

**A SURVIVAL GUIDE FOR THE "INVOLUNTARY" BANKRUPTCY LAWYER-
THE EFFECTS OF BANKRUPTCY ON THE GENERAL PRATICE OF LAW**

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I. PURPOSE.

- A. To provide an overview of the types of federal bankruptcy proceedings.
- B. To explore the effects of a bankruptcy case filing on state court actions and proceedings.
- C. To examine the bankruptcy matters over which state courts and federal courts have concurrent jurisdiction.

II. AN OVERVIEW -- HOW BANKRUPTCY AFFECTS STATE AND FEDERAL NONBANKRUPTCY MATTERS.

A. THE AUTOMATIC STAY (11 U.S.C. § 362).

- 1. When a bankruptcy petition is filed most pending state court actions must come to a halt due to the imposition of an automatic stay. In addition, many state court actions may not be commenced without violating the stay.
- 2. Some actions and proceedings, however, are not stayed and may proceed to judgment or may be commenced after a bankruptcy has been filed.
- 3. State courts and non-bankruptcy attorneys must be familiar with the concept of the automatic stay in order that they proceed only in actions which are not stayed.

B. PROPERTY OF THE BANKRUPTCY ESTATE (11 U.S.C. § 541).

- 1. Many actions are subject to the automatic stay (11 U.S.C. § 362) only if the action is directed at "property of the estate."
- 2. A party may seek disbursement of funds or distribution of property of or to a debtor in a bankruptcy proceeding. If the property is property of the estate the trustee may be entitled to possession of such monies or property.

C. DISCHARGE OF INDEBTEDNESS IN A BANKRUPTCY PROCEEDING (11 U.S.C. §§ 523, 524, 1141, 1228, 1328).

1. State and federal courts, with only three exceptions, have concurrent jurisdiction over the determination whether a debt has been discharged in bankruptcy.
2. An action to collect a discharged debt as a personal liability of the debtor violates the injunction imposed by 11 U.S.C. § 524.

III. AN OVERVIEW OF THE TYPES OF BANKRUPTCY CASES.

A. CHAPTER 7 LIQUIDATION CASES (11 U.S.C. §§ 701-766).

1. Purposes of a Chapter 7 Case.
 - a. The orderly and collective distribution of the debtor's non-exempt assets to creditors.
 - b. The discharge of pre-petition debts.
2. The Role of the Chapter 7 Trustee.
 - a. The trustee collects the debtor's non-exempt assets, converts the assets to cash and distributes the proceeds to creditors.
 - b. The trustee sets aside voidable pre-petition transactions such as preferences and fraudulent conveyances.

B. CHAPTER 11 AND 12 REORGANIZATIONS (11 U.S.C. §§ 1101-1231).

1. The Purposes of Chapter 11 and 12 Cases.
 - a. The rehabilitation of financially troubled enterprises and family farmers.
 - b. To allow financially troubled enterprises or family farmers to repay all or a percentage of outstanding obligations in an orderly fashion.
 - c. The discharge, if necessary, of a percentage of pre-petition debts.

2. The Actors in a Chapter 11 Case.
 - a. The debtor-in-possession.
 - b. Creditor and shareholder committees.
 - c. The trustee or examiner.
- C. CHAPTER 13 WAGE-EARNER CASES (11 U.S.C. §§ 1301-1330).
 1. Purposes of a Chapter 13 Case.
 - a. To allow the debtor to repay all or a percentage of debts in an orderly fashion.
 - b. The discharge, if necessary, of a percentage of pre-petition debts.
 2. The Role of the Chapter 13 Trustee.
 - a. To monitor the debtor's compliance with the plan payments.
 - b. To make disbursements of plan payments to creditors.

IV. THE AUTOMATIC STAY (11 U.S.C. § 362).

A. SIGNIFICANCE OF THE AUTOMATIC STAY.

1. Orders and judgments entered in violation of the automatic stay are generally held to be void. Kalb v. Feuerstein, 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1940); In re Scott, 24 Bankr. 738 (Bankr. M.D. Ala. 1982).
2. Litigants and their attorneys who willfully violate the stay may be held in contempt of court and may be held liable for actual and punitive damages. In re Pody, 42 Bankr. 570 (Bankr. N.D. Ala. 1984); In re Bailey, 20 Bankr. 906 (Bankr. W.D. Wisc. 1982).
3. Not all actions are subject to the automatic stay and may proceed to judgment in state court.

