



# WHAT EVERY ATTORNEY NEEDS TO KNOW ABOUT BANKRUPTCY

BY CANDACE C. CARLYON, ESQ. AND ADAM BOWLER, ESQ.

## Where to Look

A great starting point in a search for bankruptcy information is the Nevada Bankruptcy Court's website: [www.nvb.uscourts.gov](http://www.nvb.uscourts.gov). The website includes copies of the Local Rules of Bankruptcy Procedure (which supplement the Bankruptcy Code and the national Rules of Bankruptcy Procedure), local forms, judicial procedures and court calendars. This site also allows users to register for training in order to obtain Electronic Case Filing (ECF) privileges. A request for limited ECF privileges, for requesting notice or filing a proof of claim can be found at: [http://www.nvb.uscourts.gov/downloads/forms/NV\\_5005.4\(registration-limited\).pdf](http://www.nvb.uscourts.gov/downloads/forms/NV_5005.4(registration-limited).pdf). In extraordinary circumstances, the court may grant a motion to file on paper (the form can be found at [http://www.nvb.uscourts.gov/downloads/forms/NV\\_5005\(permfilepaper-mtn12-09\).pdf](http://www.nvb.uscourts.gov/downloads/forms/NV_5005(permfilepaper-mtn12-09).pdf).)

In order to obtain case information, anyone can register for an account with Public Access to Court Electronic Records (PACER) at <https://www.pacer.gov/psco/cgi-bin/regform.pl>. Visitors can view records without charge at the bankruptcy clerk's office, at 300 Las Vegas Blvd. S., 4th floor, in Las Vegas, and at 300 Booth St., 1st floor, in Reno, via public computer terminals.

When a bankruptcy is filed, the clerk's office generates a Notice of Bankruptcy Case, Meeting of Creditors and Deadlines, which includes the case number, the assigned judge, the chapter (7, 13 or 11)<sup>1</sup> of the code under which the case is filed, the name and contact information of the debtor's counsel, the date and time of the first meeting of creditors, and information regarding the deadline to file a proof of claim.

The form looks like this:

Case 13- [REDACTED] btb Doc 2 Entered 11/29/13 23:00:03 [REDACTED]	
B9F (Official Form 9F) (Chapter 11 Corporation/Partnership Case) (12/12) Case Number 13-[REDACTED]	
UNITED STATES BANKRUPTCY COURT District of Nevada	
<b>Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, &amp; Deadlines</b>	
A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on 11/29/13.	
You may be a creditor of the debtor. <b>This notice lists important deadlines.</b> You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice. Case documents may be viewed at <a href="http://www.nvb.uscourts.gov">www.nvb.uscourts.gov</a> .	
<b>Important Notice to Individual Debtors:</b> Debtors who are individuals must provide government-issued photo identification and proof of social security number at the meeting of creditors. Failure to do so may result in dismissal of their case.	
<b>Creditors — Do not file this notice in connection with any proof of claim you submit to the court. See Reverse Side For Important Explanations</b>	
Debtor(s) (name(s) used by the debtor(s) in the last 8 years, including married, maiden, trade, and address): [REDACTED]	
Case Number: 13-[REDACTED] Judge: [REDACTED]	Social Security / Individual Taxpayer ID / Employer Tax ID / Other nos: [REDACTED]
Attorney for Debtor(s) (name and address): [REDACTED]	
Telephone number: [REDACTED]	
<b>Meeting of Creditors</b>	
Date: January [REDACTED] 2014	Time: [REDACTED]
Location: 300 Las Vegas Blvd., South, Room 1500, Las Vegas, NV 89101	
<b>Deadline to File a Proof of Claim</b>	
Proof of claim must be received by the bankruptcy clerk's office by the following deadline: For all creditors (except a governmental unit): <b>90 days after the date first set for the meeting of creditors</b> For a governmental unit: <b>180 days after order for relief entered</b>	
<b>Creditor with a Foreign Address:</b>	
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.	
<b>Creditors May Not Take Certain Actions:</b>	
In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.	
<b>Address of the Bankruptcy Clerk's Office:</b> 300 Las Vegas Blvd., South Las Vegas, NV 89101 Telephone number: (702) 527-7000	<b>For the Court:</b> Clerk of the Bankruptcy Court: <i>Mary A. Schott</i> Mary A. Schott Date: [REDACTED]
Hours Open: Monday – Friday 9:00 AM – 4:00 PM	

