

**INTER AMERICAN UNIVERSITY
SCHOOL OF LAW**

**BANKRUPTCY LAW AND
PRACTICE**

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I. INTRODUCTION

– Bankruptcy Law Topic Materials:

Codification of Bankruptcy Law and Procedure:

- a. **Title 28** of US Code
(Jurisdiction, Venue, and court Administration Provisions)

28 USC §§

151 - 156 (Bankruptcy Courts and Judges)

157 (Procedures)

158 (Appeals)

1334 (Jurisdiction)

1408- 1410, 1412 (Venue)

1411 (Jury trials)

1452 (Removal)

1930 (Filing Fees)

2075 (Rule making power)

- b. **Title 11** of US Code
(The Bankruptcy Code of 1978 as amended.)

<http://uscode.law.cornell.edu/uscode/search/display.html?terms=1325&url=/uscode/html/uscode11/>

- c. Bankruptcy Rules (FRBP)
enacted by the US Supreme Court in 1983, periodically amended)

- d. Local Bankruptcy Rules (Oct. 2007)
<http://www.prb.uscourts.gov/PDF/Rules.pdf>

- e. Local Rules (USDC) (See *LBR 1001-1(b)*)

- f. Reported Case law:

-Westlaw; Lexis

-Internet (various sites e.g. <http://pacer.psc.uscourts.gov/pubaccess.html>)

-Bankruptcy Reporter (BR) West Publishing Co.

-Colliers Bankruptcy Cases (CBC, CBC 2d)

g. Other services and sources:

-PACER (USBC, PR) electronic dockets & documents
(<http://ecf.prb.uscourts.gov/>)

-Internet sites on Bankruptcy Law & Practice:

US Bankruptcy Court - District of Puerto Rico: <http://www.prb.uscourts.gov/>

American Bankruptcy Institute: <http://www.abiworld.org/>

The Bankruptcy Lawfinder: (fka agin.com/lawfind) <http://www.lawtrove.com/>

Bankruptcy Library: <http://bankrupt.com/>

National Association of
Bankruptcy Trustees: <http://www.nabt.com/>

Our Two Cents - A Debtor-Creditor <http://www.stinson.com/2cents/>

Bankruptcy Code:

<http://www.abiworld.org/legis/Title11.pdf>

<http://www.abiworld.org/wiki/index.html>

<http://www.doney.net/bkcode/index.htm>

<http://awhfy.com/> Mini-Codes – \$22.00

h. Reference Books and Authorities:

-Collier on Bankruptcy (15th Ed., Matthew Bender)

-Norton Bankruptcy Law & Practice 2d (Clark, Boardman & Callaghan)

-AmJur2d – Bankruptcy

-Treister, Fundamentals of Bankruptcy Law [WWW.ALI-ABA.ORG] [1-800-253-6397]

-Sepinuck & Rusch, Problems and Materials on Bankruptcy Law and Practice
(2007 - Thomson-West)

I. References and Materials on 2005 Amendments

1. [http://thomas.loc.gov/cgi-bin/query/z?c109:S.256.RH:"](http://thomas.loc.gov/cgi-bin/query/z?c109:S.256.RH:)
S. 256 = Text of Law
<http://thomas.loc.gov/cgi-bin/query/bdquery>: bankruptcy abuse
12 . Bankruptcy Abuse Prevention and Consumer Protection Act of 2005
(Reported in House)[S.256.RH]
13 . Katrina Emergency Relief Act of 2005 (Introduced in Senate)[S.1637.IS]
2. <http://www.doney.net/bkcode/index.htm>
Bankruptcy Code as amended – with and without red-lining
3. <http://abiworld.net/bankbill/>

Comprehensive source of hyperlinks to official and academic materials
4. <http://nacba.org/home.asp>

National Association of Consumer Bankruptcy Attorneys
5. <http://awhfy.com/>

Special Redlined Mini-Code (including BAPCPA 2005) \$22.00
6. <http://www.lexis.com/>

2005 Supplement to COLLIER PORTABLE PAMPHLET
includes: Section-by-Section Analysis by ALAN N. RESNICK, HENRY J. SOMMER

errata: cross out §523(a)(15)(B) at p. 187
7. Thompson/West
2005 Bankruptcy Reform Legislation with Analysis by Hon. W. Houston Brown and
Lawrence R Ahern III

I. INTRODUCTION – Bankruptcy Law

- 1 The Non-Bankruptcy Scenario
- 2 The Bankruptcy Alternative

II. THE BANKRUPTCY SYSTEM

(Overview of Bankruptcy Law and Practice)

- 1 Historical Highlights

The Old Act (Pre 1978)

The administrative involvement of courts

Bifurcated jurisdiction (Plenary vs. Summary)

- 2 The 1978 Reform

The 1978 Bankruptcy Courts

The Pervasive Jurisdiction

- 3 Constitutional set back

(The Marathon Case) (Repealed §1471©) prescribed: Bk.Cts. shall exercise...

Northern Pipeline Construction vs. Marathon Pipeline Co., 458 U.S. 50 (1982)

- 4 The Emergency Rule System (1982 - 1984)

- 5 Present Law:

1978 Bk Code (Title 11)

1984 Judicial Code (Title 28)

vg. §1334 jurisdiction (USDC)

§157 referral system (USBC)

§158 appeals

2005 Amendments (signed into law on April 20, 2005 --effective as to cases filed on or after Oct. 17,2005)

Known as
2005 "BAPCPA"
"Bankruptcy Abuse Prevention and Consumer Protection Act of 2005"
(formerly, "Bankruptcy Reform Act of 1998")

Future of BAPCPA?

See recent views in: following link

http://www.geocities.com/emunoz777/Postura_de_los_Candidatos_Democratas_sobre_BAPCPA.ppt
(from www.emunoz.net)

Summary of applicable versions of law:

STATUTE or AMENDMENTS	EFFECTIVE AS TO CASES FILED:
The 1898 Act	Up to 10/01/1979
The 1978 Code	AFTER 10/01/1979
BAFJA'84	>July 10, 1984
BRA-94	>Oct.22, 1994
2005 BAPCPA	>Oct.17, 2005

BAPCPA - 2005 changes affect cases filed on or after 10/17/2005.
In the district of PR, these cases begin with 05-12858-ESL.

III. THE BANKRUPTCY COURT AND ITS JURISDICTION

A. **Jurisdiction Vested** - U.S. District Court's jurisdiction:

Jurisdiction over **BANKRUPTCY CASES**,

28 USC 1334(a) provides that USDC shall have "ORIGINAL AND EXCLUSIVE" jurisdiction over BANKRUPTCY CASES:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

a. Concept and types of BANKRUPTCY CASES:

Chapter 7 Case (Liquidation)

Chapter 9 Case (Municipalities)

Chapter 11 Case (Reorganization)

Chapter 12 Case
(Farmer Reorganization)

Chapter 13 Case
(Rehabilitation of Individual with Regular Income)

Jurisdiction over civil proceedings

28 USC 1334(b) provides that USDC shall have "ORIGINAL BUT NOT EXCLUSIVE" jurisdiction over CIVIL PROCEEDINGS in bankruptcy:

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

In Rem Jurisdiction, **exclusive** over estate's and debtor's property

28 USC 1334(e)

(e) (1) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

BAPCPA - 2005 change

Under new 28 USC §1334(e)(2), district courts are given exclusive jurisdiction over matters involving 11 USC 327 and rules relating to disclosure requirements in connection with the employment of attorneys, accountants, and other professionals in bankruptcy cases.

In Personam Jurisdiction.

(Bankruptcy Rule 7004)

Nationwide service of process.

Minimum contacts rule applicable? Uncertain. See Treister, *supra*, §2.01(f) for different views and split in authorities.

B. Jurisdiction Exercised - The U. S. Bankruptcy Court

1. The referral system

a. The concept of the Bankruptcy Unit (28 USC 151)

b. Implementation (28 USC 157)

Referral of Cases

Referral of Proceedings

c. Types of *civil proceedings*: (*core/non-core*)

CORE PROC. arising under title 11

arising in Cases under title 11,

NON-CORE PROC. related to cases under
title 11.

2. Implementation of referral

A. With respect to Cases and Core Proceedings

the bankruptcy judge may "HEAR & DETERMINE" [§157(b)1]

28 usc 157(b) (1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

B. With respect to Non Core Proceedings

the bankruptcy judge may "HEAR & SUBMIT PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW" [§157(c)(1)]

28 usc 157(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

d. With respect to Non Core Proceedings in which the parties' consent,

the bankruptcy judge may "HEAR & DETERMINE" [§157(c)2]

28 usc §157((c)(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to

hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(1) How is consent given:

(a) Rules require express consent:

Rules 7008, 7012
(statement of consent in pleadings averring non-core actions)

(b) Implied consent?

In Re: El San Juan Hotel, Corp., 149 BR 263 (DC PR, JAF-1992)(implicit consent found in case litigated pre-current Rule 7012)

But see: 1987 Advisory Committee Note to Rules 7008, 7012 (statement of consent in pleadings averring non-core actions):

“... Failure to include the statement of consent does not constitute consent. ...”

3. CORE/NON-CORE

Definition and distinctions:

The statute provides no definition. §157(c)(1) refers only to "a proceeding that is not a core proceeding but that is otherwise related to a case under Title 11."

The existence of state law issues does not necessarily control the distinction between core and non-core. §157(b)(3)

Clearly identified as non-core:

(1) personal injury and wrongful death claims [expressly excluded by statute. vg.

§157(b)(2)(B) & §157(b)(2)(O)]

- (2) “the *Marathon* type of lawsuit ... described as
an *in personam* cause of action,
not created by the bankruptcy code,
that the debtor possess at the time of the petition, and
that thus became part of the estate under bankruptcy code 541.”

Treister, *supra*, §2.01(d)(2)(B)

- (3) “suits between third parties to which neither the estate or the debtor is a party ...
that indirectly affects the estate ...

[*e.g.*] a suit by a creditor against a guarantor of the debtor’s obligation.”

Treister, *supra*, §2.01(d)(2)(B). Citing *The Bible Speaks v. Dovydenas*, 81 BR 750, 756 (D.Mass. 1988), *aff’d in part, rev’d in part on other grounds*, 869 F.2d 628 (1st Cir. 1989), *cert. denied* 493 US 816 (1989) a noted author has stated: “... at least arguably, everything within the bankruptcy jurisdiction other than [the 3] limited types of matters [described above] is a core proceeding. *Id.*

§ 524 (g) gives authority to bankruptcy courts, in some circumstances, to enjoin actions against a nondebtor "alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability . . . arises by reason of . . . the third party's provision of insurance to the debtor or a related party," and to channel those claims to a trust for payments to asbestos claimants.

In reviewing the scope of these type of orders, the Supreme Court has stated:

"[Federal courts] are courts with authority, when parties are brought before them in accordance with the requirements [*2206] of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not [**111] be assailed collaterally")

*** [This type of] orders are not any the less preclusive because the attack is on the Bankruptcy Court's conformity with its subject-matter jurisdiction, for '[e]ven subject-matter jurisdiction . . . may not be attacked collaterally' "

Travelers Indem. Co. v. Bailey,
129 S. Ct. 2195, *174 L. Ed. 2d 99, **2009 U.S. LEXIS 4537,
June 18, 2009

-- Examples of core proceedings
(28 USC 157(b)(2))

A. Matters Concerning the Administration of the Estate

B. Allowance and Estimation of Claims against
the Estate, exemptions over property.

(Does not include liquidation or estimation of personal injury tort or
wrongful death claims).

C. Counterclaims by the Estate against persons filing claims.

D. Orders with respect to obtaining credit.

E. Turnover of property.

F. Avoidance and recovery of preferences.

G. Automatic Stay Litigation.

H. Fraudulent conveyances.

I. Dischargeability of debts.

J. Objections to discharge.

K. Validity, extent or priority of liens.

L. Confirmation of plans.

M. Use or lease of property.

- N. Orders approving the sale of property (other than property resulting from claims against persons who have not filed claims against the estate)
- O. Other proceedings affecting the liquidation of the assets of the estate, or the adjustment of the debtor-creditor relationship, or the equity security holder relationship
(does not include personal injury tort or wrongful death claims).

4. Case law:

In Re: Arnold Print Works, Inc., 815 F 2d 165 (First Circuit 1987):

The First Circuit Court of Appeals has held that the term "core-proceeding" should be generously construed, suggesting that the category encompassed any litigation that a non-article III judge may constitutionally decide.

[compare with facts in Marathon; pre/post petition distinction]

Granfinanciera S.A. vs. Norberg, 109 S. Ct. 2782 (1989)

Congress cannot deprive litigants of constitutional rights merely by re-labeling pre-existing common law causes of action as core-proceedings. The specific case involved a lawsuit by the trustee to recover and avoid a fraudulent transfer, and the constitutional rights specifically discussed was the right to jury trial.

Cellotex Corp. V. Edwards, 115 Sct 1493, 1499 (1995)

We agree with the views expressed by the Court of Appeals for the Third Circuit in *Pacor, Inc. v. Higgins*, 743 F2d 984 (1984), that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate,"... and that the "related to" language of §1334(b) must be read to give district courts (and bankruptcy courts under §157(a)) jurisdiction over more than simply proceedings involving the property of the debtor or the estate.

Summary of Jurisdictional Safeguards:

- relationship USDC/USBC:
- Jurisdiction §1334
- Power of Referral §157

- Power of Withdrawal §157d
- Power of Review
- Scope of B.Ct Authority

Implementation in PR

LOCAL USDC RULE 77.2
(see next page)

LOCAL USDC RULE 77.2

BANKRUPTCY

(a) Delegated Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and the District Court's Resolution of July 19, 1984, as it may be amended from time to time, the Court refers cases and proceedings in bankruptcy to the Bankruptcy Court of this district. Copies of the Resolution are available at the Clerk's Office or at the court's web site www.prd.uscourts.gov

(b) Local Rules of Bankruptcy Practice

Pursuant to the Federal Rules of Bankruptcy Procedure (FRBP) Rule 9029, the bankruptcy judges of this district are authorized to make such rules of practice and procedure as they may deem appropriate, subject to the requirements of Fed. R. Civ. P. 83, provided that in promulgating the rules governing the admission or eligibility to practice in the Bankruptcy Court, the bankruptcy judges shall require district court admission, except for *pro se* appearances or for appearances pursuant to the student practice rule of this Court.

© Conduct of Jury trial by Bankruptcy Judges

Each bankruptcy judge for the District of Puerto Rico is specially designated to conduct jury trials pursuant to 28 U.S.C. Section 157(e).

(d) Bankruptcy Appeals

All appeals from the Bankruptcy Court are to the First Circuit Bankruptcy Appellate Panel unless a timely election is filed to have an appeal heard by the district court pursuant to 28 U.S.C. § 158(c)(1) and Rule 8001(e) of the Federal Rules of Bankruptcy Procedure. The Clerk shall issue appropriate directives for the electronic transmission of the record on appeal in those cases appealed before the district court. Parties to an appeal shall notify the Bankruptcy Court a judgment concluding an appeal within thirty (30) days of its entry.

Withdrawal of Reference Section 157(d)

A. Discretionary withdrawal

B. Mandatory withdrawal

-interaction between Title 11 and other Federal Statutes regulating Interstate Commerce. §157(d)

- trial stage of personal injury tort, wrongful death claims.
§157(b)(5)

Procedure. R 5011(a)

28 USC 1930(b) (filing fee)

Heard by the District Judge.

Local Bankruptcy Rule 5011-1: the motion is to be filed with the Clerk of the **Bankruptcy** Court.

Contain 10-day response time, after which, the clerk transmits to USDC

Such motion does not automatically stay the proceedings before the Bankruptcy Court (motion for stay should be initially filed in the Bankruptcy Court) Bankruptcy Rule 5011©.

Abstention 28 USC 1334©

Discretionary abstention Section 1334(c)(1)

-interest of justice or comity with state court of state law

Mandatory abstention Section 1334(c)(2)

- (2) timely requested
- (3) non-core based on state law
- (4) no independent ground for federal jurisdiction
- (5) commenced action
- (6) timely adjudication

Personal injury/Wrongful Death Claim excepted.
§157(b)(2)(B) & (b)(5)

Procedure

R 5011(b) (1991)

(Pre '91 amendment)

In Re: Corporación de Servicios Médicos Hosp.,
805 F2d 440 (1st. Cir. 1986)

-1991 amendments to Rule 5011(b)

USBC determination as R9014 contested matter

USDC appellate rev.

-BRA 1994:

US Ct. of Appeals & Supreme Court [appellate rev. of
denials of mandatory abstention]

C. Venue

1. Bankruptcy Cases

Venue provisions

28 USC 1408

1408(1) Debtor's status:

domicile,
residence,
p. place of business,
principal assets,

In Re WPRV-TV, Inc., 102 B.R. 226; 1988 Bankr.
LEXIS 2498

the 180 day rule:

(last 180 days or the longer portion thereof of debtor's
status)

1408(2) Affiliates & Partnership

Transfer of venue

28 USC 1412:
interest of justice
convenience of parties

In Re WPRV-TV, Inc., 102 B.R. 226; 1988 Bankr.
LEXIS 2498

Bankruptcy Rule 1014(a) place of first filing

2. Civil Proceedings

The Basic Rule

- The Bankruptcy Forum
28 USC 1409(a)

- The Exceptions
28 USC 1409(b)

- a. Small Claims = Defendant's residence
Money or property worth less than \$1,100 (or \$16,425 if
consumer)
Or any other non-consumer debt from a non-insider of less
than \$10,950
28 USC 1409(b))
- b. Post Petition Cause of Action
(Applicable non-bankruptcy venue provisions)
28 USC 1409(d)
- c. Trustee as statutory successor of debtor or creditor.
(May choose to sue under applicable non-bankruptcy venue
rules.
28 USC 1409©)
- d. Party suing the estate on a post-petition claim may also choose the
venue under applicable non-bankruptcy law,

28 USC 1409(e)

Transfer of venue 28 USC 1412

No Jurisdictional Impact

D. Removal and Remand

28 USC 1452; BR 9027

28 USC 1446 (General Removal)

1. Requisites

(Pervasive jurisdiction under 28 USC 1334)

2. Limitations

- US Tax Court's Actions

- Actions by governmental unit under police or regulatory power.

3. Procedure for bankruptcy removals

Either party (removal by plaintiff possible)

Removal to US District Court (through referral, to Bankruptcy Court)

Filed with the Bankruptcy Clerk
Rule 9027(a)(1); Rule 9001(1)(3)

Removal to Local Forum (not necessarily the primary bankruptcy forum)

4. Time. Rule 9027(a)(2)-(3)

Pre-petition actions: [the longest of]

90 days from order for relief.

If stayed, 30 days from order lifting stay.

Post-petition actions: [the shorter of]

30 days from receipt of copy of initial pleading “through service or otherwise”

30 days from receipt of summons

5. Other considerations

Notice practice

R. 9011 admonitions.

Filing of Proof of Claims

Things Remembered, Inc. V. Petrarca 116 SCt 494 (1995)
[General Removal and remand of 28 USC 1446 and 1447(b) also applicable to bankruptcy]

6. Remand 28 USC 1452(b); BR 9027

On any equitable ground.

-Procedure before the bankruptcy judge contested matter per R 9014

-Procedure before the district court= Appeal.

-Non-reviewable from USDC 28 USC 1452(b)

**E. APPELLATE JURISDICTION :
BANKRUPTCY APPEALS AND REVIEW**

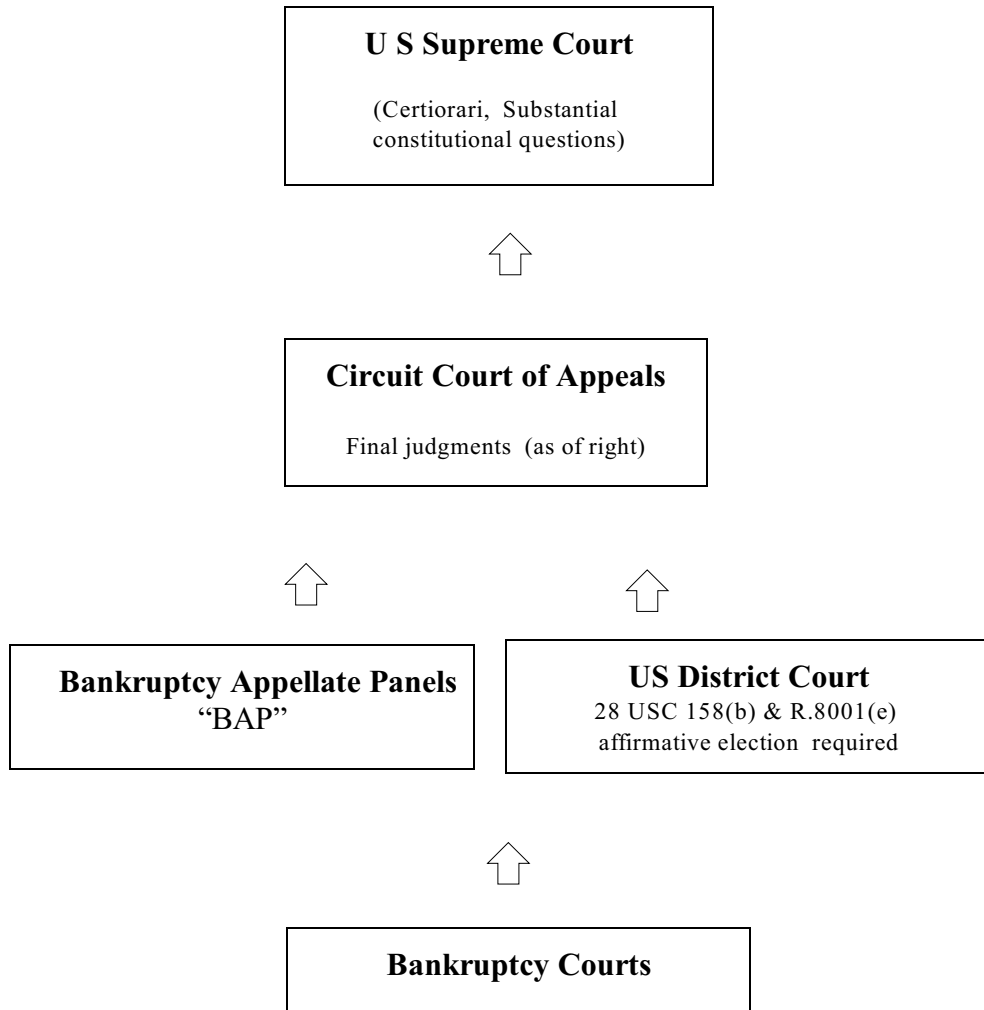
De Novo Review, controlled by 28 USC 157(c)1 & R 9033, not considered appellate review;

Appellate Jurisdiction, controlled by 28 USC 158, Part VIII of Rules (FRBP)

(1) Overview

- (i) Appeals as of right apply to: Core & consenting
Non Core
- (ii) For non-core proceedings: de Novo per FRBP 9033
(unless parties had consented to final determination
by Bk. Judge)

(2) Appeals from bankruptcy decisions – fora, and levels:



(3) Appeals to district court or BAP

Appeals directed to BAP unless timely affirmative election (of USDC)

Appellant: w/ notice of appeal
Appellee: 30 days thereafter

Rule 8001 (e) Election to have appeal heard by district court instead of bankruptcy appellate panel; withdrawal of election.

(1) Separate writing for election.

An election to have an appeal heard by the district court under 28 U.S.C. § 158(c)(1) may be made only by a statement of election contained in a separate writing filed within the time prescribed by 28 U.S.C. § 158(c)(1).

