

Concurrent Session

Young Lawyers I and II: Introduction to Bankruptcy Law

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Hon. Robert N. Kwan | U.S. Bankruptcy Court (C.D. Cal.)
Santa Ana

Hon. Michael K. Nakagawa | U.S. Bankruptcy Court (D. Nev.)
Las Vegas



ABI Southwest Presentation Outline

Friday, September 22, 2010

Program Description:

“Taught by seasoned practicing professionals and judges, this two-part program is intended to give new bankruptcy lawyers an overall understanding of the American bankruptcy system. It is an excellent primer for first- and second-year associates and will also provide a solid foundation for new lawyers to understand and appreciate the specialized panels that are offered at the conference.”

This two-part program is divided as follows:

Young Lawyers Part I: Introduction to ‘Consumer’ Bankruptcy Law – 9:45am – 11:00am

Young Lawyers Part II: Introduction to ‘Business’ Bankruptcy Law – 11:15am – 12:30pm

Panel Members

- **Hon. Robert N. Kwan**
U.S. Bankruptcy Court (C.D. Cal.); Santa Ana, CA
- **Hon. Mike K. Nakagawa**
U.S. Bankruptcy Court (D. Nev.); Las Vegas, NV
- **Rob Charles**
Lewis and Roca LLP; Phoenix, NV and AZ
- **Jonathan A. Carson**
Kurtzman Carson Consultants (KCC), Los Angeles, CA



Young Lawyers Part I: Introduction to ‘Consumer’ Bankruptcy Law – 9:45am – 11:00am

DESCRIPTION

I. Bankruptcy Overview

- a. Uniform, federal court- supervised procedure to relieve individuals and businesses from debts, while protecting and preserving the rights of secured creditors and providing unsecured creditors with equal treatment of their claims.

II. Types of Bankruptcy – Congress laid out various “chapters” of the Bankruptcy Code

- a. Chapter 7: “straight” or “liquidation” bankruptcy
- b. Chapter 11: Individual and business reorganization
- c. Chapter 12: Family farmers
- d. Chapter 13: Individuals and unincorporated businesses that intend to use future income to pay some or all of one’s debts according to a plan designed by the individual (within certain statutory limitations) to meet his or her needs.

III. Courts, Jurisdiction, Venue

- a. Federal courts, federal law
- b. United States District Courts
 - i. United States Bankruptcy Court -- a division of the United States District Court
- c. Appeals process
 - i. Appeal from Bankruptcy Court to US District Court (or BAP); United States Circuit Court of Appeals; United States Supreme Court

IV. Parties involved

- a. Debtor(s)
- b. Professionals
- c. Creditors
- d. Chapter 7 / 13 Trustee
- e. United States Trustee
- f. Bankruptcy Judge (Court)
- g. Bankruptcy Clerk / Clerks’ Office



V. Consumer Bankruptcy

- a. Consumer Bankruptcy Introduction
- b. Filing process
 - i. Voluntary Petition / Order for Relief
 - ii. Venue
 - iii. Creation of the Estate
 - iv. Exemptions
 - 1. How to claim exemptions
 - 2. Objections to claim of exemptions
- c. Automatic Stay
 - i. Very broad, § 362(a)
 - ii. Exceptions to the stay, § 362(b)
- d. Appointment of Trustee
 - i. Collect property of the estate
 - ii. Use, sell or abandon property of the estate
 - iii. Assume or reject executory contracts
 - iv. Avoiding transfers
 - v. Analyze claims
 - vi. Distributions
 - vii. Final report, compensation, close case
- e. Due Process / Notice / Other Procedural Issues
 - i. General noticing (Notice of Commencement of Case)
 - ii. The meeting of creditors –§341 Meeting
- f. Claims and Interests
 - i. Priority
 - ii. Unsecured
 - iii. Claims Process overview
- g. Motions and Complaints
 - i. Debtor motions
 - ii. Party in interest
 - iii. Trustee's role
 - iv. Court

Wrap-Up



Young Lawyers Part II: Introduction to 'Business' Bankruptcy Law – 11:15am – 12:30pm

DESCRIPTION

I. What is Bankruptcy?

- a. The differences between Ch. 7, 11 & 13
- b. Understanding Basic Finance Principles

II. Courts, Jurisdiction, Venue

- a. Pros/cons of various alternatives
- b. Hometown advantage
- c. Interpretation of Bankruptcy Code
- d. Court protocols

