THE NATIONAL ASSOCIATION OF WOMEN JUDGES

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THE BANKRUPTCY CARD AND HOW TO PLAY IT

Includes Changes As A Result of the Enactment of the
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

The Honorable Sarah Sharer Curley
United States Bankruptcy Court
District Of Arizona

August 2007

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by
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About the Author

Judge Curley currently serves as a bankruptcy judge in Arizona, having been appointed by the Ninth United States Circuit Court of Appeals, in 2000, to a second, fourteen-year term. During her term as the Chief Judge of the Court, from 2001-2005, she implemented strategic planning for the Court, including the transfer of the Court to an "electronic" or "paperless system, assisted in the opening of a self-help center at the Court for those individuals who wish to proceed without the assistance of counsel, and led the Court group in the renovation of the courthouses in Phoenix and Tucson and the move to commercial space in Prescott Valley. She is a member of the Circuit's Bankruptcy Education Committee, having served as its Chair in 2003-2004. She is active in the National Association of Women Judges ("NAWJ"), currently serving on the Executive Committee of the Board of Directors as the Chair of the Finance Committee. She previously served NAWJ as one of its Directors (2003-2005) and as its Treasurer (2002-2003)> She received the Lexis/Nexis Scholarship Award (best new project proposal at the NAWJ twenty-fifth Anniversary Convention in October 2003, which led to the electronic and hard-copy publication of this book. In 2005-2006, she was selected by the American Bar Association, Judicial Division, to serve as the first Co-Chair of the Bench-Bar Bankruptcy Council. She currently serves as the Council's Vice Chair. And recently selected to be a Fellow of the American Bar Foundation (May 2007). She is just finishing her term as President of Soroptimist International of Phoenix, which organization is a non-profit chapter of an international organization that has received non-governmental organization status at the United Nations and focuses on the empowerment of women and improving the economic status of women in local communities and throughout the world, and she was a member of the Lorna Lockwood Inn of Court (1995-2001). Judge Curley graduated from Mount Holyoke College, South Hadley, Massachusetts (B.A. degree), and received her law degree, *cum laude*, from New York Law School (member, law review). Judge Curley has lectured extensively on a national and regional basis on bankruptcy issues, particularly those bankruptcy issues faced by non-bankruptcy judges.

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[2]In 2004, when Christopher Nichols provided research assistance, he was a student at Villanova University and was an intern with the Honorable Carolyn Engel Temin, Court of Common Pleas, Philadelphia, Pennsylvania.

THE BANKRUPTCY CARD AND HOW TO PLAY IT

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I. INTRODUCTION

Over the years, I have been frequently approached by federal and state court judges to assist in the analysis of bankruptcy matters which may be presented to trial and appellate judges who have little or no familiarity with bankruptcy law. Non-bankruptcy judges, even at the federal level, apparently receive little, if any, practical training as to how to proceed. For instance, some judges have expressed a lack of understanding as to how bankruptcy matters are referred to bankruptcy judges for resolution. The administrative law judges, at the federal or state level, may have independent concerns as to how to proceed even though subject matter jurisdiction of the bankruptcy court may be in question or the particular exceptions outlined in the bankruptcy law may permit the administrative law judge or regulatory body to proceed. Appellate judges may also be confronted with bankruptcy related issues. Given the exponential increase in bankruptcy filings over the last decade, the non-bankruptcy judges have increasingly faced various issues concerning or related to the bankruptcy law with few resources. The recent enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), which has an effective date, as to most matters, of October 17, 2005, does provide some changes in the way that you will analyze matters. To the extent relevant, BAPCPA has been included in this Guide.

The purpose of this Guide is to provide an electronic means for you to access easily information about your areas of concern. Hence, this Guide will refer to websites to which you have access from the convenience of your home or office with no additional charge to your court, or it will refer to statutes or case law that you may access through Lexis/Nexis.[1] If you have a computer and Internet access, you are ready to start. To save you time, the Guide has a table of contents, which will allow you to point and click on an area or areas that you wish to explore, and immediately go to your selection. There are many wonderful treatises in the bankruptcy area if you wish a thorough analysis of an area. A few of these treatises are accessible through Lexis/Nexis; others may need to be obtained through your court library, or by joining the organization that publishes the book. This Guide does not supplant these treatises; it has a different purpose.

II. GETTING STARTED

Some judges are confused as to the nature of a bankruptcy proceeding, believing that it arises under state law. The confusion probably arises from those bar exams taken awhile ago which may have referred to an assignment for the benefit of creditors. Such assignment proceedings are governed by applicable state law, but the proceedings are limited in nature and effect. Moreover, these assignment proceedings may prompt one or more creditors to take action in the bankruptcy court, forcing a debtor into bankruptcy proceedings on an involuntary basis.

To clarify, bankruptcy proceedings are always in the federal court, specifically, the bankruptcy court, which, for subject matter jurisdictional purposes, is a unit of the federal district court. If you review Article I, Section 8, of the United States Constitution, it states

[1] Many courts have entered into contracts with Lexis/Nexis which should provide you or your law clerk with

> The Congress shall have the power ....
>
> [t]o establish ....uniform laws on the subject of bankruptcies
>
> throughout the United States;...

Various bankruptcy statutes have been enacted over the years. The current law which applies to cases that are being filed in the bankruptcy court at this time is entitled the Bankruptcy Reform Act of 1978. 11 U.S.C. § 101 et seq (2005). [2] The Reform Act had an effective date of October 1, 1979, and applied to bankruptcy cases filed after the effective date. Congress has enacted some major amendments to the law over the years. The law is referred to by bankruptcy judges and practitioners as the "Bankruptcy Code." Use of the short-hand term Bankruptcy Code allows you to develop an easy frame of reference for understanding the law applied to the bankruptcy case that the bankruptcy court has considered. The Federal Rules of Bankruptcy Procedure may also affect the issue you are considering.[3] As noted in the Introduction, Congress has recently passed BAPCPA, which includes sweeping changes to the Bankruptcy Code. Although BAPCPA primarily focuses on consumer issues, with the intended purpose of forcing more individuals with consumer debt who are above the median income in a particular state to file under Chapter 13 of the Bankruptcy Code and repay their debts over a number of years to receive a discharge, there are certain provisions of BAPCPA that apply to all cases that are filed under the Code. It should also be noted that although BAPCPA primarily applies to cases filed after October 17, 2005, the general effective date, there are certain provisions that

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unlimited access to legal research that may be necessary.

[2] The prior law was known as the Bankruptcy Act. Certain provisions of the Bankruptcy Act are similar to the Bankruptcy Code. Thus, cased decided under the Bankruptcy Act may still have precedential value today.

[3] The United States Supreme Court promulgates, with the approval of Congress, the Federal Rules of Bankruptcy Procedure. The federal district and bankruptcy courts also have rule-making authority, so your jurisdiction may also have local district and bankruptcy court rules.

became immediately effective well prior to the October date. Therefore, initially, if you believe BAPCPA is applicable to your matter, you should check the effective date of the provision that you are analyzing.

As a further preliminary matter, you should determine in which federal circuit and district your court sits. The interpretation of the Bankruptcy Code does somewhat vary from circuit to circuit, hence the need to determine your circuit before you start your analysis. From a practical standpoint, it may also assist you to know in which federal district your court sits, since the federal district court or bankruptcy court in your area may have independently published decisions which may assist you. Finally, many circuits, pursuant to federal law, have established bankruptcy appellate panels. The panels are composed of sitting bankruptcy judges who have been selected by the circuit to hear appeals from the bankruptcy judges in their circuit. In some circuits, the active bankruptcy judges rotate on and off the panel for a specified term; in other circuits, the panel consists of judges who have been selected, through an application process, to serve a specified term, with the ability to reapply for the same or a shorter term of years. No matter how the judges are selected, they continue to serve as trial judges in their districts, perhaps with a reduced caseload, and they agree not to hear appeals from the judges in their particular district. These panels also publish their decisions, another valuable resource to you.

The easiest electronic access to determine your circuit and district is to go to the website of the Administrative Office of the United States Courts. You may locate this site by accessing the Internet and typing in simply "administrative office of the united states courts" or going to the website at www.uscourts.gov. The site allows you to simply click on the Court of Appeals, District Court, or Bankruptcy Court icons, and you will be provided general information about

the courts. At the top of the site is the tab referred to as "About US Courts." If you explore this area, you will find an electronic copy of the United States Constitution. Another tab at the top of the page is entitled "Court Links," which if selected provides a map of the United States with all of the federal circuits listed to the left. The map is color coded, so if you find your state, district, or territory, you will know in which circuit your court sits. By then going to the list of circuits on the left-hand side of the screen, you may learn of the various federal district courts, bankruptcy appellate panels, and bankruptcy courts within your area. If your circuit does not have a bankruptcy appellate panel to hear bankruptcy appeals, there will be no listing.

The site is helpful because it has a direct link to the circuit, federal district, bankruptcy courts, and the bankruptcy appellate panels that have their own websites. My review reflects that most federal courts have their own sites, and because of the Electronic Access to Justice Act, which was enacted in December 2002, the federal courts are mandated to provide electronic access to the public as to case filings, published opinions, and other matters. As a result, these websites will become more sophisticated and provide more information to you within the foreseeable future. The Administrative Office of the United States Court website also provides, in pdf format, a text entitled "Bankruptcy Basics." I tried to go to specific chapters in the text, but at least at this time, that is not possible. You either have to download the entire text or you need to scroll through it while you have Internet access. Irrespective of the format limitations, the text is helpful to give you an overview of the discharge which a debtor may receive in bankruptcy, the various chapters under which a bankruptcy petition may be filed, bankruptcy terminology, and the Securities Investor Protection Act of 1970. [4]

[4] Most securities dealers and brokers are members of the Securities Investor Protection Corporation ("SIPC"), created under the Securities Investor Protection Act ("SIPA"). SIPC is a non-profit corporation that assesses its

III. THE AUTOMATIC STAY

Of all the bankruptcy issues to be confronted by non-bankruptcy judges, the automatic stay is usually of primary concern. The questions usually presented to me are: "What may I do?" and "Must I stop the trial?" The recent enactment of BAPCPA only complicates these issues. The automatic stay is no longer "automatic." Congress has amended the Code to add a new provision, 11 U.S.C. §362 (c)(4), to stop the filing of multiple cases by individual debtors.

Although subject to further interpretation by bankruptcy courts, if a single individual debtor or joint debtors (that is, husband and wife) have filed two bankruptcy cases within the last year and those cases were dismissed, if the individual debtor or the joint debtors file another bankruptcy case after October 17, 2005, the automatic stay will NOT come into effect.[5] This is a major policy shift. Although this new subsection applies to all Chapters under the Bankruptcy Code, it is only applicable to an "individual" or "individuals" who file a bankruptcy petition. In my opinion, such a limitation should be given its ordinary meaning - it applies only to an individual, not an entity.[6] Simplifying and expediting matters for you, Subsection (c)(4) now allows the bankruptcy court to provide a comfort order, upon request of a "party in interest," confirming that the stay never came into effect.[7]

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members to create a fund to protect the customers of the member dealers and brokers. The institution of a proceeding under SIPA in the federal district court brings a pending bankruptcy liquidation of a dealer or broker to a halt.

[5] Subsection 362 (c)(4) does not appear to apply to those cases which were dismissed pursuant to Section 707(b); hence, ironically, the automatic stay will go into effect for those individuals who had their cases dismissed because the filing of a Chapter 7 petition was "an abuse" of the Bankruptcy Code. Section 707(b) pertains to cases that were dismissed under Chapter 7 because the bankruptcy court concluded that an individual, with primarily consumer debts, had abused the bankruptcy process by filing a Chapter 7, rather than a reorganization proceeding that would repay creditors at least something over a term of years. As noted, such dismissals under Section 707 (b) do not appear to count in determining those cases which were filed by debtors within the last year.

[6] If spouses alternate in the filing of bankruptcy petitions over the course of a year, they also may not have the benefit of the automatic stay.

