How Bankruptcy Can Impact Your Clients: Basics for Criminal Law, Family Law, and Litigation Attorneys

Cosponsored by the OSB Debtor-Creditor Section and the Federal Bar Association

Friday, December 7, 2018
1 p.m.–4 p.m.

2.25 Practical Skills credits and .5 Ethics credit
SECTION PLANNERS

The Honorable Peter McKittrick, U.S. Bankruptcy Court, District of Oregon, Portland
Condé Cox, Law Office of Condé Cox, Portland
Julia Manela, Watkinson Laird Rubenstein PC, Eugene

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SCHEDULE

12:00  Registration

1:00  Train Derailments and Forest Fires in Civil Litigation Cases Caused by a Bankruptcy Filing (Not Fireworks)
  ✦ The Automatic Stay
  ✦ Proof of claim—deadlines, deadlines, deadlines
  ✦ Representing the bankruptcy plaintiff
  ✦ Issues and strategies for the bankruptcy defendant
  ✦ Practical and procedural differences in bankruptcy court
Susan Eggum, Eggum LLC, Portland
Brent Summers, Tarlow Naito & Summers LLP, Portland

1:45  The Rocky Marriage of Family Law and Bankruptcy
  ✦ Prefiling considerations
  ✦ Effect of the automatic stay
  ✦ Exemptions
  ✦ Chapter 7 and Chapter 13
Erin Fennerty, Luvaas Cobb, Eugene
Milly Whatley, Milly Whatley PC, Bend

2:30  Break

2:45  Arrested Discharge: When Criminal and Bankruptcy Law Collide
  ✦ When a bankruptcy case becomes a potential criminal law issue
  ✦ Criminal conduct and exceptions to discharge
  ✦ Bankruptcy crimes and how civil practitioners can help clients avoid committing bankruptcy fraud
  ✦ The federal criminal justice system
Whitney Boise, Boise Matthews LLP, Portland
Michelle Kerin, U.S. Attorney’s Office, Portland
Jonathan Kuni, Kuni Donaldson, Portland

3:30  Ethical Issues Arising in Bankruptcy
  ✦ What to consider when your client files for bankruptcy
  ✦ What to do when other parties to the matter file for bankruptcy
Teresa Pearson, Miller Nash Graham & Dunn LLP, Portland

4:00  Adjourn
FACULTY

**Whitney Boise**, *Boise Matthews LLP, Portland*. Mr. Boise has been serving individuals and corporations charged with crimes in state and federal court since 1987. He has been recognized by Best Lawyers in America for criminal defense in both white collar and non-white collar crimes and as Lawyer of the Year for White Collar Criminal Defense in 2017 and as Lawyer of the Year for General Practice Criminal Defense in 2018 and 2016. Mr. Boise has been inducted into the American College of Trial Lawyers.

**Susan Eggum**, *Eggum LLC, Portland*. Ms. Eggum is a trial attorney practicing in business and employment litigation. She has tried to judgment or verdict many cases in the state and federal courts, including claims for TROs and preliminary injunctions, claims for theft of trade secrets, breaches of restrictive covenants such as noncompete agreements, and claims of discrimination, harassment, and retaliation. She is also serving as a private arbitrator and mediator. Ms. Eggum is past president of the Owen M. Panner American Inn of Court, and she is a frequent author and speaker for the Oregon State Bar and the Multnomah Bar Association.

**Erin Fennerty**, *Luvaas Cobb, Eugene*. Ms. Fennerty’s areas of practice are family law, school law, municipal law, and general civil litigation. She is secretary-treasurer of the Lane County Bar Association and a member of the American Bar Association Family Law Section and Litigation Section, the Oregon State Bar Family Law Section and Litigation Section, the Oregon Association of Defense Counsel, Oregon Women Lawyers, and the Oregon School Board Association. Ms. Fennerty served as a School Law Adjunct Professor in the Fall 2010 and Spring 2014 terms at Northwest Christian College.

**Michelle Kerin**, *U.S. Attorney’s Office, Portland*. Ms. Kerin prosecutes complex white collar crimes, including bank, mail, and wire fraud and money laundering. She also serves as an adjunct professor at Lewis and Clark Law School, where she teaches a white-collar criminal defense seminar. Prior to her position as an Assistant United States Attorney, Ms. Kerin practiced complex business litigation and employment litigation in Portland, and before that, she was an Assistant City Attorney for the City of Vancouver, Washington, where she focused on labor and employment law.

**Jonathan Kuni**, *Kuni Donaldson, Portland*. Mr. Kuni represents individuals and small businesses in bankruptcy and workouts. He is a member of the National Association of Consumer Bankruptcy Attorneys and the Multnomah Bar Association.

**Teresa Pearson**, *Miller Nash Graham & Dunn LLP, Portland*. Ms. Pearson’s practice focuses primarily on creditors’ rights, insolvency, and reorganization. She represents lenders, trade creditors, creditor committees, trustees, receivers, debtors, and other clients in all forums where debtor-creditor issues appear—out of court, bankruptcy court, state and federal trial court, and appellate court. She is certified in Business Bankruptcy Law by the American Board of Certification. Ms. Pearson is admitted to practice in Oregon and Washington and before the U.S. Supreme Court.

**Brent Summers**, *Tarlow Naito & Summers LLP, Portland*. Mr. Summers’s practice emphasizes all aspects of commercial law, including bankruptcy and creditors’ rights. He is a member of the Oregon State Bar Debtor-Creditor Section and the American Bankruptcy Institute as well as past president of the Clackamas County Bar Association. He is certified in Business Bankruptcy Law by the American Bankruptcy Board of Certification. Mr. Summers is a regular presenter and has authored numerous articles on commercial law, UCC, bankruptcy, and creditors’ rights topics.

**Milly Whatley**, *Milly Whatley PC, Bend*. Ms. Whatley represents individual and business debtors throughout Central Oregon.
Chapter 1
Bankruptcy Litigation: Train Derailments and Forest Fires in Civil Litigation Caused by a Bankruptcy Filing (Not Fireworks)

Brent Summers
Tarlow Naito & Summers LLP
Portland, Oregon

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Eggum LLC
Portland, Oregon

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I. INTRODUCTION

“How have you been to Rules? It’s quite a brilliant restaurant near the River Thames in central London. Quite a few barristers go there, solicitors too.”

“Welcome to Rules”

The Bankruptcy Code and all of the rules and forms that go with the Code are procedural in nature. The administration of bankruptcy cases in the United States is driven by deadlines and rules designed to move cases through the system.

A. List of Resource Materials:

1. OSB 2 Volume Treatise Bankruptcy Law, last updated 2007. (Warning – due to outdated contents, this book is not available in BarBooks and is not currently cited in OSB publications).


5. CM/ECF System: (Case Management/Electronic Case Files) is the case management and electronic court filing system for most of the United States Federal Courts. PACER, an acronym for Public Access to Court Electronic Records, is an interface to the same system for public use.

B. List of Key Differences Litigating in Bankruptcy Court and Other Courts:

1. Bankruptcy “Speak” or Jargon: “Automatic Stay,” “Co-Debtor Stay,” “Preference,” “Insider Preference,” “Trustee’s Avoidance Powers,” “Order for Relief,” “Adequate Protection,” “Indubitable Equivalent,” “Discharge,” “Nondischargeability,” “Reaffirmation,” “Redemption,” “No-Asset Cases,” “Claims Audit,” “Priority Claims,” “Confirmation Requirements” “Cramdown” and “the Absolute Priority Rule.” One commentator described practicing in bankruptcy for the experienced litigator is “. . . like trying to speak Italian when you studied Spanish in school. You keep thinking you speak the language, but every so often you get an unexpected and nasty surprise.” See: ABI Journal “An Overview of Bankruptcy Litigation” February 2004 (providing “an overview of some of the differences between bankruptcy litigation and litigation in a non-bankruptcy forum, highlighting some of the pitfalls that traditional litigators may encounter when they venture into the bankruptcy arena.”—Editor’s Note).
2. Bankruptcy Goals and the Bankruptcy Process: The two paramount goals of the Bankruptcy Code are providing relief for “honest but unfortunate” debtors and equality of distribution of the nonexempt assets of such debtors to their creditors. The lawyer should keep these principles in mind when analyzing a bankruptcy issue and the outcomes intended by various bankruptcy principles embodied in the Bankruptcy Code. The goal of debtor relief is primarily accomplished through the discharge provisions and the restructuring provisions. The goal of equality of distribution is accomplished through the priority provisions, the Trustee’s avoidance powers and the claims audit and payment distribution processes. The “dishonest” debtor is subject to the nondischargeability and denial of discharge provisions and the false swearing penalties in Title 18 USC.

3. The Code, the “Big” Rules; the “Local” Rules and Other Rules that Apply: The Bankruptcy Code is Title 11 USC. The “Big” Rules are the Federal Rules of Bankruptcy Procedure (“FRBP”). The “Big Rules” are followed in most code book publications by the Official Bankruptcy Forms. The “Local Rules” (“LBRs”) are the Local Rules of the U.S. Bankruptcy Court of the District of Oregon and certain Local Rules of US District Court made applicable in Adversary Proceedings and Contested Case Proceedings. The “Local Bankruptcy Forms” ("LBF’s") supplement the LBRs and many of the bankruptcy filings are done using the LBFs, such as motions for relief from the stay, claims objections and notices of the use, sale, or lease of estate property.

4. The Bankruptcy Case: The “Bankruptcy Case” filed by the debtor (voluntary proceedings) or against the debtor (involuntary proceedings) will be assigned its own docket number and electronic docket in the ECF system. There is also a separate “Claims Register” containing a list of and electronic access to all claims filed in the Bankruptcy Case. Upon the filing of a bankruptcy case, all of the debtor’s assets, tangible and intangible and whether subject to secured claims or liens or existing legal actions, are “Property of the Estate.” The property of the bankruptcy estate is what is administered in the Bankruptcy Case, along with all of the claims against such property and the debtor.

5. The Various Chapters: Chapter 7 Cases are “liquidation cases” where a bonded court-appointed Trustee, usually from a panel of professional bankruptcy trustees, liquidates the debtor’s assets and distributes them to creditors in accordance with the priority provisions of the Bankruptcy Code. Chapter 13 Cases are individual debt restructuring cases (subject to debt ceilings) where the debtor proposes a plan of restructuring to pay creditors the value of the debtor’s nonexempt assets over a three to five year plan that must be confirmed by the Bankruptcy Court. Chapter 11 is a complex debt restructuring by a corporation or other entity (or individuals whose debts exceed the Chapter 13 debt ceilings), also pursuant to a plan of reorganization that must be confirmed by the Bankruptcy Court. The debtor in Chapter 11 cases becomes a “Debtor-in-Possession” (“DIP”) of the estate assets and has the same obligations and powers of a Chapter 7 Trustee while the case is being administered through the confirmation process.

6. Adversary Proceedings and Contested Cases: Actions in the Bankruptcy Court are started by the filing of a Complaint (and subsequent service of a summons) and are called Adversary Proceedings.” Each Adversary Proceedings is assigned an Adversary
Case No. and has its own electronic docket in the ECF System. Part VII of the FRBP's govern civil procedure in Adversary Proceedings (and many of the rules adopt or implement the mirror provisions in the Federal Rules of Civil Procedure). Contested Matters involve hearings on such matters as motions for relief from the stay, objections to claims, objections to proposed sales or leases and motions for authority to use cash collateral in restructuring cases. FRBP Rule 1019 governs Contested Matters. This rule adds some rules specific to Contested Matters and adopts most of the procedural rules in Part VII of the FRBP that govern Adversary Proceedings.

7. Economic Considerations and Perceived “Shortcuts:” Bankruptcy cases by nature generally involve diminishing or diminished assets. The availability of an estate makes bankruptcy practice similar to other “pot” practices like trusts and estates, with fees available to pay professionals involved in the administration of the estate. The debtor usually has hired a lawyer, the Trustee hires professionals, including lawyers, accountants, appraisers and auctioneers. In Chapter 11 cases, the Creditors’ Committee is entitled to a lawyer and the DIP employs lawyers and accountants. There is often much litigation between the debtor and/or the estate and creditors, both secured and general creditors. Because most of the professional fee claims are paid by the estate, there is a constant drum beat of calls to keep the professional fees down. All applications for professional compensation are subject to notice to creditors and parties-in-interest (who may file objections) and subject to review and final approval by the Bankruptcy Judge. This leads to shortcuts in the process, including the numerous form pleadings and documents that are used. The litigation practice, including the presentation of evidence, can also be less formal. Every Bankruptcy Judge is different, but all in the District of Oregon have pre-trial submission orders designed to put the exhibits in before the trial of an Adversary Case or Contested Matter, and many of them will also attempt to speed up hearings by asking their own questions of witnesses to get to the heart of the matter. In very informal situations, the lawyer may “testify” from counsel table or the podium as to what the evidence will be, however, this occurs mostly to allow the Judge to ferret out what is really at issue and what is not.

8. Bankruptcy Appeals: Warning! The general rule governing the time for appeal of a bankruptcy order or judgment under FRBP Rule 8001 is 14 days. The rule is complex and contains other time periods for appeals from certain types of orders by the Bankruptcy Court. The rule also contains provisions for filing a Motion to Extend the Time for filing the notice of appeal (within the 14 day appeal period or within 21 days after that time if the party shows excusable neglect). There are choice of forum issues, i.e., whether to file the appeal to the U.S. District Court or the Bankruptcy Appellate Panel. And, when appealing from an order approving a bankruptcy sale or a settlement, the appellant must immediately move for and obtain a stay of the order appealed from or risk a finding that the appeal is moot.
II. AUTOMATIC STAY ISSUES

A. What is the Automatic Stay and the Effect of the Stay?

1. Bankruptcy Code Section 362: One of the hallmarks of the bankruptcy remedy is to stop all forced collection activity (including collection, seizures of property and foreclosures) and all actions pending against the debtor to allow the debtor to reorganize or to conduct an orderly liquidation and distribution of the debtor’s assets. The principal tool in the Bankruptcy Code to accomplish the imposition of a breathing spell is the automatic stay that arises automatically upon the filing of the bankruptcy petition under 11 USC Section 362(a).

2. Effect: With certain exceptions enumerated in 11 USC Section 362(b) (such as criminal proceedings and enforcement of certain domestic support obligations) all acts to collect a pre-petition debt (collection calls, demand letters), including all actions against the debtor are immediately stayed, subject to the rights of creditors and parties suing the debtor to seek relief from the stay by motion.

B. What Happens to Existing Litigation in Other Courts?

1. Generally: Everything stops (automatically) due to the broad language in 11 USC Section 362(a)(1): The filing of a bankruptcy petition “operates as a stay against 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.” A capable and conscientious debtor’s lawyer will seek to notify opposing parties in pending litigation of the filing of a bankruptcy and may file a Notice of Bankruptcy (called a “Suggestion in Bankruptcy” by some debtor’s lawyers) with the state or federal court in which the action to be stayed is pending against the debtor.

2. Foreclosure and Collection Cases: Section 362(a)(2) provides a stay against “the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title.” Section 362(a)(3) provides a stay against foreclosure, provisional process and self-help repossession: “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.” Section 362(a)(4) applies to “any act to create, perfect, or enforce any lien against property of the estate.” Section 362(a)(5) stays “any act to create, perfect, or enforce 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.” Section 362(a)(6) applies to “any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.” Section 362(a)(7) applies to set off rights.

3. Tort Cases Including Fraud Cases: Pending actions for injury to person or property are stayed under Section 362(a)(1). Demands and the filing of new actions in
tort are stayed by Section 362(a)(6). To pursue a claim against a debtor’s insurance company, see the discussion of “Non-Inpersonam Relief From the Stay in Section II.C.2 below.

4. Extension of Statutes of Limitation: Section 108 of the Bankruptcy Code provides certain specific instances when statutes of limitation that apply to both claims of the debtor and claims against the debtor may be extended while the automatic stay is in effect. These are highly complex rules that are beyond the scope of this presentation, however, the existence of Section 108 is raised here for consideration by both lawyers representing a debtor holding claims and lawyers pursuing claims against a debtor where the time remaining on the statutory bar is running out.

5. Multiple Defendants Including Non-Bankrupt Parties: With the exception of the statutory co-debtor stay in Chapter 13 cases that applies to co-signers on certain consumer loans (11 USC Section 1301), the automatic stay does not apply to non-bankrupt co-defendants in an action commenced against a debtor and multiple other parties, nor does the stay apply to actions to collect from co-obligors or other non-bankrupt individuals or entities that are also liable to the creditor. In some chapter 11 cases, the debtor may file a motion or propose a plan that seeks to protect co-defendants or co-obligors.

