

## LESSON 2

### GENERAL PROVISIONS (Chapters 1 and 3 of the Bankruptcy Code)

#### CONTENTS

- I. Chapter 1 -- General Provisions
  - A. Power of Court – 11 U.S.C. § 105
  - B. Waiver of Sovereign Immunity – 11 U.S.C. § 106
  - C. Who May Be a Debtor – 11 U.S.C. § 109
- II. Chapter 3 – Case Administration
  - A. Voluntary Cases – 11 U.S.C. § 301
  - B. Involuntary Cases -- 11 U.S.C. § 303
  - C. Trustees – 11 U.S.C. §§ 321-324
  - D. Meeting of Creditors -- 11 U.S.C. § 341
  - E. Notice -- 11 U.S.C. § 342
  - F. Closing and Reopening Cases -- 11 U.S.C. § 350

#### I. CHAPTER 1 -- GENERAL PROVISIONS

##### A. Power of Court -- 11 U.S.C. § 105

- 1. Under section 105 of the Bankruptcy Code, a bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of title 11.
- 2. Section 105 is construed to empower a bankruptcy court to, for example, grant a request for injunctive relief, allow a debtor to pay selected unsecured claims of prepetition creditors, such as wage claims, and find civil contempt.

##### B. Waiver of Sovereign Immunity -- 11 U.S.C. § 106

- 1. The United States, as a sovereign, is generally immune from suit except as it consents to be sued and then only under the terms of such consent. United States v. Dalm, 494 U.S. 596, 608 (1990). Section 106 of the Bankruptcy Code provides for a limited waiver of sovereign immunity in bankruptcy cases.
- 2. Section 106(a)(1) abrogates sovereign immunity as to a governmental unit with respect to several specific sections of the Bankruptcy Code.

3. Section 106(a)(3) maintains sovereign immunity from a bankruptcy court's award of punitive damages against the government and applies the provisions of the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(2)(A), to limit the amount of damages that can be awarded.
4. Section 106(a)(4) requires that any order, process, or judgment against a governmental unit be consistent with appropriate applicable nonbankruptcy law.
5. Section 106(a)(5) sustains the general rule that the abrogation of sovereign immunity does not create any substantive claim for relief or cause of action that does not otherwise exist.
6. Under section 106(b), the filing of a proof of claim against the estate by a governmental unit is a waiver by that governmental unit of sovereign immunity with respect to compulsory counterclaims, that is, counterclaims arising out of the same transaction or occurrence.
7. Under section 106(c), the estate may offset against the allowed claim of a governmental unit any claim against such governmental unit that is property of the estate. Under this provision, the setoff permitted is only to the extent of the governmental unit's claim, and no affirmative recovery is permitted. Affirmative recovery is governed by section 106(a).

**C. Who May Be a Debtor -- 11 U.S.C. § 109**

1. Under section 109, "only a person [or entity] that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor." Further, the Code sets forth six different types of bankruptcy proceedings known by chapter number 7, 9, 11, 12, 13, or 15, each with its own set of filing requirements.
  - Chapter 7 - The debtor may be any person except a railroad, certain banks and savings institutions. Person is defined as any individual, partnership or corporation, but does not include a sole proprietorship which cannot file as an entity separate from the individual.

- Chapter 9 - The debtor must be a municipality.
  - Chapter 11 - The debtor may be a railroad, any person that may be a debtor under Chapter 7 (except a stockbroker or commodity broker), an uninsured State member bank, or corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991.
  - Chapter 12 - The debtor must be a family farmer or family fisherman with regular annual income.
  - Chapter 13 - The debtor must be an individual with regular income, and such individual's spouse, except a stockbroker or commodity broker, that owe on the petition date noncontingent, liquidated, unsecured debts of less than \$360,475 and noncontingent, liquidated, secured debts of less than \$1,081,400 (these are the adjusted amounts effective as of April 1, 2010). Section 104(b)(1) provides for the adjustment of these amounts every three years based upon the Consumer Price Index.
  - Chapter 15 – This chapter was added by the BAPCPA and applies to ancillary and cross-border cases. For purposes of this chapter, the term “debtor” means an entity that is the subject of a foreign proceeding.
2. Section 109(g) provides that no individual may be a debtor who was a debtor in a bankruptcy case within 180 days before the petition date if either (1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case or (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362.
  3. New subsection 109(h), added by the BAPCPA, requires credit counseling within 180 days before someone can file bankruptcy, unless the United States trustee determines that the approved credit counseling agencies for the debtor’s

district are not reasonably able to provide adequate services.