[7] 11 U.S.C. §362(c)(4)(A)(ii). There is a possibility that a party in interest may request that the bankruptcy court

Another major policy shift is to limit the application of the automatic stay to an individual debtor who files a Chapter 7, 11, or 13 petition and has had one pending case within the last year.[8] As to such an individual, the automatic stay terminates "on the 30th day after filing."[9] No motion need be filed by a creditor or a party in interest. So, if an action has been commenced pre-petition, or action has been taken pre-petition to foreclose on property securing a debt, the stay terminates at the end of the 30th day "with respect to the debtor."[10] If the debtor wishes to keep the stay in place, the debtor must file a motion, and have the hearing and matter decided by the bankruptcy court, before the end of the 30th day.[11] There is an ambiguity in this Subsection, since the automatic stay generally applies to the debtor, as well as to property of the estate. Because there is no mention of the property of the estate in the language terminating the stay on the 30th day, the most recent decisions have interpreted Subsection (c)(3) to apply only to the debtor, the individual, and not to property of the bankruptcy estate.[12]

Because of the ambiguities in Subsection (c)(3) and (c)(4) as to when the automatic stay terminates as to the debtor or property of the bankruptcy estate, I recommend that you rely on yet another new provision in BAPCPA. 11 U.S.C. §362(j) states:

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impose a stay, shortly after a petition has been filed, as to an individual debtor with two or more pending cases within the previous year. However, the party I n interest requesting such relief must show that the current case was filed in good faith, a somewhat daunting task for a repetitive filer or the bankruptcy trustee appointed to the case who is trying to administer valuable estate assets.

[8] 11 U.S.C. §362(c)(3). As noted with Subsection (c)(4), there is the same curious language permitting a case that has been dismissed under Section 707(b) to not be included in determining whether an individual debtor has had a pending case within the previous year. The language under Subsection (c)(3) has been slightly modified to state that a case "refiled" under a Chapter other than a Chapter 7, after a dismissal under Section 707(b), shall not be counted in determining whether a case has been pending as to the individual within the previous year.

[9] 11 U.S.C. §362(c)(3)(A).

[10] Id.

[11] 11 U.S.C. §362(c)(3)(B). This provision has been strictly enforced. In re Harris, 342 B.R. 274 (Bankr. N.D. Ohio 2006).

[12] In re Moon, 339 B.R. 668 (Bankr. N.D. Ohio 2006); In re Jones, 339 B.R. 360 (Bankr. E.D.N.C. 2006); In re Johnson,335 B.R. 805 (Bankr. W.D. Tenn. 2006)(Order extending the stay is "superfluous" as to property of the estate.)

> On request of a party in interest, the [bankruptcy] court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.

Relying on this provision, you may require the parties appearing before you to obtain a final resolution of the matter from the bankruptcy court. Once the automatic stay has been deemed terminated, you may proceed with whatever matter is before you.

A simple word of caution: If you are in doubt as to whether you may proceed in light of the changes to the Bankruptcy Code or for other reasons, don't. Stop the proceedings, advise the parties to file a motion or appropriate pleading with the bankruptcy court, and have the bankruptcy court make the final determination as to whether the automatic stay applies. The reason is that if you are wrong, even arguably under BAPCPA (unless the automatic stay never came into effect because of an individual or couple who has filed multiple cases within the last year) and proceed in violation of the automatic stay, the bankruptcy court may void any judgment or order that you enter. In re Schwartz, 954 F.2d 569 (9th Cir. 1992), Raymark Industries, Inc. v. Lai, 973 F.2d 1125 (3d Cir. 1992), In re 48th Street Steakhouse, Inc., 835 F.2d 427 (2d Cir. 1987). You may have proceedings under state or federal law over which the bankruptcy court may not have subject matter jurisdiction, but that will be rare.[13] There may also be proceedings which will be clearly within an exception to the automatic stay, allowing you also to proceed, but that too will be rare.

[13] For instance, under the Tax Issues Section, review the section on subject matter jurisdiction.

A. What Is The Automatic Stay?

It is an injunction which is automatically imposed when a debtor files a bankruptcy petition anywhere in the United States. It may even have a broader impact if the debtor has offices or assets in the United States, files a petition in this country, but has assets overseas. For instance, in the case of In re Simon, 153 F.3d 991 (9th Cir. 1998), the Ninth Circuit authorized a bankruptcy court to control effectively assets in Hong Kong by allowing the bankruptcy court to enter orders that affected how the debtor operated.[14]

In its basic provisions, the automatic stay prohibits courts, parties, entities or individuals from taking action to affect, deplete, transfer, administer, or control property which has become part of a bankruptcy estate, or to take action against a debtor who has sought bankruptcy relief.

Almost any entity or individual may file a bankruptcy petition, so a limited liability company, a business trust, a partnership, a corporation, or even a municipality may seek the protection of the automatic stay. However, the entity or the individual may be restricted in the type of petition that it/he/she may file.[15] 11 U.S.C. §109. Essentially a foreign insurance company engaged in such business in the United States, or domestic insurance company, a foreign bank that has a branch or agency (as defined in the International Banking Act of 1978), domestic banks or savings banks, or domestic or foreign credit unions may not be debtors.

BAPCPA has also added a provision that an individual debtor may not file a bankruptcy petition unless said individual has had, during the 180-day period preceding the date of filing of

[14] Under BAPCPA, a new Chapter 15 has been added to codify the case law and compacts which set forth the parameters for cross-border insolvencies. A foreign representative may now petition a bankruptcy court in the United States to recognize a foreign insolvency proceeding. If the proceeding is so recognized, the foreign representative may commence an involuntary or voluntary proceeding under the Bankruptcy Code. 11 U.S.C. §1511. The foreign representative may then administer the assets in the United States.

[15] For instance, a railroad may only file a Chapter 11 petition; a municipality may only file a Chapter 9; under

the petition, an individual or group briefing that outlines the opportunities available for credit counseling and assisted the individual in performing a budget analysis. 11 U.S.C. §109(h). Because BAPCPA applies to all cases filed after October 17, 2005, we have now entered the period when an individual debtor should be contemplating obtaining a briefing before filing. However, the United States Trustee in each federal district must determine which credit counseling agencies are approved to provide such services. Such agencies must be nonprofit and must provide "adequate services." Once approved by the United States Trustee in the federal district, the agency must be "reasonably able" to provide adequate services. It appears that most, if not all, federal districts are now able to provide counseling services.[16]

B. What Does The Automatic Stay Cover?

The automatic stay applies to bankruptcy estate property and to proceedings or actions against the debtor. In some circuits, it may also apply to actions that are brought by the debtor, whether pre- or post-petition. See In re White, 186 B.R. 700 (B.A.P. 9th Cir. 1995), Ingersoll-Rand Financial Corp. v. Miller Min. Co., Inc., 817 F.2d 1424 (9th Cir. 1987).

To determine what constitutes property of the bankruptcy estate, it is helpful to review 11 U.S.C. §541.[17] The definition is very broad, involving assets, claims, or any type of property, whether tangible or intangible, or contingent or unliquidated claims. The fact that the asset or

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BAPCPA, only a family farmer or family fisherman, with regular income, may filed a Chapter 12 petition.

[16] If services are not available in the federal district, the individual will be able to file without the counseling services. 11 U.S.C. §109(h)(2).

[17] BAPCPA has clarified what types of property do not become property of the bankruptcy estate, such as an "education retirement account" or funds used to purchase a tuition credit, or funds withheld by an employer from wages to be placed in an employee benefit plan. 11 U.S.C. §541(b)(5), (6), and (7). There are also other types of property which do not become property of the estate, such as an the interest of the debtor, as lessee, under a non-residential lease of real property, any power that a debtor may exercise solely for the benefit of an entity other than a debtor, any eligibility of the debtor to participate in programs under the Federal Higher Education Act, and certain

claim has little or no value does not affect whether the property is property of the bankruptcy estate.

However, the type of proceeding the debtor has commenced may also affect what is property of the bankruptcy estate. For instance, in a Chapter 13 proceeding, which is a type of reorganization proceeding for an individual who has regular income, 11 U.S.C.§1306 provides that the earnings of the individual are property of the estate until the case is closed, dismissed, or converted to another chapter under the Bankruptcy Code. However, in a Chapter 7 or a Chapter 11 proceeding of an individual, such earnings are non-estate property.

If you have an action pending in your court that involves non-bankruptcy-estate property, such as a pension plan[18] or a spendthrift trust,[19] you may proceed. However, if you are unable to adjudicate the rights of the parties unless the debtor is joined as a necessary party to the proceeding, the automatic stay will affect whether you may proceed with the action as to the debtor, even if the debtor is one of many parties to the action. If you are able to sever the debtor from the action involving the pension plan or trust and proceed as to the other plaintiffs or defendants, you may do so. Hence, the automatic stay applies not only to the property of the bankruptcy estate, but also to actions or claims that may be pursued against the debtor.

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interests of the debtor to liquid or gaseous hydrocarbons.

[18] 11 U.S.C. §541(b)(7).

[19] 11 U.S.C. §541(c)(2).

C. How Long Does The Automatic Stay Affect A Non-bankruptcy Proceeding.

As noted, BAPCPA provides that the automatic stay may not come into place as to certain individual debtors that have, subject to certain exceptions, filed two bankruptcy petitions within the preceding year. In other cases, however, the automatic stay remains in place until the bankruptcy court enters an order vacating or modifying the stay, or the stay is terminated as a matter of law.

1. Vacatur or modification of the stay.

An order vacating the stay is usually fairly short and uses language such as "the stay is vacated to allow all parties to the litigation to proceed." There may be no qualifications in the order. The order may also only modify the stay, which usually sets forth conditions under which you may proceed. It may allow the non-bankruptcy court to proceed only so far in the non-bankruptcy litigation. For instance, the order may state "The stay is modified to allow the parties to proceed to the point of entry of judgment in the state court; however, there shall be no execution on the judgment without further order of the bankruptcy court." The bankruptcy court may place such modifications on the operation of the stay because an execution on the non-bankruptcy court judgment may effectively direct property of the bankruptcy estate to just one party in contravention of federal law. Thus, once you receive an order vacating or modifying the stay, review it carefully to determine if there are any limitations placed upon you.

If the stay is vacated or modified, one or more parties may proceed with an appeal. Therefore, ask if the order is final, or if it is on appeal, whether the order has been stayed pending appeal. It is not unusual for an order vacating the stay to be on appeal, but the bankruptcy court

and the appellate court have refused to stay the order. If the order allows your action to move forward because the automatic stay has been vacated or modified, and the order has not been stayed on appeal, do so.

The type of petition the debtor has filed may also affect the duration of the automatic stay. For instance, in reorganization proceedings, such as a Chapter 11, 12 or 13, the bankruptcy court must address, among other issues, whether the property is necessary for an effective reorganization. If the debtor is an individual, for instance, he or she may argue that the market value of their home exceeds all of the liens filed against the property, or if there is no equity in the property, that the home is necessary for the individual's reorganization. If a debtor has filed a plan allowing the debtor to retain the home, and the debtor has sufficient assets or income to appear to be proceeding in good faith toward confirmation of the plan, the bankruptcy court will be reluctant to vacate the stay and allow the debtor to lose his or her home in foreclosure. Therefore, if you are dealing in certain state or federal law issues that may affect the debtor or other parties' rights to the residence, it may be some time before the stay is vacated as to the property. In some reorganization chapters, the debtor may confirm a plan of reorganization, and the automatic stay may remain in place pursuant to the plan and order of confirmation until the debtor has made all payments under the plan and received his or her discharge. In a Chapter 11, the debtor may be making payments under the plan after confirmation for six, seven, or more years. In a Chapter 13, for a debtor with regular income, the debtor may be making payments for three years, or five years if cause has been shown.

2. Conversion.

What if the stay is vacated in one chapter and the debtor then converts to another chapter? Is the automatic stay re-imposed? If the creditor seeking vacatur of the automatic stay clearly identifies, and provides notice to, the critical parties to the proceeding that the creditor wishes to proceed with a certain action in state court or seeks to foreclose on a certain parcel of real property, the stay is effectively vacated for the case. Obviously if the creditor seeks to vacate the stay as to parcel A, which is granted, and then seeks to vacate the stay as to parcel B, the creditor must re-notice the critical parties of said action. The argument is that if the parties with an interest in, or the right to be heard with respect to, the property, action, or asset have already received notice of the request to vacate the stay and have not opposed said relief, there is no reason to re-impose the stay at a later point in time. Due process has been accorded to all interested parties in the case.[20] Moreover, 11 U.S.C. §348, which discusses the effect of the conversion of a case, specifically states that it does not change the date of the commencement of the case. Since the automatic stay becomes effective only at the commencement of the case, once it has been vacated, it is only re-imposed if the statute so provides. As noted, the statute does not have such a provision.

