BACK TO BASICS:
BANKRUPTCY
FUNDAMENTALS FOR
NEW AND YOUNGER
LAWYERS

FEBRUARY 11, 2025

The Bench and Bar Committee
Atlanta Bar Association
W. Homer Drake Georgia Bankruptcy American Inn of Court



PANELISTS 1

HONORABLE PAUL BONAPFEL, United States Bankruptcy Judge for the Northern District of Georgia

TAMARA MILES OGIER, Ogier, Rosenfeld & Steil, P.C., Chapter 7 Panel Trustee, Northern District of Georgia, and Chapter 11 Subchapter V trustee, Region 21

K. EDWARD SAFIR, Standing Chapter 13 Trustee, Northern District of Georgia

CARRIE OXENDINE, Debtor's attorney, Berry & Associates, LLC

- Welcome and Introduction
- Fundamental Bankruptcy Principles
- Reading the Code and Rules
- Other Authorities
- Success Starts with Good Client Intake
- Bankruptcy and State Law
- Pre-bankruptcy Considerations
- Chapter 7 or Chapter 13
- Chapter 13 information
- Timing the Filing
- Appearing in Court



FUNDAMENTAL BANKRUPTCY PRINCIPLES

Several fundamental bankruptcy principles overlay how the Bankruptcy Code is interpreted. Keeping these principles in mind can help you understand the law and make better arguments.

- Equality of Distribution. Allows avoidance actions and prevents unfair discrimination.
- Debtor's Fresh Start. Requires the Court to construe some provisions in favor of debtor.
- Broad definition of a "claim" and property of estate.
- Existence, application, and purpose of the automatic stay.

THE BANKRUPTCY CODE

The Bankruptcy Code, Title 11 of the United State Code

- Chapters 1, 3, and 5 generally apply in cases filed under chapters 7, 11, 12, and 13.
- The provisions within chapters 7, 11, 12, and 13 apply only to the particular chapter, unless otherwise noted.
- Section 101 contains definitions of terms used within the Bankruptcy Code.
 Always look here first.
- Section 102 contains rules of construction, such as the instruction that "includes" and "including" are not limiting terms.

THE BANKRUPTCY RULES

The Federal Rules of Bankruptcy Procedure

- Recent restyling (effective December 1, 2024). Some rules have been renumbered. Update your forms to be sure you are citing to the correct rule number and correct any quotations.
- The Rules are divided into parts, which makes it easy to find what you need.
- Part VII applies to adversary proceedings (generally modeled upon or adopt the equivalent Federal Rules of Civil Procedure).
- Part IX contains general provisions, such as definitional sections and how to compute deadlines and obtain extensions of time (Rule 9006).
- Note that the definitions and rules of construction contained in § 101 and § 102 of the Bankruptcy Code **also** apply to the Rules.
- The Rules also contain their own definitions (Rule 9001), and their own rule of construction (Rule 1001).

OTHER SOURCES OF AUTHORITY AND AND RESEARCH

- The Federal Rules of Evidence apply in all bankruptcy cases and proceedings.
- Bankruptcy courts are authorized to adopt and amend local rules. Fed. R. Bankr. P. 9029. Local rules must be procedural rules that do not "abridge, enlarge, or modify any substantive right." Any local rule is also subordinate to the Federal Rules and must not be inconsistent with the Federal Rules or the Bankruptcy Code. The District Court's local rules may also apply.
- General orders can be found on the Court's website and address issues such as compensation paid in chapter 13 cases and the Voluntary Notice Procedures.
- Check for standing orders and consult the Court's website for information on how your judge handles procedural matters.

 Researching GANB opinions:

Since 2017, the Court transmits its opinions to the Government Publishing Office (GPO), which makes them available to the public at no cost. There is a link to the searchable site on the GANB website (https://www.ganb.uscourts.gov/judges-info/opinions/).

Additionally, you can search older opinions (issued between January 1, 2004, and December 31, 2016). (Pro tip: Some of these opinions are not on Westlaw and Lexis).

SUCCESS BEGINS WITH GOOD CLIENT INTAKE

Before advising the financially distressed client to file a bankruptcy petition, an attorney must determine the client's objectives. Does the client simply want a discharge? Is the client facing imminent creditor action? Does the client have property they want to keep that is subject to a lien? Is the client in default of a lease or contract they want to maintain?

- Gather information. Consider using a questionnaire and a document checklist to obtain basic information.
- Phrase questions in language that is understandable to a non-lawyer.
- Impress upon the client the importance of full and accurate disclosure by being frank about the potential consequences of providing incomplete or false information (denial of discharge, no discharge of a particular debt, and criminal prosecution).
- View the client's answers with a critical eye to be sure that they are logical and internally consistent and cross check the answers against documents provided (bank statements, tax returns, etc.) and other available sources of information, such a credit reports, lien searches, and PACER.
- Verify your client's identity and competence to proceed!