6. Eve of Trial or Foreclosure Sale Filings: It is not uncommon for a debtor’s bankruptcy petition to be filed the day before a trial is scheduled to start or a foreclosure sale is to take place. Because so many things can go wrong, it is not a good idea to wait for the very last minute. Two examples stand out: In one case (before electronic filing) the lawyer entrusted the debtor with taking the bankruptcy petition to the court for filing in the morning before an early afternoon foreclosure sale. The clerk rejected the petition at the clerk’s window for discrepancies in the petition. By the time the debtor and debtor’s counsel fixed and filed the petition, the foreclosure sale had taken place a few minutes before the time stamp on the petition. The ensuing litigation, including the PLF case went on for years. In the other case, the debtor walked into trial in Circuit Court and told opposing counsel and the Judge that the debtor’s bankruptcy petition had been filed so the case could not go forward. The Judge suspended the trial and sent everyone home, but when she learned from opposing counsel that the petition had, in fact, not been filed, she held the debtor in contempt and sentenced him to jail time.

C. Seeking Relief From the Automatic Stay in Bankruptcy Court:

1. Motions for Relief From the Stay: Creditors or plaintiffs seeking relief from the automatic stay to complete a foreclosure or other court action must file a motion and seek a hearing before the bankruptcy court. See: 11 USC Section 362(d). The bankruptcy court must conduct a preliminary hearing on the motion within thirty (30) days after the motion is filed to evaluate the issues for the final hearing on relief from the stay. 11 USC Section 362(e)(1). The Bankruptcy Code mandates that the final hearing on the motion for relief must occur within sixty (60) days after the motion is filed, unless the deadline is waived by the creditor or plaintiff who filed the motion. 11 USC Section 362(e)(2).
2. “Non-In Personam Relief From the Stay: At the time of the bankruptcy filing, the debtor may be a defendant or co-defendant in a personal injury or property damage action where the acts or omissions of the debtor are covered by insurance. While the plaintiff must obey the automatic stay and not proceed against the debtor in the tort case, the plaintiff must also prove up the claims against the debtor in order to collect from the insurance carrier. Often the process is to seek relief from the stay by motion representing to the bankruptcy court that the plaintiff will not seek “in personam” relief against the debtor in the state court or federal court action, and will only prosecute the case to judgment in order to collect only on the insurance policy. The Bankruptcy Court will generally allow complete discovery of the claims against the debtor and require the debtor to participate in the litigation process. In fashioning the order granting this limited relief from the stay, the court will balance the plaintiff’s needs for the debtor’s participation against the hardships the debtor will suffer in having to participate. The key here is assuming the debtor receives his or her discharge order in the Bankruptcy Case, there will be no in personam judgment entered against the debtor in the tort case.

3. “Non-Judicial Relief From Stay for Certain Secured Creditors: In Chapter 7 cases, an under-secured creditor may send a Form 750 Request for Non-judicial Relief from Stay to the Trustee (signed by the debtor’s attorney if required by the Trustee). The Form contains a statement by the Trustee there is no equity for the estate in the secured creditor’s collateral and grants the creditor relief to realize on the collateral. There is also a clause requiring the creditor to account to the Trustee for any surplus over the balance due which may be realized upon foreclosure. (In asset Chapter 7 cases, do not forget to file a timely proof of claim for the unsecured portion of the secured creditor’s claim).

D. Sanctions for Violation of the Automatic Stay (and the Discharge Injunction):

1. Motion for Sanctions: A motion for sanctions is the principal tool employed by lawyers for the debtor against creditors who violate the automatic stay by continuing their collection activity or pending action against the debtor after the bankruptcy petition is filed. 11 USC Section 362(k) authorizes the imposition of punitive damages for a willful violation of the automatic stay. Knowledge of the automatic stay is imputed by simple knowledge of the bankruptcy filing. Once a party knows of the stay, all that is required for a "willful" violation is that the action taken by the creditor or the creditor’s lawyer was intentional. The primary purpose of punitive damages awarded for a willful violation of the automatic stay is to cause a change in the creditor’s behavior.

2. Discharge Order Sanctions. **Warning!** Several debtor’s lawyers in Oregon have made a cottage industry of bringing sanctions motions against creditor’s, their collection agents and lawyers for willful violations of the automatic stay and in the context of violation of the discharge injunction that goes into effect when a debtor receives a discharge order. A party who knowingly violates the discharge injunction under Section 524(a)(2) of the Bankruptcy Code may be held in contempt under Section 105(a) of the Bankruptcy Code. The knowledge test is slightly more stringent in the discharge injunction violation arena. The Ninth Circuit standard for the actual knowledge requirement in the context of contempt before a finding of willfulness can be made
requires evidence showing the alleged contemnor was aware of the discharge injunction and aware that it applied to his or her claim. The cottage industry arose because the amount in controversy in these sanctions motions often pales in comparison to the costs of defending them.

**E. Single Asset Real Estate Cases:**

1. A Note on Single Asset Real Estate Chapter 11 Cases: To avoid early relief from the stay in a “single-asset real estate” case (as defined by 11 USC Section 101(51B)) the debtor must, not later than 90 days after the entry of the order for relief (the bankruptcy petition date in voluntary cases) or 30 days after the bankruptcy court determines the debtor is subject to the single-asset real estate provisions in 11 USC Section 362(d)(3), whichever date is the later, do one of the following: (i) have filed a plan of reorganization that has a “reasonable probability of being confirmed within a reasonable time; or (ii) started making monthly payments of interest only to the debtor’s secured creditors using the non-default rate of interest in the loan documents. If the debtor fails to do either, the court should grant the secured creditor’s motion for relief from stay to permit foreclosure of the real estate.

**III. SECURED CREDITORS, LANDLORDS AND RECLAMATION**

**A. Secured Creditors Have Collateral Including Cash Collateral:**

1. Over-secured and Fully Secured Claims: A secured creditor holds collateral as security for repayment of its debt. The residential trust deed and car loans are the most common secured claims. Banks and other financial lenders hold security interests in commercial assets such as factories, warehouses and office buildings and make secured operating loans often secured by a “blanket” security interest in all of the debtor’s tangible and intangible personal property, including cash in the bank and accounts receivable. The “value” or “extent” of the secured creditor’s claim is the value of the collateral. If the secured creditor is owed $100,000 and the collateral is worth $200,000, the creditor is “over-secured” and the debtor’s equity in the collateral (available for general creditors) is the value above the $100,000 debt plus interest and costs of collection or disposition including allowable reasonable attorney fees if there is an attorney fees clause in the debt instrument or security agreement (there almost always is). A fully secured claim simply means the value of the collateral is on par with the amount of the total debt owed to the secured creditor. A fully secured or over secured creditor does not have to file a proof of claim to realize on the collateral.

2. The Under-Secured Claim. The converse is the under-secured creditor who has collateral for a $100,000 debt worth only $50,000. Here, the secured claim is $50,000 and the unsecured claim is also $50,000 (plus interest and costs of collection including attorney fees). While a secured creditor does not have to file a proof of claim for the secured portion of the claim, the under-secured creditor MUST file a timely proof of claim to participate in any distribution to general creditors on the unsecured portion of the claim. The practice tip is to file claims for secured creditors, because the among the
Trustee’s avoidance powers are attacks on the creation and/or perfection of the security interests that could, after successful adversary proceeding by the Trustee, leave the entire claim unsecured. Also, debtors and Trustees often fight with secured creditors over the value of the collateral, especially in the context of motions for relief from the stay by the secured creditor seeking to foreclose and sell the collateral. Valuation issues, often proven through expert testimony, are among the most common of issues tried by a Bankruptcy Court, as they pertain not only to relief from stay matters, but are also at the heart of confirmation issues in restructuring cases under Chapter 13 and Chapter 11.

3. A Note on Cash Collateral Fights. In restructuring cases, especially business cases, the debtor needs to use a secured creditor’s “cash collateral” – accounts receivable and cash proceeds of the debtor’s business enterprise. The secured lender, having seen the debtor’s distress, does not want the debtor to use any more cash collateral. So at the outset of such a restructuring case, one of the first major Contested Matters is the hearing on the debtor’s request to use cash collateral (in big Chapter 11 cases in the good old days, these hearing could last all night, as the debtor desperately needs to use the cash to keep going and the secured lender vehemently wants to kill the debtor and collect all of the cash and the proceeds of liquidation).

B. Representing Landlords in Bankruptcy Cases:

1. Lease Expiration by its Term or Operation of Oregon Lease Law. The first question before we get to the landlord’s claims in a Bankruptcy Case is whether the lease expired by its terms or due to non-payment of rent before the bankruptcy petition was filed. For commercial leases under Oregon law, nonpayment of rent for a period of ten days after the rent was due may terminate the tenancy without notice, and there is nothing in the Bankruptcy Code that allows the debtor to revive a terminated lease. ORS 91.090 provides:

“The failure of a tenant to pay the rent reserved by the terms of the lease for the period of 10 days, unless a different period is stipulated in the lease, after it becomes due and payable, operates to terminate the tenancy. No notice to quit or pay the rent is required to render the holding of such tenant thereafter wrongful; however, if the landlord, after such default in payment of rent, accepts payment thereof, the lease is reinstated for the full period fixed by its terms, subject to termination by subsequent defaults in payment of rent.”

This rule is different from the rule in residential cases, which typically requires a pre-filing notice in every case, regardless of the lease’s language. ORS 105.115 and 120.

2. Landlord May Have 3 Claims in the Bankruptcy Case: A commercial landlord may have up to three different kinds of claims in a bankruptcy case: a claim for pre-petition unpaid rent; a claim for post-petition administrative rent since the bankruptcy petition date; and a claim for future or forward rent due on the remainder of the lease. The pre-petition unpaid rent claim and the forward rent claim are both treated as pre-petition general claims. The forward rent claim has a statutory cap on it. 11 USC Section
503(b)(7). The administrative rent claim should not be allowed to accrue—a DIP in a Chapter 11 case who remains in the premises and a Trustee who is holding on to the debtor’s premises to store assets or conduct a sale must pay the post-petition administrative rent as it comes due for as long as the DIP or Trustee remains in the premises. The landlord should take immediate steps to force payment of unpaid administrative rent by filing an emergency motion in the bankruptcy court for immediate payment of the administrative rent or immediate return of the premises.

3. Protection of Commercial Landlords in Bankruptcy Cases: Section 365(d)(4) of the Bankruptcy Code seeks to protect commercial landlords by minimizing the amount of time that the DIP in Chapter 11 cases or the Trustee in Chapter 7 cases has to assume or reject an unexpired lease. The deadline is the date that is 120 days after the order for relief (which may be extended for 90 days on a motion made for cause within the 120-day period by either the Trustee/DIP or the landlord.

C. Limited Protection of Sellers of Goods on the Eve of Bankruptcy:

4. UCC Seller’s Reclamation Remedy in Bankruptcy: In 1994, Congress addressed the concerns of trade creditors who claimed they often had insufficient notice of a bankruptcy to exercise their reclamation rights under UCC Section 2-702 (ORS 72.7020). Section 546(c) of the Bankruptcy Code gives a trade creditor the right to reclaim goods delivered to the debtor within 45 days before the date of commencement of the bankruptcy case and up to 20 extra days to give written notice of reclamation rights if the 45-day reclamation period expires after the filing of a bankruptcy petition.

5. Section 503(b)(9) Priority Administrative Claim For Certain Sellers of Goods: The Bankruptcy Code provides an administrative priority for creditors who sell goods (not services) to the debtor within 20 days before the bankruptcy petition is filed. 11 USC Section 503(b)(9). Entitlement to priority treatment may mean the difference between receiving nothing on account of the seller’s claim and being paid 100% of the claim for the goods delivered in the 20-day period before the debtor’s bankruptcy.

IV. PROOF OF CLAIM ISSUES

A. No Asset Cases and Subsequently Discovered Assets:

1. The Notice of Bankruptcy Says “Do Not File a Proof of Claim:” In a “no asset” Chapter 7 case where it appears from the debtor’s Bankruptcy Schedules and Statement of Affairs filed with the Bankruptcy Petition (or within a matter of weeks thereafter) the Notice of Bankruptcy may expressly tell creditors not to file claims unless they receive a subsequent notice from the court to do so, after the Trustee has located assets to administer for the benefit of creditors. FRBP Official form B 9A. Also, in many large, complex Chapter 11 cases, the bar dates for filing claims will be scheduled by the Bankruptcy Court after consultation with the Chapter 11 debtor-in-possession and the Creditor’s Committee, and a special notice of a specific bar date for general claims (and other classifications of claims) will be sent to creditors and parties-in-interest.
2. Trustee’s Notice of Time to File Claims: It is worth repeating that in many bankruptcy cases originally noticed as a “No Asset” case, the Bankruptcy Trustee subsequently discovers and recovers assets to be administered for the benefit of general creditors. Even though creditors first received a No-Asset Notice telling them not to file a proof of claim, once assets to be administered are discovered, the Trustee will cause the Clerk’s Office to mail a new “Notice of Time to File Claims” containing a bar date or deadline for the filing by general creditors of their timely proofs of claim with the court.

B. Deadline and Evidence for Timely Filing a Proof of Claim in Asset Cases:

1. Ninety (90) Days After The First Date Set For the Meeting of Creditors: Many crucial deadlines run from the “date first set for the meeting of creditors” set forth in the Notice of Bankruptcy sent by the Bankruptcy Court Clerk’s Office to creditor’s and parties-in-interest after the bankruptcy case is filed. This date is not necessarily the date of the actual meeting of creditors (if, for example the meeting date is reset or the meeting is adjourned to a later date). In bankruptcy cases with assets to be administered, the Notice of Bankruptcy will state that all creditors (except for certain taxing authorities and governmental units that are afforded more time) must file their proofs of claim within ninety (90) days after the first date set for the meeting of creditors. FRBP 3002(e).

C. Objections to Claims:

1. Who Objects and Self-Executing Court Order on the Objection Form: The Bankruptcy Trustee, the Debtor-in-Possession (in Chapter 11 cases) and debtor (in Chapter 7 and Chapter 13 cases) all have a duty to inspect all filed proofs of claim for accuracy and validity. Typically, the trustee in liquidation cases, the DIP in reorganization cases and the Chapter 13 Trustee in individual debt restructuring cases will conduct a claims audit after the bar date for timely filing claims has passed. If a claim appears inaccurate or invalid, a written objection to the claim, stating the grounds for objection is filed with the court and served on the creditor that filed the claim. The creditor is notified by mail of the objection on a form notice of objection that is typically self-executing (signed by the Bankruptcy Judge and ordering that if no timely response and request for hearing is filed, the objection is sustained).

2. Summary Hearing: If the creditor timely files a response to the form notice of objection to the creditor’s claim and requests a hearing (typically within thirty (30 days of the objection date specified on the notice form) the Bankruptcy Court will conduct a summary evidentiary hearing on the objections and the responses raised by the creditor. Most objections should be resolved prior to the hearing, however, in late-filed claims objections, the issues of receipt of notice or excusable neglect are often tried.
V. NON-DISCHARGEABILITY TIMING ISSUES, I.E. FRAUD CASES

A. List of Non-Dischargeable Claims Pertinent to Civil Litigation in Other Courts:

1. 11 USC Section 523 Exceptions to Discharge: Section 523(a)(2), (4) and (6) are the big three categories of exceptions to discharge for which an aggrieved creditor may file a timely Adversary Proceeding (Complaint to Determine the Dischargeability of a Debt) pursuant to 11 USC Section 523(c).

2. Section 523(a)(2): (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

   (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
   (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition;
   (B) use of a statement in writing—
      (i) that is materially false;
      (ii) respecting the debtor’s or an insider’s financial condition;
      (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
      (iv) that the debtor caused to be made or published with intent to deceive;
   or
   (C) (i) for purposes of subparagraph (A)—
      (I) consumer debts owed to a single creditor and aggregating more than $500 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and
      (II) cash advances aggregating more than $750 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and
   (ii) for purposes of this subparagraph—
      (I) the terms “consumer”, “credit”, and “open end credit plan” have the same meanings as in section 103 of the Truth in Lending Act; and
      (II) the term “luxury goods or services” does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor.

3. Section 523(a)(4): (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328 (b) of this title does not discharge an individual debtor from any debt—(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

4. Section 523(a)(6): (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt— (6) for willful and malicious injury by the debtor to another entity or to the property of another entity;
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B. Requirement of Filing a Timely Adversary Proceeding and Deadline Therefore:

1. Deadline: Unless extended by court order on a timely Motion, the deadline for commencing an Adversary Proceeding (filing a Complaint to Determine the Dischargeability of a Debt) against the debtor is sixty (60) days after the date first set for the meeting of creditors. As discussed above in Section III.B.1, many crucial deadlines run from the “date first set for the meeting of creditors” set forth in the Notice of Bankruptcy sent by the Bankruptcy Court Clerk’s Office to creditor’s and parties-in-interest after the bankruptcy case is filed. This date is not necessarily the date of the actual meeting of creditors (if, for example the meeting date is reset or the meeting is adjourned to a later date). Any motion to extend the 60-day deadline must be filed with the court within the 60-day period, absent certain rare circumstances, such as a provable lack of notice of the Bankruptcy Case.