## **II. CHAPTER 3 – CASE ADMINISTRATION**

Chapter 3 of the Bankruptcy Code applies to all operating chapters, including Chapters 7, 12, 11, and 13. The first part of Chapter 3 generally introduces us to the players involved in most bankruptcy cases. It also describes some of the consequences of filing a bankruptcy case and what happens when the case is converted or dismissed. The most important provision of Chapter 3 is section 362, the automatic stay.

### **A. Voluntary Cases - 11 U.S.C. §§ 301 and 302**

1. A voluntary case is commenced by the debtor filing a petition under the relevant chapter of the Bankruptcy Code with the clerk of the bankruptcy court. At the time of the filing of the voluntary petition, the clerk stamps the docket number on the petition and also stamps "relief ordered" on the petition. No formal order, executed by a judge, is necessary. Instead, the "stay" prohibiting certain actions by and against the debtor and the debtor's property is "automatically" entered at this time. Thus, the term "automatic stay" came into play.

**Note:** The BAPCPA amended section 362 and in certain cases involving the serial filing of bankruptcy petitions by an individual debtor, the stay may not automatically go into effect. See 11 U.S.C. § 362(c)(3).

2. Bankruptcy Rule 1005 requires the following information about the debtor on the petition: name, employer identification number, last four digits of the social security number or individual debtor's taxpayer-identification number, any other federal tax identification number, and all other names used within eight years before filing the petition.
3. Along with the petition, the debtor is required to file schedules and statements regarding the debtor's financial condition. The BAPCPA substantially amended section 521 to impose upon debtors additional filing requirements, including requirements to file tax returns or transcripts. See 11 U.S.C. §§ 521(e)(2)(A), 521(f), & 521(j).
4. Bankruptcy Rule 1007(b) was also amended to reflect the expanded obligations of debtors to file a variety of documents and materials by the BAPCPA. The failure to file the required schedules may result in dismissal of the case.

See 11 U.S.C. § 521(i). See also In re Dandy Doughboy Donuts, Inc., 66 B.R. 457, 459 (Bankr. S.D. Fla. 1986) (failure to file the list of creditors required by Rule 1007(d) resulted in dismissal of the case).

**Note:** This may be one area where filing a late proof of claim in a Chapter 13 can be defended. If the debtor does not list all tax identification numbers upon which he or she may be liable, some courts have held that the debtor failed to provide proper notice to the Service or other taxing entities. See In re Anderson, 159 B.R. 830, 838-39 (Bankr. N.D. Ill. 1993); In re Trembath, 205 B.R. 909, 914 (Bankr. N.D. Ill. 1997), and In Re Adair, 212 B.R. 171, 173 (Bankr. N.D. Ga. 1997). See also In re Austin, 46 B.R. 358, 360 (Bankr. E.D. Wis 1985).

5. Under section 302, a joint case is commenced by the filing of a single petition by an individual that may be a debtor under such chapter and such individual's spouse. One spouse cannot take the other spouse into bankruptcy without the other's knowledge or consent. The court must determine the extent, if any, to which the assets and liabilities of the two debtors will be combined in a single pool to pay creditors. Bankruptcy Rule 1015 provides for joint administration of the estates.

## **B. Involuntary Cases - 11 U.S.C. § 303**

1. An involuntary case may only be commenced under Chapter 7 or Chapter 11. Such a case may be commenced only against a person eligible for relief under the chapter (excluding farmers and nonprofit corporations). Involuntary cases are not permitted against municipalities or against individuals under Chapter 13.
2. An involuntary case is commenced by the filing of a petition by at least three creditors of the debtor if the debtor has more than twelve creditors. If the debtor has less than twelve creditors, the petition may be filed by only one creditor. The aggregate dollar amount of claims necessary--whether one creditor or three files--is at least \$14,425 of unsecured debt (this is the adjusted amount effective as of April 1, 2010). Each claim must not be contingent as to liability or the subject of a bona fide dispute.

