



Fresh Start at the Bankruptcy Court

BY THOMAS B. MCNAMARA

The cornerstone of American bankruptcy law is the chance for a “fresh start.” The Bankruptcy Code¹ provides “a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy ‘a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.’”² Animated by these laudable goals, bankruptcy protects the “honest but unfortunate debtor,”³ while at the same time serving as a safety valve to ensure the future vitality of the U.S. economy.

Almost one million American consumers and businesses file for bankruptcy each year.⁴ Insolvency proceedings constitute about 67% of the total caseload within the federal judiciary.⁵

While the full-time, specialized bankruptcy bar is fairly small, most Colorado lawyers likely will have at least some passing involvement with bankruptcy matters during their careers. This article provides an introduction to the bankruptcy system, identifies the foundations of bankruptcy law, describes the work of the U.S. Bankruptcy Court for the District of Colorado, and offers practice guidance for lawyers working on bankruptcy matters—especially those who may not be familiar with insolvency.

The Bankruptcy System: Bankruptcy Code, Jurisdiction, Venue, and Appeals

Article I, Section 8 of the U.S. Constitution federalizes insolvency by providing that “Congress

shall have the power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”⁶ But Congress enacted bankruptcy statutes only on a temporary and sporadic basis through much of the first century of the Republic.⁷ Thereafter, the Bankruptcy Act of 1898⁸ governed insolvency proceedings for about 80 years. In 1978, Congress passed the Bankruptcy Reform Act of 1978 (1978 Act),⁹ which modernized insolvency law and created the Bankruptcy Code. Although Congress enacted a number of important amendments¹⁰ in later years, the substantive framework of the 1978 Act still governs bankruptcy today.

The 1978 Act sought to enlarge bankruptcy court jurisdiction so that Article I bankruptcy judges were empowered to hear and finally decide most matters arising in or related to bankruptcy cases under the Bankruptcy Code. However, the jurisdictional grant has proved tenuous. The U.S. Supreme Court determined that the broad grant of jurisdiction to bankruptcy judges violated Article III of the U.S. Constitution by vesting non-Article III bankruptcy judges with too much of the “judicial power” of the United States.¹¹ After some resulting turmoil, Congress created a bifurcated jurisdictional fix under which bankruptcy judges “constitute a unit of the district court to be known as the bankruptcy court” and “[e]ach bankruptcy judge [is] a judicial officer of the district court.”¹² Congress authorized district courts to refer “any or all cases under title 11 [the Bankruptcy Code] and any or all proceedings arising under title 11 or arising in or related to a case under title 11” to bankruptcy judges subject to a dichotomy between “core proceedings” and “non-core proceedings.”¹³ Subsequently, the U.S. District Court for the District of Colorado enacted a local rule of “automatic referral” of bankruptcy matters to the Colorado Bankruptcy Court.¹⁴ But the unusual jurisdictional scheme and split responsibilities of district judges and bankruptcy judges continue to generate some uncertainty. The U.S. Supreme Court issued a trilogy of important decisions addressing the bankruptcy jurisdictional conundrum in the last several years.¹⁵

Like the jurisdictional framework, bankruptcy venue also is somewhat unusual. A

bankruptcy case may be filed in any judicial district “in which the domicile, residence, principal place of business . . . or principal assets” of the debtor are located in the 180 days prior to filing a bankruptcy petition or in which “there is a pending case . . . concerning [the debtor’s] affiliate”¹⁶ In consumer bankruptcy cases, proper venue generally is straightforward. However, the liberal bankruptcy venue statute permits forum shopping in commercial cases. Especially during the last two decades, large business enterprises, which generally are incorporated in Delaware and have some affiliate connections in New York, have taken advantage of the venue statute to file insolvency proceedings far from their headquarters’ locations and local communities. For example, General Motors, an iconic Michigan company, used a minor affiliate to file bankruptcy in New York. Similarly, in recent years most Colorado based companies—such as Sports Authority Holdings, Avaya, Inc., Molycorp, Inc., Veneco, Inc., Emerald Oil, Inc., and many others—have filed their reorganization cases in Delaware or New York. Recently, bankruptcy venue reform legislation has been proposed in Congress to resolve this problem.¹⁷

Final judgments of the bankruptcy court are subject to initial appeal to the district court as of right.¹⁸ However, Congress also authorized the formation of a “bankruptcy appellate panel

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service composed of bankruptcy judges”¹⁹ to hear initial bankruptcy appeals. The U.S. Bankruptcy Appellate Panel for the Tenth Circuit (BAP) opened for business in 1995,²⁰ but initially was not available for Colorado appeals. The U.S. District Court for the District of Colorado authorized appeals originating in Colorado to be filed with the BAP in 2005.²¹ Finally, a direct initial appeal to the circuit court of appeals also is possible in limited circumstances.²² After the

initial appeal, Colorado bankruptcy disputes may be further appealed to the U.S. Court of Appeals for the Tenth Circuit (if a direct initial circuit court appeal was not used) and then, potentially, to the U.S. Supreme Court.

