney is counseling clients who fit this category, they should consult Title 11 U.S. Code sections 526-28, for the language of necessary disclosures. In addition, it

means attorneys cannot counsel taking on additional debt in expectation of a bankruptcy discharge. (*Milavetz, Gallop & Milavetz, P.A. v. U.S.* (*Milavetz II*) (2010) 130 S.Ct. 1324, U.S.) The Court acknowledged, however, that counseling for another purpose is permissible, for example: Advice motivated by "enhanced financial prospects" is allowed. (*Id*. at 130 S.Ct. 1339, n.6.) Individuals are also required to take a mandatory credit counseling course before filing.

Eligibility

Except for a few particular entities, nearly any person, partnership or corporation can file for chapter 7 bankruptcy protection. (See 11 U.S.C. §109(b).) Strategically speaking, however, it may not be wise to enter this "liquidation" form of bankruptcy. Wage-earning individuals or companies wishing to continue in their operations may want to file under a "reorganizing" chapter (13 for individuals, 11 (including Subchapter V Small Business 11) for individuals and companies) instead. While chapter 7 individual debtors can exempt certain property from liquidation, careful consultation of the Bankruptcy Code and the exemptions (with a bankruptcy attorney) should occur before filing. Indeed, certain individuals may not be eligible for chapter 7. If income exceeds a certain threshold, the court will employ a "means test" to determine whether the case should be converted to one under chapter 13. (See 1 U.S.C. § 707(b)(1).)

Chapter 13 protection is only available to a limited population of debtors. Chapter 13 allows wage-earning individuals (including those self-employed) to propose an installment repayment plan over three to five years, but only if the individual's unsecured debts are less than $360,475 and secured debts are less than $1,081,400. (The amounts are periodically adjusted.) (See 11 U.S.C. §109(e).)

Chapter 11 also allows for reorganization, but it is available both to individuals and businesses, and is not subject to the debt restrictions of chapter 13. Note, however, that Subchapter V, small business reorganization, is subject to a debt limit of $7.5 million. In addition, there is no three-to-five-year limitation on plan length. However, the heightened filing and procedural requirements of chapter 11 render it more costly and time consuming than chapter 7. For example, chapter 11 debtors are required to file monthly operating reports and other compliance documents with the U.S. Trustee and appear at periodic status conferences.

It is also recommended that debtors considering filing bankruptcy engage in a pre-bankruptcy assessment, wherein they collect and organize all financial materials and review their assets and liabilities (including the valuation of assets and amount/priority of liabilities). This dovetails with Chapter 11 requirements of proof of credit counseling within 180 days before filing bankruptcy.

Filing

After credit counseling and a careful review to decide which chapter of the Bankruptcy Code is best, the bankruptcy case is opened with the filing of a petition and certain other documents. This may be done either without counsel (pro per), with a non-attorney bankruptcy petition preparer, or bankruptcy attorney.

In chapter 11, within one week of filing, the debtor is required to file certain documents with the Office of the U.S. Trustee (a division of the Department of Justice) [see paragraph E *infra*]. These include, among other things, a detailed survey of each parcel of real property, proof of insurance, any certificates or licenses, evidence of trusts, inventory lists (if applicable), projected cash flow, and recent tax returns. This is referred to as a "7-Day Package."

Under any chapter, within two weeks of filing, the debtor is required to file its Schedules and Statement of Financial Affairs ("SOFA"). The Schedules and SOFA are signed under penalty of perjury and disclose all the debtor's property (real and personal), creditors (secured, unsecured, and "priority" [including those holding certain tax and domestic support obligations]), co-debtors, unexpired leases and executory contracts, as well as monthly income. The SOFA details recent payments to creditors and other important information. This two-week period is mandatory, and if the Schedules and SOFA are not filed by the deadline, the case is subject to automatic dismissal. However, it is possible to get an extension of this filing deadline if the request is made before the deadline expires.