III. Corporate Restructuring Process

- a. Chapter 11 Timeline Overview
- b. Contingency Planning
- c. Chapter 11 Filing Process
 - i. Preparation
 - a) Map the Corporate & Capital Structures
 - b) Identify Business Operations & Revenue Sources
 - c) Automatic stay
 - d) Creditor Matrix
 - e) List of Creditors holding 20 largest unsecured claims
 - f) Creditors Committee
 - g) First day motions – Officially in Chapter 11
- d. Claims Process – Burden Shifting
 - i. Schedules of Assets & Liabilities/Statement of Financial Affairs
 - ii. Notice of Bar Date
 - iii. Filing Proof of Claims
- e. Negotiation of Restructuring Strategy
 - i. Plan Negotiations
 - a) Players
 - b) Development of Reorganization Plan
 - ii. Disclosure Statement/Court Approval
 - iii. Commence Solicitation
 - iv. Ballot Tabulation
 - v. Plan Confirmation & Effective Date
- f. Disbursements
- g. Due Process/Notice
 - i. Public announcement of Chapter 11 filing & notice of deadline to file claim



- h. Creditor Toolkit in Chapter 11 (Pros and Cons)
 - i. Motion to convert or dismiss
 - ii. Motion to appoint trustee or examiner
 - iii. Plan exclusivity
 - iv. Opposition to disclosure statement
 - v. Opposition to plan confirmation
 - vi. Appeal

IV. Other Considerations

- a. § 363 Use, Sale or Lease of Property
- b. § 365 Executory Contracts
- c. § 547; § 548 Avoidance Powers

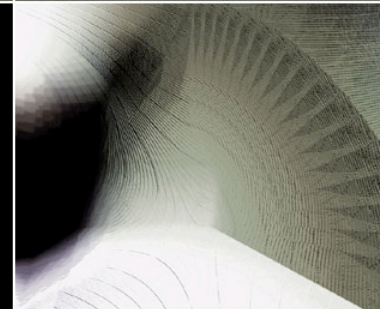
V. Wrap-Up: 5 Principles of Corporate Restructuring

- a. Be Smart
- b. Be Quick
- c. Be Prepared
- d. Be Transparent
- e. Be Sensitive



Young Lawyers Part I:

Introduction to 'Consumer' Bankruptcy Law



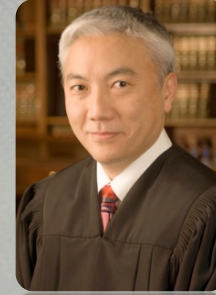
18th Annual ABI Southwest Bankruptcy Conference
Four Seasons Resort, Las Vegas, NV
September 24, 2010



Speakers



Hon. Robert N. Kwan
U.S. Bankruptcy Judge Central
District of California



Hon. Mike K. Nakagawa
U.S. Bankruptcy Judge
District of Nevada



Rob Charles
Lewis and Roca LLP



Jonathan A. Carson
Kurtzman Carson Consultants (KCC)

Agenda

- Bankruptcy Overview
- Types of Bankruptcy
- Jurisdiction and Venue
- Parties Involved
- Consumer Bankruptcy Process
- Key Takeaways



Types of Bankruptcy

- What Chapter to File Under
 - Businesses: 7, 11
 - Individuals : 7, 13, 11
 - Farmers: 12
 - Municipalities: 9
 - Foreign Rep. 15
- Businesses
 - Chapter 11 Reorganization
 - Chapter 11 Liquidation
 - Chapter 7 Liquidation
 - Conversion between 11 and 7



Bankruptcy Overview

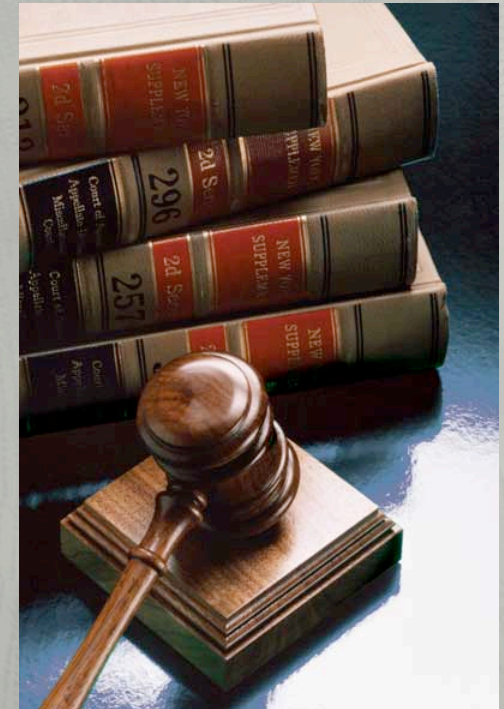
Def: Uniform, federal court- supervised procedure to relieve individuals and businesses from debts, while protecting and preserving the rights of secured creditors and providing unsecured creditors with equal treatment of their claims.