(2) Withdrawal of election.

A request to withdraw the election may be filed only by written stipulation of all the parties to the appeal or their attorneys of record. Upon such a stipulation, the district court may either transfer the appeal to the bankruptcy appellate panel or retain the appeal in the district court

(4) Appeals to district court or BAP

28 USC 158(a):

(a) Final judgments (as of right)

(b) Interlocutory orders re: exclusivity period of §1121 (as of right)

- (c) Interlocutory orders and decrees (by leave)
- (5) Appeals deal with core proceedings: (Non-core are reviewed De Novo per FRBP 9033 unless parties had consented to final determination by Bk. Judge)
- (6) Bankruptcy Appellate Panels
 - (a) Three bankruptcy judges
 - (b) With respect to forum being reviewed: same circuit, different district
- (7) Appeals to Circuit Court of Appeals
Final judgments (as of right)
- (8) The concept of finality of order.

ESTANCIAS LA PONDEROSA DEVELOPMENT CORP. vs. HARRINGTON, 992 F.2d 3 (1st Cir. 1993) Regarding finality the court has stated:

An appellate order entered by a district court sitting in bankruptcy is not appealable to the court of appeals under 28 U.S.C. § 158(d) unless it is "final," i.e., unless it conclusively determines "a discrete dispute within the larger case." See In re G.S.F. Corp., 938 F.2d 1467, 1473 (1st Cir. 1991); Tringali v. Hathaway Mach. Co., 796 F.2d 553, 558 (1st Cir. 1986); In re American Colonial Broadcasting Co., 758 F.2d 794, 801 (1st Cir. 1985); see also In re Saco Local Dev. Corp., 711 F.2d 441, 445-46 (1st Cir. 1983) ("separable dispute over a creditor's claim or priority")

*The Bankruptcy Rules recognize three distinct types of proceedings within a bankruptcy case: adversary proceedings, administrative proceedings, and contested matters.*³

We recognize that "'finality' is [to be] given a flexible interpretation in bankruptcy," G.S.F. Corp., 938 F.2d at 1472-73, where necessary to accommodate concerns unique to the nature of bankruptcy proceedings. See In re Empresas Noroeste, Inc., 806 F.2d 315, 316-17 (1st Cir. 1986) (relaxation of "finality" doctrine appropriate in bankruptcy proceedings only on sufficient showing of "special considerations bankruptcy proceedings deserve").² Nevertheless, a district court remand order in an intermediate appeal from a judgment entered in an adversary proceeding is not final and appealable under section 158(d) of the Judicial Code, see Fed. R. Civ. P. 54(a), (b); Fed. R. Bankr. P. {F.2d 6} 7054(a), 9002, 9014, unless it resolves all procedural and substantive issues necessary to conclude the entire appeal.³

The district court remand order contemplated no "significant further proceedings" before the bankruptcy court; that is, the bankruptcy court's role on remand /--- docketing the late-filed notice of appeal /--- fairly can be characterized as "ministerial." See In re Gould & Eberhardt Gear Mach. Corp., 852 F.2d 26, 29 (1st Cir. 1988)

Specific applications of “Finality Doctrine”:

In Re: Gould & Eberhardt Gear Machinery Corp., 852 F.2d 26 (1st Cir. 1988)
(**final order** reversed by USDC and remanded to Bk.Ct. For “significant further proceedings”, found **non-final** under §158(d) for appeals to Ct. of Appeals)

In Re: Unanue Casal 144 BR 604 (DC PR, JAF 1992),
998 F.2d28 (1st Cir. 1993)

(R.56 Prov.Remedy found final & appealable by USDC, found non-final under §158(d) by 1st Cir. Ct. of Appeals)

(9) time for taking the appeal from Bk.Court - Rule 8002

-extensions; -tolling

-computation:(10 days)

from EOD (regardless of notice R 9022)

-calendar days R 9006

(10) Other considerations:

NOT APPEALABLE:

Remand 28 USC 1452(b) [USDC final review]

Abstention under 28 USC 1334(c)(2)

except as allowed by BRA'94 [denials of mandatory abst. reviewable] (new §1334(d))

(11) Standard of Review ®. 8013):

FINDINGS OF FACT: clearly erroneous

CONCLUSIONS OF LAW: *de novo*

In Re: Health Co. International, Inc., ___ F.3rd___ (1st Cir. 1997) [Case 97-9005, Slip Op. 12-22-97] {same standard of review of Bk. Court by USDC, BAP, or Circuit Courts of Appeals

6. Case Law

- In Re: Caribbean Tubular Corp.**, 813 F 2d 533 (1st Cir. 1987)
In Re: El San Juan Hotel, 809 F 2d 151 (1st Cir. 1987)
In Re: Abdallah, 778 F 2d 75 (1st Cir. 1985)
In Re: American Colonial Broadcasting Corp., 758 F 2d 794 (1st Cir. 1985)
In Re: Plaza de Diego, 911 F 2d 820 (1st Cir. 1990)
In Re: Unanue Casal 144 BR 604 (DC PR, JAF 1992), 998 F.2d28 (1st Cir. 1993)

BAPCPA - 2005 change
Direct Appeals to the Court of Appeals.

Direct Appeals to the Court of Appeals. Are now permitted by Section 158 of title 28; amended to give the court of appeals jurisdiction to hear an appeal from a judgment or order of the bankruptcy court under certain conditions.

1. Required:
 - a. timely CERTIFICATE; and
 - b. authorization by the Court of Appeals
 2. Who makes the CERTIFICATE

(on request of a party or on its own motion)

 - a. the bankruptcy court,
 - b. district court (or bankruptcy appellate panel) where the matter is pending,
- or
- c. all the appellants and appellees acting jointly,
3. Contents of the CERTIFICATE. It must certify that the judgment or order
 - (a) involves a **question of law** as to which there is **no controlling decision** of the court of appeals for that circuit or the Supreme Court, **or** involves a matter of **public importance**;
 - (b) involves a question of law requiring **resolution of conflicting decisions**;

or that

© an immediate appeal from the judgment or order may **materially advance** the progress of the case or proceeding in which the appeal is taken.

EFFECTIVE DECEMBER 1, 2009 (absent contrary Congressional action)

RULE 8001(f) Certification for direct appeal to court of appeals.

(1) Timely appeal required.

A certification of a judgment, order, or decree of a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2) shall not be effective until a timely appeal has been taken in the manner required by subdivisions (a) or (b) of this rule and the notice of appeal has become effective under Rule 8002.

(2) Court where certification made and filed.

A certification that a circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists shall be filed in the court in which a matter is pending for purposes of 28 U.S.C. § 158(d)(2) and this rule. A matter is pending in a bankruptcy court until the docketing, in accordance with Rule 8007(b), of an appeal taken under 28 U.S.C. § 158(a)(1) or (2), or the grant of leave to appeal under 28 U.S.C. § 158(a)(3). A matter is pending in a district court or bankruptcy appellate panel after the docketing, in accordance with Rule 8007(b), of an appeal taken under 28 U.S.C. § 158(a)(1) or (2), or the grant of leave to appeal under 28 U.S.C. § 158(a)(3).

(A) Certification by court on request or court's own initiative.

(i) Before docketing or grant of leave to appeal. Only a bankruptcy court may make a certification on request or on its own initiative while the matter is pending in the bankruptcy court.

(ii) After docketing or grant of leave to appeal. Only the district court or bankruptcy appellate panel involved may make a certification on request of the parties or on its own initiative while the matter is pending in the district court or bankruptcy appellate panel.

(B) Certification by All Appellants and Appellees Acting Jointly. A certification by all the appellants and appellees, if any, acting jointly may be made by filing the appropriate Official Form with the clerk of the court in which the matter is pending. The certification may be accompanied by a short statement of the basis for the certification, which may include the information listed in subdivision (f)(3)© of this rule.

(3) Request for certification; filing; service; contents.

(A) A request for certification shall be filed, within the time specified by 28 U.S.C. § 158(d)(2), with the clerk of the court in which the matter is pending.

(B) Notice of the filing of a request for certification shall be served in the manner required for service of a notice of appeal under Rule 8004.

© A request for certification shall include the following:

(i) the facts necessary to understand the question presented;

(ii) the question itself;

(iii) the relief sought;

(iv) the reasons why the appeal should be allowed and is authorized by statute or rule, including why a circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists; and

(v) an attached copy of the judgment, order, or decree complained of and any related opinion or memorandum.

(D) A party may file a response to a request for certification or a cross request within 10 days after the notice of the request is served, or another time fixed by the court.

(E) Rule 9014 does not govern a request, cross request, or any response. The matter shall be submitted without oral argument unless the court otherwise directs.

(F) A certification of an appeal under 28 U.S.C. § 158(d)(2) shall be made in a separate document served on the parties.

(4) Certification on court's own initiative.

(A) A certification of an appeal on the court's own initiative under 28 U.S.C. § 158(d)(2) shall be made in a separate document served on the parties in the manner required for service of a notice of appeal under Rule 8004. The certification shall be accompanied by an opinion or memorandum that contains the information required by subdivision (f)(3)(C)(i)-(iv) of this rule.

(B) A party may file a supplementary short statement of the basis for certification within 10 days after the certification.

(5) Duties of parties after certification.

A petition for permission to appeal in accordance with F. R. App. P. 5 shall be filed no later than 30 days after a certification has become effective as provided in subdivision (f)(1).

IV. BANKRUPTCY LITIGATION AND PRACTICE

1. Definitions

§ 101
R 9001
R 9002

2. Rules of Construction

· §102: "After notice and a hearing"
means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances
...

authorizes an act without an actual hearing if such notice is given properly and if—

- (I) such a hearing is not requested timely by a party in interest; or
- (ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act;

· Procedural Aspects of notices:
See Rule 9007 and Rule 2002

3. Applicability of Chapters §103

(General organization of Code:)

CHAPTERS OF GENERAL APPLICATION:
(its §§ apply in all type of bankruptcy cases)

Ch. 1 -general provisions
Ch. 3 -Case adm.
Ch. 5 -Creditors, Debtors & Estate Rights and duties

OPERATIVE CHAPTERS:
(its §§ apply only in cases under the respective Chapter)

Ch. 7 -Liquidation
Ch. 9 -Municipal Reorganization

- Ch. 11-Reorganization
- Ch. 12-Family Farmer Reorganization
- Ch. 13-Individual's debt adjustment

4. "All Writs" provision §105

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title ...

Celotex Corp. v. Edwards, 115 SCt 1493 [§105 does not authorize collateral attacks of Bkey. Ct. Orders in other courts, even Art. III courts]

5. Bankruptcy Litigation

- a. Adversary Proc. R.7001
- b. Contested Matters R.9014
- c. Special Procedures
- d. Notice Practice

- a. Adversary proceedings . R.7001

Rule 7001. Scope of Rules of Part VII –

An adversary proceedings (commenced with a complaint) required in proceedings

- (1) to recover money or property,
(except a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002);
- (2) to determine the validity, priority, or extent of a **lien** or other interest in property,
(other than a proceeding under Rule 4003(d));
- (3) to obtain approval pursuant to § 363(h) for the **sale** of both the interest of the estate and of a **co-owner in property**;
- (4) to object to or revoke a **discharge**;
- (5) to **revoke an order of confirmation** of a chapter 11, chapter 12, or chapter 13 plan;
- (6) to determine the **dischargeability** of a debt;
- (7) to obtain an **injunction** or other equitable relief;

-
- (8) to **subordinate** any allowed claim or interest, except when subordination is provided in a chapter 9, 11, 12, or 13 plan;
- (9) to obtain a **declaratory judgment** relating to any of the foregoing; or
- (10) to determine a claim or cause of action **removed** pursuant to 28 U.S.C. § 1452.

b. Contested Matters R.9014

These are matters in a case not otherwise governed by these rules,

- relief shall be requested **by motion**,
- reasonable notice and opportunity for hearing shall be afforded
- no response is required under this rule unless the court orders an answer to a motion.
- motion shall be served in the manner provided for service of a summons and complaint by Rule 7004,
- unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028—7037, 7041, 7042, 7052, 7054—7056, 7062, 7064, 7069, and 7071.
- The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply.

c. Special Procedures:

- Stay Litigation R. 4001(a)
- Cash Collateral R. 4001(b)
- Credit Approval R. 4001©
- Agreements R. 4001(d)
- §554(b) Motions to Compel Abandonment
- §157(d)28USC Withdrawal of Reference

d. Notice Practice:

eg. "after notice and a hearing",the trustee may ...

6. Discovery

Petition & Schedules

Reports of Operation

Disclosure Statements

§341 meeting of creditors

R. 2004 examination

FRCP 26-37 [FRBP 7026-7037]

7. Jury Trial

- a. Seventh Amendment
Constitutional Considerations

“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”

- b. 28 USC 1411
 - a. [Right to trial by jury in personal injury torts or wrongful death claims unaffected]

- b. Involuntary cases may be tried without jury

- c. Cases

Granfinanciera SA vs. Nordberg, 109 S. Ct. 2782.(1989)(fraudulent monetary transfer>>Jury Trial)

Lagenkamp v. Culp, 111 S.Ct. 330 (1990) (preferential monetary transfer>> PoC filed = waiver of Jury Trial)

- d. BRA'94: amended §157(e)
12/01/97 Rule 9015

USBC may hold Jury Trials if

- (1) Right Applies,
- (2) Special Designation by USDC), **and**
- (3) Express Consent by parties

USDC Local Rule 77.2©: **© Conduct of Jury trial by Bankruptcy Judges.**
Each bankruptcy judge for the District of Puerto Rico is specially designated to conduct jury trials pursuant to 28 U.S.C. Section 157(e).

8. Section 106 - Sovereign Immunity

SOVEREIGN IMMUNITY IN BANKRUPTCY PROCEEDINGS

11 USC § 106. Prescribes Abrogation and Waiver of sovereign immunity:

(a) Notwithstanding an assertion of sovereign immunity, **sovereign immunity is abrogated** as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment ... including an order or judgment awarding a money recovery, but not including an award of punitive damages...

* * *

(b) A governmental unit that has filed a **proof of claim in the case is deemed to have waived sovereign immunity** with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

© Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be **offset against a claim** or interest of a governmental unit any claim against such governmental unit that is property of the estate.

CONSTITUTIONAL INFIRMITIES OF §106?

After the Supreme Court decision in *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996) [no abrogation allowed under Art. I (Indian Commerce Clause)], §106 abrogation was thought to be unconstitutional as to the states.

Eg J. Steven's dissent in *Seminole*, 116 S.Ct at 1134 (ruling applies to Bankruptcy Clause, also part of Art. I); *Ohio Agricultural Commodity Depositors Fund v. M.*

Mahern , 116 S.Ct. 1411 (1996) [remanding In Re: Merchants Grain, Inc. 59 F 3rd 630 (7th Cir, 1995), which have held §106 as valid abrogation]; In Re: Martínez, 196 BR 225, 230 (DPR 1996) (JP) [abrogation invalid]; In re ARECIBO COMMUNITY HEALTH CARE, INC. (Rodríguez Quesada v. Commonwealth of PR),233 B.R. 625 (1999 USBC-PR); 244 F.3d 241 (1st Cir 2001) USBC-PR CASE 91-4594 GAC(opinion entered in AP 95-0150 (GAC) dated 10-21-97) [abrogation and “deemed waived” language unconstitutional] USDC-PR partial reversal (opinion entered on appeal Civil 98-1625 (SEC) dated 03-31-99) [abrogation; “deemed waived” validity upheld -- constitutionally permissible] 233 B.R. 625; 1999 U.S. Dist. LEXIS 7143, March 31, 1999 1st Cir. REVERSED decision of USDC (appeal 00-1774) [Both abrogation and waiver found unconstitutional: citing College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666, 679 (1999) repudiated the theory that sovereign immunity may be "deemed" by Congress or a court to have been "constructively" waived.]; Arecibo Cmty. Health Care, Inc. v. P. R., 244 F.3d 241, 2001 U.S. App. LEXIS 5624, 37 Bankr. Ct. Dec. (LRP) 187, Bankr. L. Rep. (CCH) P78382 (1st Cir. P.R. 2001), Vacated, On rehearing and, Remanded by: Arecibo Cmty. Health Care, Inc. v. P.R., 270 F 3rd 17 (1st Cir. P.R. Oct. 29, 2001) [express waiver and implicit waiver valid (by person authorized by state)]

Thereafter, the Court issued two decisions clearly upholding the exercise of bankruptcy jurisdiction over any 11th Amendment claim of immunity:

Tennessee Student Assistance Corp. v. Hood , 541 U.S. 440, 124 S. Ct. 1905, 158 L. Ed. 2d 764(2004) held that a proceeding to establish the **debtor’s discharge** constituted an in rem proceeding and thus was not a suit against the state; consequently, the state was held not to have immunity from the proceeding to establish the discharge.

Central Virginia Community College v. Katz, 126 S. Ct. 990, 163 L. Ed. 2d 945 (2006) The Supreme Court ruled that an **affirmative recovery on a bankruptcy claim (preference action)** could be ordered against a state. The plurality opinion in Katz determined that a state could be sued by a trustee in bankruptcy for the affirmative recovery of a preferential transfer because the States agreed in Article I of the Constitution not to assert any sovereign immunity defense to proceedings brought pursuant to the Bankruptcy Clause.

V. THE BANKRUPTCY CASE

A. Bankruptcy Administration

a. The United States Trustee

§307: may raise and may appear and be heard on any issue in any case or proceeding

but may not file a plan pursuant to section 1121 ©

b. The Trustees

(1) Chapter 7 Trustee

- i) Liquidating Trustee
- ii) Operating Trustee

(2) Chapter 11 Trustee

(3) Chapter 13 Standing Trustee

c. Employment of Professionals

- (1) Professionals - Sections 327, 328, 329, 330 FRBP 2016
- §327(a) employment of professionals
 - court approval
 - no adverse interest to the estate
 - disinterested person

§327(b)- regularly employed professionals **on salary**

§327(d) - trustee as **his own attorney or accountant** (if in the best interest of the estate)

§327(e) - special counsel

§328- court, control and limitation on compensation of professionals

§329 - debtor's transactions with attorneys

- a. Attorney's statement of compensation
- b. Standard of reasonable value of services

□

§330 ... (3) (A) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

- (A) the time spent on such services;
- (B) the rates charged for such services;
- © whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
- (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and
- (E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

(4) (A) Except as provided in subparagraph (B), the court shall not allow compensation for—

- (I) unnecessary duplication of services; or
- (ii) services that were not—
 - (I) reasonably likely to benefit the debtor's estate; or
 - (II) necessary to the administration of the case.

11 USC 330

is amended to add as a new factor:

whether the person is

board certified or

otherwise has demonstrated skill and experience in the bankruptcy field.

(S. 256, Sec. 415)

BAPCPA - 2005 change

(certifications by attys.; sanctions); (**Debt Relief Agency Provisions.**)

Debt Relief Agency Provisions.

New §101 Definitions of

"Assisted person" means individual with primarily consumer debts and nonexempt property worth less than \$ \$164,250.

"Bankruptcy assistance" means any advice, goods, or services provided to an assisted person with respect to a title 11 case.

"Debt relief agency" a bankruptcy petition preparer, or person that provides bankruptcy assistance

to an assisted person

for money or other valuable consideration.

(S. 256, Sec. 226)

Restrictions on Debt Relief Agencies.

new 11 USC 526a

debt relief agencies must

(vg. bankruptcy atty) Perform all services promised to an assisted person,

Not advise assisted persons to make untrue or misleading statements,

may not misrepresent services to be provided or benefits or risks of such services, and

may not advise an assisted person to incur more debt in contemplation of a bankruptcy or to pay bankruptcy costs.

Any “**contract for bankruptcy assistance**”

that do not comply with these requirements and

With new 11 USC s 527 and 528 are void and may not be enforced by any court or any person, other than the assisted person.

Debt relief agencies

Are liable for fees paid if intentionally fails to comply with 11 USC s 526-528

a case is dismissed due to its negligent failure to file a required document

negligently or intentionally disregards material requirements of the Bankruptcy Code or Federal Rules of Bankruptcy Procedure.

The courts (state or federal) may impose

injunctive relief,

civil penalties, and

attorney's fees

for intentional violations of 11 USC 526 or a pattern or practice of violations.

(S. 256, Sec. 227)

Disclosures
required from Debt Relief Agencies.

new 11 USC 527,
written notice under 11 USC 342(b)(1) 11 USC 527.

statement under 11 USC 527, must be provided in a separate document:

[Statement contained in and required by 11 USC 527(b)]:

IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM AN ATTORNEY OR BANKRUPTCY PETITION PREPARER

If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities from a bankruptcy petition preparer who is not an attorney. **THE LAW REQUIRES AN ATTORNEY OR BANKRUPTCY PETITION PREPARER TO GIVE YOU A WRITTEN CONTRACT SPECIFYING WHAT THE ATTORNEY OR BANKRUPTCY PETITION PREPARER WILL DO FOR YOU AND HOW MUCH IT WILL COST.** Ask to see the contract before you hire anyone.

The following information helps you understand what must be done in a routine bankruptcy case to help you evaluate how much service you need. Although bankruptcy can be complex, many cases are routine.

Before filing a bankruptcy case, either you or your attorney should analyze your eligibility for different forms of debt relief available under the Bankruptcy Code and which form of relief is most likely to be beneficial for you. Be sure you understand the relief you can obtain and its limitations. To file a bankruptcy case, documents called a Petition, Schedules and Statement of Financial Affairs, as well as in some cases a Statement of Intention need to be prepared correctly and filed with the bankruptcy court. You will have to pay a filing fee to the bankruptcy court. Once your case starts, you will have to attend the required first meeting of creditors where you may be questioned by a court official called a 'trustee' and by creditors.

If you choose to file a chapter 7 case, you may be asked by a creditor to reaffirm a debt. You may want help deciding whether to do so. A creditor is not permitted to coerce you into reaffirming your debts.

If you choose to file a chapter 13 case in which you repay your creditors what you can afford over 3 to 5 years, you may also want help with preparing your chapter 13 plan and with the confirmation hearing on your plan which will be before a bankruptcy judge.

If you select another type of relief under the Bankruptcy Code other than chapter 7 or chapter 13, you will want to find out what should be done from someone familiar with that type of relief.

Your bankruptcy case may also involve litigation. You are generally permitted to represent yourself in litigation in bankruptcy court, but only attorneys, not bankruptcy petition preparers, can give you legal advice.

(S. 256, Sec. 228)

Requirements for Debt Relief Agencies.

New §528

11 USC § 528. Requirements for debt relief agencies

(a) A debt relief agency shall--

(1) not later than 5 business days after the first date on which such agency provides any bankruptcy assistance services to an assisted person, but prior to such assisted person's petition under this title being filed, execute a written contract with such assisted person that explains clearly and conspicuously--

(A) the services such agency will provide to such assisted person; and

(B) the fees or charges for such services, and the terms of payment;

(2) provide the assisted person with a copy of the fully executed and completed contract;

(3) clearly and conspicuously disclose in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public (whether in general media, seminars or specific mailings, telephonic or electronic messages, or otherwise) that the services or benefits are with respect to bankruptcy relief under this title; and

(4) clearly and conspicuously use the following statement in such advertisement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or a substantially similar statement.

(b)(1) An advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public includes--

(A) descriptions of bankruptcy assistance in connection with a chapter 13 plan whether or not chapter 13 is specifically mentioned in such advertisement; and

(B) statements such as "federally supervised repayment plan" or "Federal debt restructuring help" or other similar statements that could lead a reasonable consumer to believe that debt counseling was being offered when in fact the services were directed to providing bankruptcy assistance with a chapter 13 plan or other form of bankruptcy relief under this title.