The Foundations of Bankruptcy

While insolvency cases may involve a surprisingly wide array of collateral state and federal law issues, the Bankruptcy Code is the framework for all bankruptcy cases. In a broad sense, the statutory scheme recognizes two main types of bankruptcy: liquidation and reorganization. And there are two main types of debtors: individuals (consumers) and entities (businesses). Bankruptcy cases may be pursued under any of six separate chapters. Chapter 7 governs liquidation for individuals and entities through the auspices of an independent Chapter 7 trustee. Chapter 9 uniquely addresses reorganization of municipalities. Chapter 11 is normally thought of as the mechanism for reorganization of businesses, but it may also be used by individuals to reorganize. Chapter 12 is designed to protect family farmers and fisherman, including both individuals and businesses engaged in farming and fishing. Chapter 13 serves as the platform of reorganization for most individuals who have regular income. And Chapter 15 deals with international or cross-border insolvency cases.

While the substantive provisions of bank-



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ruptcy as embodied in the various chapters are quite detailed and complex, certain fundamental policies cut across all types of cases. The principal foundations of bankruptcy are (1) full disclosure, (2) breathing space, (3) notice, (4) maximization of value, (5) equality of distributions, and (6) a fresh start.

Full Disclosure

Full disclosure is one of the quid pro quos for bankruptcy protection. It starts with the petition. Early in every bankruptcy case, the debtor—whether an individual or an entity—must disclose all assets and liabilities through a statement of financial affairs and schedules.²³ The debtor's income and expenses also must be itemized. And, in Chapter 11, the debtor must provide monthly operating reports, including detailed income and expense information, throughout the bankruptcy case. The failure to timely and accurately provide complete disclosure may result in dismissal of the case, denial or revocation of discharge, or other sanctions.

Breathing Space

Most debtors are under immense financial strain before they file bankruptcy. Many are in the midst of foreclosures, evictions, garnishments, or other forms of collection on adverse state and federal judgments. Reorganization or orderly liquidation would be almost impossible without some breathing space for the debtor. Bankruptcy provides that key protection through the automatic stay.²⁴ Upon the filing of a bankruptcy petition, the automatic stay bars the commencement or continuation of most types of legal proceedings against the debtor or efforts to enforce judgments or collect assets from the debtor.²⁵ Although this protection facilitates reorganization and orderly liquidation, it is not permanent. Creditors may seek relief from the automatic stay either for cause or if the debtor lacks equity in collateral that is not necessary for an effective reorganization.²⁶

Notice

Notice is fundamental to bankruptcy and implicates due process. At the beginning of the bankruptcy case, the debtor must identify

all creditors so that the creditors can be sent notice of the bankruptcy case.²⁷ Throughout the balance of the bankruptcy proceedings, most significant actions, such as sales of property and confirmation of reorganization plans, require notice to creditors and an opportunity for a hearing so that parties in interest may present their views to the bankruptcy court. The failure to properly list creditors and adequately provide notice to parties in interest impedes the bankruptcy proceedings and may result in denial of the relief requested by the debtor.

Maximization of Value

The Bankruptcy Code serves social utility by promoting maximization of value when possible. This can be a difficult exercise given the financial and time pressures in the insolvency process. But, as a general matter, debtors and trustees must show that they used sound business judgment with respect to proposed asset sales, post-petition financing, and new equity arrangements. Sound business judgment implies, at least, an initial assessment of value, some marketing or exploration of alternatives, and a sale or financing process that is transparent. Parties in interest also are protected through an opportunity to object.

Equality of Distribution

For the creditor, securing some payment from the debtor is the goal. Bankruptcy stops the “race to the courthouse” by competing creditors and instead requires equality of distribution among similarly situated creditors. This does not mean that all creditors are treated equally. In successful reorganizations, distributions are made pursuant to the terms of confirmed plans.²⁸ In liquidations, distributions are made by trustees. Generally, secured creditors retain their liens in collateral and are paid from the proceeds of their collateral. And the Bankruptcy Code establishes a priority scheme through which some creditors, such as holders of domestic support obligations, employees, and governmental tax authorities, are paid ahead of others.²⁹ But whether the proceedings are for liquidation or reorganization, the guiding principle is parity for those creditors in the same class.