2. Service of the Summons and Complaint: Upon the filing of the Complaint, the Clerk of the Bankruptcy Court will issue a Summons for service with the Complaint on the debtor. One of the key differences in the Bankruptcy Rules applicable to all Adversary Proceedings filed in Bankruptcy Court is Bankruptcy Rule 7004 allows nationwide service of process by mail. As a practical matter, the summons and complaint should be mailed by both first class mail and certified mail, return receipt requested.

3. Discovery and Trial: The non-dischargeability Adversary Proceeding in Bankruptcy Court is the action most similar to a civil trial in state court or federal district court. The parties will exchange discovery documents, take depositions and then put on the elements of their claims and defenses at trial. There should be efforts to mediate the case before a settlement judge or mediator. The consequences of losing are dire for the debtor. If the debtor loses, the non-dischargeable judgment will follow him or her around for the rest of time (the only discharge available being death). And, the debtor has few resources to pay for a defense, as the property of the debtor’s estate may not be charged with the fees and costs of defense. The expense and frustration of taking one of these cases to trial may not be worth it to the creditor. These are difficult cases for everyone.

C. The Debtor Failed to List My Client’s Claim in the Bankruptcy Schedules:

1. It Does Not Matter in “No Asset” Cases: In “No-Asset” Chapter 7 cases, the failure of the debtor to list a creditor’s claim will NOT result in the claim being excepted from the debtor’s discharge.

2. Asset Cases: In Chapter 7 cases where the Trustee administers assets and in Chapter 11 and Chapter 13 Cases, the debtor’s failure to schedule a creditors’ claim results in that creditor’s claim being excepted from the debtor’s discharge order under 11 USC Section 523(a)(3).

3. Missed Deadlines: Lack of notice of the Bankruptcy Case due to the debtor’s failure to schedule a creditor’s claim is often a complete defense to the creditor’s failure
to comply with other deadlines, such as the 60-day deadline for filing certain non-dischargeability cases.

VI. REPRESENTING A PLAINTIFF WHO FILES BANKRUPTCY

A. The Debtor-Plaintiff’s Cases Are Property of the Bankruptcy Estate:

1. Property of the Estate Defined: Under the broad language of 11 USC Section 541(a)(1), all property of the debtor including legal actions filed or to be filed against third parties, are property of the estate:

“(a) 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.”

B. Bankruptcy Court Approval is Required to Continue the Engagement:

1. The Trustee or DIP Will Likely Retain Existing State or Federal Court Counsel for the Plaintiff-Debtor: Subject to Bankruptcy Court approval, the Chapter 7 Trustee may hire existing counsel of record in the state court or federal court case to prosecute the case for the benefit of the estate. The Trustee will be substituted for the debtor as the party plaintiff. Such employment and the terms of compensation, including any existing contingent fee agreements, must be presented to the court in an application to employ special counsel for the trustee and an order must be entered approving the terms of the engagement. The Trustee and his or her general counsel, if any, should be contacted immediately about continuing the litigation, or at least by the date set for the meeting of creditors. These same considerations hold true for lawyers representing the DIP in pending state court or federal court actions. Plaintiff’s counsel should be in close contact with the DIP’s bankruptcy lawyer(s), as the DIP will need to bring the application to employ special counsel before the Bankruptcy Court. The DIP and its bankruptcy counsel will make decisions in the litigation.

2. Chapter 13 Cases: In Chapter 13 cases the Chapter 13 Trustee acts more as a distribution agent for the debtor’s plan payments and does not generally exercise the judgment that a Chapter 7 Trustee exercises when administering estate assets such as prosecuting pending litigation where the debtor is the plaintiff. Here, if the case is to continue in state court and you wish to apply to the Bankruptcy Court, your best contact is likely the Chapter 13 debtor’s bankruptcy lawyer, as soon as you learn of the filing of the bankruptcy petition. That lawyer can file the application for Bankruptcy Court approval of your engagement and can obtain any necessary consent to the engagement from the Chapter 13 Trustee. The Bankruptcy Judge will be concerned about the costs of pursuing the litigation and the source of payment of those costs.
VII. STRATEGIES REPRESENTING A BANKRUPT DEFENDANT

A. Using Bankruptcy as a Negotiation Tactic:

1. Settlement of single-creditor claims: Creditor’s lawyers and their clients have to be wary of pursing a debtor that is an empty bag. Debtor-defendants in collections cases without the means to pay an aggressive creditor or creditors may seek the assistance of a lawyer to negotiate a settlement for less than the amount of the debt or put the creditor(s) on a payment plan as an alternative to filing bankruptcy. In these situations, transparency concerning the debtor’s inability to pay is paramount. One of the better ways to make the pitch to settle a debt for a discount or on a payment plan is to have the debtor-defendant fill out and prepare bankruptcy schedules as a way to show the creditor(s) that acceptance of the proposal is better than the bankruptcy alternative.

2. Workouts with a Body of Creditors: In a similar vein, an otherwise successful business enterprise may suffer a catastrophe like a warehouse fire or loss of a major customer and need a breathing spell while short term issues are resolved. Construction contractors that find themselves in a payment dispute with an owner or other contractors face the same issues. Again, transparency is paramount, and in addition to being forthcoming with the debtor-defendant’s financial information, the lawyer for the debtor should consider holding a meeting of all creditors at the same time and place, where the principal(s) of the debtor present the need for time, the solutions in process and the financial condition of the debtor so the creditors may make an informed group decision about giving the debtor a chance without having to file a restructuring bankruptcy.

3. Debtors With Unpaid Non-dischargeable Tax Obligations and Priority Issues: Any attempt to negotiate with and pay creditors settlements of their claims outside of bankruptcy is subject to the warning about non-dischargeable tax claims discussed in Section VII.B.2 below. The issue is so important it is worth discussing in both places. Before any settlement payments are negotiated and paid to general unsecured creditors, a bankruptcy lawyer should be involved in the evaluation of whether such funds are better spent on any non-dischargeable tax claims owing by the debtor-defendant to federal, state, or local taxing authorities. The general unsecured claims will be discharged in bankruptcy but the tax claims will not. Money is paid out to the general claims that would be discharged if the debtor ultimately has to file bankruptcy, when that money could have been paid on the priority tax claims that will not be discharged in the subsequent bankruptcy.

4. Debt Forgiveness as Taxable Income. Another trap that may befall a debtor that chooses to negotiate discounted payments with a creditor or creditors outside of bankruptcy is that debt forgiveness is taxable income. The tax impacts of the debt forgiveness on the debtor should be addressed before finalizing such a deal (refer the debtor to a CPA or tax lawyer). Indeed many special credits officers working out bad loans with individual creditors rarely miss the opportunity in a discounted payment situation to send the IRS a Form 1099 setting forth the amount of debt forgiveness.
B. Working Closely With Bankruptcy Counsel on Discharge Issues:

1. Assist With the Defense of Non-dischargeable Claims Discussed Above: If you are representing the debtor pre-bankruptcy in a fraud case, a case involving defalcation in a fiduciary capacity, or willful or malicious injury to the debtor (discussed in Section V.A. above) you should work closely with the debtor’s bankruptcy counsel. First, during the pre-bankruptcy planning stage, to help the debtor’s lawyer evaluate the underlying claims giving rise to the non-dischargeability issues. Second, (if possible) obtain an adequate retainer from assets other than property of the estate (i.e. relatives of the debtor) to continue the defense if the plaintiff timely files a non-dischargeability case in the Bankruptcy Court (costs of defense of these actions in Bankruptcy Court cannot be paid from the bankruptcy estate). Third, if the plaintiff timely files a Complaint to Determine the Dischargeability of the Debt under 11 USC Section 523(c), and you are able to make an adequate fee arrangement, the debtor’s lawyer may seek to have you appointed by the Bankruptcy Court as co-counsel to defend the action. (Often the debtor’s lawyer will assist you with bankruptcy process and procedure and you will try the elements of the underlying case before the Bankruptcy Court).

2. Beware of Non-dischargeable Tax Obligations: Warning! Tax obligations to the federal, state and local governments are entitled to priority distribution ahead of the holders of allowed unsecured (or general) claims. These tax claims are also (with rare exceptions) non-dischargeable in bankruptcy. These obligations create a trap for well meaning debtors (and their lawyers) being sued by creditors or others – any money paid in settlement of the claims of general creditors is money that could have been used to satisfy non-dischargeable priority tax claims. So beware of this trap if you are defending a debtor in court actions from collection cases to tort actions seeking the payment of money and you know the debtor has significant unpaid tax obligations, and you also know the debtor is contemplating bankruptcy. Before any settlement payments are negotiated and paid, the bankruptcy lawyer should be involved in the evaluation of whether such funds are better spent on the tax claims. The general claims (unless they are claims of the non-dischargeable type discussed in the preceding Section) will be discharged in bankruptcy but the tax claims will not. (Of course, the same pre-bankruptcy analysis applies to the settlement of general, dischargeable claims instead of settlement and payment of non-dischargeable general claims for fraud, defalcation, and the like).

VIII. YOUR CLIENT IS SUED BY THE BANKRUPTCY TRUSTEE

A. Avoidable Transfers:

1. Preferences: The Trustee’s action to recover an avoidable preference is one of the more typical instances that a non-bankruptcy practitioner will come into contact with the bankruptcy system. Your creditor client may be sued by the Trustee under 11 USC Section 547(b)(4)(A) if the client received a payment on account of an antecedent debt within the 90-day period before the bankruptcy petition date, and certain other elements of a preference claim are present (found in 11 USC Section 547(b)) and none of the
defenses found in 11 USC Section 547(c) apply, (such as the payment was made in the ordinary course of business of the debtor and the creditor).

2. Insider Preferences: Insiders of the debtor are defined in 11 USC Section 101(31) by an incomplete listing of people whose relationship with the debtor make them an “insider” for purposes of the Trustee’s power to avoid and recover preferential transfers to insiders made within one year before the filing of the bankruptcy petition. Relatives of the debtor, business partners, officers, directors, shareholders and other affiliates of corporations are common defendants in such Adversary Proceedings under 11 USC Section 547(b)(4)(B). The Trustee sues to recover payments of money or transfers of property made by the debtor within the one-year period in full or partial satisfaction of antecedent debts owed by the debtor to the insider.

3. Fraudulent Transfers: If the debtor transferred or concealed property or otherwise hindered, delayed, or defrauded creditors within two years before the filing of the bankruptcy petition, the Trustee may recover any such property transferred or concealed in fraud of creditors from the transferee. 11 USC Section 548(a)(1)(A). The Trustee (or DIP in a chapter 11 case) may recover so-called “constructive fraudulent transfers” in which the debtor gave a way or transferred property for less than the “reasonably equivalent value” of the property within two years before the filing of the bankruptcy case if the debtor was insolvent at the time of the transfer or rendered insolvent by reason of the transfer. 11 USC Section 548(a)(1)(B).

B. Substitution of the Trustee in Existing Actions Filed by the Debtor:

1. As discussed above in Sections VI(A) and (B), if the plaintiff in a case you are defending in state or federal court files bankruptcy, the Trustee in a Chapter 7 case, or the DIP in a Chapter 11 case, or the debtor in a Chapter 13 case may choose to continue to prosecute the case against your client after the bankruptcy case is filed.

IX. INVOLUNTARY BANKRUPTCY

A. Debtor Not Paying Debts as They Come Due:

1. Threat of Involuntary Bankruptcy: When the obligor on an account debt owed to one of your clients is not paying the debt when due, and your client discovers there are at least two other unpaid account creditors of the debtor, a threat of filing involuntary bankruptcy against the obligor may bear fruit. The involuntary bankruptcy threat is sometimes more effective than the threat of a collection lawsuit. Note: As discussed below, if your client knows the obligor has less than 12 creditors, a single creditor involuntary petition may be filed if the rest of the pre-requisites are met.

2. Fully Liquidated, Non-Contingent and Undisputed Debts: The claims of the petitioning creditors in the three-creditor case must aggregate at least $10,000 and the claim of a single petitioning creditor must be at least $10,000. Each claim must be fully liquidated, non-contingent and undisputed by the debtor.
B. Process and Procedure:

1. One (1) Creditor Petition vs. Three (3) Creditor Petition: The Official Bankruptcy Form for filing an Involuntary Petition under 11 USC Section 303 is quite short and inexpensive to prepare. If there are less than 12 known creditors, a single creditor petition may be filed alleging the debtor is not paying a debt of at least $10,000 as the debts came due (known as “cash flow insolvency”). Again where there are more than 12 known creditors, a 3 creditor petition is filed and the indebtedness must be at least $10,000 in the aggregate. The attorney fees and filing fee incurred in preparing and filing the petition may be recovered as a distribution from the bankruptcy case as an administrative priority claim. Once the petition is filed a Summons containing the date of the hearing before the Bankruptcy Court on the Involuntary Petition is issued by the Bankruptcy Court Clerk to be served by the petitioning creditor(s) on the “Alleged Debtor.” The Summons advises the Alleged Debtor that an answer to the petition must be filed within 21 days after the summons is served and if an answer is timely filed, the date the Bankruptcy Court will conduct the hearing on the petition. The prayer in the petition requests the court to enter an order for relief (putting the debtor in bankruptcy).

2. Alleged Debtor’s Response; Summary Hearing: The Alleged Debtor may make several responses in the Answer which must be proven at the summary evidentiary hearing on the sole question of whether the Alleged Debtor is paying its debts as they come do. The Alleged Debtor may deny that the petitioning creditors are unpaid; dispute the debts or allege one or more of the debts are contingent or not fully liquidated. In a one creditor case, the Alleged Debtor may answer there are more than 12 creditors, however, that will not defeat the petition. The Bankruptcy Rules allow the single petitioning creditor time to locate and join two additional petitioning creditors. In a contested case, the Bankruptcy Court will enter an order for relief after trial of the issues raised by the pleadings if the petitioning creditors prevail. The time between the filing of the involuntary petition and the entry of an order for relief is called the “gap period.” Except to the extent the court orders otherwise, the debtor may continue to operate its business and may continue to acquire, use and dispose of its property as if the petition had not been filed. One difference between an involuntary case and voluntary cases is the order for relief in an involuntary case is the date the court enters the order, not the date the involuntary petition was filed. In voluntary cases, the petition date is the date of the order for relief.

3. Recovery of Priority Claim for Attorney Fees: The reasonable attorney fees and costs associated with the successful filing of an Involuntary Petition against a debtor are recoverable from the bankruptcy estate as an administrative priority claim. An application for professional compensation is filed with the court by the lawyer or law firm that represented the petitioning creditor(s). The fee application will be reviewed by the Trustee and creditors and parties-in-interest are notified of the application as part of the case-closing and final distribution process. The claim is subject to approval by the Bankruptcy Judge, and is paid as a priority administrative claim through the regular administrative process, usually at the end of the Bankruptcy Case.
X. PRACTICE TIPS

A. Violation of the Automatic Stay:

1. Absent actual notice of a bankruptcy filing, complete your court action, foreclosure sale, or repossession;

2. Upon notice and verification of the filing, stop all collection activity immediately and move for relief from the automatic stay if appropriate; and

3. Negotiate a drop dead order that approximates the time the court would give a debtor or trustee to remain in control of the asset(s) you seek to recover.

B. Representing Landlords in Bankruptcy Cases:

1. Has the lease expired pre-bankruptcy for nonpayment of rent? If so, the lease is terminated by operation of law pre-bankruptcy.

2. Enforce the debtor’s immediate obligation to pay post-petition administrative rent by filing a motion in the bankruptcy court;

3. Negotiate a move-out or move for relief from stay to FED; and

4. File the proper proof of claim including unpaid pre-petition rent; post-petition administrative rent; and the general unsecured claim for future (or forward) rent discounted pursuant to the formula and cap in Section 503.

C. Opposing the Use of Cash Collateral:

1. The crux issue is whether a secured creditor’s cash collateral (i.e. proceeds of sales of inventory) should continue to be available for the debtor’s use in the operation of the debtor’s business (which is losing money or otherwise in financial distress);

2. The battle will be won or lost on the facts, usually with the help of expert testimony from accountants, business consultants and appraisers; and

3. Cash collateral fights, like many of the engagements for clients dealing with a bankruptcy case, may be best left to the bankruptcy lawyers.