SUCCESS BEGINS WITH GOOD CLIENT INTAKE

Check for general eligibility.

- Section 109(a). Reside or have a domicile, a place or business, or property, in the United States (U.S. citizenship is not required).
- Section 109(g). No prior cases dismissed within last 180 days for willful failure to abide by court order or voluntarily following the filing of a motion for relief from stay.
- Section 109(h). Credit counseling briefing within the last 180 days. Check the UST website for list of approved agencies.

Check for prior cases and consider the impact of filing a new case.

- Will the debtor be able to receive a discharge? § 727(a)(8), (9); § 1328(f).
- Will the automatic stay arise or be limited? § 362(c)(3) or (c)(4).
- Chapter 13 Practice and Procedure is titled "The Financially Distressed Individual and Bankruptcy Alternatives."

BANKRUPTCY AND STATE LAW

- Debtors find themselves in financial distress for a variety of reasons. It is important to understand what state law remedies are available to creditors and how a bankruptcy filing can (and cannot) address the issues facing a distressed client.
- Real estate foreclosures and pursuit of deficiency (O.C.G.A. § 44-14-161 & 162).
- Personal property repossession and pursuit of deficiency. O.C.G.A. § 11-9-601 & 607 through 609; § 10-1-36.
- Eviction. O.C.G.A. § 44-7-49 through 53.
- Pending suit, judgment, and garnishment. O.C.G.A. § 9-13-1through 3; 9-13-10 through 13; ; § 9-12-80; O.C.G.A. §§ 8-4-1.



PRE-BANKRUPTCY CONSIDERATIONS

- When the debtor seeks legal advice regarding financial distress, an attorney must consider the debtor's circumstances.
- What actions could the debtor be subject to if they do not file a bankruptcy petition?
- What benefits will be available if they do file?

- Analyze whether the client should file bankruptcy, and if so, when and under which chapter.
- First, obtain accurate and complete information about the client's assets and liabilities, contracts, and filing history.
- Always consider nonbankruptcy alternatives first.
- Timing the filing can often be critical.
- Chapter 7 or chapter 13?

CHAPTER 7 OR CHAPTER 13?

- Depends on the client's goals? Generally, an individual debtor is better off in chapter 7 if they can accomplish their objectives and their case will not be subject to dismissal as an abuse. Chapter 7 is typically cheaper and faster.
- Chapter 13 might be preferable if:
 - (1) a chapter 7 case would be subject to dismissal for abuse;
 - (2) the debtor would not be eligible for a Chapter 7 discharge (received one in the last 8 years);
 - (3) a chapter 7 case will not allow the debtor to keep property (equity in the home, etc.);
 - (4) a chapter 7 will not discharge particular debts (*e.g.*, a nonsupport divorce debt that would be dischargeable in chapter 13 but not chapter 7 (§ 523(a)(15)).
 - (5) the debtor could modify a secured creditor's claim, such as by "cramming" down the lien (note, if the debtor can afford to redeem the property by paying cash, chapter 7 is generally a better alternative) or
 - (6) debtor has a prepetition arrearage on their mortgage and needs time to cure it (and negotiation of a modification or reaffirmation is unlikely).

CHAPTER 7 OR CHAPTER 13?

But, first, make sure the client eligible for chapter 13 under § 109(e):

- Regular income. It does not have to be earnings from work or a business. It can be social security, pension, or contributions from family.
- Noncontingent, liquidated, unsecured debts of less than \$465,275
- Noncontingent, liquidated, secured debts of less than \$1,395,875
 Note these figures will adjust upward on April 1, 2025.

TIMING THE FILING

Consider the impact of the petition date on substantive rights:

- The 6-month look-back period. Could delaying (or expediting) allow debtor to exclude a large, one-time payment of income from current monthly income (bonus, commission, etc.)?
- Has debtor purchased a vehicle within 910 days or other personal property within a year?
- Whether a tax claim is dischargeable or entitled to priority may depend upon the filing date (3-year lookback period) especially at the beginning of the year.
- Whether a debt incurred on a credit card for luxury goods or cash advances will be presumed fraudulent depends on whether it was incurred within 90 or 70 days prior to filing (see § 523(a)(2)(C)).
- Exemptions could depend on the filing date (*i.e.*, if the debtor has recently moved to Georgia) (see § 522(b)(3)(A)).
- Recent transfers of property that could be avoided (§§ 544(b), 547, § 548).
- Prior conduct that might form the basis for a denial of a Chapter 7 discharge (*i.e.*, if the debtor made a fraudulent transfer within one year of filing (see § 727(a)(2))).
- This is not an exhaustive list get a mentor!