There is one exception to the foregoing general rule. What if a bankruptcy petition is filed, and the asset is initially not property of the estate, but upon conversion becomes property of the estate? For instance, the individual debtor files a Chapter 7 proceeding which permits the debtor to retain and use his wages, earned for services rendered after the filing of the petition, as

[20] Keep in mind that in a Chapter 11 (reorganization) proceeding, the debtor in possession or the bankruptcy trustee (if one has been appointed) acts as a fiduciary for all creditors in the case. Similar fiduciary concepts are incorporated into the other chapters of the Bankruptcy Code as the same may apply to the debtor or trustee there under. As a fiduciary, the debtor or the trustee must ensure that the bankruptcy estate is administered for the benefit

non-estate property. 11 U.S.C. §541(a)(6). However, the debtor then converts to a Chapter 13 proceeding, which mandates that the earnings or wages of the individual debtor for services rendered after the date of conversion become property of the estate. 11 U.S.C. §§1306(a)(2), 348. Under such facts, the wages that are being earned for services rendered post-petition become property of the estate and subject to the automatic stay once the case is converted to a Chapter 13. This change in what constitutes the bankruptcy estate will be the rare case, but something that you should keep in mind.

3. The Ten-day Rule.

Even if you receive an order vacating or modifying the stay, you should review the order to see if Federal Rule of Bankruptcy Procedure 4001(a)(3) has been waived.[21] If the subsection has been waived, the bankruptcy court order must state so specifically. What if the order is simply silent; that is, the subsection is simply not referred to in the order? Because the bankruptcy judge must act as to this subsection, if the order is silent, the subsection applies, which means that there is a mandatory ten-day stay in place from entry of the order on the bankruptcy docket. As a non-bankruptcy judge, you may not take any action until the expiration of the ten-day period and after receiving information from one or more of the parties involved in your litigation that the order has not been appealed and a stay pending appeal has not been granted.

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of all creditors.

[21] The Subpart provides: "Stay of Order. An order granting a motion for relief from an automatic stay ... is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise." Fed.R.Bankr.P. 4001 (a)(3).

4. Termination of the automatic stay.

The automatic stay may be terminated as a matter of law. Termination may occur at different intervals depending on whether the analysis is of property of the bankruptcy estate or whether an action or proceeding involves the debtor. Under 11 U.S.C.§362 (c), the automatic stay remains in place until the property is no longer property of the bankruptcy estate. Unless the debtor has filed one or more cases within the year preceding the filing of the current petition, if the debtor is an individual, the automatic stay remains in place until the debtor has received his or her discharge, or the bankruptcy case is dismissed or closed. This is a complex way to say that the debtor may have accomplished what he or she desires under the bankruptcy laws, or the bankruptcy court no longer has an interest in the protection of the property or the debtor. If presented with the possibility that the automatic stay may affect your proceedings, ask as to the status of the bankruptcy proceedings. For instance:

a. Has the bankruptcy case been closed.

In some jurisdictions, the bankruptcy courts used to move quickly to close liquidation proceedings (Chapter 7's) that involved consumer debtors. However, under BAPCPA, it appears that there will be fewer Chapter 7 proceedings filed by individuals, and it may take longer to close the Chapter 7 cases filed under the new law. For instance, individuals filing under Chapter 7 must complete a separate course in "personal financial management" to receive a discharge.[22]

[22] 11 U.S.C. §727(a)(11). Another cause for delay may result from the bankruptcy courts now having an independent duty, prior to granting a discharge to an individual in a Chapter 7 proceeding, to deny a discharge if the bankruptcy court finds that "there is reasonable cause to believe" that the individual has been involved in fraud, deceit, or other Securities Act violations or involved in the abuse of the Title 11 provisions, which conduct has resulted in a felony conviction, or the individual may have engaged in such prohibited conduct, even if the criminal proceedings that may be pending have not yet resulted in a felony conviction. 11 U.S.C. §727(a)(12).

In any event, the bankruptcy court will enter an order closing the case or, with the increasing use of the electronic docket, an electronic entry noting that the case has been closed. If the case has been closed, the automatic stay is no longer a factor.

b. Has the bankruptcy case been dismissed?

As noted above, once the case has been dismissed, the bankruptcy court will enter an order closing the case. Although dismissal is not a specific event referred to in Subsection 362 (c), it also terminates the stay as a matter of law. A different provision of the Bankruptcy Code, 11 U.S.C. §349 states that once a case is dismissed, the debtor and the creditors are returned to the same position and rights and remedies that they had prior to the filing of the bankruptcy petition. It is an open question as to whether dismissal orders are effective immediately upon the entry of the order on the bankruptcy docket. So, you may either wait the ten days which would ensure that the dismissal order has become final, or you may rely on applicable case law. Of course, another alternative would be to wait until the case is closed, but that may be well beyond the effective date of the dismissal order, and unnecessary.

c. Is the debtor an individual and has he or she received a discharge?

Because of the wording of Subsection 362 (c), it is possible that the debtor has received his or her discharge, but the case has not been closed or dismissed. The entry of the discharge, therefore, may be the earliest event which may trigger the termination of the automatic stay as to the debtor and allow you to proceed. Be careful, however. As noted above, the concept of the automatic stay covers not only the debtor (such as actions brought against the

debtor), but also property of the bankruptcy estate. The automatic stay may have terminated as a matter of law as to the debtor, but the automatic stay may still be in place as to property of the bankruptcy estate.

d. Is the property no longer property of the bankruptcy estate?

As noted previously, the bankruptcy estate may cease to exist if the bankruptcy case is dismissed or if the case is closed. If the bankruptcy estate has ceased to exist because of the dismissal of the case or the case has been closed, the automatic stay no longer applies to such property. In reorganization proceedings (Chapters 11, 12, 13, for instance), the debtor may provide, in the plan and the order of confirmation, that once the plan is confirmed, the property of the bankruptcy estate shall be transferred to the debtor. Normally the automatic stay will have no effect on the property, once it has been transferred from the estate to the debtor. But, be careful. The plan and confirmation order may provide that during the term of the plan, the automatic stay still prohibits any action to be taken against the debtor as to the debts that are wrapped into the plan. Hence, the plan and the confirmation order may impose a type of injunction that prohibits a creditor from taking any action against the debtor or the debtor's property, so long as the debtor is making payments pursuant to the confirmed plan.

e. Abandonment.

There is yet another way to divest the estate of property; the bankruptcy term is "abandonment." The debtor or a creditor may request such relief. The debtor may want the property abandoned because a bankruptcy trustee has been appointed who has control over the

property so long as it is part of the estate. If the property is the debtor's residence, and the debtor has placed a number of consensual liens (such as mortgages or deeds of trust) on the property, the debtor is entitled to a homestead under applicable law, and the creditors of the bankruptcy estate will receive no funds if the bankruptcy trustee sold the property at a private sale or public auction, and the trustee will agree to the debtor's request for abandonment. In essence, the property is burdensome or of inconsequential value to the estate, so the debtor will be able to regain control of the property as before. A creditor may also have so encumbered the property that the bankruptcy trustee sees no benefit to retain and administer the property for the creditors of the estate.

If the property is abandoned from the estate, the creditor will then be able to pursue its rights and remedies under applicable law. From your standpoint, it is important to ask as to the status of property that may be part of the bankruptcy estate. If the property has been abandoned from the estate, you may also proceed, so long as the sole focus of your proceeding is the property or a type of "in rem" proceeding. It should be noted that in some circuits, a bankruptcy order is required to ensure that the bankruptcy court has considered and abandoned the property from the bankruptcy estate.

5. What if the same individual or entity files numerous bankruptcy petitions?

As noted, BAPCPA may limit the ability of an individual to do that, because the automatic stay may not go into effect as to the individual.[23] Of course, if you are dealing with an

[23] As noted, bankruptcy estate property may still be protected by the automatic stay although the debtor owning the property has had one case pending within the preceding year of the filing of the subject bankruptcy petition.

entity that is a debtor, it appears that the individual or entity may file repetitive bankruptcy proceedings, with good faith being the critical issue in determining whether such a filing is appropriate. As to an individual, The United States Supreme Court previously discussed this type of repetitive filing in the decision of Johnson v. Home State Bank, 501 U.S. 78 (1991). In that decision, the debtor had received a discharge under Chapter 7 of the Code but continued to have financial problems. The debtor then filed a Chapter 13 trying to repay his remaining obligations (those obligations that were not discharged as a result of certain provisions of the Code) over a period of time.[24] This created the so-called Chapter "20," which the secured creditor challenged as being barred per se. The Supreme Court disagreed, noting that there were only limited prohibitions in the Code to a debtor refiling a petition and that so long as the debtor was proceeding in good faith, the debtor could file the multiple petitions discussed in the case. As a result of BAPCPA, the Johnson decision has been effectively overruled as to the individual debtor.[25]

A debtor that is an entity may file a Chapter 11 reorganization petition, decide to sell certain assets, dismiss the case, then refile, in a year or so, another Chapter 11 petition because tax obligations need to be repaid or another business division needs reorganizing. It is also possible that a debtor may file a Chapter 11 petition, confirm a plan, obtain a discharge because the entity intends to continue with its business operations, then file a second Chapter 11 petition because economic circumstances have changed and the debtor needs to reorganize again or, perhaps, liquidate its assets. See In re Jartran decision, 886 F.2d 859 (7th Cir. 1989).

There are more limits, however. For instance, under BAPCPA, a bankruptcy court may

[24] 11 U.S.C. §523 sets forth a number of debts which may be determined non-dischargeable and, hence, still be a financial drain on a debtor prompting further relief through the filing of another bankruptcy petition.

have entered an order prohibiting a debtor, whether an individual or an entity, from affecting the rights of a creditor that has a lien on the debtor's real property.[26] The creditor must have a lien secured by an interest in the debtor's real property and the bankruptcy court must have found, in a prior proceeding, that the filing of the bankruptcy petition was part of a "scheme to delay, hinder, and defraud creditors that involved either the transfer of all or [a] part . . .[of the debtor's ownership interest in] the real property without the secured creditor's consent or a court order or multiple bankruptcy filings affecting such real property."[27] Once the bankruptcy court enters such an order, however, the secured creditor may record it in accordance with applicable state law concerning the filing of notices or interests in real property, and said order will effectively control or prohibit the automatic stay from going into effect for a period of two years from the entry of the order.[28] The debtor may attempt to modify or vitiate this order in a subsequent bankruptcy case, but only after notice and hearing in the bankruptcy court and only upon a showing of changed circumstances or "for good cause shown."[29]

Other limitations in the filing of petitions focus on 11 U.S.C. §109, Subsections (h) and (g) and §349(a). Under BAPCPA, an individual debtor may not file a bankruptcy petition unless credit counseling has been completed or exigent circumstances exist.[30] Section 109 also prohibits an individual debtor from filing a new case for a period of 180 days when the debtor willfully disobeyed a court order in the prior case or the creditor filed a motion for relief from the stay and

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[25] 11 U.S.C. §1328(f).
[26] 11 U.S.C.§362(d)(4)..
[27] Id.
[28] Id.
[29] Id.
[30] 11 U.S.C. §109(h).

the debtor voluntarily dismissed his/her prior case.[31] Section 349 focuses on the general ability of the debtor to refile a petition after dismissal of a case, no discharge having been obtained. However, the preamble to §349(a) states "Unless the court, for cause, orders otherwise, the dismissal of a case . . .does not bar the discharge, in a later case . . .of debts that were dischargeable in the case dismissed;" Various courts have used the provision to allow a court to bar a debtor from ever receiving a discharge of debts in a dismissed case (i.e., the court, for cause, prohibits the discharge of debts) when the behavior of the debtor is egregious. See In re Hall, 304 F.3d 743 (7th Cir. 2002), In re Leavitt, 171 F.3d 1219 (9th Cir. 1999), In re Tomlin, 105 F.3d 933, 937 (4th Cir.1997).