A Fresh Start

For individuals, the holy grail of bankruptcy is a discharge of debts.³⁰ The discharge releases a debtor from personal liability for most types of pre-petition debt³¹ and enjoins post-bankruptcy collection of such debts. Successfully reorganized corporate debtors also may be entitled to a limited discharge.³² The discharge allows the debtor a fresh start—a “new opportunity”³³ to proceed unencumbered by pre-petition debts.

The U.S. Bankruptcy Court for the District of Colorado

Congress has authorized the appointment of five bankruptcy judges in the District of Colorado.³⁴ Colorado bankruptcy judges are appointed by the U.S. Court of Appeals for the Tenth Circuit and serve for 14-year terms, subject to potential reappointment. The Colorado Bankruptcy Court is led by Chief Bankruptcy Judge Michael E. Romero. The other current Colorado bankruptcy judges and their years of appointment are Elizabeth E. Brown (2001), Thomas B. McNamara (2015), Joseph G. Rosania (2016), and Kimberley H. Tyson (2017). A sixth bankruptcy judge, Cathleen D. Parker (2015), serves as the only bankruptcy judge in the District of Wyoming but also assists in bankruptcy cases filed in Northern Colorado. So, there has been a bit of a “fresh start” in terms of the composition of the Colorado Bankruptcy Court bench in the last few years following the retirement of several long-serving and distinguished bankruptcy judges.

Each bankruptcy judge is assisted by capable chambers staff, including experienced law clerks and courtroom deputies. Away from the courtroom, much of the day-to-day work of the Colorado Bankruptcy Court is performed by the clerk of the court (Kenneth S. Gardner) and his excellent staff of about 45 people, including a deputy clerk and case management, case administration, finance, operations, and technology professionals. They serve as the real backbone of the Colorado Bankruptcy Court. In recent years, bankruptcy staff have implemented many technological advances, including electronic case management, electronic filing, and electronic evidence presentation in the courtroom.

PRACTICE GUIDANCE FOR INSOLVENCY MATTERS

Over the years, a number of prominent federal and state judges have used the Judges' Corner column to provide important practice guidance to trial lawyers.¹ The "Practicing in Federal Court" section of Chief District Judge Krieger's recent column applies equally to practice in the Colorado Bankruptcy Court.² There is no doubt that lawyers practicing in the Colorado Bankruptcy Court should demonstrate attributes such as competency, credibility, civility, courtesy, integrity, humility, and respectfulness. We are fortunate to have a very capable Colorado consumer and business bar that recognizes the importance of such qualities in the courtroom. So, while endorsing such general characteristics of successful counsel, the following guidance specific to bankruptcy practice is offered:

1. Know the client. The main causes of consumer bankruptcy are job loss, medical debt, divorce, and other family problems. For many consumers, filing bankruptcy may be one of the most stressful events in their lives. Accordingly, it is critical for consumer bankruptcy counsel to communicate in an open and honest way with their clients concerning the clients' circumstances and objectives, as well as their bankruptcy options. Waiting to do so until the morning of the first hearing is a mistake. Creditors also can have strong emotions when faced with the loss of expected income or avoidance actions. And counsel for business debtors must spend the time to learn the business, communicate with management, and ascertain what is really feasible.

2. Understand the law. Although some might consider bankruptcy work to be a niche, in reality bankruptcy practice provides very broad exposure to many areas of federal and state law. This can be exciting but also challenging. Naturally, the Bankruptcy Code forms the overall framework. It is detailed, complex, and sometimes a little daunting. There are many issues unique to bankruptcy such as automatic stay and nondischargeability litigation. But beyond that, bankruptcy draws from many other areas of the law. For example, liquidating and allowing bankruptcy claims may require the application of state contract law, federal environmental law, federal and state employment law, international treaties, or even foreign law. To determine priorities, family law and state and federal tax law may be implicated. So bankruptcy counsel must be adept at identifying the applicable sources of law—and arguing the

law to the bankruptcy judge. The bankruptcy milieu also requires counsel who can practice as both transactional and trial attorneys.

