

# Bankruptcy Basics and Practice Points for the Non- Practitioner



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# Types of Bankruptcies



- **Liquidation**

- **Chapter 7**

- ✦ Can be filed by both businesses and individuals
- ✦ Immediate appointment of a Chapter 7 Trustee
  - Chapter 7 Trustee takes control of all non-exempt assets
  - Goal of Chapter 7 Trustee is to locate and liquidate all assets to provide a return to creditors
- ✦ For individuals, debts are generally discharged quickly
  - No discharge for corporations

# Types of Bankruptcies



- Reorganization
  - Chapter 13
    - ✦ Generally filed by individuals with primarily consumer debt
    - ✦ Goal is to confirm a “Chapter 13 Plan”
      - Standardized form plan
      - All disposable income is paid for up to five years
      - Discharge obtained after completion of all plan payments
  - Chapter 12
    - ✦ Similar to Chapter 13, but for family farmers
  - Chapter 11
    - ✦ Can be filed by both businesses and individuals
    - ✦ Goal is to confirm a Chapter 11 Plan
    - ✦ More complicated and expensive process than a Chapter 13
      - But now Subchapter V

# The Estate



- **Property of the estate 11 U.S.C. § 541(a)(1)-(4)**

“The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, **all legal or equitable interests** of the debtor in property as of the commencement of the case....”

# Schedules and Statement of Financial Affairs (11 U.S.C. 521)



- The debtor shall—
  - (1) file—
    - ✦ (A) a list of creditors; and
    - ✦ (B) unless the court orders otherwise—
      - (i) a schedule of assets and liabilities;
      - (ii) a schedule of current income and current expenditures (for individuals)
      - (iii) a statement of the debtor’s financial affairs
      - (iv) a statement of the amount of monthly net income, itemized to show how the amount is calculated (for individuals)
- Standardized forms
- Filed under penalty of perjury

# Exemptions for Individuals-Texas



- Texas Exemptions
  - Homestead
    - ✦ Up to 10 acres if in the city
    - ✦ Up to 100 acres if in the country
  - Wages
    - ✦ No wage garnishment in Texas except for child support
  - Child Support/Alimony
  - Health aids
  - Family bible
  - Retirement accounts/Pensions
  - Life Insurance Policies
  - Personal Property (Texas Property Code 42.001 et seq)
    - ✦ Up to \$100,000/family or \$50,000/single adult
      - (1) home furnishings, including family heirlooms; (2) provisions for consumption; (3) farming or ranching vehicles and implements; (4) tools, equipment, books, and apparatus, including boats and motor vehicles used in a trade or profession; (5) wearing apparel; (6) jewelry (not to exceed 25 percent of the limit); (7) two firearms; (8) athletic and sporting equipment, including bicycles; (9) one motor vehicle for each member of a family or single adult who holds a driver's license; (10) the following animals and forage on hand for their consumption: (A) two horses, mules, or donkeys and a saddle, blanket, and bridle for each; (B) 12 head of cattle; (C) 60 head of other types of livestock; and (D) 120 fowl; and (11) household pets.

# Exemptions for Individuals-Federal (11 U.S.C. 522)



- **Federal Exemptions**
  - Equity in a homestead (up to approximately \$24,000)
  - Motor vehicle up to \$3,775.
  - Animals, crops, clothing, appliances and furnishings, books, household goods, and musical instruments up to \$600 per item, and up to \$12,625 total.
  - Jewelry up to \$1,600.
  - Health aids.
  - Wrongful death recovery
  - Personal injury recovery up to \$23,675 except for pain and suffering or for pecuniary loss.
  - Lost earnings payments.
  - Tax exempt retirement accounts
  - IRAS and Roth IRAs to \$1,283,025.
  - Public assistance, Social Security, Veteran's benefits, Unemployment Compensation.
  - Implements, books and tools of trade, up to \$2,375.
  - Alimony and child support needed for support.
  - Unmatured life insurance policy except credit insurance.
  - Life insurance policy with loan value up to \$12,625.
  - Disability, unemployment or illness benefits.
  - Life insurance payments for a person you depended on, which you need for support.
  - \$1,250 of any property, and unused portion of homestead up to \$11,850.