(2) An advertisement, directed to the general public, indicating that the debt relief agency provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt shall--

(A) disclose clearly and conspicuously in such advertisement that the assistance may involve bankruptcy relief under this title; and

(B) include the following statement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or a substantially similar statement.

(S. 256, Sec. 229)

Lamie v. United States Trustee, 14. 540 U.S. 526, 124 S. Ct. 1023, 1028, 157 L. Ed. 2d 1024 (2004) (agreeing with the Fifth and Eleventh Circuits and rejecting the interpretation by the Second, Third and Ninth Circuits)

Resolving split between circuits, the Supreme Court resolved that pursuant to the plain language of the statute a Chapter 7 debtor's counsel could not be compensated pursuant to section 330 since it could not be retained pursuant to section 327.

B. Eligibility for Relief - Section 109

1. §109(a) All Chapters:

Nexus w/ USA
domicile,
residence,
p. place of business,
principal assets,

2. Chapter 7

§109(b): A Person, excluding

A. railroads

B. banks, insurance co., & other regulated institutions

3. Chapter 9

§109©: municipalities
[specific local enactment needed]

4. Chapter 11

§109(d): A Person, excluding

A. stockbrokers, commodity brokers

B. banks, insurance co., & other regulated institutions

Any other person qualifies whether or not engaged in business.

Toib v. Radloff, 111 S.Ct. 2197 (1991)

5. Chapter 12 (FARMERS & FISHERMEN)

§109(f): Family farmer with regular annual income (defined in §101)

6. Chapter 13

1. §109(e): -Individuals

2. -With regular income

3. -Excluding stockbrokers, commodity brokers

4. -With total indebtedness:
-Less than \$336,900 in unsecured debts**
-Less than \$1,010,650 in secured debts**

HISTORY of dollar limitations:

1978 (up to 1994)
-Less than \$100,000 in unsecured debts*
-Less than \$350,000 in secured debts*

1994 (up to 1998)
-Less than \$250,000 in unsecured debts*
-Less than \$750,000 in secured debts*

1998 (CPI adjustment **effective: 4/1/98**)
(up to 2001)
-Less than \$269,250 in unsecured debts*
-Less than \$807,750 in secured debts*

2001 (CPI adjustment **effective: 4/1/01**)
(up to 3/30/2004)
-Less than \$290,525 in unsecured debts*
-Less than \$871,550 in secured debts*

2004 (CPI adjustment **effective: 4/1/04**)
(up to 3/31/2007)
-Less than \$307,675 in unsecured debts**
-Less than \$922,975 in secured debts**

(*) BRA'94: amended §104 \$\$ adjustment per CPI each **3-year interval**;

** 4th adjustment **effective: 4/1/2007**
** Next adjustment: **4/1/2010**

ABUSIVE FILING OF BANKRUPTCY CASES

REPETITIVE FILING NOT PER SE PROHIBITION

Johnson v. Home State Bank, 111 SCt 2150, 2156 (1991) "**Chapter 20**" ok'd
if not barred by 109(g)

Ineligibility (grounds for disqualif.) §109(g)

180 day bar for:

- (1) -willful failure to
 - A. abide by orders, or
 - B. appear before court
- (2) -voluntary dismissal after stay relief motion

BAPCPA - 2005 change
(serial filings, new §362(b)exception based on §109(g))

Abuse of Ch.7 §707(b)
[PRE 2005 BAPCPA]

- 1 § 707 (b) Dismissal.
 After notice and a hearing,
- 2 the court, on its own motion or on a motion by the United States Trustee,

 (but not at the request or suggestion of any party in interest)
- 3 may dismiss a case
- 4 filed by an individual debtor under this chapter
- 5 whose debts are primarily consumer debts
- 6 if it finds that the granting of relief would be a substantial abuse of the provisions
 of this chapter.
- 7 There shall be a presumption in favor of granting the relief requested by the
 debtor.

In Re: Lamanna 153 F.3rd 1 (1st Cir. 1998) (224 BR [9])**

substantial abuse: *per se* rule rejected; equitable discretion to be applied

“totality of the circumstances” adopted

Including:

Ability to meet debts without bk.

Ability to fund Ch.13 plan with disposable income

Bad faith

Needs-based bk.

STATUS: signed into law on April 20, 2005 -- effective as to cases filed on or after Oct. 17,2005.

[post 2005 BAPCPA]

§ 707 (b) Dismissal or conversion

1 After notice and a hearing,
2 the court, on its own motion or on a motion by the United States Trustee, trustee
or any party in interest)
3 may dismiss a case or convert with debtor’s consent
4 filed by an individual debtor under this chapter
5 whose debts are primarily consumer debts
6 if it finds that the granting of relief would be an abuse of the provisions of this
chapter. (substantial abuse no longer the test)
7 used to be: There shall be a presumption in favor of granting the relief requested
by the debtor.

Now: The court SHALL presume abuse if debtor’s “CURRENT
MONTHLY INCOME” does not pass an objective MEANS TEST

8 §707(b)(2)(B) “SPECIAL CIRCUMSTANCES” strictly defined as to what &
how demonstrated

9 if no Presumption, or if rebutted, Re Lamanna test, supra, still applies – codified
under §707(b)(3)

See (Title I) of 2005 BAPCPA, and new §707(b)(2)

BAPCPA - 2005 change

BAPCPA - 2005 change
on "Credit Counseling"

Credit Counseling and Personal Financial Management Course.

To be eligible for bankruptcy relief,

an individual must receive

credit counseling and

budget analysis

from a nonprofit counseling agency

approved by the United States trustee

2. The Bankruptcy Petition

A. **Voluntary Petitions - Sections 301, 302**

Official Form No.1

1. §301 Single Cases

Married debtor/ (spousal consent needed?)

In Re: Gómez Molina 77 BR 368 (ESL-1987) **REVERSED** in **In Re: Lang** . 191 BR 268 (Case 94-5424 ESL, December 20, 1995)

2. §302 Joint Cases

(b) After the commencement of a joint case, the court shall determine the extent, if any, to which the debtors' estates shall be consolidated.

B. **Involuntary Petitions - Section 303**

Official Form No.5

a. Involuntary debtors §303(a):

1. Chapter 7 or Chapter 11 only

2. §109 requirements

3. Excluded:
Farmers
Non-Profit Corps.

b. Petitioning Creditors

Who may bring petitions - Section 303(b):

303(b)(1) 3 or more creditors with at least
**\$13,475 in unsecured debts

[BRA'94: amended §104 \$\$ adjustment per CPI]

** 3rd adjustment **effective: 4/1/04**

303(b)(2) 1 creditor if fewer than 12 creditors

303(b)(3) partnership cases, by less than the partners required

(pursuant to applicable non-bankruptcy law)
R1004 (amended 12/01/02)

c. Grounds for relief - 303(h)

- A. -generally not paying debts as they become due (excluding debts w/
bona fide dispute present), OR
- B. -120 days- custodian

d. Procedure:

Answer to involuntary petition

R. 1011(b) 20 days
mandatory order for relief upon default

The involuntary gap

dismissal, sanctions

Conversion to another chapter
Sections 706, 1112, 1208, 1307

VI. THE ESTATE AND ITS AVOIDING POWERS

A. THE ESTATE

(Section 541)

1. §541(a)(1) Debtor's interest

Butner v. US, 440 U.S. 55 (1979): Federal law controls whether debtor's interest-in-property is part of the bankruptcy estate.

In re: the Ground Round, Inc. 482 F.3d 15, 17 (1st Cir. 2007): while federal law (vg §541) controls whether debtor's interest-in-property is part of the bankruptcy estate; state law determines whether or not debtor has an interest-in-property.

1984 Amendments added "by whomever held" to §541(a)

____ **U.S. vs. Whiting Pools, Inc.** 462 U.S. 198 (1983), 103 S. Ct. 2309, 76 L.Ed.2d 515 [at n.15: possessory interests]:

§541 is a definition of the estate — not a limitation — hence, its scope is to be construed broadly. Possessory interests are part of the estate even if lost by debtor prepetition. cf. §363 and §542

1984 Amendments added "by whomever held" to §541(a)

2. §541(a)(2) Community Property

In re: Lang, 191 BR 268 Case 94-5424 ESL

Campolieto v. Anaya, 142 D.P.R. 582 (1997)

3. §541(a)(3) Recovery by Avoidance

4. §541(a)(4) Subordination u/§510© or Preservation of Rank u/§551

5. §541(a)(5) 180-Day Windfall

a. bequest, inheritance, etc.

b. property settlement with spouse or divorce decree

c. life insurance policy

6. **§541(a)(6) Proceeds, Rents, Profits, etc.**

(Post-Pet. earnings from services performed by **individuals** excluded)

7. **§541(a)(7) Interest in property acquired by the Estate post-petition**

B. Exemptions

1. Introduction

-Assets of limited value to creditor and deemed basic for debtor's fresh start

-Individuals only

-choice of exemptions:
§522(d) Federal, or
32 LPRA 1129, 1130

- Venue considerations (domicile)

2. List of Federal Exemptions

§522(d)

[BRA'94: amended §104 \$\$ adjustment per CPI every 3 yrs.]**
Last change effective: 4/01/2007
(See Addendum at the end)

** Current adjustment **effective: 4/1/07 through 3/30/2010**

TYPE OF PROPERTY:	Code Sections	New Dollar Amounts
-- The homestead exemption	522(d)(1)	\$20,200;

-- The vehicle exemption	522(d)(2)	\$3,225;
-- The household goods exemption	522(d)(3)	\$525 per item, with a cap of \$10,775;
-- The jewelry exemption	522(d)(4)	\$1,350;
-- The "wild card exemption"	522(d)(5)	\$1,075 plus any unused homestead exemption up to \$10,125;
-- The tools of trade exemption	522(d)(6)	\$2,025;
-- The insurance exemption	522(d)(8)	\$10,775;
-- The bodily injury payment	522(d)(11)(D)	\$20,200;

(7) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive—

(A) a social security benefit, unemployment compensation, or a local public assistance benefit;

(B) a veteran's benefit;

© a disability, illness, or unemployment benefit;

(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless— ...

See Analysis, *infra* on new provisions on exempting Retirement Accts

- (11) The debtor's right to receive, or property that is traceable to—
- (A) an award under a crime victim's reparation law;
 - (B) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;
 - © a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;
 - (D) a payment, not to exceed \$20,200, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or
 - (E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

3.-operation of exemptions
-liens not affected

-Ch. 11, 12, 13 (exemptions considered in calculating Liq/ Value)

-joint petitions (per spouse)

4. -Procedure R. 4003
-Schedule of Property claimed exempt
-Objection by trustee or creditor

Time: 30 days after conclusion of 341 mtg.

Taylor v. Freeland & Kronz 112 S Ct. 1644 (1992)
[Debtor claimed as exempt a cause of action listed in Schedules with “value = \$ unknown”; the asset was subject to a \$1,500

exemption; no timely objection to the exemption as claimed;
action settled for \$110,000]

2008 amendment
to Rule 4003(b)

in cases in which the debtor has fraudulently claimed an exemption,
the trustee, but not other parties, may file an objection to the
exemption within one year after the closing of the case

BAPCPA - 2005 change

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005
Contains several Amendments Re: Exemptions:

BAPCPA - 2005 changes affect cases filed on or after 10/17/2005.
In the District of PR, these cases begin with 05-12858-ESL.

1. (S. 256, Sec. 216) domestic support obligations

All property exempted

is **liable** for domestic support obligations,

even if not liable under applicable non bankruptcy law.

2. (S. 256, Sec. 224) **Protection of Retirement Savings.**

11 USC 522

amended to exempt all funds

exempt from taxation under sections 401, 403, 408, 408A, 414, 457, and 501(a) of the
Internal Revenue Code.

With a \$1,095,000 cap on certain IRA accts, unless the court increases that amount in the
interests of justice.

3. (S. 256, Sec. 307) ***Domicile Requirements.***

11 USC 522(b)(3)

amended *Exemption Domicile Requirements*.

exemptions based upon the law of the state
where the debtor has been domiciled for the 730 days before the petition (was 180 days)

4. (S. 256, Sec. 308) REDUCTION OF HOMESTEAD EXEMPTION FOR FRAUD.

11 USC 522
amended homestead exemption

reduced to the extent it is attributable to property

- (a) that the debtor could not exempt
- (b) and was disposed of within 10 years before the petition
- (c) with the intent to hinder, delay, or defraud creditors.

5. (S. 256, Sec. 322) *Limitation on Homestead Exemption*.

11 USC 522
Amended to impose a
Limitation on Homestead Exemption.

Generally, may not be exempted: "any amount of interest" acquired by the debtor
in the 1,215 days before the petition that exceeds \$ 136,875

Due to its anachronic homestead exemption statute (\$15,000), this change is
usually of limited impact in Puerto Rico. (Useful in instances of debtors moving
from PR to a jurisdiction like FL)

(a) **Abandonment of property of the estate §554**

(0) Definition

Procedure to rid the estate from burdensome property:

Over encumbered

Of inconsequential value

Or that cannot be otherwise administered or sold for the benefit of creditors

(0) Effects:

Property interests revert to pre-petition status

(0) Case law:

Midatlantic National Bank v. NJ Dept. Of Env. Protection, 474 US 494 (1986)
[hazardous waste may not be abandoned in violation of law]

(a) **Turnover of Estate Property**

Liquidation and/or reorganization entails sale, use or lease of estate property. Hence, **possession by trustee** (or debtor in possession) is provided for by requiring turnover:

(1) §521(4) turnover by Debtors

(2) §542 turnover by entities other than debtors and custodians

(3) §543 turnover by custodians

THE AVOIDING POWERS

1. Introduction

One of the basic purposes of bankruptcy and insolvency laws:

Orderly distribution of the debtor's assets;

Creditors with similar claims should receive proportionate shares from the estate of an insolvent debtor

Among the ways used to achieve this end, bankruptcy laws commonly vest the trustee with certain avoiding powers. The reasoning behind these powers has been described as follows:

One of the fundamental policies of bankruptcy is insuring equality of distribution among creditors. Although the rights of the parties are fixed for most purposes as of the date the bankruptcy case is commenced -that is, the Section 541 estate initially consists of the debtor's interests in property as of the time of the petition-

the fair distribution principle would be undermined if nothing were done about actions of the debtor or a creditor before bankruptcy that have the effect of allowing one creditor to obtain an advantage at the expense of others. For this reason both present and past bankruptcy laws have granted to the trustee or other representative of the estate the power to avoid certain transactions or transfers occurring before the commencement of the case. Judicial liens or other preferences and actual or constructive fraudulent or similar transfers that would disrupt the intended bankruptcy distributional scheme if allowed to stand are avoidable in bankruptcy if they occurred within specified pre-petition periods.

Treister, Fundamentals of Bankruptcy Law, page 152, § 4.02 (ALI-ABA, 4th Ed. 1995)

Standing: avoiding powers given to **trustees**

in a Chapter 11, where ordinarily no trustee is appointed, the **debtor in possession** has most of the rights (including the avoiding powers) of the trustee. See §1107(a)

2. §544 THE STRONG ARM CLAUSE

- (1) The hypothetical judicial lien creditor. §544(a)(1) or judgment creditor with unsatisfied execution §544(a)(2)
- (2) The hypothetical bonafide purchaser. §544(a)(3)
- (3) Trustee as successor to the rights of unsecured creditors §544(b)
 - (a) **Applying Section 544(a) “the strong-arm clause”**

Example 1:

(Rule 56 of the Puerto Rico Rules of Civil Procedure: a creditor seeking to secure the effectiveness of an eventual judgment against debtor, or seeking to execute a final judgement, may obtain a judicial lien over debtor’s assets.)

hypothetical judicial lien creditor:

Upon the bankruptcy filing, the trustee is given, for the benefit of the estate (i.e. for the unsecured creditors) all the rights and protections of a **hypothetical creditor** that obtained such a **judicial lien** over **all property** of the debtor which could have been subject to such lien **as of the date of such bankruptcy filing**.

For instance, a **pledge agreement** whereby a creditor received a mortgage note as collateral will not withstand the attack of a trustee **unless duly perfected** under the applicable non-bankruptcy law. Pledge agreements without a date certain (required by the **Civil Code**), were consistently avoided in bankruptcy cases applying this §544.

V.g. Matter of Supermercados San Juan, Inc. 575 F2d 8 (1st Cir. 1978); Constructora Maza, Inc. v. Banco de Ponce, 616 F2d 573 (1st Cir. 1980); In re Santos & Nieves, Inc., 814 F2d 57 (1st Cir. 1987) (These holdings cite and rely heavily on the Supreme Court of Puerto Rico decision Ramos Mimoso v. Tribunal Superior, 93 DPR 551 (1966). For a thorough discussion on these cases, see B. Rodríguez Ramón, Personal Bankruptcy in P.R., at pages 113-126 (NBI, 1990).

The same results take place when the “secured” party fails to perfect pursuant to the UCC Article 9 adopted in PR. 19 L.P.R.A. sec. 2002

Example 2:

bonafide purchaser of debtor’s real property

Likewise, the trustee is also vested with the rights of a **bonafide purchaser of debtor’s real property** as if such purchase had been duly perfected for the benefit of the estate at the time of commencement of the case.

Under these provisions, the trustee may avoid the majority of the liens and transfers made by the debtor (or effected against him) which at the time of bankruptcy remained **unperfected as to third parties**.

Section 544(b) The trustee as successor to creditors

Under §544(b) the trustee is also allowed to avoid any transfer that may be voidable under **non-bankruptcy law** by any of debtor’s unsecured creditors. In this instance, there must be an **actual**, as opposed to a hypothetical, **creditor**.

This additional attribute enhances the trustee’s arsenal in two ways:

first, making any **applicable non-bankruptcy avoiding power** extensive to the bankruptcy context, and to be exercised for the benefit of the estate;

secondly, contrary to the strong-arm clause of §544(a), the rights of the trustee are **not fixed on the date of the filing** of the bankruptcy petition, thus making

available any greater right that may have resulted from extending credit at an earlier date.

E.g. 1: 4 yr. **fraud avoidance** per civil code
(& presumption)

E.g. 2: avoiding a **pre-petition bulk transfer** made in violation of the law would not be possible by the hypothetical creditor of §544(a) whom, by definition, did not exist at the time of the transfer. Any actual creditor that may have been affected by the transfer will pass his avoiding rights to the trustee via §544(b).

§547 PREFERENCES

One of the most widely known, and frequently used, avoiding power is the action for avoidance of preferential transfers contained in §547(b) of the Code. An aspect of this action that makes it difficult to understand by the general public is the fact that the transfer is usually a legal and valid transaction with no infirmity in itself. The section was designed to promote “one of bankruptcy’s primary goals” i.e. “to achieve the policy of fostering equality of distribution among the creditors of an insolvent debtor.”

Treister, supra, at page 169, 4.03©

- (a) Elements Listed in 547(b)
 - 1. Transfer of Debtor’s property
 - 2. To (or for the benefit) of creditors
 - 3. Antecedent debt
 - 4. Insolvency
 - 5. 90 days (or 1 year for insiders)
 - 6. Preferential effect

These **elements** of a voidable preference are spelled out in §547(b). Each and every one of those elements must be **proven by the trustee** (or at least presumed) in order for the trustee to prevail.

- (b) Elements explained:

(1) transfer of an interest in debtor’s property

“Transfer” is a term of art defined in §101(54) as follows:

“transfer” means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor’s equity of redemption;

- (a) As can be seen, the term encompasses practically every **disposition** of, or **encumbrance** over, assets of the debtor. It covers plain, outright dispositions (as money payments, payment in kind, and barter); as well as transfers of equity in the property through the creation of liens and security interests, such as the granting of a mortgage.

(b) Examples:

1. Payment
2. grant a mortgage to secure a debt
3. suffer a judicial lien (e.g. embargo)
Both **voluntary** and **involuntary** transfers are covered by the definition. Examples of involuntary transfers include judicial liens, attachments and foreclosure sales. Any diminution in equity on debtor's assets will do.
4. Found: **not** a transfer of estate property:

Begier v. IRS, 110 S.Ct. 2258 (1990) [trust fund tax payments not estate property] Hence, payment to IRS from operating (commingled) account not a preference.

(2) to or for the benefit of a creditor

This element is deceitfully simple. A **creditor** is defined in §101(10) as follows:

"creditor" means—

- (A) **entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;**
- (B) **entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(I) of this title; or**
- © **entity that has a community claim;**

The repeated references to the term **claim** compels a review of its §101 definition:

"claim" means—

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

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

(3) for an antecedent debt -§547(b)(2)

Except for strictly contemporaneous exchanges (such as C.O.D. sales), or payments for future consideration (e.g. retainer fees), any short extension of credit will satisfy this element.

In National City Bank v. Hotchkiss, 231 US 50 (1913), the Supreme Court presents a dramatic illustration of this. An unsecured loan obtained by debtor earlier on the same day of the payment, was found to be potentially preferential.

(4) Insolvency §547(b)(3)

The Code uses the balance sheet test of insolvency (excess of liabilities over assets) at fair valuation. See the definition of insolvency at §101(32).

Section 547(f) provides the trustee with a rebuttable presumption that debtor was insolvent during the last 90 days before the filing of the bankruptcy case.

(5) within 90 days or one year - §547(b)(4)

The transfer must have occurred **within 90 days**, or in the case of an insider, within **one year** before the filing of the bankruptcy case.

The presumption of insolvency mentioned above would be applicable to those transfers made within the 90 day period.

Barnhill v. Johnson, 112 S.Ct. 1386 (1992). The Supreme Court has adopted the view that for the purpose of §547(b) a transfer by check is deemed to occur on the **date the check is honored**. Thus, a payment by a check issued outside of the 90 day preferential period, but honored by the bank within the 90 day period was deemed to be preferential.

(6) preferential effect of the transfer

To establish this final element an analysis has to be made constructing a **hypothetical distribution** under a **Chapter 7** case. This hypothetical distribution must be calculated at the time of the filing of the bankruptcy case. Leuger v. USA (In re: Tenna Corp.), 801 F2d 819, 823 (6th Cir. 1986) This element is met if the transfer permits the creditor to receive more on its claim than what would otherwise be received in a Chapter 7 liquidation case.

Since any transfer would allow the creditor to collect said payment in addition to any dividend to which creditor may be entitled in the Chapter 7 for any deficiency, **any payment, partial or total, will satisfy this element unless:**

- A. made by a **solvent** debtor, [theoretically, a solvent debtor's liquidation should provide 100% payment to the creditors]; or
- B. made to satisfy a debt entitled to **priority**, when such priority would receive 100% payment in the hypothetical Chapter 7 scenario; or
- C. made to a **fully secured creditor** [the secured creditor is entitled to collect from its collateral].

The case of **partially secured creditors:**

In the case of **partially secured creditors**, potential preferential payments have been presumed to be applied to the **unsecured portion** of the debt. Drabkin v. A.I. Credit Corp., 800 F2d 1153 (DC Cir. 1986); see also Barash v. Public Fin. Corp., 658 F2d 504, 509 (7th Cir. 1981)

Exceptions to preference avoidance. §547©

Section 547©, although drafted as a list of exceptions or limitations to the trustee's power, is really a list of affirmative defenses that need to be raised and proven by the creditor. See §547(g).

The most common of these defenses:

- (1) Contemporaneous Exchange. §547(c)(1)

Section 547(c)(1) excepts from avoidance an otherwise preferential transfer to the extent that such transfer was:

- (A) Intended by the debtor and the creditor to be a contemporaneous exchange for new value given to the debtor; and
- (B) in fact a substantially contemporaneous exchange.