Bankruptcy and Alternatives

- Workouts,
- Receiverships
- Assignment for benefit of creditors

The Bankruptcy Code and Rules

- The Code (title 11)
- Federal Rules of Bankruptcy Procedure
- Local Rules and Standing Orders
- Individual Judge's Rules
- **Uniformity** (Butner – property rights, exemptions - Erie Doctrine issues, preemption/preclusion issues)
- Contracts Clause Limit



Filing Statistics

Filing Statistics

Central District of California - Percent Increase in Filings *January - August 2010* to January - August 2009*

| | | | |
|------------------------------|------------------------|------------------------------|------------------------------|
| 42% ↑ | 0.5% ↑ | 35% ↑ | 40% ↑ |
| 2010: 72,349 2009: 53,199 | 2010: 764 2009: 762 | 2010: 20,314 2009: 15,013 | 2010: 93,427 2009: 68,974 |
| Chapter 7 | Chapter 11 | Chapter 13 | Total |

National - Percent Increase in Filings

12 Mo. Period Ending June 30, 2010 to Same Period Ending June 30, 2009

| | | | |
|----------------------------------|------------------------------|--------------------------------|------------------------------------|
| 34% ↑ | 29% ↑ | 12% ↑ | 27% ↑ |
| 2010: 1,133,320 2009: 907,603 | 2010: 14,272 2009: 13,951 | 2010: 424,242 2009: 384,187 | 2010: 1,572,597 2009: 1,306,315 |
| Chapter 7 | Chapter 11 | Chapter 13 | Total |

*Based on estimated filing data for August 2010.

Factors Favoring The Filing Of Chapter 7 Case

- Debtor's property claimed as fully exempt
- Debtor may have all or mostly unsecured debts
- Debts may exceed the eligibility limits for chapter 13 (currently \$360,475 for unsecured debts; \$1,081,400 for secured debts)
- Debtor may not have any excess income that could fund a chapter 13 plan
- Debtor may wish to avoid a lien on secured property that would impair his or her exemption
- Debtor may simply have an immediate need for a "fresh start"



Factors Favoring The Filing Of Chapter 13 Case

- Chapter 13 may be the only way for a debtor to stop a home-foreclosure sale and cure a pre-petition default
- Debtor may stop an auto repossession or compel turnover of property already repossessed
- Debtor may pay unsecured debts, either in full or percentage of the amount owed, over a 3 to 5 year period (no post-petition late charges and interest paid on unsecured debts, except if nonexempt property exists)
- Chapter 13 may protect a co-debtor on an obligation based on the stay provided under §1301
- Debtor may have excess disposable income that would warrant dismissal of a chapter 7 case under §707(b)
- Chapter 13 may help debtors who want to pay their debts but lack the discipline to do it on their own
- Chapter 13 discharge, particularly if entered after completion of a 100% plan, may possibly have less negative impact on the debtor's credit rating



Jurisdiction and Venue

- Bankruptcy Case
- Proceedings within a case
 - Arising under
 - Arising in
 - Related to
- Post-Confirmation Jurisdiction
- The Bankruptcy Court and Appellate Courts
 - Bankruptcy Courts
 - Appeal to District Court
 - Appeal to Bankruptcy Appellate Panel
 - Appeal to U.S. Court of Appeals



Jurisdiction and Venue

- **Other Bankruptcy Laws**
 - Title 28 (Jurisdiction)
 - Title 18 (Crimes)
 - Title 26 (Tax)
 - Laws That Create Liens (Federal and State)
 - Other State Laws (e.g., avoidance law, exemptions)
- **Core vs. Noncore**
 - 28 U.S.C. § 157(b)
 - Noncore matters can be decided by bankruptcy judge only with parties' consent; otherwise, proposed findings and conclusions to District Court.
 - 28 U.S.C. § 157(c)



