A QUICK BANKRUPTCY REFERENCE GUIDE

Hon. Kimberley H. Tyson
United States Bankruptcy Judge

A. SOURCES OF BANKRUPTCY LAW AND RULES.

Bankruptcy is a creature of federal law.

The Bankruptcy Code is located at Title 11 of the United States Code, 11 U.S.C. 101, et seq.

Besides the provisions of the Bankruptcy Code, proceedings in a bankruptcy case are governed by the Federal Rules of Bankruptcy Procedures as well as any local rules which take the form of both rules and General Procedural Orders.

These can be found on the Bankruptcy Court's website.

The local rules were extensively revised last year and the changes became effective December 1 when revisions to the Federal Rules went into effect. There are a few minor revisions being considered but they are in the nature of clean up and clarification.

In addition, the judges may have procedures which are applicable to their individual courtrooms. These are typically posted on the individual judge's webpage on the court's website.

Because local rules are subject to revision, it is important to routinely review the court's website.

While the Bankruptcy Code is federal law, questions involving competing property rights, lien priorities, and the like are determined by looking to state law.

B. TYPES OF BANKRUPTCY CASES.

There are six chapters under which a debtor may file. Under all cases, upon the filing of a bankruptcy petition, all of the assets of the debtor become assets of the debtor's bankruptcy estate.

Chapter 7 is often referred to as "straight liquidation." Upon the filing of the bankruptcy petition, the United States Trustee's office will appoint a Chapter 7 trustee whose sole job is to (1) gather all assets; (2) liquidate those assets; and (3) distribute the proceeds to creditors.

The concept is analogous to what occurs during a receivership or within the context of a probate proceeding

Typically, upon the filing of a Chapter 7 case, a business will simply cease operations.

Occasionally, if a company has a going concern value, a Chapter 7 trustee may operate the business for a very short period of time.

Four of the remaining chapters are rehabilitative. In these cases, the debtor remains in possession of the property of the bankruptcy and may continue to use it in the ordinary course of business. In addition, in all of these chapters a debtor files a plan pursuant to which there is at least some payment made to the unsecured creditors.

Chapter 9 is for municipalities and governmental entities. Whether a municipality or governmental entity can file bankruptcy is a matter of state law or the enabling statute creating the governmental entity.

Chapter 11 is the reorganization chapter. Virtually anyone except stockbrokers, commodity brokers, insurance companies and banks can file under Chapter 11.

Chapter 12 is specifically tailored for the family farmer or family fisherman and has attributes of Chapter 11 and 13.

Chapter 13 is often called the wage-earner chapter.

Only individuals with "regular income" and unsecured debt of less than $394,725 and secured debt of less than $1,184,200 qualify.

These limits will increase from time to time.

If your client wants to challenge a Chapter 13 filing, make sure the debtor qualifies. Often they do not include deficiency amounts in their unsecured debt calculation.

One of the hallmarks of Chapter 13 is that in exchange for paying into the plan all disposable income, an individual can get a broader discharge than is available in a Chapter 7 case.

Chapter 15 is for ancillary and other cross border cases.

Provides a much greater direction for recognizing decisions and orders entered in foreign insolvency proceedings.

C. THE TRUSTEES AND THEIR ROLES.

United States Trustee.

The United States Trustee is responsible for overseeing all bankruptcy cases.

The United States Trustee tends to be more overtly active in Chapter 11 cases while supervising the Chapter 7, 12, and 13 trustees but they do police all cases in some detail.

In addition to the United States Trustee, there is automatically a case trustee appointed in cases arising under Chapters 7, 12 and 13.

Chapter 7 Trustees.

A Chapter 7 trustee's role is to gather the debtor's assets, liquidate those assets and distribute the proceeds of that liquidation pursuant to the distribution scheme set forth in 11 U.S.C. § 507.

In a Chapter 7 case, the Chapter 7 trustee takes possession of the property of the estate and is responsible for its administration.

In performing his or her duties, a Chapter 7 trustee has the ability to employ professionals and to pursue the avoidance actions set forth in 11 U.S.C. §§ 544, 545, 547, 548 and 549. These avoidance powers are often referred to as the trustee's "strong arm powers."

Chapters 12 and 13 Trustees.

Because Chapters 12 and 13 are rehabilitative in nature, the case trustees' roles are more supervisory in nature. A Chapter 12 or 13 debtor remains in possession of his or her property. In exchange for being able to retain possession, the Chapter 12 or 13 debtor dedicates all disposable income to repaying his or her creditors. This is accomplished by making monthly payments to the Chapter 12 or 13 trustee over the life of the plan. The Chapter 12 or 13 trustee is then responsible for paying these funds out to creditors pursuant to the terms of the confirmed plan. The Chapter 12 or 13 trustee participates in the confirmation process to ensure that any proposed plan complies with all statutory provisions and that the debtor is making the required payments.

Chapter 11 Trustees.

A Chapter 11 trustee may be appointed upon a motion and after a hearing. Typically a Chapter 11 trustee is only appointed if the moving party can show gross mismanagement, fraud, etc.

D. AUTOMATIC STAY.

The immediate effect of a bankruptcy filing is the imposition of the automatic stay which as its name implies, automatically goes into effect when the case is filed.