D. Bankruptcy Sales of Real or Personal Property:

1. Authority of the debtor or trustee to sell property;

2. Sales are subject to bankruptcy court approval (notice of sale and due process);

3. Sales free and clear of liens and/or interest under Section 363;
4. Objections, upset bids and auctions; and

5. Appeal rights, posting a bond and the mootness doctrine (trap).

**E. Valuation and Cram Down Issues:**

1. A secured claim is secured only to the extent of the value of the collateral. The balance of the claim is unsecured and you must file a proof of claim on behalf of an unsecured creditor to share in distributions from the estate; and

2. Negotiate before litigating the value issue, the interest rate issue and the repayment terms, as the courts and bankruptcy practitioners in the various districts have developed rules of thumb for each of these repayment issues.

**F. It Remains the Same Inside or Outside of Bankruptcy: “Just the Facts Ma’am.”**

*(With apologies to Sgt. Joe Friday)*
Chapter 2
The Rocky Marriage of Family Law and Bankruptcy

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PREFILING CONSIDERATIONS

I. Conflicts of Interest

   A. Two categories of clients: former clients and current clients. Conflicts can be potential or actual. All couples contemplating bankruptcy have potential conflicts. When a dissolution is in the offing, those conflicts can become actual quite quickly. Actual conflicts can arise between spouses or between the lawyer and the client(s).

   B. Ethics Opinions:

      1. The relevant OSB Formal Ethics Opinion No’s are: 2005-11 (Former Clients- Matter Specific), 2005-40 (Current Clients - Debtor and Creditor in Bankruptcy), 2005-86 (Current Clients - Spouses in Bankruptcy), and 2005-111 (Current Clients - Bankruptcy & Fees Owed Lawyer); and the relevant Oregon Rules of Professional Conduct, Conflict of Interest: Rule 1.7 (Current Clients), Rule 1.8 (Current Clients, Specific Rules), and Rule 1.9 (Duties to Former Clients).

      2. “Pursuant to Oregon RPC 1.0(h), a lawyer is charged with all knowledge that a reasonable investigation of the facts would show. Typically, such an investigation will not lead the lawyer to conclude that a conflict exists under Oregon RPC 1.7(a) when joint bankruptcies or wills are contemplated, because the interests of the spouses in such matter will generally be aligned.” Opinion 2005-86 (citations omitted).

      3. Opinion 2005-86 goes on to state that “parties to a marital dissolution will almost always have directly adverse interests . . .”. And then lists nine factors at a minimum which must be meet before representation of both can be contemplated. One of those factors is that the “marital estate must not contain substantial assets or liabilities.”

      4. It is then the rare case where the intersection of bankruptcy and dissolution doesn’t give rise to an actual conflict of interest. Instances where joint representation might be possible are a pre-dissolution Chapter 7 where the martial assets can be preserved through exemptions and there is significant individual and joint debt which can be discharged; or post-dissolution individual Chapter 7s where the both ex-spouses waive any potential conflicts. In all cases, the attorney should obtain “informed consent” in writing signed by each debtor. See, Oregon Rules of Professional Conduct 1.0(b), (g) and (h).

1 Thank you to C. Casey White, who prepared the course materials related to Prefiling Considerations
5. Opinion 2005-111, Representing Bankruptcy Client Who Owes Lawyer Substantial Fees, in practical terms can be summed up by don’t unless you: (1) are prepared to waive your fees or (2) have a preexisting lien to secure your fees or (3) have contract for a contingent fee in a civil case. Even then, the court may find that you have an adverse interest which is not waivable.

II. Exemptions

A. The tension in bankruptcy is always between debts and assets. What debts can be discharged and what assets be kept. In Oregon, a debtor can choose between the judgment debtor exemptions (ORS § 18.345) and the Federal exemptions (11 U.S.C. § 522).

B. Conflicts can arise between spouses when both are filing and a particular exemption scheme is better for one spouse. If spouses have filed separate individual cases, the court may order joint administration of their estates. If that happens and they have not used the same exemption scheme, then 11 U.S.C. § 522 (b)(1) controls. As set forth procedurally by Rule 1015 (b), “the court may order a joint administration of the estates” after giving consideration to protecting creditors of the different estates. If a consolidation is ordered and one spouse has elected state exemptions and the other federal exemptions, the court will allow a reasonable time for the spouses to amend the exemptions. If they fail to do so within that time, “they will be deemed to have elected the exemption provided by § 522 (b)(2) or the Federal exemptions.”

C. Where the marital status is terminated, or when one spouse files before the marital status is terminated and the other after, each is free to choose the exemptions which benefit their particular situation. As an example, husband has a truck with equity and want to use the Federal exemptions, wife wants to use the Oregon exemptions because she expects to keep the house and wants to maximize her homestead exemption. If husband files before the dissolution is final, he is free to use the Federal exemptions. Ex-wife is free to use the Oregon exemptions when marital status is terminated. Caveat: Pursuant to 11 U.S.C. § 541(a)(5)(B), if the husband in this example receives a share of the equity in the house or a equalizing award within 180 days of his filing, that property comes back into his estate. This may present a problem for the attorney if this contingency could not be completely exempted or had not been anticipated and discussed with the client.

III. Effect of Pre-Filing Conduct

A. Fraudulent Conveyances. In the Ninth Circuit, property division in dissolution proceedings and fraudulent conveyances have been addressed by In re Bledsoe, 569 F.3d 1106 (9th Cir. 2009), and In re Beverly, 374 B.R. 221 (BAP 9th Cir. 2007, aff’d in part 551 F.3d 1092 (9th Cir 2008).

1. In re Bledsoe: The wife received a fraction of what husband received under a default judgment because she failed to comply with the Oregon court’s orders or
otherwise participate in the proceeding. *Bledsoe* at 1008. The Ninth Circuit held in *Bledsoe*:

“...Under Oregon law, a party who challenges a dissolution judgment must allege and prove “extrinsic fraud.” Following the lead of the Fifth Circuit in *Ingalls v. Erlewine (In re Erlewine)*, 349 F.3d 205 (5th Cir. 2003), we also hold that a dissolution judgment from a regularly conducted, contested divorce proceeding conclusively establishes “reasonably equivalent value” under 11 U.S.C. § 548(a)(1)(B) in the absence of fraud, collusion, or violation of state law.” *Bledsoe* at 1108.

2. *In re Beverly*: The debtor transferred non-exempt assets pursuant to a marital settlement agreement and received in return exempt retirement funds in a dissolution proceeding. He then filed for Chapter 7 bankruptcy. The Bankruptcy Appellate Panel (“BAP”) found, “This is a paradigm case of actual intent to hinder, delay, or defraud creditors under the Uniform Fraudulent Transfer Act (“UFTA”).” *Beverly* at 227. (The debtor in *Beverly* was an attorney who anticipated a large judgment on a debt before entering into the settlement agreement.)

The BAP in *Beverly* also found overwhelming evidence that William Beverly “actually intended to hinder and delay creditors” by transferring the non-exempt assets to his ex-spouse in return for exempt assets and instructed the bankruptcy court to enter a judgment denying his discharge pursuant to 11 U.S.C. § 727(a)(2)(A). *Beverly* at 246. Because the discharge decision by the BAP and the bankruptcy court were both interlocutory, the Ninth Circuit dismissed this portion of the BAP decision. *In re Beverly*, 551 F.3d 1092 (9th Cir 2008).

In affirming *Beverly* in part, Ninth Circuit stated: “The BAP held that the Beverlys’ transfer of assets through a martial settlement agreement was an avoidable transfer pursuant to 11 U.S.C. § 544(b) and Cal. Civ. Code § 3439.04. . . . We . . . adopt as our own the well-reasoned BAP opinion, *In re Beverly*, 374 B.R. 221.” *Beverly*, 551 F.3d 1092 (9th Cir 2008).

B. *Preferences*. 11 U.S.C. § 523 (c)(7) states that a trustee may not avoid a transfer “to the extent such transfer was for a bona fide payment of a debt for a domestic support obligation.”

1. *In re Halbert v. Dimas (In re Halbert)*, 576 B.R. 586 (Bankr. N.D. Ill., 2017): Issue was whether the Illinois DHS received a preference when it took the debtor’s income tax refund in payment of an overpayment of SNAP benefits. The court considered cases which found overpayments as being in the nature of support and cases which found overpayments as not being in the nature of support. The *Halbert* court found: “The debt owed to DHS is merely a debt for the return of benefits that should never have been paid to the Debtor at all, and that debt does not automatically retain any supportive nature that the benefits may have had.” *Id* at 589.
2. **Rivera v. Orange County Prob. Dep’t (In re Rivera), 823 F.3d 1103** (9th Cir. 2016): Cited by the *Halbert* court, the issue was whether a debt which arose from a child’s involuntary juvenile detention was a “domestic support obligation” (“DSO”) and therefore non-dischargeable. In holding that the debt was not a DSO, the Ninth Circuit found that the detention served a correctional purpose and not a domestic support purpose. *Id.* at 1108-1109.

C. **Prior Bankruptcy**

1. If either spouse has filed a bankruptcy and had it dismissed either for willful failure to provide by orders of the court or to appear in prosecution of the case, or the debtor obtained an order of dismissal after a motion for relief was filed, there is 180 day bar against that spouse refiling. 11 U.S.C. § 109(g).

2. A prior filing may effect a spouse’s discharge, if he/she was granted a discharge in a Chapter 7 case commenced within 8 years of the current filing (11 U.S.C. § 727 (a)(8)), or was granted a discharge in a Chapter 13 case commenced within 6 years of the current filing (11 U.S.C. § 727 (a)(8)).

D. **Taxes and Tax Returns**

1. Taxes and tax returns are often a consideration. Before dissolution takes place, is it to the debtors’ advantage to file any outstanding tax returns as married filing separately or as joint returns? Does one spouse claim zero exemptions, and the other multiple exemptions? Is earned income credit an issue?

2. If a dissolution has taken place, one spouse may be made responsible for any joint outstanding tax liability by the judgement. Like all other creditors, this may bind the parties to the dissolution but not the taxing agencies. Have your client(s) discuss tax issues with his/her or their tax preparer.

3. **Joint Tax Debt Generally:**

   a. If spouses have filed joint tax returns, they are jointly and severally liable for any taxes which are due. 26 U.S.C. § 6013(d)(3). There are three categories of tax returns: (1) tax returns that have been filed and the tax assessed, (2) tax returns that have been filed but the tax has not yet been assessed, and (3) tax returns that have not yet been filed.

   b. Taxes that have been assessed can be priority and unsecured 11 U.S.C. 507(a)(8), secured, or unsecured. Taxes for which returns that have not been filed or which have been filed but the tax has not been assessed are not dischargeable.
c. 11 U.S.C. § 1308(a) requires a Chapter 13 debtor to file “all tax returns for all taxable periods ending during the 4-year period ending on the date of the filing of the petition.” Any outstanding tax returns are required to be filed before the first meeting of creditors.

4. Relief:

   a. If spouses have filed joint tax returns, it is possible for one spouse to get relief from joint and several liability on a joint return under very limited circumstances dealing with an understatement of tax - the “innocent spouse” relief. 26 U.S.C. § 6015(b).

   b. Additionally, if a joint return has been filed and the taxpayers are no longer married or are legally separated or not living together, then under certain circumstances a taxpayer may be able to limit or eliminate any item giving rise to a deficiency. 26 U.S.C. § 6015(c).

   c. Finally, equitable relief may be available under 26 U.S.C. § 6015(f) if a taxpayer is liable for any unpaid taxes or deficiency can’t qualify under subsections (b) or (c).

   d. While relief may be available under 26 U.S.C. § 6015, the taxpayer must first request a determination by the IRS. Any appeal from an adverse determination is to the Tax Court as it has exclusive jurisdiction to review an adverse decision by the IRS. 26 U.S.C. § 6015(e)(1)(A). See, In re Mikels, 524 B.R 805, 807 (Bankr. S.D. Ind. 2015) (“Although the statute does not address whether the Tax Court’s jurisdiction is exclusive, court interpreting the statute have concluded it is.”) See also, United States v. Stein (W.D. Ky, 2015) in footnote 1. (“While there is a dearth of published authority, low courts have spoken with near unanimity on this question.”) [citations omitted]. It is only after a determination by the Tax Court that the parties can look to the District Court for relief.

   e. Because of the time it takes to get relief from joint tax liability, it may be prudent to seek the relief before a Chapter 13 case is filed. In Ordlock v. C.I.R., 533 F.3d 1136 (9th Cir. 2008), the wife filed a request in March of 1999 for relief from tax debt under the 26 U.S.C. § 6015(b). Relief was eventually granted over 3 years after the request was made. However, during the pendency of a Chapter 13 case, the debtor in In re Mikels, 524 B.R 805, 807 (Bankr. S.D. Ind. 2015), was able to obtain a determination in just eight months.
IV. **Effect of Means Test**

A. For petitions filed after May 1, 2018, in Oregon, an individual is considered to have disposable income if his/her gross annual income is over $53,501. A married couple is considered to have disposable income if the combined gross income is over $65,190. A married couple with one child is considered to have disposable income if their combined gross annual income is over $76,603.

B. For parties contemplating bankruptcy and divorce, it may be to their advantage to file bankruptcy after separation of the household and/or after dissolution. As an example, each spouse earns about $40,000. Their combined gross income, without more, means that they would be ineligible for Chapter 7. Individually, both would be eligible for Chapter 7 if they are separated/or divorced and maintaining separate households.

C. An issue under the means test may arise if one of the parties is living with a parent and not paying rent. Pursuant to the Statement of the U.S. Trustee Program’s Position on Legal Issues Arising Under the Chapter 7 Means Test, the allowance for housing is not applicable. As a practical matter, the easiest way to make this adjustment to the debtor’s gross income may be by simply adding back in the housing allowance as other income.

V. **The Chicken or the Egg**

A. Whether it more advantageous to divorce first or to file bankruptcy first is entirely fact driven. One of the comments that regularly pops up in blogs on the issue is that it may be less expensive for the divorcing spouses to file together before filing for dissolution. Less expensive for whom? As one or more of the foregoing factors may arise during representation and the attorney has to withdraw, where is the benefit to any of the parties, including the attorney?

B. With that warning, there are clearly situations where it might be to the advantage of the parties to file together before dissolution - (joint debt, exemptible assets, only one spouse is working, and wages are being garnished) - but these cases are rare and should only be undertaken after a thorough investigation and obtaining informed written waivers. All other things being equal, filing after dissolution, makes more sense in most cases.

**EFFECT OF AUTOMATIC STAY**

I. **Takes Effect Upon Filing - 11 USC 362(a)**

A. Filing a bankruptcy petition triggers an “automatic stay” that prohibits, among other things, the commencement or continuation of judicial proceedings that were or could have been commenced before the filing.
B. Prevents creditors and others from undertaking collection efforts or otherwise interfering with the property of the bankruptcy estate and administration of the case.

II. **Exceptions to Stay for Domestic Relations Matters - 11 USC 362(b)**

A. *Commencement of Proceedings:*

1. To establish paternity.

2. To establish or modify an order for a domestic support obligation.

3. Concerning child custody or visitation.

4. To dissolve a marriage as long as it doesn’t determine the division of bankruptcy estate property.

5. Regarding domestic violence.

B. *Collection of Domestic Support Obligations*

1. Collection of DSOs from non-estate property, such as exempt property ("The general rule is that exempt property immediately revests in the debtor... ‘the effect of an exemption is that the debtor's interest in the property is ‘withdrawn from the estate (and hence from the creditors) for the benefit of the debtor.’" *Mwangi v. Wells Fargo Bank*, 764 F3d 1168, 1175 (9th Cir 2014) (quoting *Gebhart v. Gaughan*, 621 F.3d 1206, 1210 (9th Cir 2010)).

2. Collection of DSOs via withholding of post-petition wages (Note - this exception does not apply in Chapter 13 cases as post-petition earnings are estate property).

3. Withholding, suspending or restricting a driver's license, a professional or occupational license, or a recreational license under state law, as specified by the Social Security Act (42 USC 466(a)(16)).

4. Reporting overdue support to any consumer reporting agency as specified in the Social Security Act (42 USC 466(a)(7)).

5. Intercepting a tax refund, as required by the Social Security Act or under an analogous state law.

6. Enforcing a medical obligation as specified by the Social Security Act (Title IV).
III. **Duration of Stay - 11 USC 362(c)**

Generally, the automatic stay continues until either the case closes, is terminated, or discharge is granted or denied.

IV. **Practical Effect of Stay**

A. The existence of an open bankruptcy case does not prevent the initiation/continuation most family law proceedings. Biggest hiccup with concurrently pending bankruptcy and family law proceedings is determining the division of non-estate property.

B. **Non-Judicial Relief from Stay** - A “belt and suspenders” filing if wanting to initiate/continue dissolution case when bankruptcy case is pending (see attached form).