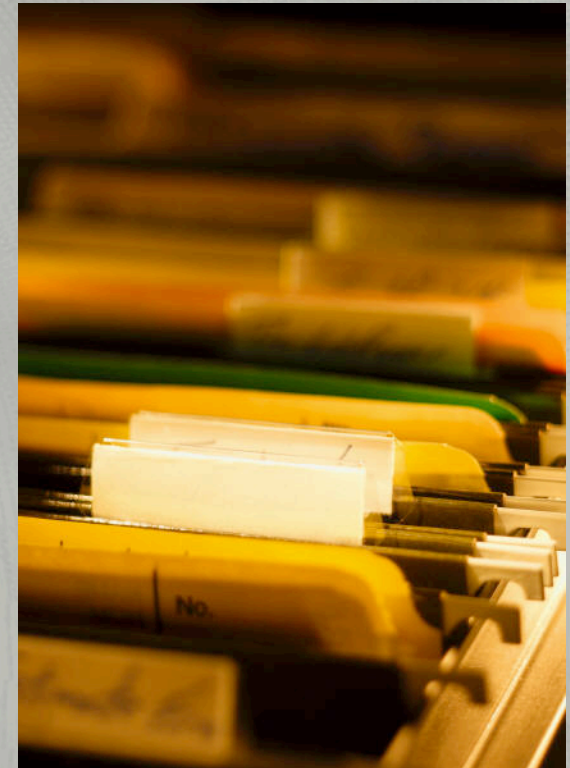
Jurisdiction and Venue

- **Direct Appeal to Circuit Court**
 - 28 U.S.C. Section 158(d)
 - Applies if Bankruptcy Court, District Court or BAP or all appellants and appellees certify that:
 - (a) no controlling law in circuit or matter of public importance, or (b) question of law requiring resolution of conflicting decisions, or (c) immediate appeal materially advances the process of the case, and (d) Court of Appeals authorizes direct appeal.
- **Ways Out of Bankruptcy Court**
 - Withdrawal of reference
 - Abstention
 - Remand (after removal)



Jurisdiction and Venue

- **Withdrawal of Reference**
 - Mandatory: Material issue of nonbankruptcy federal law affecting interstate commerce
 - Discretionary: Cause (convenience, efficiency, uniformity, expertise, anything else)
 - Jury trial
- **Abstention (entire case)**
 - Section 305
 - Interests of debtors and creditors would be better served (*e.g.*, involuntary petition to upset workout), or
 - Chapter 15 case pending and abstention would serve purpose of chapter 15
 - Abstention not reviewable by Court of Appeals



Jurisdiction and Venue

- Abstention (any proceeding)
- 28 U.S.C. § 1334(c)
- Discretionary: Comity and deference to state courts
- Mandatory: “related to” (non-core) state law causes of action if no basis for federal jurisdiction other than § 1334 and action is commenced and can be timely adjudicated in State Court
- Not appealable to Court of Appeals other than denial of mandatory abstention



Jurisdiction and Venue

- **Removal and Remand**
 - 28 U.S.C. § 1452
 - to District Court
 - any case subject to 28 U.S.C. § 1334 jurisdiction
- Remand on “any equitable ground”
- Remand not appealable to Court of Appeals



Jurisdiction and Venue

- **Venue Selection**
 - 28 U.S.C. 1408 for individuals
 - 28 U.S.C. §§ 1408 – 1410 for business
 - Domicile, residence, principal place of business or principal assets for past 180 days
 - Location of affiliate’s pending bankruptcy case
 - The “state of incorporation venue” debate



Jurisdiction and Venue

- **Venue Strategy**
 - Substantive law
 - First day issues
 - Convenience
 - Court's Procedures
 - Court's experience with comparable cases
 - Professionals' issues
 - Change of Venue

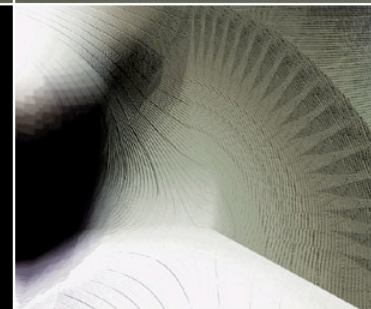


Parties Involved

- Debtor(s)
- Creditors
- Professionals, “dabblers”
- Bankruptcy Petition Preparers
- United States Trustee
- Chapter 7 / 13 Trustee
- Bankruptcy Judge
- Clerk’s Office



Consumer Bankruptcy Process



Bankruptcy Timeline

("routine" consumer chapter 7 case)

| | |
|---|---|
| Within 180 days of petition filing date | Debtor receives credit counseling briefing from approved agency - §109(h) |
| Case initiated by filing Petition, counseling certificate (or waiver request), mailing matrix; Filing fee paid or waiver/ installment application filed | Order for relief entered; Panel trustee appointed; 341 meeting date set |
| 15 days after petition filed | Balance of schedules, CMI and means test statement, payment advices (received within 60 days pre-petition) due - Rule 1007(c) |
| At least 7 days before first date set for 341 meeting Note: copy to be provided to creditor if request made at least 15 days before first date set for 341 meeting | Tax return or transcript to be provided to trustee for most recent tax year ending immediately before petition date for which a return was filed - Rule 4002(b) |
| 30 days (approximately) after petition date | Section 341 meeting held; Debtor to bring recent bank statement, picture ID, proof of current income, and proof of Social Security number - Rule 4002(b) |
| 45 days after petition date | Deadline for filing all documents required by §521(a) (1), or motion for extension of time (up to 45 days), to avoid automatic case dismissal |