IV. REGULATORY ISSUES

A. Is The Entity Properly Before the Bankruptcy Court?

There are debtors who file bankruptcy petitions and have no right to do so. Potential improper filers are banks or insurance companies. These entities are highly regulated under state or federal law, and there are specific procedures for the reorganization, restructuring, or liquidation of the entities. Be careful, though; some of the entities are subsidiaries of holding companies. The holding companies may file a bankruptcy petition that will not include the regulated entitles, although the bankruptcy proceedings may delay operations or otherwise affect the entities that are before you. Moreover, there are other entities, such as securities dealers or

[31] 11 U.S.C. §109(g).

brokers who are members of the Securities Investor Protection Corporation, who may file a bankruptcy petition, but those proceedings may come to a halt, or be stayed, if a proceeding is commenced under the Securities Investor Protection Act in federal district court.[32]

B. The Automatic Stay.

11 U.S.C. §362(b)(4) allows a governmental unit to commence or continue with a proceeding against the debtor. The governmental unit may enforce the judgment obtained prior to the filing of the bankruptcy petition, so long as it is not a money judgment. The focus may be to enjoin the debtor to protect the public. However, these actions must be within the governmental unit's regulatory power. See In re Compton Corp., 90 B.R. 798 (N.D.Tex. 1988) (exempting Department of Energy's suit to liquidate claim against Chapter 7 debtor for oil price overcharges from automatic stay). See generally In re First Alliance Mortg. Co., 264 B.R. 634 (C.D. Cal. 2001) (discussing generally whether governmental action falls within exception).

BAPCPA has also added a new exception to the automatic stay which allows a court or an agency with jurisdiction to withhold, suspend, or restrict "a driver's license, a professional or occupational license, or a recreational license under state law."[33] Prior case law is consistent with this change, at least as to professionals who are licensed, such as lawyers. In re Wade, 948 F.2d 1122 (9th Cir. 1991).

[32] 11 U.S.C. §742.
[33] 11 U.S.C. §362(b)(2)(D).

C. Requirement To Comply With State Laws.

28 U.S.C. §959 requires bankruptcy trustees, debtors in possession, or other managers of bankruptcy estate property, except in the railroad reorganization cases, to comply with the applicable state laws where the property is situated. If the debtor operates in multiple states, the debtor must comply with the laws in each state. Thus, the bankruptcy professionals must act in the same manner, and be bound, as any other individual or entity under applicable state law. If you are a state judge in a regulated area, you are correct in believing that the debtor must still comply with all regulations in your industry even though the debtor is trying to reorganize its debts or liquidate its assets.

The only exception will be if your specific state law provision conflicts with a Code provision. If there is a conflict, federal law, the Code, will control. Perez v. Campbell, 402 U.S. 637 (1971). For instance, you may have a regulatory scheme that permits the state or governmental unit to enter into a contract to perform certain essential services to the public. The contract may state that the contract is terminated if the debtor becomes insolvent. There may also be other provisions which allow the state to control, by refusing performance, who may be an assignee or otherwise perform services under the contract if the debtor is no longer able to perform. 11 U.S.C. §§365(b)(1) and (b)(2) allow the trustee or debtor in possession to assume an executory contract even though the debtor may be in default as to certain insolvency or financial provisions. Since state law conflicts with the Code, the Code will control the situation. However, 11 U.S.C. §365(c) may prohibit the trustee from assuming or assigning an executory contract if state law allows the state or the governmental unit to refuse performance from any one other than the debtor under applicable state law. In such a case, the Code is consistent with state law, so the

state would not be required to accept performance from another party. See In re Claremont Acquisition Corp., Inc., 113 F.3d 1029 (9th Cir. 1997).

V. DOMESTIC RELATIONS PROCEEDINGS

A. The Automatic Stay.

For an overview of the automatic stay and how it may affect litigation generally, review the information under the specific issue. However, given the nature of your proceedings, which may or may not be within an exception to the automatic stay, the issue that arises is whether you may proceed.

BAPCPA has substantially expanded the area in which a domestic relations court may proceed without vacatur or termination of the automatic stay. Under prior law, the collection of alimony, maintenance or support was limited to property that was not part of the bankruptcy estate.[34] Now BAPCPA permits the state court to withhold income that is property of the bankruptcy estate in payment of a "domestic support obligation."[35] 11 U.S.C. §362(b)(2) (C).

The various exceptions are set forth in 11 U.S.C. §362(b). Note that this Subsection has been revised as a result of BAPCPA. A modification to §362(b)(2)(A) now states that the exception concerning domestic relations matters pertains to a "civil" action or proceeding concerning the establishment of paternity, the establishment or modification of a "domestic

[34] 11 U.S.C. §362(b)(2)(B). For instance, in a Chapter 7 proceeding, the debtor's wages are not property of the estate. 11 U.S.C. §541(a)(6).

[35] The term "domestic support obligation," as defined in 11 U.S.C. §101(14A), is fairly broad, including the ability of a legal guardian to collect such an obligation, and the assistance provided by a governmental unit to a spouse, former spouse, child of the debtor or such child's parent. The domestic support obligation may be established by applicable non-bankruptcy law, which may include a separation agreement, property settlement agreement, order of the court, or by a governmental unit acting according to applicable law. The spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative may voluntarily assign the obligation to a governmental unit for collection and not destroy the character of the obligation as alimony, maintenance, or support.

support obligation," child custody or visitation, the dissolution of a marriage, except for the division of property of the bankruptcy estate, and domestic violence.

Under prior law, a party could commence or continue any proceeding under applicable law that established paternity. So, there has been no change as to that provision. However, the dissolution of the marriage no longer requires a vacatur of the stay as under prior law. Somewhat problematic is the requirement that the state court not divide the property of the bankruptcy estate as a part of the dissolution action or proceeding. Given the requirements of applicable law, you may not be able to enter a final decree in the action or proceedings dissolving the marriage until the bankruptcy court has determined how to proceed with the bankruptcy estate property that may be owned by the debtors or the debtor and the non-debtor spouse. Depending on the nature of the bankruptcy case (whether it is a reorganization or liquidation proceeding) and/or the nature of the bankruptcy estate property, the bankruptcy court may proceed with a sale or liquidation of the estate assets, refinancing of the debt on the assets, with the assets to remain part of the bankruptcy estate until all creditors are paid pursuant to a plan, or some other treatment. You may be delayed with your action until the bankruptcy court determines the appropriate course of action. Finally, the recent amendments to the Bankruptcy Code also focus on the automatic stay not applying to a civil action "regarding domestic violence." It is unclear what this provision means and is subject to applicable state law in interpreting its meaning. However, if the domestic violence action is a criminal action or proceeding under your state law, then read the hypothetical set forth below and review the part of the outline which discusses the applicability of the automatic stay in criminal actions or proceedings.

Although you may also establish or modify an order for a domestic support obligation,

which was similar to your actions previously to establish or modify an order for alimony, maintenance, or support, few orders simply refer to the rights of the parties to the proceedings. The area of greatest confusion, and litigation in the trial and appellate courts, was the collection or enforcement of payments that had been ordered. A new provision attempts to clarify that a domestic support obligation may be collected not only from non-bankruptcy estate property,[36] but also may be repaid through "the withholding of income that is property of the estate or property of the debtor," so long as it is pursuant to a "judicial or administrative order" or a statute.[37] Such a change may make it substantially easier for you to make sure that the non-debtor spouse or a child are provided for during the course of any bankruptcy proceeding.

From a practical standpoint, how do you sort out these various changes? Let us assume that the debtor is ordered to pay child support and alimony to the non-debtor spouse, and the debtor falls behind in those payments after the bankruptcy petition has been filed. The non-debtor spouse may request that the district attorney bring criminal proceedings against the debtor, or the non-debtor spouse may seek a hearing before you in a civil action to force the debtor to cure all defaults within a specified period of time. Reviewing these issues:

1. The district attorney, or similar official under applicable law, may always commence a criminal proceeding against the debtor. This is a separate exception to the automatic stay. 11 U.S.C. §362(b)(1); In re Gruntz, 202 F.3d 1074 (9th Cir. 2000).

2. A further hearing and court order modifying the domestic support obligation may be appropriate. 11 U.S.C. §362(b)(2)(A)(ii). Also see, In re Stringer, 847 F.2d 549

[36] 11 U.S.C. §362(b)(2)(B).
[37] 11 U.S.C. §362(b)(2)(C).

(9th Cir. 1988) as to analysis prior to BAPCPA.

3. An order requiring that the debtor immediately cure all arrearages from property that is not property of the estate or by withholding income that is property of the estate or property of the debtor is also acceptable. 11 U.S.C. §362, Subsections (b)(2)(B) and (b)(2)(C). However, it is subject to interpretation as to what constitutes the "income" that is property of the estate or property of the debtor that may be withheld to pay the domestic support obligation. For instance, if the debtor is a principal in a business and receives a distribution, is that income for purposes of the exception? Prior case law drew a distinction between wages and distributions in determining whether the property was an asset of the bankruptcy estate. See, e.g., In re Timbers of Inwood Forest Associates, Ltd., 808 F.2d 363 (5th Cir. 1987); In re Fitzsimmons, 725 F.2d 1208 (9th Cir. 1984). Will a similar argument be presented to prohibit the use of a distribution to pay a domestic support obligation? Case law may need to be developed on this point.

4. The issue of whether the state court may enter an order of contempt if the debtor fails to comply with the state court order to pay the arrearages is a separate issue. The case law under the prior law generally supports the state court entering such a contempt order. In re Marriage of Sachs, 116 Cal.Rptr.2d 273 (Cal. App. 2002).

B. Child Support, Alimony, and Property Settlement Issues.

Although the bankruptcy courts are still required to do an independent review, BAPCPA

has made it easier for the bankruptcy courts to determine the issue of non-dischargeability under 11 U.S.C. §523, Subsection (a)(5) and (a)(15). A domestic support obligation is now non-dischargeable,[38] and any debt owed to a spouse, former spouse, or child of the debtor that is not a domestic support obligation.[39] Prior case law required a more complicated analysis under Section 523(a)(15), with the non-debtor spouse or other interested party, first presenting a prima facie case that the obligation was incurred as a result of a divorce or separation under applicable law, whether incorporated in an order, decree, or an agreement, and that the obligation was not in the nature of support. The burden of proof then shifted to the debtor to show that based upon the current circumstances of the debtor and the non-debtor spouse, the debtor did not have the ability to pay the obligation, or that the benefit to be received by the debtor as a result of the discharge outweighed the detrimental consequences to the non-debtor spouse or the child of the debtor. In re Jodoin, 209 B.R. 132 (B.A.P. 9th Cir. 1997).

Because it will take a fair amount of time for all of the bankruptcy cases filed prior to the enactment of BAPCPA to be administered by the bankruptcy court, you may be entering judgments, orders, or decrees that the bankruptcy court will utilize in rendering a decision under prior law. As a result, you should not forgo detailed findings of fact and conclusions of law, if your state law so requires, in finalizing any decree or judgment in a domestic relations or divorce proceedings. These detailed findings and conclusions will assist the bankruptcy courts in a preliminary review of the case. For instance, in the In re Jodoin decision, the Bankruptcy Appellate Panel in the Ninth Circuit determined that the bankruptcy court could utilize the divorce decree, containing the property settlement and the statement that neither spouse was

[38] 11 U.S.C. §523(a)(5).
[39] 11 U.S.C. §523(a)(15).

entitled to maintenance or alimony, as setting forth the prima facie case for the non-debtor spouse under the prior version of Section 523(a)(15).

VI. CRIMINAL PROCEEDINGS

A. The Automatic Stay.

As noted previously, criminal proceedings fall within an exception to the automatic stay, allowing the state or federal court to proceed without having the parties seek permission of the bankruptcy court. 11 U.S.C. §362(b)(1). Essentially Congress was concerned about public safety and made a policy decision to allow these proceedings to continue. BAPCPA did not modify this exception. The usual debate in this area involves whether the proceedings are criminal. This may be a complicated debate.[40] Some ideas to consider:

1. Who commenced the proceeding in your court? If the state or federal prosecutor, district attorney, or similar officer of the governmental unit commenced the proceeding, it is a criminal proceeding.

2.What is the nature of the proceedings; civil or criminal? Is the individual being prosecuted for a specific crime where the freedom of the individual is at stake? Individuals charged with criminal activity, with the possibility of jail or prison time will fall within the exception. However, not all proceedings are clear cut. In Gruntz,[41] the debtor had not paid support for a prolonged period of time. The non-debtor spouse then requested that the state prosecute the individual for the non-payment of support. The fact that the state ultimately made the independent decision to prosecute turned the proceedings from civil to criminal. Traffic penalties or

[40] The citation for the final decision is In re Gruntz, 202 F.3d 1074 (9th Cir. 2000); however, you may analyze the

"driving under the influence" proceedings may be criminal in nature. Was the individual placed under arrest? Did the individual face time in jail? Or is a monetary judgment simply being entered? If you do not believe you are within this exception, are you exercising the police or regulatory powers under applicable law, so that 11 U.S.C. §362(b)(4), another exception to the automatic stay, may apply? If you are unsure, you may require the parties to proceed in the bankruptcy court.