## Obtaining Information

Either with the filing of the bankruptcy petition, or within 15 days thereafter (unless an extension is obtained), the debtor will file schedules, listing all assets and liabilities, and a statement of financial affairs. In a Chapter 11 case, the debtor is also required to file monthly operating reports. These documents can be a valuable source of information. Approximately five weeks after the bankruptcy is filed, a creditors' meeting (also called a § 341 meeting as Bankruptcy Code § 341 requires the meeting) will take place. Anyone can attend and ask questions of the debtor (for a limited time). Unlike in a court

proceeding, a corporate entity may send a non-lawyer representative to ask questions at the creditors' meeting. Additional information and documents may be obtained under Fed. R. Bankr. P. 2004, which permits examination of any entity on matters relating to the debtor's assets, liabilities, financial condition, businesses, ability to reorganize, right to discharge or any other matter that may affect the administration of the estate. Attendance and production of documents may be compelled via subpoena pursuant to Fed. R. Bankr. P. 9016, which incorporates the subpoena provisions of Fed. R. Civ. P. 45. Local Rule 2004 provides that the clerk may issue an order for examination, so long as at least 14 days' notice is given, and LR 9016 provides for service on an attorney for a party who has appeared in the case.

## Property of the Estate and Automatic Stay

Under § 541(a), the filing of a bankruptcy petition creates a bankruptcy estate, which is "comprised of all legal or equitable interests owned by the debtor as of the commencement of the case."<sup>2</sup> The bankruptcy estate includes all claims and causes of action (including personal injury claims) existing as of the date of the bankruptcy filing, whether or not a lawsuit has yet been filed.<sup>3</sup> The estate generally includes interests of the debtor and the debtor's spouse in community property.

The bankruptcy filing also triggers the automatic stay under Bankruptcy Code § 362. As its name implies, the stay arises automatically upon the bankruptcy filing and operates as a powerful injunction, prohibiting actions against the debtor or its property and applying whether or not the creditor has notice or knowledge of the bankruptcy. Acts taken in violation of the stay are void.

## Important Deadlines

The filing of the case creates several automatic deadlines. The first is the deadline to object to exemptions, which is generally 30 days after the creditors' meeting concludes. The deadline to file a complaint objecting to a discharge in a Chapter 7 or 13 case in bankruptcy court is 60 days after the first date set for the first meeting of creditors (whether or not the meeting goes forward or concludes on that date).<sup>4</sup> Grounds for objection to discharge are

# WHAT EVERY ATTORNEY NEEDS TO KNOW ABOUT BANKRUPTCY

continued from page 7

set forth in 11 USC §§ 523 and 727, and may include debts obtained by fraud, defalcation by a fiduciary and injuries caused while under the influence. Marital and support obligations are generally excepted from discharge without the necessity of filing a complaint.<sup>5</sup> The deadline to file a proof of claim is generally 180 days from the filing of the petition. Unless the claim is correctly listed on the debtor's schedules and not designated as "disputed," filing a claim is essential in order to share in any recovery in the case.<sup>6</sup> There is no such thing as paying a claim "outside of bankruptcy."

## Personal Injury Claims

As noted above, personal injury claims are property of the bankruptcy estate. Further, counsel for the debtor (including personal injury counsel) must be employed in the bankruptcy, upon motion to, and order from, the bankruptcy court – failure of the debtor's counsel to be employed in the bankruptcy may result in the disallowance and/or disgorgement of any attorneys' fees. This employment also requires approval of the trustee in

a Chapter 7 case. To the extent that recoveries may be exempt (such as 75 percent of wage claims and certain disability and occupational injury claims), the exemption must be listed on the schedules. Settlement of the debtor's claims generally requires court approval. A failure to schedule such claims could lead to dismissal of the claims in state court.<sup>7</sup>

## Mechanic's Liens

NRS 108.233 provides that a mechanic's lien lapses after six months, unless an action to enforce the lien is filed. Bankruptcy Code § 546(b)(2) provides that, when a statute provides that continuation of a lien is subject to a requirement to commence an action, the party asserting the lien against the debtor may perfect by giving notice within the time fixed by such law for such commencement. Thus, in order to maintain the lien in the face of an intervening bankruptcy, a notice of perfection of the lien pursuant to § 546(b) should be filed with the Bankruptcy Court and served upon the debtor. *See In re Baldwin Builders*, 232 B.R. 436 (9<sup>th</sup> Cir. BAP 1999).

## Leases and Executory Contracts

Bankruptcy Code § 365 governs treatment of executory contracts,<sup>8</sup> including leases. Various provisions define and limit claims based upon breach of a lease or certain contracts. The debtor must generally demonstrate ability to perform in order to assume a lease or executory contract. In addition to permitting assumption, the court may permit the debtor to sell/assign the lease or contract to a third party. Section 362(l) also contains specific provisions with regard to residential lease evictions.

A common provision found in many leases and executory contracts is a clause that automatically terminates the lease or contract upon the insolvency or bankruptcy of the debtor. However, Bankruptcy Code § 365(b)(2) provides that such provisions do not constitute a breach that must be cured.