The creditor must establish the two elements. A substantially contemporaneous exchange, such as when the debtor gets a loan on a 30 day note, and repays it the same day would not meet the 1st requirement of intention.

(2) Ordinary Course of Business §547(c)(2)

Congress intended "to leave undisturbed normal financial relations, because [doing so] does not detract from the general policy of the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy."

1977 House Report, cited in *Marathon Oil Co. v. Flatau* (In Re. *Craig Oil Co.*), 785 F2d 1563, 1566 (11th Cir. 1986)

Section 547(c)(2) thus insulates a creditor from a preferential attack by the trustee if the transfer was:

Pre 2005 BACPA:

- (A) In payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
- (B) Made in the ordinary course of business or financial affairs of the debtor and the transferee; and
- © Made according to ordinary business terms.

BAPCPA - 2005 change:
amended 547(c)(2)
(S. 256, Sec. 409)

Ordinary Course of Business defense now requires only two elements:

- and
1. that the debt was incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee
 2. either of the following:
 - A. the payment was made in the ordinary course of business or financial affairs of the debtor and the transferee
 - B. the payment was made according to ordinary business terms.
- or

(3) New Value - §547(c)(4)

This exception operates as a defense when three elements are established:

- 1st After receiving the preferential transfer, the creditor advances additional credit ("new value");
- 2nd the new value must be on an unsecured basis; and
- 3rd the new credit must remain unpaid.

(4) Receivable and inventory financing (floating liens) - §547(c)(5)

Cf. The timing rule of §547(e)(3) (security interest transfer does not occur until the collateral is owned by the debtor)

As an accommodation for these creditors: §547(c)(5) protects such secured lenders from preferential attacks by limiting the "preferential" transfers.

The trustee may avoid:

only to the extent that the creditor improves its position as of the date of bankruptcy, when compared with the actual security had at the starting date of the preferential period (90 days or one year if insider), or at any later time in which new value was first given under the agreement.

(5) Alimony & Child Support - §547(c)(7)

Bona fide payment of a debt for a domestic support obligation

i.e.

To spouse, ex-spouse or child of debtor
Actually in the nature of alimony, maintenance, or support
In connection w/ separation agreement or divorce decree
Not assigned ... SEE §101(14A)

(8) Small Preferences in Consumer Cases-§547(c)(8)

If the debtor's debts are primarily consumer debts,

a preference is not voidable

if the aggregate value is less than \$ 600

BAPCPA - 2005 change

(9) Small Preferences in Business Cases.
new 547(c)(9)
(S. 256, Sec. 409)

If the debtor's debts are not primarily consumer debts,

a preference is not voidable

if the aggregate value is less than
\$ 5,475.

§548 FRAUDULENT TRANSFERS

Section 548 allows trustees to avoid transfers made, or obligations incurred by debtor
involving actual or constructive fraud.

(1) Actual Fraud. §548(a)(1)(A)

2 Elements:

A. TIME: 2 year-window (formerly one year); and
(BAPCPA 2005: Changed to TWO years for cases commenced after
Oct.17, 2005)

BINTENT: the transfer or the obligation was made or incurred with actual intent to defraud, hinder or delay the creditor.

(2) Constructive Fraud §548(a)(1)(B)

3 Elements:

- A. TIME: 2 year-window (formerly one year);
- B. VALUE: less than reasonably equivalent value; and
- C. Adverse Financial Condition: (insolvency, under-capitalization, or inability to pay)

Foreclosure Sales

This avoidance for constructive fraud was applied in the past to foreclosure sales by some circuits and rejected by others.

The Supreme Court resolved the split by upholding the 9th Circuit in *In Re- BFP*, 114 S.Ct. 1757, (1994) The Court concluded that a non collusive foreclosure sale is tantamount to the 'reasonably equivalent value' of §548 and is thus not voidable thereunder.

BAPCPA - 2005 change
affecting Fraudulent Transfers. AND Asset Protection Trusts

Fraudulent Transfers.
11 USC 548 (avoidance of fraudulent conveyances)
amended as follows

1. Reachback Period: transfers made within two years (formerly one year) before the petition date may be avoided
2. Transfers to an insider under an employment contract: transfers and obligations for the benefit of an insider under an employment contract are avoidable if:
 - A. made within the 2 years reachback period;
 - B. the debtor received less than reasonably equivalent value in exchange for the transfer or obligationand
 - C. Adverse Financial Condition: (insolvency, under-capitalization, or inability to pay) **OR**

the transfer or obligation was made for the benefit of an insider under an employment contract and it not in the ordinary course of business.
3. Asset Protection Trusts. 11 USC 548(e) added so that the trustee may avoid any transfer of the debtor's property made within 10 years before the commencement of the case if
 - A the transfer was made by the debtor to a self-settled trust or similar device,
 - B the debtor is the beneficiary of the trust or device,and
 - C the debtor made the transfer with actual intent to hinder, delay, or defraud any entity to which the debtor is indebted.

Effects of §548 Avoidance:

1. When an **obligation** is avoided under this section,

the claim is not allowed to participate in the bankruptcy distribution.

2. If the trustee avoids a **transfer**,

he may recover the **property** transferred or its **value**. §550(a).

3. If the avoided transfer is an **encumbrance** over property of the estate,

then the avoidance results in the **preservation** of said lien's rank for the benefit of the estate. §551.

Protection to transferees §548©

As a **protection for good faith transferees**, the recovery of a fraudulent conveyance is **limited** by §548©.

Said provision gives a transferee

who takes for value and in good faith
a lien over the property to the extent of the value given.

§549 POST PETITION TRANSFERS

Elements. 549(a)

1. Transfer must take place post-petition i.e. after the filing of the petition
2. The transfer was unauthorized by code and not authorized by the court

Exceptions: §§549(b) and 549©

§549(b): Involuntary gap transferees, to the extent of post-petition value

§549©: Good faith transferees of realty are protected to the extent of value given prior to registry notice of the bankruptcy:

If present fair equivalent value, no avoidance

If less than that, protected by lien equal to present value given.

GENERAL PRINCIPLES REGARDING AVOIDANCE

Statutes of limitations:

-§546(a) **Pre-pet. transfers,**

earlier of-

(a) Case closed or dismissed §546(a)(2), or

(b) Later of :

i) 2 years after order for relief [546(a)(1)(A)], or

ii) 1 year from trustee's appointed when so appointed within **the** 2 yrs after order for relief. Section 546(a)(1)(B)

-§549(d) **Post-Petition transfers,** earlier of-

(a) Case closed or dismissed or

(b) 2 years from transfer

-§550 **recovery from transferees (once transfers are avoided)**

The statute of limitations for a proceeding to impose liability upon a transferee is either

(whichever is **earlier**)

(A) **one year** after avoidance of the transfer on account of which recovery is sought,

(B) the time at which a **case is closed,**

or

© the time at which a **case is dismissed,**

Section 550 – Recovery of property, or its value
From transferees and sub-transferees
Protections to transferees

§ 550(a) [the property or its value]

Except to the extent that a transferee is immune from this recovery action, a trustee has the option of recovering either the property involved in an avoided transfer or its value from the transferee;

§ 550(e) [Improvements by
good faith transferees]

Any good faith transferee who is required to surrender the transferred property is given a lien securing improvements that increased the value of the property;

§ 550(a) [From transferees
and sub-transferees]

trustee has the option of recovering from the initial transferee and subsequent transferees that are not insulated (see below).

§ 550(b) [Protections to
subsequent transferees]

In addition to the protections in the individual avoiding powers (vg. §548c), subsequent transfers (made after the initial transfer) may be insulated from trustee's recovery. Three requisites to be met by sub-transferee:

[three prerequisites to immunity]

1 Taking for value (includes the satisfaction or securing of either a present or an antecedent debt)

2 Taking in good faith;

and

3 Taking with lack of actual knowledge of the voidability of a transfer.

Section 551 – When a transfer/lien is avoided §551 provides for the reservation of rank of avoided lien/transfer for the benefit of the estate

VII. ADMINISTRATIVE POWERS

A. ADEQUATE PROTECTION

A Party with an interest in property owned or used by a bankruptcy estate is entitled to be ADEQUATELY PROTECTED throughout the case.

Concept:

Adequate protection is required:

A. to protect an entity's interest in property. Seen in various contexts:

- 362 Automatic Stay
- 363 Sales
- 364 Post Petition Credit
- 365 Leases
- Chapter 11, 12, 13 Plan Provisions

B. required only for the value of an entity's interest in the property.

C. If claim exceeds the value of its interest in property, only the interest is entitled to protection; the remainder of the claim is unsecured and does not give rise to protection.

§361 provides a non-exclusive list of methods (A - C, below) to provide adequate protection:

- | | | |
|---|---------------|---|
| A | CASH PAYMENTS | Periodic cash payments to the creditor in proportion to the decrease in the value of the collateral (<i>eg</i> payments to offset or compensate depreciation); |
| B | LIENS | replacement of liens; and/or providing additional lien; |

C	EQUIVALENT	Providing the " indubitable equivalent "(<i>eg</i> surrendering or abandonment of the collateral);
D	EQUITY	It is generally accepted that equity cushion , including the value provided by junior liens, constitutes in itself adequate protection. <u>In Re: Mellor</u> , 734 F. 2d. 1396 (9th Cir. 1984).

B. THE AUTOMATIC STAY

INTRODUCTION

- (a) **Debtor and the creditors protection.** The automatic stay is a **protection for both the debtor and the creditors.** House and Senate Reports cited in **In re López Soto** 764 F.2d 23, 27 (1st Cir. 1985)
- (b) **Scope.** The automatic stay was enacted by Congress with a drafting that conveys its **broad scope.** The exceptions, on the other hand are narrowly drafted.
- (c) **Effectiveness.** The automatic stay takes effect **immediately upon the filing** of a bankruptcy petition, and regardless of any formal notice by the court or actual knowledge on the part of the creditor. As will be discussed below, the consequences of violating the stay may vary depending on the actual knowledge by the transgressor.
- (d) **Not permanent.** The automatic stay, on the other hand, is not intended as a permanent or immutable bar. The basic purpose of the stay is to provide a **temporary relief** to the debtor in order to permit an orderly reorganization or liquidation of the assets without the disruptive and inequitable results of allowing a race of diligence between creditors. As opposed to the discharge, the stay is intended to affect rights on a temporary and **procedural basis.**

Scope §362(a) (what the code stays)

Subject to the specific exceptions listed in Sec. 362(b), the filing of the bankruptcy case, triggers an automatic stay affording protection in three different areas:

- (A) debtor;
- (B) the estate and its property; and
- © debtor's property.

(The duration and scope of said automatic stay varies depending on the specific area of protection involved.)

A. DEBTOR'S PROTECTION:

This protection refers to debtor's personal liability, as opposed to liens or other charges against specific assets owned by debtor. Stayed acts applicable to debtor would include:

§ 362(a)(1):

-- any action or proceeding regarding a Pre-Petition claim

§ 362(a)(2)

-- enforcement of Pre-Petition Judgment

§ 362(a)(6)

-- any act to collect, assess, or recover Pre-Petition Claims

§ 362(a)(8)

-- Proceedings before the U. S. Tax Court

B. PROTECTION OF THE ESTATE

Upon the filing of the bankruptcy petition, an estate is created comprising all the assets of debtor not subject to exemptions or exceptions. This estate is defined by law (§541 of the Bankruptcy Code) and is separate and distinct from debtor's other assets.

In Chapter 13, the estate, and thus the assets being protected, would also include property acquired by debtor after the filing of the petition. Section 1306(a). After 2005 BAPCPA, the same applies in Chapter 11 cases filed by individuals. §1115

Stayed acts applicable to the estate:

§ 362(a)(2)

-- enforcement of Pre-Petition judgments

§ 362(a)(3)

-- Acts to obtain **possession** of, or exercise **control** over, property of the estate arising from Pre-Petition or Post-Petition claims.

§ 362(a)(4)

-- Act to create, perfect or enforce liens to secure Pre-Petition or Post-Petition claims. (But see exception §362(b)(3) below.)

§ 362(a)(7)

-- Set-off of Pre-Petition Receivables

Note that the scope of the estate's protection extends to both **pre and post-petition** claims.

C. PROTECTION FOR DEBTOR'S PROPERTY

This property includes:

property not part of the estate (*eg* acquired by a Chapter 7 debtor after the filing of the petition *cf* §541);
property exempted by debtor (§522); and
property abandoned in the case. (§554)

Stayed acts applicable to debtor's property

§ 362(a)(5)

-- Act to create, perfect, or enforce liens securing Pre-Petition claims, except when the lien secures a debt for alimony, maintenance or support. (See §362(b)(2) below)

§ 362(a)(7)

-- Set-off of Pre-Petition receivables (assuming they are not property of the estate through exemptions, abandonment, etc.)

b. Exceptions §362(b) (what is not stayed)

While Section 362(a) contains a catalogue of acts, actions, proceedings, etc. that are deemed automatically stayed upon the filing of the bankruptcy petition, Section 362(b) lists of exceptions to such stay.

In other words, even if encompassed under any of the provisions defining the scope of the automatic stay, Congress concluded that certain acts should not (and are not) automatically stayed due to considerations of public policy.

These acts may, however, be specifically stayed through the injunctive relief provided in Section 105 or Rule 7065 of the Federal Rules of Bankruptcy Procedure. See House Report at 175, 343, reprinted in 1978 US Code Cong. and Admin. News at 6135, 6298; and In Re: Corporación de Servicios Médicos Hosp., 805 F.2d. 440,449 (1st Cir, 1986) Congress has thus shifted the burden of seeking relief to the party seeking the protection against those acts. These injunctions may be issued, under the normal standards for injunctive relief.

BAPCPA added several exceptions to the list in §362(b). Additionally – after BAPCPA – new sub-sections of §362 limit the duration of the stay or prevent its application when there have been repeat bankruptcy filings by an individual debtor.

THE EXCEPTIONS TO THE AUTOMATIC STAY:

§ 362(b)(1) Criminal proceedings against the debtor.

Caveat 1: Bad Check Prosecution

Criminal proceedings regarding bad checks may be indirectly stayed:

vg. PR Criminal Code requires a collection letter as pre-condition to prosecution. In Re: Jeens of Puerto Rico, Inc., 74 BR 16 (1987, ESL); In Re: Almodovar, 35 BR 289 (1983, AHR)

Also some courts view the exception as intended only when the proceeding is brought for the purpose of enforcing the criminal law. When it is concluded that a debtor is prosecuted to pressure him into paying a debt that might otherwise be dischargeable courts are divided:

Some courts refuse to stay a criminal proceeding leaving the debtor with the option to raise a bankruptcy defense [lack of criminal intent] in the state court proceeding

Other courts have exercised their equitable power to enjoin such prosecution when the primary purpose is debt collection, *ie* when enforcement of the criminal law is not the primary motivation of the prosecution.

Caveat 2: Enforcement of Criminal Sanctions

Criminal courts may jail or fine the debtor, but may not seize property of the estate or of the debtor

**§ 362(b)(2) Domestic Support Obligations
and Other Family Law Matters**

Prior to BAPCPA (see note below),

§ 362(b)(2) excepted from the stay

(A) the commencement or continuation of a civil action or proceeding for--
(I) the establishment of paternity; or
(ii) the establishment or modification of an order for alimony, maintenance, or support; or

(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;

BAPCPA - 2005 changed many aspects of the bankruptcy case to enhance the rights of creditors entitled to child support, and facilitate enforcement of claims falling under the newly defined term (§101) “Domestic Support Obligations”. Title II, Subtitle B (sec. 211, *et seq* of the amendments) contains many of those changes

BAPCPA - 2005 changes affect cases filed on or after 10/17/2005.
In the District of PR, these cases begin with 05-12858-ESL.

Section 362(b)(2) now excepts from the automatic stay the following acts or proceedings:

- (A) PATERNITY, FIXING OF SUPPORT OBLIGATIONS, CUSTODY, DIVORCE, DOMESTIC VIOLENCE
 - (I) for the establishment of paternity;
 - (ii) for the establishment or modification of an order for domestic support obligations;
 - (iii) concerning child custody or visitation;
 - (iv) for the dissolution of a marriage,
 - except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or
 - (v) regarding domestic violence;
- (B) COLLECTION
 - of the collection of a domestic support obligation from property that is not property of the estate;
- © WITHHOLDING OF INCOME
 - with respect to the withholding of **income that is property of the estate** or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;
- (D) WITHHOLDING, SUSPENSION, OR RESTRICTION OF A LICENSE
 - of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;
- (E) REPORTING DELINQUENCY
 - of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;
- (F) INTERCEPTION OF A TAX REFUND
 - of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(G) ENFORCEMENT OF A MEDICAL OBLIGATION
of the enforcement of a medical obligation, as specified under title IV of the
Social Security Act;

§ 362(b)(3) Post-Petition perfection of certain liens

Post-Petition perfection of interest in estate property as permitted or
contemplated in §546(b) and §547(e)(2)(A)

ie post bankruptcy perfection of liens are permitted when the lienholder's action
would be effective against a trustee.

§362(b)(4) Actions under Police or Regulatory Power

the commencement or continuation of a proceeding by a governmental unit to
enforce its police and regulatory power,

including the enforcement of a judgment;

but not a **money judgment** against the estate.

court-developed tests to determine whether the government's action is allowed or
stayed:

-- the pecuniary purpose test: if the governmental unit pursuing a matter of public
safety and welfare rather than a governmental
pecuniary interest, no stay – the action is permitted.

-- the public policy test: if the government action designed to effectuate public
policy rather than to adjudicate private rights, no stay – the
action is permitted.

In Re: Corp. de Servicios Médicos Hosp., 60 BR 920,931-933 (1986, JAF); In Re:
Corp. de Servicios Médicos Hosp., 805 F. 2d. 440 (1st Cir, 1986); Berg v. Good
Samaritan Hosp., Inc. (In re Berg), 230 F.3d 1165 (9th Cir. 2000)

§ 362(b)(5) [deleted; its terms are now part of **§ 362(b)(4)**]

§ 362(b)(6) Commodities and Securities Setoffs

permits setoff of certain mutual debts in connection with commodity contracts, forward contracts and securities contracts

§ 362(b)(7) Setoffs by Repo Participants

permits certain ordinary, short-term transactions in securities markets:

setoffs by repo participants or financial participants of claims against the debtor for a margin or settlement payment arising under a repurchase agreement ("repo" defined §101)

§ 362(b)(8) Commencement of HUD Foreclosures

the Secretary of Housing and Urban Development may commence foreclosure actions of certain mortgages described in the exception

§ 362(b)(9) Taxes: Audits, Notices Deficiency, Demand for Returns and Assessments

permitted: giving notice of tax deficiency,

conduct an audit to determine tax liability,

make a demand for tax returns

make an assessment, issue notice and demand payment of any tax

tax liens: perfected as a result of the assessment and demand may not attach property of the estate unless

the tax represents a nondischargeable debt of the debtor and

the property or proceeds to which the lien will attach have been transferred out of the estate to, or are otherwise to revert in, the debtor.

§ 362(b)(10) Expired Commercial Leases

act by a lessor to the debtor to obtain possession of such property under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case

§ 362(b)(11) Presentment of a Negotiable Instrument

the automatic stay does not prevent the presentment of a negotiable instrument (*eg* checks or promissory notes), or giving of notice and protesting dishonor

§ 362(b)(12) Merchant Marine Act Foreclosure by Secretary of Transportation

permits certain actions by the Secretary of Transportation under 46 U.S.C. § 31325 involving a chapter 11 debtor to foreclose a preferred ship or fleet mortgage. (Applies only in cases filed between August 1, 1986, and December 31, 1989)

§ 362(b)(13) Merchant Marine Act Foreclosure by Secretary of Commerce

permits certain actions by the Secretary of Commerce under 46 U.S.C. § 31325 involving a chapter 11 debtor to foreclose a preferred ship or fleet mortgage. (Applies only in cases filed between August 1, 1986, and December 31, 1989)

**§ 362(b)(14) Actions by Accrediting Agencies
Re: Status of Debtor as Educational Institution**

**§ 362(b)(15) Actions by State Licensing Bodies
Re: Licensure of Debtor as Educational Institution**

§ 362(b)(16) Actions Re: Eligibility of Debtor under Higher Education Act of 1965

§ 362(b)(17) Setoffs by Participants Swap Agreements

§ 362(b)(18) Statutory Liens for Ad Valorem Property Taxes

the creation or perfection of a statutory lien for ad valorem property taxes that become due after the commencement of a case.

This exception, however, does not permit enforcement of such liens

NEW EXCEPTIONS ADDED BY BAPCPA:

§ 362(b)(19) Wage Withholding and Collection on Retirement Fund Loan

authorizing the withholding and collection for the benefit of certain pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457 or 501© of the Internal Revenue Code

EXCEPTIONS ARISING FROM A PRIOR CASE:
(BAPCPA's treatment of abusive serial filings)

§ 362(b)(20) In Rem Orders (under §362(d)(4)) in prior cases

exception for the enforcement of a lien against or security interest in real property

following the entry of an order **under §362(d)(4)** in a prior bankruptcy case prohibiting the application of the automatic stay as to that property

§362(d)(4) provides that the court may grant relief from the stay with respect to an act against the property upon a finding that the filing of the petition was part of a scheme to delay, hinder and defraud creditors that involved either

(1) the transfer of all or part ownership of or interest in the property without the consent of the secured creditor or court approval; or

(2) multiple bankruptcy filings affecting the property.

Once the §362(d)(4) order is recorded in compliance with applicable state law governing the recordation of real property liens, it shall be binding in all future bankruptcy cases that might affect the subject property for a period of two years after the date of the entry of the order.

In other words, unless relief from the order is granted in a subsequent case, the order shall remain in effect – and the secured creditor will not be stayed from enforcing its lien – for a period of two years after the date of its entry.

§ 362(b)(21) Filing by Ineligible Debtor or in Violation of Court Order

No stay of the enforcement of a lien against or security interest in real property in:

(A) a case filed by a debtor who is ineligible to be a debtor under section 109(g),
or

(B) a case filed in violation of a bankruptcy court order in a prior case prohibiting the debtor from refileing.

**§ 362(b)(22) Residential Property Evictions
Where Landlord has a Prepetition Judgment for Possession**

This exception is subject to the provisions of section 362(l)(1), which permits debtors to put in motion a process whereby the automatic stay will be maintained for 30 days (and beyond) by

- (A) filing with the petition a certification under penalty of perjury that circumstances exist in which the debtor would be permitted under applicable non bankruptcy law to cure the entire monetary default that gave rise to the judgment for possession, and
- (B) depositing with the clerk of the bankruptcy court any rent that would become due during the 30-day period after the filing of the petition.

Under §362(l)(2) the automatic stay which takes effect as a result of section 362(l)(1) remains in force, beyond the 30-day period, upon filing with the court within the 30-day period after the filing of the petition, an additional certification attesting that the entire monetary default that gave rise to the judgment for possession has been cured under applicable non bankruptcy law.

The lessor may contest the certification filed under section 362(l)(1) or (l)(2) – in which case, the court shall then hold a hearing within 10 days of the filing of the objection to determine whether the certification is true.

**§ 362(b)(23) Residential Property Evictions
Based On Endangerment of Property or Illegal Drug Use**

Evictions, involving residential property in which the debtor resides as a tenant, when based on

the endangerment of such property or

the illegal use of controlled substances on such property.

This exception is subject to section 362(m) which requires that the lessor files with the bankruptcy court and serves on the debtor a certification under penalty of perjury

that such an eviction action has been filed, or that during the 30-day period preceding the filing of the certification, the debtor has endangered the property or illegally used or allowed to be used a controlled substance on the property.

