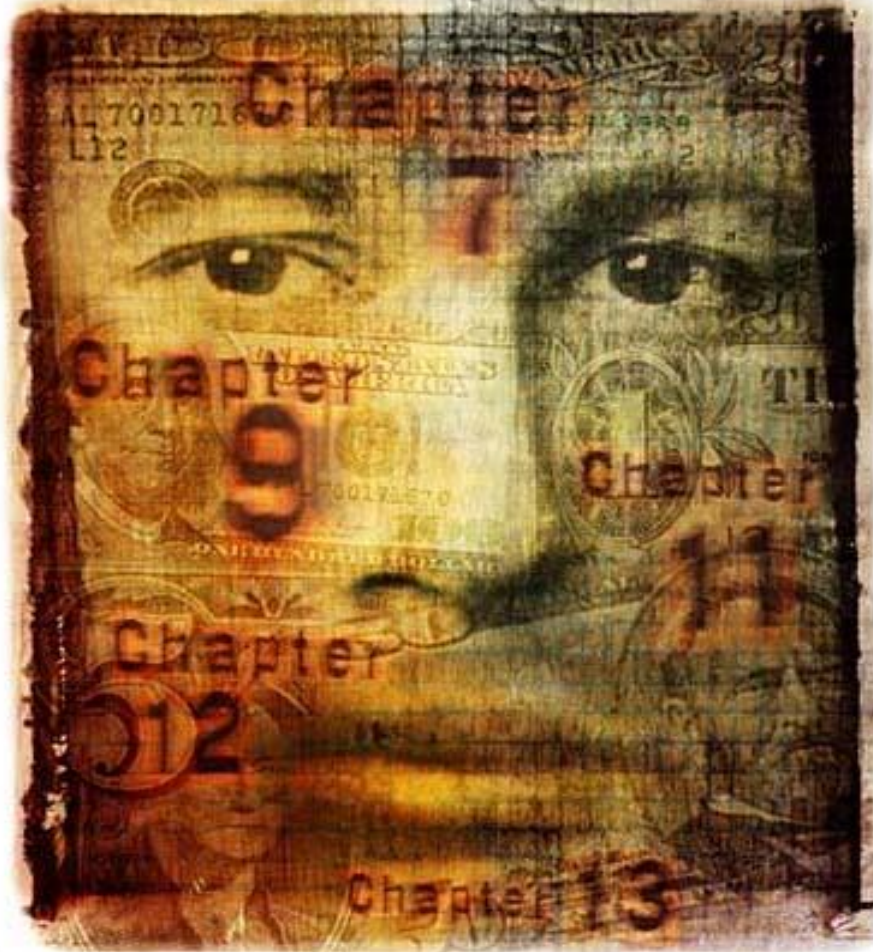


The Effect of Bankruptcy on Litigation: How to Avoid Pitfalls and Sanctions





Bankruptcy Is Having an Affect on Our Daily Lives





Scenarios to be Covered

1. The Defendant Files Bankruptcy Prior to You Filing Suit
2. The Defendant Files Bankruptcy After You File Suit
3. You Decide to File Suit on a Post-Petition Claim While the Defendant Is in Bankruptcy

**The First Thought of Most Lawyers When
They Hear the Word “Bankruptcy”**



Bankruptcy Vocabulary

- **Debtor** (11 U.S.C. § 101(13))
- **Creditor** (11 U.S.C. § 101(10))
- **Automatic Stay** (11 U.S.C. § 362)
- **Executory Contract** (11 U.S.C. § 365)
- **Pre-Petition Claim**
- **Post-Petition Claim**
- **Proof of Claim** (11 U.S.C. § 501)
- **Secured Claim**
- **Unsecured Claim**
- **Unliquidated Claim**
- **Chapter 7 Bankruptcy**
- **Chapter 11 Bankruptcy**

Bankruptcy Claims: Order of Payment

- 1. Secured Claims**
- 2. Super-Priority Claims (11 U.S.C. § 507(b))**
- 3. Administrative Expenses (11 U.S.C. §§ 503 & 507(a)(1))**
- 4. Unsecured Claims**
- 5. Equity Holders**

Client Questions You Should Be Prepared to Answer

- 1. Is the case worth pursuing?**
- 2. What are the immediate affects of this filing?**
- 3. If I have already filed a lawsuit, may I continue that lawsuit?**
- 4. If I have not filed a lawsuit, may I do so?**
- 5. What are the long-term affects of this filing?**

Non-Dischargeable Debts

Non-Dischargeable Debts

- Fines or penalties for violating the law (traffic tickets, criminal restitution, etc.)
- Most federal, state, and local taxes
- Any debts that could not be discharged in a previous bankruptcy that was dismissed due to fraud or misfeasance

May Be Non-Dischargeable – Objection

- Debts incurred based on fraudulent acts
- Debts incurred as a result of willful or malicious injury to another person or another person's property
- Debts from embezzlement, larceny, or breach of trust
- Debts owed under a divorce decree or marital settlement agreement

