



BANKRUPTCY ISSUES IN NON-BANKRUPTCY CASES

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You're having a conversation with a client or potential client and they utter the word "bankruptcy." What do you do? This article discusses some of the primary differences between Chapter 7 and Chapter 13 bankruptcy cases, what to do when your client is involved in a bankruptcy case and considerations regarding the automatic stay.

A Brief Primer on Bankruptcy

The main consumer bankruptcy chapters are Chapters 7 and 13. A Chapter 7 bankruptcy is commonly known as a liquidation, because a debtor's non-exempt assets are typically liquidated in order to pay the debtor's creditors. Alternately, a Chapter 13 bankruptcy case is most frequently referred to as a reorganization bankruptcy, because debtors are given an opportunity, generally over a period of three to five years, to manage as many of their debts as possible, while also meeting certain other requirements.

Upon filing a bankruptcy case, a bankruptcy estate, comprised of all of a debtor's property,¹ is created. Chapter 7

bankruptcy estates consist of all property in which a debtor has a legal or equitable interest as of the date of filing the bankruptcy case. Property of the estate also includes, in part, any interest a debtor acquires (or becomes entitled to acquire) from an inheritance, a property settlement with the debtor's spouse, payment from life insurance or death benefits and all rental income, within 180 days of filing bankruptcy. In a Chapter 13 case, property of the estate is expanded beyond the parameters of Chapter 7 to include any property acquired by a debtor after the commencement of the case, but before the case is closed, dismissed or converted.²

A debtor is required to disclose all property of the estate; this can include a cause of action. Generally, this disclosure is accomplished by filing statements and schedules with the bankruptcy court. A debtor's failure to properly disclose property may result, at a minimum, in the debtor losing rights to such property.

Debtors in bankruptcy are entitled to exempt certain property of the estate, effectively removing this property from the bankruptcy estate. Nevada has opted out of allowing the Federal bankruptcy exemptions set forth in 11 U.S.C. §522(d).³ As a result, if a debtor has been domiciled within the state of Nevada for 730 days prior to the filing of the bankruptcy case, the debtor must use Nevada's bankruptcy exemptions, which can be found under Nevada Revised Statute (NRS) 21.090(1).⁴

Not All Trustees Are the Same

In Chapter 7 or 13 bankruptcy cases, a trustee is assigned to administer the case. The approach taken by each assigned trustee may differ based on the chapter under which the bankruptcy was filed. A main difference between Chapter 7 and Chapter 13 trustees is that a Chapter 7 trustee is charged with liquidating property of the estate, while a Chapter 13 trustee is not.⁵

In a Chapter 7 case, the trustee takes control of non-exempt property of the estate and converts the property to money, which is then used to satisfy a debtor's creditors.⁶ Alternately, a Chapter 13 trustee's primary task is administering payments made pursuant to a debtor's Chapter 13 plan.⁷ There is an element of liquidation in a Chapter 13 case, because a debtor must pay the value of the non-exempt assets to creditors in order to complete the bankruptcy.⁸ Importantly, in Chapter 13, the debtor is granted many of the rights, duties and powers that would properly be delegated to a bankruptcy trustee in other chapters.⁹ Therefore, while a Chapter 13 debtor is not required to liquidate assets to satisfy liquidation value, the debtor may do so in order to satisfy requirements under the Bankruptcy Code.

Someone Said "Bankruptcy"...Now What?

When your client enters bankruptcy, you must consider how your work will intersect with the bankruptcy proceedings. If you represent a debtor, you may need approval from the bankruptcy court in order for that client to employ or pay you. Alternately, if you represent a creditor, you may want to consider whether it is

appropriate to seek relief from the automatic stay. Acting without proper approval can have serious consequences. Taking the time to consider your responsibilities will likely prove very beneficial.

Get Employed and Get Your Fees Approved

An attorney (other than the bankruptcy attorney) representing a party in a bankruptcy case must be employed pursuant to 11 U.S.C. § 327 for any work done in furtherance of administration of the estate. In a Chapter 7 bankruptcy, the attorney is typically hired by the trustee to assist with his or her assigned duties. In contrast, in a Chapter 13 bankruptcy, the debtor typically must hire any necessary professional help.