B. ACTIONS AND PROCEEDINGS SUBJECT TO THE AUTOMATIC STAY. (11 U.S.C. § 362(a)).

1. **11 U.S.C. § 362(a)(1)**. Judicial and administrative proceedings --

- a. that were or could have been commenced against the debtor before the bankruptcy case was filed; or
- b. to recover a claim that arose before the bankruptcy case was filed.
 - (1) Claim is broadly defined as a right to payment or a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment (11 U.S.C. § 101(4)).
 - (2) See generally Ohio v. Kovacs, 469 U.S. 274 (1985).
- c. Examples.
 - (1) Tort, contract, and contribution and indemnity actions against the debtor based on conduct which occurred before the petition was filed. In re Edge, 60 Bankr. 690 (Bankr. M.D. Tenn. 1986) (malpractice action against dentist debtors stayed where based on pre-petition conduct discovered post-petition); In re Dembek, 64 Bankr. 745 (Bankr. N.D. Ohio 1986) (action to collect pre-petition debt for tuition); In re Johns-Manville Corp., 57 Bankr. 680 (Bankr. S.D.N.Y. 1986) (contribution and indemnity action against debtor that could not, under applicable state law, have been brought until after bankruptcy filed was nevertheless stayed because it was based on pre-petition acts); see also In re Yanks, 49 Bankr. 56 (Bankr. S.D. Fla. 1985); contra, In re Frenville Co., Inc., 744 F.2d 332 (3rd Cir. 1984) cert. denied, 469 U.S. 1160 (1985) and Schweitzer v. Consolidated Rail Corp., 758 F.2d 936 (3rd Cir. 1985) cert. denied, 106 S.Ct. 183 (1985) (holding that applicability of stay depends on when right to payment arose under state law). See also In re Remington-Rand Corp., 836 F.2d 825 (3rd Cir. 1988).

- (2) Tort actions against the debtor's co-defendants to the extent that judgments against them would establish the debtor's liability such as where the debtor would be liable to a third party for indemnity under contract or law. A.H. Robins Co., Inc. v. Piccinin, 788 F.2d 994 (4th Cir. 1986).
- (3) Dissolution actions and actions in which adjudications of rights to spousal and child support or determine actions of custody rights are sought. In re Flagg, 17 Bankr. 677 (Bankr. E.D. Pa. 1982); Schulze v. Schulze, 15 Bankr. 106 (Bankr. S.D. Ohio 1981) (dissolution and custody actions stayed). In re Murray, 31 Bankr. 499 (Bankr. E.D. Pa. 1983) (action seeking adjudication of rights to alimony and child support stayed); But see In re Shock, 37 Bankr. 399 (Bankr. D.N.D. 1984) (dissolution action is not stayed).
- (4) Appellate courts are stayed from rendering decisions where the debtor's initial status in the trial court was that of a defendant regardless of the alignment of the parties on appeal. Cathey v. Johns-Manville Sales Corp., 711 F.2d 60 (6th Cir. 1983); Ellison v. Northwest Eng'g. Co., 707 F.2d 1310 (11th Cir. 1983); Ass'n of St. Croix Condo Owners v. St. Croix Hotel Corp., 682 F.2d 446 (3rd Cir. 1982) and 690 F.2d 363 (3rd Cir. 1982). Appeals are not stayed where the debtor was a plaintiff in the trial court. Freeman v. Commissioner, 799 F.2d 1091 (5th Cir. 1986).
- (5) Occasionally a bankruptcy court uses its broad authority under 11 U.S.C. § 105(a) to issue any "order, process, or judgment necessary to carry out the provisions of [the bankruptcy code]" by staying an action against a non-debtor. See e.g. A.H. Robins v. Piccinin, 788 F.2d 994 (4th cir. 1986) cert. denied, 479 U.S. 876. (suits against debtor's co-defendants can be enjoined where judgment against co-defendants would in effect be a judgment against the debtor or where such

proceedings would diminish the debtor's property (e.g., an insurance fund or pool)); In re Old Orchard Investment Co., 31 Bankr. 599 (W.D. Mich. 1983) (actions to collect debtor partnership debts from individual non-debtor partners enjoined).