The bankruptcy estate and the U.S. Trustee

The moment the petition is filed, the debtor is no longer the owner of its assets. Rather, a "bankruptcy estate" is created, which becomes the owner of all assets and is charged with the proper distribution of assets to creditors.

Property is very broadly defined under the Bankruptcy Code, and as a result, the estate created consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." (11 U.S.C. § 541(a). See also *Chartschlaa v. Nationwide Mut. Ins. Co.* (2d Cir. Conn. 2008) 538 F.3d 116, 122 (citing 4 *Collier on Bankruptcy* P 541.01 (15th ed. 2001)) ["It would be hard to imagine language that would be more encompassing than this broad definition… Every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of § 541"].)

In chapter 7, the debtor's estate is managed by a case trustee appointed by the Office of the U.S. Trustee. The trustee will liquidate non-exempt assets of the estate to pay creditors. It is rare for unsecured creditors to receive much, if anything, of what they are owed, since most debtors filing for chapter 7 have few nonexempt assets. It is up to the trustee to investigate the debtor's assets and determine what, if any, assets are available. Filing under chapter 13 also results in the appointment of a trustee who administers the repayment plan.

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In Subchapter V chapter 11, a Subchapter V trustee is appointed. However, the Sub V trustee does not take control over the debtor's assets, rather they serve an administrative function to review the plan and assist in negotiations with creditors. In a regular chapter 11, a trustee is not automatically appointed. In both Sub V and regular chapter 11, the debtor also acts as the debtor in possession, and administers the estate as a fiduciary for the creditors.

This "debtor in possession" ("DIP") status is how a chapter 11 business debtor is permitted to continue operating the business in bankruptcy, as the DIP is given the same powers as a trustee. A chapter 11 trustee may be appointed by the court in a chapter 11 case for cause however, including mismanagement of the estate. A DIP is still required to obtain court permission for use of secured creditor collateral, to employ professionals (including attorneys), and conduct business (especially sales) outside of the ordinary course.

Even though a debtor may have approached an attorney to conduct its initial filings, the debtor must seek court permission to employ professionals at the expense of the estate immediately after filing its petition. Such motions are brought pursuant to Title 11 U.S. Code sections 327-331 and will also be necessary to employ special or joint counsel, accountants, appraisers, and other professionals that will assist the debtor later in its case. Payment arrangements with primary bankruptcy counsel should be worked out with the client in advance of the filing of the petition and are subject to court approval.

As a general rule for attorneys representing litigants related to the debtor, when in doubt, it is best to seek leave of the bankruptcy court to continue with court actions in which the debtor is a participant. (See, e.g., *In Matter of Mahurkar Double Lumen Hemodialysis Catheter Patent Litigation* (D N. D. Ill. 1992) 140 B.R. 969, 974 ["There is all the difference in the world between a litigant who barges ahead as if the bankruptcy filing never took place and the litigant who conscientiously brings the filing to the attention of the court and asks for interpretation and instruction"].) Violation of the bankruptcy stay is actionable and could subject the creditor to a claim for damages, sanctions and/or contempt.

Community property

Whether a couple files for bankruptcy jointly, or only one spouse files, pursuant to Title 11 U.S. Code section 541(a)(2), property of the estate includes, "[a]ll interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is – (A) under the sole, equal, or joint management and control of the debtor; or (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable."

Even if divorce proceedings are pending, community property will generally still become the property of the estate of a single debtor if no final order portioning the property has been entered. As a result of this wide inclusion of property, pursuant to Title 11 U.S. Code section 524(a)(3), the community property that is acquired post-petition is also protected by the bankruptcy discharge.