**The First and Most Important
Question:
Is the Case Worth Pursuing?**



Ways to Determine the Financial Position of the Debtor

- **Asset Search**
- **Get a Copy of the Schedules**
- **Get a List of the Secured Creditors**
- **Get a List of the 20 Largest Unsecured Creditors**
- **Take a 2004 Exam of the Debtor**

Debtor Files for Bankruptcy Before You File Suit

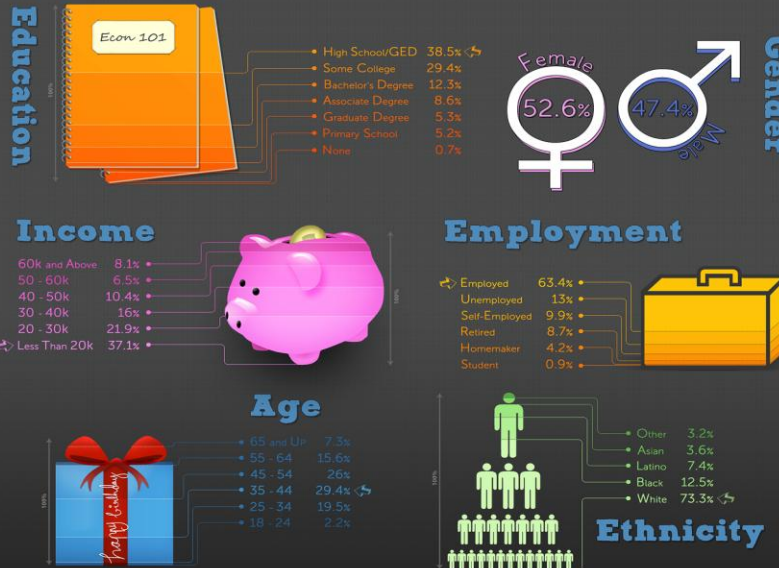
Who Is Filing Bankruptcy?

A look at the 1.07 million Americans who filed bankruptcy in 2008.



The average American who filed bankruptcy last year was Caucasian, 35-44 years old and married; had a high school education, and made less than \$30,000.

The demographics of Americans filing bankruptcy in 2008:



How Does the Filing Affect This Case?

- **Automatic Stay**
- **Unsecured/Unliquidated Claim**
- **Jurisdiction**
- **Statute of Limitations**
- **Settlement**
- **Proof of Claim**

The Automatic Stay: 11 U.S.C. § 362

- (a) When the Stay Applies**
- (b) Exceptions to the Stay**
- (d) Court's Ability to Modify**
- (g) Burden of Proof**
- (h) Consequences of Violation**

What Do I Do Now?

- 1. Wait Until the End of the Bankruptcy**
- 2. Request Relief From the Bankruptcy Court**
- 3. Automatic Stay Only Applies to Non-bankruptcy Courts**

Seeking Relief From the Bankruptcy Court

- **The Court's Power** (11 U.S.C. § 362(d))
- **“For Cause”** (11 U.S.C. § 362(d)(1))
- **In Practice**
 - ✦ **Insurers, Guarantors, or Sureties**
 - ✦ **Pre-Petition Stay Waiver** (Michael St. Patrick Baxter, *Prepetition Waivers of the Automatic Stay: A Secured Lender's Guide*, 52 Bus. Law. 577 (1997))
- **The Burden of Proof** (11 U.S.C. § 362(g))
- **The Cost**

A light blue map of the United States is visible in the background, showing state boundaries. The title text is overlaid on the map.

Bankruptcy Court Jurisdiction

28 U.S.C. § 157

- **National Jurisdiction**
- **“Related To” and “Core” Proceedings**
 - a. **Claims Related to the Administration of the Estate**
 - b. **Claims Allowances**
 - c. **Obtaining Credit**
 - d. **Preferences**
 - e. **Fraud**
- **The Federal District Court Where the Bankruptcy Is Filed**
 - a. **Diversity or Federal Question Do Not Matter**

Settlement

- **Court Approval Required**
- **“Fair and Reasonable” Analysis**
(Bankr. R. 2002 and 9019)
 - ⇒ **Notice to Creditors**
 - ⇒ **Creditors May Object**
 - ⇒ **Hearing on the Merits**