2. **11 U.S.C. § 362(a)(2)**. The enforcement of judgments obtained before the bankruptcy case was filed against --
 - a. the debtor; or
 - b. property of the bankruptcy estate.
 - c. Examples.
 - (1) Attachment or execution on property of debtor (exempt property) or property of the estate. In re Anderson, 23 Bankr. 174 (Bankr. Ill. 1982).
 - (2) Issuance of warrant of eviction. In re Butler, 14 Bankr. 532 (D.N.Y. 1981).
 - (3) Garnishment of bank accounts or wages. In re Pody, 42 Bankr. 570 (Bankr. N.D. Ala. 1984).
3. **11 U.S.C. § 362(a)(3)**. Any act to obtain possession of property of the estate or from the estate or to exercise control over property of the estate.
 - a. Examples.
 - (1) Suits against the debtor's insurance company or against employees who would be entitled to indemnity under such policies or who are additional insureds are stayed. A.H. Robins Co., Inc. v. Piccinin, 788 F.2d 994 (4th Cir. 1986); Tringali v. Hathaway Machinery Co., Inc., 796 F.2d 553 (1st Cir. 1986).
 - (2) Lessor may not serve a termination notice in the prime lessee where debtor is a sublessee under the lease. In re 48th Street Steakhouse, Inc., 835 F.2d 427 (2d Cir. 1987), cert. denied, 108 S.Ct. 1596 (1988).

- (3) Actions seeking a division of marital or community property are stayed. In re Shock, 37 Bankr. 399 (Bankr. D.N.D. 1984); In re Murray, 31 Bankr. 499 (Bankr. E.D. Pa. 1983).
4. **11 U.S.C. § 362(a)(4), (5).** Any act to create, perfect or enforce a lien against --
 - a. property of the bankruptcy estate; or
 - b. property of the debtor to the extent that the lien secures a pre-petition debt.
 - c. Examples.
 - (1) Mortgage foreclosures. In re Augustus Court Associates, 46 Bankr. 619 (Bankr. Pa. 1985).
 - (2) Repossessions and replevin actions to enforce Article 9 security interests. In re Southern Properties, Inc., 44 Bankr. 838 (Bankr. D. Va. 1984).
 - (3) Enforcement of tax liens. Olsen v. Deutscher, 731 F.2d 376 (6th Cir. 1984).
 - (4) Filing a financing or continuation statement. Bond Enters, Inc. v. Western Bank, 54 Bankr. 366 (Bankr. D.N.M. 1985).
5. **11 U.S.C. § 362(a)(6).** Any act to collect a pre-petition debt against the debtor.
 - a. Examples.
 - (1) Dunning letters or harrassing phone calls.
 - (2) Filing suit to collect a pre-petition obligation.
6. **11 U.S.C. § 362(a)(7).** The setoff of pre-petition debts owed to the debtor against a claim against the debtor.
 - a. Examples.
 - (1) Setoff by a bank of pre-petition amounts in debtor's checking account against debtor's obligation to bank. Nelson v.

First Nat'l Bank & Trust Co., 6 Bankr. 248
(Bankr. D. Kan. 1980).

C. 11 U.S.C. § 362(b). ACTIONS AND PROCEEDINGS WHICH ARE NOT STAYED.

1. 11 U.S.C. § 362(b)(1). Criminal actions and proceedings may be commenced and may continue against the debtor.

- a. The prosecution of a criminal offense may be continued or commenced. In re Lare, 24 Bankr. 959 (D. Md. 1982).
- b. The judicial trend appears to be that even where the principal motive behind a criminal prosecution is to collect a debt, the action is not stayed and may not be enjoined by the bankruptcy court unless there is a great and immediate danger of irreparable harm to a federally protected right. Matter of Davis, 691 F.2d 176, 179 (3rd Cir. 1982); Barnette v. Evans, 673 F.2d 1250 (11th Cir. 1982); In re Milone, 73 Bankr. 452 (Bankr. D. N. Hamp. 1987). Cf., Kelly v. Robinson, 497 U.S. 36 (1986). Contra, In re Whitaker, 16 Bankr. 917 (Bankr. W.D. Tenn. 1982); In re Kaping, 13 Bankr. 621 (Bankr. D. Or. 1981) (holding that a mere showing of debt collection as the principal motive behind a criminal prosecution is sufficient to enjoin the action).
- c. Some courts have embraced the principal motive test (see b. above) in the context of criminal contempt proceedings. See e.g., Guarglia v. Community Nat'l Bank & Trust Co., 382 F.Supp. 758 (E.D.N.Y. 1974) aff'd 516 F.2d 896 (2d Cir. 1975); Matter of Thayer, 24 Bankr. 491 (Bankr. W.D. Wisc. 1982). However, it seems likely that such an approach ultimately will be rejected by the Supreme Court and that an analysis similar to that employed in criminal prosecutions adopted. See generally Kelly v. Robinson, 107 S.Ct. 353 (1986).
- d. The imposition of a criminal sentence is not stayed. In re Wise, 25 Bankr. 440 (Bankr. D. Va. 1982).
- e. An action to revoke the debtor's probation due to failure to pay a criminal fine is not stayed

according to In re Gilliam, 67 Bankr. 83 (Bankr. M.D. Tenn. 1986).