C. **Judicial Relief from Stay under 11 USC 362(d)** - Can be used to obtain relief to allow the court in the family law case to determine ownership of property, the value of an equitable division of the parties debts/assets, or even equitable distribution itself. *See In re Goss*, 413 BR 843 (Bankr D Or 2009); *In re Kostenko*, 2:12-BK-02741-DPC (BAP 9th Cir July 9, 2015).

**ISSUES IN CHAPTER 7 BANKRUPTCY**

I. **Non-Dischargability of Obligations Generally**

A. See 11 USC 523 for a complete list.

II. **Non-Dischargability of Obligations Specifically – 11 USC 523(a)(5) & 11 USC 523(a)(15)**

A. 11 USC 523(a)(5) - For a domestic support obligation:

1. Never dischargeable.

2. Pre-petition payments are not considered a preference under 547(c)(7).

B. 11 USC 523(a)(15) - To a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit.

1. Never dischargeable.

2. No adversary complaint needed (no adversary complaint / no balancing test).
III. **How dischargeability is affected by joint filings or filing by only one spouse**

A. *Joint Debts:*
   1. Joint Filing: Debt is dischargeable as to both spouses.
   2. Single Spouse Filing: Debt is dischargeable as to filing spouse, but entity holding debt can still come after non-filing spouse, regardless of terms of divorce judgment.
      b. Precautions: Include language in divorce judgment: “This judgment requires each party to pay certain debts; however each party is aware that the court's order cannot modify the repayment agreement between the parties and their creditors. The court’s order can only impact the obligation to pay as between the parties themselves.

B. *Indemnification Clauses:*
   1. Example: “Husband shall pay according to the creditor's repayment terms, defend, indemnify and hold Wife harmless from the following debts....”
   2. Not dischargeable under 11 US 523(a)(15) – Considered a debt incurred as part of a separation agreement and/or divorce judgment if included in the document. *In re Francis,* 505 BR 914, 919 (BAP 9th Cir 2014).

**ISSUES IN CHAPTER 13 BANKRUPTCY**

I. **Payment of Priority Debt**

A. *11 USC §1322(a)(2):* The plan shall provide for payment in full of all claims entitled to priority under §507 (domestic support obligation, hereinafter “DSO”) unless the holder of a particular claim agrees to a different treatment of such claim.

B. *Exception – 11 USC §1322(a)(4):* The plan may provide for less than full payment of all amounts owed for a claim entitled to priority under section 507(a)(1)(B) (DSO assigned, owed to or recoverable by a governmental unit) if the plan provides that the debtor’s projected disposable income will be applied to plan payment for a period of five years.

C. *Compare to Chapter 7: Debits simply not discharged. 11 USC §523(a)(5).*
II. **Dischargeability of Non-Priority Debt**

A. **11 USC §523(a)(15):** No discharge in Chapter 7 OR Chapter 13 hardship discharge of debt to a spouse, former spouse or child incurred by the debtor in the course of a divorce or separation.

B. **11 USC §1328(a):** Governs discharge in Chapter 13 after completion of all payments under the plan. Contains no exception for non-DSO debts to spouse, former spouse, or child.

III. **Domestic Support Obligations**

A. **Definition: 11 USC §(14A):** The term “domestic support obligation” means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—

   (A) owed to or recoverable by—

      (i) a spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative; or
      (ii) a governmental unit;

   (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child’s parent, without regard to whether such debt is expressly so designated;

   (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—

      (i) a separation agreement, divorce decree, or property settlement agreement;
      (ii) an order of a court of record; or
      (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

   (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child’s parent, legal guardian, or responsible relative for the purpose of collecting the debt.
B. **Choice of Law**: Whether an obligation is in the nature of support and thus qualifies as support under bankruptcy law is a question of federal law.” *Thorud v. Thorud* (Case No. 10-6107, October 26, 2011, slip op. at 4 (citations omitted); *In re Moser*, 530 B.R. 872 (Bankr. D. Or. 2015).

C. **Burden of Proof**: “The marital claimant has the burden of proving by a preponderance of the evidence that the obligation is in the nature of support.” *Thorud*, *supra*, slip op. at 5 (citation omitted).

D. **Relevance of “labels”**: The labels parties used for the payments may provide evidence of intent *In re Nelson*, 451 B.R. 918, 923 (Bankr. D. Or. 2011) but are not binding on the bankruptcy court. *Moser, supra*, 530 B.R. at 874.

E. **Relevant Intent**: When the judgment is entered following a contested trial, the intent of the state court is controlling. *Moser, supra* 530 B.R. at 874. When the obligation is created by a stipulated judgment, the intent of the parties at the time the agreement is executed is dispositive. *Nelson, supra*, 451. B.R. at 921.

IV. **Is it Spousal Support?**

A. **Factors to consider:**

1. Presence of minor children;
2. Imbalance in the income of the parties;
3. Whether obligation terminates on death or remarriage of recipient spouse;
4. Whether award is affected by change in circumstances;
5. Nature and duration of the obligation;
6. Whether payments are made directly to the recipient;

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2 The Ninth Circuit articulated standards for analyzing whether an award is a DSO or property settlement in *Shaver v. Shaver*, 736 F.2d 1314 (9th Cir. 1984): “Factors indicating that support is necessary include the presence of minor children and an imbalance in the relative income of the parties. Similarly, if an obligation terminates on the death or remarriage of the recipient spouse, a court may be inclined to classify the agreement as one for support. A property settlement would not be affected by the personal circumstances of the recipient spouse; thus, a change in those circumstances would not affect a true property settlement, although it would affect the need for support. The court will look also to nature and duration of the obligation to determine whether it is intended as support. Support payments tend to mirror the recipient spouse’s need for support. Thus, such payments are generally made directly to the recipient spouse and are paid in installments over a substantial period of time.” *Shaver, supra*, 736 F.2d at 1316-1317 (citations omitted). How the parties treat the claim or debt for tax purposes is also a factor. *Thorud v. Thorud* (Case No. 10-6107, October 26, 2011)
7. Whether payments are made in installments over a period of time;

8. Treatment of claim for tax purposes.

B. Selected cases:

1. Thorud v. Thorud, (Case No. 10-6107, October 26, 2011) – even though there was an imbalance in income and claimant was awarded custody, the debt was not a DSO. The obligation survived the parties’ death; it was payable in a lump sum rather than installments; it was labeled a “proper division” by the parties; it was structured so as not to be taxable to claimant and deductible by Debtor.

2. In re Morgan, (Case No. 10-67114, April 26, 2011) – the award was not a DSO despite the requirement of installment payments and a ruling that payments would terminate upon the death of either party. The parties’ incomes were relatively equal, and the judgment specifically addressed the bankruptcy consequences of the allocation of debts but failed to include a similar provision regarding the bankruptcy consequences of the equalizing judgment.

3. In re Nelson, 451 B. R. 918 (Bankr. D. Or. 2011) – Debtor’s obligation to pay mortgage on which ex-spouse was co-debtor was not a DSO. The marriage was short-term; there was no evidence that ex-spouse needed support; the obligation did not terminate on her death or remarriage; the judgment contained contradictory provisions regarding support.

V. Is it Child Support?

A. Factors to consider:3

1. The substance of an award;

2. Whether the state court intended the award to be in the nature of support.

B. Selected cases:

1. In re Chang, 163 F.3d 1138 (9th Cir. 1998) – attorney fees incurred in a child custody proceeding may be in the nature of support. Fees for representation of a guardian ad litem were in the nature of support.

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3. The factors relevant to an analysis of whether an obligation is spousal support “do not fit neatly within a determination of whether an obligation constitutes child support. Thus we look ‘at the surrounding circumstances and all other relevant incidents bearing on the [court’s] intent’ to determine whether [the court] intended a particular obligation to be in the nature of child support. Moser, supra 530 B.R. at 876.
2. *Koch v. Olsson*, 532 BR 810 (D. Or. 2015) – attorney fees awarded as a sanction for bringing the action were not in the nature of support and were dischargeable.

3. *In Re Rehkow*, 2006 Bankr. LEXIS 4870 (9th Cir. BAP 2006, aff’d 239 Fed. Appx. 341 (9th Cir. 2007) – attorney fees arising from disputes over service of a mental health expert appointed to provide an opinion regarding custody and visitation were in the nature of support and non-dischargeable.

4. *In re Luetkenhaus*, 2016 Bankr. LEXIS 3115 (Bankr. D. Or. 2016) – even though claimant, while seeking attorney fees in state court, argued that debtor’s bad conduct should not be rewarded, the bankruptcy court found that the state court “intended the award not as punishment for bad behavior but instead to compensate [claimant] for harm done from the unnecessary protracted litigation regarding the welfare of the child.” Eighty per cent of the award was ruled not dischargeable; the remaining 20% represented fees incurred in matters other than child custody and parenting time.

5. *In re Luetkenhaus*, 2016 Bankr. LEXIS 4254 (Bankr. D. Or. 2016) – fees awarded to legal counsel appointed to represent the interest of the child were in the nature of support, even though counsel was not a “spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative.

6. *In re Moser*, 530 B.R. 872 (Bankr. D. Or. 2015) – state court changed custody from debtor to claimant and awarded claimant $20,000 in attorney fees. The attorney fee award was in the nature of support and therefore a DSO because the proceeding was one to determine the best interests of the child. The issue is whether the basis of the debt benefitted the child, not whether repayment will benefit the child.

V. Post-Petition Support Obligations:

A. Confirmation: A Chapter 13 plan cannot be confirmed unless debtor is current on all post-petition support obligations. 11 USC §1325(a)(8).

B. Discharge: Debtors are required to make all required post-petition DSO payments, and prior to receiving a discharge must certify that all such payments have been made. Notice of the certification must be served upon the recipient of the award. 11 USC §1328(a); LBF 525.

VI. Co-Debtor Stay: Unlike Chapter 7, Chapter 13 provides protection to co-debtors who are liable on consumer debts unless the debt was incurred in the ordinary course of business. The creditor may seek relief from stay, however, if the co-debtor received the consideration; the debtor’s plan proposes not to pay the claim; or the creditor’s interest would be irreparably harmed by continuation of the stay.
In re: Jane Doe

Debtor(s).

Case No. xx-xxx-xxx7

NON-JUDICIAL RELIEF FROM THE AUTOMATIC STAY OF 11 U.S.C. §362(a)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

1. Jane Doe, the Debtor in the above entitled bankruptcy case, is hereby authorized to commence an action to dissolve her marriage from John Doe in the Circuit Court of the State of Oregon for ____________ County upon the condition that she does not assert that the state court has jurisdiction over property of:

   A. The Bankruptcy Estate of John Doe, administered in the United States Bankruptcy Court for the District of Oregon, Case No. xx-xxx-xxx7; or,

   B. The Bankruptcy Estate of Jane Doe, administered in the United States Bankruptcy Court for the District of Oregon, Case No. xx-xxx-xxx7

2. Notwithstanding the preceding paragraph, Jane Doe, may ask the state court to assert jurisdiction over property of the Debtor which:

   A. Is determined to not be part of the Debtor’s bankruptcy estate, but is subject to division by the state court (for example property which is an asset of a qualified pension plan);

   B. Is determined to be “exempt” from the claims of Debtor’s creditors, but is subject to division by the state court;

   C. Is abandoned by the Debtor’s bankruptcy estate;

   D. Is an equitable interest of the Debtor in assets eventually distributed by the bankruptcy estate upon full administration of the bankruptcy estate.

DATED this _____ day of ______, 2018

______________________________

Trustee

______________________________

Debtor(s)/Debtor(s)’ Attorney
Chapter 3A

Bankruptcy and Criminal Law

WHITNEY BOISE
Boise Matthews LLP
Portland, Oregon

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Three Possible Scenarios:

a) Bankruptcy is filed, and criminal activity arises after the filing of the case;
b) Bankruptcy is filed during an investigation but before any indictment on criminal charges; or
c) Bankruptcy is filed after criminal charges are filed against the debtor.
Common Criminal and Bankruptcy Law Collisions

- Criminal Tax
- Investor Fraud/Securities Violations
- Bank Fraud

Bankruptcy Steps Involving Signing Under Oath

- Petition
- Schedules
- SOFA
Chapter 3A—Bankruptcy and Criminal Law

Petition

I have examined this petition and I declare under penalty of perjury that the information provided is true and correct.

If I have chosen to file under Chapter 7, I am aware that I may proceed, if eligible, under Chapter 7, 11, 12, or 13 of title 11, United States Code. I understand the relief available under each chapter, and I choose to proceed under Chapter 7.

If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I understand making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

Signature of Debtor 1

Executed on ______ / _____ / ______

Signature of Debtor 2

Executed on ______ / _____ / ______

Schedules

Official Form 106Dec
Declaration About an Individual Debtor's Schedules 12/15

If two married people are filing together, both are equally responsible for supplying correct information.

You must file this form whenever you file bankruptcy schedules or amended schedules. Making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

Sign Below

Did you pay or agree to pay someone who is NOT an attorney to help you fill out bankruptcy forms?

☐ Yes

☐ No

Name of person ________________________________ Attach Bankruptcy Petition Preparer's Notice, Declaration, and Signature (Official Form 119).

Under penalty of perjury, I declare that I have read the summary and schedules filed with this declaration and that they are true and correct.

Signature of Debtor 1

Executed on ______ / _____ / ______

Signature of Debtor 2

Executed on ______ / _____ / ______
Information solicited on schedules

- **Schedule A**: All real property in which debtor has an interest
- **Schedule B**: All personal property in which debtor has an interest
- **Schedule I**: All income
- **Schedule J**: All expenses

Ex. cash, vehicles, claims against third parties

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**SOFA**

I have read the answers on this Statement of Financial Affairs and any attachments, and I declare under penalty of perjury that the answers are true and correct. I understand that making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $250,000, or imprisonment for up to 20 years, or both.


\[\times\]

Signature of Debtor 1

Signature of Debtor 2

Date __________  Date __________

Did you attach additional pages to Your Statement of Financial Affairs for Individuals Filing for Bankruptcy (Official Form 107)?

- No
- Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out bankruptcy forms?

- No
- Yes. Name of person ____________________________

Attach the Bankruptcy Petition Preparer's Notice, Declaration and Signature (Official Form 119).
Information solicited on SOFA

• Statement of Financial Affairs
  • Historical income
  • Property held for another or by another
  • Transfers to third parties
  • Transfers to family members
  • Payments made to third parties or family members

Bankruptcy Steps Involving Oral Testimony and Document Discovery

• 341a Meeting
• 2004 Exam
• Adversary Proceedings and Contested Matters
Oral Testimony Under Oath

• 341a Meeting or “First Meeting of Creditors”
  • Occurs between 30-45 days after filing of the petition
  • Debtor placed under oath and recorded.
  • Debtor required to answer questions of Trustee (Chapter 7 or 13) or office of US Trustee (Chapter 11).
  • Creditors may appear and ask questions, present documents for testimony or authentication; and ask about debtor’s assets, liabilities and financial affairs.
  • Not intended to serve as deposition as to specific creditor claims

More Oral Testimony Under Oath

• 2004 Exam
  • Any party in interest may examine the debtor (or vice versa) in relation to any issues about the case or the debtors financial affairs. Order may require oral testimony or production of documents.
  • May include request for issuance of subpoenas to third parties.
  • No need to have any separate adversary proceeding pending or contested matter pending.
  • Orders granting motion to conduct Rule 2004 examination are freely given by judges and often signed on an ex parte basis.
Discovery Under Federal Rules

• Adversary Proceedings

• A lawsuit filed within the bankruptcy case, which becomes its own separate proceeding. Fed. R. Bankr. P. 7001.
• Common Examples:
  - Objection to discharge or dischargeability of a debt (§§ 727 and 523)
  - Complaints to recover fraudulent transfers (§§ 544 and 548)
  - Complaints to recover preferential transfers (§ 547)
  - Declaratory judgment actions surrounding title or ownership.
• FRBP’s apply, incorporating many of the FRCP’s.
• Typical discovery tools are available, just like with complaints filed in USDC.
• Debtors often required to submit to depositions, answer request for admissions, and respond to request for production and interrogatories.

Discovery in Contested Matters

• Contested Matters

• A dispute arising in the bankruptcy case for which a separate adversary proceeding is not required
• Common Examples:
  - Creditor seeking relief from automatic bankruptcy stay
  - Assumption or rejection of executory contracts
  - Confirmation of a plan over creditor objections
• Begin with a motion or application, not a complaint
• Governed by some but not all of the same rules applicable in adversary proceedings and USDC cases. This includes Rule 26, governing discovery.
Federal Criminal Justice System

- Federal jurisdiction is expansive.
- Federal criminal statutes are typically written broadly.
- Charging decisions are generally within the discretion of the specific prosecutor.
- Federal indictments usually have significantly negative personal and business impacts, regardless of ultimate outcome.

Takeaway: Tell the Truth . . . or Take the Fifth.