3. The venue rules in involuntary cases are the same as those in voluntary cases. If an involuntary petition is controverted by a timely answer, the court cannot order the relief sought unless either:
  - a. the debtor is generally not paying debts as they become due, unless such debts are the subject of a bona fide dispute; or
  - b. within 120 days before the petition date, a custodian was appointed or took possession of substantially all of the property of the debtor.
4. The duty of the debtor to file a list of creditors, schedules, and statement of affairs also applies in involuntary cases. Bankruptcy Rule 1007(a)(2). Bankruptcy Rule 1003 governs the procedural requirements of filing an involuntary petition.
5. Nothing precludes the Service from commencing an involuntary case against an otherwise eligible person or entity.

**C. Trustee - 11 U.S.C. §§ 321- 324**

1. The trustee is an officer of the court who represents the bankruptcy estate. Any individual who is competent to perform the duties of a trustee is eligible to serve in that capacity.
2. It sometimes gets confusing attempting to distinguish between the various trustee titles that may arise in a particular case. One should distinguish between the United States Trustee, a panel trustee or case trustee, and a Chapter 13 trustee.
3. The U.S. Trustee is largely a supervisory entity which polices the Chapter 7 panel or case trustees and to a lesser extent the Chapter 13 trustees. In some circumstances the U.S. Trustee can be a case trustee. Usually this occurs when there is no panel trustee who will accept a particular case.
  - a. The panel trustee, also called the case trustee, is the trustee assigned to a particular bankruptcy case. This is usually in a Chapter 7 case, but sometimes occurs in a Chapter 11 case.

- b. The Chapter 13 trustee functionally operates as a disbursing agent for the creditors. The debtor makes monthly payments to the Chapter 13 trustee and the trustee disburses payments to the creditors.
4. In addition to being eligible to serve as a trustee, the person must qualify for the position by filing a bond to secure the performance of his or her official duties. The amount of the bond and sufficiency of the surety on the bond are determined by the United States Trustee. A proceeding on a trustee's bond may not be commenced after two years from the date of the trustee's discharge. 11 U.S.C. § 322.
5. The selection and qualification of an individual as trustee does not prevent a subsequent replacement. The trustee may be removed for cause after the bankruptcy court conducts a hearing on notice. 11 U.S.C. § 324.
6. Bankruptcy Rules 2008-2015 govern the procedures in selection and qualifications of trustees. See also 28 U.S.C. § 586 for the role of the U.S. Trustee in connection with case trustees.

**D. Meeting of Creditors & Equity Security Holders -  
11 U.S.C. § 341**

1. After an order for relief is entered, notice is sent to creditors and the debtor informing them of the date set for the meeting of creditors. (This may be combined with the notice of the order for relief.) The United States Trustee convenes the meeting of creditors. The debtor is required to attend the meeting and submit to examination under oath. The court does not preside over or attend the meeting of the creditors. 11 U.S.C. § 341.
2. The purpose of the meeting is to give creditors and the trustee an opportunity to examine the debtor regarding the debtor's acts, conduct, or property, or in respect to any other matter that may affect the debtor's right to a discharge or the administration of the estate. Another purpose of the meeting is the election of a regular trustee and, when appropriate, a creditors' committee.
3. Section 341(d), added by the Bankruptcy Reform Act of 1994, requires the trustee to orally examine a Chapter 7 debtor to ensure that the debtor is aware of all of the

consequences of the petition and expected discharge as well as the alternative Title 11 solutions available.