Meeting of creditors

Pursuant to Title 11 U.S. Code section 341, after filing the bankruptcy petition, a debtor is required to attend a meeting of creditors convened by the U.S. Trustee (usually held between 20 and 50 days after filing). Though not held before a court, statements at this meeting are still made under penalty of perjury and the meeting is recorded. At this meeting, creditors (who may be represented by attorneys) are permitted to question the debtor about the content of the Schedules and SOFA, alongside the trustee. In a chapter 11 case, an analyst assigned by the U.S. Trustee may also conduct an "Initial Debtor Interview" ("IDI") with the debtor (and often the debtor's bookkeeper) and debtor's attorney.

The automatic stay

Aside from discharge or reorganization, one of the primary reasons individuals and entities file for bankruptcy is the protection afforded by the automatic stay. The automatic stay provides a "breathing spell" for debtors: the moment the petition is filed, all actions to "to create, perfect, or enforce any lien against property of the estate," as well as judicial or enforcement actions, are stayed. (See 11 U.S.C. § 362.)

Given the statutory language, the scope of the stay is exceedingly broad. The stay is not absolute however: Creditors can file a motion for "relief from the automatic stay" with the bankruptcy court, to obtain permission to re-commence enforcement or judicial proceedings, such as foreclosure or re-possession, or to allow actions in non-bankruptcy forums (e.g., litigation the debtor was involved in prior to bankruptcy) to continue.

It is difficult to have the stay lifted in the first few months of a bankruptcy case unless the property a secured creditor is seeking to take has no equity and the debtor is completely unable to make "adequate protection payments." (See 11 U.S.C. § 361.) Indeed, the most common grounds to lift the stay against debtor property include lack of adequate protection (which may be demonstrated by lack of an "equity cushion"), or a lack of equity in property that is *also* unnecessary to reorganization. (11 U.S.C. § 362.)

In determining whether relief from stay should be granted or denied as to property, in addition to finding that the property is "necessary for reorganization," the Supreme Court has held that a plan of reorganization needs to be reasonably "in prospect." (See *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.* (1988) 484 U.S. 365, 375-76 (*Timbers*).) In the case of a request for relief from stay to proceed with state court litigation, such relief may be granted to allow the plaintiff/debtor to pursue

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recovery from an insurance carrier, or, in certain instances, to determine and liquidate existing choses in action or claims. When a creditor seeks to foreclose on real property, the creditor has the burden of proving there is no equity in the subject property. (11 U.S.C. § 32(g).)

Cash collateral

If a debtor is using a secured creditor's collateral (such as rents or accounts receivable collections) to continue its operations, one of the first motions (aside from applications to employ professionals) it will have to consider is a "Motion for Use of Cash Collateral." Secured creditors are entitled to have their collateral adequately protected, and the debtor needs to obtain lender permission or court permission before it can use such collateral.

For instance, a debtor collecting rents on secured properties may be required to obtain court permission before using those rents to make payments. Or, if a creditor is secured by accounts receivable financing, the debtor will need court permission before it can use the proceeds from that as well. Often, negotiated agreements are worked out between debtors and creditors for use of cash collateral after the petition date. (See generally, 11 U.S.C. § 363; *Timbers*, *supra*, 484 U.S. 365.)

Liquidation, reorganization and discharge

The ultimate goal of an individual debtor is discharge, or the legal elimination of debt. Not all debts are entitled to discharge. Debts that can remain after bankruptcy include, student loan payments, domestic support obligations, certain taxes, debts stemming from criminal fines, or debts due to death or personal injury caused while driving under the influence. (See generally, 11 U.S.C. § 523.)

In addition, debts that are non-dischargeable under chapters 7 and 11 that are dischargeable under chapter 13, include those stemming from injury to property, and debts arising from settlements in divorce.

Debts arising through fraud, embezzlement, conversion, or larceny are also generally nondischargeable; however, for these kinds of debts (and contentions), there are adversary proceedings with strict deadlines to file a complaint with the court to determine nondischargeability. Attorneys should take note of this deadline, which is usually 60 days after the first meeting of creditors.