- The Fifth Amendment applies in civil and administrative cases and may be asserted in bankruptcy proceedings.
- Right can be exercised if testimony would create a mere reasonable possibility of prosecution by providing a “link in the chain” of incriminating evidence.
- In civil contexts (including bankruptcy proceedings), fact-finder may draw adverse inferences from a party’s refusal to testify.
- 11 U.S.C. § 727(a)(6)(B), (C): Court may deny discharge if debtor takes the Fifth after receiving grant of immunity or refuses to answer “material” question on ground other than “properly invoked privilege against self-incrimination.”
  - The invocation of privilege, even if properly invoked, can adversely affect dischargeability if it interferes with the proper administration of the bankruptcy estate.
  - Per § 727(a)(6)(C), the invocation of privilege cannot be the sole reason for a refusal of discharge, but the effects of its invocation on the bankruptcy proceedings can be considered.
  - Can a debtor obtain a stay of a 727 denial of discharge action because he/she has been put on notice of a criminal investigation? See Laying v. Garcia (In re Garcia) 569 BR 480 (N.D. Ill 2017).
  - Does the Act of Production doctrine apply in the bankruptcy context?
Fifth Amendment: Act of Production in Bankruptcy

- Act of production privilege applies when the act of production itself is:
  1. Compelled;
  2. Testimonial; and
  3. Incriminating.
- The act of production is not testimonial but an act of surrender when:
  1. The existence and location of the documents are a foregone conclusion; and,
  2. The trustee can demonstrate that the debtor’s act of production adds nothing or little to what the trustee already knows about the existence and location of the documents.
- Courts look to whether the act of producing the documents is incriminating, not whether the content of the documents is incriminating.
- If a debtor’s turning over of documents would serve to implicitly authenticate the documents, thus providing a necessary link to incriminating evidence within, the act of production would be incriminating in nature.

Fifth Amendment: Act of Production in Bankruptcy

- Ambiguous application of Bouknight’s “regulatory regime directed toward society as a whole” exception to Fifth Amendment act of production.
  - One court has stated that bankruptcy is such a regulatory regime and that the 5th Amendment Act of Production doctrine would not apply in that case.
  - In re Ross, 156 B.R. 272, 281 (Bankr. D. Idaho 1993)
  - Subsequent courts have ignored this limitation and applied the 5th amendment Act of Production doctrine in the bankruptcy context.
Federal Criminal Justice System

- Investigated by a wide variety of agencies with law enforcement capabilities.
- Investigations sometimes referred to federal law enforcement by other federal, state, and local agencies.
- United States Attorney’s Office prosecutes violations of federal criminal laws within the District.

How Would the US Attorney’s Office Get Involved?

**United States Trustees Program**
- 2003: US Trustees established Criminal Enforcement Unit.
- 18 U.S.C. § 3057
- 2005: Bankruptcy Abuse Prevention and Consumer Protection Act

**Person of Interest Files Bankruptcy**
- Ongoing criminal investigation of fraud
- Brings significant scrutiny to target of investigation
Why Would the US Attorney’s Office Get Involved in Bankruptcy Fraud?

18 USC §152 (1)

- Knowingly and fraudulently conceals assets.
- Must be property of bankruptcy estate.
- Property of estate and concealment broadly construed.

18 USC §152 (2) - (3)

- 18 USC §152(2)—knowingly and fraudulently making a false oath in case under title 11.
- 18 USC 152(3)—knowingly and fraudulently making a false declaration, verification under penalty of perjury.
- Misrepresentations must be material.

“Knowingly and Fraudulently”

- Usually the most difficult element for the government to prove.
- Willful blindness – a defendant cannot escape criminal liability by willfully ignoring obvious facts.
- Since intent is often difficult to prove, the government frequently relies on indicia of fraud.
Indicia of Fraud in Bankruptcy Proceeding

- Unnecessarily complex business structures
- Transfer of property to friends, family, insiders, etc., just before bankruptcy
- Inadequate consideration
- Inability to account for property listed on insurance policies
- Mixing corporate and personal assets
- Incomplete schedules and frequent amendments in response to creditor’s questions
- Tax returns not filed for relevant years

Why Would the US Attorney’s Office Get Involved in Bankruptcy Fraud? (cont’d)

**18 USC § 152(4)-(9)**

- The other provisions of 18 USC § 152 criminalize:
  - False proofs of claim.
  - Knowingly and fraudulently receiving property from a debtor or withholding property with intent to defeat bk.
  - Giving, receiving or attempting to obtain reward/advantage for acting or not acting in bk.
  - Knowingly and fraudulently transferring with intent to defeat bk provisions, property of debtor in contemplation of bk.
  - Falsifying documents.

**18 USC § 157**

- Scheme to defraud and for the purpose of the scheme:
  - Files a bankruptcy petition;
  - Files a document in a bankruptcy proceeding; or
  - Makes false statements concerning or in a bankruptcy proceeding.
Why Would the US Attorney’s Office Get Involved in Bankruptcy Fraud? (cont’d)

18 USC § 1001

- Knowingly and willfully, in any matter within the jurisdiction of US Government:
  - Falsifies or conceals by a trick, scheme or device a material fact;
  - Makes materially false statement; or
  - Make or use a false document.

18 USC § 1519

- Part of SOX 2002.
- Knowingly altering, destroying, concealing any record, document or tangible object with the intent to impede bankruptcy proceeding.

How will your client or you be contacted by law enforcement?

- Law Enforcement Interview
- Grand Jury Subpoenas
  - For documents
  - To appear as a witness
- Search Warrants
  - Administrative search warrants
  - Federal or state search warrants
What Could Happen if The US Attorney’s Office is Involved?

- Determine whether to investigate.
- Investigation could include:
  - Bankruptcy document review
  - Interviews by the FBI
  - Grand jury subpoenas
  - Grand jury witnesses
  - Search warrants
- Indictment or other charging instrument
  - Charging decision in sole discretion of the USAO.
  - Will typically depend on loss/intended loss and interference with administration of justice.

Penalties

- Sentencing guidelines under the bankruptcy statutes could result in significant penalties:
  - Looks at prior criminal history
  - Depends largely on loss or intended loss
  - Impact on the judicial system
  - Means of fraud
  - Number of victims
- Maximum penalties are $250,000 fine and 5 years imprisonment.
- Maximum term of imprisonment under SOX is 20 years.
### Forfeiture v. Bankruptcy

<table>
<thead>
<tr>
<th>Type</th>
<th>Description</th>
<th>Forfeiture filed first</th>
<th>BK filed first</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil</td>
<td>In rem proceeding initiated by civil lawsuit against property. Government has burden to demonstrate property forfeitable by preponderance.</td>
<td>9th Cir BAP: forfeiture action prevails over automatic stay pursuant to police power exception to bankruptcy stay. Dist. Ct. has exclusive jurisdiction.</td>
<td>Forfeiture action probably prevails over automatic stay pursuant to police power exception to bankruptcy stay.</td>
</tr>
<tr>
<td>Crim</td>
<td>Initiated with an Indictment or Information in a criminal case. Part of the sentencing of a defendant as a punishment for the crime committed.</td>
<td>Forfeiture action prevails over automatic stay. 21 USC §853 prohibits criminal defendant from filing a BK that affects criminally forfeitable property</td>
<td>BK court can't prevent criminal forfeiture because automatic stay doesn't apply. 11 USC §362(b)(1). Govt may seek stay of BK proceeding to cease asset disposal.</td>
</tr>
<tr>
<td>Admin</td>
<td>Initiated with judicially approved probable cause statement. If claim asserted, govt. must initiate judicial forfeiture within 90 days.</td>
<td>BK proceeding listing forfeitable asset possible claim, causing Govt to file judicial action.</td>
<td>n/a</td>
</tr>
</tbody>
</table>

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### Defenses

- **Advice of counsel**
  - Waiver of privilege
  - Importance of good record-keeping by bankruptcy counsel

- **Recantation**
  - Did debtor make a mistake or get caught?

- **Statute of limitations**
  - 5 years
  - Misrepresentations: from date of misrepresentation
  - Concealment: from date of discharge or denial of discharge
  - What if no discharge or denial of discharge?
Collection of Restitution During a Bankruptcy Proceeding

- The clash between the automatic stay and collection of restitution.
- Pardita vs. US DOJ 862 F.3d 909 (9th cir. 2017).
- Clash between the mandatory Victim Restitution Act (MVRA) and Section 362 of the bankruptcy code.

Collection of Restitution During a Bankruptcy Proceeding

- Conflict: 362 prohibits any action or proceeding that relates to the collection of pre-filing debts, with a number of exceptions: One such exception is the “commencement or continuation of a criminal action or proceeding against the debtor”.
- But is post conviction collection of a restitution judgment “commencement or continuation of a criminal action against the debtor”?
- Ct. found despite no clear and specific exception in Section 362, the MVRA trumps the bankruptcy code, and post-petition actions to collect restitution are not stayed under the code.
Practice Tips to Avoid BK Fraud Criminal Referral and Prosecution

• Make sure clients understand the gravity of signing bankruptcy documents and testifying at the creditors’ meeting.
• Make sure the documents are consistent, tell a story, and that you can explain any anomalies.
• Ask your client what exes and individual creditors might say.

If You Suspect Bankruptcy Fraud

• Get the documents in the case.
• Attend the First Meeting of Creditors.
• Tell the US Trustee about your suspicions.
To report suspected bankruptcy fraud, please prepare a written summary that contains the following information:

**REQUESTED INFORMATION**

- Name and address of the person or business you are reporting.
- The name of the bankruptcy case, case number, and the location of where the case was filed.
- Any identifying information you may have regarding the individual or the business.
- A brief description of the alleged fraud, including how you became aware of the fraud and when the fraud took place. Please include all supporting documentation.
- Identify the type of asset that was concealed and its estimated dollar value, or the amount of any unreported income, undervalued asset, or other omitted asset or claim.
- Your name, address, telephone number, and email address. You are not required to identify yourself, though it is often helpful to do so if questions arise.

THE LIKELIHOOD OF FURTHER INVESTIGATION AND POSSIBLE CRIMINAL PROSECUTION IS INCREASED FOR THOSE MATTERS WHERE SUPPORTING DOCUMENTATION AND SPECIFIC FACTUAL INFORMATION ARE PROVIDED. ANY INFORMATION YOU PROVIDE IS VOLUNTARY AND ITS MAINTENANCE BY THE UNITED STATES TRUSTEE PROGRAM IS AUTHORIZED BY 28 U.S.C. § 586.

You can send this information via email to: USTPBankruptcy.Fraud@usdoj.gov or by mail to:

**Executive Office for U.S. Trustees**
Criminal Enforcement Unit
20 Massachusetts Avenue, NW
Suite 8000
Washington, DC 20510
Critical to their function, the government and the courts have the power to compel the testimony of witnesses. See Kastigar v. United States, 406 U.S. 411, 443-44 (1972). However, the Fifth Amendment of the United States Constitution presents an exception, which provides, in part, “[n]o person shall be ... compelled in any criminal case to be a witness against himself.” USCS Const. Amend. 5. “The Fifth Amendment guarantees against federal infringement – the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.” Malloy v. Hogan, 378 U.S. 1, 8 (1964).

The Fifth Amendment “can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.” Kastigar, 406 U.S. at 444-45. These include bankruptcy proceedings.

About the Author
Sydney J. Darling is counsel with Walsh Pizzi O’Reilly Falanga LLP and practices primarily in the firm’s financial services and risk management group. She clerked for the Honorable Raymond T. Lyons (Ret.), United States Bankruptcy Court, District of New Jersey, and focuses her practice on the representation of creditors, debtors, Chapter 11 trustees, liquidating trustees, asset purchasers and other interested parties in bankruptcy court and out-of-court workouts. She also represents assignees for the benefit of creditors in state court insolvency proceedings.

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II. Necessary Elements of a Claim for Fifth Amendment Privilege

For the privilege to apply, disclosure must be compelled (physical or morally) from an unwilling witness, the information must be “testimonial” in nature and “incriminatory.” See, e.g., Fisher v. United States, 425 U.S. 391, 397, 401 (1976); Couch v. United States, 409 U.S. 322, 328, 336 (1973). In the case of bankruptcy proceedings, the requirements of the Code themselves constitute compulsion. See Connelly, 59 B.R. at 431-32 (citing Butcher, 753 F.2d at 469).

With respect to the “testimonial” requirement, a debtor may be giving “testimony” for Fifth Amendment purposes “whether this debtor testifies at a meeting of creditors or other court proceeding or reveals information by filing the required petition, schedules and statement of financial affairs.” Connelly, 59 B.R. at 432 (citing McCarthy, 266 U.S. at 34). However, no privilege may be asserted to protect a debtor from the obligation to turn over property of the estate to the trustee. See In re Crabtree, 39 B.R. 726, 731 (Bankr. E.D. Tenn. 1984) (citing In re Harris, 221 U.S. 274, 279 (1911); Johnson, 228 U.S. at 458-59; In re Fuller, 262 U.S. 91, 93-94 (1923); McCarthy, 266 U.S. at 41; United States v. Sullivan, 274 U.S. 259, 263-64 (1927).

A debtor must also demonstrate that the testimony requested has a reasonably likelihood of incrimination, or, as characterized by the Supreme Court, a “reasonable cause to apprehend danger.” Hoffman v. United States, 341 U.S. 479, 486 (1951). “The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.” Id. For further analysis, consult the Hoffman decision. Id. at 485-87. See also In Re Corrugated Container Antitrust Litigation, 661 F.2d 1145, 1150 (7th Cir. 1981) (aff’d, 459 U.S. 248 (1983) (the question involves the possibility, not the likelihood, of prosecution). The debtor’s burden in this regard, inter alia, prevents a debtor from invoking the Fifth Amendment privilege in blanket fashion. See Connelly, 59 B.R. at 433 (citing Hoffman, 341 U.S. at 479; In re Morganroth, 718 F.2d 161, 167 (6th Cir. 1983)).

As for many of the seemingly innocuous questions interposed by a bankruptcy trustee or parties in interest, “where there is nothing suggestive of incrimination about the setting, . . . the burden of establishing a foundation for the assertion of the privilege should lie with the witness making it.” Morganroth, 718 F.2d at 169 (citing United States v. Moreno, 536 F.2d 1042, 1049 (1976); United States v. Rosen, 174 F.2d 187, 188 (2d Cir. 1949), cert. denied, 388 U.S. 851 (1949)).
nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer’s belief that the papers are those described in the subpoena. The elements of compulsion are clearly present....

Id. at 410-11. See also United States v. Doe, 465 U.S. 605 (1984) (applying “implied admissions” analysis and holding that the act of producing voluntarily prepared papers involved testimonial self-incrimination and, absent a grant of immunity, was privileged); United States v. Porter, 711 F.2d 1397, 1403 n. 5 (7th Cir. 1983) (When the existence and location of documents are at issue, their production will arguably be testimonial); In re Grand Jury Subpoena Duces Tecum, 722 F.2d 981 (2d Cir. 1983) (allowing former company president to assert privilege as to corporate records in his possession despite the fact that the contents of the records were not privileged); but see Butcher, 753 F.2d at 468-69 (noting that the jurisprudence extending to the privilege to protect documents has been largely eroded and is only applied in rare instances); In re Fairbanks, 135 B.R. 717, 730 (Bankr. D.N.H. 1991) (“If an asset is unknown to the trustee, and is not reflected in the books and records that he presently possesses, and a disposition of that asset by the debtor was in some way unlawful, the production of the record would logically be communicative and testimonial on the part of the debtor. . . . On the other hand, knowledge of such assets is imperative if the trustee is to fulfill his statutory duties under the Bankruptcy Code to liquidate all assets and distribute the proceeds to the creditors.”).

In attempting to solve the issues presented by the Fisher jurisprudence as it relates to what is testimonial in a bankruptcy proceeding, a New Hampshire bankruptcy court proposed: “the resolution of the conundrum mentioned above is to simply recognize that there are some regulatory disclosure requirements in modern society that have to be complied with even though there may in fact be some incidental incriminating effects upon the party required to comply provided that the regulatory requirements in question are strictly noncriminal in nature and have general applicability throughout the society.” Fairbanks, 135 B.R. at 730; c.f., Butcher, 753 F.2d at 469 (records relating to property of the bankruptcy estate are generally not protected by the privilege).

Unlike the implied admissions doctrine, some exceptions are well settled. For instance, documents not prepared by the debtor do not constitute compelled disclosure. For example, in the seminal case applying the “implied admissions” doctrine, the Supreme Court refused to extend to the privilege for taxpayers under investigation by the IRS where documents relating to tax returns, which were prepared by the accountants of the taxpayers, were sent from the taxpayers to their attorneys.4 Fisher, 425 U.S. at 393; 396.