4. Section 341(c) was amended by the BAPCPA to permit non-lawyer representatives of creditors holding “consumer debts” to appear at and participate in section 341 meetings in Chapter 7 and 13 cases, notwithstanding any local court rule, State law, or otherwise applicable nonbankruptcy law requiring representation by an attorney.
5. Section 341(e) was added by the BAPCPA to provide that on the request of a party in interest, the court is authorized to waive the meeting of creditors or equity security holders, after notice and a hearing for cause, if the debtor has filed a plan to which the debtor solicited acceptances prior to the commencement of the case (typically known as a “prepackaged plan”).
6. Bankruptcy Rule 2003 governs the procedural aspects of the creditors' meeting (date, place, who presides, minutes, report), while Rule 2004 allows any party in interest to move for a court order providing for the examination of any entity. Rule 2005 provides for obtaining an order to compel attendance for examination.
7. The use of the creditors' meeting can be invaluable to the Service to obtain information otherwise unavailable outside of bankruptcy. The Bankruptcy Code requires a debtor to disclose fully the nature and existence of all assets in which the debtor has an interest. All aspects of the debtor's financial status must be disclosed.

**Note:** In some jurisdictions, the number of creditors' meetings set on a particular day may preclude the Service from delving too deeply into some cases. In these circumstances, the use of Rule 2004 examinations is preferred especially if the questions posed to the debtor would also require the production of documents. The procedure in most courts allows for ex parte applications for a Rule 2004 examination. Once the order allowing for the examination is executed by the court, Counsel will usually set the examination at a mutually convenient time. The courts have universally held that the scope of the examination under Rule 2004 is “very broad and can be in the nature of a fishing expedition.” In re Coffee Cupboard, Inc., 128 B.R. 509, 514 (Bankr. E.D. N.Y. 1991). See also In re Bennett Funding Group, Inc., 203 B.R.



24, 27-28 (Bankr. N.D.N.Y. 1996); In re Drexel, Burnham Lambert Group, Inc., 123 B.R. 702, 711 (Bankr. S.D.N.Y. 1991); and Chereton v. United States, 286 F.2d 409, 413 (6th Cir. 1961), cert. denied, 366 U.S. 924 (1961).

**E. Notice - 11 U.S.C. § 342**

1. Section 342 requires that appropriate notice of an order for relief be given. The BAPCPA substantially amended section 342 to add specific notice requirements.
2. Section 342(c), as amended by the BAPCPA, generally requires the debtor to send any notice required by the Bankruptcy Code to an address supplied, in writing, by the creditor at least twice within the 90-day period preceding the bankruptcy. The communications sent to the debtor in the preceding 90 days must include the debtor's account number and the address at which the creditor requests to receive correspondence.
3. Section 342(e), added by the BAPCPA, allows a creditor in a Chapter 7 or 13 case involving an individual debtor to file with the court and serve on the debtor a notice of address specifying the address to which any notices should be sent in that case, and makes the address effective seven days after receipt.
4. Section 342(f), added by the BAPCPA, allows any entity to file with the court a notice stating its address for notice purposes in Chapter 7 and Chapter 13 cases, and makes that address effective in any Chapter 7 or 13 case 30 days after filing, unless specific notice is given under section 342(e) with respect to a particular case.
5. Section 342(g), added by the BAPCPA, provides that where notice is not provided in accordance with section 342, it is not effective until the notice is brought to the attention of the creditor. Additionally, section 342(g) provides that a creditor who has not yet received appropriate notice of the commencement of the bankruptcy is not subject to sanctions for certain specified actions, including violation of the automatic stay.

**E. Closing and Reopening Cases - 11 U.S.C. § 350**

1. Section 350(a) provides that after an estate is fully administered and the trustee has been discharged by the court, the court shall close the case. As provided in section 350(b), a closed case may be reopened to administer assets, to accord relief to the debtor, or for other cause.

**Note:** Closing a case is different from dismissal of a case.

2. Bankruptcy Rule 5009 implements section 350. Rule 5010 allows a case to be reopened upon the motion of a debtor or other party in interest. If a Chapter 7, 12, or 13 case is reopened, a trustee is not appointed unless the court determines that a trustee is needed. Bankruptcy Rule 3022 provides for the entry of a final decree upon the full administration of the estate in a Chapter 11 case.