Non-exempted assets generally remain in the bankruptcy estate, and as such are liable to satisfy pre-petition debts. Title 11 U.S. Code section 507(a) lays out the priority for payment of expenses and claims.

The chapter 11 plan essentially creates new contracts between the debtor and its creditors and is overseen by the bankruptcy court throughout the life of the plan. A chapter 11 or 13 discharge does not officially take place until an individual debtor has completed making payments under the plan of reorganization. (See, e.g., 11 U.S.C. § 1141(d)(5).) While a debtor may file a plan for liquidation under chapter 11 or 13, the plan proposed is usually one for reorganization, and may take years to "fully administer."

Common bankruptcy issues

Exemptions and residency requirements

Certain assets of a debtor are not subject to administration by the trustee or DIP as part of the estate. This is one area of bankruptcy law where state law is very important. State law also operates to define the property rights of the debtor. (See *Butner v. United States* (1979) 440 U.S. 48.)

On its "Schedule C," the individual debtor can claim certain property "exempt" from bankruptcy. As this varies by state, what follows is only a very general treatment.

The state in which a debtor files for bankruptcy protection is significant because it will bear on which exemptions exist. There is also a federal list of exemptions. Some states permit debtors to choose between using the state or federal exemptions. In California, this choice exists, but both technically arise under state law. Hence it is included among the majority of states, which don't permit the federal exemptions (i.e., states that "opt out").

Under the 2005 BAPCPA revisions to the Bankruptcy Code, a person must have lived in a state for 730 days (two years) before they can use that state's exemptions. If the debtor's domicile has been located in more than a single state during the 730-day interval, the law requires that the governing exemption law will be the state in which the debtor's domicile was located for 180 days immediately *preceding* the 730-day period, "or for a longer portion of such 180-day period than in any other place." This precludes a debtor moving from one state to another to take advantage of that state's more favorable exemption rules. (See 11 U.S.C. § 522(b)(3)(A).)

Liens and claims

Creditors may be required to file "proofs of claim" in a bankruptcy case. These documents constitute prima facie evidence the debtor owes a certain amount to a creditor (the debtor may, of course, file objections to claims without violating the automatic stay). In a chapter 7 case, because of the limited assets (and usually the presence of secured creditors), claims are not normally filed unless the trustee determines the case to be an "asset case" where a distribution will take place.

Secured creditors retain their security interests in collateral to the extent there is sufficient equity to support the debt. Any balance in excess of the value of the collateral is treated as an unsecured claim. The law is mixed on whether secured creditors are required to file a proof of claim, so the better course is to file. Unsecured creditors of a chapter 11 or 13 debtor should file claims as soon as practicable to take part in a distribution to similarly situated creditors, if any. In most bankruptcies, once administrative fees and secured debts are taken care of, unsecured creditors are usually paid only pennies on the dollar, if anything.

Practice tip for representing creditors

If a client approaches you claiming to be a creditor of a bankruptcy estate, one of the first things to check for is if the bankruptcy court has established a "Claims Bar Date." This can be set following a motion of the debtor, or may appear on a notice of meeting of creditors, or motion brought by the U.S. Trustee.

Like property of the estate, a "claim" against the estate is also very broadly defined. (See, e.g., *Johnson v. Home State Bank* (1991) 501 U.S. 78.) In addition, certain liens of secured creditors can be modified by the bankruptcy court.

Chapters 11and 13 do not permit modification of loans secured by a debtor's primary residence. (See, e.g., 11 U.S.C. § 1322.) Other loans, however, are susceptible to change. In the chapter 11 and 13 contexts, if a secured creditor is "undersecured" – that is, if the collateral securing the liability is no longer valued as high as the debt – then the claim is bifurcated into a secured claim and an unsecured claim. (11 U.S.C. § 502(a) [this "lien stripping" is generally not available in chapter 7 pursuant to *Dewsnup v. Timm* (1992) 502 U.S. 410, nor for undersecured home mortgages in chapter 13 pursuant to *Nobelman v. American Savings Bank* (U.S. 1993) 508 U.S. 324].)