Bankruptcy Timeline

(cont.)

| | |
|--|--|
| Within 30 days after first date set for 341 meeting (45 days if PMSI on personal property) | Debtor must perform intention as provided on Statement of Intention - §521(a)(2) and (a)(6) |
| 30 days after conclusion of 341 meeting | Deadline for objections to claim of exemptions - Rule 4003(b) |
| 45 days after first date set for 341 meeting | Deadline for filing certification of financial education course completion - Rule 1007(c) |
| 60 days after first date set for 341 meeting | Deadline for objection to debtor's discharge – Rule 4004(a); Deadline for objections to dischargeability of particular debt - Rule 4007(c) |
| Three – four months (approximately) after petition filed | Report of no distribution filed by trustee; Discharge entered; Case closed |

Debtor Objectives

- Automatic stay
- Discharge of debt
- Exemption of asserts
- Lien avoidance
- Home retention through mortgage

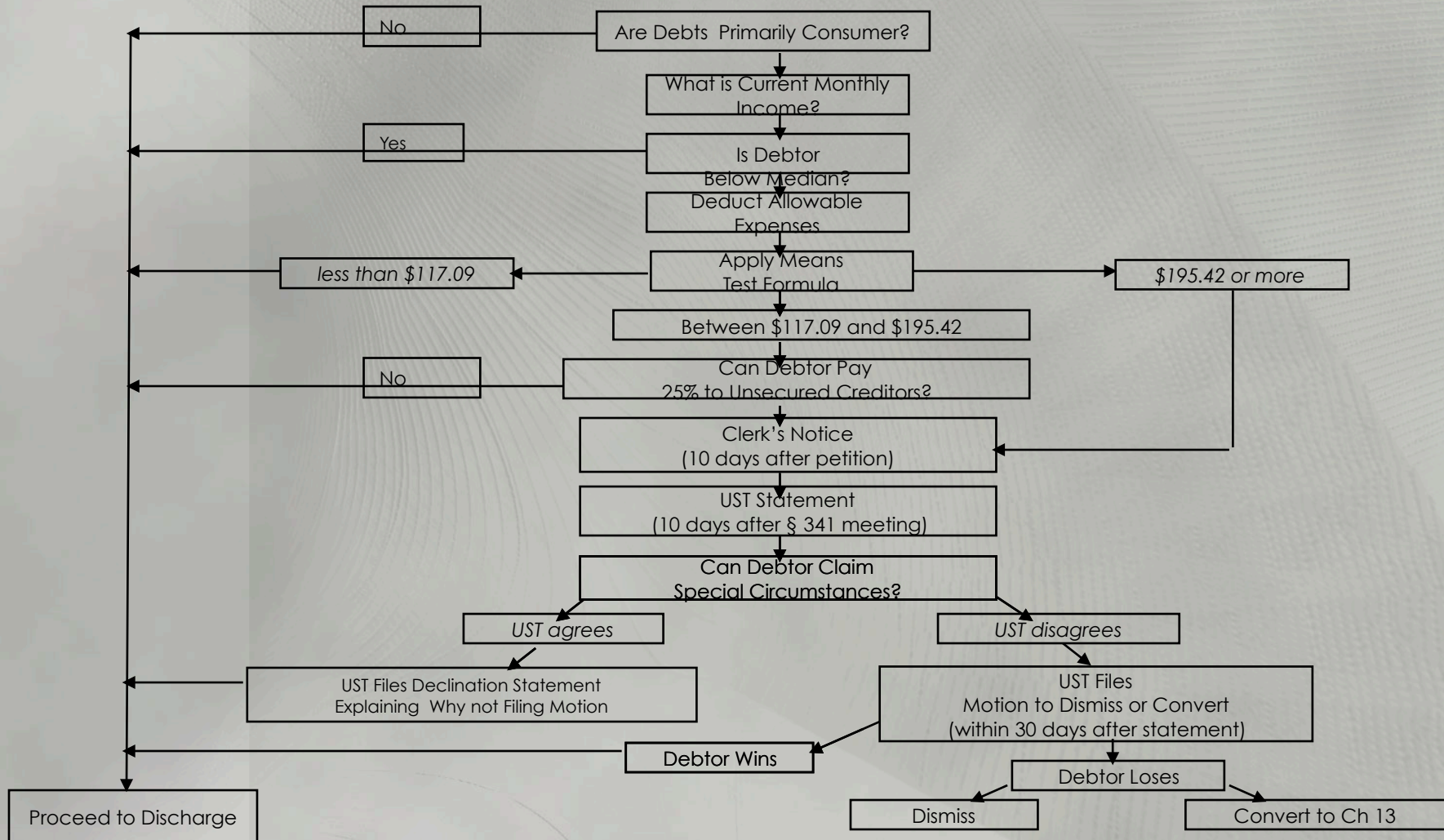


Eligibility

- Debt limits
- Means test requirements
 - “Current Monthly Income” (CMI)
 - Safe harbor for below-median-income debtors
 - Exemption for certain disabled veterans
 - Deductions for allowable expenses
 - Means Test calculations
 - Effect of the Means Test
 - Dismissal for “Abuse”



Means Test Flowchart



Debtor's Attorneys

- Scope of representation issues, compensation 7-11-13
 - 7 – fees not approved by court; scope of representation
 - 11 – court supervised fees - need for advance employment authorization
 - 13 – court supervised fees, but RARAs; also scope issues



Advising Client on Choosing the Type of Bankruptcy