Nor can a debtor claim the Fifth Amendment privilege over records not in his or her possession. Connelly, 59 B.R. at 437 (citing Couch, 409 U.S. at 322; Fisher, 425 U.S. at 402.)

In addition, certain “required records” are excluded from the privilege. See Shapiro v. United States, 335 U.S. 1, 33 (1948). “This exception is a narrow one limited to ‘records required by law to be kept,’ and only compels turnover of documents the government requires to be preserved ‘pursuant to an essentially regulatory scheme. [Such] records have assumed ‘public aspects’ which render them analogous to public documents.” Connelly, 59 B.R. at 440-41 (citations omitted).

Similarly, the records of any collective entity, corporations, partnerships and the like, . . .are not privileged and must be produced, even if they incriminate [the debtor] personally. Id. (citing Bellis v. United States, 417 U.S. 85, 89-90 (1974)); Butcher, 38 B.R. at 794-95; United States v. Mackey, 647 F.2d 898 (9th Cir. 1981)).

IV. Adverse Inferences

In some instances, the court may draw an adverse inference when a litigant asserts the Fifth Amendment privilege. See, e.g., Doe v. Glanzer, 232 F.3d 1258, 1264 (9th Cir. 2000) (citing SEC v. Colella, 139 F.3d 674, 677 (9th Cir. 1998)). Independent evidence of the fact for which the inference is urged must exist. See, e.g., LaSalle Bank Lake View v. Seguban, 54 F.3d 387, 391 (7th Cir. 1995); Peiffer v. Lebanon Sch. Dist., 848 F.2d 44, 46 (3d Cir. 1988).


V. Conclusion

The Fifth Amendment poses many complex issues of competing rights, balancing interests and parsing through jurisprudence dating back over a hundred years. However, its availability to debtors in bankruptcy is clear. To defeat a claim for privilege, a trustee or other party in interest must establish that the debtor is not or was not compelled (physical or morally) to produce the information, that the information is not “testimonial,” or that the debtor has not established that the information is incriminating and should urge the reviewing court to consider these issues in light of the Code’s policy of full disclosure.

ENDNOTES:

1 The author thanks Sabrina Solow, a summer intern with the firm, for her contributions to the article.

2 A trustee may also attempt to invoke §707 – dismissal for cause. See Connelly, 59 B.R. 421 (“[I]t should be permissible for this court to exercise its discretion and impose the lesser sanction of dismissal under circumstances permitting a denial of discharge.”)

3 “The constitutional privilege cannot be legislatively nullified, whether in bankruptcy or any other situation.” Butcher, 753 F.2d at 467.

4 While not directly relevant to this article, it is noteworthy that the issue turned on whether the Fifth Amendment applied even were the documents in the hands of the taxpayer (and not his attorney). In other words, the attorney-client privilege did not protect the documents because they were obtainable from the taxpayer and therefore attainable from his attorney. Fisher, 425 U.S. at 403-405.
Criminal Restitution Awards and Chapter 7 Trustee Practice

By Bradley D. Jones, Esq., Odin Feldman & Pittelman, P.C., Reston, Virginia

From the American Bankruptcy Trustee Journal, Summer 2018. Reprinted with permission.

Bankruptcy is often the last chapter in a series of ill-fated events. This includes criminal conduct. The criminal system has a restitution scheme to compensate victims of crime as well as to require perpetrators to attempt to make those victims whole. But the interaction of the criminal restitution scheme and the Bankruptcy Code’s policy goals and priority scheme often pits the competing goal of these statutory schemes against each other. Courts have struggled with applying the Bankruptcy Code and the restitution scheme both in cases where the victim is the debtor as well as cases where the criminal perpetrator is the debtor.

The Automatic Stay Does Not Prevent the Government from Seeking to Satisfy a Restitution Award From Estate Property But the Trustee May Still Be Able to Pursue Certain Chapter 5 Claims

At the federal level, restitution is governed in criminal cases by the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3661 et seq., which departed from the prior statutory scheme by making restitution mandatory in nearly all cases in which the victim suffered an identifiable monetary loss. Under the MVRA, the government may enforce a judgment imposing restitution "notwithstanding any other federal law." 18 U.S.C. § 3613(a). A restitution order creates a lien in favor of the United States to the same extent as if the restitution award were a liability for a tax under the Internal Revenue Code." 18 U.S.C. § 3613(c).

While the case law is still developing, the Courts of Appeals generally agree that this language gives the United States the ability to satisfy an outstanding restitution order out of bankruptcy estate property when a convicted criminal files bankruptcy—with the Sixth and Ninth Circuits ruling for the United States on this issue. In re Robinson, 764 F.3d 554 (6th Cir. 2014); In re Partida, 862 F.3d 909, 913 (9th Cir. 2017).¹

As a result of this statutory system, if a criminal restitution judgment under the MVRA is entered against a debtor pre-petition, restitution payments made by the debtor pursuant to that judgment order are likely immune from a subsequent attack by the trustee as a preference, even if those payments were made in the 90 days pre-petition. However, notwithstanding the MVRA, there are opportunities for chapter 7 trustees to administer estate assets, notwithstanding the existence of a restitution order against the debtor.

¹ While applying different reasoning, the Second Circuit has also held that the automatic stay did not prevent the enforcement of a restitution order where that order was part of the Debtor’s probationary sentence, relying on the automatic stay exception in § 362(b)(1). United States v. Colasuonno, 697 F.3d 164, 177 (2d Cir. 2012)
One such opportunity is when the restitution payment is made prior to the entry of an award or judgment of restitution by the district court. Restitution payments are commonly made before an adjudication of guilt in criminal cases, and under the Federal Sentencing Guidelines, early payments may assist in securing a downward departure in the offense level classification, potentially reducing the length of the defendant’s prison sentence. See United States Federal Sentencing Guidelines, § 3E1.1 cmt 1(c) (listing among the factors in whether a defendant may receive a two or three level downward departure for acceptance of responsibility, the "voluntary payment of restitution prior to adjudication of guilt"). But this procedure may create some dangers if a bankruptcy is subsequently filed.

A recent case, In re Grooms, 572 B.R. 559 (Bankr. W.D. Pa. 2017) is illustrative. In Grooms, the debtor engaged in a complex embezzlement scheme defrauding his employer of hundreds of thousands of dollars. After he was fired for some unrelated misconduct, the fraudulent scheme was discovered. The debtor reached an agreement with the U.S. Attorney's Office to make a $100,000 restitution payment prior to pleading guilty to wire fraud. The debtor then fraudulently obtained two loans from a bank to help him make restitution for his first fraud and filed bankruptcy shortly afterwards. The trustee pursued the restitution payment as a preference.

At the debtor's criminal sentencing, the district court judge was incredulous that the trustee was pursuing the restitution payment and stated he "can't imagine that the amount would be disturbed" and assumed that there would be an "exemption in the law for restitution orders in criminal cases." Id. at 564–65. But the bankruptcy court disagreed. In its view, the timing of the payment mattered. While the bankruptcy court recognized that the MVRA provides a judgment lien in favor of the United States, that lien only arises once a judgment under the MVRA is entered. So when a restitution payment is made before the district court enters the restitution order, the judgment lien has not arisen yet. As a result, the trustee could recover the restitution payment as a preference.

The bankruptcy estate's chapter 5 claims are also likely outside the scope of an MVRA judgment. While the MVRA judgment and lien will attach to all assets of the estate at the time of filing, the lien likely does not attach to funds not yet brought into the bankruptcy estate. The government's lien under the MVRA is treated the same as the government's right to enforce a tax lien or levy on a delinquent taxpayer. 18 U.S.C. § 3613(c). And tax liens do not attach to property that has been transferred by the taxpayer. See, e.g., U.S. v. Rodgers, 461 U.S. 677, 690–

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2 Unsurprisingly, the bank and debtor agreed that the debt from these loans was non-dischargeable pursuant to § 523 and, after an adversary proceeding filed by the U.S. Trustee, the debtor agreed to waive his chapter 7 discharge pursuant to § 727(a)(10). Grooms, 572 B.R. at 563 fn2.
91, (1983) (holding that the government’s tax lien cannot extend beyond the property interest held by the delinquent taxpayer).³

The identity of the recipient of the preference as a victim of the crime does not appear to make a difference. At one time there was some disagreement regarding whether restitution payments to crime victims could be recoverable as preferences. Some courts held that recovering such payments would be an anomalous result and courts should construe the Bankruptcy Code to minimize federal interference with the criminal justice system. *In re Nelson*, 91 B.R. 904, 906 (N.D. Cal. 1988) *abrogated by In re Silverman*, 616 F.3d 1001 (9th Cir. 2010). Those courts also found that recovering a restitution payment would turn the criminal justice system on its head by reaching into the coffers of the government entity that required the payment to the criminal victim. And the courts were also concerned that these recoveries would impose undue burdens and uncertainties on the victim and hamper the sentencing decisions of criminal courts. However, now bankruptcy courts generally agree that restitution payments made to victims during the statutory period may be recovered by the chapter 7 trustee as preferences. *See Silverman*, 616 F.3d at 1007–08 (“There is no judicial exception for criminal restitution payments under section 547(b)”; *In re Lacefield*, 167 B.R. 89, 91 (Bankr. E.D. Ky. 1994).

**Where Restitution Is Owed to a Debtor, Who Was a Victim of Crime, the Trustee Can Generally Recover the Restitution Payment for the Estate Unless the Restitution Is Compensation for a Physical Injury**

Under § 541(a)(1), the bankruptcy estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case. The scope of § 541(a) is broad and "is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code," which includes the estate’s ability to compel turnover of property that the estate owns, even from the Government, or to pursue claims owed to the estate. *See United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983).

While such an eventuality may have been unanticipated at the time when restitution was ordered, when a person who is owed restitution files for bankruptcy, the entitlement to any restitution is property of the bankruptcy estate. As such, the restitution award may be pursued by the Trustee just like any other asset, even if this results in the restitution being paid to the victim’s creditors, rather than directly to the crime victim. *See e.g.*, *In re Seymour*, 285 B.R. 57 (Bankr. N.D. Ga. 2002) (siding with the chapter 7 trustee and disallowing exemption claimed by debtor in restitution awarded where contractor had defrauded debtor out of money paid for construction contract). However, the trustee’s ability to pursue this asset is also subject to any

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³ In fraudulent conveyance cases, it is possible for the government to pursue its own state law fraudulent conveyance theory. *See U.S. v. Doyle*, 276 F.Supp.2d 415, 429 (W.D. Pa. 2003). But it is unlikely that the government would choose to do so when a bankruptcy trustee already has expertise in pursuing such conveyances.
proper claim of exemption claim asserted by the debtor. Exempt property may not be recovered by the trustee.

Forty states, the District of Columbia, and the federal exemptions scheme provide a specific exemption for compensation payable to crime victims. The federal exemption for reparations for crime victims is found in § 522(d)(11)(A) and many state's crime victim exemption statutes are nearly identical to the language used in the federal provision. While the contours of the specific state exemptions will vary by jurisdiction. There is a split among the cases regarding the scope of the federal exemption.

Some courts hold that the federal exemption only protects amounts intended as compensation for losses associated with a debtor’s personal, bodily injury or the loss of a future source of support or income from a family member who is a victim of violent crime. See e.g., Seymour, 285 B.R. at 59; In re Carelock, No. 05-51431-JDW, 2006 WL 3708688 (Bankr. S.D. Ga. Jan. 13, 2006). As a result, restitution for most financial crimes, or other loss of property, will generally not be exempt under the federal exemption statute.

However, at least one court has held that this exemption is broader, protecting all criminal restitution awards. In re Soares, 471 B.R. 20 (Bankr. D. Mass. 2012). In this Court's view, the plain meaning of the statute was clear so the Court found it unnecessary to consider the legislative history or the statutory structure.

Of these competing views, the more limited view, holding that the exemption only protects amounts awarded for personal injuries is the better one. It is more consistent with the legislative history regarding the provision, which states, in part, that the section "is designed to cover payments in compensation of actual bodily injury, such as the loss of a limb, and is not intended to include the attendant costs that accompany such a loss," including medical care and other costs, which are often included in the restitution analysis. And it is also more consistent with general bankruptcy principles: If the crime had never happened and the property had never been lost, stolen, or destroyed, the trustee would have been able to administer it. So a restitution award, intending to put the debtor in the position she was before the crime, should not keep that property from the trustee. This reasoning is consistent with how courts have parsed exemptions in other contexts, such as employment discrimination claims, differentiating the treatment of personal injuries that could not be recovered by the trustee from monetary or economic losses that may be recoverable. See In re Webb, 210 B.R. 266, 273(Bankr. E.D. Va.), aff’d, 214 B.R. 553 (E.D. Va. 1997); In re Hurst, 239 B.R. 89 (Bankr. D. Md. 1999).

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Conclusion

For bankruptcy trustees, restitution payments present the challenge of harmonizing the statutory goals of bankruptcy with the goals of the criminal restitution scheme, which can result in complex legal puzzles. This is particularly challenging as the case law is often sparse. However, both in cases where restitution payments are owed to a debtor and in cases where a debtor has made restitution payments, there may be opportunities for trustees to recover assets for the benefit of the bankruptcy estate and its creditors.

About the Author

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Chapter 3B—When Criminal and Bankruptcy Law Meet

When Criminal and Bankruptcy Law Meet

1. Criminal conduct and exceptions to the bankruptcy discharge

Civil fines and penalties are not dischargeable in chapter 7 bankruptcy but most of these liabilities can be discharged in a Chapter 13 bankruptcy.

§523(a)(7)* excluded from the Chapter 7 discharge an obligation “to the extend such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a government unit, and is not compensation for actual pecuniary loss, other than a tax penalty- . . .”

§1328(a)(2) provides a list of subsections from §523(a) which are also excepted from discharge in Chapter 13. However, this section does not incorporate the §523(a)(7) exclusion from discharge. Therefore, these civil liabilities are dischargeable in Chapter 13.

Practice tip: It is not uncommon for debtor to file a Chapter 13 with the primary purpose of recovering their driver’s license which has been suspended for nonpayment of civil fines or penalties.

Liabilities for criminal conduct are not dischargeable in Chapter 7 or Chapter 13 bankruptcy.

Additionally, in Chapter 7, under §523(a)(13), a debt is not dischargeable if it is “for payment of an order of restitution issued under title 18, Untied States Code.”

In Chapter 13, under §1328(a)(3) debts are excepted from discharge if it is “for restitution, or a criminal fine, included in a sentence on the debtor’s conviction of a crime; . . .”

Practice tip: A debtor may consider filing a Chapter 7 bankruptcy to eliminate the debt which is dischargeable, and then file a Chapter 13 to pay the nondischargeable debt over a 3 to 5 year term with payments they can afford. The debtor must be aware that they will likely be charged the postpetition interest on the nondischargeable debt after the Chapter 13 bankruptcy has completed.

Other exceptions to discharge under §523(a) which may arise from criminal conduct include:

§523(a)(1)(C) excludes from discharge any tax obligation “with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax.”

§523(a)(2) excludes from discharge any debt “for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by –

(A) False pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition

(* Unless otherwise noted, all statutory references are to Title 11 of the United States Code.)
(B) Use of a statement in writing –
   (i) that is materially false;
   (ii) respecting the debtor’s or an insider’s financial condition;
   (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
   (iv) that the debtor caused to be made or published with intent to deceive; . . .”

§523(a)(3) excludes debt from discharge if the debtor fails to list or schedule the obligation which may be nondischargeable under §523(a)(2) Fraud; §523(a)(4) Fraud while acting as a fiduciary; and §523(a)(6) Willful and malicious injury. This exclusion is not applicable if the creditor had notice or actual knowledge of the bankruptcy filing within time to oppose the discharge.

§523(a)(4) excludes from discharge any debt “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;”

§523(a)(6) excludes from discharge any debt “for willful and malicious injury by the debtor to another entity or to the property of another entity;”

§523(a)(9) excludes from discharge any debt “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;”

§523(a)(11) excludes from discharge any debt “provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;”

523(a)(17) excludes from discharge any debt “for a fee imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of any assertion of poverty by the debtor under section (b) or (f)(2) of section 1915 of title 18 (or a similar non-Federal law), or the debtor’s status as a prisoner . . .”

523(a)(19) excludes from discharge various violation under Federal security laws.

The above exceptions to discharge apply in all Chapter 7 bankruptcy cases. Under the 2005 revision to the bankruptcy code, many of these exceptions to discharge have been extended to Chapter 13 cases.

Other exceptions to discharge in Chapter 13 under §1328(a) which may arise from criminal conduct include:

§1328(a)(2) incorporates the exceptions to discharge provided in §523(a)(2) Fraud, (3) Failure to list certain nondischargeable claims, (4) Fraud while acting as a fiduciary; and (9) Death or injury cause by an intoxicated driver. These debts are also not dischargeable in a Chapter 13 bankruptcy.
§1328(a)(4) excludes from discharge any debt “for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual.”