3.Contempt proceedings. Such proceedings are unique, and the results may differ depending on the case law in your circuit.[42] Whether you are dealing with a civil or criminal contempt of court proceeding, most bankruptcy courts which have considered the issue have concluded that the non-bankruptcy court should be able to enforce its own orders when the debtor is in contempt of court. This may include the incarceration of the debtor for the conduct. However, there is a caveat: the non-bankruptcy court does not have jurisdiction over bankruptcy estate property. Once the debtor has filed a bankruptcy petition, you may not enter an order directing or controlling how bankruptcy estate assets will be utilized. The automatic stay would need to be vacated to enter such an order.

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earlier iterations at 177 F.3d 729 (9th Cir. 1999); 177 F.3d 728 (9th Cir. 1999); 166 F.3d 1020 (9th Cir. 1999).

[41] See preceding footnote for a full citation to the case.

[42] For an overall analysis of the various positions that courts have taken, see In re Rook, 102 B.R. 490 (Bankr. E.D. Va. 1989). Some courts have concluded that the contempt proceedings must relate to an already pending criminal proceeding to be an exception to the automatic stay. In re Dervaes, 81 B.R. 127, 129 (Bankr. S.D. Fla. 1987.) A second approach is to analyze the intent of the order. In re Rudaw/Empirical Software Products Ltd., 83 B.R. 241, 247 (Bankr. S.D.N.Y. 1988). Other courts do not look at the nature of the proceedings (criminal or civil), but look instead at the inherent power of the Court. U.S. Sprint Communications Co. v. Buscher, 89 B.R. 154, 156 (D. Kan. 1988); In re Clowser, 39 B.R. 883 (Bankr. E.D. Va. 1984.)

B. Restitution.

As a judge presiding over criminal proceedings, you may confront issues as to the effect of a bankruptcy proceeding, or the discharge received as a part of the proceeding, that may cause concern. As a result of prior case law, criminal restitution was determined to be nondischargeable in Chapter 7, 11, and 12 proceedings concerning an individual.[44](This should be numbered FN43. Cases remain the same in FN.) A change to the Bankruptcy Code in 1990 also required that restitution imposed in an individual's criminal proceeding be nondischargeable in a Chapter 13 proceeding.[43] (This should be numbered FN 44. Cases remain the same.) Under BAPCPA, an individual debtor in a Chapter 12 or 13 proceeding is required to pay interest on such nondischargeable claims as a part of any plan of reorganization, unless the available income of the debtor is insufficient. [44] BAPCPA also clarifies the issue of whether restitution is nondischargeable if the restitution is imposed in a civil action. For instance if the debtor is required to pay civil restitution as a result of the "willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual," it is also nondischargeable in a Chapter 13.[45] Footnote below is 43, then followed by 44. Somehow numbers reversed.

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[44]See Kelly v. Robinson, 479 U.S. 36, 93 L.Ed.2d 216, 107 S.Ct. 353 (1986); Colton v. Verola (In re Verola), 446 F.3d 1206 (11th Cir. 2006). Because the United States Supreme Court, in Kelly, utilized 11 U.S.C. §523(a)(7), concerning the nondischargeability of certain penalties, fines, or forfeitures for non-monetary loss and payable to or for the benefit of a governmental unit as the lynchpin for its decision requiring an individual to pay criminal restitution, the decision also applied to Chapter 11 or 12 proceedings of an individual, since those Chapters also excepted §523(a)(7) debts from discharge. 11 U.S.C. §§1141(d)(2) and 1228(a)(2).

[43] 11 U.S.C. §1328(a)(3). This change in Chapter 13 vitiated the United States Supreme Court decision of Pennsylvania Dept. of Public Welfare v. Davenport, 110 S.Ct. 2126 (1990).

[44] 11 U.S.C. §§1222(a)(11), 1322(a)(10). The debtor is actually required to pay interest if the "disposable income," a defined term in the Code, is sufficient. Moreover, the aforesaid provisions actually provide for the payment of interest on any nondischargeable debt under Section 523. Congress did not insert a similar provision in BAPCPA as to the payment of interest in a Chapter 11 proceeding as to an individual.

[45] See 11 U.S.C. §1328, Subsections (a)(3) and (a)(4).

Remember, your criminal proceedings are not stayed by the automatic stay.[46] However, the bankruptcy court may allow the individual debtor to include the payment of restitution in the plan of reorganization, so that the governmental unit is ultimately paid pursuant to a confirmed plan of reorganization. Under Chapter 12 or 13, any earnings of an individual debtor received after the commencement of the bankruptcy case are property of the bankruptcy estate.[47] As a result of BAPCPA, an individual debtor in a Chapter 11 proceeding must now devote such post-petition earnings from personal services or future income as is necessary to execute the debtor's plan of reorganization to repay the creditors of the estate.[48]Conversely, in a Chapter 7 proceeding pertaining to an individual debtor, the earnings received from personal services are not property of the estate. Thus, any order that you have issued requiring that the debtor pay restitution as a part of a wage execution, or a similar garnishment of earnings, may be impacted by the automatic stay. So, if you know of a pending bankruptcy proceeding as to an individual debtor, request that you be provided with any orders concerning a modification or termination of the stay concerning the earnings or wages of the debtor.

Once the bankruptcy proceedings are near conclusion, the bankruptcy court may issue an injunction, as a part of the confirmation order, which may limit the ability of the governmental unit, and indirectly you, to enforce an order of restitution. Therefore, if you believe that a debtor is not making restitution payments as ordered by you, and the debtor may have confirmed a plan

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[46] 11 U.S.C. §362(b)(1).
[47] 11 U.S.C. §§1207 and 1306.
[48] 11 U.S.C. §1123(a)(8). 11 U.S.C. §1115(a)(2) now requires that such earnings for personal services be considered property of the individual's Chapter 11 bankruptcy estate. 11 U.S.C. §541(a)(6) defines property of the estate in a Chapter 7 proceeding of an individual. However, see In re Fitzsimmons, 725 F.2d 1208 (9th Cir. 1984) which differentiates between earnings of the individual, which is not property of the estate, and a distribution made to an individual who is the principal of the professional corporation, which is estate property. Under BAPCPA, an individual debtor in a Chapter 11 proceeding is required to have earnings from personal services and future income devoted to payment of creditors if necessary to execute a plan. With such an amendment, Chapter 11 proceedings

of reorganization, you should review the confirmation order and any plan before deciding how to proceed.

VII. LANDLORD-TENANT ISSUES

A. The Automatic Stay.

BAPCPA has added a new exception to the automatic stay concerning landlord-tenant proceedings against a debtor who is the tenant of residential real property pursuant to a rental agreement or a lease. Now if an unlawful detainer action, eviction, or similar proceeding, has been brought by the lessor against the debtor, and the lessor has obtained a pre-petition judgment against the debtor for possession of the residential real property, then the lessor may continue with the proceedings post-petition without obtaining relief from the automatic stay. [49] Thus, if the debtor is to be evicted under applicable state law, and a writ of restitution needs to be issued to effectuate said action, that may now be accomplished by the state court without further proceedings in the bankruptcy court to vacate the stay.

There are some limited exceptions. The debtor may file, with the bankruptcy petition, a certification under penalty of perjury that under applicable non-bankruptcy law,

> (1) there are circumstances which allow the debtor to cure the entire monetary default that gave rise to the judgment for possession of the residential property even after a judgment for possession has been entered; and

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are now similar to Chapters 12 and 13 in the use of the individual's earnings to fund a plan of reorganization.
[49] 11 U.S.C. §362(b)(22).
[50] 11 U.S.C. §362(l)(1).

(2) the debtor (or an adult dependent of the debtor) has deposited with the clerk of the bankruptcy court any rent that would become due during the 30-day period after the filing of the bankruptcy petition.[50]

If such a certification has been filed, then the automatic stay will remain in place as to the lessor, and you will not be able to proceed, for a period of 30 days.

If, within said 30-day period, the debtor or an adult dependent of the debtor files a further certification that all of the foregoing has been effectuated, and the debtor or the adult dependent of the debtor has cured the monetary default (not just described the circumstances) that led to the judgment of possession, then the debtor is entitled to the benefit of the automatic stay pending a further order from the bankruptcy court. Of course, keep in mind that these limited exceptions assume that this is the first petition that the debtor has filed within the last year. Remember, there have been other changes to the Bankruptcy Code that generally limit the applicability of the automatic stay to a debtor who has filed one or more cases within the last year.

If you are presiding over such an eviction or similar type proceeding, you should consider the following checklist.

1. Does applicable law permit the debtor to cure the monetary default under the lease once a judgment for possession has been entered? Interestingly enough, some of the bankruptcy judges did a quick analysis of the laws in various states and found, in a number of states, that the debtor had no such ability to cure the monetary default, irrespective of what the circumstances were or whether the debtor, or someone on behalf of the debtor, effectuated some type of monetary cure. So always do this analysis first. If

the debtor has no ability to cure under applicable state law, then the automatic stay should not be a factor in your proceedings. If there is the ability to cure, then proceed with the below analysis.

2. Has the debtor filed any certification with his bankruptcy petition? If there is no certification, then there is no automatic stay to prohibit you from proceeding. Ask the debtor to provide you with a copy of the certification that was filed with the bankruptcy court.

3. If there is a filed certification, has the debtor filed a second certification regarding a cure of the monetary default within the 30-day period? If the second certification has not been filed, there is no automatic stay. You may wish to set a hearing 30 days from the filing of the bankruptcy petition to determine the status of the matter.

4. If both certifications have been timely filed, then wait for direction from the bankruptcy court.

B. Assumption or Rejection of an Unexpired Lease of Nonresidential Property.

BAPCPA had modified the provisions as to nonresidential real property.[51] If the debtor is the lessee of such real property at the time of filing, the debtor in possession or the trustee may consider, for a period of 120 days after filing, whether to assume or reject the lease. The bankruptcy court, acting without the consent of the landlord, may extend this time period only once, if a motion is made within the 120-day period. Such an extension is only for a period of 90

[51] 11 U.S.C. §365(d)(4).

days unless the landlord consents in writing to a further extension and the bankruptcy court grants such an extension. This is a substantial change in the prior law. Previously the debtor in possession or the trustee only had 60 days after the order for relief was entered to assume or reject such a lease or file a motion with the bankruptcy court for an extension of time to consider the appropriate action to be taken. However, the motions for extension could be repeatedly filed, sometimes over a prolonged period of time. Now the bankruptcy estate, through a debtor in possession or a trustee, has a longer period of time initially - 120 days, instead of 60, but said party may only get one 90-day extension from the bankruptcy court without the consent of the landlord. If the time period expires, or the party is unable to obtain a further extension of time, as a matter of law, the unexpired lease is deemed rejected. The rejection of such a lease may have substantial implications in any litigation over which you are presiding.

VIII. TAX ISSUES

A. Preclusion.

A bankruptcy court may be unable to resolve a tax issue that has been determined in a prior tax proceeding. This was highlighted in the Ninth Circuit Decision of In re Mantz, 343 F.3d 1207 (9th Cir. 2003). The Bankruptcy Code vests the bankruptcy court with subject matter jurisdiction to determine the amount and validity of a tax assessment against a debtor unless the matter has been adjudicated by another tribunal prior to the filing of the bankruptcy petition. Thus, if a federal or state tax tribunal has determined the tax issues under applicable law, that may limit the ability of the taxpayer to obtain relief in the bankruptcy court, if the taxpayer actually contested the liability in the federal or state tax tribunal.[52] The courts have recognized that an individual taxpayer of limited financial means may not participate in the tax court proceedings, allowing a default to be entered that may ultimately impact the taxpayer/debtor's creditors in the bankruptcy proceedings. See City Vending of Muskogee, Inc. v. Okla Tax Comm'n, 898 F.2d 122, 125 (10th Cir. 1990); New Haven Projects LLC v. City of New Haven (In re New Haven Projects LLC), 225 F.3d 283, 288 (2nd Cir. 2000). Thus, the "actually litigated" element is important in determining whether the bankruptcy court has the ability to hear and determine the matter.