The exception begins 15 days after the filing of lessors's certification, unless the debtor files and serves on the lessor an objection challenging the truth or legal sufficiency of the lessor's certification, or that the situation has been remedied. .

The court decides the dispute hearing that shall be held within 10 days after the filing of the objection.

§ 362(b)(24) Transfers Not Avoidable under Sections 544 and 549

Transfers that prevail over the trustee's §544 powers (vg § 546)

Good faith purchasers insulated by Section 549© from the trustee's avoidance actions under §§549(a) or (b)

§ 362(b)(25) Investigations or Actions by Securities Self Regulation Organizations

§ 362(b)(26) Setoff of Income Tax Refunds

setoffs permitted under applicable non bankruptcy law by a governmental unit of an income tax refund based on a prepetition taxable period against a prepetition tax liability

§ 362(b)(27) Setoff under Master Netting Agreements

enforcement of setoff or netting provisions in swap agreements, master netting agreements, and security agreements or arrangements related to one or more swap agreements or master netting agreements

§ 362(b)(28) Exclusion of Debtor from Participation in Federal Health Care Programs

permits the Secretary of Health and Human Services to exclude the debtor from participation in the Medicare program or any other federal health care programs as defined in section 1128B(f) of the Social Security Act.

§ 362(n) Exceptions in Serial Small Business Chapter 11 Cases

No automatic stay in a case in which the debtor:

- (A) is a debtor in a small business case (§101) pending at the time the petition is filed;
- (B) was a debtor in a small business case dismissed by an order that became final within the previous 2-year period;
- (C) was a debtor in a small business case in which a plan was confirmed within the previous 2-year period;
- or
- (D) is an entity that has acquired substantially all of the assets or business of a small business debtor described in subparagraph (A), (B), or ©,

unless such entity establishes by a preponderance of the evidence that such entity acquired substantially all of the assets or business of such small business debtor in good faith and not for the purpose of evading this paragraph.

These small business exceptions do not apply--

- (A) to an involuntary case involving no collusion by the debtor with creditors;
- or
- (B) to the filing of a petition if--
 - (I) the debtor proves by a preponderance of the evidence that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time the case then pending was filed; and
 - (ii) it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable period of time.

DURATION OF THE AUTOMATIC STAY §362©
(statutory termination of the stay)

As opposed to the permanent effect of a discharge (§524, §1141, and §1328) the duration of the stay is limited by the Code itself in §362©. The automatic stay may also be lifted by the court upon a request by a creditor under §362(d) (discussed *infra*)

The specific time for the lapsing of the stay under §362© depends on the specific area of protection covered by the estate discussed above (debtor, the estate, debtor's property).

§ 362© (1) Stays of acts against property.

Stays of acts against property of the estate, are in effect until the property is no longer property of the estate.

Examples:

- Sale of property (§363)
- Exemption of property (§522)
- Abandonment of property (§554)
- Termination of the estate due to dismissal

In Re: De Jesús Sáez, 721 F.2d 848, 851 (1st Cir. 1983)

§ 362© (2) Stays of any other act.

Stays of any other act under Sub-Section (a) (i.e. the protection of debtor and of his/her property) are in effect until the earliest of:

- A. Closing of the Case
- B. Dismissal of the Case
- C. Granting or denial of the discharge

BACPA added new §362(c)(3) and §362(c)(4) to deal with serial filings by individuals.
BAPCPA - 2005 changes affect cases filed on or after 10/17/2005.
In the District of PR, these cases begin with 05-12858-ESL.

§362(c)(3) Filing of Case
Following the Dismissal of One Previous Case

IF

1 a new case is filed (Chapters 7,11, or 13)

“other than a [Ch.11, 12,or 13 case refiled following a dismissal under §707(b) – ie upon finding (or presumption) of abuse]”

2 by an individual (or by spouses jointly)

3 within one year from dismissal of earlier case,

THEN

A The automatic stay “with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease” terminates in 30 days *with respect to the debtor*

(1st Cir. BAP has ruled that this termination does not apply to the estate property – ie the stay remains in effect re: estate. Jumpp v. Chase Home Fin., LLC (In re Jumpp), 356 B.R. 789 (BAP 1st Cir. 2006); [12/28/06, JUDGES: de Jesus, Vaughn and Deasy, OPINION: Per Curiam])

unless,

B the court extends the stay

upon 1. a finding that the new case was filed in good faith;
2. on motion of a party in interest
3. after notice and a hearing
4. completed before the expiration of the 30-day period

C Presumption of Bad Faith. In said hearing on debtor’s request to maintain the stay bad faith is presumed:

The new case is presumed “filed not in good faith”. This presumption is granted as to all creditors, or for the benefit of just one creditor, depending on the following circumstances:

- as to all creditors if
- I the debtor had more than one prior (non-Ch.12) case in the preceding year;
- or
- II Just one prior (non-Ch.12) case dismissed in the preceding year for
 - aa failure to file documents without substantial excuse,
 - bb failure to provide adequate protection as ordered, or
 - cc failure to perform the terms of a confirmed plan;
- or
- III If there has been no substantial change in financial or personal affairs of debtor since the dismissal of the previous case to the extent needed for the new case to be concluded with a confirmed plan or a Chapter 7 discharge.

as to any creditor that requested relief from the automatic stay that was granted or pending at the time of dismissal of the previous case

§362(c)(3)© (“presumption may be rebutted by clear and convincing evidence to the contrary”)

**§362(c)(4) Filing of Case Following the Dismissal
Of More than One Previous Cases**

IF

1 new case filed

“other than a [Ch.11, 12, or 13 case refiled following a dismissal under §707(b) – ie upon finding (or presumption) of abuse]”

2 by an individual (or by spouses jointly)

3 within one year from dismissal of TWO OR MORE previous cases,

THEN

A No automatic stay under 11 USC 362 goes into effect

B The court may order that the stay take effect if,

1 within 30 days after the filing of the case,

2 a party in interest requests it and shows that the filing of the new case is in good faith as to the creditors to be stayed, and

3 after notice and a hearing in which the new case is presumptively filed not in good faith

C At said hearing, a such presumption may be rebutted by clear and convincing evidence to the contrary)--

D This bad faith presumption is granted as to all creditors, or for the benefit of just one creditor, depending on the following circumstances:

as to all creditors if I the debtor had more than one prior
(non-Ch.12) case in the preceding year;

or

II Just one prior (non-Ch.12) case dismissed in
the preceding year for

- aa failure to file documents without substantial excuse,
- bb failure to provide adequate protection as ordered, or
- cc failure to perform the terms of a confirmed plan;

or

- III If there has been no substantial change in financial or personal affairs of debtor since the dismissal of the previous case to the extent needed for the new case to be concluded with a confirmed plan or a Chapter 7 discharge.

as to any creditor that requested relief from the automatic stay that was granted or pending at the time of dismissal of the previous case

§362(d) Relief From the Automatic Stay

Section 362(d) of the Code permits a creditor affected by the stay to request relief therefrom

- (1) For Cause, including lack of adequate protection;
- (2) Debtor's lack of equity in property if such property is not necessary to a effective reorganization;
- (3) In Single Asset Real Estate cases (§101) the creditor secured with such asset may request the remedies based on the timing of the filing of a feasible plan, or commencement of post-petition (pre-confirmation) payments by debtor. Debtor is given specific periods within which:

the plan must be filed (and deemed confirmable); or

to start payments.

- (4) In Rem Orders recordable, and effective for 2 years, in future cases.

Secured creditors may obtain these orders in certain circumstances (schemes to delay, hinder and defraud creditors)§362(b)(20) in conjunction with §362(d)(4) [added by BAPCPA - 2005]

§362(e) Procedure for Relief From the Automatic Stay and lapse thereof

Section 362(e) of the Code and Rule 4001, prescribes an expedited procedure to consider §362(d) reliefs.

- (1) Thirty days after a request for relief from the stay of any act against property of the estate, the stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of a final hearing and determination under subsection (d) of this section.

If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for

a specific time which the court finds is required by compelling circumstances.

(2) in a case under chapter 7, 11, or 13 in which the debtor is an individual, the stay under subsection (a) shall terminate on the date that is 60 days after a request is made by a party in interest under subsection (d), unless--

(A) a final decision is rendered by the court during the 60-day period beginning on the date of the request; or

(B) such 60-day period is extended--

(I) by agreement of all parties in interest; or

(ii) by the court for such specific period of time as the court finds is required for good cause, as described in findings made by the court.

Violation of the Stay

Consequences or effects:

A Nullity

In Re: Smith Corset Shops, Inc., 696 F. 2d. 971, 976 (1st Cir, 1982); In Re: Advent Corp., 24 BR 612 (1st Cir. BAP 1982); In re Soares, 107 F3d 969 (1st Cir. 1997)

First Circuit held: Sec. 362(d) permits bankruptcy courts to lift the automatic stay retroactively and thereby validate actions which otherwise would be void. [Soares, *supra*, 107 F3d at 976.]

B Contempt

In Re: De Jesús Sáez, 721 F. 2d. 848 (1st Cir. 1983)

C Damages

§362(k): **an individual** injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages

IN RE: SPOOKYWORLD, INC., 346 F.3d 1 (1st Cir. 2003):

A corporation, cannot not bring suit under § 362(k) because the statutory language suggests that only individuals may obtain damages for violation of the automatic stay.

Corporations are not wholly without remedy for violations of the automatic stay: Under § 105(a) , "the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Contempt orders issued under section 105(a), including awards of damages, are routinely used to punish violations of the automatic stay

VIII- RIGHTS AND DUTIES OF DEBTORS AND TRUSTEES

SECTION 363: USE, SALE AND LEASE OF ESTATE PROPERTY

A- in the ordinary course of business

- Sec. 363(c)(1)

If Operation of business is authorized
(under Sec. 721, 1108, 1304, 1203 or 1204)

Use, sale or lease is permitted Without notice or hearing

Exception: Sec. 363(c)(2)
cash collateral

(1) Definition of cash collateral: Sec. 363(a)

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents ... in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits ...

(2) Use, sale or lease of cash collateral prohibited unless:

- a. consent; or
- b. court authorization

Procedure: Sec. 363(c)(3) and Rule 4001

363(e) adequate protection required

Burden of proof- §363(o)

1. the trustee: adequate protection

2. other party: validity, priority or extent of interest in property

B- Outside the ordinary course of business

-after notice and a hearing §363(b)(1)
(Notice Practice per §102-1)

POST-PETITION CREDIT §364

1. Administrative Priority
§364-Ordinary Course of Business: without Notice or order
§364(b) Outside of the ordinary course, order required
2. Super Priority or Secured Credit §364(c),order required
3. Subordination of senior liens §364(d),order required
4. Subordination of Chapter 11 administrative expenses to the liquidation expenses of Chapter 7

EXECUTORY CONTRACTS §365

. Definition

Prof. Vern Countryman definition:

Existing contract w/ bilateral obligations;

- Each party w/ outstanding (executory) compliance; and
- failure to perform by any party excuses performance by the other

Other definitions: The Functionality Approach

- a. Forfeiture clauses - (inoperative in a bankruptcy case)

Under §363(l); 365(e); 365(f) and 541© the following types of clauses are unenforceable:

- (1) Limiting performance to a specific person (anti-assignment clause)

- (2) Conditioned on the debtor's insolvency or financial condition, the commencement of a bankruptcy case, or the appointment of a receiver or custodian

Exceptions:

1. Pre-petition termination
 2. Special types of contracts (§365©; 365(e)(2) (Personal Contracts and Contracts to Make Loans)
 3. Enforceability after dismissal
- b. . Time limitations for assumption/rejection
1. Chapter 7 -60 days to assume, or else, DEEMED REJECTED §365(d)(1)
 2. Ch. 11,12,13, until confirmation §365(d)(2)
 - (1) Exception- non-residential real estate leases (120 days) §365(d)(4)
- b. **Rejection of the contract, effects:**
- . 1- Future performance may be rendered unenforceable. See **In re: the Ground Round, Inc.** 482 F.3d 15, 17 (1st Cir. 2007) (The law is in “remarkable confusion”; “bright line solutions” not the answer.)
 - . 2- Rejection is treated as a breach giving rise to a pre-petition claim §365(g); §502(e)
 - . 3- Use and occupancy doctrine: administrative claim for post-petition/pre surrender period
 - . 4- Rejection after assumption: a post-petition claim with administrative expense status
 - . 5- Rejection/Assumption criteria: Business judgment standard
 - .

. 6- Rejection of labor contracts :

NLRB v. Bildisco 465 US 513 (1984):

- (1) Rejection not an unfair labor practice
- (2) Burdensome requirement and balance of equities
- (3) Ch. 11-§1113 of '84BAFJA
(§365 STANDARD (per Bildisco) still applies to Ch. 7, 12, 13)

UNITED FOOD & COMMERCIAL WORKERS UNION v. ALMAC'S ,
90 F.3d 1 (1st Cir. 1996) (interim changes to the union contract under
§1113 not "partial rejections" giving rise to §365(g) damages)

b. Assumption of the executory contract

. Effects:

- a. Breaches produce administrative expenses
- b. Full contract becomes part of estate; estate derives full benefits (and assumes all obligations)

. Requirements:

a. Court approval §365(a)

b. Curing of defaults

Eagle Ins. Co. v. Bankvest Capital Corp. (In re Bankvest Capital Corp.), 360 F.3d 291 (1st Cir. 2004)

No-monetary breaches:
§365(b)(2)(D) interpreted in a manner that allows substitution of a monetary cure of such non-monetary defaults. (prepetition failure to deliver equipment to the debtor's lessee need not be cured, but the reorganized debtor remained liable for damages for the breach).

c. Compensation for losses

- d. Adequate assurance of future performance
- a. Assignment of contracts §365(f)
 - a. Assumption required
 - b. Adequate assurance of future performance by assignee
 - c. Estate released from post-assignment defaults §365(k)
- b. Debtor as landlord, realty vendor, and seller in time-share contracts 365(h),(i),(j)

Upon rejection:

-non-debtor party has 2 options:

1. claim damages; or
2. remain in possession offsetting damages against rent or purchase price

BAPCPA - 2005 change

Personal Property Leases.

If a lease of personal property is not timely assumed by the trustee,

- A. the property is no longer property of the estate and
- B. the automatic stay is terminated as to the property.

However, individual chapter 7 debtors may request in writing to assume a personal property lease. Specific procedures and landlords rights added.

UTILITY SERVICE - §366

A. INTERRUPTION PROHIBITED:

Interruption or denial of service based on pre-petition debt
or filing of bankruptcy

Discrimination also prohibited

B. INTERRUPTION PERMITTED:

if no adequate assurance of payment of post petition
services is provided within 20 days

BAPCPA - 2005 change

Utility Service. adequate assurance of payment in Ch 11 cases

A utility is permitted to terminate service to a chapter 11 debtor if it does not receive adequate assurance within 30 days of the petition. §366(c)(2)

For other chapters still 20 Days. §366(b)

Compare §366(b)

with §366(c)(2): “adequate assurance of payment for utility service that is satisfactory to the utility”

IX. DISTRIBUTION OF THE ESTATE

§501 Filing proof of claim

§101 Definition of claim

- A. right to payment regardless of:
 - reduced to judgment
 - liquidated/unliquidated
 - fixed
 - contingent
 - matured/unmatured
 - disputed/undisputed
 - legal, equitable, secured or unsecured
- B. remedies for breach of performance if gives rise to a right to payment
- C. §102 claim against debtor includes **claim against property** of debtor

Ohio v. Kovacs 469 US 274 (1985) a mandatory injunction under state environmental protection law requiring debtor to clean up pollution defined as a claim since the state was seeking reimbursement of the expenses incurred in cleaning.

Dept. of Public Welfare v. Davenport, 110 SCt 2126 (1990) claim includes criminal judgment ordering restitution

Johnson v. Home State Bank, 111 SCt 2150, 2154 (1991) "Congress intended ... the broadest definition of claim" (includes mortgage lien on debtor's property even if debtor's personal liability was previously discharged)

Rule 3003(4) Effect of filing claim or interest.

A proof of claim or interest executed and filed in accordance with this subdivision shall supersede any scheduling of that claim or interest pursuant to § 521(a)(1) of the Code.

§502 ALLOWANCE OF CLAIMS

BAPCPA - 2005 change
20% reduction of certain claims as part of its PROMOTION OF ALTERNATIVE DISPUTE
RESOLUTION

a. Only “allowed claims” participate in distributions. A claim is deemed allowed unless objected.

b. Objections to claim

1. any defense
2. unmatured interest
3. ad valorem property taxes exceeding value of property
4. unreasonable claims of insiders or debtor's attorneys
5. unmatured and non-dischargeable alimony or support claims.
6. limitation of lessor's damages
7. limitation of employees' damages
8. certain tax penalties under FUTA
9. late claims (1994 amendments)

c. Ch. 11 deemed filed unless listed as §1111(a)
disputed
contingent or
unliquidated

d. TIME FOR FILING – Rule 3002- Rule 3003© (Local R 3003-1)

not later than **90 days** after the first date set for the meeting of creditors called under § 341(a) of the Code, except as follows:

EXCEPTIONS:

Per Rule 3002

- (1) A proof of claim filed by a governmental unit,
..... 180 days after the date of the order for relief.

If filed by a governmental unit for a claim resulting from a tax return filed under § 1308,
..... 180 days after the date of the order for relief; or
..... 60 days after the date of the filing of the tax return.

- (2) Claim by an infant or incompetent person or the representative of either
In the interest of justice and if it will not unduly delay the administration
of the case, the court may extend the time
- (3) An unsecured claim allowable as a result of a judgment
..... within 30 days after the judgment becomes final
- (4) A claim arising from the rejection of an executory contract
..... within such time as the court may direct.
- (5) If notice of insufficient assets to pay a dividend was given, and
subsequently the trustee notifies the court that payment of a dividend
appears possible,
the clerk shall give at least 90 days' notice by mail

-EXTENSIONS FOR EXCUSABLE NEGLECT

- 1. permitted in Ch. 11. Rule 9006(b)(1)
Pioneer Investment V. Brunswick 113 S.Ct. 1489 (1993)
- 2. not permitted in Ch. 7 . Rule 9006(b)(3)
Re: Hemingway Transport 993 F.2d 915 (1ST Cir. 1993)
- 3. not permitted in Ch. 13 Rule 9006(b)(3)
Re: Aboody 223 BR 36 (BAP- 1ST Cir. 1998)
[1998 Bankr. Lexis 982 17 Apr. 98 (BAP 1st Cir) (Votolato, ESL, GAC)]

- OTHER EXTENSIONS

- R.3002(1) The court may, for cause, enlarge the time for a governmental unit
to file a proof of claim only upon motion of the governmental unit
made before expiration of the period for filing a timely proof of
claim.

R.3002(6) If notice of the time to file a proof of claim has been mailed to a creditor at a foreign address, on motion filed by the creditor before or after the expiration of the time, the court may extend the time by not more than 60 days if the court finds that the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim.

Rule 3004. Filing of Claims by Debtor or Trustee

If a creditor does not timely file a proof of claim under Rule 3002© or 3003©, the debtor or trustee may file a proof of the claim
. within 30 days after expiration of the time for filing claims

Rule 3005(a). Filing of Claim By Guarantor, Surety, Indorser, or Other Codebtor

If a creditor does not timely file a proof of claim under Rule 3002 or 3003©, an entity that is or may be liable with the debtor to that creditor, or who has secured that creditor
. within 30 days after the expiration of the time for filing claims

e. SECURED CLAIMS, not lost if PoC not filed, however:

1. - limited to collateral
2. - No payment under Chapter 13 plan from trustee
3. - Bound by provisions in confirmed plans

Types of claims

- secured
- priority
- non-priority

§506 SECURED CLAIMS

- a. Validity of lien
- b. Value of collateral
- c. Extent of claim

§506 secured status entitles claimant to:

Payment of: PRINCIPAL + INTEREST,

ATTY. FEES, COSTS, OR CHARGES

IF: agreed, secured by value of collateral, and
reasonable. §506(b)

* §506© Surcharge

Valuation standard,

In Re: Winthrop Old Farms Nurseries, Inc. 50 F.3rd 72 (1st Cir. 1995)

* §1111(b) election in Chapter 11 cases

§507 PRIORITY/NON-PRIORITY CLAIMS

Applicable to:

- Chapter 7 liquidations
- Ch. 11, 12 & 13 plan

■ § 507. Priorities.

- * Section 507(a) sets forth several categories of claims and expenses that are entitled to priority in bankruptcy cases.
- * The effect of such priority varies among the different chapters of the Code.
- * The priorities are summarized as follows:

First Priority: Section 507(a)(1) Domestic Support Obligations.

Domestic support obligations are **first in priority**

Administrative expenses of a trustee incurred in
administering assets to pay those obligations **paid prior**
to domestic support obligations

BAPCPA - 2005 change
Domestic Support Obligations new 1st Priority

Former 1st - 6th renumbered 2nd - 7th
Employee related priorities (renumbered 4th & 5th) increased to \$10,950 & 180 days

Second Priority: Section 507(a)(2)

Administrative Claims.

allowed under section 503(b) fees and charges assessed against the estate under chapter 123 of title 28.

Third Priority: Section 507(a)(3)

Gap Period Claims.

Claims allowed under section 502(f) of the Code,

consist of claims arising

- A. in the ordinary course of the debtor's business or financial affairs

- B. after the commencement of an involuntary bankruptcy case but

- C. before the earlier of an appointment of a trustee and the order for relief.

Fourth Priority: Section 507(a)(4)

Wages, Salaries, and Commissions.

Wages, salaries, or commissions, including vacation, severance, and sick leave pay earned

to the extent earned within 180 days before the earlier of the date of the filing of the petition or the date the debtor ceased business and up to \$10,950 per individual or qualifying corporation.

Fifth Priority: Section 507(a)(5)

Employee Benefit Plan Contributions.

arising from services rendered within 180 days before the earlier of the date of the filing of the petition or the date of the cessation of the debtor's business

up to \$10,950 per employee, less the sum paid to such employees under section 507(a)(3), and any other employee benefit plan.

Sixth Priority: Section 507(a)(6)

Grain Producers and United States Fishermen.

Claims of persons engaged in the production or raising of grain (or United States fishermen) against a debtor who owns or operates a grain (or fish produce) storage facility limited to \$5,400 per holder of a claim.

Seventh Priority: Section 507(a)(7)
Lay-Away Deposits of Consumers.

Claims of individuals arising from a prepetition deposit of money with the debtor in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or up to \$2,425 per individual.

Eighth Priority: Section 507(a)(8)
Taxes and Customs Duties.

Claims of governmental units for the seven categories of tax obligations mentioned therein, including:

- (A) Taxes measured by income or gross receipts-- for a taxable year ending on or before the filing of the petition
 - (i) for which any required return is last due ... **three years** ... prepetition, or
 - (ii) assessed within 240 days of the date of the filing of the petition ... or
 - (iii) not assessed before, but assessable by law or agreement after, the filing of the petition ...
- (B) Property taxes assessed before the commencement of the case and last payable without penalty after **one year** before the date of the petition;
- © Trust fund taxes, (all years)
- (D) Employment taxes on wages, salaries, or commissions of a kind specified in section 507(a)(3) earned ... **three years** before the date of the filing of the petition;
- (E) Excise taxes--
... **three years** before the date of the filing of the petition; or
- (F) Customs duties arising out of the importation of merchandise--
entered within **one year** before the date of the filing of the petition; or
four years ... if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending ...

(G) Penalties related to a claim of a kind entitled to a section 507(a)(8) priority, but only if the penalty is in compensation for actual pecuniary loss.