This automatically creates a stay against efforts to either collect prepetition debts or exercise control over, or take possession of a debtor's property.

The automatic stay prevents a broad range of actions by creditors, whether litigation or self-help, during the course of a bankruptcy case. The automatic stay thus provides a debtor a "breathing spell" which is one of the central protections to a debtor in bankruptcy.

The stay will terminate any foreclosure actions.

Creditors will receive an initial notice of the bankruptcy filing mailed shortly after the filing.

Particularly if the debtor is an individual, make sure this notice is kept. It will be the only time you will receive the debtor's complete social security number which is needed if relief from stay is sought.

11 U.S.C. § 362(d) provides the grounds for obtaining relief from the stay.

11 U.S.C. § 362(d)(1) provides that relief from stay may be granted "for cause, including lack of adequate protection."

The "for cause" standard is designed to give a bankruptcy court broad discretion whether to grant relief from stay for any equitable grounds.

The most common ground for relief from stay under the "for cause" provision is failure of adequate protection. The general purpose of adequate protection is to ensure that a secured creditor's collateral is not unfairly jeopardized or diminished during the course of the bankruptcy case.

Adequate Protection includes:

Cash payments to compensate for decline in the value of collateral.

If the debtor has unencumbered assets, it may grant an additional lien or a replacement lien, with the value of such liens subject to agreement of the parties or determination by the bankruptcy court.

An "equity cushion," i.e. excess of collateral value under the secured creditor's lien, is a common form of adequate protection.

A debtor must also keep the property maintained and insured, and typically take such other actions as are reasonable and customary to protect the collateral.

If a debtor is unable to demonstrate an ability to maintain insurance, relief from stay will almost certainly be granted.

Besides lack of adequate protection, other potential "for cause" grounds include:

> "Bad faith" filings, typically single asset real estate cases where the debtor has one asset such as a tract of undeveloped or developed real property, the property is fully encumbered, there is really no operating business and the bankruptcy is filed for the sole purpose of stopping a foreclosure proceeding.
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> To permit prepetition litigation against the debtor to proceed to judgment.
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> > As a general rule, the closer a matter is to trial, the more likely a bankruptcy court will be to lift the stay. The stay will only be lifted, however, to obtain a judgment; a bankruptcy court will not lift the stay to permit a successful litigant to execute on the judgment.

11 U.S.C. § 361(d)(2) mandates that relief from stay be granted if (i) the debtor lacks equity in the property and (ii) the property is not necessary to an effective reorganization.

> Regarding the first prong, lack of equity in the property, debtor lacks equity in property if the value of all liens exceeds the value of the property.
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> > Then, if it is determined that the debtor lacks equity in the collateral, the inquiry becomes whether the property is "not necessary to an effective reorganization." In a Chapter 7 case, the issue is moot, since there is no reorganization. Otherwise, the inquiry has two subparts.
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> > > First, as an initial matter, the debtor must prove that reorganization itself is "in prospect."
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> > > > Thus, the ability to confirm a plan requires an analysis of both the feasibility of a reorganized debtor's operations and debtor's ability or inability to meet the legal requirements to confirm a Chapter 11 plan, even in the face of creditor abstinence.
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> > > Second, the debtor must also demonstrate that the property is necessary "in the operation of the business, or in a plan, to further the interest of the estate. . ."

The necessity test will turn upon the facts of the case.

Relief from stay is commenced by filing a motion accompanied by a filing fee, presently $181.

Service of the motion is governed by F.R.Bankr.P. 4001(a) and L.B.R. 4001-1, which require service upon the debtor, any trustee, debtor's counsel, any committees appointed any affected party and on such other entities as the court may direct.

Be sure to comply with the requirements of the Servicemembers Civil Relief Act of 2003.

A preliminary hearing then must be held within 30 days of the filing of the motion.

In Colorado, the party seeking relief from stay must obtain the hearing time and date prior to filing the motion and must serve notice of the hearing of the motion.

Objections to the motion must be filed no later than seven court days prior to the scheduled preliminary hearing date.

The moving party that fails to comply with these local rules, or that mis-sets the hearing is deemed to have waived its statutory protections.

At the preliminary hearing, no witnesses will be examined and no testimony will be taken.

In lieu thereof, parties shall make offers of proof "in sufficient detail to enable the court to make specific findings based thereon."

Exhibits shall be exchanged 24 hours before the hearing.

Based upon the declarations, exhibits and arguments, the court may treat the hearing as final and grant or deny the motion; or the court may treat it as a preliminary hearing and set the matter over for a final hearing.

If the court elects to treat the hearing as preliminary, the court must find that the debtor has a reasonable likelihood of prevailing at the final hearing in order to continue the stay.

The final hearing must be conducted not more than 30 days after conclusion of the preliminary hearing.

This 30-day period may be extended, however, with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

In individual cases, if a creditor has filed a motion for relief from stay and there has been no ruling within 60 days, the relief from stay is automatically granted.

The 60-day time period can be extended by agreement of all parties in interest or by the court for a specific period of time if such extension is based on "cause" as set forth in the specific findings made by the court.