Take, for example, a scenario in which you represent a party in pursuing a cause of action. Because of the differences discussed above, in a Chapter 7 case, the trustee will typically take over prosecution of a cause of action. However, because a Chapter 13 debtor remains, for the most part, in possession of the estate's property, and because of the absence of the duty to liquidate, many courts hold that a Chapter 13 debtor is better suited than a Chapter 13 trustee to wield the right to pursue litigation on behalf of the bankruptcy estate.¹⁰ If your services are needed, a Motion to Employ must be filed with the bankruptcy court as soon as you become aware of the bankruptcy.¹¹

When representing a party in bankruptcy and expecting to be paid after the filing of the bankruptcy, any payment of fees and costs for your services must first be approved by the bankruptcy court. Absent such approval, you may not have any

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right to collect. The Bankruptcy Code governs the amount professionals can be paid for their services in bankruptcy.¹² Fees are typically approved by filing an application for compensation. In a contingency case, such approval may be sought at the same time as the Motion to Employ. In reviewing the application, the court will look at the time spent, the rates charged, and whether the services were in furtherance of completion of the bankruptcy and in the best interest of the estate. The court will typically also award reasonable compensation for actual and necessary expenses. Thus, when seeking approval of fees and costs from the court, it is important to include an itemization of the tasks completed, time spent, expenses incurred, party performing the work and work rates. Make sure this is done timely, and do not disburse any funds, including your fees and costs, until after you have an order of the bankruptcy court.

What About the Automatic Stay?

The topic of the automatic stay, as provided under 11 U.S.C. § 362, is complex but, at minimum, there are a

few things you need to know and some guidelines to follow. The automatic stay is typically created upon the filing of a bankruptcy case. Generally, the stay prevents parties from pursuing recovery from property of the estate without the bankruptcy court's permission. Therefore, it is good practice to consider how one's actions relate to anything that may be considered property of the bankruptcy estate.

If you are pursuing an action against a party that has filed bankruptcy, you should typically consider that party protected by the automatic stay until you can determine that an exclusion applies to your particular issue. Once aware that the automatic stay applies to your action, or if you suspect it might, it is common practice to file and notice a Motion for Relief from Stay with the bankruptcy court.

If you represent a client who is a debtor in bankruptcy, he or she is probably protected by the stay, but be sure to verify this. A party filing bankruptcy for the first time is, for the most part, automatically protected by the stay. However, subsequent bankruptcy filings may diminish this protection.

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Be Proactive and Ask Questions

The best practice is to include a discussion regarding bankruptcy in your intake process for new clients. Just asking the question, “have you filed or do you intend to file bankruptcy?” can go a long way toward helping protect your firm. It is also important to counsel your clients that if they file bankruptcy while another legal issue is pending, they *must* notify you immediately.

Don’t be afraid to seek the assistance of the debtor’s bankruptcy attorney or the assigned trustee. They can be a wonderful resource when seeking to ensure compliance with the Bankruptcy Code. Additionally, you can use this article to identify important considerations when you have a client who is also a bankruptcy debtor or creditor; doing so will assist in protecting both you and your client. **NL**

1. 11 U.S.C. §541.
2. 11 U.S.C. §1306; *In re Dale*, 505 B.R. 8 (9th Cir. B.A.P. 2014); *In re Waldron*, 536 F.3d 1239 (11th Cir. 2008).
3. N.R.S. §21.090(3).
4. 11 U.S.C. §522(b)(3)(A).
5. 11 U.S.C. §704(a)(1) versus 11 U.S.C. §1302(b)(1).
6. 11 U.S.C. §704(a).
7. 11 U.S.C. §1302 & 1326.
8. 11 U.S.C. §1325(a)(4).
9. 11 U.S.C. §1303; 11 U.S.C. §1306(b).
10. 11 U.S.C. §1302(b)(1); See *Crosby v. Monroe County*, 394 F.3d 1328, 1331 note 2 (11th Cir. 2004); *Cable v. Ivy Tech*

State College, 200 F.3d 467, 472-74 (7th Cir. 1999); *Kelsey v. Waste Management of Alameda County*, 76 Cal.App.4th 590, 594-597, 90 Cal.Rptr.2d 510 (1999).

11. 11 U.S.C. §327(e), 1328 & Federal Rule of Bankruptcy Procedure 2014.
12. 11 U.S.C. § 328, 329, 330.



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Jennifer Hostetler returns to the Labor & Employment team after serving as Chief Deputy Attorney General for the Personnel Division in the Nevada Office of the Attorney General.



Adrienne Brantley is a graduate of the William S. Boyd School of Law at the University of Nevada, Las Vegas and joins the firm’s Litigation practice group.



Nancy Snow brings engineering experience to our Intellectual Property practice, and is a graduate of the William S. Boyd School of Law at the University of Nevada, Las Vegas.

Join us in welcoming Jennifer Hostetler, Adrienne Brantley and Nancy Snow to the Las Vegas office.