Debtor's attorney must certify on Exhibit B of Petition that debtor has been advised that may proceed under Chapter 7, 11, 12 or 13 and been provided explanation of the relief available under each chapter.

Filing Process

- BAPCPA reporting obligations – “debt relief agency”
 - Milavetz, 130 S.Ct. 1324 (2010)
- Voluntary Petition / Order for Relief
- Involuntary Petition
- Venue
- Creation of the Estate
- Exemptions
 - How to claim exemptions
 - Objections to claim of exemptions
- Electronic Claim Forms (ECF)



Automatic Stay

- Grounds for Relief – 362(d)
 - For cause
 - No equity and no reorganization
- Very broad, § 362(a)
 - Commencement or continuation of judicial or other proceedings to collect pre-petition claims
 - Efforts to create, perfect or enforce liens on property of the estate or of the debtor, if relating to a pre-petition claim
 - Efforts to take possession of or assume control of property of the estate
 - Enforcement against the debtor or property of the estate of a pre-petition judgment
 - Any act to collect pre-petition claim
 - Set off of pre-petition debts
- Exceptions to the stay, § 362(b)
 - Section 362(b) contains 27 exceptions to the stay, 10 of which were added by BAPCPA.
- Adequate protection



Appointment of Trustee

- Collect property of the estate
- Use, sell or abandon property of the estate
- Assume or reject executory contracts
- Avoiding transfers
- Analyze claims
- Distributions
- Final report, compensation, close case



Due Process/Notice

- Creditor Matrix
- Bankruptcy Rule 2002
- General Noticing
- Improper Notice



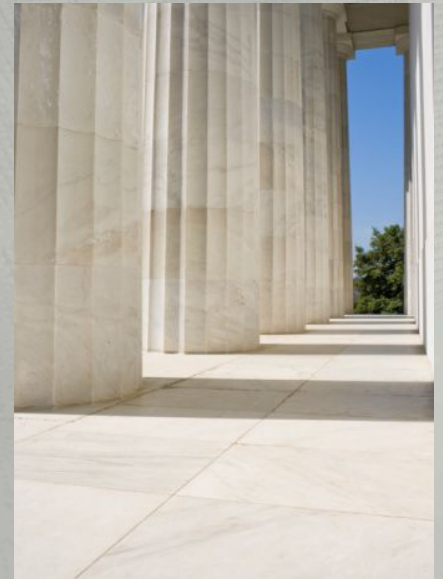
Claims and Interests

- Definition of a Claim
- Type of Claims
- Definition of an Interest
- Claims Administration / Reconciliation