This "strip down" is subject to much litigation in bankruptcy, as the value of the collateral is very important because it will determine the size of claims, usually treated very differently under a plan. A plan may also alter the interest rate paid on secured claims. (See, e.g., *Till v. SCS Credit Corp.* (2004) 541 U.S. 465 [plurality decision].) With BAPCPA, the "strip down" is also no longer permitted for vehicles purchased by the debtor within 910 days of filing for bankruptcy. (11 U.S.C. § 1325.)

Litigation and adversary actions

Bankruptcy courts may hear certain matters that are closely related to the bankruptcy case, even if it involves litigation (adversary proceedings). (See generally, FRBP 7001-87.) These can take many forms (the most common appear at parts D-E, *infra*). The procedure in adversary actions would look similar to most attorneys: a complaint is filed, and response required, followed by calendaring and administration, status conferences, discovery, and even trial.

Objections to discharge/complaints to determine nondischargeability

One of the most common adversary proceedings in bankruptcy are objections to discharge (or complaints for nondischargeability). Naturally a debtor will attempt to maximize both exempted assets and dischargeable debts. Creditors often will object to dischargeability of certain debts so that the liability will survive the bankruptcy.

Typically, the grounds will be the debt was incurred by fraud or willful and malicious injury. (See 11 U.S.C. § 523; 11 U.S.C. § 727.) The heightened pleading standards for fraud are applicable in bankruptcy actions. (See *Lancaster Community Hosp. v. Antelope Valley Hosp. Dist.* (9th Cir. 1991) 940 F.2d 397, 405.) Also, if pleading willful and malicious injury, it is generally understood that the *injury* must be willful and malicious, not just the result of an intentional act. (*Kawaauhau v. Geiger* (1998) 523 U.S. 57, 61.)

Preferential transfers and fraudulent conveyances

In addition to objections to discharge, trustees often seek to use their avoidance powers to set aside certain transfers and conveyances that took place pre-petition, in order to increase the size of the estate and payout to creditors. For example, under Bankruptcy Code section 547, the "preference statute," a "trustee may avoid any transfer of an interest of the debtor in property," to a creditor occurring within 90 days pre-petition, while the debtor was insolvent, that allowed the creditor to receive more than it would under liquidation (the 90-day limit is extended to one year if the creditor is an "insider" of the debtor as that term is defined in the Bankruptcy Code, including relatives and officers).

Bankruptcy Code section 548 allows the trustee to recover fraudulent transfers, i.e., transfers that were made for less than fair consideration, such as gifts that were made within two years before the bankruptcy filing. Additionally, pursuant to Title 11 U.S. Code section 544, the trustee is authorized to avoid transfers under applicable state law, which often provide for longer time periods than the federal reach-back of two years provided by Title 11 U.S. Code section 548.

Executory contracts and landlord rights

The chapter 11 debtor or chapter 7 trustee may either assume or reject executory contracts in the debtor's name (including, with certain limitations, personal services contracts) after filing the petition, just as it can with leases. One of the most common iterations of this topic relates to a landlord's rights. A chapter 11 debtor may reject its lease, assume (keep) it, or assign the lease to a third party.

If a client's *tenant* has filed for bankruptcy, the client should be made aware that rents owed by the debtor must be kept current post-petition (even though the debtor is not required to cure the pre-petition arrearages until the decision to assume or reject the lease). In a chapter 7 case, the trustee needs to either accept or reject a lease within 60 days of the petition date.

In addition, if a debtor-tenant rejects a non-residential real property lease, the landlord obtains an unsecured claim for damages. These damages are calculated as the greater of one year's worth of rent or 15% of the remaining term of the lease (not to exceed three years). (11 U.S.C. § 502(b).) Further, the debtor-tenant is deemed to have rejected such a lease if the debtor takes no action to assume or reject within 120 days of filing a voluntary bankruptcy case. (See generally, 11 U.S.C. § 365.)