Ninth Priority: Section 507(a)(9)
Commitments to Regulatory Agencies.

Claims based upon any commitment by the debtor to a federal depository institutions regulatory agency to maintain the capital of an insured depository institution.

BAPCPA - 2005 change
new TENTH Priority for
Drunk Driving and Boating Debts.
(S. 256, Sec. 223)

TENTH Priority: Section 507(a)(10)
debts for death or personal injury

resulting from unlawful operation of a motor vehicle or vessel due to intoxication from alcohol, drugs, or another substance.

X. THE DISCHARGE

- § 524 The Discharge

 - Scope & Definition

One of the ultimate goals of a debtor filing a bankruptcy case is to obtain a discharge. This discharge is the **court's decree**:

 - A. eliminating debtor's **personal liability** on the claims covered thereby (generally, pre-petition claims not otherwise excepted from discharge *v.g.* §523, *infra*), and
 - B. **enjoining creditors** from any collection efforts. See §524

- An otherwise valid **lien is not affected** by debtor's discharge.

 - Johnson v. Home State Bank, 111 SCt 2150, 2153 (1991) claim includes mortgage lien (and right to foreclose) on debtor's property even if debtor's personal liability was previously discharged

- Contrary to what is intended with the automatic stay, the discharge involves effects that are both **permanent** and **substantive**.
- There are grounds to **object (§727)** the discharge, and to **except (§523)** debts from a discharge
- Chapter 7 Discharge

Debtor surrenders his non-exempt assets, and receives the discharge re: all dischargeable debts. The creditors then claim against the estate. See discussion below re: dischargeable debts (§523), and distribution of the estate (§726).

- Discharge in Other Chapters: §§ 1141, 1328.
- § 727 Objections to Debtor's Discharge

Pursuant to §727, a discharge can be denied to a debtor in a Chapter 7 when any of the circumstances listed therein are present. Some of these grounds are:

-
- (1) the debtor is not an individual; [automatic ground for denial of discharge]
- (2) the debtor, with intent to hinder, delay, or defraud ... 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;
 - © 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
 - © 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;

[the EIGHT-YEAR (previously six-year (**)) discharge rule]

- (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 EIGHT(**) years before the date of the filing of the petition;

BAPCPA - 2005 change

11 USC 727(a)(8) amended to modify Time Between Bankruptcy Discharges.

(**) A chapter 7 discharge after a prior chapter 7 or chapter 11 discharge, from six to **eight years** (time between the two orders for relief).

-
- (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; or

BAPCPA - 2005 change

NEW GROUNDS FOR OBJECTING DISCHARGE:

11 USC 727(a)(11) If debtor fails to complete personal finance education course approved by the UST

11 USC 727(a)(12) If court has reasonable cause to believe that debtor is involved in certain felonies (convicted or case pending) set forth in new §522(q)

Sec. 1228 of BAPCPA (under “TITLE XII TECHNICAL AMENDMENTS”)

No discharge shall be granted unless debtor provides requested tax documents to the court

- (a) The **time for filing** a complaint under §727 is 60 days from the date of the meeting of creditors scheduled under §341 of the Code. Rule 4004(a).

Kontrick v. Ryan, 540 U.S. 443, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004):

Held: the time limit in Rule 4004(a) is **not a matter of subject matter jurisdiction**, but rather a procedural rule. Hence, a debtor who did not raise the untimeliness of a creditor's complaint until after the bankruptcy court had entered judgment was precluded from arguing lack of jurisdiction to enter that judgment. (The Court did not decide whether the untimeliness of the complaint was in the nature of an affirmative defense or the failure to state a claim, but held that in either case **the issue must be raised before trial**.)

- (b) The **burden of proof** rests on the creditor objecting the discharge. Rule 4005

§ 523 Nondischargeability of Certain Debts

Section 523 provides yet another list of grounds under which certain debts can be found to be non-dischargeable even when debtor is granted a discharge:

§ 523. Exceptions to discharge include:

- (1) for a tax or a customs duty—

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

- (B) with respect to which a return, if required—
 - (i) was not filed; or
 - (ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or
 - © with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;
 - (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
 - © for purposes of subparagraph (A) of this paragraph,
 - consumer debts owed to a single creditor and aggregating more than **\$550 for "luxury goods or services"** incurred by an individual debtor on or **within 90 days** before the order for relief under this title, or
 - cash advances** aggregating more than **\$825** 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**; "luxury goods or services" ...

-
- (3) **neither listed nor scheduled** under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, **in time to permit—**
- (A) timely filing of a proof of claim,
- (unless such creditor had notice or actual knowledge of the case in time for such timely filing); and
- (B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely request for a determination of dischargeability ...
- (4) for **fraud or defalcation** while acting in a **fiduciary** capacity, embezzlement, or larceny;
- (5) to a spouse, former spouse, or child of the debtor, for **alimony to, maintenance for, or support of such spouse or child**, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement ...
- (Does not include a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support)
- (6) for **willful and malicious injury** by the debtor to another entity or to the property of another entity;
- (7) to the extent such debt is for a **fine, penalty, or forfeiture** payable to and for the benefit of a **governmental unit**, and is **not compensation for actual pecuniary loss**, other than a tax penalty ...
- (8) for an **educational benefit overpayment or loan made**, ...
- (9) for **death or personal injury** caused by the debtor's **operation of a motor vehicle** if such operation was unlawful because the debtor was **intoxicated** from using alcohol, a drug, or another substance;
- (13) for any payment of an order of **restitution** issued under **title 18**, United States Code;
- (14) incurred to **pay a tax to the United States that would be nondischargeable** pursuant to paragraph (1);

-
- (15) certain debts incurred by the debtor in connection with a separation agreement, divorce decree or other order of a court of record, under certain conditions
- [condominium maintenance fees]
- (16) for a fee or assessment that becomes due and **payable after the order** for relief to a membership association with respect to the debtor's interest in a dwelling unit that has condominium ownership or in a share of a cooperative housing corporation, but only if such fee or assessment is payable for a period during which—
- (A) the debtor physically occupied a dwelling unit in the condominium or cooperative project; or
- (B) the debtor rented the dwelling unit to a tenant and received payments from the tenant for such period,
- but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order or relief in a pending or subsequent bankruptcy case;
- (17) for a fee imposed by a 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 an assertion of poverty by the debtor under section 1915(b) or (f) of title 28, or the debtor's status as a prisoner, as defined in section 1915(h) of title 28; or

[] see §523 for details and procedure for excepting debts from discharge.

BAPCPA - 2005 change
Drunk Boating or Flying exception to discharge in
11 USC 523(a)(9)

[Section 523© and Rule 4007©]

In cases under Chapter 7 and Chapter 11, the **time to file a complaint** under the provisions of

- §523(a) (2) (false pretenses),
(4)(fiduciary fraud)

(6)(willful or malicious injury)

is **60 days from the 341** meeting of creditors. [Section 523© and Rule 4007©]

All other grounds for non-dischargeability may be exercised at any time. See Rule 4007(b).

Burden and type of proof.

According to **Grogan v. Garner, 498 US 279 (1991)**, The burden is on the creditor, who must prove any of the grounds by the preponderance of evidence.

Differences with discharge granted in other chapters

§1141 **Ch.11**

- ▶ Includes post-petition claims (pre-conf.)
- ▶ Individual Debtors (not corps.) subject to §523
(BAPCPA - 2005
changed this re: No discharge in corporate chapter 11 cases for certain governmental claims based on fraud
- ▶ Liquidating Debtors subject to §727
- ▶ Granted upon conf. of plan
(BAPCPA - 2005
changed this re: individuals: discharge in new cases granted upon completion of plan)

§1328 **Ch.13**

- ▶ Granted upon completion of plan
- ▶ only some of the §523 exceptions apply to a Chapter 13 discharge:
 1. any **extended long-term** debts provided for in the plan. §1328(a)(1)
 2. non-dischargeable **alimony and support** obligations §1328(a)(2)
 3. certain **educational loans**. §1328(a)(2)
 4. liabilities for **personal injuries or death of debtor's driving while intoxicated** §1328(a)(2); and
 5. **restitution** obligations arising out of debtor's criminal conviction §1328(a)(3).

(BAPCPA - 2005 added
to list of nondischargeable debts in chapter 13 cases:

- (a) §507(a)(8)© priority taxes (withheld trust fund taxes)
- (b) §523(a)(1)(B) for a tax with respect to which a return, or equivalent report or notice, if required
 - (a) Not filed
 - Or
 - (b) Filed late
- (c) §523(a)(1)© tax with respect to which
 - (0) the debtor made a fraudulent return or
 - (0) willfully attempted in any manner to evade or defeat such tax
- (d) §523(a)(2) for money, property, services, ... obtained by
 - (0) false pretenses,
 - (0) a false representation, or
 - (0) actual fraud
 - (0) Materially false statements on financial condition ...
- (e) §523(a)(3) neither listed nor scheduled
- (f) §523(a)(4) for fiduciary fraud or defalcation, embezzlement, or larceny
- (g) for restitution, or damages,
 - (0) awarded in a civil action against the debtor
 - (0) as a result of willful or malicious injury by the debtor
 - (0) that caused personal injury to an individual or the death of an individual.

(S. 256, Sec. 314 & 707)

XI. CHAPTER 7 LIQUIDATIONS

Types of Cases

Voluntary

Involuntary

The Chapter 7 Debtor

Eligibility to be a Chapter 7 debtor §109(b)

§109(b): A Person, excluding

- (a) railroads
- (b) banks, insurance co., & other regulated institutions

Capacity to file a Chapter 7

- (a) Individuals
- (b) Corporate
- (c) Partnership

Duties of a Chapter 7 debtor

§521 List of Duties

- (1) file certain documents (schedules, income statements, etc.)
- (2) individual debtor's with secured debts,
 - file with the clerk a statement of intention re: collateral of secured debts
 - perform his intention with respect to such property
- (3) cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties

-
- (4) surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title;
 - (5) appear at the hearing required under section 524(d) [discharge and reaffirmation agreements]
 - (6) in a case under chapter 7 of this title in which the debtor is an individual, not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either--
 - (A) enters into an agreement with the creditor pursuant to section 524© with respect to the claim secured by such property; or
 - (B) redeems such property from the security interest pursuant to section 722.
 - (7) unless a trustee is serving in the case, continue to perform the obligations required of administrators of an employee benefit plan (as defined in the statute)
 - §341 Examination & Fifth Amendment Privilege
 - §344 Immunity

Attorney/Client Privileges

Corporate (as opposed to an individual's) attorney/client priv. belongs to the trustee of such corp.

Commodity Futures Trading vs. Weintraub, 471 US 343 (1985)

BAPCPA - 2005 change

New Duties, Sanctions for lack of compliance
(S. 256, Sec. 304)

Debtor's Duties -- Statement of Intention.

amended 11 USC 521(a)

new 11 USC 521(a)(6):

Regarding personal property in which a creditor has a purchase-money security interest:

-
- (a) An individual chapter 7 debtor shall not retain possession unless,
- (1) within 45 days after the first 11 USC 341(a) meeting of creditors, either
- enters into a reaffirmation agreement
 - or
 - redeems the property under 11 USC 722
- (b) If the debtor fails to so act,
- the automatic stay with respect to such property is terminated,
 - the property is no longer property of the estate, and
 - the creditor can take whatever action with respect to the property is permitted by applicable non bankruptcy law.
- C. However, the court may find,
- on motion of the trustee,
 - filed before the expiration of the applicable time
- (a) that the property is of consequential value or benefit to the estate
and
(b) order delivery of the property to the trustee.

BAPCPA - 2005 change
(S. 256, Sec. 315(b))
New Duties, Sanctions for lack of compliance

11 USC 521
amended to impose
Additional Document Required from debtors

- (a) certification that the debtor received the notice under 11 USC 342(b).

- (b) itemized statement of monthly net income,
- (c) copies of payment advices or other evidence of payment received within the 60 days before the petition from the debtor's employer(s),
- (d) statement of any reasonably anticipated increases in income or expenses in the 12 months after the petition is filed.

At least seven days before the first date set for the 11 USC 341(a) meeting,

- (e) provide to the trustee a copy of the **federal tax return** required under applicable law or a transcript thereof for the most recent tax year before the year the case was filed and for which a return was filed.
- (f) supply a **copy at the same time to any creditor** that timely requests one. If the debtor fails to provide such copies the court must dismiss the case unless the failure is for reasons beyond the debtor's control.
- (g) chapter 7, 12, or 13 individual debtor must, at the request of the court, United States trustee, or a party in interest, file with the court federal tax returns or tax transcripts for each year ending while the case is pending and, if federal tax returns for any of the three years ending before the commencement of the case are filed during the case, the returns or tax transcripts for such years.
- (h) Chapter 13 debtors must file annual statements of income and expenditures.
- (i) If requested by the trustee or United States trustee, the debtor must provide information that establishes the identity of the debtor.

(S. 256, Sec. 316)

11 USC 521 amended to mandate

Dismissal for Failure to File Documents.

-
- (a) if an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required
- within 45 days after the date of the filing of the petition,
- the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition.
- (b) any party in interest may request the court to enter an order dismissing the case.
- If requested, the court shall enter an order of dismissal not later than 5 days after such request.
- © upon request of the debtor made within 45 days after the date of the filing of the petition
- the court may allow the debtor an additional period of not to exceed 45 days to file the information required
- if the court finds justification for extending the period for the filing.
- (d) on the motion of the trustee filed before the expiration of the applicable period
- the court may decline to dismiss the case if
- the court finds that the debtor attempted in good faith to file all the information required
- and
- the best interests of creditors would be served by administration of the case.

BAPCPA - 2005 change
(S. 256, Sec. 720)

Mandatory Dismissal for Not Filing of Prepetition Tax Returns

(c)--(1)-- A governmental unit that operates a **student grant or loan program** or a person engaged in a business that includes the making of **loans guaranteed or insured under a student loan program** may not deny a grant, loan, loan guarantee, or loan insurance

The Trustee in a Chapter 7 Case

Selection

- Interim trustee
- elected trustee

Types of trustee

General Rule: Liquidating trustee

Exception: operating trustee

§721 permits Operation to Preserve Going Concern during a limited time

Role & capacity of trustee

§323(a) Representative of the Estate

§323(b) standing to sue and be sued

Compensation

§326: Commissions based on work performed (“reasonable compensation”), limited by percent (scales) of amounts paid

Duties §704

Defend, represent, administer, estate assets

Evaluate and object, if proper:

- A. Debtor’s claims for exemptions
- B. Creditors’ claims

Evaluate & act upon actions (avoiding powers, etc.)

Propose, Report and Effect Distribution

§726 Distribution & Final Report

- General Principles Re: **Secured Claims**
- §726(a): Levels of Distribution to **Unsecured Creditors**
(Prorated at any level, in case of deficit)
 1. §507 priorities
 2. Timely filed, (and tardily filed if excusable & in time to permit payment)
 - EXCLUDING: Penalty claims (ie those that are not compensation for pecuniary loss)
 3. Late claims (not excusable tardiness)
 4. Penalty claims (that are not compensation for pecuniary loss)
 5. Interest (legal rate)
 6. Debtor's refund.

Distribution of **Community Property**:

- A. Allocation of Adm. Exp.
- B. Community Claims paid from community property
- C. Unpaid balance of B. (plus other claims) paid from debtor's separate property.

In re: Lang, 191 BR 268,

Case 94-5424 ESL (extent of estate encompasses all community property)

Campolieto v. Anaya, 97 JTS 26 97 CA 25, 142 D.P.R. 582 (4,marzo,1997)

[responsabilidad solidaria del cónyuge sin discharge (aquel que no radicó quiebra): bienes gananciales (librados del caudal) no responden (pag.152); bienes privativos responden por la mitad de la deuda (pag.153)]

Conversion to another chapter §706

- (a) Absolute right of voluntary conversion by debtor: Ch. 11, 12 or 13 (for cases originally filed under Ch.7)

Case law exception:

Right to convert may be denied in extreme circumstances constituting bad faith, or fraud.

- Kuntz v. Shambam, 233 BR 580, 582 (1st Cir BAP 1989); Cabral v. Shambam 285 BR 563 (1st Cir BAP); In Re Marrama, 313BR 525, 539 (1st Cir BAP 2004); 1st Circuit affirmed in 2005 WL 2840634, 430 Fed 3rd 474 (1st Cir) 2005; CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT No. 05-996. Argued November 6, 2006—Decided February 21, 2007 Marrama v. Citizens Bank of Massachusetts, 2007 WL 517340 __ US __ (2007)

- (b) conversion “On request of a party in interest”:

to Ch.11 only
After notice & a hearing
The court “may convert”

Dismissal §707

- (a) for cause, including:
 1. Unreasonable delay
 2. Nonpayment of fees
 3. Failure to file papers
- (b) abuse of Ch.7 under 2005-BAPCPA
 - by individual consumer debtor
 - [filing under Chapters 13 or 11 is clearly favored by the law]:
- §707(B)(2) ABUSE IS PRESUMED when debtor can pay specific amounts established by law:
 - Adjusted CMI (“current monthly income”) x 60months is not less than the lesser of (I) or (II) below:

- (I) 25% of general unsecured debts, or \$6,000 (whichever is higher)
 - or
 - (II) \$10,000
- §707(B)(3) IF ABUSE IS NOT PRESUMED (or presumption is rebutted by showing of SPECIAL CIRCUMSTANCES as set forth in the statute)
 - the court shall determine abuse based showings of bad faith or the “totality of circumstances” (See eg. In Re: Lamana, 153 F.3rd 1 (1st. Cir. 1998))

XII. CHAPTER 13
—ADJUSTMENT OF DEBTS
OF AN INDIVIDUAL WITH REGULAR INCOME

Introduction

Ch.13 entails:

- ▶ no liquidation (substitution of payment plan for Ch.7 dividends)
- ▶ debtor remains “in-possession” of estate
- ▶ enhanced discharge
- ▶ enhanced protection from automatic stays (§362 & §1301)

§109(e) Who may file

§109(e): -Individuals

-With regular income

-Less than \$336,900 in unsecured debts

-Less than \$1,010,650 in secured debts

-Excluding stockbrokers, commodity brokers

[precluded from chapter 13; they are subject to special chapter 7 provisions designed for customer protection. See 11 U.S.C. §§ 761-766 -- “stockbroker” and “commodity broker” defined in 11 U.S.C. § 101] Collier ¶ 1300.12 (at note 101)

Voluntary Nature of Chapter 13

- §303(a) No Involuntary Petitions
- §1307(a) Absolute Right to Convert to Chapter 7
- §1307(b) Absolute Right to Dismiss
- §1321 Only debtors’ plans

§1301 Co-debtors' automatic stay

§1301(a) a creditor may not act, ... to collect ...

a **consumer debt** of the debtor

from any individual that is liable on such debt with the debtor, ...

[*consumer debt* means debt incurred by an individual primarily for a personal, family, or household purpose]

[intended protection: to debtor, from indirect pressures through co-debtors]

Creditor's remedy:

§1301© On request of a party in interest and after notice and a hearing, the court **shall grant relief** from the stay provided by subsection (a) of this section with respect to a creditor, to the extent that—

- (1) as between the debtor and the individual protected under subsection (a) of this section, **such individual received the consideration** for the claim held by such creditor;
- (2) the **plan** filed by the debtor proposes not to pay such claim; or
- (3) such creditor's interest would be **irreparably harmed** by continuation of such stay.

§1306 Chapter 13 Estate

Scope:

- (a) §541 estate (pre-petition property)
- (b) §1306: post-petition acquired property, including debtor's earnings

Effects:

- ▶ enhanced protection from §362 automatic stay
- ▶ increased "best effort" confirmation standard

Chapter 13 Debtor and the trustee

- (a) **Standing Chapter 13 trustees** (§1302(b))
- (b) **§1303, §1306(b)** Role of Chapter 13 debtor-in-possession
- (c) §1304 debtors engaged in business

Conversion or dismissal §1307

§1307

- Voluntary conversion to Ch. 7 or voluntary dismissal (ie. by debtor); (absolute right)
- Other conversions or dismissals – discretionary.

§1307 (a) VOLUNTARY CONVERSION

The debtor

- **may convert** a case under this chapter to a case under chapter 7 of this title
- at any time.
- Any waiver of the right to convert under this subsection is unenforceable.

§1307 (b) VOLUNTARY DISMISSAL

On request of the debtor

- at any time, if the case has not been converted under section 706, 1112, or 1208 of this title,
- the court **shall dismiss** a case under this chapter.
- Any waiver of the right to dismiss under this subsection is unenforceable.

§1307 © INVOLUNTARY CONVERSION

Except as provided in subsection (e) of this section,

- on request of a party in interest
- or the United States trustee
- and after notice and a hearing,

- the court
 - may convert a case under this chapter to a case under chapter 7 of this title,
 - or may dismiss a case under this chapter,
 - whichever is in the best interests of creditors and the estate,
 - for cause, including--
 - (1) unreasonable delay by the debtor that is prejudicial to creditors;
 - (2) nonpayment of any fees and charges required under chapter 123 of title 28;
 - (3) failure to file a plan timely under section 1321 of this title;
 - (4) failure to commence making timely payments under section 1326 of this title;
 - (5) denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;
 - (6) material default by the debtor with respect to a term of a confirmed plan;
 - (7) revocation of the order of confirmation under section 1330 of this title, and denial of confirmation of a modified plan under section 1329 of this title;
 - (8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan;
 - (9) only on request of the United States trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition commencing such case, the information required by paragraph (1) of section 521;§(1\$) [or]
 - (10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of section 521[.];§(2\$) or
 - (11) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

§1307 (d) CONVERSION TO Chapters 11 or 12
Except as provided in subsection (e) of this section,
[Se refería a la “(e)” – re: farmers – que se renumera a “(f)”]

- at any time before the confirmation of a plan under section 1325 of this title,
- on request of a party in interest or the United States trustee
- and after notice and a hearing,
- the court **may convert** a case under this chapter to a case under chapter 11 or 12 of this title.

§1307(e) Upon the failure of the debtor to file a tax return under section 1308, on request of a party in interest or the United States trustee and after notice and a hearing, the court shall dismiss a case or convert a case under this chapter to a case under chapter 7 of this title, whichever is in the best interest of the creditors and the estate.

§1307[(e)](f) The court may not convert a case under this chapter to a case under chapter 7, 11, or 12 of this title if the debtor is a farmer, unless the debtor requests such conversion.

[(f)](g) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

BAPCPA - 2005 change
FAMILY LAW PROVISIONS
(SUBTITLE B)

Dismissal in Chapter 11, 12, and 13 Cases:

new (BACPA) §1307(c)(11)

Grounds for dismissal of a Chapter 11 chapter 12 or chapter 13 case
Now include failure to pay [postpetition] domestic support obligations

BAPCPA - 2005 changes

new

11 USC §1307(e); & §1308

Re: Filing of Prepetition Tax Returns in Chapter 13 Cases.

chapter 13 debtors are required to file with taxing authorities any unfiled tax returns that were due

in the **four years** before the petition by federal, state, or local law.

(S. 256, Sec. 716)

Mandatory Dismissal for Not Filing of Prepetition Tax Returns in Chapter 13 Cases

If the debtor does not file such returns,

the court **must dismiss or convert the case** on request of a party in interest or the United States trustee.

NEW 1307(e) Upon the failure of the debtor to file a tax return under 11 USC 1308, on request of a party in interest or the United States trustee and after notice and a hearing,

the court shall dismiss a case or convert a case under this chapter to a case under chapter 7 of this title, whichever is in the best interest of the creditors and the estate.

no objection to confirmation need be filed by a taxing authority until 60 days after the filing of required tax returns and

no objection to a tax claim may be filed, if a return is required with respect to the claim, until the tax return has been filed.