- f. The courts are presently split on the issue of whether the collection of a criminal fine is stayed during the pendency of the bankruptcy case. 134 Baker Street, Inc. v. State of Georgia, 47 Bankr. 379 (N.D. Ga. 1984); In re Kohr, 82 Bankr. 706 (Bankr. M.D. Pa. 1988); United States v. Troxler Hoisery Co., Inc., 41 Bankr. 457 (D.N.C. 1984) (enforcement of criminal fine is not stayed). In re Landstrom Distributors, Inc., 55 Bankr. 390 (Bankr. C.D. Cal. 1985) (collection of criminal fine was stayed).
2. **11 U.S.C. § 362(b)(2)**. Actions to collect alimony, maintenance, or support from non-estate property are not stayed.
- a. For a complete understanding of the scope of this exception, the concept of "property of the estate" must be explored. (See Outline at V.)
- (1) In Chapter 7 cases, the debtor's post-petition wages and other property and property exempted in the bankruptcy case are non-estate property.
- (2) In Chapter 12 and 13 cases, the debtor's post-petition wages and other property NOT devoted to making the plan payments are non-estate property after plan confirmation. However, until the plan is confirmed, wages and property acquired post-petition are property of the estate.
- b. Most courts hold that only actions to collect support (as opposed to actions seeking an adjudication of rights to support) are not stayed. See e.g., In re Murray, 31 Bankr. 499 (Bankr. E.D. Pa. 1983); In re Garrison, 5 Bankr. 256 (Bankr. E.D. Mich. 1980).
- c. The obligations sought to be collected must be nondischargeable support obligations as opposed to dischargeable property settlement obligations. In re Pody, 42 Bankr. 570 (Bankr. N.D. Ala. 1984). (See Outline at VI. C. 3. for a discussion of nondischargeable support debts.)

3. 11 U.S.C. § 362(b)(4). Actions and proceedings by governmental units to enforce police or regulatory powers are not stayed.
- a. The critical distinction is whether the action is to enforce police or regulatory powers or is to enforce contract rights or for an otherwise pecuniary purpose. In re Corporacion de Servicios Medicos Hospitalarios de Fajardo, 805 F.2d 440 (5th Cir. 1986); In re Mason, 18 Bankr. 817 (Bankr. D. Tenn. 1982).
- b. Examples.
- (1) Action by State Attorney General to enjoin debtor from violating state consumer fraud act and to recover (but not enforce) civil penalties was not stayed. In re Liss, 59 Bankr. 556 (N.D. Ill. 1986).
 - (2) Town's action, pursuant to state court order, to clear debtor's land of used truck parts was not stayed. Cournoyer v. Town of Lincoln, 790 F.2d 971 (1st Cir. 1986).
 - (3) City's action to evoke debtor's building permit was not stayed. Matter of 1600 Pasadena Offices, Ltd., 64 Bankr. 192 (M.D. Fla. 1986).
 - (4) Age discrimination suit by Equal Opportunity Commission was not stayed to the extent it sought to enjoin discriminatory practices but was stayed to the extent it sought back pay. In re Bennett Paper Corp., 63 Bankr. 8 (E.D. Mo. 1985). The latter ruling seems erroneous although the enforcement of such a money judgment is most likely stayed under 11 U.S.C. § 362(b)(5).
 - (5) Issuance of order authorizing entry of State Environmental Protection agents to clean up toxic wastes on debtor's premises did not violate stay. Matter of Hildemann Industries, Inc., 53 Bankr. 509 (Bankr. D.N.J. 1985).
 - (6) Worker Compensation claims may be adjudicated by state industrial commission under this exception. In re Mansfield

Tire and Rubber Co., 660 F.2d 1108 (6th Cir. 1981) cert. denied, 454 U.S. 1162 (1982).

c. **11 U.S.C. § 362(b)(5)**. However, only non-money judgments obtained in such actions may be enforced without violating the stay.

(1) The decisions are in conflict with respect to the enforcement of money judgments obtained in governmental actions to enforce police or regulatory powers. See e.g., In re Blair, 62 Bankr. 650 (Bankr. D. Ala. 1986); In re Linz Oil Service, Inc., 65 Bankr. 292 (Bankr. N.D. All. 1986) (stay prevents enforcement of money judgments). In re Bean, 66 Bankr. 454 (D. Colo. 1986); U.S. v. Energy Intern., Inc., 19 Bankr. 1020 (Bankr. D. Ohio 1981) (stay did not prevent enforcement of money judgment).