3. Comply with the procedural rules. Perhaps more so than most other areas of federal practice, bankruptcy work is rules-bound. The procedural starting place is the Federal Rules of Bankruptcy Procedure, which contains about 250 procedural rules that supplement and fill in the gaps for the Bankruptcy Code. Most, but not all, of the Federal Rules of Civil Procedure also apply in bankruptcy cases. At trial, the Federal Rules of Evidence govern. The Colorado Bankruptcy Court also has its own set of Local Bankruptcy Rules, which were substantially revised as of December 1, 2017, to facilitate local practice. Finally, while most bankruptcy judges favor uniformity of rules, each bankruptcy judge on the Colorado Bankruptcy Court has specific "chambers rules." All of the applicable rules are available on the Court's website: www.cob.uscourts.gov. Among the many procedural rules, there are some traps for the unwary. Compliance with the applicable procedural rules is key for success.

4. Recognize the importance of bankruptcy fundamentals such as disclosure and notice. At the beginning of every bankruptcy case, the debtor must make full disclosure of assets and liabilities as well as income and expenses. Other disclosures may be required throughout the bankruptcy proceeding. Recognizing that the debtor bears the ultimate responsibility, counsel must invest the time and effort up-front to ensure the accuracy and completeness of disclosure, or the case may suffer the consequences. Similarly, notice adequate to satisfy due process is required for virtually every major event in a bankruptcy case. If there is a failure on notice, relief may not be granted.

5. Communicate with opposing counsel. Regardless of the practice area, communication with opposing counsel is advisable, but perhaps even more so in the bankruptcy field. Bankruptcy is a hybrid of negotiation and litigation. And, often, the litigation is broader than just a single adversary proceeding. Because of these attributes, successful bankruptcy counsel must confer in good faith with opposing counsel, negotiate resolutions where possible, and professionally present any remaining disputes for determination by the bankruptcy judge.

NOTES

1. See, e.g., Hood, "Becoming the Trusted Messenger at Trial," 38 *Colorado Lawyer* 83 (Apr. 2009); Jackson, "Joe DiMaggio and You," 37 *Colorado Lawyer* 65 (Apr. 2008); Romero, "The Four Cs of Courtroom Presentation," 35 *Colorado Lawyer* 81 (July 2006).


2. Kreiger, "A Federal Perspective," 46 *Colorado Lawyer* 8 (Dec. 2017).

In 2016, debtors filed 13,519 bankruptcy cases with the Colorado Bankruptcy Court.³⁵ During the same time period, the number of pending bankruptcy cases totaled 18,104.³⁶ Thus, on average, each of Colorado's five bankruptcy judges maintains a docket in excess of about 3,500 pending bankruptcy cases. Consistent with national averages, the Colorado Bankruptcy Court caseload comprises about 97% consumer filings and 3% business filings.³⁷

All of the bankruptcy judges and staff of the Colorado Bankruptcy Court currently are assigned to the court's principal location at the U.S. Custom House in Denver. Under the leadership of Chief District Judge Marcia S. Krieger, the U.S. District Court for the District of Colorado has initiated a "major outreach to all corners of the district."³⁸ Consistent with such outreach efforts, the Colorado Bankruptcy Court regularly conducts trials at U.S. Courthouses in Colorado Springs, Grand Junction, and Cheyenne. Colorado bankruptcy judges look forward to conducting trials in the newly dedicated U.S. Courthouse in Durango as well.

The Colorado Bankruptcy Court performs outreach by participating in regular "brown bag lunch" workshops along with the CBA Bankruptcy Section as well as other programming offered by the Faculty of Federal Advocates, the American Bankruptcy Institute, and many other organizations. The Colorado Bankruptcy Court participates with other federal and state judges in the Colorado Judicial Coordinating Council.

Looking Forward

The Colorado Bankruptcy Court is committed to serving the people of Colorado effectively, efficiently, and economically within the framework of our bankruptcy law. We look forward to welcoming all of you to the Colorado Bankruptcy Court. 



Thomas B. McNamara is a U.S. Bankruptcy Judge for the District of Colorado, where he has served since being appointed by the U.S. Court of Appeals for the Tenth Circuit in 2015.