The other critical element in Mantz is that a judgment must be final before the filing of the bankruptcy petition. Mantz 343 F.3d at 1212. In reviewing California law, the Court

[52] 11 U.S.C. §505(a)(2)(A) states, in relevant part, that the bankruptcy court may not adjudicate "the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under [the Bankruptcy Code] . . . ."

determined that a decision of the State Board of Equalization did not become final until thirty days after the service of the notice of the decision upon the petitioner. After the taxpayers/debtors received notice of the decision, the debtors requested a rehearing on the matter. Before the Board could rule on the request for a rehearing, the taxpayers/debtors filed their bankruptcy petition. Hence, the state tax proceedings were still pending when the taxpayers/debtors filed their bankruptcy petition, and the bankruptcy court had the jurisdiction to resolve the matter. Id. at 1213. Most courts that have reviewed this issue have also looked for a final adjudication of the matter under applicable law. Texas Comptroller of Public Accounts v. Trans State Outdoor Advertising Co. (In re Trans State Outdoor Advertising Co.), 140 F.3d 618 (5th Cir. 1998) (administrative decision had not been appealed and had become final under state law prior to the bankruptcy petition filing); City Vending of Muskogee, Inc. v. Oklahoma Tax Commission, 898 F.2d 122 (10th Cir. 1990)(a federal court will have jurisdiction to hear the matter if the state proceedings are still pending; however, the Oklahoma Tax Commission had adjudicated the tax liability, the debtor had not appealed, and the Commission's decision had become final under state law prior to the filing of the bankruptcy petition.)

A minority view is that the judgment need not be final to divest the bankruptcy court of the ability to hear the matter. In the decision of In re The Railroad Street Partnership, 255 B.R. 644, 647 (Bankr. N.D.N.Y. 2000), the Court concluded that since the debtor had a "'full and fair' opportunity to present its case to the Assessment Board, and . . . an adjudication was made by a tribunal of competent jurisdiction," the bankruptcy court no longer had the ability to hear the matter.

Although the courts have, at times, described the issue as one of subject matter

jurisdiction, it really appears to be a problem of issue preclusion. Thus, as with the doctrine of collateral estoppel or res judicata, if a matter has been actually litigated or a final judgment has been entered by a state or federal tax court pre-petition, the bankruptcy court will not have the statutory ability to decide the issue.

B. Exceptions to the Automatic Stay.

Be careful. There are different rules, depending on the court or agency involved. 11 U.S.C. §362(b)(9) makes it clear that there are certain tax proceedings that are not affected when a debtor files a bankruptcy petition. A particular state or federal agency may be proceeding with an audit or an assessment, with a demand for payment to a taxpayer, when the taxpayer files a bankruptcy petition. These proceedings, along with a notice of tax deficiency or a demand for tax returns, are not subject to the automatic stay. However, any lien imposed in such proceedings may have no effect until the bankruptcy case has concluded and the debt secured by such a lien has been determined to be nondischargeable under 11 U.S.C. §523.

BAPCPA has modified the provisions, however, concerning tax court proceedings. The Tax Court may not determine a corporate debtor's tax liability "for a taxable period that the bankruptcy court may determine" or the tax liability of an individual debtor "for a taxable period ending "before the debtor filed the bankruptcy petition." 11 U.S.C. §362(a)(8). The automatic stay must be vacated as to such proceedings.[53]

[53] See 11 U.S.C. §505 which sets forth the tax issues that may be heard and determined by the bankruptcy court.

IX. DISCHARGE ISSUES

A. Overview.

As a result of BAPCPA, if an individual debtor has received a Chapter 7 or Chapter 11 discharge, the debtor shall not receive another discharge, under any circumstances, in a newly filed Chapter 7 proceeding, if the discharge was granted in a case commenced within eight years of the filing of the current petition under review.[54]

There are similar controls for an individual who files a Chapter 13 proceeding, or a family farmer or fisherman who files a Chapter 12, and receives a discharge in the applicable case within six years of filing a Chapter 7 petition commencing a new case, unless substantial payments were made to creditors under the Chapter 13 or Chapter 12 plans.[55]

An individual or entity that receives a discharge under Chapter 11 may have difficulty obtaining another discharge.[56] However, an entity may not be seeking a discharge in a second Chapter 11; just the opportunity to liquidate its assets in an orderly manner.

BAPCPA now provides that an individual that files a Chapter 11 petition must make all payments under the confirmed plan, unless the bankruptcy court, after hearing and for cause, finds that the discharge should be granted.[57] Hence, the duties and responsibilities of an individual debtor in a Chapter 11 proceeding are now more in line with those of an individual debtor in a Chapter 12 or 13 proceeding.

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[54] 11 U.S.C. §727(a)(8). BAPCPA has increased the number of years from 6 to 8.
[55] 11 U.S.C. §727(a)(9). BAPCPA has not modified the number of years. It remains at 6.
[56] 11 U.S.C. §1141. Note that unlike a Chapter 7, an entity may receive a discharge in a Chapter 11. Compare Section 727 (a)(1) with Section 1141(d)(1) and (d)(3). However, an entity that liquidates all, or substantially all, of its assets, through a plan of reorganization, and does not have any ongoing business operations after the plan is consummated is not entitled to a discharge. 11 U.S.C. §1141(d)(3).
[57] 11 U.S.C. §1141(d)(5).

BAPCPA also provides new limitations on an individual receiving a Chapter 13 discharge if the debtor has received, within a relatively short period of time, a discharge in a prior Chapter 7, 11, 12, or 13 proceeding. The bankruptcy court is unable to grant a discharge in the new Chapter 13 proceeding, if the individual debtor received a discharge in a Chapter 7, 11, or 12 proceeding within four years of the filing of the new Chapter 13 petition.[58] Moreover, if the individual debtor has received a discharge in a Chapter 13 proceeding, the debtor may not receive a discharge in any Chapter 13 proceeding that is commenced within two years of the discharge received in the prior Chapter 13 proceeding.[59]

The Code does not seem to prohibit an individual debtor who has been designated a family farmer or family fisherman from filing a Chapter 12 petition, proposing and confirming a plan, making all payments there under for the usual period of three years (five years as to domestic support obligations that have a priority under the Bankruptcy Code or for cause), getting a discharge, then filing a second Chapter 12 petition and paying those debts recently incurred in another plan, with a discharge to follow after payments under the second plan.[60]

B. Exceptions to Discharge. This issue only pertains to individuals and may come before you as a result of circuit-level cases. An individual in a Chapter 7, 11, 12, or 13 proceeding may be seeking the discharge of priority unsecured (such as state and federal taxes) and general unsecured (such as credit card obligations) debt.[61] In some cases, individual creditors are not

[58] 11 U.S.C. §1328(f)(1).
[59] 11 U.S.C. §1328(f)(2).
[60] 11 U.S.C. §§1225, 1228.
[61] Secured debt is treated differently. If a secured creditor has a valid lien pre-petition, that lien may carry through a Chapter 7 proceeding unaffected. Dewsnup v. Timm, 502 U.S. 410 (1992). In a Chapter 11 or 13 proceeding, if the secured creditor only has a lien on the debtor's residence, the debtor's ability to modify the loan is extremely limited, with the secured creditor retaining its lien on the residence and generally receiving the same payments as provided for under the loan documentation. 11 U.S.C. §§ 1123(b)(5); 1322(b)(2). However, if the secured creditor has a lien on several assets or a lien on some property other than the residence, the debtor may modify the rights of a secured

objecting to the debtor's receiving a discharge. Instead, the creditor believes that it has a basis to have just its debt survive a discharge. Hence, the creditor may request that its particular debt be "excepted" from the discharge of debts that a debtor normally receives.

In the Ninth Circuit decision of In re Beezley, 994 F.2d 1433 (9th Cir. 1993), the court concluded that not all dischargeability issues should necessarily be determined by the bankruptcy court. In Beezley, the individual debtor had filed a Chapter 7 liquidation proceeding in the bankruptcy court, but had forgotten to list an unsecured creditor. The bankruptcy trustee administered the estate and concluded that there were no non-exempt assets that could be liquidated for the benefit of creditors. Because the bankruptcy trustee could not locate any assets for the creditors, the bankruptcy clerk's office set no date by which creditors should file proofs of claims with the bankruptcy court.[62] The debtor's case was closed, and that seemed to resolve all issues. Unfortunately, the omitted unsecured creditor later proceeded in the state trial court, at which time the debtor raised the issue of the bankruptcy discharge, hoping to have the state court proceeding dismissed. The debtor also attempted to reopen the bankruptcy case, hoping that either the bankruptcy court or the state court would provide relief. The Ninth Circuit resolved the controversy, concluding that the bankruptcy case should not be reopened, because the bankruptcy court in the no asset, no claims bar date case could provide any relief to the debtor. The Ninth Circuit then opined that the state court could determine whether the debt was discharged. Given the current posture of the decisions from the United States Supreme Court

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creditor by changing the terms and conditions of the underlying loan documentation and repaying that creditor at a different interest rate, over a longer period of time than what the contract originally required, with lower monthly payments. Id.

[62] Such a case is known as a no-asset, no-claims-bar-date case.

and the circuit courts, you may be able to hear and determine some of these issues.[63]

For you to proceed, however, you must determine that you have subject matter jurisdiction to hear the matter. The circuits are fairly consistent in their approach that only bankruptcy courts may determine whether debts under Section 523(a)(2),[64] (a)(4),[65] or (a)(6)[66] are excepted from a discharge granted to a debtor. See Rein v. Providian Financial Corp., 270 F.3d 895 (9th Cir. 2001); Matter of Schwager, 121 F.3d 177 (5th Cir. 1997); In re McKendry, 40 F.3d 331 (10th Cir. 1994).

However, the circuits have generally concluded that other matters may be heard by non-bankruptcy courts. Whitehouse v. LaRoche, 277 F.3d 568 (1st Cir. 2002) (bankruptcy courts and non-bankruptcy courts alike are vested with concurrent jurisdiction over nondischargeability proceedings arising under Section 523(a)(7)); Cummings v. Cummings, 244 F.3d 1263 (11th Cir. 2001) (state courts have concurrent jurisdiction with the bankruptcy courts to determine the discharge of debts for alimony, maintenance, or support pursuant to Section 523(a)(5)). If you cannot determine the matter because of your circuit's approach to your subject matter jurisdiction, ask the parties to return to the bankruptcy court to resolve the issue.

C. The Discharge Injunction.

A separate, but related, issue that you may face is a lawsuit commenced by a creditor trying to foreclose a lien or collect on a debt. 11 U.S.C. §524 provides that the discharge voids any judgment entered at any time, operates as an injunction prohibiting the commencement or continuation of a lawsuit, or enjoins any act to collect on a debt to the extent the debt is a

[63] The relevant provision analyzed by the Ninth Circuit, 11 U.S.C. §523(a)(3), was not modified by BAPCPA.
[64] False pretenses, false representations, and actual fraud.
[65] Fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.
[66] Willful and malicious injury to an individual or entity or the property of same.

personal liability of the debtor. The discharge injunction is usually asserted by the debtor in his or her answer or other appropriate responsive pleading in your court. Obviously the secured creditor may still request that you allow the proceedings to continue if they solely focus on foreclosing on the lien. The only prohibited action is for you to enter some kind of order or judgment which also states that the debtor is personally liable to the creditor. If the creditor is simply suing on an unsecured note or debt, you are prohibited from proceeding, since any order or judgment will necessarily be a determination of the personal liability of the debtor that has been discharged. Of course, there are exceptions when you may proceed even though you have been advised that the debtor has obtained a discharge. A few of the exceptions:

1. As noted previously, a creditor may have received a judgment or order excepting a particular debt from discharge. If the debt is so excepted, you may proceed with the execution or similar proceeding on the debt. Ask to see a copy of the judgment or order excepting the debt from discharge before you proceed.

2. The creditor may be asking you to determine whether the debt should be excepted from discharge. There may be a support obligation (Section 523 (a)(5)) or other relief that may be presented to you that was not determined by the bankruptcy court. The first step, as noted, would always be for you to check to make sure that your circuit believes that you have subject matter jurisdiction to hear and determine such issues.