2. **11 U.S.C. § 362(b)(8)**. The commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust if the mortgage or deed of trust is or was insured under the National Housing Act and covers property of five or more living units.

3. **11 U.S.C. § 362(a)(9)**. Any acts by a lessor of nonresidential real property to obtain possession of the property under a lease which has terminated by the expiration of the stated term of the lease before or during the bankruptcy case are not stayed.

D. **DURATION OF THE AUTOMATIC STAY.** (11 U.S.C. § 362(c)).

1. **11 U.S.C. § 362(c)(1)**. The stay of actions against **property of the estate** continues until the property is abandoned. Property is generally abandoned to the debtor and becomes **the debtor's property**. Certain acts against **the debtor's property** are stayed. Therefore, the stay may still apply even after abandonment.

2. **11 U.S.C. § 362(c)(2)**. Stays against the debtor or the debtor's property continue until the earliest of:

a. the time the bankruptcy case is closed;

b. the time the bankruptcy case is dismissed; or

c. in the case of individual debtors, the time a discharge of debts is granted or denied.

3. **11 U.S.C. § 362(d).** The automatic stay of acts against property of the estate, property of the debtor, and the debtor can be lifted by the bankruptcy court.

E. EXAMPLES OF ACTIONS NO LONGER STAYED.

1. Foreclosure of a mortgage or deed of trust where the bankruptcy court entered an order lifting the automatic stay.
2. Replevin action to recover property subject to a security interest where the trustee has abandoned the personal property in question and the debtor has received a discharge.
3. Dissolution action after the debtor has obtained a discharge.

V. PROPERTY OF THE BANKRUPTCY ESTATE. (11 U.S.C. § 541).

A. SIGNIFICANCE OF THE CONCEPT OF PROPERTY OF THE ESTATE.

1. Certain actions are stayed only as against property of the estate. E.g., spousal and child support may be collected from non-estate property; lessor of nonresidential real property may evict debtor from premises where lease term has expired before or during the bankruptcy case.
2. The court may be requested to disburse money or distribute property of or to a debtor in a bankruptcy case. The bankruptcy trustee may be entitled to the monies or property.

B. PROPERTY WHICH IS PROPERTY OF THE ESTATE. (11 U.S.C. § 541).

1. **11 U.S.C. § 541(a)(1).** Property of the estate consists of all property in which the debtor has a legal or equitable interest as of the commencement of the bankruptcy case.
 - a. Congress intended the scope of section 541(a)(1) to be very broad and to reach assets that were not included in the estate under

former law. United States v. Whiting Pools, 462 U.S. 198, 204-05 (1983).

b. The state law label of an item as "property" does not control the decision whether the item is property of the estate. However, state law does define the item's nature, extent, and other attributes. Butner v. U.S., 440 U.S. 48 (1979).

c. Examples of legal or equitable interests which are property of the estate.

(1) Real estate. In re Presidential Row, Inc., 37 Bankr. 1 (Bankr. D.S.C. 1983).

(2) Personal property. In re Gunder, 8 Bankr. 390 (Bankr. S.D. Ohio 1980).

(3) Causes of action. Matter of Smith, 640 F.2d 888 (7th Cir. 1981).

(4) Contract rights. In re Scanlon, 10 Bankr. 245 (Bankr. D. Kan. 1982).

(5) Contingent interest in a trust. In re Dias, 37 Bankr. 584 (Bankr. D. Idaho 1984).

d. The estate acquires only the debtor's interest in property. 11 U.S.C. § 541(d); Matter of Depoy, 29 Bankr. 466 (Bankr. N.D. Ind. 1983).

e. It is not necessary that the debtor's creditors be able to reach the property or that the debtor be able to transfer the property for it to be considered property of the estate. 11 U.S.C. § 541(c)(1); Regan v. Ross, 691 F.2d 81 (2d Cir. 1982).

2. **11 U.S.C. § 541(a)(2).** In addition, property of the estate includes all interests of the debtor and the debtor's spouse in community property as of the commencement of the bankruptcy case that is --

a. under the sole, equal or joint management and control of the debtor; or

b. liable for an allowable claim against the debtor or for both an allowable claim against the debtor and the debtor's spouse, to the extent the interest in property is so liable.