Coordinating Editor: Hon. Stephanie Dunn, stephanie.dunn@judicial.state.co.us

NOTES

1. 11 USC §§ 101 et seq.
2. *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)).
3. *Id.*
4. The business filings include bankruptcy cases filed primarily under Chapters 7 and 11 of the Bankruptcy Code. The consumer filings include bankruptcy cases filed primarily under Chapters 7, 11, and 13 of the Bankruptcy Code. See Table F-2 U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code During the 12-Month Periods Ending December 31, 2010 and 2016, www.uscourts.gov/statistics-reports/analysis-reports/statistical-tables-federal-judiciary. In 2010, there were 1,593,081 new bankruptcy cases filed in the United States. In subsequent years, the filings decreased.
5. U.S. Courts, Judicial Caseload Indicators 12-Month Periods Ending December 31, 2006, 2011, 2014, and 2015, www.uscourts.gov/statistics-reports/analysis-reports/statistical-tables-federal-judiciary. For example, in 2015, 844,495 new bankruptcy cases were filed while the cases filed in the U.S. Courts of Appeals, U.S. District Courts, and U.S. Bankruptcy Courts totaled 1,254,563. The proportion of insolvency cases in the federal judiciary is somewhat understated because a material portion of the caseload in the U.S. District Court and U.S. Courts of Appeals includes bankruptcy appeals.
6. James Madison described the rationale of the constitutional provision in *The Federalist*: "The power of establishing uniform laws on bankruptcy is so intimately connected to the regulation of commerce, and will prevent so many frauds . . . that the expediency of it seems not likely to be drawn into question." Hamilton et al., *The Federalist: The Famous Papers on the Principles of American Government*, No. 42 (Harvard Univ. Press 1961).
7. See Tabb, "The History of the Bankruptcy Laws in the United States," 3 *Am. Bankr. Inst. L.Rev.* 5 (1995); Campbell and Tsu, *Tenth Circuit Bankruptcy History* 2–4, www.10thcircuithistory.org/court-history-1992-present. Congress enacted temporary insolvency legislation effective only from 1800 to 1803, 1841 to 1843, and 1867 to 1878.
8. 55 Cong. Ch. 541, 30 Stat. 544 (1898).
9. Pub. L. No. 95-598, 92 Stat. 2549 (1978).
10. See, e.g., Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984); Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (1986); Bankruptcy Judgeship Act of 1992, Pub. L. No. 102-361, 106 Stat. 965 (1992); Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).
11. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), superseded by statute, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333.
12. 28 USC § 151.
13. 28 USC § 157.
14. D.C. Colo. L. Civ. R. 84.1(a).
15. *Wellness Int'l Network, Ltd. v. Sharif*, 135 S.Ct. 1932 (2015); *Exec. Benefits Ins. Agency v. Arkinson*, 134 S.Ct. 2165 (2014); *Stern v. Marshall*, 564 U.S. 462 (2011).
16. 28 USC § 1408.
17. See A Bill to Amend Title 28, United States Code, to Modify Venue Requirements Relating to Bankruptcy Proceedings, S. 2282, 115th Cong. (2018).
18. 28 USC § 158(a).
19. 28 USC § 158(b).
20. Plonsky, *Anchors Aweigh: The Creation of the United States Bankruptcy Appellate Panel of the Tenth Circuit* 3 (2010), www.10thcircuithistory.org/court-history-1992-present.
21. *Id.* at 40, n. 59.
22. 28 USC § 158(d)(2).
23. 11 USC § 521.
24. 11 USC § 362(a).
25. Although the automatic stay is broad, 11 USC § 362(b) lists 28 exceptions to the automatic stay.
26. 11 USC § 362(d).
27. 11 USC § 521(a)(1)(A).
28. 11 USC §§ 1121–24, 1126, 1129, 1141–43, 1221–22, 1225–27, 1321–22, and 1325–27.
29. 11 USC § 726.
30. 11 USC §§ 727, 1141, 1228, and 1328.
31. 11 USC § 523(a) lists 19 types of debts that presumptively are not discharged.
32. 11 USC § 1141(d).
33. *Grogan*, 498 U.S. at 286 (quoting *Local Loan Co.*, 292 U.S. at 244).
34. 28 USC § 152(a)(2).
35. Such bankruptcy cases include both main bankruptcy cases and adversary proceedings. See Table F, U.S. Bankruptcy Courts—Bankruptcy Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending December 31, 2015 and 2016; and Table F-8, U.S. Bankruptcy Courts—Adversary Proceedings Commenced, Terminated, and Pending During the 12-Month Periods Ending December 31, 2015 and 2016, both available at www.uscourts.gov/statistics-reports/analysis-reports/statistical-tables-federal-judiciary.
36. *Id.*
37. The business filings include bankruptcy cases filed primarily under Chapters 7 and 11 of the Bankruptcy Code. The consumer filings include bankruptcy cases filed primarily under Chapters 7, 11, and 13 of the Bankruptcy Code. See Table F-2, U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code During the 12-Month Periods Ending December 31, 2015 and 2016, www.uscourts.gov/statistics-reports/analysis-reports/statistical-tables-federal-judiciary.
38. Kreiger, *A Federal Perspective*, 46 *Colorado Lawyer* 9 (Dec. 2017).