3. The debtor may have entered into a reaffirmation agreement which allows the creditor to pursue enforcement of a personal liability judgment or order on its claim

even though the debtor has received a discharge. Be careful with the reaffirmation agreement. There has been extensive class action litigation in federal courts about certain creditors that did not proceed properly to obtain a reaffirmation agreement. If the creditor has obtained an appropriate reaffirmation agreement, the creditor will be able to produce, at a minimum, the following documents to you:

a. The Reaffirmation Agreement. Section 524 spells out exactly how the agreement should look (what must be disclosed, etc.) if you have any doubts.

b. The bankruptcy court order or an attorney's affidavit. For instance, if the debtor was not represented by counsel in the bankruptcy proceeding, a bankruptcy court order approving the agreement is required. However, if the debtor was represented by counsel, the duly completed affidavit by the debtor's attorney will be at the end of the reaffirmation agreement.

The creditor may have additional documents, such as the underlying loan documents, and a payment history of the loan transaction, but the documents outlined above are critical to having the reaffirmation agreement appropriately approved by the bankruptcy court. If the creditor is unable to produce the necessary documents, or you are sure that the debtor received a discharge, request further information from the parties before proceeding.

X. POST-BANKRUPTCY ISSUES

A. After the Confirmation of the Plan.

Although orders of confirmation and plans of reorganization in Chapter 11, 13, or other reorganization proceedings generally provide for the bankruptcy court to retain jurisdiction to resolve any disputes which may arise post confirmation as to the interpretation or enforcement of the order or plan, you may, on occasion, be asked to resolve such a dispute. It will generally, at the trial (state or federal) or appellate level, be presented as a contract dispute. The Circuit Court cases are consistent on the point that a confirmed plan of reorganization is a binding contract on all creditors and interested parties listed by the debtor on its/his/her mailing list and schedules, whether the creditor has filed a proof of claim, a notice of appearance, voted to accept or reject the plan of reorganization, or otherwise participated in the bankruptcy proceeding. See Miller v. U.S., 363 F.3d 999, 1004 (9th Cir. 2004); In re Dial Business Forms, Inc., 341 F.3d 738, 742 (8th Cir. 2003); In re Varat Enterprises, Inc., 81 F.3d 1310, 1317 (4th Cir. 1996); Paul v. Monts, 906 F.2d 1468, 1471 (10th Cir. 1990).

Most non-bankruptcy judges have difficulty with the binding effect of the order of confirmation and plan, since they expect that with most contracts, the party to be bound must be a signatory to the agreement. This is not the case in the bankruptcy context. In determining how to proceed on these issues, there are a number of preliminary steps:

1. Obtain a copy of the order of confirmation and the plan. It is not unusual for a debtor to propose a number of plans and disclosure statements to be noticed to

creditors and interested parties, with hearings thereon, before a plan is finally confirmed by the bankruptcy court. Therefore, you need a copy of the order of confirmation and the final plan actually confirmed by the bankruptcy court. The order and plan will generally reflect whether the bankruptcy court has retained jurisdiction to hear and determine post-confirmation issues.

2. Watch for the interplay between bankruptcy law and the applicable state law. For instance, the plan of reorganization may provide for the rejection of executory contracts under 11 U.S.C. §365. Depending on the circuit or the federal district in which you sit, such a rejection may also be a termination of the contract under applicable state law. See In re Lavigne, 114 F.3d 379, 387 (2d Cir.1997) (applying state law to determine damages for breach of contract upon Trustee's rejection of lease under Section 365); In re Rega Properties, Ltd., 894 F.2d 1136, 1139 (9th Cir.1990) (noting that in the absence of contrary guidance, the state law on damages should be applied under Section 365 unless doing so conflicted with bankruptcy policy). Thus, your decision may be different if the executory contract is rejected under bankruptcy law and terminated under applicable state law versus if it is only rejected under bankruptcy law.

B. The Bankruptcy Case is Dismissed.

A debtor or creditor may request dismissal of a case before or after confirmation. In some cases, the bankruptcy court independently acts[67] to dismiss the case.

1. A pre-confirmation dismissal of the case generally places the parties in the same position as if the case had never been filed. It returns the parties to the pre-petition status quo. 11 U.S.C. §349. There are exceptions. The bankruptcy court, for cause, may enter a dismissal order that places restrictions on the debtor or how certain pending state or federal court actions will proceed, or the bankruptcy court may enter a dismissal order that affects a debtor's ability to receive a future discharge of certain debts. See In re Leavitt, 171 F.3d 1219, 1225 (9th Cir. 1999). There are other exceptions. A bankruptcy case may have been stayed while a case is proceeding under the Securities Investor Protection Act. In such circumstance, only a dismissal order under 11 U.S.C. §742 would have a dispositive effect on the stockbroker which filed the bankruptcy case. Moreover, although 11 U.S.C. §349 (b)(3) revests property of the bankruptcy estate in the entity such property was vested in immediately prior to the debtor's filing of a bankruptcy petition, this provision does not apply to property which was sold in the bankruptcy proceeding prior to dismissal. Sales of property, be the property tangible or intangible, real or personal, are final.[68] Sale orders also become final in ten days or sooner,[69] so a party may find that the sale of certain bankruptcy estate property may not be vitiated even though

[67] For instance, the bankruptcy court may have dismissed the case for the debtor's failure to file a master mailing list to give notice to creditors, to file schedules in a timely manner, to attend a meeting of creditors, or to attend a hearing.
[68] 11 U.S.C. §363(b), (c), and (m).
[69] Bankruptcy Rule 6004(g).

the bankruptcy case has been dismissed.

2. Post confirmation dismissals may involve the issues previously addressed as to the binding effect of an order of confirmation and a plan of reorganization on creditors and interested parties who may have been listed on the debtor's master mailing list and schedules but not otherwise participated in the reorganization process. Many of the provisions are binding at confirmation even if the case is subsequently dismissed before the debtor has fully performed under the plan and a final decree and order closing the bankruptcy case is ever entered. The easiest way to understand the concept is that 11 U.S.C. §349 places the creditors and interested parties in the same position as if the case had never been filed unless the bankruptcy court "for cause, orders otherwise..." The confirmation order would be the type of order that would affect dismissal of the case and the creditors' and interested parties' rights and remedies thereafter. So, for instance, if a debtor had issued securities as a part of the reorganization process, but the case was subsequently dismissed, a state or federal agency would not have a basis to pursue the debtor for a securities fraud violation for the mere issuance of the securities as a result of the reorganization process.[70]

[70] If the debtor complies with the provisions of the Bankruptcy Code concerning the issuance of securities as a part of the confirmation process, and the plan is confirmed, the debtor need not comply with state and/or federal law concerning the issuance of securities even though the case is subsequently dismissed. Of course, the debtor would be unable to issue further securities after the case has been dismissed.

XI. APPELLATE PROCEEDINGS

A. The Debtor as Appellant.

Some courts rely on a nationwide bankruptcy rule[71] for the proposition that once a debtor files a Chapter 11 bankruptcy petition and remains in possession of the property of the bankruptcy estate as a "debtor in possession," said debtor may proceed as an appellant without notifying or receiving permission from the bankruptcy court. However, at least one circuit is of the view that even though the debtor may be the appellant, the appellee may have claims to be asserted on appeal that would have an adverse affect on the bankruptcy estate. This is particularly true if the appellant is a defendant in the cause of action or adversary proceeding. Therefore, the automatic stay should be vacated before any of the parties may proceed. Ingersoll-Rand Financial Corp. v. Miller Min. Co., Inc., 817 F.2d 1424 (9th Cir. 1987).[72] Check the applicable law to determine how to proceed.

B. The Bankruptcy Trustee as Appellant.

Certain types of bankruptcy cases[73] have an interim or permanent bankruptcy trustee acting as a fiduciary for the creditors and interested parties of the bankruptcy estate. In such cases, the debtor no longer has standing to proceed with the appeal. See In re Eisen, 31 F.3d 1447, 1451 n.

[71] Fed.R.Bankr.P. 7041.

[72] However, in the Ninth Circuit, under certain circumstance, a creditor or interested party may request dismissal of an appeal brought by the debtor without obtaining relief from the automatic stay. In re White, 186 B.R. 700 (B.A.P. 9th Cir. 1995). The rationale is that the creditor is not seeking any affirmative relief as a part of the appeal; hence, the bankruptcy estate is not affected.

[73] For instance, a Chapter 7 case which involves the liquidation of the debtor's non-exempt property in a prompt manner by the bankruptcy trustee, or a Chapter 11 case whenever the debtor is no longer in possession of bankruptcy estate property.

2 (9th Cir.1994).[74] Therefore, you should initially check to determine if the party with standing is proceeding with the appeal. In many cases, I have found state or federal courts allowing a debtor to proceed improperly with an appeal, although the debtor has filed a Chapter 7 petition and no longer had standing to proceed.

C. The Debtor or the Bankruptcy Trustee as Appellee.

The circuits are consistent that if the debtor or the bankruptcy trustee, depending on the type of proceeding, is the proper appellee, the automatic stay must be vacated, UNLESS the appeal involves a proceeding that is an exception to the automatic stay. Compare 11 U.S.C. §362(a) with §362(b). Also review the earlier portion of this bench book. In such matters, whether you have multiple parties as appellants or multiple parties as appellees, if the bankruptcy estate is an appellee, the automatic stay, in most cases, must be vacated if you cannot enter an appellate mandate or judgment affording complete relief to the parties unless the bankruptcy estate is included in the mandate or judgment.

XII. SPECIAL CONCERNS OF FEDERAL DISTRICT COURT JUDGES

A. Jurisdictional Overview.

When the United States Supreme Court determined the Bankruptcy Code to be unconstitutional because of the breadth of the subject matter jurisdiction afforded to bankruptcy

[74] As in most cases, there are exceptions. For instance, in a Chapter 13 proceeding, which is the reorganization proceeding for individuals, the circuits allow the debtor or the Chapter 13 trustee to prosecute an appeal.

judges, who are Article I judges,[75] Congress resolved the issue by having the bankruptcy courts become units of the district court and referring the bankruptcy cases to the bankruptcy courts. 28 U.S.C. §157(a). Hence, the federal district court has original and exclusive jurisdiction over the bankruptcy cases (Chapter 7, 9, 11, etc.), and over the property of the debtor (as of the commencement of the case) and the bankruptcy estate, wherever that property may be located. 28 U.S.C. §1334, Subsection (a) and (e).[76] From a practical standpoint, however, federal district courts do not hear bankruptcy cases. Most cases have contested matters which require that hearings being held on an expedited or emergency basis, and the procedures utilized in cases are different than what most judges encounter in standard litigation. Because of these concerns and the heavy caseload already handled by federal district courts, most federal courts have, by general order or by way of local rule, referred bankruptcy cases to bankruptcy judges to be heard. Please refer to the general order or local order in your court to determine how the bankruptcy cases are being heard in your district.

B. Abstention.

A separate issue to consider is how to handle those actions or proceedings that have been filed pre-petition. The federal district court has original, but not exclusive jurisdiction, over a civil proceeding or an action that arises under Chapter 11, or arises in or is related to a case under Chapter 11. 28 U.S.C. §1334(b).[77] From a practical standpoint, any request for abstention, because of the referral of bankruptcy cases to the bankruptcy court, will be heard, in the first

[75] Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

[76] The United States Supreme Court has consistently refused to revisit this resolution of the jurisdiction of the bankruptcy court as a unit of the federal district court. Commodity Futures Trading Com'n v. Schor, 478 U.S. 833, 847-49 (1986); Thomas v. Union Carbide Agr. Products Co., 473 U.S. 568 (1985).

[77] In proceedings or actions that are within the original, but not exclusive, jurisdiction of the District Court, the Court may be required to abstain or may, because of comity or other reasons, permissively abstain from hearing a

instance, by the bankruptcy court. However, if because of the peculiar circumstances of the litigation, the request is presented to you, there are some guidelines. For instance, although the federal district court may have subject matter jurisdiction to hear the action, there may be other provisions of Title 28 which dictate that the federal district court should allow the court where the pre-petition action was pending to hear the matter. Under certain circumstances, the federal district court may be required to abstain from hearing the matter. 28 U.S.C. §1334(c)(2). Mandatory abstention pertains to a matter that was commenced pre-petition in the state court, the action is still pending at the time of the request for abstention, the action involves a state law claim, the action may be timely adjudicated in the state forum, and the matter would not be in your court but for the removal of the action and the pending bankruptcy case.[78]

A more likely occurrence, to the extent that the issue is presented to you, is the request that you permissively abstain from hearing a matter. The request for permissive abstention considers a variety of factors, such as when the trial is set in the state court proceeding, whether comity with the state courts would support abstention, whether state law issues predominate, and similar factors.[79] Usually these actions will be related to a bankruptcy case, but do not involve core bankruptcy issues.[80] How you decide to handle the matter is within your discretion.