The Plan §1322

§1322 Contents of the plan:

Mandatory provisions §1322(a) & 1322(d)

- § 1322. (a) **The plan shall—**
- (1) **[submission of future earnings to the trustee]**
provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;
- (2) **[full payment to priority claims]**
provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim;[support obligations owed to gov may be excepted in certain cases] and
- (3) **[same treatment for each claim within a class]**
if the plan classifies claims, provide the same treatment for each claim within a particular class.
- (4) [2005 BAFCPA] a plan may provide for less than full payment of ASSIGNED "Domestic support obligation" only if the plan provides that all of the debtor's projected disposable income for a 5-year period
- §1322 (d) [Maximum spread of plan payments is **5 years.**]
- If debtor has Current Monthly Income below Median (formula in statute),
 - the plan may not provide for payments over a period that is longer than **three years**,
 - unless the court, for cause, approves a longer period, but the court may not approve a period that is **longer than five years.**

- if the debtor's current monthly income is above the applicable state median income, no cause need be shown for confirmation of a plan extending longer than three years, as long as it is not longer than five years

Permissive provisions §1322(b)

(b) Subject to subsections (a) and © of this section, the plan may—

- (1) **designate a class** or classes of unsecured claims, as provided in section 1122 of this title, but **may not discriminate unfairly** against any class so designated;

however, such plan may treat **claims for a consumer debt of the debtor if an individual is liable** on such consumer debt with the debtor differently than other unsecured claims;
- (2) **modify the rights** of holders of secured claims, **other than** a claim secured only by a security interest in real property that is the **debtor's principal residence**, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;
- (3) provide for the **curing or waiving** of any default;
- (4) provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim;
- (5) notwithstanding paragraph (2) [**debtor's principal residence exception**] of this subsection, provide for the **curing of any default** within a **reasonable time** and **maintenance of payments** while the case is pending on **any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due**;
- (6) provide for the payment of all or any part of any claim allowed under section 1305 of this title;

-
- (7) subject to section 365 of this title, provide for the **assumption, rejection, or assignment of any executory contract** or unexpired lease of the debtor not previously rejected under such section;
- (8) provide for the **payment** of all or part of a claim against the debtor **from property of the estate** or property of the debtor; [payment-in-kind]
- (9) provide for the **vesting of property** of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity; and
- (10) include any other appropriate provision not inconsistent with this title.

§1322(e) Curing of defaults to be determined per the contract terms and pursuant to applicable non-bk law

- The result in *Rake v. Wade* (interest on interest when curing arrears) was overruled by Congress through 1994 amendments

new (BACPA) §1322(f) protection of certain pension-related loans [excepted from stay; payments excluded from estate; no material alteration the terms of a loan allowed]

§ 1325. Confirmation of plan.

Confirmation requirements

All required; the Basic requirements: are found in (a)(4), (a)(5), & (b)(1)

§ 1325.

- (a) Except as provided in subsection (b), **the court shall** confirm a plan if—

-
- (1) the **plan complies with the provisions** of this chapter and with the other applicable provisions ... ;
 - (2) any [court] fee, ...has been paid;
 - (3) the plan has been proposed in **good faith** ...

- (4) [LIQUIDATION (or BEST INTEREST) TEST]
the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;
- (5) with respect to each allowed **secured claim** provided for by the plan—

- (A) the holder of such claim has **accepted** the plan;

or

- © the debtor **surrenders** the property securing such claim to such holder;

or

- (B) (i) the plan provides that the holder of such claim **retain the lien** securing such claim;
- (ii) the **value, as of the effective date of the plan**, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and
- (iii) if—...in the form of periodic payments, such payments shall be in **equal monthly amounts**; and [if—...] ...**secured by personal property**,...sufficient to provide to the holder of such claim **adequate**

Re: cramdown

protection during the period of the plan;

Associates Commercial Corp. v. Rash, 520 U.S. 953, 117 S. Ct. 1879, 138 L. Ed. 2d 148, 37 C.B.C.2d 744 (1997) Per section 506(a), the amount of a secured creditor's claim that the debtors must pay the secured creditor under section 1325(a)(5) is the **replacement value** (such as the debtor's cost of replacing the item)

Till v. SCS Credit Corp., 541 U.S. 465, ___, 124 S. Ct. 1951, 1956, 156 L. Ed. 2d 787, 51 C.B.C.2d 642 (2004) If paid over a period of time, **present value** discount must add to basic rate a factor to account for the **risk of non-payment** posed by the debtor.

BAPCPA - 2005 changes to §1325 includes §1325(a)(5)(B)(iii);

Known among commentators as “the hanging paragraph” certain language added at the end of section 1325(a)

- removes certain claims from the protections of section 1325(a)(5):
 - 1st car loans incurred **910 days** preceding the filing of the petition; and
 - 2nd **purchase money** security interest for a debt incurred within **one year** preceding the filing of the petition, if “the collateral consists of any other thing of value”.

Commentaries discuss that this language – although intended to prohibit the use of section 506(a) to **bifurcate** a secured claim as part of the cramdown permitted by section 1325(a)(5)(B) and, therefore, that such claims should be treated as fully secured claims regardless of the value of the collateral

- because the new language added to section 1325(a) renders entirely inapplicable for some creditors section 506(a)[the only section that gives those creditors its secured status], it does not to carry out such intent.

See, *vg.* 8-1325 Collier on Bankruptcy-15th Edition Rev. § 1325.06

[FEASIBILITY]

- (6) the debtor will be able to make all payments under the plan and to comply with the plan.

new (BACPA) §1325(a)(7)	the action of the debtor in filing the petition was in good faith ;
new (BACPA) §1325(a)(8)	the debtor has paid all domestic support obligation and that first become payable after the date of the filing of the petition ... [postpetition]
new (BACPA) §1325(a)(9)	the debtor has filed all applicable Federal, State, and local tax returns ...

BEST EFFORT TEST § 1325(b)
The Ability-to-Pay (Disposable Income) Test of § 1325(b)

§ 1325

- (b) (1) If the **trustee** or the holder of an allowed **unsecured claim objects** to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

[100% DIVIDEND]

- (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; **or**

[BEST EFFORT TEST]

- (B) the plan provides that all of the debtor's projected **disposable income** to be received in the applicable **Commitment Period(3 or 5 year period)** beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

§1325(b)(2) and (3) define in detail “debtor's projected **disposable income**” See p. 136, *infra*.

§1325(b)(4) sets the "applicable commitment period" for section 1325(b) objections:

- **three years** if the current monthly income of the "debtor and the debtor's spouse combined" is below the applicable state median income,
- **five years** if it that current monthly income is above the applicable state median income.

Effect of confirmation

The plan is confirmed if the same meets the criteria of §1325

- ▶ **regardless of acceptances** by creditors, and
- ▶ creates a new **binding relationship** between debtor and creditors

BAPCPA - 2005 change
11 USC 1324
amended

Scheduling of Chapter 13 Confirmation Hearing.

- (a) the confirmation hearing may be held
 - (a) no earlier than 20 days after the meeting of creditors and
 - (b) no later than 45 days after the meeting

unless the court finds that it is in the best interests of creditors and the estate to hold it **earlier** and no party objects.

(S. 256, Sec. 317)

BAPCPA - 2005 change

Confirmation in Chapter 11, 12, and 13 Cases.

standards for confirmation of a plan in chapter 11, 12, and 13 cases
amended to include the debtor's payment of **postpetition** (in addition to the
prepetition-priority) **domestic support obligations**

THE NEW BEST EFFORTS TEST UNDER 2005 BAPCPA

Determining Disposable Income under Section 1325(b)
as Amended in 2005

[a] Use of "Current Monthly Income" to Determine Income; § 1325(b)(2).

1. defined in section 101

[b] Exclusions from Income; § § 1325(b)(2), 541(b)(7) and 1322(f).

- 1 benefits such as those under the Social Security Act
- 2 income of other household members, including a nondebtor spouse, can be considered only to the extent that it is regularly contributed to household expenses.
- 3 child support payments,
foster care payments,
or disability payments received by the debtor for a dependent child to the extent reasonably necessary to be expended for the child.
- 4 funds used for repayments of pension loans. loans described in section 362(b)(19) (basically loans from qualified plans)

[c] Determination of Expenses; § 1325(b)(2) & (3).

- 1 deducted from income : payments on POST-petition domestic support obligations
(ordinarily deducted from debtor's budget under the law in effect prior to the amendments as well)

**[i] Debtors with Current Monthly Income
Above Applicable State Median Family Income; §1325(b)(2) & (3).**

1. use of the section 707(b) means test expense calculations,
2. requirement of a five-year plan, for some debtors.

**[ii] Debtors with Current Monthly Income
Below Applicable State Median Family Income; § 1325(b)(2).**

1. similar to the expense calculation under prior law:
deduction for postpetition payments on a domestic support obligation,
2. expenses are now deducted from "CMI" as defined in section 101 as adjusted by other provisions

[d] Required Length of Plan; § 1325(b)(4).

if the debtor is not proposing to pay 100 percent of allowed unsecured claims

and an objection is raised.

Section 1325(b)(4)

"applicable commitment period"
for section 1325(b) objections.

remains three years if the CMI of the "debtor and the debtor's spouse combined" is below the applicable state median income,

but

is five years if it that CMI is above the applicable state median income

BAPCPA - 2005 change
Confirmation of Chapter 13 Plans -- Treatment of certain Secured Debts and §506 bifurcation

BAPCPA - 2005 change
Confirmation of Chapter 13 Plans -- adequate protection payments

§1328 Chapter 13 Discharge

The scope of a discharge in a case under Chapter 13 is much broader. Pursuant to §1328, the only **exceptions to a Chapter 13 discharge** are:

1. any **extended long-term** debts provided for in the plan. §1328(a)(1)
2. non-dischargeable **alimony and support** obligations §1328(a)(2)
3. certain **educational loans**. §1328(a)(2)
4. liabilities for **personal injuries or death of debtor's driving while intoxicated** §1328(a)(2); and
5. **restitution** obligations arising out of debtor's criminal conviction §1328(a)(3).

BAPCPA - 2005 change
(BAPCPA - 2005
added to list of nondischargeable debts in chapter 13 cases the following types of claims

6. §507(a)(8)© priority taxes (withheld taxes)

-
7. §523(a)(1)(B) for a tax with respect to which a return, or equivalent report or notice, if required
 - Not filed, or
 - Filed late
 8. §523(a)(1)© tax with respect to which
 - the debtor made a fraudulent return or
 - wilfully attempted in any manner to evade or defeat such tax
 9. §523(a)(2) for money, property, services, ... obtained by
 - false pretenses,
 - a false representation, or
 - actual fraud
 - Materially false statements on financial condition ...
 10. §523(a)(3) neither listed nor scheduled
 11. §523(a)(4) for fiduciary fraud or defalcation, embezzlement, or larceny
 12. 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.

(S. 256, Sec. 314 & 707)

BAPCPA - 2005 change

11 USC 1328(f) added Re: time between Ch 13 discharges

A chapter 13 discharge may not be entered if the debtor received a discharge

1. in a case filed under chapter 7, 11, or 12 during the **four years** preceding the date of the new order for relief
- Or
2. in a prior chapter 13 case filed within **two years** before the date of the order for relief.

Discharge in Chapter 12, and 13 Cases. (S. 256, Sec. 213)

NO full compliance **chapter 12 or chapter 13 discharge**

for debtors under a judicial or administrative order or by statute to pay a domestic support obligation **unless**

the debtor certifies that all such payments due have been paid, per confirmed plan.

Hardship Discharge:

§ 1328(b) At any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if—

- (1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
- (2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and
- (3) modification of the plan under section 1329 of this title is not practicable.

© A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 of this title, except any debt—

- (1) provided for under section 1322(b)(5) of this title; or
- (2) of a kind specified in section 523(a) of this title.

h. §1330 Revocation of Confirmation

180 days from order of confirmation
For fraud

i. §1327 Effect of Confirmation

- 0. Binding effect
- 0. Vesting of property
- 0. Property free & clear

j. Modification of plan

§1323 pre-confirmation, only by debtor

§1329 post-conf. by debtor, trustee, or creditors (for substantial change in circumstances)

XIII. CHAPTER 11 – REORGANIZATIONS

INTRODUCTION AND GENERAL ASPECTS OF CHAPTER 11

1. Preference of reorganization over liquidation.
2. Chapter 13 similarities
 - a. Future income vs liquidation of present assets
 - b. Use of estate property
 - c. Individuals eligible
 - d. Liquidating, and partially liquidating plans allowed
 - e. Targeting of going concern over liquidation value; typically, based on
 - (1) Ch.13 - gainful employment
 - (2) Ch.11 - operation of business
 - f. Business and non-business cases
3. Chapter 13 differences
 - a. Complexity and cost
 - b. Ch. 13 limited:
 - (1) to individuals
 - (2) debt limits
 - (3) plan length (5yr)
 - c. who may file
 - (1) Petition
 - (a) Involuntary Ch 11
 - (2) plans
 - d. Plans
 - (1) Creditors' participation
 - (2) Voting
 - (3) Confirmation requirements
 - (4) Minimum payments
 - e. Creditors Committee
4. Causes and remedies

-
- a. Dealing with causes
 - b. Remedies/ outcome
 - . Success // vs Demise of debtor
 - . Surviving entity
5. Immediate concerns
- a. Keeping the ship afloat
 - b. Prepetition planning
 - c. Prepackaged Ch.11
 - d. First-Day motions/orders
 - e. Doctrine of Necessity
 - (1) Critical vendors Status
 - In Re: Kmart Corp., 359 F.3d 866 (7th Cir.), *cert. denied* 543 US 986 (2004)
 - (2) Elements:
 - (a) critical vendor
 - (b) unwillingness to sell
 - (c) necessity, lack of alternatives
 - (d) no negative net effect on other creditors
 - (e) if within first 20 days from filing, immediate and irreparable harm (Rule 6003)

COMMENCEMENT OF THE CHAPTER 11 CASE

- a. Eligibility for Relief §109
 - §109(d): debtor must be a Person, excluding
 - stockbrokers, commodity brokers
 - banks, insurance co., & other regulated institutions

Any other person qualifies whether or not engaged in business. **Toib v. Radloff**, 111 S.Ct. 2197 (1991)

- b. The Concept of Debtor in Possession
§1101(1), 1107(a), Rule 6009, Rule 9001 (10)

TRUSTEE = DEBTOR-IN-POSSESSION

- There are many references throughout the Bankruptcy Code to the trustee as representative of the estate, and to the powers and duties of the trustee. As a general rule, there is no trustee in a Chapter 11 case. The debtor becomes the debtor-in-possession (§1101) is recognized as the representative of the estate, and is vested with all the powers and duties of the trustee. §1107(a)

BAPCPA - 2005 change

New Disclosures required in Ch.11

***Information Regarding Chapter 11 Debtor's
Substantial or Controlling Interests in Subsidiaries.***

- c. Creditors' Committee §1102,§1103
Appointment by US Trustee
7 largest Unsecured Creditors
participation in all proceedings, §1103©
Power to employ attorneys or accountants, §1103(a)
- d. Conversion or Dismissal §1112

Conversion by the debtor

ABSOLUTE RIGHT TO CONVERT

Under §1112(a) a Chapter 11 debtor has an absolute right to convert the case to a liquidation under Chapter 7 unless:

1. the debtor is not a debtor-in-possession (i.e. that a trustee has been appointed under §1104);
2. the case was commenced through an involuntary petition under Chapter 11; or
3. the case has already been converted to Chapter 11 upon a request by a party other than the debtor.

Involuntary Conversion under §1112(b)

DISCRETIONARY CONVERSION

Section 1112(b) empowers the court to convert a Chapter 11 case to a liquidation under Chapter 7 for cause.

This section contains a non-exclusive list of illustrations of cause.

§1112(b) (1)

- on request of a party in interest,
- and after notice and a hearing,
- absent unusual circumstances
 - ... that the requested conversion or dismissal is not in the best interests of creditors and the estate,
- the court **shall**
 - convert a case under this chapter to a case under chapter 7
 - or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, if the movant establishes cause.

§1112(b)(2)

- The relief shall not be granted ...
- if the debtor or another party in interest objects and establishes that—
 - (A) there is a reasonable likelihood that a plan will be confirmed within the time frames established or ... within a reasonable period of time;
- and
- (B) the grounds for granting such relief include
 - an act or omission of the debtor (other than under paragraph (4)(A) below)
 - (i) for which there exists a reasonable justification for the act or omission; and
 - (ii) that will be cured within a reasonable period of time fixed by the court.

§1112(b)(3) sets time frames:

- 30 days after filing of the motion
 - for the court to commence the hearing
- 15 days after commencement of such hearing
 - to decide the motion

§1112(b)(4) For purposes of this subsection, the term “cause” includes—

- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;
- (B) gross mismanagement of the estate;
- © failure to maintain appropriate insurance that poses a risk to the estate or to the public;
- (D) unauthorized use of cash collateral substantially harmful to 1 or more creditors;
- (E) failure to comply with an order of the court;
- (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;
- (G) failure to attend the meeting of creditors convened under section 341 (a) or an examination ordered under rule 2004 of the Federal Rules of Bankruptcy Procedure without good cause shown by the debtor;
- (H) failure timely to provide information or attend meetings reasonably requested by the United States trustee (or the bankruptcy administrator, if any);
- (I) failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief;
- (J) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court;
- (K) failure to pay any fees or charges required under chapter 123 of title 28;
- (L) revocation of an order of confirmation under section 1144;
- (M) inability to effectuate substantial consummation of a confirmed plan;
- (N) material default by the debtor with respect to a confirmed plan;

-
- (O) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan; and
 - (P) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

§1112©

- The court may not convert a case under this chapter to a case under chapter 7 of this title if the debtor
 - is a farmer
 - or a corporation that is not a moneyed, business, or commercial corporation,
- unless the debtor requests such conversion.

§1112(d)

- The court may convert a case under this chapter to a case under chapter 12 or 13 of this title only if—
 - (1) the debtor requests such conversion;
 - (2) the debtor has not been discharged under section 1141 (d) of this title; and
 - (3) if the debtor requests conversion to chapter 12 of this title, such conversion is equitable.

In addition to the list provided in §1112(b), cause for conversion have been found by the courts in the following instances:

- ▶ under the same circumstances justifying relief from stay for cause (§362(d)),
- ▶ under the same circumstances justifying the appointment of a trustee (§1104),
- ▶ failure to abide by court orders, or to attend a §341 meeting of creditors.
- ▶ **Bad faith filing** has also been raised as cause for conversion or dismissal. The case of **In re Grieshop, 63 BR 657 (BC Ind. 1986)** provides the following list of matters to be considered in determining lack of good faith:

CRITERIA FOR Bad faith filing

1. Does the debtor have few or no unsecured creditors?
2. Has there been a previous bankruptcy petition by the debtor or related entity?
3. Has prepetition conduct by the debtor been improper?

-
4. Does the petition effectively allow the debtor to evade court orders?
 5. Are there few debts to creditors who are not seeking dismissal?
 6. Was the petition filed on the eve of a foreclosure?
 7. Is the property to be foreclosed the sole or major asset of the debtor?
 8. Does the debtor have an ongoing business or employees?
 9. Is there an economic possibility of reorganization?
 10. Is the debtor's income sufficient to operate?
 11. Was there pressure prior to the filing from creditors other than those who have moved to dismiss?
 12. Does the reorganization essentially involve a resolution of a two-party dispute?
 13. Was a corporate debtor formed and did it receive title to its major assets immediately before the petition?
 14. Did the debtor file solely to take advantage of the automatic stay?

Dismissal

Dismissal of a Chapter 11 case is controlled by the same §1112(b) discussed above. The **same grounds** for conversion would justify the dismissal of the case.

The choice between dismissal or conversion rests on the sound discretion of the court and will be based on the best interest of creditors and the estate. Said **best interest** will have to be evaluated on a case by case basis in light of the consequences of a conversion prescribed by §348 and the effects of a dismissal spelled out in §349.

Limits and alternatives to conversion

The conversion or dismissal of a Chapter 11 case is considered an extraordinary remedy (preference of reorganization over liquidation)

APPOINTMENT OF A TRUSTEE OR EXAMINER §1104 election by creditors (BRA'94)

Grounds for the Appointment of the Trustee

Section 1104 of the Code provides as follows:

(a) At any time after the commencement of the case but before confirmation of a plan on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee-

- (1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or
- (2) if such appointment is in the interest of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

Following, is a list of specific instances of cause for the appointment of a trustee in a Chapter 11:

- Payments by the DIP to affiliates and insiders. In Re McCorhill Publishing, Inc., 73 BR 1013 (BC NY 1987).
- Substantial delay in presenting a plan. In Re VVF COMMUNICATIONS, CORP., 41 BR 546 (BC DC 1984); In Re McCall, 34 BR 68 (BC PA 1983).
- Failure to file reports of operations. In Re Paolino, 53 BR 399 (BC PA 1985).
- Failure to maintain adequate financial records. In Re Colby Construction, Corp., 51 BR 113 (BC NY 1985).
- Debtor's failure to comply with the U.S. trustee's operating guidelines. In Re Cohoes Indus Terminal, Inc., 65 BR 918 (B C NY 1986)
- Embezzlement and other fraud. In Re McCordi, Corp., 6 BR 172 (BC NY 1980).

-
- Failure to pay post-petition taxes. In Re Great Northwestern Lumber and Mill Work, Corp., 20 BR 610 (BC PA 1982).
 - Failure to maintain insurance. In Re Caroline Desert Disco, Inc. 5 BR 536 (BC CAL 1980).
 - Failure to investigate and prosecute voidable transfers. In Re State Capital, Corp., 51 BR 400 (BC GA 1985).
 - Commingling of assets In Re Vischshoonmaker Galleries International, 35 BR 816 (BC HAW 1983).
 - Failure to maintain and repair assets. Hotel Associates, Inc., 3 BR 343 (BC PA 1980).
 - Stalemate in board of directors. In Re Petralex Stainless Ltd., 78 BR 738 (BC PA 1987).
 - Problems regarding with confidence in management and its abilities. In Re V. Savino Oil & Heating Co., Inc., 99 BR 518 (BC NY 1989).
 - As a less drastic remedy to a motion to convert to Chapter 7. In Re Table Talk, Inc., 22 BR 706 (BC MASS 1982).
 - Concealment of assets. In Re Deena Packaging Industry, Inc., 29 BR 705
 - Failure to comply with adequate protection requirements. In Re McCall, supra
 - Conflicts of interest. In Re William H. Vaughn, 40 BR 524 (BC PA 1984).
 - Failure to file tax returns. In Re Evans, 48 BR 46 (BC TEX 1985).
 - Unauthorized post-petition transfers. In Re McCorhill Publishing, Inc., supra; In Re Clinton Centrifuge, Inc., 85 BR 980 (BC PA 1987).
 - Incarceration of the DIP. In Re Newhaven Radio, Inc. 23 BR 762 (SDNY 1982)
 - Death of the DIP. In Re Smith, 6 BR 641 (BC GA 1980).

Appointment of a trustee is considered an extraordinary remedy to be used only in extraordinary circumstances. This is so because of the strong presumption in favor of maintaining a debtor-in-possession.

The actual appointment of who will serve as the trustee is made by the U.S. Trustee and not by the Court directly. In Re Plaza De Diego Shopping Center, Inc., 911 F2d 820 (1st Cir. 1990).