In addition to assuming, assigning or rejecting a lease, a debtor may seek to have a contract that purports to be a lease reclassified as a purchase and finance agreement (for example, an equipment lease with a \$1 purchase payment at the end of the lease period). In such cases, the debtor may show that the lease provisions more closely resemble the type of provisions found in a purchase agreement.<sup>9</sup> This can have negative consequences for the financing party, since, unlike lease obligations, terms for payment of secured claims may be modified in a Chapter 11 or 13 case. Section 506 of the Bankruptcy Code provides that if the amount owed exceeds the value of the collateral, the secured claim is reduced to the value of the collateral. Further, unless properly perfected, an unperfected security interest may be set aside in bankruptcy.

## Recovery of Pre-Bankruptcy Payments

The trustee (or a debtor-in-possession), may bring actions to recover certain transfers, including preferences (pursuant to Bankruptcy Code § 547) and fraudulent transfers (pursuant to Bankruptcy Code § 548 and NRS Chapter 112). In addition, § 544 of the Bankruptcy Code permits the trustee or debtor-in-possession to exercise certain powers, including that of a judicial lien creditor and a bona fide purchaser of real property, and it allows for the avoidance of certain unrecorded or unperfected interests.

**continued on page 10**

# WHAT EVERY ATTORNEY NEEDS TO KNOW ABOUT BANKRUPTCY

continued from page 9

[Please note: the foregoing is intended to assist in spotting issues, not to be a comprehensive treatment of the issues discussed. This article is for informational purposes and does not constitute legal advice nor create an attorney-client relationship.]

1 Generally, a Chapter 7 case involves the appointment of a trustee to administer and distribute non-exempt assets. An individual or business may file for protection under Chapter 7. However, an individual with the ability to repay debts may be required to file a Chapter 13 case. Only an individual with regular income can file Chapter 13. The debtor maintains control of assets, but proposes a plan to repay creditors from net disposable income, generally over five years, with payments made to a Chapter 13 trustee. A Chapter 11 may be filed by an individual or business entity and requires a plan of reorganization to be voted on by creditors. Unless a trustee is appointed for cause, a Chapter 11 debtor remains in possession of its assets (and, on the date of the bankruptcy filing, becomes the "debtor-in-possession").

- 2 *In re Bronner*, 135 B.R. 645, 647 (9th Cir. BAP 1992); 11 USC § 541(a)(1).
- 3 All such claims must be listed as assets on the debtor's schedules. The 1994 amendments to the Bankruptcy Code explicitly include debtor's attorneys in the class of people who are guilty of bankruptcy crimes for concealment of assets from creditors or the bankruptcy trustee. Such conduct is a felony, carrying a possible sentence of \$5,000, five years in prison or both. See 18 USC § 152.
- 4 In a Chapter 11 case, the deadline is the first date set for hearing on confirmation of the plan.
- 5 "Essentially, the combination of amended §§ 523(a)(5) and (15) would be to exclude from discharge all marital and domestic relations obligations, whether support in nature, property division ... provided that they were incurred in the course of a divorce or separation...." Hon. William Houston Brown & Lawrence Ahern III, *2005 Bankruptcy Reform Legislation with Analysis*, 32 (2005).
- 6 In a Chapter 7 case, where it appears that there are no assets to distribute, there may be a statement issued that claims need not be filed. If assets are later discovered, a deadline to file claims will be set. However, even in a no-asset case, a claim may be filed, and doing so will both preserve the right to share in distributions, if any are made, and will assist the creditor in receiving future notices in the case.
- 7 A debtor's failure to disclose a potential cause of action in his bankruptcy schedules is an omission regarded as an affirmative representation that no such claim exists, and may trigger dismissal of the claim under the doctrine of judicial estoppel. *Hamilton v. State Farm Fire & Casualty Co.*, 270 F.3d 778, 782-83 (9th Cir. 2001).
- 8 Generally, a contract is "executory" if there is performance that remains due from both parties.
- 9 See *Pacific Express, Inc. v. Teknekron Infoswitch Corp.* (*In re Pacific Express Inc.*), 780 F.2d 1482, 1487 (9th Cir. 1985). ■



**CANDACE C. CARLYON** has practiced in bankruptcy court since 1986. She was involved in such cases as the Aladdin, Riviera, Gold River, Landmark and Stratosphere hotel/casino reorganizations, and has represented debtors, creditors, trustees and committees in a variety of bankruptcy matters. Carlyon is the president of the American Board of Certification of Bankruptcy and Insolvency Professionals, and has been recognized as a certified Commercial Bankruptcy Specialist for 20 years.



**ADAM BOWLER** was born and raised in Las Vegas, and has practiced law in southern Nevada for 10 years. Bowler practices primarily in the areas of complex corporate and consumer restructuring, bankruptcy and litigation. His practice also includes real estate, government licensing/land use and planning, and general corporate law.