3. **11 U.S.C. § 541(a)(5).** Property of the estate includes property that would otherwise have been property of the estate and which the debtor acquires or becomes entitled to acquire within 180 days after the filing of the bankruptcy petition --
 - a. by bequest, inheritance or devise;
 - b. as a result of a property settlement agreement with the debtor's spouse or of an interlocutory or final divorce decree; or
 - c. as a beneficiary of a life insurance policy or of a death benefit plan.
4. **11 U.S.C. § 541(a)(6).** Proceeds, product, offspring, rents, or profits of or from property of the estate are property of the bankruptcy estate.
5. **11 U.S.C. §§ 1207, 1306.** Chapter 12 and 13 cases -- all of the foregoing property and all property, including earnings of the debtor, that the debtor acquires after commencement of the bankruptcy case is property of the estate.

C. **PROPERTY WHICH IS NOT PROPERTY OF THE ESTATE.**

1. **11 U.S.C. § 541(b)(1).** Any power, such as a power of appointment, that the debtor may exercise solely for the benefit of another entity is not property of the estate.
2. **11 U.S.C. § 541(b)(2).** Any leasehold interest of the debtor as a lessee under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of the bankruptcy case or which expires during the case is not (or ceases to be) property of the estate.
3. **11 U.S.C. § 541(a)(6).** Post-petition wages earned by an individual in a Chapter 7 or Chapter 11 case are not property of the estate.

D. **PROPERTY IN WHICH THE ESTATE'S INTEREST MAY BE LIMITED.**

1. **11 U.S.C. § 541(c)(2)** provides that a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a bankruptcy case.

2. The courts are in disagreement over the status of ERISA qualified pension plans as property of the estate. ERISA provides for qualification of pension trusts that meet certain requirements including that "each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). Tax law gives preferential treatment to qualified pension trusts and requires a similar provision in the plan. 26 U.S.C. § 401(a)(13).

The majority view is that anti-alienation and non-assignability clauses in qualified pension plans do not prevent the debtor's interest from becoming part of the estate unless they are enforceable under state law as spendthrift trusts. In re Daniel, 771 F.2d 1352 (9th Cir. 1985), cert. denied U.S. (1986); In re Lichstrohl, 750 F.2d 1488 (11th Cir. 1985); In re Graham, 726 F.2d 1268 (8th Cir. 1984); In re Goff, 706 F.2d 574 (5th Cir. 1983); Regan v. Ross, 691 F.2d 81 (2d Cir. 1982). Contra Warren v. G.M. Scott & Sons, 34 Bankr. 543 (Bankr. S.D. Ohio 1983); In re Pruitt 30 Bankr. 330 (Bankr. D. Colo. 1983).

3. 11 U.S.C. § 541(d). Property in which the debtor holds only legal title and not an equitable interest becomes property of the estate only to the extent of the debtor's limited interest in the property.
- E. HOW PROPERTY CEASES TO BE PROPERTY OF THE ESTATE AND BECOMES PROPERTY OF THE DEBTOR.
1. Debtor successfully claims the property as exempt.
 2. The trustee abandons the property and the bankruptcy court approves the abandonment.
- F. EXAMPLES OF ACTIONS AGAINST THE DEBTOR'S PROPERTY WHICH MAY PROCEED UPON ABANDONMENT BY THE TRUSTEE AND/OR EXEMPTION OF THE PROPERTY BY THE DEBTOR WHERE THE DEBTOR HAS RECEIVED OR BEEN DENIED A DISCHARGE.
1. Replevin actions to enforce valid liens on personal property.
 2. Foreclosure of valid mortgages, deeds of trust, and land contract cancellation proceedings.
 3. 11 U.S.C. § 522(c). With only three exceptions, property exempted in the bankruptcy case may not be

pursued even by creditors holding unsecured nondischargeable debts. The exceptions are:

- a. Nondischargeable tax and spousal and child support claims may be satisfied from exempt property.
- b. Valid liens on exempt property may be enforced.

VI. THE DISCHARGE OF INDEBTEDNESS IN BANKRUPTCY. (11 U.S.C. §§ 523, 524, 1141(d), 1228, 1328).

A. SIGNIFICANCE.

1. With only three exceptions, state courts and federal courts have concurrent jurisdiction to determine whether an obligation has been discharged in bankruptcy.
2. If a debt has been discharged in bankruptcy, an action to collect the debt as a personal liability of the debtor violates the prohibitory injunction imposed by 11 U.S.C. § 524(a).
3. Thus, further litigation in actions or appeals pending at the time the bankruptcy case was filed and which sought directly or indirectly to collect or recover a debt as a personal liability of the debtor will be initially stayed by the automatic stay and permanently enjoined after the debt is discharged by virtue of section 524(a).