United States Bankruptcy Court		PROOF OF CLAIM	
In Re:		Case Number	
NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" of payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.			
Name of Creditor (Person or entity to whom the debt is owed)		Check box if claimant is a trustee, receiver, assignee, or other fiduciary (State name and title in the space below)	
Name and Address where notices should be sent		<input type="checkbox"/> Check box if you have never received any notices from the bankruptcy court in this case. <input type="checkbox"/> Check box if the address differs from the address on the envelope sent to you by the court.	
Telephone No.		THIS SPACE IS FOR COURT USE ONLY	
ACCOUNT NUMBER BY WHICH CREDITOR IDENTIFIES DEBTOR:			
1. BASIS FOR CLAIM: <input type="checkbox"/> Goods sold <input type="checkbox"/> Services performed <input type="checkbox"/> Money loaned <input type="checkbox"/> Personal injury/wrongful death <input type="checkbox"/> Other (Describe briefly) _____			
<input type="checkbox"/> Taxes <input type="checkbox"/> Retiree benefits as defined in 11 U.S.C. § 1114(a) <input type="checkbox"/> Wages, salaries and compensations (Fill out below) <input type="checkbox"/> Your social security number _____ <input type="checkbox"/> Last compensation for services performed _____ to _____			
2. DATE DEBT WAS INCURRED: _____		3. IF COURT JUDGMENT, DATE OBTAINED: _____	
4. CLASSIFICATION OF CLAIM. Under the Bankruptcy Code all claims are classified as one or more of the following: (1) Unsecured Priority, (2) Secured, (3) Secured. It is possible for part of a claim to be in one category and part in another. CHECK ONE OR MORE BOXES that best describe your claim and STATE THE AMOUNT OF THE CLAIM AT TIME CASE FILED:			
<input type="checkbox"/> SECURED CLAIM \$ _____ Attach evidence of perfection of security interest Brief Description of Collateral: _____ <input type="checkbox"/> Real Estate, <input type="checkbox"/> Vehicle, <input type="checkbox"/> Other (Describe) _____ Amount of secured claim (including interest) included in secured claim above, if any \$ _____		<input type="checkbox"/> Wages, salaries, or commissions (up to \$4000*), earned not more than 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3) <input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4) <input type="checkbox"/> Up to \$1,800* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6)	
<input type="checkbox"/> UNSECURED NONPRIORITY CLAIM \$ _____ A claim of this type is the lowest priority claim in the bankruptcy case. If the claim is for a tax or a claim for a tax on the estate, the claim is not eligible for discharge.		<input type="checkbox"/> Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7) <input type="checkbox"/> Taxes or penalties of governmental units - 11 U.S.C. § 507(a)(8) <input type="checkbox"/> Other-Specify applicable paragraph of 11 U.S.C. § 507(a) _____	
<input type="checkbox"/> UNSECURED PRIORITY CLAIM \$ _____ Specify the priority of the claim: _____		*Amounts are subject to adjustment on 4/1/98 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.	
5. TOTAL CLAIM AT TIME CASE FILED: (Unsecured) \$ _____ (Secured) \$ _____ (Priority) \$ _____ (Total) \$ _____ <input type="checkbox"/> Check this box if claim includes charges in addition to the principal amount of the claim. Attach itemized statement of all additional charges.			
6. CREDITS AND SETOFFS: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. In filing this claim, claimant has deducted all amounts that claimant owes to debtor.		THIS SPACE IS FOR COURT USE ONLY	
7. SUPPORTING DOCUMENTS: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, or evidence of security interests. If the documents are not available, explain. If the documents are voluminous, attach a summary.			
8. TIME-STAMPED COPY: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.			
Date	Sign and print name & title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any)		

Pre-Petition Judgments

- Automatic Stay
- Enforcement Prohibited Against Debtor's Property
- Abstracted Judgments
- Proof of Claim
- Discharge

Executory Contracts

- **Special Treatment** (11 U.S.C. § 365)
- **Assumption or Rejection**
- **Chapter 7 vs. Chapter 11 Proceeding**
- **Motion to Assume or Reject** (11 U.S.C. § 365(d))
- **Court Approval and the “Business Judgment” Rule**
- **The Affect of Rejection**
- **The Affect of Assumption and the “All or Nothing” Rule**
- **Breach of an Assumed Contract**

The Defendant Files Bankruptcy After You File Suit



How Does the Filing Affect this Case?

- **Automatic Stay**
 - a. **The Initial Affect Is the Same**
 - b. **Court Approval**
 - c. **Financial Analysis Is Just As Important**
- **Unsecured/Unliquidated Claim**
- **Jurisdiction**
- **Settlement**
- **Proof of Claim**

How Pre-Petition Claims Are Affected by the Automatic Stay

- **Direct Actions Against the Debtor**
- **Actions by the Debtor Against Your Client**
- **Debtor Related Claims**
 1. **Defendant in Same Proceeding**
 2. **Jointly and Severally Liable**
 3. **Co-Debtors, Subsidiaries, Sureties, Guarantors, Directors, Officers, or Partners**
- **Debtor's Property Affected**
- **Counter-Claims**
- **Cross-Claims**
- **Appeals**
 1. **Debtor Was the Original Defendant**
 2. **Debtor Was the Original Plaintiff**

My Claim Arose Post-petition, or Did It?



Post-Petition Claims

1. **Post Petition Claims Are Not Affected by Bankruptcy**
2. **Qualify As Expenses of Administration (11 U.S.C. §507)**

*** Bankruptcy Claims Order of Payment**

1. **Secured Claims**
2. **Super-priority Claims**
3. **Administrative Expenses**
4. **Unsecured Claims**
5. **Equity Holders**

Pre-Petition vs. Post-Petition

1. **The “Accrual” Theory**
2. **The “Conduct” Theory**
3. **In Practice**
 - ✱ **Every Close Call Goes in Favor of the Debtor**
 - ✱ **Avoid Having Your Claim Discharged Before You Get a Chance to Bring It**
 - ✱ **Don’t Forget About the “Bankruptcy Defense”**
4. **ASK THE COURT!**