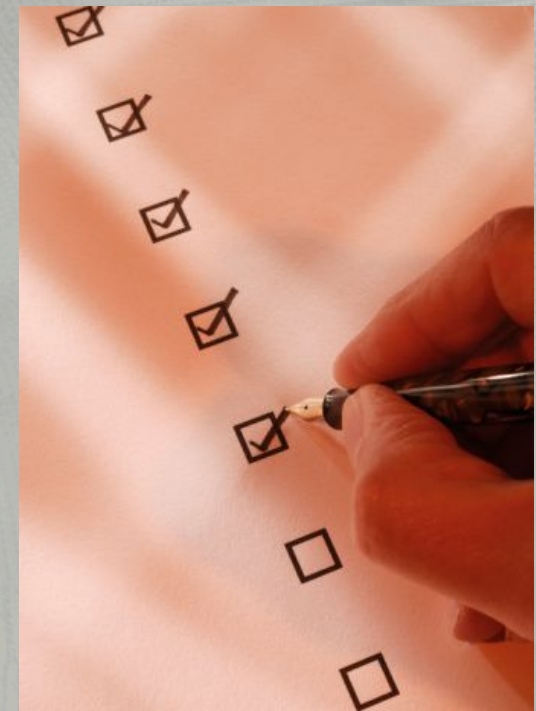
Bankruptcy litigation practice

- **Trial practice – most matters negotiated**
 - Litigated matters are adversary proceedings and contested matters
 - Rule 7026 requirements, Rule 7026 pretrial scheduling conference, discovery, Rule 7016
- **Final pretrial conference, and trial**
 - Infrequent issues – withdrawals of reference; jury demands
 - Importance of trial judge – most trial judgments final because not appealed
- **Appellate proceedings – BAP v. USDC; stays pending appeal**
 - Why choose one or other (appeals, withdrawals of reference)
 - BAP argument - expect a "hot" bench



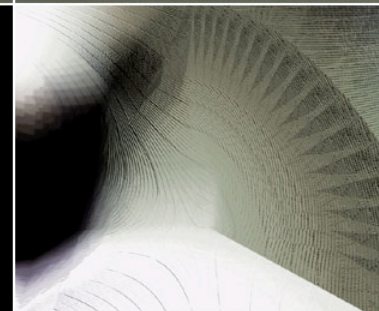
Key Take-Aways

1. Practical knowledge of local courts, rules and players
2. Need for basic knowledge of Chapter 11 concepts
3. Be aware of procedural traps





Discussion

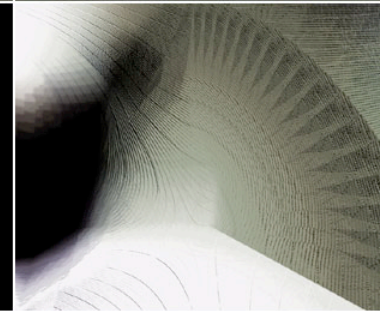


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Young Lawyers Part II:

Introduction to 'Business' Bankruptcy Law



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LEWIS
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LAWYERS



KURTZMAN
CARSON
CONSULTANTS

Speakers



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Agenda

- What is Bankruptcy vs. Corporate Restructuring?
- Corporate Restructuring Process
- Creditor Toolkit
- Other Considerations
- Five Principles of Corporate Restructuring
- Discussion



What is Bankruptcy?

Definition: A provision of Federal Law whereby a debtor surrenders his assets to the bankruptcy court and is relieved of the future obligation to repay his unsecured debts.

Chapter 7

Chapter 13

Individuals/Consumers

Chapter 11

Businesses

What is Corporate Restructuring?



THE GAME

- Chapter 11
- From stigma to strategy



THE PLAYERS

- Attorneys
- Financial Advisors
- Investment Bankers
- Other Professionals
- Claims Agent



THE FORUM

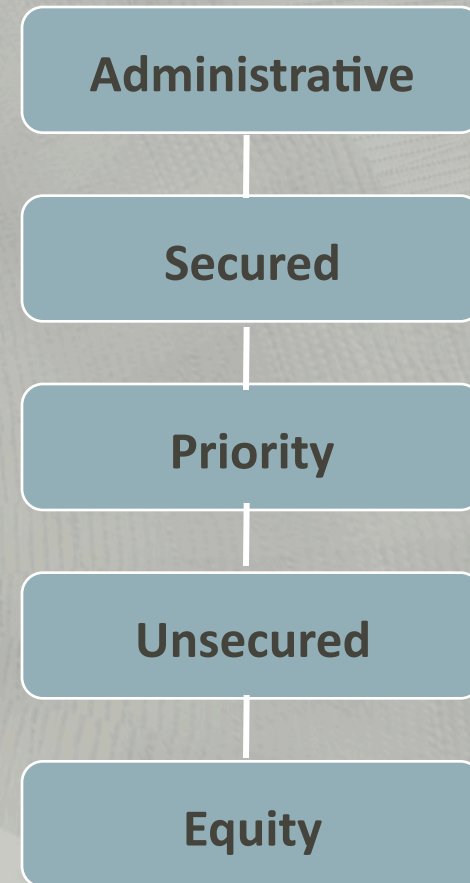
- Bankruptcy Court
- Hometown Advantage
- Court Protocols