B. THE NATURE AND EFFECTS OF DISCHARGE IN BANKRUPTCY.

1. A discharge acts as a shield against efforts to collect dischargeable debts as a personal liability of the debtor. 11 U.S.C. § 524(a)(2).
2. A discharge voids any judgment to the extent it is a determination of the personal liability of the debtor with respect to any dischargeable debt. 11 U.S.C. § 524(a)(1).
3. A discharge does not prevent the enforcement of valid liens which have survived bankruptcy. 11 U.S.C. § 506.
4. Only individuals and family farmers (not corporations or partnerships that are not family farmers) can obtain a discharge in Chapters 7, 12,

and 13. Individuals, corporations and partnerships can obtain a discharge in Chapter 11.

C. DEBTS WHICH MAY NOT BE DISCHARGED IN CHAPTER 7, 11, AND 12 FAMILY FARMER OR CONSUMER BANKRUPTCY CASES AND WHICH BOTH STATE AND FEDERAL COURTS MAY DETERMINE TO BE NONDISCHARGEABLE. (11 U.S.C. § 523(c); IN RE ALDRICH, 34 BANKR. 776 (BANKR. 9TH CIR. 1983)).

1. 11 U.S.C. § 523(a)(1). Nondischargeable taxes and customs duties are described below.

- a. Unsecured taxes on or measured by income or gross receipts due within three years before the bankruptcy case.
- b. Property taxes assessed before the bankruptcy case and last payable (without penalty) within one year before the bankruptcy case.
- c. A tax required to be collected or withheld and for which the debtor is liable in any capacity.
- d. Employment taxes on wages, salary or commissions earned from the debtor before the filing of the petition due within 3 years before the bankruptcy case.
- e. Excise taxes on pre-petition transactions due within three years before the bankruptcy case.
- f. A debt for any tax or customs duty with respect to which a return, if required --
 - (1) was not filed; or
 - (2) was filed after the return was due within two years before the bankruptcy case.
- g. A debt for any tax or customs duty for which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat the tax.
- h. See e.g., In re Rosenow, 715 F.2d 277 (7th Cir. 1983).

2. 11 U.S.C. § 523(a)(3). Debts which were not listed on the debtor's schedules of debts in time to allow filing of a proof of claim unless the creditor had notice or actual knowledge of the case in time for timely filing of the proof of claim are not

dischargeable. See generally In re Stark, 717 F.2d 322 (7th Cir. 1983).

3. **11 U.S.C. § 523(a)(5)**. Alimony, maintenance, spousal and child support claims of a spouse, former spouse, or child of the debtor if the liability is actually in the nature of support rather than in the nature of a property settlement obligation are nondischargeable obligations. See generally In re Calhoun, 715 F.2d 1103 (6th Cir. 1983).
 4. **11 U.S.C. § 523(a)(7)**. Fines, penalties and forfeitures payable to and for the benefit of a governmental unit to the extent that they are not compensation for actual pecuniary losses, other than tax penalties for dischargeable taxes or older than three years measured as of the date of the filing of the bankruptcy petition are nondischargeable. Kelly v. Robinson, 479 U.S. 36 (1986).
 5. **11 U.S.C. § 523(a)(8)**. Government guaranteed or insured student loans that first became payable within five years before bankruptcy are not discharged unless the loan imposes an undue hardship on the debtor and the debtor's dependents. See generally Matter of Whitehead, 31 Bankr. 381 (Bankr. S.D. Ohio 1983).
 6. **11 U.S.C. § 523(a)(9)**. Debts arising from judgments or consent decrees entered against the debtor in a court of record for liability incurred as a result of the debtor's operation of a motor vehicle while legally intoxicated cannot be discharged. See generally In re Ganzer, 54 Bankr. 75 (Bankr. D. Minn. 1985).
- D. DEBTS WHICH MAY NOT BE DISCHARGED IN CHAPTER 13 CASES AND WHICH BOTH STATE AND FEDERAL COURTS MAY DETERMINE TO BE NONDISCHARGEABLE. (11 U.S.C. § 523(c)).
1. There are two kinds of discharges in Chapter 13, a "super-discharge" under 11 U.S.C. § 1328(a) and a "hardship discharge" under 11 U.S.C. § 1328(c).
 2. **11 U.S.C. § 1328(a) "Super-Discharge."** Such a discharge is given in a Chapter 13 case in which the debtor completes all payments called for by the plan.
 - a. The only debts which are not dischargeable are those for which the plan provides for repayment beyond the life of the plan; and