Practice tips: The Chapter 7 §523(a)(6) exception excludes from discharge willful and malicious injury by the debtor. §1328(a)(4) excludes willful or malicious injury. Arguably, the burden to exclude this type of debt may be less in Chapter 13 than in Chapter 7.

Action needed to determine dischargeability.

Most of the debts which are excluded from discharge in §523(a) and §1328(a) require no action by a creditor for the debt to be excepted from discharge. However, in Chapter 7 or 13, a creditor must take action to exclude debts from discharge under §523(a)(2), (a)(4), and (a)(6). If a creditor fails to timely object to the discharge through an adversary proceeding, these types of debts will be discharged.

2. Revocation of Discharge under §727

- Destruction or concealing property within a year prior to the bankruptcy filing or after the filing occurs.

§727(a)(2) states a discharge shall be entered unless “the debtor, with intent to hinder, delay or defraud a creditor or an officer of the estate charges with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or permitted to be transferred, removed, destroyed, mutilated, or concealed –

(A) property of the debtor, within one year before the date of the filing of the petition;
(B) property of the estate, after the date of the filing of the petition;”

- Destruction or failure to preserve documents/records.

§727(a)(3) states a discharge shall be entered unless “the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtors’ financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all the circumstances of the case;”

- Debtor’s false testimony

§727(a)(4) states a discharge shall be entered unless “the debtor knowingly and fraudulently, in or in connection with the case –

(A) made a false oath or account;
(B) presented or used a false claim;
(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or
(D) withheld from an officer of the estate entitled to possession under this title, any recorded
information, including books, documents, records, and papers, relating to the debtor’s property
or financial affairs;”

- Debtor’s inability to account for loss of assets

§727(a)(5) states a discharge shall be entered unless “the debtor has failed to explain satisfactorily,
before determination of denial of discharge under this paragraph, any loss of assets or deficiency of
assets to meet the debtor’s liabilities;”

- Debtor’s failure to testify

§727(a)(6) states a discharge shall be entered unless “the debtor has refused, in the case –

(A) to obey any lawful order of the court, other than an order to respond to a material question or
to testify;
(B) on the ground of privilege against self-incrimination, to respond to material question approved
by the court or to testify, after the debtor has been granted immunity with respect to the
matter concerning with such privilege was invoked; or
(C) on the ground other than the properly invoked privilege against self-incrimination, to respond to
a material question approved by the court or to testify;”

3. Bankruptcy Crimes

18 USC §152. Concealment of assets; false oaths and claims; bribery

A person who—

(1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of
the court charged with the control or custody of property, or, in connection with a case under title
11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;

(2) knowingly and fraudulently makes a false oath or account in or in relation to any case under
title 11;

(3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement
under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case
under title 11;

(4) knowingly and fraudulently presents any false claim for proof against the estate of a debtor,
or uses any such claim in any case under title 11, in a personal capacity or as or through an agent,
proxy, or attorney;

(5) knowingly and fraudulently receives any material amount of property from a debtor after the
filing of a case under title 11, with intent to defeat the provisions of title 11;
(6) knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11;

(7) in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;

(8) after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor; or

(9) after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court or a United States Trustee entitled to its possession, any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor,

shall be fined under this title, imprisoned not more than 5 years, or both.

18 USC §153. Embezzlement against estate

(a) Offense.—A person described in subsection (b) who knowingly and fraudulently appropriates to the person's own use, embezzles, spends, or transfers any property or secretes or destroys any document belonging to the estate of a debtor shall be fined under this title, imprisoned not more than 5 years, or both.

(b) Person to Whom Section Applies.—A person described in this subsection is one who has access to property or documents belonging to an estate by virtue of the person's participation in the administration of the estate as a trustee, custodian, marshal, attorney, or other officer of the court or as an agent, employee, or other person engaged by such an officer to perform a service with respect to the estate.

18 USC §154. Adverse interest and conduct of officers

A person who, being a custodian, trustee, marshal, or other officer of the court—

(1) knowingly purchases, directly or indirectly, any property of the estate of which the person is such an officer in a case under title 11;

(2) knowingly refuses to permit a reasonable opportunity for the inspection by parties in interest of the documents and accounts relating to the affairs of estates in the person's charge by parties when directed by the court to do so; or
(3) knowingly refuses to permit a reasonable opportunity for the inspection by the United States Trustee of the documents and accounts relating to the affairs of an estate in the person's charge, shall be fined under this title and shall forfeit the person's office, which shall thereupon become vacant.

18 USC §155. Fee agreements in cases under title 11 and receiverships

Whoever, being a party in interest, whether as a debtor, creditor, receiver, trustee or representative of any of them, or attorney for any such party in interest, in any receivership or case under title 11 in any United States court or under its supervision, knowingly and fraudulently enters into any agreement, express or implied, with another such party in interest or attorney for another such party in interest, for the purpose of fixing the fees or other compensation to be paid to any party in interest or to any attorney for any party in interest for services rendered in connection therewith, from the assets of the estate, shall be fined under this title or imprisoned not more than one year, or both.

18 USC §156. Knowing disregard of bankruptcy law or rule

(a) Definitions.—In this section—

(1) the term “bankruptcy petition preparer” means a person, other than the debtor's attorney or an employee of such an attorney, who prepares for compensation a document for filing; and

(2) the term “document for filing” means a petition or any other document prepared for filing by a debtor in a United States bankruptcy court or a United States district court in connection with a case under title 11.

(b) Offense.—If a bankruptcy case or related proceeding is dismissed because of a knowing attempt by a bankruptcy petition preparer in any manner to disregard the requirements of title 11, United States Code, or the Federal Rules of Bankruptcy Procedure, the bankruptcy petition preparer shall be fined under this title, imprisoned not more than 1 year, or both.

18 USC §157. Bankruptcy fraud

A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so—

(1) files a petition under title 11, including a fraudulent involuntary petition under section 303 of such title;

(2) files a document in a proceeding under title 11; or

(3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title, shall be fined under this title, imprisoned not more than 5 years, or both.
Chapter 4

Ethical Issues Arising in Bankruptcy

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Hypothetical #1 - Requirement of Competence

You are representing the plaintiff in an employment law case. You are meeting with your client to prepare for depositions. Your client confides in you that, after she was terminated from her job, she had a really hard time paying her bills. In fact, she got so far behind that her mortgage company has put her house into foreclosure. Even though she just started a new job a month ago, she can’t pay the delinquent amount due, and the foreclosure sale is scheduled for next week. The house has a lot of equity in it, and she would hate to lose it. She heard from her friend that a bankruptcy can stop foreclosure and that she can save her house. She asks if you can help her file a bankruptcy.

Should you do it?

RULE 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
Hypothetical #2 – Concealing Assets

You are representing a defendant in a criminal case who has been accused of assault. The defendant is concerned that, if he is convicted, he will be required to pay restitution to the alleged victim. The defendant is well off, having received a nice inheritance from his parents, and has many assets. He asks you if it would be okay to give his mother’s jewelry collection to his sister, so that it won’t be seized to pay any judgment and won’t leave the family. He would also like to put his car in his best friend’s name, and his stocks into the name of his brother, for each to hold for him until after he is acquitted. He is thinking about filing bankruptcy, and if he does that, he does not want to disclose these assets as belonging to him in his bankruptcy case.

Can you advise him?

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(d) Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding Oregon’s marijuana-related laws. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy.

11 U.S. Code § 521 - Debtor’s duties

(a) 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;

(iii) a statement of the debtor’s financial affairs and, if section 342(b) applies, a certificate—

(I) of an attorney whose name is indicated on the petition as the attorney for the debtor, or a bankruptcy petition preparer signing the petition under section 110(b)(1), indicating that such attorney or the bankruptcy petition preparer delivered to the debtor the notice required by section 342(b); or

(II) if no attorney is so indicated, and no bankruptcy petition preparer signed the petition, of the debtor that such notice was received and read by the debtor;

(iv) copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor;

(v) a statement of the amount of monthly net income, itemized to show how the amount is calculated; and

(vi) a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition;

* * *

11 U.S. Code § 727 - Discharge

(a) The court shall grant the debtor a discharge, unless—

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor’s financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case—
(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor’s property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor’s liabilities;

(6) the debtor has refused, in the case—

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within 8 years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least—

(A) 100 percent of the allowed unsecured claims in such case; or

(B)

(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor’s best effort;

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter;
after filing the petition, the debtor failed to complete an instructional course concerning personal financial management described in section 111, except that this paragraph shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional courses under this section (The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in this paragraph shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter.); or

the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is reasonable cause to believe that—

(A) section 522(q)(1) may be applicable to the debtor; and

(B) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

(c)

(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if—

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee;

(3) the debtor committed an act specified in subsection (a)(6) of this section; or

(4) the debtor has failed to explain satisfactorily—

(A) a material misstatement in an audit referred to in section 586(f) of title 28; or
Chapter 4—Ethical Issues Arising in Bankruptcy

(B) a failure to make available for inspection all necessary accounts, papers, documents, financial records, files, and all other papers, things, or property belonging to the debtor that are requested for an audit referred to in section 586(f) of title 28.

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge—

(1) under subsection (d)(1) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of—

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

18 U.S. Code § 152 - Concealment of assets; false oaths and claims; bribery

A person who—

(1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;

(2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;

(3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;

(4) knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney;

(5) knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11;

(6) knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11;

(7) in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;

(8) after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor; or
(9) after the filing of a case under title 11, knowingly and fraudulently withholds from a
custodian, trustee, marshal, or other officer of the court or a United States Trustee entitled to
its possession, any recorded information (including books, documents, records, and papers)
relating to the property or financial affairs of a debtor,

shall be fined under this title, imprisoned not more than 5 years, or both.
Hypothetical #3 – Disclosure Requirements

You represent a plaintiff, a medical group with a specialty practice, in its antitrust lawsuit against the local hospital. The specialist doctors have accused the local hospital of requiring its own doctors to refer patients to the hospital’s affiliated medical practices, even though the specialists’ unaffiliated facility would be a better choice for the patients.

When you took the antitrust case, you had to and did obtain appropriate conflict waivers. One of your law partners provides legal advice to the hospital regarding real estate leases to unrelated laboratory facilities on the hospital campus.

The antitrust case is in federal court and pretty far along—the pretrial order is due in a couple of weeks. In the meantime, however, the medical practice has been having financial problems. The medical practice has decided to file chapter 11 to reorganize and term out its debt while it waits to recover money from the hospital when it wins your lawsuit. The medical practice hired a lawyer skilled in chapter 11 cases to handle the bankruptcy. But, the medical practice wants to have you continue to represent it in the antitrust case.

Should you do it? What extra steps are involved now that your client is in chapter 11?

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or

(3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

(4) each affected client gives informed consent, confirmed in writing.
11 U.S. Code § 327 - Employment of professional persons

(a) Except as otherwise provided in this section, the trustee, with the court’s approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee’s duties under this title.

(b) If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.

(c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person’s employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e) The trustee, with the court’s approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

(f) The trustee may not employ a person that has served as an examiner in the case.


(a) Application for and Order of Employment. An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to §327, §1103, or §1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant’s knowledge, all of the person’s connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person’s connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

(b) Services Rendered by Member or Associate of Firm of Attorneys or Accountants. If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation, or individual may act as attorney or accountant so employed, without further order of the court.
Federal Rule of Bankruptcy Procedure 2016. Compensation for Services Rendered and Reimbursement of Expenses

(a) Application for Compensation or Reimbursement. An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application.

(b) Disclosure of Compensation Paid or Promised to Attorney for Debtor. Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 14 days after the order for relief, or at another time as the court may direct, the statement required by §329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed.

(c) Disclosure of Compensation Paid or Promised to Bankruptcy Petition Preparer. Before a petition is filed, every bankruptcy petition preparer for a debtor shall deliver to the debtor, the declaration under penalty of perjury required by §110(h)(2). The declaration shall disclose any fee, and the source of any fee, received from or on behalf of the debtor within 12 months of the filing of the case and all unpaid fees charged to the debtor. The declaration shall also describe the services performed and documents prepared or caused to be prepared by the bankruptcy petition preparer. The declaration shall be filed with the petition. The petition preparer shall file a supplemental statement within 14 days after any payment or agreement not previously disclosed.
Hypothetical #4 – Representing Multiple Creditors

You represent a creditor, an excavator, in its claim for payment against a general contractor. Your client likes the work you’ve been doing. The excavator refers you to several of his buddies, who are a pipe supplier, a flooring subcontractor, and a painter, who are also owed money by the general contractor. After obtaining appropriate conflict waivers, you have brought creditor claims on behalf of all of these clients against the general contractor. At the time you took on all the clients, you thought the general contractor would be able to pay all of the claims. You have just learned that the general contractor has filed bankruptcy, and now you are concerned there might not be enough money to pay all your clients.

Can you continue to represent all of these claimants?

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(d) Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding Oregon’s marijuana-related laws. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy.

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or

(3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.
(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2. the representation is not prohibited by law;
3. the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
4. each affected client gives informed consent, confirmed in writing.

**BUT: Oregon Rule of Professional Conduct (RPC) 1.7 does not apply when a conflict is only of a general economic or business nature. See American Bar Association (ABA) Model RPC 1.7 comment [6]. (Oregon has not officially adopted the ABA Model RPC comments, but it has not rejected those comments, either).**

**Identifying Conflicts of Interest: Directly Adverse**

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client’s informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer’s ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client’s case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

**Federal Rule of Bankruptcy Procedure 2019. Disclosure Regarding Creditors and Equity Security Holders in Chapter 9 and Chapter 11 Cases**

(a) Definitions. In this rule the following terms have the meanings indicated:

1. “Disclosable economic interest” means any claim, interest, pledge, lien, option, participation, derivative instrument, or any other right or derivative right granting the holder an economic interest that is affected by the value, acquisition, or disposition of a claim or interest.
2. “Represent” or “represents” means to take a position before the court or to solicit votes regarding the confirmation of a plan on behalf of another.

(b) Disclosure by Groups, Committees, and Entities.
(1) In a chapter 9 or 11 case, a verified statement setting forth the information specified in subdivision (c) of this rule shall be filed by every group or committee that consists of or represents, and every entity that represents, multiple creditors or equity security holders that are (A) acting in concert to advance their common interests, and (B) not composed entirely of affiliates or insiders of one another.

(2) Unless the court orders otherwise, an entity is not required to file the verified statement described in paragraph (1) of this subdivision solely because of its status as:

(A) an indenture trustee;

(B) an agent for one or more other entities under an agreement for the extension of credit;

(C) a class action representative; or

(D) a governmental unit that is not a person.

(c) Information Required. The verified statement shall include:

(1) the pertinent facts and circumstances concerning:

(A) with respect to a group or committee, other than a committee appointed under § 1102 or § 1114 of the Code, the formation of the group or committee, including the name of each entity at whose instance the group or committee was formed or for whom the group or committee has agreed to act; or

(B) with respect to an entity, the employment of the entity, including the name of each creditor or equity security holder at whose instance the employment was arranged;

(2) if not disclosed under subdivision (c)(1), with respect to an entity, and with respect to each member of a group or committee:

(A) name and address;

(B) the nature and amount of each disclosable economic interest held in relation to the debtor as of the date the entity was employed or the group or committee was formed; and

(C) with respect to each member of a group or committee that claims to represent any entity in addition to the members of the group or committee, other than a committee appointed under § 1102 or § 1114 of the Code, the date of acquisition by quarter and year of each disclosable economic interest, unless acquired more than one year before the petition was filed;

(3) if not disclosed under subdivision (c)(1) or (c)(2), with respect to each creditor or equity security holder represented by an entity, group, or committee, other than a committee appointed under § 1102 or § 1114 of the Code:

(A) name and address; and
(B) the nature and amount of each disclosable economic interest held in relation to the
debror as of the date of the statement; and

(4) a copy of the instrument, if any, authorizing the entity, group, or committee to act on behalf
of creditors or equity security holders.

(d) Supplemental Statements. If any fact disclosed in its most recently filed statement has changed
materially, an entity, group, or committee shall file a verified supplemental statement whenever it takes
a position before the court or solicits votes on the confirmation of a plan. The supplemental statement
shall set forth the material changes in the facts required by subdivision (c) to be disclosed.

(e) Determination of Failure to Comply; Sanctions.

(1) On motion of any party in interest, or on its own motion, the court may determine whether
there has been a failure to comply with any provision of this rule.

(2) If the court finds such a failure to comply, it may:

(A) refuse to permit the entity, group, or committee to be heard or to intervene in the
case;

(B) hold invalid any authority, acceptance, rejection, or objection given, procured, or
received by the entity, group, or committee; or

(C) grant other appropriate relief.