Understanding Basic Principles

Corporate Finance



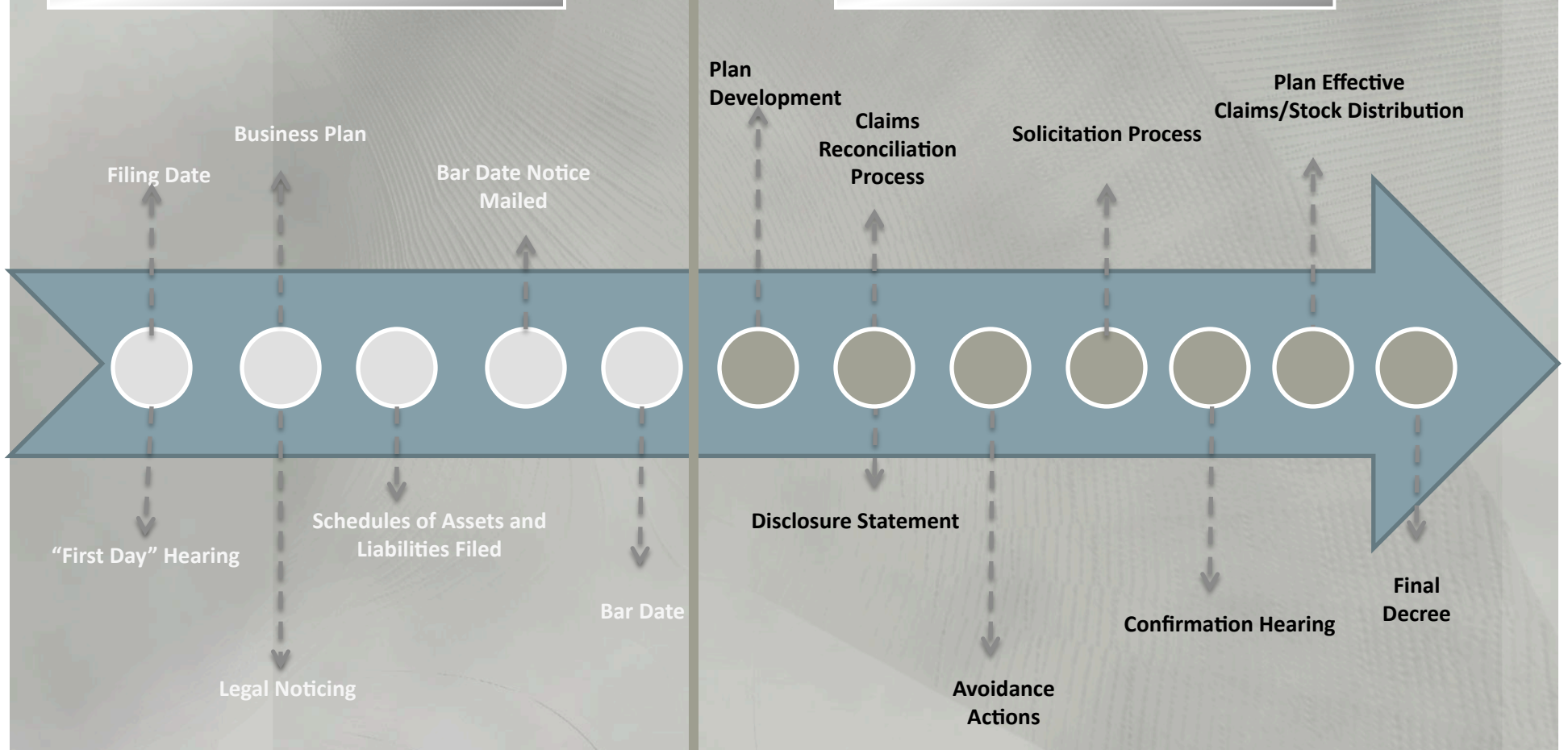
Bankruptcy Priority Scheme



The Corporate Restructuring Process

Phase 1: Filing & Transition

Phase 3: Plan Process



Phase 2: Reporting & Administration

Contingency Planning

- Plan Development
 - Pre-packaged
 - Pre-arranged
 - Traditional Reorganization
- Plan Strategies
 - Debt-for-equity swap
 - Rights offering
 - Merger/consolidation
 - Liquidation



Filing Process

- Identify and understand business operations
 - Revenue Sources
 - Creditor constituencies, vendors
 - Third-party relationships
- Identify and understand corporate & capital structure
- Automatic Stay