- b. Alimony, maintenance, and spousal or child support claims of a spouse, former spouse or child of the debtor.
 - c. Thus, most debts that would be nondischargeable in a Chapter 7, 11 or 12 case are discharged in a Chapter 13 case if the debtor completes all payments called for by the plan. See generally In re Johnson-Allen, 69 Bankr. 461 (Bankr. E.D. Pa. 1987). But see In re Kohr, 82 Bankr. 706 (Bankr. M.D. Pa. 1988).
3. **11 U.S.C. § 1328(c) "Hardship Discharge."** Such a discharge is given in a Chapter 13 case in which the debtor does not successfully complete the payments called for by the plan.
- a. In the event the debtor receives a "hardship" discharge only those debts that are discharged in a Chapter 7 or 11 consumer bankruptcy case are discharged. (See Outline VI. C.).
4. State and federal courts have concurrent jurisdiction over the dischargeability of debts to the same extent they would if the case were a Chapter 7 or 11 consumer bankruptcy case. (See Outline VI. C.).

VII. RESEARCHING A BANKRUPTCY ISSUE.

A. TREATISES

- 1. Collier on Bankruptcy (15th ed.).
- 2. Norton Bankruptcy Law and Practice.

B. ARTICLES

- 1. Automatic Stay -- Kennedy, Automatic Stay Under the New Bankruptcy Law, 12 U. Mich. J.L. Ref. 3 (1978).
- 2. Family Law and Bankruptcy -- White, Strange Bedfellows: The Uneasy Alliance Between Bankruptcy and Family Law, 17 New Mexico L. Rev. 1 (1987) (in press).
- 3. Dischargeability Issues -- 3 Collier on Bankruptcy § 523.01 et seq. (15th ed.).

C. CASE LAW

1. Bankruptcy court decisions are collected in West's Bankruptcy Reporter (cited as Bankr. or B.R.). West publishes a digest for this reporter.
2. United States Code Annotated is, in the author's view, easier to use and better digested than the West digest.

D. LEGISLATIVE HISTORY

1. Appendix 3 of Collier on Bankruptcy (15th ed.) reproduces the Bankruptcy Code's legislative history.
2. The principal sources of the legislative history of the original 1978 Bankruptcy Code (Senate and House Reports) are cited as follows:
 - a. S. Rep. No. 598, 95th Cong. 2nd Sess., reprinted in 1978 U.S. Code Cong. & Admin. News 5787.
 - b. H. Rep. No. 595, 95th Cong. 1st Sess. reprinted in 1978 U.S. Code Cong. & Admin News 5963.

Problems

1. You represent J. C. Payme, a judgment creditor, and have been garnishing the wages of I.M. Notgoingto for several months. I.M. files a Chapter 7 case on April 1. Before you receive actual notice of the bankruptcy filing, a portion of I. M.'s post-petition wages are withheld pursuant to the garnishment and payed over to you. I.M.'s attorney demands that you remit these funds to her client. Is I. M. entitled to the funds? Does the Chapter 7 trustee have a right to the funds?

2. You represent Last Bank. A Last Bank officer has just telephoned you at your office and advised you that one of its borrowers, The Scotch Tape Store, Inc., filed a Chapter 11 bankruptcy case two days ago. The Scotch Tape Store owes Last Bank \$15,000 (which was made on an unsecured basis) and presently its corporate checking account shows a balance of \$12,000. A check drawn on this account, dated the day after the Chapter 11 case was filed and in the amount of \$10,000, has just been presented for payment. Must Last Bank honor the check? Are there any alternatives? What risks are presented under these options?

3. You represent Detrimental Finance Co. Detrimental was in the process of replevying several trucks in which it had a validly perfected security interest when its borrower, a moving company called Starving Students, Inc., filed a Chapter 11 petition. Starving Students is in possession of the trucks and is using them in its ongoing business operations. The trucks are worth \$200,000 and secure an obligation to Detrimental in the amount of \$150,000. The trucks depreciate at the rate of 10% a year. Starving Students has made no payments of principle or interest to Detrimental since the inception of the case three weeks ago. As far as Detrimental knows the trucks are presently insured. Is there a basis on which to request the bankruptcy court to lift the automatic stay?

4. Several years ago you represented I. Vanna Bealone in her divorce from her ex-husband, Dondo Trumpet, now party to a Chapter 7 proceeding. The dissolution decree incorporated the terms of an agreement between the estranged couple which required Dondo to pay I. Vanna \$500,000 a year for ten years in lieu of any claims to alimony she might have and in satisfaction of her interest in property acquired by the parties in the course of the marriage. Dondo is in default under the terms of the agreement and has listed I. Vanna as an unsecured creditor in the amount of \$850,000. Is the obligation dischargeable? Must you litigate the issue in Dondo's bankruptcy proceeding? What factors will you evaluate in deciding how to proceed? If you had the opportunity, what might you now include in the parties' stipulation?