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proceeding or action. 28 U.S.C. §1334, Subsections (c) and (d), Bankruptcy Rule 5011.

[78] There are circuits or districts which have concluded that a state court action may not necessarily be pending, just the possibility of a state court action being filed, which triggers the mandatory abstention provision. Since this an evolving area, you should check the case law in your circuit or district.

[79] For an outline of the factors, see In re Tucson Estates, 912 F.2d 1162 (9th Cir. 1990).

[80] Most circuits have adopted a broad definition of when an action is related to a bankruptcy case. In re Fietz, 852 F.2d 455 (9th Cir. 1988); In re Pacor, 743 F.2d 984 (3rd Cir. 1984). As to what is a core proceeding, see 28 U.S.C. §157(b). Bankruptcy judges initially make a determination as to whether an action or proceeding is core or non-core and whether it is related or not related to a bankruptcy case.

C. Withdrawal of the Reference.

In some cases, one or more litigants may request that a bankruptcy case, or an action or proceeding in a bankruptcy case, be withdrawn to the federal district court to be heard. 28 U.S.C. §157(a) initially refers bankruptcy cases, and the related proceedings, to be heard and determined by the bankruptcy courts. However, on motion made in your court, a request will be made by one or more parties, that the reference to the bankruptcy court be withdrawn.[81] Recent case law suggests that if the district court withdraws the reference, the court should articulate the reasons therefor, with such action only being done reluctantly.[82] The mere filing of a motion to withdraw the reference to the federal district court does not stay the bankruptcy judge from continuing to hear matters in the case or proceeding. Bankruptcy Rule 5011(c). Even experienced bankruptcy practitioners forget about this national Bankruptcy Rule, believing that they can get a stay of the bankruptcy case or proceedings by filing a motion to withdraw the reference.

As noted, you hear motions to withdraw the reference. Usually the motion is filed in the bankruptcy court where the case is pending and then transferred to the district court. There is no obligation for you to withdraw the reference. In fact, most federal district court judges view such motions as litigation tactics by one or more parties who may want to slow down a case or proceeding when the bankruptcy judge is moving toward a prompt trial or hearing to resolve the case or the action or proceeding within the case. Remember, if you do decide to withdraw the reference, you are now committed to being the trial judge on the case, the adversary proceedings,

[81] You do have the power, sua sponte, to withdraw the reference "for cause" of the entire bankruptcy case or an action or proceeding. 28 U.S.C. §157(d). Be careful; the parties may question or challenge your ability to so act.

[82] Container Recycling Alliance v. Lassman, 359 B.R. 358 (D. Mass. 2007), the power to withdraw a reference should only be used if it is "essential to preserve a higher interest," Veldekens v. GE HFS Holdings, Inc. 362 B.R. 762 (S.D. Tex. 2007), the decision to withdraw the reference "must be based on a sound, articulated foundation," at least when the case adjudicates the relative rights of the debtor and creditors.

and all contested matters, handling most matters in the case on an expedited basis, such as motions for relief from the stay, motions re adequate protection, confirmation of plans which must be heard on an expedited basis because of statutory constraints (such as Chapter 12 proceedings concerning the family farmer), or other maters because the debtor will not survive from a business standpoint.

Probably the only time that you would want to grant a motion to withdraw the reference is if the issues in the bankruptcy case have become intertwined with an action or proceeding that involves issues of federal law that are within the original or exclusive jurisdiction of the federal courts and are normally matters, complex or not, which are routinely tried by the federal district court. Examples of such proceedings may be actions involving employment discrimination, violation of civil rights, claims under FIRREA, etc. See In re Ozier, 132 B.R. 595 (Bankr. E.D.Ark.1991).[83]

D. Wrongful Death and Personal Injury Litigation.

Although the ability of the federal district court to refer matters to the bankruptcy courts is broad, and the bankruptcy courts are permitted to hear non-core, but related matters (even those matters involving jury trials) with the consent of the parties,[84] the federal district court must resolve any wrongful death or personal injury action. This conclusion arises from the interpretation of a number of statutory provisions. 28 U.S.C. §157(b)(2)(B) states that the liquidation or estimation of such contingent, unliquidated personal injury or wrongful death claims against the bankruptcy estate are not core proceedings. Next, the federal district court

[83] Also see the section below concerning Wrongful Death and Personal Injury Litigation which requires that only the federal district court hear the matter.
[84] 28 U.S.C.§157, Subsections (b), (c)(1), and (e).

may not mandatorily abstain from hearing such claims. 28 U.S.C. §157(b)(4).[85] Yet another provision, 28 U.S.C. §157(b)(5), requires that the district court in the district in which the bankruptcy case is pending shall determine whether the wrongful death or personal injury claim shall be tried in the district court in which the bankruptcy case is pending or in the district court in the district in which the claim arose.

Thus, a plaintiff may have commenced, years ago, a personal injury action in Colorado against a manufacturer that has multi-state operations. The manufacturer may have a business operation in Colorado, but decides that, because of numerous personal injury actions filed in Colorado, Arizona, and other western states, it should file a bankruptcy petition in Arizona where its corporate offices are located. The Arizona Federal District Court cannot mandatorily abstain from hearing the personal injury actions, cannot allow the bankruptcy court to resolve the matter, and must determine whether it should try all of the matters as a type of multi-district litigation, or refer one or more of the pending actions to the various district courts where the various claims arose. It also appears that permissive abstention by the federal district court is not possible, since such action would be in contravention of 28 U.S.C. §157(b)(5) directing that the district court shall determine in which district court such actions shall be tried. See Arnold v. Garlock, Inc., 278 F.3d 426 (5th Cir. 2001); In re U.S. Lines, Inc., 216 F.3d 228 (2d Cir. 2000).

E. The Appellate Process After BAPCPA.

Since the effective date of the Bankruptcy Code, the Ninth Circuit has established, and allowed to remain in effect for the entire period, a bankruptcy appellate panel. 28 U.S.C.

[85] See earlier section concerning Abstention.

§158(b)(1). Other circuits have, from time to time, established bankruptcy appellate panels as well. Check your circuit's website as to whether there is currently a bankruptcy appellate panel in place for your circuit. As to whether you, or the bankruptcy appellate panel, hear the appeal, the usual procedure is that the matter will be heard by the bankruptcy appellate panel unless one or more of the parties have followed a procedure to "opt out."[86]

If your court is to hear the matter, the federal district court is authorized to hear appeals from the final judgments or orders of the bankruptcy court, as well as those interlocutory orders or decrees which may be appealed, as of right, or heard by the district court after leave has been granted. One thought to focus on is that the bankruptcy judge's findings of fact may not be set aside unless clearly erroneous and "due regard" needs to be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses. Bankruptcy Rule 8013. As trial judges, we have a temptation to review the record and believe that the matter should have been decided differently. Resist that temptation!

Congress has amended various provisions of 28 U.S.C. §158, as a result of BAPCPA, which provisions may cause some confusion and await interpretation. First, the appellate process has been changed to allow a direct appeal to the circuit court under a new certification process. 28 U.S.C. §158(d)(2). The certification process does not stay the lower court proceedings.[87] Moreover, the bankruptcy court has the ability to certify an issue to the circuit court from one of

[86] Bankruptcy Rule 8001 states that the matter will be heard by the bankruptcy appellate panel in the circuit unless, by a separate written statement, the appellant elects at the time that it files a notice of appeal to have the district court in the district in which the bankruptcy court sits which entered the order hear the appeal. If the appellant does not file such an election, any other party to the appeal has 30 days after service of the notice of appeal to elect to have the district court hear the appeal.

[87] 28 U.S.C. §158(d)(2)(D).

its decisions, orders, or judgments.[88] If the appeal is pending before you, you may, sua sponte, or at the request of one of the parties to the appeal, certify the appeal to the circuit court. The appellate issue must be unique, be subject to conflicting decisions in the circuit court, be a "matter of public importance," or of such a nature that it "may materially advance the (bankruptcy) case or proceeding" 28 U.S.C. §158(d)(2)(A). It is also possible, under the same provision, that all of the appellants and appellees, acting in concert, may certify a question to the circuit court without the intervention of any court. However, whether the certification is by you or all of the parties to the appeal, the circuit court must also authorize the direct appeal of such a judgment, order, or decree.[89]

There is also a separate certification process under 28 U.S.C. §158(d)(2)(B). Since Subsection (d)(2)(A) refers to the appeals which arise under 28 U.S.C. §158(a), over which the district court has jurisdiction, and Subsection (d)(2)(B) has no such limitation, the latter Subsection may cover a broader range of appeals, including those presumably being heard by the bankruptcy appellate panels. Subsection (d)(2)(B) also permits only a majority of the appellants and a majority of the appellees to request certification to the circuit court. Importantly, the Subsection does not require the circuit court to authorize the appeal. However, any certification under Subsection (d)(2)(B) must be effectuated within 60 days of the entry of the judgment, order, or decree that is being appealed. Given this new certification process, we must await the appellate courts' interpretation of the new statutory provisions.

The only other issue of relative importance is that bankruptcy appeals are to be heard on an expedited basis. See In re Financial News Network, Inc., 931 F.2d 217 (2d Cir. 1991). In

[88] 28 U.S.C. §158(d)(2)(A) and (B).
[89] 28 U.S.C. §158(d)(2)(A).

many cases, the debtors are hoping for an early resolution of various matters in dispute or of confirmation of their plans of reorganization in Chapter 11 proceedings. If matters are not promptly resolved, the administrative costs of the bankruptcy proceedings (such as the professionals - lawyers, accountants, investment bankers, etc.) continue to accrue. In some major corporate Chapter 11 proceedings, these costs may be as high as $1 million or more a month. If the debtor or other interested parties must wait for a prolonged period of time for the resolution of a matter on appeal, it may mean the financial destruction of the debtor to the detriment of the debtor, the creditors, the shareholders, and other interested parties.

XIII. JURISDICTIONAL ISSUES - ATTORNEYS' FEES

BAPCPA has added some provisions which may cause you to pause before considering fee applications that may be presented to you by attorneys previously involved in a bankruptcy proceeding. Usually the issue arises when an attorney is involved in litigation in a state court action and includes the attorneys' fees and costs from the bankruptcy proceeding in the fee application submitted to you. However, I am aware of attorneys who have filed an action in the state court, noting that they have only been paid a part of their fee in a bankruptcy proceeding, and request that the state court enter judgment against the debtor for the balance of the fees.[90]

If you have previously hesitated to hear such matters, you now have good reason. Under 28 U.S.C. §1334(e)(2), as a result of BAPCPA, the bankruptcy court that is currently presiding over the case shall have exclusive jurisdiction to hear "all claims or causes of action" that involve the construction of those provisions relating to the retention of a professional in a bankruptcy

[90] Of course, it is possible, if not likely, that the attorney may not be entitled to the balance of the fee, because of an order entered in the bankruptcy proceeding.

case, including the adequacy of the professional's disclosures.[91]

Once again, since this is a new provision, we must wait to see how the case law develops. From a practical standpoint, however, why would you want to become involved in such a controversy?

XIV. CONCLUSION.

I hope that this bench book has assisted you in becoming acquainted, and somewhat comfortable with, the wonderful world of bankruptcy. The electronic nature of this book should assist you in easily finding cases or statutes that are of interest to you. Perhaps there is an area that should be added to the bench book, perhaps there are bankruptcy procedures for which you require more information, or perhaps you would like more information about the unique problems or issues that you may face as a state or federal judge. As you use this book over time, please fee free to provide me with your comments or suggestions. And the next time when an attorney approaches the podium and states, "Your honor, one of the parties to this action filed a bankruptcy petition ....," you will be able to smile.

[91] The Section refers to the "district court" where the case has been commenced or is currently being heard. Under General Orders or by Local Rules, however, the federal district courts automatically refer all bankruptcy cases to be heard by the judges of the bankruptcy court in the district. Thus, when it is stated to you that a bankruptcy case has been "referred" to the bankruptcy court to be heard, you now understand the context.