An employment contract may also be rejected in bankruptcy. If the employer/debtor rejects the contract, the employee's claim is limited to one year of compensation, even if the contract provides for a greater claim.

Domestic support obligations

The changes of BAPCPA in October 2005 had a particularly large impact on domestic support obligation ("DSO") claims. Besides broadening the definition in section 101(14A), the Code elevated the priority payment status (of § 507(a)) of DSOs to *first* on the list (even *before* administrative expenses of the bankruptcy itself).

BAPCPA also added certain family-court proceedings to the exceptions to the automatic stay; now, filing a petition will not stay certain proceedings regarding paternity, child custody/visitation, domestic violence, and divorce. Further, post-petition child support payments must also be fully current for a debtor to receive a chapter 13 discharge (see 11 U.S.C. §1307(c)(11)).

Pursuant to section 522(c)(1), DSO creditors may look to otherwise exempted property to satisfy their claims (a privilege only enjoyed by certain tax/custom duty creditors). In addition, given section 523(a)(15), even related non-DSO debts, such as property settlements, in a divorce or related proceeding are also rendered nondischargeable.

Other topics

If a client approaches counsel claiming to be a creditor of a bankruptcy estate, the course of action will vary depending on the particulars. After exploring options involving lifting the automatic stay and filing proofs of claim, as well as potential objections to discharge and/or dischargeability or pre-petition transfers, an attorney should investigate other avenues to protect a client's claims. It may also be possible to request dismissal of the bankruptcy if bad faith or an improper purpose can be shown.

If a creditor client is a lessor of personal property (such as a car), the client should consider contacting the debtor's attorney with a request for reaffirmation. Reaffirmation agreements permit the debtor to assume a lease and re-affirm a debt subject to the newly negotiated terms, subject to bankruptcy court review to ensure that new payments do not exceed income or impose undue hardship.

Similarly, a reorganizing debtor will be required to state whether it is rejecting or assuming leases and executory contracts in its plan of reorganization.

Practice Tip: Disclosure Statements

Except in Subchapter V, a chapter 11 plan of reorganization is required to be accompanied by a "Disclosure Statement." This document contains important information about the plan, including timelines for objections, payouts, and a feasibility analysis. An attorney should consult both the plan and Disclosure Statement to determine how their client's claim(s) will be treated. The debtor in chapter 11 is given an exclusive period of 120 days to file a plan (which may be extended up to 18 months). If exclusivity expires without a plan being filed (unless it is extended by request made before expiration of the deadline), creditors are allowed to file competing plans.

A plan will divide creditors into "classes;" for a class to vote to accept a plan, more than half of the dollar amount of that class must vote to accept the plan, representing two-thirds of the number of creditors. The Plan and Disclosure Statement must also contain a voting deadline set by the Court by which a creditor must file its ballot.

Conclusion

Bankruptcy is a complex set of rules, statutes and case law that may require consulting competent legal counsel specializing in bankruptcy, insolvency, and restructuring. Much will depend on the particular circumstances of the client, whether a debtor or creditor. Bankruptcy law has connections with the tax code, securities laws, and other regulations, not to mention its own procedural, jurisdictional, and appellate questions (for example, the appeals process in bankruptcy typically moves more quickly than in civil litigation and may move on to either "Bankruptcy Appellate Panels" or the U.S. District Court).

As the number of bankruptcy filings increases, it becomes more and more likely that, at some point, a client will inform counsel she or he is contemplating filing for personal bankruptcy, or counsel will receive paperwork from some other debtor whose filing affects a client. When that client approaches with questions, knowing where to look for answers will save time and money, and the knowledgeable attorney will be a great asset to their firm, or in a better position to expand their own practice.

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