CHAPTER 13 RESOURCES

- Chapter 13 trustees in the Northern District of Georgia:
 - Melissa J. Davey www.13trusteeatlanta.net
 - K. Edward Safir www.atlch13tt.com
 - Nancy J. Whaley www.njwtrustee.com
- Plan payments: EDO, personal checks, money orders, certified funds, or electronic payments
 - Electronic Payments (preferred): epay and TFS BillPay
 - Walk-in payments are discouraged
- Secure Document Portal (bkdocs.us)
- 13network and National Data Center (ndc.org)
 - Resources for debtors and attorneys



APPEARING VIRTUALLY

A virtual hearing is a court proceeding, and attorneys must observe formalities. In other words, if you are appearing virtually, act like you would act in the courtroom.

- Wear appropriate, conservative business attire.
- Use a professional background.
- Minimize distractions and possible disruptions. It is difficult for the Court to take you seriously when your cat jumps on your desk.
- Make sure your connection to Zoom is stable.
- Wear a headset if it helps you to be heard.
- Mute your microphone when not speaking, but do not forget to unmute when it's your turn to speak.
- Do not multi-task. Give the Court and the parties your undivided attention.
- Although you are being video recorded on Zoom, the Court's record is still an audio-only recording. It will
 not pick up head shaking. Don't forget to state your name for the record to make it clear who is speaking.

APPEARING IN THE COURTROOM

- No food or drink.
- Turn off your cell phone.
- Counsel table on the right side, as you face the Bench, is generally where the "plaintiff" or "movant" sits, and counsel table on the left is where the "defendant" or "respondent" sits. The Chapter 13 trustees also typically sit on the right side.
- If more than one matter is being heard in the courtroom, you can move to the appropriate counsel table when the Clerk calls your matter and return when your matter concludes.
- If your client is in the courtroom, they can join you at counsel table.
- It is generally best to go to the podium to make your presentation. But you can stand at your table to answer a question or make an objection if another attorney is at the podium.
- Remember to speak into the microphone. If you leave the podium, even if you are loud enough for the judge to hear, the recording may not pick up your voice.
- Mark your exhibits and show exhibits to opposing counsel before showing them to the judge or the witness.
- Ask permission to approach a witness or the Bench.

SHOW UP, BE ON TIME, AND REMAIN PRESENT

- Arrive for court a little early.
- If you file a motion, you must appear, even if no response or opposition has been filed and you expect no opposition. If not, your matter may be dismissed for want of prosecution.
- If you are appearing in multiple courtrooms and cannot stay in the courtroom or virtual hearing room, you must check in with the Courtroom Deputy to make arrangements regarding your matters. The Courtroom Deputies are more than willing to work with you, but you must help them, help you.
- Contact info for each chambers is on the Court's website. Be sensitive to ex parte communications.
- When your matter is concluded, if court is still in session but you have no further matters, you may ask to be excused. Otherwise, do not leave.

BE PREPARED

- Have ready access to all relevant facts. Think about what questions you would have if you
 were the judge. Make a practice to observe hearings before all the judges to get a sense of
 what information each judge finds important on various matters.
- Expect the unexpected. Even when no response has been filed and no one appears at the calendar call, the judge may have questions. If you do not know the answer to a question of fact, do not guess. If the information is critical, you can file a supplement to your motion.
- Talk to your client in advance to get the information necessary to make a proffer. Mass calendars are generally not the time for the Court to hear evidence, and many judges do not want to take testimony on Zoom. While you are presenting or making an argument, it is not appropriate to ask your client to "correct" you if you are mistaken, to ask your client to answer the judge's questions, or let your client address the Court. If necessary, ask the Court how to proceed. If it is a simple question and there is no opposition, the Court may allow the client to answer it. The Court may prefer to take a break to allow you to speak with your client, place your client under oath, or reschedule the matter for an evidentiary hearing.

ADDRESSING THE COURT

- In the courtroom, stand when speaking.
- Always refer to the judge as "your honor" or Judge [last name].
- Do not talk over or interrupt the judge or opposing counsel.
- Do not argue with the judge or opposing counsel. Always address your comments to only the judge.
- Do not refer to opposing counsel, the trustee, or a party by first name only.
- Be concise. The Court has limited time, especially on a mass calendar. Speak slowly and distinctly but get to the point quickly without rambling.
- Lay out the facts in a logical order and tell the Court what you want. For example, if you
 want a reset of confirmation to allow your client more time to amend the plan, be clear
 about it. Ask for that upfront and explain why more time is necessary.
- Avoid slang or colloquialisms, the use of filler words (such as "um"), and unnecessary repetition.

CLOSING THOUGHTS

- There's no replacement for time and experience, but we were all new here, once upon a time. Most experienced attorneys are willing to help a bit.
- Learn by watching, then by doing:
 - Sit in a courtroom and watch oral arguments
 - See what good lawyers do
 - See what judges seem to find important
 - Read case law updates
 - Attend CLEs
 - Ask questions
 - Listen to your client, opposing counsel, and the Judge
 - Find a mentor!