# Claims



- **Claim Definition 11 U.S.C. § 101 (5)**

“The term ‘claim’ means---

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.”



# Proof of Claim



- Creditors should file a proof of claim in the bankruptcy case
  - Standardized form
    - ✦ Should include supporting documents
    - ✦ Special rules for mortgages on homestead
  - Properly filed proof of claim is presumed to be “prima facie” valid
    - ✦ Debtor/Trustee may object to claim and must overcome presumption of validity
      - If objection filed, bankruptcy court will decide validity of claim

# Automatic Stay



- **Automatic Stay 11 U.S.C. § 362 (a)**

“ . . . a petition filed under . . . this title . . . operates as a stay applicable to all entities, of---

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce any lien against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor...

# Automatic Stay-Relief from Stay



- **Automatic Stay 11 U.S.C. § 362 (d)(1)-(2)**

“On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay---

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if---

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;”

# Automatic Stay-Damages for Violations



- **Automatic Stay 11 U.S.C. § 362 (k)**

“(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.”

# Adversary Proceedings



- **Adversary Proceedings: FED. R. BANKR. P. 7001**

“...The following are adversary proceedings:

- (1) a proceeding to recover money or property
- (2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property
- (4) a proceeding to object to or revoke a discharge
- (6) a proceeding to determine the dischargeability of a debt
- (7) a proceeding to obtain an injunction or other equitable relief
- (9) a proceeding to obtain a declaratory judgment relating to any of the foregoing; or
- (10) a proceeding to determine a claim or cause of action removed under 28 U.S.C. 1452.”

# Discharge (11 U.S.C. 523)



## **Certain debts are NOT dischargeable in a bankruptcy:**

- **(1) certain taxes:**
  - Income tax if no return was filed
    - ✦ if a return was timely filed, where the tax due was due after two years before the date of bankruptcy filing
    - ✦ if the return was fraudulent or if the Debtor willfully attempted in any manner to evade or defeat such tax;
  - Property taxes
  - Trust fund taxes
    - ✦ 941 employment taxes withheld from employee paycheck
- **(2) for money, property, services, or an extension, renewal, or refinancing of credit obtained by fraud**
- paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;
- **(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;**
- **(5) for a domestic support obligation;**
- **(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;**
- **(7) certain fines, penalties, or forfeitures payable to a governmental unit, but not tax penalties or penalties imposed for an event that happened more than three years before filing**
- **(8) student loans**
  - Unless undue hardship
- **(9) for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;**

# Preferences



- **Preferences 11 U.S.C. § 547(b)**

“Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property---

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made---

(A) on or within 90 days before the date of the filing of the petition;

or

(B) between ninety days and one year before the date of the filing of the petition, if such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if---

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.”

# Preferences



- **Preferences 11 U.S.C. § 547(c)(1)**

“The trustee may not avoid under this section a transfer--

(1) to the extent that such transfer was---

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;”



# Preferences



- **Preferences 11 U.S.C. § 547(c)(4)**

“The trustee may not avoid under this section a transfer--

...

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor---

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;”

# Preferences



- **Preferences 11 U.S.C. § 547(c)(2)**

“The trustee may not avoid under this section a transfer--

...

(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was---

(A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or

(B) made according to ordinary business terms;”

# Fraudulent Transfers (11 U.S.C. 548)



- Transactions may be avoided under section 548 either:
  - As actually fraudulent transfers where the transactions had the intent of hindering, delaying or defrauding creditors.
    - ✦ (1) the debtor had an interest in property;
    - ✦ (2) a transfer of that interest occurred within one year of the filing of the bankruptcy petition;
      - Four years under Texas law
    - ✦ (3) that the transfer was incurred with actual intent to hinder, delay, or defraud present or future creditors
  - As constructively fraudulent transfers where the transactions had the effect—irrespective of intent—of reducing the pool of assets that would otherwise be available to satisfy creditors' claims.
    - ✦ (1) the debtor had an interest in property;
    - ✦ (2) a transfer of that property occurred within one year of the filing of the bankruptcy petition;
      - Four years under Texas law
    - ✦ (3) the debtor was insolvent at the time of the transfer or became insolvent as a result thereof; and
    - ✦ (4) the debtor received less than a reasonably equivalent value in exchange for such transfer.