EFFECTS OF THIS REMEDY:

Ch. 11 Trustee replaces DIP

(Examiner does not)

CONFIRMATION OF THE CHAPTER 11 PLAN

Overview of the confirmation Process

- 1) Initial stages of Ch.11 reorganization (adjustments, negotiations, stop-gap remedies)
- 2) Filing of a Plan and a Disclosure Statement
- 3) Approval of Disclosure Statement (adequacy of information)
- 4) Distribution of Plan and a Disclosure Statement – Ballots, Order w/deadlines and notice of hearing on confirmation.
- 5) Voting process; Objections to confirmation
- 6) Confirmation Hearing
- 7) Post-confirmation matters – Substantial completion; Final Decree

The Chapter 11 Plan

1. Who May File §1121

Initially (during an “exclusivity period”) only the debtor may file a plan.

Thereafter – upon expiration of exclusivity period :

Any party in interest may file a plan, including

the debtor,
 the trustee,
 a creditors' committee,
 an equity security holders' committee,
 a creditor,
 an equity security holder,
 or any indenture trustee

****- **UST excluded**. (§307)

The "exclusivity period" The exclusivity period varies depending on whether the case is filed by a small business debtor as defined in section 101:

FOR CHAPTER 11 DEBTORS (non - small business) – §1121©

The period runs from the order for relief, until any of the following 3 scenarios occur:

- 1- a trustee is appointed,
- 2- (exclusivity period to file a plan) 120 days after said order for relief, (§1121(d) – for cause, may be reduced, or extended up to 18 months), or
- 3- (exclusivity period to obtain votes accepting plan) 180 days after the order for relief if the plan has not been accepted by each impaired class.

(§1121(d) – for cause, the exclusive period may be reduced, or extended up to 20 months) (If the plan is accepted by each impaired class, debtor maintains the exclusivity in the case.)

FOR SMALL BUSINESS DEBTORS – §1121(e)

§1121(e)(1): The exclusivity period runs from the order for relief, until 180 days (rather than the 120 days) after the order for relief ;

§1121(e)(2): (Time limit for plans by any party) The plan shall be filed not later than 300 days after the date of the order for relief;

§1121(e)(3) The time periods specified in paragraphs (1) and (2), and the time fixed in section 1129(e) [45-days within which the plan shall be confirmed], may be extended only if--

(A) the debtor, after providing notice,

demonstrates by a preponderance of the evidence the likelihood that the plan will be confirmed within a reasonable period of time;

(B) a new deadline is imposed at the time the extension is granted; and

© the order extending time is signed before the existing deadline has expired.

§1129(e) In a small business case, **the court shall confirm** a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121 (e)

not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121 (e)(3).

2. Contents of a Plan §1123

[]

Mandatory provisions

- (1) designate, subject to section 1122 of this title, classes of claims ...
- (2) specify any class ... that is not impaired under the plan;
- (3) specify the treatment of any class ... that is impaired ...
- (4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;
- (5) provide adequate means for the plan's implementation such as—
 - (A) retention by the debtor of all or any part of the property of the estate;
 - (B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;
 - (C) merger or consolidation of the debtor with one or more persons;
 - (D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;
 - (E) satisfaction or modification of any lien;
 - (F) cancellation or modification of any indenture or similar instrument;
 - (G) curing or waiving of any default;
 - (H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;
 - (I) amendment of the debtor's charter; or

-
- (J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or ©) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;
 - (6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)©) of this subsection, of a provision prohibiting the issuance of nonvoting equity-securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, ...
 - (7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee.

Permissive provisions

- (b) Subject to subsection (a) of this section, a plan may—
 - (1) impair or leave unimpaired any class of claims, ...
 - (2) ... provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;
 - (3) provide for—
 - (A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or
 - (B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;
- (LIQUIDATING CH.11 CASES)
- (4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;
 - (5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principle residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

- (6) include any other appropriate provision not inconsistent with the applicable provisions of this title.

3. CLASSIFICATION OF CLAIMS §1122

- 1122(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such case.

Generally,

- SECURED CLAIMS: **each** secured claim is a class of its own;
- UNSECURED CLAIMS: **all** unsecured claims are a class of its own;

administrative convenience §1122(b) exception: separate classes of unsecured claims based on amount (“less than or reduced to an amount that the court approves”) and administrative convenience

4. DISCLOSURE STATEMENT §1125

- 1125 (b) An acceptance or rejection of a plan may not be solicited ... unless, transmitted ... [AFTER, OR TOGETHER WITH] a written disclosure statement approved ... by the court as containing adequate information...

Contents of **Disclosure Statements**

Factors Affecting Adequacy of Disclosure (from the US Trustee Manual 3-10.2.3)

Several factors can affect the appropriate quantity and quality of disclosure in a given case, including:

- (1) the nature of the proposed plan of reorganization or liquidation;
- (2) the sophistication of the various holders of claims and interests and their familiarity with the debtor and its business;
- (3) whether the expense of the disclosure would substantially outweigh its anticipated benefit to creditors and stockholders;

-
- (4) the peculiarities of the debtor's business or financial condition;
 - (5) the need for an expeditious resolution; and
 - (6) the access of a plan proponent, other than the debtor, to factual information regarding the debtor.

Items to Include

(from the US Trustee Manual 3-10)

- 3-10.3.2 **Description of the Debtor's Business**
- 3-10.3.3 **Reasons for Financial Difficulties and Correction of Those Factors**
- 3-10.3.4 **Historical and Current Financial Information**
- 3-10.3.5 **Material Postpetition Events**
- 3-10.3.6 **Outline of the Plan**
- 3-10.3.7 **Means of Effectuating the Plan**
- 3-10.3.8 **Securities to be Issued**
- 3-10.3.9 **Projections**
- 3-10.3.10 **Management, 11 U.S.C. § 1129(a)(5)**
- 3-10.3.11 **Controlling Persons**
- 3-10.3.12 **Insider and Affiliate Claims**
- 3-10.3.13 **Transactions with Insiders and Affiliates**
- 3-10.3.14 **Disputed Claims**
- 3-10.3.15 **Legal Proceedings**
- 3-10.3.16 **Tax Consequences**
- 3-10.3.17 **Trustee or Examiner**
- 3-10.3.18 **Creditors' Committees and Equity Security Holders' Committees**

-
- 3-10.3.19 Information Regarding Plan Proponent
 - 3-10.3.20 Liquidation Analysis
 - 3-10.3.21 Vote Required for Acceptance
 - 3-10.3.22 “Cram Down”
 - 3-10.3.23 Miscellaneous Matters

Confirmation of the Plan §1129

Under § 1129(a) the court shall confirm a plan only if **all of the requirements** listed therein are met:

[Basic elements : 7, 8 (or b2), & 9]

[PROTECTION OF INDIVIDUAL CLAIMANT]

(7) With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class—

has accepted the plan; or [Liq Value]

[CLASS PROTECTION]

(8) With respect to each class of claims or interests—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

§1126 ©): Acceptance of Plan by each voting class:

More than ½ in numbers (##) of creditors
voting; **and**

REPRESENTING at least 2/3 in dollar
amounts (\$)

Eg. Class comprised of 3 creditors:

Creditor A w/ \$100,000 claim
Creditor B w/ \$150,000 claim
Creditor C w/ \$ 50 ,000 claim

=====
\$300,000 total claims in class

Accepting creditors A & B constitute required majority
Accepting creditors B & C constitute required majority
Accepting creditors A & C DO NOT constitute required majority

Rejecting creditor B, has veto power in this scenario

[PRIORITIES]

- (9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

[non tax priorities]

[ADMINISTRATIVE EXPENSES & INVOLUNTARY GAP CLAIMS]

- (A) with respect to a claim of a kind specified in section 507 (a)(2) or 507 (a)(3) of this title, **on the effective date** of the plan, the holder of such claim **will receive on account of such claim cash** equal to the allowed amount of such claim;

[DOMESTIC SUPPORT OBLIGATIONS & OTHER NON-TAX PRIORITIES]

- (B) with respect to a class of claims of a kind specified in section 507 (a)(1), 507 (a)(4), 507 (a)(5), 507 (a)(6), or 507 (a)(7) of this title, each holder of a claim of such class will receive—
- (i) **if such class has accepted the plan**, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
- (ii) **if such class has not accepted the plan**, cash on the effective date of the plan equal to the allowed amount of such claim;

[tax priorities]

- (C) with respect to a claim of a kind specified in section 507 (a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash—

-
- (i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;
 - (ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and
 - (iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122 (b)); and
- [SECURED TAX CLAIMS]
- (D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507 (a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph ©.

[FEASIBILITY TEST]

- (11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

Cramdown Confirmation §1129(b)

Cramdown allowed as to:

- A. Secured Claims
- B. Unsecured Claims
- C. Stock holders

Requirements:

- (A) If a class of claims is impaired under the plan,
 - at least **one class** of claims that is impaired under the plan **has accepted** the plan (determined without including any acceptance of the plan by any insider); and
- (B) the plan does **not discriminate unfairly**, and
- (C) is **fair and equitable**, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

§1129(b)(2): For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

[secured claims]

(A) With respect to a class of secured claims, the plan provides—

(i) (I) that the holders ... retain the liens ...; and

(II) that each holder of a claim ... receive ... [PRESENT VALUE] deferred **cash** payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of ... such holder's interest in the estate's ... property;

or

(ii) for a **sale free and clear** of liens , ... of any property that is subject to the liens securing such claims,, with such **liens to attach to the proceeds** ... and the treatment ... under clause (i) or (iii) of this subparagraph;

or

(iii) for the realization by such holders of the **indubitable equivalent** of such claims.

[unsecured claims]

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim **property** of a value, as of the effective date of the plan, **equal to the allowed amount** of such claim;

or

[strict priority rule]

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such **junior claim** or interest any property.

[Stock holders]

(C) With respect to a class of interests—

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest **property** of a value, as of the effective date of the plan, equal to the greatest of the **allowed amount of any fixed liquidation preference** to which such holder is entitled, any **fixed redemption price** to which such holder is entitled, or the **value of such interest**;

or

[strict priority rule]

-
- (ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such **junior interest** any property.

BAPCPA - 2005 change

Confirmation in Chapter 11, 12, and 13 Cases.

standards for confirmation of a plan in chapter 11, 12, and 13 cases

amended to include the debtor's payment of **postpetition (in addition to the prepetition-priority) domestic support obligations**

- g. Filing of Claims §1111:

if listed by debtor in schedules , PoC deemed filed except

when it is scheduled as:

Disputed,
Contingent, or
Unliquidated.

- h. Discharge. §1141(d)

1141(d) provides for

the discharge of debts that arose before plan confirmation and

the termination of the rights and interests of equity security holders and general partners that are provided for under the plan.

The discharge and termination are subject to the terms of the plan.
(To the extent that the plan or order of confirmation provides for payment of a claim, such claim is not discharged.)

IN THE CASE OF AN INDIVIDUAL, the discharge:

. is subject to the section 523 exceptions
. is granted after completion of payments under the plan

(where the debtor has not completed plan payments, the court may grant a discharge, in the court's discretion, if the debtor has paid creditors at least "liquidation value," measured as of the plan's effective date and plan modification is not practicable)

IN THE CASES OF CORPORATIONS AND PARTNERSHIPS

In the case of a liquidating plan the grounds in section 727 to object discharge apply.

Debts not dischargeable

. 1. owed to a domestic governmental unit when incurred by fraud

. 2. for a tax or customs duty if the debtor made a fraudulent return, or willfully attempted to evade or defeat such tax or customs duty.

BAPCPA - 2005 change

BAPCPA makes several changes to

Chapter 11 Cases Filed by Individuals adding provisions that make an individual's Chapter 11 similar to Chapter 12 and Chapter 13 cases:

- (a) **Property of the estate.** Now includes property acquired during the case, as well as earnings from postpetition services performed by the debtor. New §1115
 - (b) **Chapter 11 plans** must provide for payment to creditors under the plan of all or a portion of postpetition earnings from personal services or other **future income.** New §1123(a)(8)
 - (c) **Plan confirmation** Chapter 11 is also amended to include the same **disposable income standard** of 11 USC 1325(b)(2). New §1129(a)(15)
(5-year period, or throughout spread in longer plans)
 - (d) **Chapter 11 discharge** is now granted after an individual debtor completes payments under the plan. New §1141(d)(2) & §1141(d)(5)
 - (a) **Hardship discharge** similar to Chapter 13's §1328(b): the court may grant a discharge even if the debtor defaults on plan payments when
 - A. the value actually distributed under the plan to unsecured creditors is not less than the amount they would have received in a chapter 7 liquidation,
- and

B. modification of the plan is not practicable. New §1141(d)(5)(B)

- (e) **Post-confirmation Modification of Plan.** the plan may be modified after confirmation on request of the debtor, the trustee, the United States trustee, or an unsecured creditor, either to increase or to reduce the amount or time periods regarding payments.
§1127(e) *cp.* §1329

(S. 256, Sec. 321)

FAST TRACK REORGANIZATIONS FOR SMALL BUSINESSES

DEFINITION (§101)

The term “**small business case**” means a case filed under chapter 11 of this title in which the debtor is a small business debtor.

The term “**small business debtor**”— means a person

1//engaged in commercial or business activities

(including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning or operating real property or activities incidental thereto)

2//that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition or the date of the order for relief in an amount **not more than \$2,190,000**

(excluding debts owed to 1 or more affiliates or insiders)

3//in a case in which the United States trustee has **not appointed** under section 1102 (a)(1) a **committee of unsecured creditors**

or – if a **committee** is appointed – where the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor;

Rule 1020. Small Business Chapter 11 Reorganization Case

(a) Small business debtor designation.

In a voluntary chapter 11 case, the debtor shall state in the petition whether the debtor is a small business debtor. In an involuntary chapter 11 case, the debtor shall file within 15 days after entry of the order for relief a statement as to whether the debtor is a small business debtor. Except as provided in subdivision ©, the status of the case as a small business case shall be in accordance with the debtor's statement under this subdivision, unless and until the court enters an order finding that the debtor's statement is incorrect.

(b) Objecting to designation.

Except as provided in subdivision ©, the United States trustee or a party in interest may file an objection to the debtor's statement under subdivision (a) no later than 30 days after the conclusion of the meeting of creditors held under § 341(a) of the Code, or within 30 days after any amendment t

© Appointment of committee of unsecured creditors.

If a committee of unsecured creditors has been appointed under § 1102(a)(1), the case shall proceed as a small business case only if, and from the time when, the court enters an order determining that the committee has not been sufficiently active and representative to provide effective oversight of the debtor and that the debtor satisfies all the other requirements for being a small business. A request for a determination under this subdivision may be filed by the United States trustee or a party in interest only within a reasonable time after the failure of the committee to be sufficiently active and representative. The debtor may file a request for a determination at any time as to whether the committee has been sufficiently active and representative.

(d) Procedure for objection or determination.

Any objection or request for a determination under this rule shall be governed by Rule 9014 and served on: the debtor; the debtor's attorney; the United States trustee; the trustee; any committee appointed under § 1102 or its authorized agent, or, if no committee of unsecured creditors has been appointed under § 1102, the creditors included on the list filed under Rule 1007(d); and

any other entity as the
court directs.

§308 Additional duties and reporting requirements R. 2015,
§1116

§362(n) some limitations on automatic stay

§1102(a)(3) Court may order that no Creditors Committee be appointed

§1121(e) Longer exclusivity period for filing plans

§1125(f) Flexible Standards for Disclosure Statements and Plans in Small Business Cases
R. 3016, 3017, 9009:

1) no ds

2) ds forms

3) Conditional Approval of DS subject to final approval at hearing combined with
confirmation

. in a small business case,

the court may determine that

- 1) (a) the plan itself provides adequate information and that
(b) a separate disclosure statement is not necessary.

- 2) The court also may approve a disclosure statement submitted

on a standard form

- A. approved by the court or
- B. adopted by the Judicial Conference as an official form.

(Standard Form Disclosure Statement and Plan for Small Business Cases.)

The Judicial Conference of the United States is required to prescribe official forms for
a disclosure statement and plan for small business cases.

The forms are intended to achieve a practical balance between reasonable needs of the courts and the parties for reasonably complete information, as well as economy and simplicity for debtors. (S. 256, Sec. 433).

3) Conditional Approval of Disclosure Statement in Small Business Case.

the court may conditionally approve a disclosure statement in a small business case, subject to final approval after notice and a hearing.

The conditionally approved disclosure statement must be mailed not later than 25 days (USED TO BE 10)before the confirmation hearing, and the hearing on final approval of the disclosure statement may be combined with the confirmation hearing.

Rejection of Collective Bargaining Agreements §1113

Pre 1984: Business judgment standard

NLRB v. Bildisco 465 US 513 (1984):

1. Rejection not an unfair labor practice
2. Burdensome requirement and balance of equities
(Still applies to Ch. 7, 12, 13)

Ch. 11-§1113 of '84BAFJA

\ RIGHT TO REJECT

§ 1113. Rejection of collective bargaining agreements.

(a) The debtor in possession, or the trustee ... may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

REQUIREMENTS TO MOVE FOR REJECTION

(b) (1) ... prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee ... shall—

(a)make a proposal to the authorized representative of the employees covered by such agreement,

based on the most complete and reliable information available ...

necessary modifications in the employees benefits and protections that are necessary to permit the reorganization ...

assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(b) provide, ... such relevant information as is necessary to evaluate the proposal.

(c) During the period beginning on the date of the making of a proposal ... and ending on the date of the hearing ...

the trustee shall meet, at reasonable times, with the authorized representative

to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

REQUIREMENTS TO APPROVE REJECTION

© The court shall approve an application for rejection ... only if ... —

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

EXPEDITED HEARING

(d) (1) ... the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application.

... notice shall be provided ... at least ten days before the ... hearing. ...
[EXTENSIONS ARE LIMITED AND CONDITIONED]

(2) The court shall rule ... within thirty days after the date of the commencement of the hearing.

In the interests of justice, the court may extend such time ... as the trustee and the employees' representative may agree to.

If the court does not rule on such application within thirty days ... or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, ... as may be necessary to prevent disclosure of information ... [THAT] could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If ... essential to the continuation of the debtor's business. or in order to avoid irreparable damage to the estate, the court, ... may authorize the trustee to implement interim changes ...

UNITED FOOD & COMMERCIAL WORKERS UNION v. ALMAC'S, 90 F.3d 1 (1st Cir. 1996) (interim changes to the union contract under §1113 not "partial rejections" giving rise to §365(g) damages)

Single Asset Real Estate Cases BRA'94:

DEFINITION (§101)

The term "single asset real estate" means

real property constituting a single property or project,

(other than residential real property with fewer than 4 residential units,)

which generates substantially all of the gross income of a debtor

(who is not a family farmer)

and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental.

SPECIAL PROTECTIONS FOR THE SECURED CREDITOR

§362(d)(3): Generally, relief from stay granted unless:

Plan filed w/90 days w/ reasonable possibilities of prompt conf., or

Debtor starts making monthly payments at the non-default contract rate of interest (formerly, "current fair market rate")

§362(d)(4): Protection against multiple bankruptcy filings (*in rem orders, supra*)

**2007 CPI ADJUSTMENT OF DOLLAR AMOUNTS PER 11 USC 104
TO BE APPLIED IN CASES FILED ON APRIL 1, 2007
(next change will become effective 4/1/2010)**

<http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/E7-2501.htm>

Dollar amount to be adjusted	New (adjusted) dollar amount	
28 U.S.C.:		
1409(b) --a trustee may commence a proceeding arising in or related to a case to recover:		
(1)--money judgment of	\$1,000.....	\$1,100
or property worth less than.		
(2)--a consumer debt less than.	\$15,000.....	\$16,425
(3)--a non consumer debt against a non insider less than.	\$10,000.....	\$10,950
11 U.S.C.:		
Section 101(3)--definition of assisted person.	\$150,000.....	\$164,250
Section 101(18)--definition of family farmer.	\$3,237,000 (each	\$3,544,525 (each time it appears).
101(19A)--definition of family fisherman.	\$1,500,000 (each	\$1,642,500 (each time it appears)
101(51D)--definition of small business debtor.	\$2,000,000 (each	\$2,190,000 (each time it appears)
Section 109(e)--allowable debt limits for individual filing bankruptcy under chapter 13.	\$307,675 (each	\$336,900 (each time it appears)
	\$922,975 (each	\$1,010,650 (each time it appears)
Section 303(b)--minimum aggregate claims needed for the commencement of involuntary chapter 7 or chapter 11 bankruptcy:		
(1)--in paragraph (1)...	\$12,300.....	\$13,475
(2)--in paragraph (2)...	\$12,300.....	\$13,475
Section 507(a)--priority expenses and claims		
(1)--in paragraph (4)...	\$10,000.....	\$10,950
(2)--in paragraph (5)...	\$10,000.....	\$10,950
(3)--in paragraph (6)...	\$4,925.....	\$5,400
(4)--in paragraph (7)...	\$2,225.....	\$2,425
Section 522(d)--value of property exemptions allowed to the debtor		
(1)--in paragraph (1)...	\$18,450.....	\$20,200
(2)--in paragraph (2)...	\$2,950.....	\$3,225
(3)--in paragraph (3)...	\$475.....	\$525
	\$9,850.....	\$10,775
(4)--in paragraph (4)...	\$1,225.....	\$1,350
(5)--in paragraph (5)...	\$975.....	\$1,075
	\$9,250.....	\$10,125
(6)--in paragraph (6)...	\$1,850.....	\$2,025
(7)--in paragraph (8)...	\$9,850.....	\$10,775
(8)--in paragraph	\$18,450.....	\$20,200
(11) (D).		

-2009-

522(f)(3)--exception to lien \$5,000..... \$5,475
 avoidance under certain state laws.

522(f)(4)--items excluded \$500 (each time it \$550 (each time it appears
 from definition)
 household goods for lien avoidance purposes.

522(n)--maximum aggregate \$1,000,000..... \$1,095,000
 value of assets in individual retirement accounts exempted.

522(p)--qualified homestead \$125,000..... \$136,875
 exemption.

522(q)--state homestead \$125,000..... \$136,875
 exemption.

523(a)(2)(C)--exceptions to discharge:
 in subclause (i)(I)-- \$500..... \$550
 consumer debts, incurred < = 90 days before filing owed to a single creditor in the
 aggregate.
 in subclause (i)(II)-- \$750..... \$825
 cash advances incurred < = 70 days before filing in the aggregate.

541(b)--property of the estate exclusions:
 (1)--in paragraph \$5,000..... \$5,475
 (5)(C)--education IRA funds in the aggregate.
 (2)--in paragraph \$5,000..... \$5,475
 (6)(C)--pre-purchased tuition credits in the
 aggregate.

547(c)(9)--preferences, \$5,000..... \$5,475
 trustee may not avoid a transfer if, in a case filed by a debtor whose
 debts are not primarily consumer debts, the aggregate value of property is less than.

707(b)--dismissal of a case or conversion to a case under chapter 11 or 13
 (means test):.
 (1)--in paragraph \$6,000..... \$6,575
 (2)(A)(i)(I).
 (2)--in paragraph \$10,000..... \$10,950
 (2)(A)(i)(II).
 (3)--in paragraph \$1,500..... \$1,650
 (2)(A)(ii)(IV).
 (4)--in paragraph (5)(B) \$1,000..... \$1,100
 (5)--in paragraph 6(C).. \$525..... \$575
 (6)--in paragraph 7(A).. \$525..... \$575

1322(d)--contents of chapter \$525 (each time it \$575 (each time it appears) 13 plan,
 monthly income.

1325(b)--chapter 13 \$525 \$575 (each time it appears)
 confirmation of plan,
 disposable income.

1326(b)(3)--payments to \$25..... \$25
 former chapter 7 trustee.
